RECENT PROTEST DECISIONS ON ORGANIZATIONAL CONFLICTS OF INTEREST

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Far 2.101

- An OCI occurs 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.”

- What kinds of “relationships or circumstances” can cause OCIs
  - Self interest
  - Affiliated entities
RECENT DECISIONS ON
RELATIONSHIPS/CIRCUMSTANCES


• Generally, pre-existing contractual relationships will not be considered sufficient to impair contractor’s objectivity
• Awardee’s long-standing subcontractor relationship with company whose performance it would be required to evaluate did not create OCI
• Possibility of future contracting relationships with company to be evaluated too remote
• “Generally we look for some indication that there is a direct financial benefit to the firm alleged to have the OCI”
• May be fact specific inquiry
RECENT DECISIONS ON RELATIONSHIPS/CIRCUMSTANCES


- GAO found two OCIs in context of merger/acquisition negotiations before transaction was finalized
- Two separate corporations, but the interest of the acquiring entity in the target company was sufficient to create an OCI
- Parent of acquisition support contractor on the procurement negotiating to acquire key design subcontractor for awardee
- Biased ground rules and unequal access to information OCIs
- Merger negotiation secrecy guidelines inadequate
- Disqualification of awardee recommended
- Implications for acquisition due diligence
RECENT DECISIONS ON RELATIONSHIPS/CIRCUMSTANCES


- COFC effectively reversed GAO *McCarthy/Hunt* decision and held agency decision to follow GAO disqualification recommendation arbitrary and capricious – ordered reinstatement of award
- No holding that acquisition negotiations could never give rise to OCI; reversed based on particular facts and GAO application of wrong standard of review
- “Possible” access to information not enough – hard facts
- Appeal pending and argued
- Due Diligence Ramifications
- COFC Docket Ramifications
Recent Unequal Access to Information Decisions

- Alleged unfair competitive advantage because awardee knew certain offeror pricing information; all offers had to use awardee’s satellites to perform
- No OCI because, for OCI, information must be obtained through performance of a Government contract

- Former long-term employee of protester allegedly leaked proprietary information to awardee
- Although protester alleged at least some of information was learned while performing government contract, GAO denied protest because it found no reason to believe he did not learn all through his employment
Allegation that awardee received unfair competitive advantage through use of former agency employee to prepare proposal, because former agency employee had had access to proprietary and other insider information while overseeing protester’s performance of incumbent contract

Based on Health Net decision

Agency did investigation in response to first protest

Analysis same as unequal access to information OCI cases

Front-end

- Information must be competitively useful
- Incumbent contract labor rate information outdated because several years earlier
- Staffing approach not competitively useful because protester changed approach in new proposal and could be “discerned by regular observation”

Not reach back-end issues regarding role in proposal preparation
RECENT CASES ON OCI MITIGATION

*First Coast Service Options, Inc.*, B-401429, July 31, 2009, 2010 CPD ¶ 6
  - Medicare, self-evaluation, so impaired objectivity
  - 2 mitigation plans properly rejected by agency-deference
    - Setting up an affiliated company to do the work
    - Last-minute summary proposal to use firewalled subcontractor to do the work, but with no details

  - Medicare, self-evaluation, so impaired objectivity
  - GAO rejected agency’s acceptance of last-minute one-sentence amended mitigation plan lacking detail
    - Plan included three options at discretion of awardee
    - Agency only evaluated one option – divestiture – but no binding promise to divest
RECENT CASES ON OCI WAIVERS

MCR Federal, LLC, B-401954.2, Aug. 17, 2010, 2010 CPD ¶ 196

• GAO upheld agency waiver of OCIs for two offerors based on small pool of competitors; waiver needed to avoid limiting competition

• “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.”

• Reviewed whether Agency complied with requirements of FAR 9.503 for level of approval and written explanation of why waiver in the Government’s interests

CIGNA Govt. Services, LLC, B-401068.4, et al., Sept. 9, 2010, 2010 CPD ¶ 230

• Protest denied because agency followed proper waiver procedures and basis for waiver was reasonable
Questions?

