

Organizational Conflicts of Interest and Post Government Employment Restrictions

In Partnership with



A PilieroMazza Webinar
December 14, 2016



Important

THIS MATERIAL IS PRESENTED WITH THE UNDERSTANDING THAT THE AUTHOR IS NOT RENDERING ANY LEGAL, ACCOUNTING OR OTHER PROFESSIONAL SERVICE OR ADVICE. BECAUSE OF THE RAPIDLY CHANGING NATURE OF THE LAW, INFORMATION CONTAINED IN THIS PRESENTATION MAY BECOME OUTDATED. AS A RESULT, THE USER OF THIS MATERIAL MUST ALWAYS RESEARCH ORIGINAL SOURCES OF AUTHORITY AND UPDATE INFORMATION TO ENSURE ACCURACY WHEN DEALING WITH A SPECIFIC LEGAL MATTER. IN NO EVENT WILL THE AUTHOR BE LIABLE FOR ANY DIRECT, INDIRECT, OR CONSEQUENTIAL DAMAGES RESULTING FROM THE USE OF THIS MATERIAL.



Presented By

PilieroMazza Government Contracts Group

Megan C. Connor, Associate
mconnor@pilieromazza.com
(202) 857-1000



Michelle E. Litteken, Associate
mlitteken@pilieromazza.com
(202) 857-1000



About PilieroMazza

PilieroMazza PLLC is a full-service law firm located in Washington, D.C. We are most well known as a government contracting firm, and for 25 years we have helped our clients navigate the complexities of doing business with the federal government. We also provide a full range of legal services including advice on corporate, labor and employment, SBA procurement programs, and litigation matters. Our clients value the diverse array of legal guidance they receive from us and our responsiveness as we guide their growth and secure their success.

Sign up for our newsletters and blog at www.pilieromazza.com

PM Legal Minute – our blog, written by all of PilieroMazza’s attorneys, provides trending insight to small and mid-sized businesses.

Legal Advisor Newsletter – our quarterly publication which addresses current issues that are of concern to federal government contractors and commercial businesses nationwide. The Legal Advisor articles focus on recent legal trends, court decisions, legislative and regulatory rule-making, as well as other newsworthy events.

Weekly Update – an email sent every Friday that provides an up-to-the-minute recap of legislative and regulatory issues affecting small businesses.

Webinars on YouTube – all of our past webinars can be found on the PilieroMazza YouTube channel.

Follow us on:  @pilieromazza



PilieroMazza Channel

Overview

- ❖ Introduction to Organizational Conflicts of Interest (“OCI”).
- ❖ Waiving an OCI.
- ❖ Strategic Considerations.
 - Proposals.
 - Protests.
- ❖ Restrictions on Post Government Employment.
- ❖ Recommendations.
- ❖ Q&A.

Introduction to OCIs

Overview of OCIs

“An OCI arises when, because of **other relationships or circumstances**, a contractor may be unable, or potentially unable, to render **impartial advice or assistance to the government**, the contractor’s **objectivity in performing the contract work is or might be impaired**, and/or the contractor would have an **unfair competitive advantage**” – FAR 2.101

❖ 3 Types of OCIs:

- Unequal access to information.
- Biased ground rules.
- Impaired objectivity.

❖ Complex Analysis

- COs are required to identify and investigate OCIs as early as possible.
- Assessing a potential OCI is a fact-specific inquiry.
- OCIs are dynamic.
- Many OCIs can be mitigated, neutralized, or avoided.



Unequal Access to Information

FAR 9.505-4, Obtaining Access to Proprietary Information

- Occurs when a contractor has access to **competitively useful, non-public information** through the performance of a contract.
- May be Government information or information of another contractor.
- Incumbency is generally not an unequal access to information OCI.

