

Holland+Knight

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Organizational Conflicts of Interest
-- Remarks of Alan Dickson

The Strange Evolution of OCI

Original Concepts, Current Concerns,
Mitigation Techniques, Planning

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OCI

Obtaining Independent Advisory Services for DOD and other agencies:

- In-House? FFRDCs? Private Companies?
- Bell Commission 1962 — Companies
 - Wasteful of talent to not utilize industry
- ASPR Appendix G (1963)

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ASPR Concept:

1. Management of Conflicts
2. Not "Crime and Punishment"
3. Today's FAR and nuclear agency regs:
 - OCI placed under "contractor qualifications", rather than under "improper business practices"

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Generic types of organizational conflicts:

1. Unequal Access to Non-Public Information [*e.g.*, proprietary or source-selection data; may give unfair competitive advantage]
2. Biased Ground Rules [*e.g.*, creation of statements of work or specifications; could give unfair competitive advantage or operate to steer contracts]
3. Impaired Objectivity [*e.g.*, evaluation of own products/services or those of competitor; advisory role on issues of significance to future or current work of contractor or affiliates]

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Current OCI Regulations

FAR Subpart 9.5:

Emphasizes C.O. Role, Restrictions on Future Contracts; No Required Disclosures; No Standard Clauses.

DEAR Subpart 909.5 and NRCAR Subpart 2009.5:

Emphasize Disclosures by Offerors and Contractors; Standard Provisions and Clauses Impose Large Duties on Companies and Warn of False Claims, Defaults, etc.

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Some things lost in the evolutionary process in DOD contracting:

1. Pre-FAR [ASPR, DAR], hardware exclusions and other restricted future work clauses were expressly “negotiable” with offerors; on switch to FAR (1 April 1984) agencies could designate OCI clauses to be non-negotiable.
2. Pre-FAR, an offeror thought to have an OCI on a new proposed project (because of earlier contracts) could not be excluded from the competition unless there had been a specific exclusionary clause placed into a predecessor contract (*e.g.*, in an advisory type contract). This guidance was entirely dropped as of 1 April 1984.

Result: Today offerors may spend a million dollars on a proposal only to have it rejected for OCI reasons after submittal of the proposal.

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Practical Concerns and Evolving Issues and Practices:

- a. Consolidation of defense / aerospace industry in recent years; *e.g.*, manufacturers acquiring advisory companies and vice versa. OCI as critical analysis in mergers and acquisitions — can be a gate-closer, precluding new projects or forcing discontinuation of existing work.
- b. New wrinkle: Some large primes now considering divesting themselves of advisory services units that had been acquired not long ago.
- c. Mixed FAR / Nuclear agency clause techniques, combining future restrictions with current and future disclosures.

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- d. Agency as well as contractor personnel may be losing perspective or knowledge concerning purposes and practices of FAR OCI system.
- e. "Fraudification" and "Criminalization" of OCI:
 - Nuclear agency clauses.
 - Small number of cases characterizing bidder/contractor inaction or silence as being an implied certification of "No OCI," and if Govt. disagrees, potential False Claims Act liability plus penalties for every invoice submitted, and reputation of contractor may be severely impaired.

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f. Contract for general policy advice to Govt. (not specific analytical tasks) may still affect company's own economic interests. [*Alion Science & Technology Corp*, GAO B-297022.3, 2006; SAIC, GAO B-293601, 2004]

g. Self-evaluation of own products or services – does it involve “judgment” or merely data collection? *PURVIS Systems Inc*, GAO B-293807.3, 2004.

h. Some Govt. agencies and protestors say that certain factors may produce the “appearance” or “perception” of OCIs. FAR uses **no such words**; neither do the nuclear agency regulations.

i. Small number of GAO cases employ such language; quaere whether required for analysis of the cases. Regulatory language speaks of “actual” and “potential.” (So do most cases in GAO's history of decisions.)

