ORGANIZATIONAL CONFLICTS OF INTEREST

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Debate Over Contractor Conflicts Of Interest Heats Up,"

February 3, 2006, Government Executive.

- “The Government Accountability Office has sustained its second bid protest this year involving an organizational conflict of interest, an issue that has recently received increased scrutiny. “
- “Organizational conflict of interest, where a company is hired to perform duties that conflict with its other obligations, has been a hot topic among government contractors since the fall, when Daniel Gordon, managing associate general counsel for procurement law at GAO, published an article on the subject in the American Bar Association's Public Contract Law Journal.”

Factors

- Constrained Agency Budgets
- Industry Consolidations
- Cost Reimbursement Contracts
- Public and Congressional Scrutiny
Resources

• Federal Acquisition Regulations (FAR), Part 9.5.

• NASA FAR Supplement, Part 1809.5.

• National Aeronautics and Space Administration’s Guide on Organizational Conflicts of Interest, March 2010.

What is an OCI?

- OCIs are a subset or type of Conflict of Interest (COI)
  - The conflict relates to the organization having competing interests. (Known as Organizational Conflicts of Interest, “OCIs”).
  - The conflict relates to an individual, not an organization – (Known as personal conflicts of interest, “PCIs”)

- There are two important aspects of OCIs:
  - Organizations want to further their own interest: companies are set up to provide goods or services and to earn profits.
  - People and entities associated with an organization will want to further the interests of the organization.

  - “Organizational conflicts of interest occur when a firm has access to nonpublic information that would give it a leg up in competing for work. Conflicts also could crop up when a contractor is performing tasks that are subjective and could have an impact on its bottom line.”
FAR Subpart 9.5 was written to protect the Government and accomplish 2 things:

- Prevent the existence of conflicting roles that might bias a contractor’s judgment
- Prevent unfair competitive advantage
CO’s Duties related to OCI

• FAR Subpart 9.5 imposes two primary responsibilities upon the contracting officer (CO).
  – Identify and evaluate potential organizational conflicts of interest as early in the acquisition process as possible; and
  – Avoid, neutralize, or mitigate significant potential conflict before contract award.

• COs should obtain the advice of legal counsel and the assistance of appropriate technical specialists.

• Examine each contracting situation on the basis of its particular facts and the nature of the proposed contract.

• Recommend a course of action for resolving any significant conflicts prior to issuing a solicitation.

• Notify a contractor about OCI and allow the contractor a reasonable opportunity to respond before withholding award on the basis of an OCI.
Types of OCI

- **Unfair access to information** – When a contractor has access to nonpublic information which may provide the firm an unfair competitive advantage in a later competition for a government contract.

- **Impaired objectivity** – When a contractor’s judgment and objectivity in performing the contract requirements may be impaired due to the fact that the substance of the contractor’s performance has the potential to affect other interests of the contractor.

- **Biased ground rules** – When a firm, as part of its performance of a government contract, has in some sense set the ground rules for another government contract by, for example, writing the statement of work or the specifications.
Unfair Access to Information

• Involves principle of Unfair Competitive Advantage
  – All data a contractor processes will provide some competitive advantage; however, not all data provides an unfair competitive advantage.
  – Incumbent contractors obtain a “natural competitive advantage” from acquired technical expertise and firsthand knowledge of the costs related to a requirement’s complexity. Access to this experience and data is not considered to be an unfair advantage which the procuring agency must eliminate.

• Unfair Competitive Advantage is created when a firm has access to another contractor’s proprietary data and/or nonpublic Government that would be helpful in a future competition.
  – Sensitive information clauses/restricted information clauses used to address this OCI, but do not establish firewall.

• Court test to determine when there is Unfair Access to Information
  – Whether offeror access to nonpublic information unavailable to protester
  – Whether nonpublic information competitively useful responding RFP
  – Whether the awardee was afforded an advantage by having unequal access to that information
Impaired Objectivity

• Involves the principle of bias due to the existence of conflicting roles that might influence the contractor’s judgment.
  – A conflict based upon “impaired objectivity” exists when the SOW involves the subjective judgment of the contractor and when the contractor’s performance could affect its other interests.

• Contains two elements: subjective judgment and financial interest

• Indicia of subjective judgment
  – SOW containing phrases such as: “analyze,” “study,” “develop recommendations,” “develop programs,” “develop strategies,” and “provide advice.”
  – Contract clauses for key personnel; educational requirements of key personnel in RFP.