Examples

- While performing support services contract, company had access to agency network that had budget information about contracts, including labor categories, rates, estimated number of employee hours, and funding—its competitors' pricing information. Netstar-1 Gov't Consulting, Inc. v. U.S., 101 Fed. Cl. 511 (2011).
- Company A teamed with Company B to provide procurement support services to an agency (called phase one). Company C proposed Company A as a subcontract for phase two. GAO held that an OCI existed because Company A had access to contracts, core requirements, information of other companies, and non-public information relevant to the agency activity. L-3 Servs, B-400134.11; B-400134.12 (Sept. 3, 2009).



Unequal Access to Information - Mitigation

- ❖ Easiest type of OCI to mitigate (usually no need to have Government involvement).
- ❖ Focus on limiting access to competitively-useful information.
- ❖ Proactive and forward-looking.
- ❖ Techniques & Tools:
 - Firewalls.
 - Non-disclosure agreement.
 - Locating personnel in separate spaces/facilities.
 - Document control.
 - Employee training.
 - Release of information to all competitors.

Biased Ground Rules

FAR 9.505-2, Preparing Specifications or Work Statements

- Occurs when a contractor prepares or assists in preparing solicitation documents or future contract requirements.
- Not limited to specifications—any document that influences the way proposals are evaluated could give rise to a biased ground rules OCI.
- Concern that a contractor would shape the requirements in its favor, even if inadvertently.

Examples

- Company was a subcontractor on a contract to prepare a report that made recommendations on measures to use to conserve energy. Subcontractor was then excluded from competing for an energy efficiency design build contract because 80% of the solicitation requirements came from the study. Energy Systems Group, B-402324 (Feb. 26, 2010).



Biased Ground Rules—Mitigation

❖ Difficult to mitigate.

- Conflict based on affiliation with organization and economic interest.
- Firewalls are ineffective.
- Use of a separate division/entity is insufficient.
- Likely requires Government participation in mitigation efforts.

❖ Techniques & Tools.

- Recusal (mostly effective/possible in MAC scenarios) after working with Government to pre-identify possible efforts creating an OCI.
- Use of subcontractor combined with employee firewalls and NDAs, with cooperation from the Government.



Impaired Objectivity

FAR 9.505-3, Providing Evaluation Services

- “Contracts for the evaluation of offers for products or services shall not be awarded to a contractor that **will evaluate its own offers for products or services, or those of a competitor**, without proper safeguards to ensure objectivity to protect the government's interests.”

Examples

- Successful offeror would provide analytical and technical support services to assess undersea warfare systems. Agency awarded the contract to a company that manufactured 12 of the 59 systems to be tested. Protest sustained because the contractor would be evaluating its products and the products of its competitors. PURVIS Sys., B-293807.3, B-293807.4 (Aug. 16, 2004).
- Contractor would provide consolidated IT operations and maintenance services, including making recommendations about existing programs. Company A had a contract to provide the agency's desktop environment, and the agency selected Company A for award. GAO held Company A had an OCI because it would need to make recommendations about its desktop environment services. Nortel Gov't Solutions, B-299522.5; B-299522.6 (Dec. 30, 2008).



Impaired Objectivity—Mitigation

❖ Extremely difficult to mitigate.

- Conflict based on affiliation with organization and economic interest.
- Firewalls are ineffective.
- Use of a separate division/entity insufficient.
- Any knowledge or potential knowledge of entity being evaluated likely to trigger immitigability.

❖ Techniques & Tools.

- Use of subcontractor or neutral third party.
- Reliance on objective criteria.
- Government supervision and control necessary to obscure identity of evaluated entity and elimination of identifying information (reason why more procurements limit contractor identifiable information).



Waiving an OCI

FAR 9.503: “The agency head or a designee may **waive any general rule or procedure** of this subpart by determining that its application in a particular situation would not be in the **government's interest**. Any request for waiver must be in writing, shall set forth the extent of the conflict, and requires approval by the agency head or a designee. Agency heads shall not delegate waiver authority below the level of head of a contracting activity.”

