



Organizational Conflict of Interest

NCMA Battlefield-Dulles Chapter

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17 November 2010

Agenda



- What is OCI?
- Background and environment
- Relevant legal cases
- WSARA and proposed DFARS OCI rule
- Agency independent interpretations
- Industry actions to anticipate probable regulations
- Future of OCI

What is OCI?



- OCI definition
 - From the FAR:
 - OCI occurs when because of 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 otherwise be impaired, or a person has an unfair competitive advantage [FAR 2.101]
 - Term “person” includes organizations
 - Addressed in FAR Subpart 9.5
 - » FAR indicates concern with actual and potential conflicts
 - » Directs measures be taken to detect and mitigate actual and potential OCIs

What is OCI? (cont.)



- FAR Subpart 9.5 prescribes Contracting Officer responsibilities, general rules and procedures:
 - Identify and evaluate potential OCI as early as possible in the acquisition process. [FAR 9.504(a)(1)]
 - Avoid, neutralize or mitigate significant potential OCIs before contract award. [FAR 9.504(a)(2)]
 - Award contract to the apparent successful offeror, unless OCI cannot be avoided or mitigated. [FAR 9.504(e)]
 - Request waiver of OCI if CO finds such waiver is in the best interest of the government. [FAR 9.504(e)]

What is OCI? (cont.)



- Four Areas in FAR 9.505 where OCI is “most likely” to occur:
 - Systems Engineering and Technical Direction
 - Preparing Specifications or Work Statements
 - Providing Evaluation Services
 - Obtaining Access to Proprietary Information

Background



- GAO protest and Court of Federal Claims decisions
 - Impaired objectivity
 - Biased ground rules
 - Unequal access to information
- Acquisition Advisory Panel report – January 2007
 - “Uniform regulations providing guidance to contracting officers and contracting agencies could help to reduce the frequency of failures to identify and mitigate OCIs.”
- OFPP Advanced Notice of Proposed Rulemaking—March 2008
 - Re-opens public comment period July 2008

Background



- DSB Task Force: Creating an Effective National Security Industrial Base for the 21st Century – July 2008
 - “Clusters of these conflicts [OCI’s in the product and service provider side] in a market area are not inherently resolvable through firewalls or similar mitigations. Recusals and other structural solutions are necessary.”
- Congress establishes the Weapons Systems Acquisition Reform Act (WSARA) – May 2009
 - Section 207 requires the Secretary of Defense to revise the DFARS to provide “uniform guidance and tighten existing requirements for OCI by contractors in major defense acquisition programs.”

Chronology of OCI “Events”



- 3/26/08 – Proposed FAR rule on OCI (Case 2007-018)
- 7/17/08 – Re-opened industry comments on Case 2007-18
- 5/22/09 – Weapons Systems Acquisition Reform Act (WSARA) signed
- 6/26/09 – NRO memo on OCI
- 11/3/09 – SAF/AQC memo on OCI
- 11/8/09 – Northrop Grumman sells TASC
- 12/8/09 – DoD public meeting on WSARA and Sec. 207
- 4/21/10 – Proposed DFARS rule on OCI (Case 2009-D015)
- 10/3/10 – NGA memo on OCI
- 10/16/10 – Lockheed Martin sells Enterprise Integration Group

Environment



- What is different today:
 - Increased reliance on contractors for work formerly done by the government
 - Industry consolidation
 - Contract consolidations and large IDIQ vehicles
 - Blended workforce
 - Frequent grounds for protest
 - GAO protest decisions provide a framework for analysis

Legal Cases



- The Government Accountability Office (GAO) through protest decisions, has addressed the types of OCI, best laid out in *Aetna Government Health Plans*, July 27, 1995
 - Unequal Access to Information
 - Impaired Objectivity
 - Biased Ground Rules

See www.gao.gov for cases and other detailed information

- The Court of Federal Claims (COFC) began citing the *Aetna* decision and description of OCIs in *Vantage Assocs., Inc. v. United States*, 59 Fed. Cl. 1, 10 (2003).

