



Understanding OCI Mitigation Plans

A PilieroMazza Webinar

Presented By

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About PilieroMazza

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Overview

- Introduction to Organizational Conflicts of Interest (“OCI”)
- Identifying an OCI
- Mitigation Strategies
 - Unequal Access to Information OCIs
 - Impaired Objectivity OCIs
 - Biased Ground Rules OCIs
- Key Elements in an OCI Mitigation Plan
- Considerations Related to Affiliates and Teaming Partners
- 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
 - A contract may give rise to multiple types of OCIs

The Significance of OCIs

- 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
 - An important consideration for teaming, hiring, and staffing
- A Growing Problem
 - Industry consolidation
 - Use of umbrella contracts
 - Contract portfolios limited to one or two agencies
- Protest Risk

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

Example

- 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).

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
- Example
 - 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 Sys. Grp., B-402324 (Feb. 26, 2010).

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.”
- Example
 - 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).

Identifying an OCI



Requirements with an Unequal Access to Information OCI Risk

- Supporting agency functions that handle sensitive information, such as the Program Management Office or the Chief Financial Officer
- Non-public and competitively useful information, such as:
 - Competitor pricing
 - Competitor technical information
 - Government financial information
 - Procurement information

Requirements with an Impaired Objectivity OCI Risk

- Contracts that involve evaluating or monitoring programs, services, or systems
 - Making recommendations
 - Auditing
 - Testing
 - Assessing
 - Inspecting
 - Reviewing

Requirements with a Biased Ground Rules

OCI Risk

- Contracts involving acquisition support
 - Drafting solicitations
 - Defining requirements
 - Studies, recommendations, white papers, etc.
 - Proposal evaluation

Mitigation Strategies

Mitigation of an Unequal Access to Information OCI

- 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

Mitigation Measures – Unequal Access to Information OCIs

- Firewall
 - Communication restrictions
 - Documents controls
 - Hard copy documents
 - Electronic documents
 - IT systems
 - Physical spaces
- Non-disclosure agreements
- Locating personnel in separate spaces/facilities
- Job assignments
- Employee training

Mitigation of an Impaired Objectivity OCI

- Extremely difficult to mitigate
 - Conflict based on affiliation with organization and economic interest
 - Use of a separate division or entity—including an affiliate—is insufficient
 - Any knowledge or potential knowledge of entity being evaluated likely to trigger immitigability
- Firewalls alone are ineffective
- A third party is often required

Mitigation Measures – Impaired Objectivity OCI

- Use of subcontractor
 - Removes the conflicted contractor
 - Subcontractor reports to the government
- Reliance on objective criteria
 - Depends on nature of requirement
- Obscure identity of evaluated entity
 - Limited to certain types of requirements

Mitigation of a Biased Ground Rules OCI

- Extremely 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

Mitigation Measures – Biased Ground Rules OCI

- Recusal
 - Mostly effective/possible in MAC scenarios
 - Requires pre-identification of possible efforts creating an OCI
- Using a Subcontractor **and**
 - Employee firewalls
 - NDAs
 - Government cooperation

Key Elements in an OCI Mitigation Plan

Preliminary Matters

- **Demonstrate an Understanding of the Issue**
 - Discuss the potential or actual OCI
 - Explain the purpose of the plan
 - Address any relevant solicitation provisions
- **Show Commitment**
 - Display buy-in from company leadership
 - Explain why OCIs are important to the customer and you
- **Introduce the Company**
 - Explain any corporate relationships (parent, subsidiary, sister companies)
 - The type of work performed
- **Discuss Company Policies at a High Level**
 - Employee training
 - Screening opportunities

Firewall Measures

- Firewalled Employees List
- Communications Restrictions
 - NDAs
 - Meetings
 - Casual conversations
- Document Security
 - Storage of physical documents
 - Storage of electronic documents/files
 - Access to systems
 - Safeguarding information when in use
- Workspace Separations

Employee Restrictions

- Firewall measures
- Business development efforts
- Financial incentives
- Future employment opportunities

Enforcement and Administrative Provisions

- NDAs
- Employee training
 - Onboarding
 - Annual
 - Refreshers
- Exit briefings
- Program manager pledges
- Periodic compliance reviews
- Notice of intent to bid
- Modification procedures

Considerations Related to Affiliates and Teaming Partners

OCIs Can Be Contagious – Affiliates

- Relationships of Concern
 - Parent-subsidiary
 - Common owner
 - Not the same definition as the U.S. Small Business Administration
- Examine prior, current, and future work
- OCI Considerations
 - A company is presumed to act in the interest of its affiliates
 - Concern that information is shared
 - Inherent lack of objectivity

OCIs Can Spread – Subcontractors

- Key Question: How does this contract relate to other work the subcontractor has done, is doing, or plans to do?
- Proposal Stage
 - Access to competitively useful information
 - Relationship to existing contracts
- Performance
 - Relationship to existing contracts
 - Impact on future opportunities

Working with Subcontractors

- OCI Screening
- Teaming Agreement
 - Representations
 - Cooperation
 - Termination
- Subcontract
 - Representations
 - Flow down requirements
 - Division of work
- Require a Mitigation Plan

Questions?

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