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Federal Contracting by John W. Chierichella

How to know when you're in too deep with the feds

Most everyone in Washington who pays attention to the news has a basic understanding of conflicts of interest. The term usually is used in the context of an individual — a federal employee negotiating for a position with a contractor while handling the negotiation of contracts with that same company on behalf of the government.

Various statutes govern personal conflicts of interest, some with criminal sanctions. Just ask Darlene Druyun what can happen when you negotiate billions of dollars of Air Force contracts with a company while you're also negotiating for a post-retirement gig with that company.

However, federal contracting regulations also address a set of conflicts that is not so generally, or readily, understood, even by some government contracting officers.

Organizational conflicts of interest (OCI) arise out of the confluence of corporate relationships and the performance of government contracts.

OCI can affect a firm's eligibility for a wide range of contract awards, force you to outsource tasks under some contracts, affect your choice of teaming partners and limit your ability to allocate personnel within your organization. A failure to address OCI when evaluating takeover candidates can unsuspectingly wreak havoc on your core business.

Back when the Armed Services Procurement Regulations governed the administration of military contracts, OCIs were much more manageable. Such conflicts were addressed there and the regulations made it clear that rules were not "self-executing." Contractors could never be "surprised" by an OCI that had been created by a prior contract. Unless that prior contract specifically advised you of the conflict and of your exclusion from future contracts, future contracts were "fair game."

No more. Today, the burden is on the contractor to identify such conflicts and persuade the contracting officer that they can be adequately avoided and mitigated.

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OCI rules are designed to avoid unfair competitive advantage gained by unequal access to information or through the performance of conflicting roles in which the contractor's judgment might be biased or its objectivity impaired.

Some common OCI situations are:

■ **Unequal access to information.** A contractor may perform services for the government that afford it access to the proprietary information of third parties, either directly or via access to source-selection sensitive information generated by the government. The recipient of such information should not be able to leverage it for its own advantage and to the disadvantage of the provider. Such OCIs are usually mitigated by way of a nondisclosure agreement between the companies that limits the uses to which the recipient may put the information.

■ **Biased judgment.** One classic scenario is when a company is awarded a contract to develop a statement of work to be used in a future competitive acquisition; there may be an understandable tendency for that contractor to construct the statement around its products and capabilities.

Also getting attention in bid protests is when a contract calls for a systems engineering and technical assistance contractor to evaluate products developed or produced, or services provided, by itself, an affiliate or competitors. There may be a predisposition for that company to shade its evaluations to favor its products or services or its affiliates.

A critical point that's often overlooked is that a biased judgment OCI analysis does not focus solely on the business unit that you may colloquially regard as the "bidder" or "offeror." It looks across the corporate entity of which that unit is a part, to all divisions, sister corporations and teammates.

The ability for the bias to operate in favor of and benefit another division, an affiliated corporation or teammate is a sufficient cause for concern and basis for a contracting officer to demand a OCI mitigation plan.

The General Accountability Office can and does sustain OCI-based protests, particularly those involving impaired objectivity in the performance of a contract. Contractors need to identify such conflicts during the proposal process. Deferral of that concern to the post-award period is a perilous course.

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