See www.uscfc.uscourts.gov for cases and other detailed information

Key GAO Decisions



- Shaping of the Acquisition Community's response to OCI is at times based on GAO protest decisions such as:
 - Leads Corporation September 26, 2003
 - Purvis Systems, Inc. August 16, 2004
 - Lucent Technologies World Services, Inc., March 2, 2005
 - Alion Science & Technology Corporation September 26, 2006
 - Overlook Systems Technologies November 28, 2006
 - Greenleaf Construction Company April 4 2007
 - Axiom Resource Management, Inc. July 12, 2007
 - AT&T Government Solutions, Inc. August 28, 2008
 - Nortel Government Solutions , Inc. December 30, 2008
 - L3 Services, Inc. September 3, 2009
 - The Analysis Group LLC November 13, 2009
 - Cahaba Safeguard Administrators January 25, 2010

Key COFC Decisions



- Masai Technologies Corp. v. U.S. (2007)
- ARINC Engineering Svcs v. U.S. (2007)
- Axiom Resource Management v. U.S. (2008)

Legal Case Conclusions



- OCI can be defined by three areas:
 - Unequal access to information
 - Biased ground rules
 - Impaired objectivity
- Unequal access to information OCIs may be mitigated through a firewall
- Biased ground rules and impaired objectivity OCIs generally cannot be mitigated through a firewall, but may be mitigated by other means
- Training and audits are frequent elements of OCI mitigation plans
- Mitigation plans must be rigorously reviewed
- Contracting Officer's well written decisions, when fully justified, will not be overturned
- Incumbency does not create an OCI
- OCI can be avoided or mitigated by agencies through affirmative actions such as reassigning certain work scope



Proposed DFARS Rule

Proposed DFARS Rule Summary



- New rule is firmly based upon OCI analysis established in GAO and Court of Federal Claims bid protest decisions
- Provides uniform OCI guidance for all DoD contracting agencies
- Tightens existing requirements for OCI's
- Mandates Systems Engineering and Technical Assistance (“SETA”) contractor restrictions for Major Defense Acquisition Programs (MDAPs)
- Proposal is not in DFARS subpart 209.5 but rather appears in new DFARS subpart 203.12
- Provides that as a matter of policy, mitigation is the *preferred* method of OCI resolution
- Provides PCO resolution direction for OCI's
- Applies to commercial acquisitions, does not apply to COTS

What's New In the DFARS OCI Rule



- Definitions of OCI 'types' from GAO protest decisions
- Expansion to all DoD contracts including TOs/DOs and commercial
- Both pre and post award contractor reporting of OCI's
- Three resolution methods
- Five new contract clauses
- Flow down requirement for subcontractors

Potential Rule Concerns



For Industry:

- Additional OCI constraints of applying to all DOD contracts beyond WSARA
- Application to and Impact on TOs/DOs for IDIQ vehicles
- PCO default to avoidance vs. mitigation as an easier solution
- Treating the entire contractor as a single entity
- Both pre and post award contractor reporting of OCI's

For Government:

- Continued bid protests based on varying interpretations
- PCO experienced resources to consistently implement
- Source of pre-award conflict information

Three Types Of Conflicts



- Impaired objectivity
 - Use of subjective judgment, and
 - Financial or economic interest
 - Examples: Evaluate own products or services or those of competitor
- Unfair access to non-public information
 - Provides unfair competitive advantage
 - Example: Support contractor in a program support office has access to proprietary or source selection information giving an unfair competitive advantage
- Biased ground rules
 - Set the ground rules for another acquisition
 - Example: SOW/Specifications/source selection criteria preparation

Three Resolution Methods



- Avoidance (exclusion of certain offerors)
 - Exclude from future contracts- use as last resort
 - Draft SOW to exclude tasks that require subjective judgment
 - Access to non-public information not required
- Limitation on future contracting (neutralization)
 - Perform on instant contract but not on future contracts giving unfair advantage
- Mitigation (OCI control measures)
 - Resolution methods that have been developed in practice (and accepted through GAO decisions) are offered as illustrative examples
 - firewalls
 - dissemination of previously nonpublic information
 - Use of conflict-free subcontractors to isolate OCI-causing work