MCR Federal LLC, B-401954.2 (Apr. 17, 2010)

- CIA issued a proposal for cost analysis and research support services.
- The RFP warned offerors that the awardee would be unable to participate in any intelligence community agency acquisition for a major system for the life of the contract.
- Contractors currently providing systems engineering and technical assistance support to prime or subcontractors responsible for major systems development were excluded from the procurement.
- CIA made an award to a company with a current contract, and a protest followed.
- CIA opted to waive the OCI. GAO denied the protest, stating: “Where a procurement decision—such as whether an OCI should be waived—is committed by statute or regulation to the discretion of agency officials, our office will not make an independent determination of the matter.”



Strategic Considerations - Proposals

❖ Solicitation Provisions.

- May be directed to submit a mitigation plan.
- May be advised of restrictions on future activity.

❖ Getting out in Front.

- Avoid, neutralize, or mitigate potential OCIs pre-award.
- Understating or hiding a potential OCI imposes risks.
- Work with the Government pre-proposal to address major questions.

❖ Address the Issue.

- Submit a mitigation plan.
- An agency may communicate with an offeror about an actual or potential OCI without engaging in “discussions.”
- Address directly in the proposal where possible and if confident about mitigation.



Strategic Considerations - Protests

❖ When to Protest?

- If you believe **another offeror** (or its team member) has an OCI, the concern has been raised to the agency, and the agency is allowing the offeror to compete, **you must protest before proposals are due.**
- If an agency **excludes you** because of a potential or actual OCI, **you must protest before proposals are due.**
- **Protest before proposals are due** if there is a harmful **blanket prohibition** on bidding **based upon perceived OCIs.**

❖ Standard of Review

- Responsibility of identifying an OCI and whether exclusion is warranted rests with the CO.
- Agency is given “considerable discretion.”
- A protester must identify **hard facts** that indicate the existence or potential existence of an OCI—inference or suspicion are insufficient.
- GAO/COFC reviews **reasonableness** of the investigation and whether agency gave **meaningful consideration** to the issue.



Stay Tuned–Pending Proposed Rule

- ❖ Proposed in April 2011.
- ❖ Re-categorizes OCIs.
 - Would transfer FAR provisions to FAR Part 3, Improper Business Practices and Personal Conflicts of Interest.
 - Distinguishes between (1) OCIs that create an unfair competitive advantage and (2) OCIs that impact the Government’s interest by compromising a contractor’s objectivity.
 - COs would have great discretion to address and accept the risk posed by the second type.
- ❖ New Solicitation and Contract Provisions.
- ❖ Creation of FAR Subpart 4.4, Safeguarding Information within Industry.

Restrictions on Post Government Employment

Types of Restrictions

- ❖ Procurement Integrity Act.
- ❖ Lifetime Restriction = particular matter + participated personally and substantially.
- ❖ Two-Year Restriction = particular matter + official responsibility.
- ❖ One-Year Restriction = any matter + former senior employee.
- ❖ Two-Year Restriction = any matter + former very senior employee.
- ❖ No Compensation for Representational Services.

Procurement Integrity Act

A former employee may not accept compensation from a contractor that has been awarded a competitive or sole source contract, as an employee, officer, director, or consultant of the contractor within a period of 1 year after the employee—

- ❖ Served, at the time of selection of the contractor or the award of a contract to that contractor, as the procuring contracting officer, the source selection authority, a member of a source selection evaluation board, or the chief of a financial or technical evaluation team in a procurement in which that contractor was selected for award of a contract in excess of \$10 million;
- ❖ Served as the program manager, deputy program manager, or administrative contracting officer for a contract in excess of \$10 million awarded to that contractor; or
- ❖ Personally made for the Federal agency a decision to—
 - Award a contract, subcontract, modification of a contract or subcontract, or a task order or delivery order in excess of \$10 million to that contractor;
 - Establish overhead or other rates applicable to a contract or contracts for that contractor that are valued in excess of \$10 million;
 - Approve issuance of a contract payment or payments in excess of \$10 million to that contractor; or
 - Pay or settle a claim in excess of \$10 million with that contractor.
- ❖ Additionally, a former employee may not disclose “contractor bid or proposal information” or “source selection information,” before the award of a Federal agency procurement contract to which the information relates, other than as provided for by law.



