GC-136

Understanding Conflict of Interest

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Conflicts of Interest (COIs)
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- Conflicts of Interests (COIs) can prevent you from winning a public contract and can result in you being removed from a public contract!

- Don’t let this happen to you.

- Recognize COIs and deal with them before they become an issue.

- We can help!
Conflicts of Interest (COI) Basics

- Some things to know about COI
  - A conflict of interest (COI) occurs when an individual or organization is involved in multiple interests, one of which could possibly bias the motivation for an act in the other.
  - A conflict of interest can exist even if there has been no unethical or improper activity. It is NOT a “no harm no foul” situation. Even the appearance of COI is reason to mitigate.
  - For many professionals and professions, it is virtually impossible NOT to have COI from time to time.
  - Prime Contractors can be held liable for the COIs of their Subcontractors
Conflicts of Interest Forms

- COIs come in basically two forms:
  - Personal Conflicts of Interests (PCIs)
    - Discussed by Stephanie Widzinski
  - Organizational Conflicts of Interest (OCIs)
    - Discussed by Rich Wilkinson
Personal Conflicts of Interest (PCIs)
Personal Conflicts of Interest (PCIs)

- PCIs can develop when a person has personal or family financial or other interests that could cause them bias in making business decisions.

- Examples of financial interest include compensation, consulting arrangements, stock and real estate investments, future employment negotiations, gifts and intellectual property.
PCIs and the FAR

- FAR Part 3.11 Preventing Personal Conflicts of Interest for Contractor Employees Performing Acquisition Functions

- Requires Contractors to:
  - ID and prevent PCIs for “covered” employees
  - Prohibit “covered” employees who have access to non-public info on Gov. Contract from using such info for personal gain
Personal Conflicts of Interest (PCIs)

- Covered Employee:
  - means an individual who performs an acquisition function closely associated with inherently governmental functions and is—
    - (1) An employee of the contractor; or
    - (2) A subcontractor that is a self-employed individual treated as a covered employee of the contractor because there is no employer to whom such an individual could submit the required disclosures.
Personal Conflicts of Interest (PCIs)

- Acquisition function closely associated with an inherently governmental function means you are under contract to the Government for any of these functions:
  - Planning acquisitions
  - Determining Requirement to be acquired, including developing statements of work
  - Developing or approving any contractual documents
  - Evaluating contract proposals
  - Awarding Government contracts
  - Administering contracts
  - Terminating contracts
  - Determining whether costs are reasonable, allocable, and allowable
Personal Conflicts of Interest (PCIs)

- Implemented by FAR Clause 52.203-16

- Contractors must:

  - Have procedures in place to screen covered employees for PCIs by requiring:
    - Disclosure of Interest Statements updated when personal or financial circumstances change or at least annually
Personal Conflicts of Interest (PCIs)

- Disclosure of Interest Statements must include:
  - Financial interests of the covered employee, of close family members, or of other members of the covered employee’s household
  - Other employment or financial relationships of the covered employee (including seeking or negotiating for prospective employment or business)
  - Gifts, including travel
Personal Conflicts of Interest (PCIs)

- In addition, Contractors must:
- Train their employees on PCIs
- Maintain oversight and verify compliance with PCIs
- Take disciplinary action when PCIs are violated
- Report to the CO any PCI violation and corrective action taken
Personal Conflicts of Interest (PCIs)

- Violations FAR requirement:
- CO to seek agency legal counsel advise on course of action
- Most likely outcomes:
  - Removal of employee from contract
  - Finding of inadequate internal controls/start of debarment process
  - Fine imposed on Contractor (less likely)
Future of PCI

- Expansion into non-acquisition type activities

- From the March 26, 2008 Federal Register Advanced Notice of Proposed Rule for Service Contractor Employee PCIs
  - “The Federal Government is increasingly turning to private contractors to perform a wide array of its work. As a result, contractor employees are increasingly working side-by-side with Federal employees, but are not subject to the same ethical safeguards that have been put in place for Federal employees to ensure the integrity of Government operations.”
PCI Best Practices/Mitigation Strategies

- Establish a corporate culture of ethical compliance from the top down.

- Include PCI training in the companies’ annual Ethics Training for everyone. And while everyone must take the training, it is important to make the training appropriate for the level of employee/manager/director.
PCI Best Practices/Mitigation Strategies

- Make sure there are NO penalties for disclosure. No one should be demoted or fined for disclosing a potential conflict. This promotes full disclosure while allowing for mitigation.