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SEVEN PROPOSED CHANGES TO THE FEDERAL ACQUISITION REGULATION’S OCI PROVISIONS THAT WOULD IMPACT THE WAY YOUR COMPANY DOES BUSINESS WITH THE GOVERNMENT

James G. Peyster
Proposed FAR OCI Rule Overview

- Issued on April 26, 2011
- Deadline for comments is June 27, 2011
- Would apply to all acquisitions, including task order acquisitions of any size
- Does not appear to dramatically alter the landscape from a bottom-line perspective of when some form of Contracting Officer intervention would be necessary.
- However, the rule:
  - Redefines key concepts, and
  - Adds more guidance and more responsibilities for both contracting officers and contractors
  - Changes the periphery of acceptable ways in which contractors and contracting officers can address OCIs
Background: Dec. 2010 DFARS OCI Rule

• **Application**: Only to Major Defense Acquisition Programs (MDAP) and pre-MDAPs of the Dept. of Defence (DoD)

• **MDAP**: Any program designated as such by DoD, or any program with an expected R&D expenditure of $300 million or expected total expenditure of $1.8 billion (in FY 1990 constant dollars)

• **Key Policy**: Implementing the Weapons System Acquisition Reform Act of 2009 (“WSARA”), a contract issued for the performance of Systems Engineering and Technical Assistance (SETA) for a MDAP must prohibit the contractor, or any of its affiliates, from participating as a contractor or Major Subcontractor in the development or construction of a weapon system under such program.
  
  – **Corollary**: A contractor with an existing production or supply contract for an MDAP cannot compete for a SETA contract related to that MDAP
Background: Dec. 2010 DFARS OCI Rule

- **Major Subcontractor**: Subcontract equals or exceeds (i) both the cost or pricing data threshold and 10% of the value of the contract under which the subcontracts are awarded, or (ii) $50 million.

- **Exception**: The rule expressly recognizes that the prohibition on future work as a production or supply contractor does not apply if the head of contracting activity determines that (i) an exception is necessary because DoD needs the domain experience and expertise of the highly qualified, apparently successful offeror, and (ii) based on an agreed-to resolution strategy, the apparently successful offeror will be able to provide objective and unbiased advice, without a limitation on future participation in development and production.
Interplay Between DFARS and FAR OCI Rules

- FAR rule would not alter the treatment of OCI issues that arise in the context of Department of Defense procurements of MDAPs and pre-MDAPs. The rules would apply coextensively.

- Proposed FAR rule is markedly different than the framework presented in the proposed DFARS OCI rule of 2010, and the FAR Councils “are seeking specific feedback regarding which course of action, or whether some combination of the two, is preferable.”
Seven Key Changes In Proposed FAR Rule That Would Impact Your Business

1. New Proposed Definition of OCIs
2. New Harm-Based OCI Policy
3. Agency Threshold OCI Risk Determination
4. Mandatory Disclosure of OCIs in Proposals
5. Increased Guidance on Available Mitigation Options
6. Consideration of OCI Information From Outside Sources
7. Contractor Post-Award OCI Disclosure Requirements
KEY CHANGE #1: Current Definition of OCIs

- FAR § 2.101 currently states that:
  - “Organizational conflict of interest” 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.
KEY CHANGE #1: New Proposed Definition of OCIs

Per revised Far § 2.101, an “OCI” would mean 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.
KEY CHANGE #1: Analysis of Proposed Definition

• The proposed definition no longer attempts to sweep up all “unfair competitive advantages.” Instead focuses only on those unfair competitive advantages created through the contractors’ direct application of “judgment” in “assist[ing] the Government” that could influence an acquisition in which the contractor might compete.

• ‘Unequal Access to Information’ is no longer an OCI because it does not involve a scenario where “the contractor may be improperly influenced by its own interests rather than the best interests of the Government.”
KEY CHANGE #1: Potential Impact of Proposed Definition

• OCI prevention efforts would now need to focus exclusively on “biased ground rules” and “impaired objectivity”-type conflicts.