Protesting a PIA Violation

- ❖ “A person may not file a protest against the award or proposed award of a Federal agency procurement contract alleging a violation of [the PIA], and the Comptroller General may not consider that allegation in deciding a protest, unless the person, no later than 14 days after the person first discovered the possible violation, reported to the Federal agency responsible for the procurement the information that the person believed constitutes evidence of the offense.” 41 U.S.C.A. § 2106.
- ❖ FAR 3.104-7 lays out the requirements for the agency’s investigation.
 - Essentially, the CO must make an initial determination of prejudice, which must then be reviewed by other agency officials, including the agency’s Head of Contracting Activity.

Lifetime Restriction

- ❖ No former employee shall knowingly, with the **intent to influence**, make any **communication to or appearance** before an employee of the United States on behalf of any other person in connection with a **particular matter** involving a specific party or parties, in which he **participated personally and substantially** as an employee, and in which the United States is a party or has a direct and substantial interest.
- ❖ 5 C.F.R. § 2641.201.

Intent to Influence

- ❖ A communication or appearance is made with the intent to influence when made for the purpose of:
 - Seeking a Government ruling, benefit, approval, or other discretionary Government action; or
 - Affecting Government action in connection with an issue or aspect of a matter which involves an appreciable element of actual or potential dispute or controversy.
- ❖ Example: A former Government employee calls an agency official to complain about the auditing methods being used by the agency in connection with an audit of a Government contractor for which the former employee serves as a consultant. The former employee has made a communication with the intent to influence because his call was made for the purpose of seeking Government action in connection with an issue involving an appreciable element of dispute.

Intent to Influence Not Present

- ❖ Making a routine request not involving a potential controversy, such as a request for publicly available documents or an inquiry as to the status of a matter;
- ❖ Making factual statements or asking factual questions in a context that involves neither an appreciable element of dispute nor an effort to seek discretionary Government action, such as conveying factual information regarding matters that are not potentially controversial during the regular course of performing a contract;
- ❖ Signing and filing the tax return of another person as preparer;
- ❖ Signing an assurance that one will be responsible as principal investigator for the direction and conduct of research under a Federal grant;
- ❖ Filing a SEC Form 10-K or similar disclosure forms required by the SEC;
- ❖ Making a communication, at the initiation of the Government, concerning work performed or to be performed under a Government contract or grant, during a routine Government site visit to premises owned or occupied by a person other than the United States where the work is performed or would be performed, in the ordinary course of evaluation, administration, or performance of an actual or proposed contract or grant; or
- ❖ Purely social contacts.



Communication or Appearance

- ❖ Communication = impart or transmit information of any kind, including facts, opinions, ideas, questions or direction, to an employee of the United States, whether orally, in written correspondence, by electronic media, or by any other means.
- ❖ Appearance = physically present before an employee of the United States, in either a formal or informal setting.
- ❖ Example: A former employee of the Federal Bureau of Investigation makes a brief telephone call to a colleague in her former office concerning an ongoing investigation. She has made a communication. If she personally attends an informal meeting with agency personnel concerning the matter, she will have made an appearance.



Behind-the-Scenes Assistance Okay

- ❖ Nothing in this section prohibits a former employee from providing assistance to another person, provided that the assistance does not involve a communication to or an appearance before an employee of the United States.
- ❖ But...



