

ORGANIZATIONAL CONFLICTS OF INTEREST

WHAT YOU NEED TO KNOW FOR

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2020

February 25, 2020

What is an OCI?

- An Organizational Conflicts of Interest (“OCI”) may arise when a contractor has a role that would (1) present an unfair competitive advantage; or (2) bias the contractor’s judgment or influence a competitive procurement.
- Primarily Arises in Service Contracts:
 - Acquisition Support Services
 - Advisory and Assistance Services
 - Program Management Support Services
 - Technical Evaluation Services
 - Systems Engineering and Technical Assistance (SETA) Services

Three Types of OCIs

- Unequal Access to Information: The contractor has access under another government contract to nonpublic, competitively useful information to which other competitors do not have access.
- Impaired Objectivity: The contractor is tasked under one government contract with evaluating the work that the contractor, or an affiliate or subcontractor, performs or proposes to perform under a different government contract.
- Biased Ground Rules: The contractor has established under one government contract the ground rules (*e.g.*, contract specifications or Statement of Work) for another government contract that the contractor proposes to perform.

SETA OCIs

- FAR 9.505-1: A contractor that provides systems engineering and technical direction for a system but does not have overall contractual responsibility for its development, its integration, assembly, and checkout, or its production shall not:
 - Be awarded a contract to supply the system or any of its major components; or
 - Be a subcontractor or consultant to a supplier of the system or any of its major components.

SETA OCIs

- Systems engineering includes a combination of substantially all of the following activities: determining specifications, identifying and resolving interface problems, developing test requirements, evaluating test data, and supervising design.
- Technical direction includes a combination of substantially all of the following activities: developing work statements, determining parameters, directing other contractors' operations, and resolving technical controversies.
- Thus, SETA contractors are susceptible to impaired objectivity and biased ground rules OCIs.

Identifying OCIs, Mitigation, and Waiver

Identifying OCIs

- Understand the work that typically gives rise to OCIs.
- Review solicitations carefully.
 - Is there a preclusion clause?
 - Does it involve systems engineering work? Drafting specifications or an SOW? Performing evaluation services?
 - Would performing the contract give the company access to proprietary or source selection information that could relate to future competitions in which the company may participate?
- Track work performed by employees, subcontractors, and affiliates.

Identifying OCIs

- Certain types of activities typically do not trigger an OCI so long as specific precautions are taken. These include:
 - White Papers
 - Development Work
 - Incumbency
 - Teaming Arrangements

Due Diligence for OCIs

- Identify pertinent OCI Clauses and verify whether there is any limitation on agency's ability to waive OCIs.
 - FAR clauses
 - Agency Supplements
 - Contract-specific clauses
- Carefully review the Statement of Work
 - Is there any SETA work?
 - Impaired objectivity?
- Maintain an open dialogue with the buyer/seller

Mitigating OCIs

- OCI mitigation is the process by which the government and the contractor avoid or neutralize an actual or perceived OCI to prevent a situation that would otherwise appear to bias the contractor's judgment or that would create an unfair competitive environment.
- The burdens of implementing OCI mitigation plans should be carefully considered before proposal submission.
- OCI mitigation plans must meet the specific requirements of FAR Subpart 9.5, which can prove costly.

Mitigating OCIs

- Unequal Access to Information
 - Firewalling employees
 - Releasing the non-public, competitively useful information to all competitors
- Impaired Objectivity
 - Firewalling subcontractors or affiliates
 - Strategic subcontracting with unbiased supervision
- Biased Ground Rules
 - Avoidance

Mitigation Plans

- To satisfy FAR Subpart 9.5's requirements, any proposed mitigation plan must, at a minimum:
 - Describe the circumstances giving rise to the OCI
 - For firewalls, describe how the firewall will achieve organizational isolation and controlled access
 - Detail OCI awareness training both generally and in the specific context of the proposed mitigation plan
 - Require flow down of all OCI mitigation requirements to relevant subcontractors
 - Describe the audit procedures in place to verify that the OCI mitigation plan is effective

Waiver of OCIs

- The FAR authorizes agency heads, or their appropriate designees, to grant a waiver of an OCI where application of the OCI rules would not be “in the government’s interest.”
- Support for the waiver creates only a very minimal burden on contracting agencies.
 - Contracting officers need only submit a written request for waiver setting forth the extent of the conflict to the applicable agency head, or designee, for approval.
- Despite this minimal burden, OCI waivers are rare. The preference is to avoid OCIs in the first instance.

