

# **ORGANIZATIONAL CONFLICTS OF INTEREST**

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## **OVERVIEW**

- ❖ Introduction to Organizational Conflicts of Interest (“OCI”)
- ❖ Unequal Access to Information
- ❖ Biased Ground Rules
- ❖ Impaired Objectivity
- ❖ Waiving an OCI
- ❖ Strategic Considerations
  - Proposals
  - Protests
- ❖ 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



# THE SIGNIFICANCE OF OCIs

## ❖ A Growing Problem

- Industry consolidation
- Government buying services that require the exercise of judgment
- Use of umbrella contracts

## ❖ Exclusion from Procurements

- FAR 9.504(a) requires COs to (1) identify and evaluate potential organizational conflicts of interest as early in the acquisition process as possible; and (2) avoid, neutralize, or mitigate significant potential conflicts before contract award
- Trend of government utilizing blanket approach

## ❖ Protest Risk

## ❖ Impact on Business

- Corporate restructuring
- Selection of subcontractors/team members
- Selection of opportunities
- Inefficiencies and increased costs





## 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.”



## WAIVING AN OCI

SRA International, Inc., B-407709.5; B-407709.6 (Dec. 3, 2013)

SRA Int'l, Inc. v. U.S., No. 13-969C (Fed. Cl. Jan. 13, 2014) & (Jan. 26, 2014)

- GSA issued a request for task order proposals, seeking IT support services for the FDIC
- SRA protested, arguing that the awardee had an OCI because its subcontractor had been monitoring and auditing the FDIC's network security for at least four years and it had unlimited access to the network
- Late in the protest process (the 91<sup>st</sup> day), GSA notified GAO that it waived the OCI. GAO dismissed the protest.
- SRA challenged the waiver at the COFC. COFC requested an advisory opinion from GAO on whether the waiver violated the Administrative Procedures Act ("APA")
- GAO responded that the waiver complied with the APA

*Note: the Federal Circuit subsequently held that the COFC lacked jurisdiction because the waiver was issued in connection with a task order—a matter exclusively within the GAO's jurisdiction*





# 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
- Any time to avoid discussion?



# 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**



## STRATEGIC CONSIDERATIONS - PROTESTS

### ❖ Standard of Review (continued)

- GAO/COFC reviews **reasonableness** of the investigation and whether agency gave **meaningful consideration** to the issue
- GAO/COFC will not substitute its judgment for the agency's unless there is clear evidence that the agency's conclusion was unreasonable

### ❖ Defending a Protest

- Mitigation measures already taken or to be implemented
- Agency's investigation flawed or non-specific
- Absence of "hard facts"
- Lack of unfair competitive advantage



# **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**



# STAY TUNED—PENDING PROPOSED RULE

## ❖ New Solicitation and Contract Provisions

- Offers would be required to make broader OCI disclosures—**all** relevant information, including information about potential subcontracts
- Signing of offer would be a formal representation of compliance with disclosure requirements
- Increased requirement for COs to seek out information

## ❖ Creation of FAR Subpart 4.4, Safeguarding Information within Industry

- New home for unequal access to information OCIs

## ❖ Treatment of Affiliates

- COs would be required to analyze the business relationships between an offeror and its affiliates using a list of factors
- Identifies “structural or behavioral barriers” to lessen the risks posed by an affiliate



# Any Questions?

Thank you for joining us today.

If you would like to speak with Cy or Michelle about OCIs, please contact them at:

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