• There would be an increased focus on early OCI identification and OCI avoidance because “biased ground rules” and “impaired objectivity” OCIs are often difficult or impossible to mitigate after the fact.
KEY CHANGE #2: New Harm-Based OCI Policy

• In FAR Subpart 9.5, OCIs are categorized by the type of task, e.g. “Preparing specifications or work statements,” “Providing evaluation services.”

• The proposed rule migrates all OCI rules to FAR Part 3 and the new proposed FAR § 3.1203 categorizes OCIs by nature of the harm to the Government:
  A. Harm to the integrity of the competitive procurement process
  B. Harm to the Government’s business interests

• The Contracting Officer has the discretion to determine in which category an OCI falls.
KEY CHANGE #2:
How Do These Categories Inter-Relate?
KEY CHANGE #2:
Why the Integrity/Business Distinction Matters

• As is the case under FAR 9.5, OCIs under the proposed rule affecting the “integrity of the procurement process” must be avoided, neutralized, mitigated, or formally waived.

• However, for OCIs affecting only the Government’s business interests, “acceptance” is an option on the Contracting Officer’s menu.
  – A documented finding that the risk is tolerable would allow a conflicted offeror to continue participating even where the OCI cannot otherwise be mitigated and has not been formally waived.
KEY CHANGE #2: Potential Impact of New OCI Policy

• Certain procurements that would previously have been off limits to your company would become new business opportunities

• The Government would have more flexibility to determine what OCIs do and do not matter

• A new frontier for potential bid protests: Was the CO’s decision of how to categorize a particular OCI a reasonable decision?
KEY CHANGE #3: Threshold OCI Risk Determination

- Under the proposed FAR § 3.1207(a), the Contracting Officer is to make a threshold analysis of whether the subject procurement “may give rise” to OCIs.
- If the Contracting Officer answers that question in the affirmative he or she would include a newly proposed FAR Clause, “Notice of Potential Organizational Conflict of Interest” (FAR § 52.203-XX) in the solicitation.
- FAR 52.203-XX sets out the basic framework for addressing OCIs via avoidance, neutralization, mitigation, and/or acceptance.
- FAR § 3.1207(b) requires the Contracting Officer to identify by name within FAR § 52.203-XX any contractors who assisted the procuring agency in drafting the solicitation.
KEY CHANGE #3: Threshold OCI Risk Determination

- If the Contracting Officer determines that the subject procurement will not give rise to OCIs, FAR § 52.203-XX would not be included in the solicitation.
KEY CHANGE #3:
Impact of the Threshold OCI Determination

• The omission of this clause may have a major impact on OCI bid protests:
  – What must be shown to establish that the Contracting Officer was unreasonable to assess that no OCIs could arise?
  – If clause is omitted, are all OCI protests waived if not challenged pre-award in the form of a solicitation protest?

• Companies may need to be more proactive during the pre-award phase about flagging any potential OCI concerns with known or likely competition

• Companies would need to consider if/how to disclose potential OCIs when the solicitation does not include OCI disclosure provisions.
KEY CHANGE #4: Mandatory Disclosure of OCIs in Proposals

• If FAR Clause 52.203-XX, Notice of Potential Organizational Conflict of Interest, is included in a solicitation, offerors would be required to make broader OCI disclosures than in the past

• Offerors must disclose all relevant information regarding any organizational conflicts of interest, including information about potential subcontracts and limitations on future contracting

• By signing the offer, the contractor makes a formal “representation” that it has complied with the disclosure requirements
KEY CHANGE #4:
Potential Impact of Mandatory OCI Disclosure Rule

• Burden on industry to identify OCI information would remove the question of whether or not to disclose an OCI from the category of ‘business decisions’ and add significant work in the proposal capture process.

• Companies risk being accused of making an actionable false statement if they knowingly omit relevant OCI information from proposals covered by FAR 52.203-XX.

• Proposed rule creates ambiguity about what obligation a firm has to identify a potential OCI, or potential appearance of impropriety, which the firm believes does not rise to the level of an actual conflict.
KEY CHANGE #5: Guidance on Available Mitigation Options

- The current FAR § 9.504 provides no guidance on mitigation, leaving it entirely to the creativity of the contractor and the discretion of the contracting officer to craft acceptable mitigation plans.