- Make sure the right people have all the information on potential conflicts so the right steps can be taken.

- Have predetermined multiple mitigation strategies developed and on file
Impact of PCI on Federal Acquisitions:

- Provides additional source for GAO Protest
- Could lead to suspension and debarment if timely notice of violations not provided to CO with adequate mitigation plan
- Could lead to finding of deficiency in a business system if Contractor not providing PCI training and monitoring per FAR requirements
Organizational Conflicts of Interest (OCI)
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- Potential for OCI typically exists when a business relationship could create incentives or self-interest affecting performance of an existing Government contract or pursuit of a procurement in process.
A (Very) Short History of OCI

- Procurement of “Independent Advisory Services” for DOD and other agencies
  - Insourced? FFRDCs? Private Firms?
  - Bell Commission – 1962
    - “Wasteful of talent” not to utilize industry

- OCI potential recognized and discussed in ASPR Appendix G (1963)
Original OCI Concept

- To manage the conflicts, not to punish the conflicted
- Even today in FAR and other agency regulations…
  - OCI provisions organized under “contractor qualifications,” not “improper business practices”
  - Regulations recognize conflicts as occurring in the ordinary course of business
Thoughts on the Evolution of OCI

- **Work restriction clauses (hardware exclusion, etc.)**
  - Pre-FAR (ASPR, DAR) were expressly negotiable
  - FAR (post 1984) agencies may designate as non-negotiable (and do)

- **Excluded parties**
  - Pre-FAR parties could be excluded from a procurement ONLY if an exclusionary clause included in prior contract
  - FAR does NOT include this provision (dropped in 1984)
Thoughts on the Evolution of OCI

- Results of pre-FAR to FAR evolution…
  - Companies may invest heavily in pursuit of an opportunity only to have it rejected for OCI reasons (real or otherwise)
  - Companies may WIN a contract only to have it terminated for convenience for OCI reasons
  - OCI is the new “third rail” for Contracting Officers and the newest best grounds for a protest
Today’s General OCI Types

- **Unequal Access to Non-Public Information**
  - Proprietary data
  - Source selection data
  - May give unfair competitive advantage

- **Biased Ground Rules**
  - Authoring of SOWs
  - Could steer contracts or give unfair competitive advantage

- **Impaired Objectivity**
  - Evaluation of own products/services or those of parent, subsidiary or affiliate
  - Advisory role on issues of significance to own work or that of parent, subsidiary or affiliate
Specific FAR Prohibitions (9-505)

- Providers of Systems Engineering or Technical Direction
  - Shall not be awarded a contract to supply the system of a subcontract for any major component
  - Shall not be a subcontractor or consultant to a supplier of the system or any of its major components.
Specific FAR Prohibitions (9-505)

- Contractors who prepare complete specs for non-developmental items may not furnish the items as a prime or sub…
  - including at least the duration of the initial production contract
  - Does not apply when…
    - Specs are for item the contractor already supplies
    - Contractor acts as industry rep to assist in prep under Government supervision and control
Specific FAR Prohibitions (9-505)

- Contractors who write SOWs for competitive acquisition...
  - Excluded from supplying the system unless...
    - It is the sole source
    - It has participated in design work
    - More than one contractor worked on SOW
Specific FAR Prohibitions (9-505)

- Contractors may not perform contracts requiring them to evaluate their own products

- Contractors with access to proprietary information may not compete when info would give unfair competitive advantage
  - Unless data furnished voluntarily without restrictions
  - Available from other sources without restriction
  - Restrictions extend to Marketing/BD consultants
Basic Approaches to Mitigation

- Prevent contractors from receiving access to certain non-public procurement information to address Unequal Access to Information
- Limit contractors’ future contracting opportunities to address Biased Ground rules
- Use “firewalls” and other techniques to further mitigate potential OCI including Impaired Objectivity
A Deeper Dive into Types of OCI

- Unequal Access to Non-Public Information
  - Difficult to mitigate (hard to “un-ring a bell”)
  - Even harder to prove information has been purged
  - Disclosure before the fact almost always results in exclusion from acquisition process
  - Other (related) business units MAY be able to participate, but effective (AND REAL) segregation of the proposal team is MANDATORY
More on Unequal Access...