Mere Physical Presence May Be Enough

- ❖ Under some circumstances, a former employee's mere physical presence, without any communication, may constitute an appearance with the intent to influence an employee of the United States.
- ❖ Relevant considerations include such factors as whether:
 - The former employee has been given actual or apparent authority to make any decisions, commitments, or substantive arguments in the course of the appearance;
 - The Government employee before whom the appearance is made has substantive responsibility for the matter and does not simply perform ministerial functions, such as the acceptance of paperwork;
 - The former employee's presence is relatively prominent;
 - The former employee is paid for making the appearance;
 - It is anticipated that others present at the meeting will make reference to the views or past or present work of the former employee;
 - Circumstances do not indicate that the former employee is present merely for informational purposes, for example, merely to listen and record information for later use;
 - The former employee has entered a formal appearance in connection with a legal proceeding at which he is present; and
 - The appearance is before former subordinates or others in the same chain of command as the former employee.

Public Gatherings & Conferences

- ❖ A former employee who addresses a public gathering or a conference, seminar, or similar forum as a speaker or panel participant will not be considered to be making a prohibited communication or appearance if the forum:
 - Is not sponsored or co-sponsored by a federal agency, an independent agency in the executive, legislative, or judicial branch, federal court, or court-martial.
 - Is attended by a large number of people; and
 - A significant proportion of those attending are not employees of the United States.
- ❖ In these circumstances, a former employee may engage in exchanges with any other speaker or with any member of the audience.
- ❖ A former employee also may permit the broadcast or publication of a commentary provided that it is broadcast or appears in a newspaper, periodical, or similar widely available publication.



Particular Matter

- ❖ Must involve specific parties.
- ❖ Not defined in statute, but generally means a specific contract, grant, license, product approval application, enforcement action, administrative adjudication, or court case.
- ❖ A contract is almost always a single particular matter involving specific parties.
- ❖ Generally, successive or otherwise separate contracts (or other agreements) will be viewed as different matters from each other, absent some indication that one contract (or other agreement) contemplated the other or that both are in support of the same specific proceeding.

Participated Personally and Substantially

- ❖ To “participate” means to take an action as an employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or other such action, or to purposefully forbear in order to affect the outcome of a matter.
- ❖ An employee does not participate in a matter merely because he had knowledge of its existence or because it was pending under his official responsibility.
- ❖ To participate “personally” means to participate: (i) Directly, either individually or in combination with other persons; or (ii) Through direct and active supervision of the participation of any person he supervises, including a subordinate.
- ❖ To participate “substantially” means that the employee's involvement is of significance to the matter.



Two-Year Restriction for Particular Matter Involving Official Responsibility

- ❖ For two years after his Government service terminates, no former employee shall knowingly, with the **intent to influence**, make any **communication to or appearance** before an employee of the United States on behalf of any other person in connection with a **particular matter** involving a specific party or parties, in which the United States is a party or has a direct and substantial interest, and which such person knows or reasonably should know was actually pending under his **official responsibility within the one-year period prior** to the termination of his Government service.
- ❖ 5 C.F.R. § 2641.202.



Official Responsibility

- ❖ “Official responsibility” means the direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and either personally or through subordinates, to approve, disapprove, or otherwise direct Government action.
- ❖ Ordinarily, the scope of an employee's official responsibility is determined by those functions assigned by statute, regulation, Executive Order, job description, or delegation of authority.
- ❖ All particular matters under consideration in an agency are under the official responsibility of the agency head and each is under that of any intermediate supervisor who supervises a person, including a subordinate, who actually participates in the matter or who has been assigned to participate in the matter within the scope of his official duties.
- ❖ A nonsupervisory employee does not have official responsibility for his own assignments.



Exceptions and Waivers to Lifetime Restriction and Two-Year Official Responsibility

The lifetime and two-year prohibitions do not apply to a former employee who is:

- ❖ Acting on behalf of the United States.
- ❖ Acting as an elected State or local Government official.
- ❖ Communicating scientific or technological information pursuant to procedures or certification.
- ❖ Testifying under oath (except generally expert testimony).
- ❖ Acting on behalf of an international organization pursuant to a waiver.
- ❖ Acting as an employee of a Government-owned, contractor-operated entity pursuant to a waiver.