DOD SETA Prohibition

- DFARS 209.571-7(b)(1) provides a SETA contract for a major defense acquisition program will prohibit the contractor or any affiliate from competing as a contractor or major subcontractor for development or production of the weapon system.
- Definitions are important – What is a MDAP? What is considered a major subcontractor?
- This prohibition may NOT be waived.
 - Instead, DFARS provides for an exception if the HCA determines that DOD “needs the domain experience and expertise of the highly qualified, apparently successful offeror” and “based on the agreed-to resolution strategy,” the offeror will be able to provide objective and unbiased advice.

Hypothetical

- Alpha Company intends to submit a proposal for a large government program. One of Alpha's affiliates (Affiliate Alpha) will supply a major component of the development to Alpha Company. Beta Company has also reached out to Affiliate Alpha to have Affiliate Alpha supply the same component to Beta for the competition Alpha intends to do. Is there an OCI? What steps should each party take?
- Zeta Company is entering into a subcontract with a contractor (Echo), which is listed as a SETA contractor in the RFP for development and production of a large weapons system. As part of its work, Echo will be evaluating the performance of the awardee of the large weapons system contract. Zeta has also been approached about being a major subcontractor to a competitor for the weapons system, which it intends to do. Is there an OCI? Can it be mitigated? Waived? What steps can Zeta company take?

Do OCIs Travel to Affiliates?

Access To Information & Affiliation

- Fairly easy to mitigate through employee firewalls.
- If information is firewalled, there is no impact on affiliates.
- Firewalls are straightforward and a best practice, whether or not you are concerned about spread of information to affiliates.
- Firewalls should be documented and provided to the Government customer.

Biased Rules/Impaired Objectivity & Affiliation

- Most challenging OCIs to mitigate because of interlocking financial relationships.
- No conflict if the relationships between the companies or corporate affiliates are “too remote,” or the possibility of a conflict is “too unlikely or speculative” to create an OCI.
- Critical Question: Is there any indication that there is a **direct financial benefit** to the firm alleged to have the OCI?

Case Study: *AdvanceMed Corp.*

- Protester alleged that awardee would be in a position to conduct audits of companies with whom its parent had contracts, creating an impaired objectivity OCI.
- GAO concluded that CO properly determined the conflict to be too remote to require mitigation.
- The possibility that the affiliate's partners would pressure the affiliate into then pressuring the awardee to conduct only favorable audits was too remote and too far removed for the awardee to have an OCI.
- There was no direct financial benefit to the awardee.
- Note: Awardee was required to divest a 17% interest in firm that would be subject to audit.

AdvanceMed Corp.; TrustSolutions, LLC, B-404910.4 et al., Jan. 17, 2012, 2012 CPD ¶ 25.

Case Study: *Maximus Fed. Servs.*

- Awardee's affiliate held contract under which affiliate collected Medicare overpayment data and provided such data to audit contractors for reconsideration.
- Protester alleged that agency could not award audit reconsideration contract to awardee because affiliate would have impaired objectivity OCI. Specifically, the affiliate would have an improper financial motive to manipulate overpayment data under its contract in order to steer reconsideration work to the awardee.
- GAO agreed with the CO that any link between the provision of overpayment data and increased claims to the awardee was “technically unfeasible, very remote, and extremely unlikely.”

MAXIMUS Fed. Servs., Inc., B-410359, Dec. 17, 2014, 2014 CPD ¶ 11.

Avoiding Affiliate OCIs Through Strategic Focus

- Sophisticated firms maneuver to manage the risks of an OCI by strategically selecting which business opportunities to pursue, and by developing comprehensive mitigation plans where necessary.
- If a platform performing SETA work is deeply entrenched in a specific customer or specific type of program, other platforms simply avoid direct conflict.