- The proposed rule (FAR § 3.1204-3) endorses three specific forms of mitigation:
  
  i. subcontracting the portion of work from which the conflict arises (if possible)
  
  ii. soliciting advice from multiple sources so as to limit the impact of impaired objectivity, and
  
  iii. working with the contracting agency to establish internal mitigation measures
KEY CHANGE #5: Guidance on Internal Mitigation Measures

- The Rule provides particularly detailed guidance as to the third category, “internal mitigation”:
  - Internal firewalls
  - Independent members of the board of directors
  - Board of director resolution restricting certain employees from participating in contract performance
  - Non-disclosure agreements
  - the hiring of a senior-level OCI compliance officer to supervise all mitigation efforts.
KEY CHANGE #5:
Potential Impact of Internal Mitigation Guidance

• Provides a playbook to contractors attempting to craft mitigation

• Endorses forms of mitigation relating to boards of directors which are contrary to GAO’s broad statement about affiliate attribution under the current OCI rule in Aetna Gov’t Health Plans, Inc.; Foundation Health Fed. Servs., Inc., B-254397.15 et al., July 27, 1995, 95-2 CPD ¶ 129.

• Uncertain impact on how contracting officers would assess mitigation ideas not on the list
KEY CHANGE #6: OCI Information From Outside Sources

• For the first time, the proposed rule would add a FAR provision requiring Contracting Officers to consult outside sources in their routine OCI analyses:
  – Proposed FAR § 3.1206-3(a)(2): “The contracting officer should seek readily available information about the financial interests of the offerors, affiliates of the offerors, and prospective subcontractors from within the Government or from other sources and compare this information against information provided by the offeror.”

• Currently, FAR is silent on this subject.
• Case law is vague and deferential in identifying what an agency must consider
KEY CHANGE #6:
“Outside” Sources Within the Government

• Government sources include the files and the knowledge of personnel within:
  – The contracting office
  – Other contracting offices
  – The cognizant contract administration, finance, and audit activities
  – The requiring activity

• Non-Government sources which the Contracting Officer “should” consider in their OCI assessment include:
  – Offeror’s Websites
  – Annual corporate shareholder reports
  – Trade and financial journals
  – Business directories and registers
KEY CHANGE #6:
Potential Impact of Outside Source Consideration

- Firms would need to take extra steps to ensure that the representations in their proposals (as well as what is not disclosed) match up with both (1) intra-agency information about the firm and, (2) publicly available information about the firm.

- To a lesser degree, firms would also need to consider increased coordination with their internal marketing and public relations departments to manage what information is released and how that information is presented.
KEY CHANGE #7: 
Post-Award Disclosure Requirements

• FAR Clause 52.203-ZZ, Disclosure of Organizational Conflict of Interest After Contract Award, would be included in any contract resulting from a solicitation in which the Contracting Officer has opted to include the clause at 52.203-XX, Notice of Potential Organizational Conflict of Interest.

• FAR Clause 52.203-ZZ would require the contractor to continually monitor itself and proactively disclose any newly identified OCIs, including both:
  – OCIs that existed prior to award but were undiscovered, and
  – OCIs that developed for the first time after award
KEY CHANGE #7:
Potential Impact of Post-Award Disclosure Rule

• Creates new affirmative disclosure obligation
• Failure to timely disclose could give rise to allegations of false statements and/or false certifications
• Risk of termination further incentivizes the need for industry to identify OCIs as early in the process as possible, so as to avoid creating conflicts with ongoing contracts that might be impossible to mitigate
• Firms may need to implement new processes to red flag conflicts and communicate those conflicts to the appropriate persons within the company
Questions?