New Statutory / Regulatory Dangers

- FAR Changes to parts 3, 9 and 52: Code of Ethics, Compliance Systems, Mandatory Disclosures, Enhanced Debarment Risks re: Failing to Disclose Crimes and False Claims Events and Overpayments.
- Substantial changes to the False Claims Act by enactment of the Fraud Enforcement and Recovery Act of 2009, including elimination of longstanding defenses.
- Increasing dangers of interlocks between OCI issues and false claims.

OCI Mitigation Plans

1. Who Prepares / Approves?
2. Organizational / personnel barriers.
3. Isolating subcontractors from planning aspects.
4. Subcontractor (or prime) task declination.
5. Altering corporate structures, sale of units, recent CMS uniform plan for having all offerors establish special subsidiaries.
6. Restrictions on future work (original ASPR/FAR scheme).
7. Defining scope of work to minimize OCIs.

More on Mitigation Techniques

8. Mitigation Plans as source selection factor in addition to, or in lieu of, remediation function.

9. Nondisclosure agreements.

10. Many other types and functions of OCI mitigation plans.

11. PCOs must take contractor mitigation plans seriously and not brush them off!

-- *Informatix Corp. v. U.S.*, 40 Fed. Cl. 508 (1998).

OCI Mitigation Plans

Recurrent Mitigation Plan Missteps by Companies:

- a. “Canned” plans not tailored to situation.
- b. Overdependence on NDAs.
- c. Rushing to submit mitigation plan before analyzing whether conflicts are present, potential, likely, or even possible.
- d. Allowing Govt. agencies or competitors to refer to “OCI appearances” without challenge or at least commentary.
- e. Failure to consider the three major OCI types.
- f. Not adhering to duties of mitigation plan.

OCI Preventive Steps

Preventive steps for contractors and subcontractors:

- Identify and track contracts by which unusual insight into agency operations and planning is obtained.
- Identify and track contracts containing OCI restrictions on future work.
- Identify and track contracts containing DOE, NRC or other disclosure obligations (see EPA and FAA rules). Also consider preventive disclosures when in doubt.
- Clear lines of OCI responsibility within company: Program managers? High-level contracting personnel? General or division counsel? All personnel? Special OCI prevention and information department or function?
- When OCI challenges occur from Govt. agencies or competitors, carefully analyze, treat as highest-level concern akin to criminal investigation, discuss promptly with counsel.

OCI — Important Illustrative COFC Case

See Judge Braden's opinion in *Axiom Resource Management, Inc. v. U.S.*, 28 September 2007.

- First sentence starts: "The federal government's increased use of and dependence on outside contractors to perform essential government functions...often results in nonpublic information...."
- Potential OCI. Question for the Court: Does the mitigation plan meet FAR requirements?

Axiom Case, Continued

-- Contracting officer did not exercise sound judgment in developing an appropriate mitigation plan.

-- Lockheed Martin's own mitigation plan is inadequate — firewalls, "voluntary" measures and NDAs will not remedy an "impaired objectivity" type of OCI. LM's plan is self-serving, per the Court and "unauditable," not having sufficient implementation and policing.

-- In this case, the C.O. did not investigate potential OCIs until the first of three GAO protests had been filed. Court: This violates the FAR.

DFARS Developments

DFARS Rules on OCI/Lead Systems Integrators

- Beginning with January 2008 interim rule
- Second interim rule effective 15 July 2009
- Weapon Systems Acquisition Reform Act of 2009
 - Mandates new/improved DFARS OCI rules, but only for major defense programs:
 - To provide uniform guidance
 - To tighten existing requirements
- What will DoD devise?

A Related Article

Holland+Knight's *Government Contracts Alert*, June 30, 2009, provides an interesting related article, "Weapons Reform Statute Directs New Defense Regulations on Organizational Conflicts of Interest." You can view it at

<http://www.hklaw.com/id24660/PublicationId2691/ReturnId31/contentid54266/>

OCI Presentation -- End

- Stay out of trouble.
- Otherwise, have authorized company personnel call me!!
- Even better, have them call me earlier for preventive purposes.
- Consider OCI inclusion in company ethics codes, compliance plans, etc.
- Watch what happens with DFARS revisions.
- Thank you!!

Alan Dickson
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