Current Trends

Current Trend: Failed Challenges

	GAO Sustain	GAO Deny	CoFC Grant	CoFC Deny	Total
2017	3	11	0	6	20
2018	5	25	*1	*4	34
2019	2	5	0	4	11

* One case granted in part and denied in part

2017 OCI Challenges

	GAO Sustain	GAO Deny	CoFC Grant	CoFC Deny	Total
Unequal Access	1	7	0	5	13
Impaired Objectivity	2	5	0	1	8
Biased Ground Rules	1	3	0	0	4

*Some protesters alleged multiple types of OCI. The numbers above reflect the number of allegations, not the number of protests.

2018 OCI Challenges

	GAO Sustain	GAO Deny	CoFC Grant	CoFC Deny	Total
Unequal Access	4	15	1	2	22
Impaired Objectivity	2	10	0	2	14
Biased Ground Rules	0	6	0	1	7

*Some protesters alleged multiple types of OCI. The numbers above reflect the number of allegations, not the number of protests.

2019 OCI Challenges

	GAO Sustain	GAO Deny	CoFC Grant	CoFC Deny	Total
Unequal Access	0	2	0	3	5
Impaired Objectivity	2	4	0	1	7
Biased Ground Rules	0	1	0	0	1

*Some protesters alleged multiple types of OCI. The numbers above reflect the number of allegations, not the number of protests.

“Hard Facts” Are Necessary

- The pendulum has swung away from vigorous OCI enforcement based on innuendo and the appearance of impropriety.
- A protester must identify “hard facts” that indicate the existence or potential existence of a conflict; mere inference or suspicion of an actual or potential conflict is not enough. *Turner Construction Co. v. United States*, 645 F.3d 1377 (Fed. Cir. 2011).

COs Have Substantial Discretion

- The Contracting Officer has “considerable discretion in determining whether a conflict is significant.” *Turner Construction Co. v. United States*, 645 F.3d 1377 (Fed. Cir. 2011).
- Contracting officers are to exercise “common sense, good judgment, and sound discretion.” FAR § 9.505.
- GAO will not overturn the CO except where the determination is “unreasonable.”
- Thus, the key is convincing the customer.

Case Study: Trust But Verify

- In *C2C Innovative Sols., Inc.*, B-416289, July 30, 2018, 2018 CPD ¶ 269, the protester alleged an impaired objectivity OCI because the awardee's decisions under one task order would be reviewed by the awardee's subsidiary under a separate contract. The protester also alleged these facts gave rise to an unequal access to information OCI.
- Although the agency had completed an OCI evaluation before the award and during the pendency of the protest, the GAO concluded that the scopes of the reviews were inadequate.
 - The record showed the agency had not meaningfully examined whether the awardee could render objective advice to the agency under the circumstances.
 - The agency also did not address whether the awardee had access to any non-public information that might provide a competitive advantage, even if that information did not fit the definition of proprietary or source selection information.

Other Unfair Competitive Advantage Issues

Procurement Integrity Act

- Prohibits disclosure by a current or former government official of contractor bid/proposal information or source selection information before the award of a procurement contract to which the information relates.
- Also prohibits obtaining such information.
- ***If the Company receives information it suspects is covered by the Act, do not read or review, copy, further distribute, or use.***

Case Study: PIA Violations

- In *IBM Corp.*, B-415798.2, February 14, 2019, 2019 CPD ¶ 82, the protester alleged the agency’s PIA investigation was inadequate and resulted in an unreasonable award.
 - IBM’s subcontractor had provided IBM’s bid and proposal information, as well as information regarding the IBM’s software development, to the awardee.
 - IBM contended the awardee knew or should have known the subcontractor had an NDA with IBM.
- The GAO held that “IBM’s protest, even if uncontradicted, would fail to establish a violation of the PIA occurred because the protest is devoid of any allegation that the government improperly disclosed any contractor bid or proposal or source selection sensitive information, or otherwise was involved in the alleged misconduct.”

