

## Policy & Regs: It's Not Your Father's Organizational Conflict of Interest Rules

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For almost 30 years, the Federal Acquisition Regulation (FAR) has provided limited policy guidance on organizational conflict of interest (OCI). Created in an era when product procurements dominated spending, these policies focused attention on what has become known as the “hardware exclusion.” That is, a contractor should not recommend a product to an agency and then be in a position to offer that product through a procurement—notwithstanding the competitive nature of the agency’s acquisition.

**GAO fills a gap.** While most federal procurement spending has shifted from products to services, government systems have become more complex, and agency technical resources have diminished, the FAR has not been modified to reflect the kind of OCI scenarios that these changes generate. As a result, Government Accountability Office (GAO) bid-protest decisions have become the main source of policy-making concerning OCI. (Note that GAO’s lead attorney on OCI issues was Dan Gordon, now the OFPP Administrator.)

These decisions have defined three major types of OCI concerns, even in the services context and have upheld protests (1) where the procuring agency failed to ask the contractor about any potential conflict, (2) where the agency asked the contractor but failed to evaluate the response and (3) where the agency evaluated the response but failed to monitor the contractor’s proposed mitigation plan.

GAO has also denied protests (1) where agency solicitations have clearly defined the conflicts to be avoided and fairly evaluated and monitored them as well and (2) when there were unsubstantiated allegations of a contractor’s OCI.

**DoD actions.** In addition, several procurement agencies, mainly in DoD, are taking their own paths on OCI. For example, the National Reconnaissance Office has applied a rigorous OCI policy to its procurements and developed its own OCI Guide.

The Missile Defense Agency has applied a bright-line prohibition on systems

engineering contractors competing under the MiDAESS program from also participating on any contractor program teams.

The Naval Sea Systems Command has told its contractors to “choose your major”—either work on a naval platform or provide engineering support to the government for those platforms.

**Congressional actions.** Last year’s defense authorization act directed OFPP to evaluate the existing OCI rules and revise the FAR as necessary. In advance of any legislation, in mid-2008 the FAR Councils asked for comments on the FAR coverage and recommendations for modifications or enhancements. I authored a lengthy response to that notice, suggesting critical modifications to consider when evaluating the continued appropriateness of the current FAR OCI policies and practices.

In addition, this past May, Congress enacted the Weapon Systems Acquisition Reform Act (WSARA). Section 207 of that act requires DoD to revise by February 2010 the DoD acquisition regulations to provide uniform OCI guidance and “tighten existing requirements” in major defense acquisition programs. Congress spelled out a number of considerations for DoD when revising those regulations. These include a provision that generally requires that a contract for the performance of systems engineering and technical assistance functions for a major defense acquisition program prohibit the contractor or any affiliate from participating as a prime contractor or major subcontractor in the development or construction of a weapon system.

**Northrop sells TASC.** Even though DoD has yet to issue any implementing guidance statement, let alone any proposed rules, to implement Section 207, some companies have chosen to act. The most notable was the early November sale by Northrop Grumman of its consulting unit, TASC, to a private equity investors. In a statement announcing the sale, Northrop’s chairman acknowledged that the sale was motivated in part by a “desire to align quickly with the government’s new OCI standards.”

In addition, even though there are new

DoD statements, the Air Force did not wait for department-wide regulations. It issued a November 3 memorandum to assist Air Force contracting officers in recognizing and adjudicating OCI issues, while also “caution[ing] all of you” to exercise common sense, good judgment and sound discretion in assessing whether a conflict exists and “not attempt mitigation for those that must instead be avoided or neutralized.”

#### **What’s a contractor to do?**

For companies doing business with DoD supporting major defense acquisition programs, it is essential to identify in your current contract statements of work any areas that might create a near-term potential OCI. This involves more than a search for any specific OCI provision; it should involve a thorough review of specific offerings, service lines of business and even market strategies. Northrop did that with its TASC business and concluded that the potential OCI risk overlap was significant.

Second, evaluate options for mitigating each of the potential OCI issues identified. There are numerous successful strategies that have been used to mitigate potential OCI issues with government contracting officer approval. You can be assured that any such mitigation strategies will be closely reviewed, so the documentation of the actions planned to be taken, and the steps to be taken to monitor your compliance with those actions, will be critical to success.

If the government adopts a strong OCI policy approach, don’t assume that the regulations will grant any type of “grandfather” clause to allow current “conflicting” business relationships to continue indefinitely, although I’ve urged the government to provide a reasonable period of time for implementation and to avoid business fire sales.

Third, regardless of the markets you’re in, carefully monitor the federal regulatory processes. While the WSARA law is limited to major defense acquisition programs, there is no prohibition on DoD developing more comprehensive departmental regulations on OCI. The civilian agencies are carefully watching DoD and may be willing to adopt government-wide FAR regulations patterned after the DoD coverage.

Concerns about OCI have risen steeply in the last few years, not just because of the new laws and regulations, but also because of greater attention and scrutiny by many departments and agencies, as well as alert contractors. As with the TASC sale, a restrictive government OCI posture can be the impetus for other divestitures and, over time, can alter the competitive framework. OCI has now been extended from the compliance realm into corporate business strategy. An OCI analysis that fails to account for these dimensions of your business may result in serious limitations on downstream growth. ■