- Disclosure after the fact can be painful
  - Usually involves
    - Search for the guilty
    - Punishment of the innocent
    - Distinction for the uninvolved
  - Penalties can be extreme
Beware the Revolving Door

Many “Unequal Access” OCI issues arise out of new hires from procuring agencies
Unequal Access Case Study

- **The setup**
  - A major public company recently hired a retired (more than 3 years) Air Force officer to work in one of their field offices
  - The firm subjected this new hire to three days of (presumably) intensive ethics training
  - It is alleged the employee disclosed to other firm employees non-public procurement-related data that could have given it an unfair competitive advantage
Unequal Access Case Study

- **The result**
  - Another employee reported the disclosure to the firm’s legal dept, they self-reported and withdrew from participation in the procurement
  - The firm terminated the employee
  - Air Force suspended the field office involved from all Federal awards
  - Air Force formally proposed debarment of the offending field office (only)
  - Federal prosecutions are possible
Unequal Access Case Study

- The principle takeaways…
  - Knowing non-public data is not misconduct and could be mitigated
  - Retaining non-public data from a previous public position might be
  - Using or disclosing that data probably is

- Why the draconian reaction?
Unequal Access Case Study

- How to change the outcome…
  - Segregate the individual with the information from the proposal team
    - Different business unit and/or physical location probably required
    - Ensure information is NOT disseminated (at all)
    - Disclose, disclose, disclose!
- Not guaranteed to be effective, but better!
A Deeper Dive into Types of OCI

- Biased Ground Rules
  - More susceptible to mitigation ("Chinese walls")
  - Can also be much more restrictive
    - If mitigation is impossible (or even difficult to demonstrate), the result may be exclusion
    - No protection from Gov.’s failure to identify the potential COI
    - Potential for “Bias COI” has led to recent divestitures in large firms
Bias OCI

- **How it happens**
  - Contractors write specs for hardware and software
  - Contractors write statements of work for solicitations and contracts
  - Contractors assist in acquisition planning from program budgeting to source selection plans

- **Just being there can be enough!**
"Bias OCI" in the News

- The Washington press has speculated that NG’s divestiture of TASC was OCI-driven
- Washington Technology (Feb 2012) described L-3 spinoff of defense eng and tech services units (now Engility) as OCI-driven as well
- Others…
  - ITT’s spinoff of Excellis
  - SAIC’s sale of oil & gas unit to WIPRO
  - QinetiQ’s divestiture of security unit to ManTech
Why Divestiture?

- While Bias OCI can be mitigated, proof (or demonstration) that there is no OCI is VERY difficult (hard to prove a negative)
- “Appearance” of OCI can lead to the same remedies as real OCI
- Favored remedies from the Government’s perspective is procurement exclusion
A Deeper Dive into Types of OCI

- **Impaired Objectivity**
  - The hardest of all types of OCI to mitigate
  - Financial self-interest at the organizational level is assumed in all cases
  - “Chinese walls and proposal team segregation not acceptable as mitigation techniques
  - Favored mitigation technique here is also exclusion
  - Here comes that “divestiture” alternative again
Impaired Objectivity Case Study

- **The Setup…**
  - February 2008, GSA was already embroiled in a multi-contractor protest on Alliant
  - During protest, it was revealed that contractor past performance evaluations had been performed by a small consulting firm, not the Government
  - The firm had among its past and current clients a number of the competitors under evaluation
Impaired Objectivity Case Study

- The Result…
  - GSA agreed to completely redo the evaluations without using any of the outside work
  - Second award included virtually every qualified contractor
  - Final awards were more than two years late
Impaired Objectivity Case Study

- The principle takeaways…
  - Contractor performance of activities “closely associated with inherently Governmental functions” are ALWAYS risky
  - GSA should have required disclosure and examined the firm selected to perform the evaluations for potential COI
  - The firm should have disclosed potential OCI whether or not required by contract provision
Impaired Objectivity Case Study

- How to change the outcome...
  - GSA could have (probably should have) used another contractor for evaluations
  - If use of the selected firm was imperative, GSA could have required that evaluations of the firm’s existing clients be performed by a third party
  - Other mitigation techniques difficult and high profile of program might have made them impractical
Practical OCI Approaches

- Build early identification of potential OCI into BD process
- Build identification of PCI into HR policies and procedures
- Design effective mitigation techniques BEFORE they are needed
- Disclose, disclose, disclose
Questions?
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