• Indicia of financial interest in the matter under its review
  – Look to publicly available information such as data from the internet to determine whether contractor may have multiple interests in the outcome of its advice.
Conflicts due to “biased ground rules” are created when a contractor as part of its performance of a government contract, has in some sense set the ground rules for another government contract.

- “Biased ground rules” usually involve writing the statement of work or the specifications for a solicitation, helping define future Government requirements, or being involved in the evaluation of the future competition.

The primary concern in cases of "biased ground rules" is that “the firm could skew the competition, whether intentionally or not, in favor of itself.” Involves both principles of unfair competitive advantage and bias.

- Conflicts due to “biased ground rules” can be unintentional because a contractor is naturally biased to view things in a certain manner.
- GM, for example, can only provide advice to the Government on the GM way of doing something.
Impaired Objectivity and Biased Ground Rules

• “Biased Ground Rules” involves both principles of unfair competitive advantage and bias.

• This conflict is the same as “Impaired Objectivity” except that the conflicting interest is narrowed to having an interest in the outcome of a future competition.

• Both large and small contractors are equally concerned about conflicts that affect future competitions where one contractor could skew outcome in favor of itself.
FAR Examples

- Section 9.505 of the FAR provides examples of common OCIs
  - Providing systems engineering and technical direction
  - Preparing specifications or work statements
  - Providing evaluation services
  - Access to proprietary information

- Three types of OCIs defined in case law intended to be broader than FAR examples
Resolve OCIs

• **Avoid** – To prevent the occurrence of an OCI through actions such as exclusion of sources or modification of requirements. Avoidance precludes the conflict.

• **Neutralize** – To counteract, through a specific action, the effects of a potential or actual OCI. The conflict remains, but the impact of the conflict has been negated.

• **Mitigate** – To reduce the effects of an OCI to an acceptable level of risk so that the Government’s interests with regard to fair competition and/or contract performance are not impaired. The conflict remains, but action was taken that minimizes the impact of the conflict to an acceptable level of risk.

• **Waive** – Conflict cannot be successfully avoided, neutralized, or mitigated and retention of offeror and/or contractor is deemed to be in the best interest of the Government. Conflict remains without sufficient resolution.
Resolve OCIs (redux)

- Avoid: Take measures so that no conflict exists.
- Neutralize: Conflict exists, but effects counteracted.
- Mitigate: Conflict exists, but measures are taken so that the effects are “acceptable.”
- Waive: Conflict exists, but the head of agency or designee decides that applying subpart 9.5 is not in Government’s interest.
Avoiding OCI

Avoidance requires actions on the part of the Government and normally is best accomplished early in the process. Common methods of avoidance include:

– Ensuring the SOW does not require contractors to use subjective judgment. Examples of objective requirements include reporting, monitoring, maintenance, testing, training, integration, operations, and administrative functions.
– Ensuring any work involving subjective judgment is performed by the Government or a contractor free from conflict.
– Ensuring that more than one contractor prepares the specifications or SOW for a competitive solicitation.
– Eliminating a contractor or group of contractors.
Using More than One Contractor

- Caution using exception in Section 9.505-2(b)(1)(iii).

- Exception provides there is no conflict with regard to preparing specifications or SOWs when more than one contractor is involved.

- Contractors must be involved in the same areas of the SOW rather than contractors involved in different parts of SOW.
Neutralizing OCI

• Limitation of future contracting is most common way to neutralize OCI.
  – Contractually prevents the contractor from exploiting its financial interest thereby resolving the conflict.
  – Limitations on future contracting may not be practical when there are few “players” with the available expertise or the contractors with the necessary expertise prefer to participate in the future competition rather than provide the upfront advice to the Government.
  – Obtaining a limitation on future contracting is the traditional method the FAR recommends to resolve OCI’s due to “impaired objectivity.”
    • NFS 1852.209-71, Limitation of Future Contracting.

• In some cases, dissemination of data can be viewed as a type of “neutralization”.
  – Placing nonpublic data in the public domain is an action that may be appropriate when a contractor has access to information about a future competition and that contractor may wish to participate in the competition.
Mitigating OCI

• Mitigating an OCI does not remove the conflict, but instead, mitigates the risk of the potential/actual conflict to an acceptable level.

