

Conflicts of Interest

Conflicts of Interests (COIs) can prevent a firm from winning a public contract and can result in the firm being removed from an existing public contract!

Conflicts of Interest (COI) Basics

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 encounter conflicts of interest from time to time.

COIs come in basically two forms:

- Personal Conflicts of Interests (PCIs)
- Organizational Conflicts of Interest (OCIs)

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.

FAR Part 3.11, Preventing Personal Conflicts of Interest for Contractor Employees Performing Acquisition Functions, is the primary regulation governing government PCI. This provision requires contractors to identify and prevent PCIs for “covered” employees and prohibit “covered” employees who have access to non-public info from using such information for personal gain.

A Covered Employee is an individual who performs an acquisition function closely associated with inherently governmental functions and is—

- An employee of the contractor; or
- 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.

An acquisition function closely associated with an inherently governmental function is one performed under contract to the Government for any of the following 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

The provisions with respect to Personal Conflicts of Interest (PCIs) are implemented by FAR Clause 52.203-16. This clause requires contractors to 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.

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

In addition, Contractors are required to:

- 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

In the event of a violation of the PCI rules, the contracting officer is required to seek agency legal counsel advise on course of action. Most likely outcomes are:

- Removal of employee from contract
- Finding of inadequate internal controls/start of debarment process
- Fine imposed on Contractor (less likely)

PCI is widely considered to be likely to expand into non-acquisition type activities in the near future. The following statement was included in an Advanced Notice of Proposed Rule for Service Contractor Employee PCIs published in the March 26, 2008 Federal Register:

“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

Companies should make sure there are no penalties associated with disclosure. No one should be demoted or fined for disclosing a potential conflict. This promotes full disclosure while allowing for

mitigation. Companies should also make sure the right people have all the information on potential conflicts so the right steps can be taken.

It is advisable to have predetermined, multiple mitigation strategies developed and on file for use if the situation should arise.

Organizational Conflicts of Interest (OCI)

Potential for OCI typically exists when a business relationship could create incentives or self-interest. The original OCI concept was a remains to manage the conflicts, not to punish the conflicted. Even today in FAR and other agency regulations, OCI provisions are organized under “contractor qualifications,” not “improper business practices.” The FAR and other regulations recognize conflicts as occurring in the ordinary course of business.

In today’s OCI environment, companies may invest heavily in pursuit of an opportunity only to have it rejected for OCI reasons (real or otherwise). Companies may even win a contract only to have it terminated for convenience for OCI reasons. OCI has become the new “third rail” for Contracting Officers and the newest best grounds for a protest.

General OCI Types are:

- 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

The specific prohibitions contained in FAR 9-505 are:

- A 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.
- A contractor who prepares complete specs for a non-developmental item may not furnish the item as a prime or sub for at least the duration of the initial production contract. This does not apply when...
 - The specs are for item the contractor already supplies, or

- The contractor acts as industry rep to assist in prep under Government supervision and control
- A contractor who writes the statement of work (SOW) for a competitive acquisition is excluded from supplying the system unless...
 - It is the sole source
 - It has participated in design work
 - More than one contractor worked on SOW
- A contractor may not perform contracts requiring it to evaluate its own products
- Contractors with access to proprietary information (including Marketing/BD consultants) may not compete when info would give unfair competitive advantage unless...
 - The data was furnished voluntarily without restrictions
 - The data was available from other sources without restriction

More on the Types of OCI

Unequal Access to Non-Public Information

This type of OCI is particularly hard to mitigate. It's like trying to "un-ring a bell." It is even harder to prove information has been purged and disclosure before the fact almost always results in exclusion from acquisition process. Other (related) business units may be able to participate in the affected procurement, but effective segregation of the proposal team is mandatory.

Case Study #1 – In 2012, a major public company 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.

Another employee reported the disclosure to the firm's legal department and the company self-reported the violation and withdrew from participation in the procurement. The firm also terminated the employee, but the Air Force still suspended the field office involved from all Federal awards and formally proposed debarment of the offending field office (only).

The principle takeaways from this case study are (1) knowing non-public data is not misconduct and could be mitigated, but (2) retaining non-public data from a previous public position might be and (3) using or disclosing that data almost certainly is.

Case Study #2 – A small Navy services contractor competed for and won a five-year training contract. After award, a "disappointed bidder" (FAR-speak for "loser") protested alleging that winner had employees "behind the firewall" in the program office. The core of the allegation was that the winner had unequal access to information. As a result, the Contracting Officer issued a stop work, the Navy conducted a minimal investigation and then converted the Stop Work order to a Termination for Convenience and proceeded to re-compete the work.

The principle takeaways from this case study are (1) having employees behind the firewall is not necessarily fatal to the procurement, but (2) keeping those employees in communication with anyone

on or connected to the proposal team could be, and (3) not disclosing the situation and the mitigation efforts will almost certainly be fatal.

Biased Ground Rules

This type of OCI is much more susceptible to mitigation using so-called “Chinese walls” to segregate the organization with the conflict from the rest of the firm. This type, however, can also be much more restrictive. If mitigation is impossible (or even difficult to demonstrate), the result may be exclusion from the procurement. There is no protection from Government’s failure to identify the potential conflict. The contractor is solely responsible.

Potential for “Bias COI” has led to recent divestitures in large firms. The Washington press has speculated that Northrop Grumman’s divestiture of TASC was OCI-driven. Washington Technology (Feb 2012) described L-3 spinoff of defense engineering and technical services units (now Engility) as OCI-driven as well. There have been 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 is common because while Bias OCI can be mitigated, proof (or demonstration) that there is no OCI is VERY difficult. “Appearance” of OCI can lead to the same remedies as real OCI and the favored remedy from the Government’s perspective is procurement exclusion. This can be VERY expensive if a small services contract to perform test and evaluation (T&E) services excludes a company from participation in a major system procurement.

Impaired Objectivity

This is the hardest of all types of OCI to mitigate because financial self-interest at the organizational level is assumed in all cases. “Chinese walls” and proposal team segregation are not acceptable as mitigation techniques for impaired objectivity.

The favored mitigation technique here (from the Government’s perspective) is also exclusion. For this reason, “divestiture” often crops up when this type of OCI is present.

Case Study #3 – In February 2008, GSA was already embroiled in a multi-contractor protest on the Alliant program. During the 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. While this had no impact on the allegations of the protest, it did prevent GSA from using anything the contractor had done in the re-evaluation of the Alliant proposals.

As a result, GSA was forced to completely redo the evaluations without using any of the outside work in settlement of the protest. When the second awards were made, they included virtually every qualified contractor and the final awards were more than two years late.

The principle takeaways here are that (1) contractor performance of activities “closely associated with inherently Governmental functions” are ALWAYS risky, (2) GSA should have required disclosure and examined the firm selected to perform the evaluations for potential OCI and (3) the firm should have disclosed potential OCI whether or not required by contract provision.

This outcome could have been very different if GSA had used another contractor for evaluations. They could also have required that evaluations of the firm’s existing clients be performed by a third party with the results provided directly back to GAS without even going through the contractor’s hands.

Practical OCI Approaches

Contractors should build early identification of potential OCI into the Business Development process. They should also build identification of PCI into Human Resources policies and procedures

Firms should consider designing effective mitigation techniques BEFORE they are needed and above all else, they should disclose, disclose, disclose.