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Personal Conflicts of Interest

Elizabeth Newsom
Personal Conflicts of Interest

• The rules for contractor PCIs are changing
• Contractor access to nonpublic information is emerging as a species of PCI, not OCI
• Heightened concern about contractor access to nonpublic government information
• Trend on many fronts
  – Duncan Hunter NDAA FY 2009 Section 841
  – 2009 Proposed PCI Rule
  – 2011 ACUS Proposal
  – 2011 Proposed OCI Rule
Current State of the Rules

- Contractor access to nonpublic information: analytical framework depends on information and source
  - Prior contract – possible OCI
  - Procurement integrity data – analyzed under PIA
  - Hiring govt employee – possible UCA (Health Net)
  - Current govt employee – possible OCI, PCI, PIA, UCA, bias, or FAR 3.101-1
    - “avoid strictly . . . even the appearance of a conflict of interest”
Changing Landscape: Prior Changes

- NDAA FY 2009 Section 841, requires OFPP to
  - Develop policy and clauses on contractor employees “performing acquisition functions” that are “closely associated with inherently governmental functions”
  - Study PCIs and OCIs, propose FAR changes

- 2009 Proposed PCI Rule
  - Cover contractor employees performing acquisition functions closely associated with inherently governmental functions
  - Contractors must screen employees for PCIs, obtain NDAs, report PCI violations to CO
New Developments

• Proposed New OCI Rule
  – Unequal Access to Information would no longer be on OCI
  – Moved to FAR Part 4

• Administrative Conference of the United States
  – Long dormant, recently rejuvenated
  – A public-private think tank on administrative regulation
  – Adopted, as its flagship issue, contractor ethics
Proposed Addition to FAR Part 4

- FAR Part 4 to address contractor access to nonpublic information, and risks/consequences thereof
  - Premise: much of such access comes from performance on other government contracts
  - Managing access to be part of contract administration

- New “Access” clause
  - Preclude contractors from using government or 3rd party information for any purpose unrelated to contract performance
  - Mandatory in solicitations, contracts when performance may require access to nonpublic information
Proposed Addition to FAR Part 4 cont’d

• Definition of “nonpublic information” vague
  – Anything not releasable under FOIA, or for which FOIA releasability not yet determined
  – Excludes information otherwise known by contractor
  – Very difficult to apply in practice

• Requires NDA’s with contractor, subcontractor employees

• New “Release” clause
  – Notify 3d parties if their information is improperly used or disclosed
  – 3d party has right to enforce NDAs
• UCAs: new solicitation provision to require offerors
  – Identify whether it or “any of its affiliates” possess nonpublic information relevant, provided by government
  – Certify (where firewall exists) that no breaches occurred
• Obligates CO to take action when unequal access to nonpublic information poses risk of UCA, risk to integrity of an acquisition
  – CO must analyze: access government-provided, unequal, and unfair
  – Mitigation preferred; disqualification “least favored”
• Expect implementation to be messy
  – OCI provisions more mature than new Part 4
2011 ACUS Proposal

• Premise:
  – Government employees are subject to a “comprehensive ethics regime” while contractor employees are not
  – Contractors performing services that can influence government decisions or gain access to nonpublic information are “in a position of public trust”

• Factual scenarios that cause concern
  – Contractor employees using nonpublic government information for personal gain
    • E.g., land speculation near a BRAC-enhanced facility
  – Contractor employees influencing government action for personal gain
2011 ACUS Proposal

• Current proposal to ask FAR Council, for
  – Two categories of contracts
    • “Information risk” contracts – those with high risk of contractors learning sensitive nonpublic information
    • “PCI risk” contracts – those with high risk of PCI
  – Propose FAR provisions and clauses
  – Require contractor certifications that its employees do not have a personal conflict of interest, training, oversight, disclosure of violations
What It Means: More Scrutiny of PCIs

• Already, for OCIs, PCIs, UCAs, PIA, contractors must police relationships and transactions
  – New hires (Health Net)
  – Consultants
  – Subcontractors
  – Possible mergers and acquisitions
What It Means: More Scrutiny of PCIs

• Expect soon
  – Services contracts under greater scrutiny
    • Those close to “inherently governmental” functions
    • Those colocated with government staff -- access to nonpublic sensitive government data
  – New clauses requiring
    • Vetting employee PCIs
    • Certifications re absence of PCIs
    • Training and monitoring of employee use of nonpublic government data
    • Disclosure obligations
Questions?

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