• Most mitigation also involves receiving an OCI Mitigation plan from the contractor.
  – A plan should be incorporated in the contract in order to make it a contractual requirement.

• Common methods of mitigating conflicts that may be included in a OCI Mitigation Plan include:
  – Firewalls
  – Use another contractor that does not have a conflict
  – Release of information to the public
  – Government monitoring
  – Limitation on reassignments
Firewalls

- **1852.237-72**, Access to Sensitive Information requires certain protection of data
  - Limits use to performing services specified in the contract
  - Requires data be safeguarded
  - Limits access to data
  - Requires training and written affirmation each contractor employee understands the restrictions

- **NFS 1809.505-4(b) provides waiver of**
  - FAR management & administrative requirement that contractors enter specific agreements to protect information from unauthorized use or disclosure before gaining access to other companies’ proprietary information.
  - NFS waiver only effective when Access to Sensitive Information clause in contract.

- Requirements in Access clause may not be sufficient for a firewall. A limitation on reassignment of individuals may also be required.
- Firewalls only mitigate conflicts based “Unfair Access to Information.” Firewalls, by themselves, do not mitigate other types of OCIs.
Use of Non-conflicted Party

- Method used to mitigate conflicts due to impaired objectivity and involves having contractor with conflict “disqualify” itself from portion of SOW creating conflict and having another contractor free of conflict, exclusively perform effort.

- Technique best used with an ID/IQ contract or when the potential conflict exists at the subcontractor level.

- In both instances, the work must be discretely separated.

- Must be firewall between the two contractors regarding the conflicted portion of SOW to ensure work is not influenced by one of the “conflicted” members of the team.

- Contract administration issues may exist if conflict involves large percentage of SOW.
Waivers of OCI

• Waivers do not resolve a conflict.

• FAR 9.503 permits the agency head or a designee to waive any general rule or procedure of FAR 9.5 by determining that its application in a particular situation would not be in the Government’s interest.

• Waiver requests must
  – be in writing,
  – set forth the extent of the conflict, and
  – explain why applying the provisions of FAR 9.5 is not in the Government’s interest.

• Waivers should be obtained only after all other possible steps have been taken to resolve the conflict. NFS 1809.503 delegates the authority to waive OCIs to the Assistant Administrator of Procurement.
SEB’s Strategy

• Identifying scope of Conflict
  – Examine SOW for conflicts
  – Annotating SOW with potential OCIs for offerors helps establish a common understanding.

• Obtain Early Input from Industry
  – Solicit ideas
  – Most meaningful discussions are in “one-on-ones”

• Decide whether the RFP needs to reserve the right to waive an OCI
  – Must be stated in RFP to exercise right
  – Do so when market research indicates potential that no acceptable resolution possible
Proposed Rewrite of 9.5

  - DoD, GSA, and NASA proposed to amend the Federal Acquisition Regulation (FAR) to provide revised regulatory coverage on organizational conflicts of interest (OCIs), provide additional coverage regarding contractor access to nonpublic information, and add related provisions and clauses.

  “FAR coverage on OCIs has remained largely unchanged since the initial publication of the FAR in 1984. The FAR coverage was adapted from an appendix to the Defense Acquisition Regulation, which dated back to the 1960s.”

  In recent years, a number of trends in acquisition and industry have led to the increased potential for OCIs, including—
  - Industry consolidation;
  - Agencies’ growing reliance on contractors for services, especially where the contractor is tasked with providing advice to the Government; and
  - The use of multiple-award task- and delivery-order contracts, which permit large amounts of work to be awarded among a limited pool of contractors.
Proposed Rewrite of 9.5

• Retains the principles of subpart 9.5
• Moves coverage to Part 3 of the FAR
• Incorporates case law
  – redefines OCIs to reflect the "impaired objectivity" and "biased ground rules" scenarios in the Government Accountability Office's bid protest decisions.
• Unequal access to nonpublic information do not necessarily arise from a "conflict of interest“
  – propose addressing concerns over any unfair competitive advantage that may result from these situations in FAR Part 4.
• New Solicitation Provision and Contract Clauses Related to OCIs
• Contains more information about waivers
• Differences Between Proposed FAR Rule and Proposed DFARS Rule
Discussion