SETA Restrictions



- SETA contract for MDAP prohibits the contractor or any affiliate from participating as a contractor or major subcontractor (>10% of prime contract value) in the development or construction of that program
- Exceptions:
 - Performance is design or development work
 - Preparation of work statements
 - Contractor is highly qualified with domain experience and expertise and the OCI will be adequately resolved
- Systems engineering activities: determining specs, resolving interface problems, developing test requirements, evaluating test data, supervising design
- Technical assistance activities: developing work statements, determining parameters, directing other contractors' operations, resolving technical controversies

Contractor Notification of OCI's



- Pre-award
 - Notify PCO of any potential OCI's before preparing offer
 - In offer disclose all relevant information regarding any OCI
 - If no OCI, state same
 - Describe any other work performed within the last 5 years that is associated with the offer
 - If potential for OCI, explain resolution of OCI including submission of mitigation plan and/or accepting a limitation in future contracting
- Post-award
 - Any resultant contract will include the Government-approved mitigation plan and attendant clause
 - Less than full disclosure could result in termination for default
 - Report changes in OCI status during contract performance
 - Flow down to subcontractors

PCO Responsibilities



- ID likely OCI conflicts early in acquisition and resolve prior to contract award
- Develop appropriate means for resolving OCI's
- Give preference to mitigation to resolve OCI's
- Before withholding award from apparent successful offeror based on OCI, allow the contractor a reasonable opportunity to respond

Rule Contract Clauses



- 252.203-70VV MDAP OCI for SETA
- 252.203-70WW MDAP OCI prohibition in solicitation and contract for SETA, including commercial and major subcontractors
- 252.203-70XX Notice of potential OCI
- 252.203-70YY Resolution of OCI's
- 252.203-70YZ Limitation on future contracting
- 252.203-70ZZ Disclosure of OCI after award



Recent Individual Agency Reactions

Missile Defense Agency



Lieutenant General Patrick J. O'Reilly, USA
Director, Missile Defense Agency
Before the
Senate Armed Services Committee
June 16, 2009

Good morning, Mr. Chairman, Senator McCain, and distinguished
Committee. I appreciate the opportunity to testify before you
on the Fiscal Year (FY) 2010 budget for developing and im-
proving the Department of Defense's missile defense program.
We are proposing approximately \$7.8 billion for

Organizational Conflict of Interest. As directed by the Acquisition Reform Act (Section 206), MDA strives to prevent Organizational Conflict of Interest (OCI) by rigorously applying prohibition of contracting for inherently governmental functions in the transition to new consolidated services contracts, prohibiting developmental contractors from participating in the requirements process, and tightening oversight of potential organizational conflicts involving our system engineers and support contractors. In compliance with Secretary of Defense direction, we are looking for opportunities to transition support contractors to government positions, thus reducing OCI concerns.

Acquisition Excellence. Implementation of a functional management construct (where the MDA acquisition workforce is assigned to functional areas rather than projects) has resulted in greater focus on our human capital development at the enterprise workforce level and implements parts of Section 102 of the Acquisition Reform Act of 2009 to develop the acquisition workforce. Our functional managers maintain a broad focus on career development and education of acquisition professionals rather than a narrow focus on enhancing skills for current

NRO Notice to Industry on OCI



National Reconnaissance Office Office of Contracts Notice to Industry Partners

Notice 2009-04

26 June 2009

Subject: NRO Corporate Organizational Conflict of Interest Agreement Program

Last month, President Obama signed into law the Weapon Systems Acquisition Reform Act of 2009. Section 207, *Organizational Conflicts of Interest in Major Defense Acquisition Programs*, is designed to prevent the occurrence of conflicts created when the same contractor is used for both support services and development on a Major Defense Acquisition Program (MDAP). The current National Reconnaissance Office (NRO) organizational conflict of interest (OCI) policy is consistent with the spirit of Section 207, and establishes the NRO preference to avoid actual or potential OCI. The primary objectives of the NRO OCI policy are to protect the integrity of the NRO acquisition decision making process, and to protect the NRO development contractor base through the use of non-conflicted support contractors.