Additional One-Year Restriction on Former Senior Employee Concerning Any Matter, Regardless of Prior Involvement

- ❖ For one year after his service in a senior position terminates, no former senior employee may knowingly, with the **intent to influence**, make any **communication to or appearance** before an employee of an agency in which he served in any capacity within the one-year period prior to his termination from a senior position, if that communication or appearance is made on behalf of any other person in connection with **any matter** on which the former senior employee **seeks official action** by any employee of such agency.
- ❖ 5 C.F.R. § 2641.204.



Seeks Official Action

A former senior employee seeks official action when the circumstances establish that he is making his communication or appearance for the purpose of inducing a current employee to make a decision or to otherwise act in his official capacity.



Exceptions and Waivers

The one-year restriction does not apply to a former senior employee who is:

- ❖ Acting on behalf of the United States.
- ❖ Acting as an elected State or local Government official.
- ❖ Acting on behalf of specified entities.
- ❖ Making uncompensated statements based on special knowledge.
- ❖ Communicating scientific or technological information pursuant to procedures or certification.
- ❖ Testifying under oath.
- ❖ Acting on behalf of a candidate or political party.
- ❖ Acting on behalf of an international organization pursuant to a waiver.
- ❖ Acting as an employee of a Government-owned, contractor-operated entity pursuant to a waiver.
- ❖ Subject to a waiver issued for certain positions.

Additional Two-Year Restriction on Former Very Senior Employee Concerning Any Matter, Regardless of Prior Involvement

- ❖ For two years after his service in a very senior employee position terminates, no former very senior employee shall knowingly, with the **intent to influence**, make any **communication to or appearance** before any official appointed to an Executive Schedule position or before any employee of an agency in which he served as a very senior employee within the one-year period prior to his termination from a very senior employee position, if that communication or appearance is made on behalf of any other person in connection with **any matter** on which the former very senior employee **seeks official action** by any official or employee.
- ❖ 5 C.F.R. § 2641.205.



Exceptions and Waivers

The two-year restriction does not apply to a former very senior employee who is:

- ❖ Acting on behalf of the United States.
- ❖ Acting as an elected State or local Government official.
- ❖ Acting on behalf of specified entities.
- ❖ Making uncompensated statements based on special knowledge.
- ❖ Communicating scientific or technological information pursuant to procedures or certification.
- ❖ Testifying under oath.
- ❖ Acting on behalf of a candidate or political party.
- ❖ Acting on behalf of an international organization pursuant to a waiver.
- ❖ Acting as an employee of a Government-owned, contractor-operated entity pursuant to a waiver.

Prohibition Against Receiving Compensation for "Representational Services"

- ❖ 18 U.S.C. § 203 prohibits a former employee from receiving any compensation for "representational services" in connection with a particular matter in which the United States is a party or has a direct and substantial interest, if the covered representational services were provided at a time when the individual was a Government employee, and regardless of whether or not the individual personally provided those representational services.
- ❖ "Representational services" means communications to or appearances before Federal entities with the intent to influence the Government on behalf of a third party. This includes legal and consulting services.
- ❖ The prohibition applies equally to representational services rendered by the former employee personally or by another if the employee shares in the compensation.
- ❖ Accordingly, a former employee may not share in compensation received by his or her new employer for representational services it provided to a third party, in connection with a particular matter in which the United States is a party or has a direct and substantial interest, at the time the former employee worked for the Government.



Recommendations for Hiring Former Government Employee

- ❖ Gain understanding of employee's level of authority.
- ❖ Ask for the employee's job description with the Government.
- ❖ Request a copy of the employee's ethics opinion.
- ❖ Have the employee sign representations and certifications regarding what he's told you and his ethics opinion.

Any Questions?

Thank you for joining us today.

If you would like to speak with Megan or Michelle about OCIs and post government employment restrictions, please contact them at:

Megan C. Connor

mconnor@pilieromazza.com

(202) 857-1000

Michelle E. Litteken

mlitteken@pilieromazza.com

(202) 857-1000