FAR Obligations

- FAR 9.505(b) states that an unfair competitive advantage exists where a contractor competing for award of a contract possesses :
 - Proprietary information that was obtained from a Government official without proper authorization; or
 - *This is a classic example of a scenario in which a Procurement Integrity Act violation may arise.*
 - Source selection information that is relevant to the contract but is not available to all competitors, and such information would assist that contractor in obtaining the contract.
 - *This is a classic example of a scenario in which an “unequal access to information” OCI may arise.*

Hiring Former Government Employees

- Former officers or employees of the U.S. Federal Government or other government entities or agencies are responsible for complying with applicable post-retirement or post-employment restrictions, including (but not limited to):
 - Lifetime restrictions for matters on which employee participated “personally and substantially”;
 - 2-year restrictions for matters under the employee’s official responsibility; and
 - 1-year restrictions on communications with former agency (senior employees)
- Current employees subject to such restrictions that have not notified the Legal Department should do so immediately.

Case Study: Gallup's Bad Hire

- Gallup held a contract to survey “federal employees to measure and assess their engagement with their jobs.”
- January 2014
 - Lead Government director for contract interviews with Gallup, but does not report it. Gallup awarded additional \$500,000.
 - Director tells Gallup he “got another 500k put on the contract. Cool huh?”
- February 2014
 - Director receives formal job offer from Gallup and announces retirement. Director certifies he has no post-Government employment restrictions.
- Gallup is subject to a civil claim. Director is subject to civil and criminal charges. Job offer withdrawn.

Case Study: Appearance of Impropriety

- In *Obsidian Solutions Group, LLC.*, B-417134, March 1, 2019, 2019 CPD ¶ 156, the protester alleged the agency unreasonably excluded it from an IDIQ competition because its subcontractor hired a former government employee who also participated, on behalf of the offeror, at an oral presentation of the proposal.
- The GAO held this was a FAR Subpart 3.1 issue, not a FAR Part 9 issue.
- The agency claimed the former government employee had information that gave him a “better understanding of the Government’s needs and requirements” and that the employee potentially had knowledge of the agency’s budget and an incumbent’s performance shortfalls.
- The GAO sustained the protest, finding that because “all qualified offerors with an acceptable proposal, and a fair and reasonable price, were to receive an award, there seems to be little risk of an unfair competitive advantage.”

Personal Conflicts of Interest

Personal Conflicts of Interest

- In addition to vetting for OCIs, contractors must ensure that personnel assigned to a proposal or contract involving acquisition functions or inherently governmental functions do not have personal conflicts of interest.
- A personal conflict of interest can arise because of:
 - financial interests of a covered employee, close family members, or other members of his household (such as employment, honorariums, research funding, investments, real estate, patents/IP rights, business ownership, retirement plans);
 - other employment or financial relationships of an employee (including seeking or negotiating employment); and
 - gifts, including free travel, honoraria, or research funding received from entities related to the contract.

Personal Conflicts of Interest

- When evaluating the risk for personal conflicts, consider restrictions related to government employees, such as gift limitations and revolving door rules.
- Also consider the Anti-Kickback of 1986, which prevents subcontractors from providing kickbacks to obtain favorable treatment under a prime contract.

Personal Conflict of Interest

Hypothetical

- Company A is performing a contract whereby it provides acquisition support, including assisting the Government's source selection evaluation board in evaluating proposals for a particular program.
- Company A assigns an employee to perform this work who realizes he has stock in an offeror, but believes that stock is frozen.
 - Personal Conflict of Interest?
- Employee later realizes he was mistaken about the frozen nature of his stock, and immediately sells his shares one month before the Government received final revised proposals.
 - Personal Conflict of Interest?
- Depends on the CO.

KEY TAKE-AWAYS

- Identify potential OCI issues early. Work to avoid or mitigate any issues.
- Keep in mind that some OCIs cannot be mitigated, so avoidance will be necessary.
- Engage early with the agency if possible.
- When hiring former government officials, look beyond the ethics letter.

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