Corporate Organizational Conflicts of Interest Plan

As defense contractors realign and transform their organizations to comply with the legislation and policy changes, questions have arisen on how these changes will be implemented. Accordingly, the NRO intends to initiate a program to negotiate corporate OCI agreements with companies that are “non-conflicted” support service providers in accordance with the NRO OCI policy, and who assert they will remain non-conflicted with regard to their support of the NRO.

The agreement will take the form of a corporate OCI plan submitted to the Director, NRO Office of Contracts (D/OC), and will follow the guidelines in the NRO Acquisition Manual (NAM) Sub-part 9.5 and NAM Form 9.5061, *OCI Mitigation Plan Checklist*. The submitting contractor will be required to describe, at a corporate level, the measures taken to prevent instances of OCI within the context of the NRO OCI policy and the definitions below:

- *Support Services* means management support, consultant, and professional services; studies, analysis and evaluations; systems engineering, technical direction, and assistance; and other services that may provide contractor employees access to sensitive or proprietary

Air Force Memo on OCI



DEPARTMENT OF THE AIR FORCE
WASHINGTON DC

OFFICE OF THE ASSISTANT SECRETARY

NOV 03 2009

MEMORANDUM FOR ALMAJCOM/DRU/FOA (Contracting)

FROM: SAF/AQC

SUBJECT: Organizational Conflicts of Interest (OCI)

Concern about the number of potential and actual OCIs in public contracting has grown significantly and has been the subject of recent sustained GAO-level protests. The Fact Sheet and SAF/GCQ briefing slides that are attached to this memorandum are intended to assist contracting officers in recognizing and adjudicating OCIs in light of relevant case law, with special focus on restrictions that should be placed on conflicted contractors in future acquisitions.

Not all OCIs can be mitigated. There has been an overreliance on firewalls and non-disclosure agreements to try to resolve “biased ground rules” and “impaired objectivity” OCIs, which can only be avoided through the use of restrictions. I caution all of you to exercise “common sense, good judgment, and sound discretion” in assessing whether a conflict exists and not to attempt mitigation for those that must instead be avoided or neutralized.

If you have any questions, please contact Ms. Susan Tackis, SAF/AQCP, susan.tackis@pentagon.af.mil or 703-588-7060.

ROGER S. CORRELL
Deputy Assistant Secretary (Contracting)
Assistant Secretary (Acquisition)

Other Agency Reactions



- NAVSEA: Elliott Branch “choose your major”
- DARPA / IARPA: First to require company-level SETA vs. development decision

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Looking Ahead

Industry Actions to Prepare for OCI Issues



- Read your contracts
- Know what's required of your Statements of Work
- TRAIN the Contracts, Procurement, Business Development, Program Management, Line Management, and Human Resources staff
- Create an obligation for adherence with Program Management, Line Management, and Business Development
- Follow your proposal/contract commitments on mitigation plans, firewalls, NDA's, etc.
- Identify and track contracts and RFP's with special disclosure or certification obligations (especially regulatory agencies such as DOE, NRC, EPA)

Industry Actions to Prepare for OCI Issues (Cont'd)



- Know your business base and how it interrelates with your scope of customers
- Anticipate OCI issues and deal with them early in the acquisition cycle
- Work with your customers early to discuss potential issues and mitigate OCI
- Screen for OCI's in your entire company, including affiliates and subcontractors

Future of OCI



- Dan Gordon, OFPP Administrator, advised that FAR OCI guidance would be different from the DFARS rule
- Additional agencies tightening OCI rules toward avoidance
- GAO continued findings of OCI issues
- Additional industry divestitures (and/or consolidations)
- Additional congressional OCI pressures
- Increased transparency around OCI

Questions?



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