Conflicts of Interest (OCI) – A Review Before the New Rule
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Issues in Focus Webinar Series
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Agenda

• Definitions
• Types of OCIs
• The current state of the law on OCI: what is, and is not, an OCI;
• Recent protests that have highlighted the importance of OCI avoidance and mitigation;
• How to proactively prevent OCIs;
• Elements of an acceptable mitigation plan
• What to Do When You Discover an OCI
Definitions
Definition

• FAR 2.101

  “Organizational conflict of interest” [OCIs] means that because of other activities or relationships with other persons, a person is unable or potentially unable to render impartial assistance or advice to the Government, or the person’s objectivity in performing the contract work is or might be otherwise impaired, or a person has an unfair competitive advantage.”

• See DFARS 209.571 and DFARS 252.209-7008 & 7009 as to OCIs on Major Defense Acquisition Programs (MDAPs) – no difference in definition.
Types of OCIs
Types of OCIs

• Biased ground rules;
  – A biased ground rules OCI arises where a firm, as part of its performance of a government contract, has in some sense set the ground rules for the competition for another government contract. FAR §§ 9.505-1, 9.505-2.

• Unequal access to information; and
  – An unequal access to information OCI exists where a firm has access to nonpublic information as part of its performance of a government contract, and where that information may provide the firm an unfair competitive advantage in a later competition for a government contract. FAR §§ 9.505(b), 9.505-4

• Impaired objectivity.
  – An impaired objectivity conflict arises where a firm’s ability to render impartial advice to the government would be undermined by the firm’s competing interests. FAR § 9.505-3
Financial Interests

• A financial interest alone is not an OCI; must have "hard facts" that an actual OCI exists
  
  
  – *Maximus Fed. Servs., Inc.*, B-410359, 2015 CPD ¶ 11 (Comp. Gen. Dec. 17, 2014) (“Our Office has recognized that an agency may reasonably find that certain relationships between companies or corporate affiliates are too remote or that the possibility of a conflict is too unlikely or speculative to conclude that there is a disqualifying OCI.”)
  
Current State of the Law and Recent Protest Decisions on OCIs
Current State of the Law

- FAR Case 2011-001, “Organizational Conflicts of Interest and Unequal Access to Information” was published as a proposed rule 26 Apr 11 and is reported to be ready for publication as a final rule.
- The proposed rule added a new definition for OCIs
  - “Organizational conflict of interest means a situation in which—
    - (1) A Government contract requires a contractor to exercise judgment to assist the Government in a matter (such as in drafting specifications or assessing another contractor’s proposal or performance) and the contractor or its affiliates have financial or other interests at stake in the matter, so that a reasonable person might have concern that when performing work under the contract, the contractor may be improperly influenced by its own interests rather than the best interests of the Government; or
    - (2) A contractor could have an unfair competitive advantage in an acquisition as a result of having performed work on a Government contract, under circumstances such as those described in paragraph (1) of this definition, that put the contractor in a position to influence the acquisition.
Consequences of an OCI

- OCIs, when unmitigated, create potentially serious consequences for contractors
  - *Jacobs Tech. Inc. v. United States*, 100 Fed. Cl. 198, 217 (2011) (contracting officers are “authorized to disqualify an offeror for even an appearance of impropriety to ensure the integrity of the procurement process.)
  - *United States v. SAIC*, 626 F.3d 1257 (D.D.C. 2010) (false certification regarding compliance with OCI requirements may serve as a basis for False Claims Act liability)
  - Bid protest risk (next slide)
Recent Protests

- Concurrent Technologies Corporation, B-412795, B-412795.3, 17 Jan 17
- HP Enterprises Services, LLC; AON National Flood Services, B-413967, 17 Jan 17
- NCI Information Systems, Inc., B-412870.2, 14 Oct 16
- Systems Made Simple, Inc., B-412948.2, 20 Jul 16
- Social Impact, Inc., B-412941, 8 Jul 16
- BAE Systems Technology Solutions & Services, Inc., B-411810.3, 24 Jun 16
- Platinum Business Systems, LLC, B-413947, 23 Dec 16
How to Proactively Prevent OCIs
How to Proactively Prevent OCIs

• Organizational conflicts of interest may be addressed by means of avoidance, limitations on future contracting, mitigation, or the Government’s assessment that the risk inherent in the conflict is acceptable. In some cases, a combination of methods may be appropriate.

• Understand difference between “shaping” a procurement and designing/providing specifications

• Where you have multiple business functions providing both advice and assistance and either developing and delivering products and services – ensure you have adequate firewalls and guidance on the sharing of information

• Where you find an OCI, immediately notify the appropriate government KO and develop a mitigation plan

• Develop and deliver training to all employees on OCI, what to do to prevent OCIs and what to do when an OCI is discovered.

• Ensure Company leadership provides a consistent and frequent message about avoiding and mitigating OCIs.
Elements of a Successful Mitigation Plan
Elements of a Successful Mitigation Plan

• The required complexity of the mitigation plan is related to the complexity of the organizational conflict of interest and the size of the acquisition.

• Some elements of a plan may include:
  – Requiring a subcontractor or team member that is conflict-free to perform the conflicted portion of the work on the instant contract.
  – Requiring the contractor to implement structural or behavioral barriers, internal controls, or both.
    • A Board resolution prohibiting participation by certain directors, officers or employees
    • Non-disclosure agreements
    • The addition of a “Independent Director”
    • Creation of a Compliance Official to oversee OCI issues
    • Establishment of firewalls for certain capture activities
    • Asking the government for a determination that the risk presented by the OCI is in the best interest of the government
What to do when you discover an OCI
What to do when you discover an OCI

- Immediately take steps to localize all information – build a wall around it.
- Evaluate extent of the conflict
- Notify/disclose to government
- Develop mitigation plan
  - may include decision not to proceed further with the capture
Questions?
Join us next month on Wednesday, April 12th, 2017
DHG’s 22nd Annual Government Contracting Update: shaping today’s challenges into tomorrow’s success

When: May 4th, 2017

Where: The Hyatt Regency in Tysons Corner, VA

CPE: 8 hours (pending approval)

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