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Government Contract Compliance: Effective Mitigation of Organizational Conflicts of Interest

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Introduction

Organizational conflicts of interest regularly occur in the current federal procurement environment. Contractors are generally aware of organizational conflicts of interest concepts; however, they often fail to appreciate the nuances of conflict mitigation. Effective mitigation strategies require careful planning and advance consideration of prospective conflicts. All too often, organizational conflicts of interest that could have been effectively mitigated or neutralized go unidentified until the conflict is raised by a disappointed offeror in a bid protest that may result in the awardee losing the contract, despite its winning proposal. The following discussion is designed to illuminate a variety of common factual scenarios giving rise to organizational conflicts of interest and to demonstrate, sometimes by negative example, effective strategies to mitigating or avoiding such conflicts of interest.

Overview of Organizational Conflict of Interest Concepts

Organizational conflicts of interest are defined and regulated by Federal Acquisition Regulation (FAR) Subpart 9.5.[1] FAR Subpart 9.5 "[p]rescribes responsibilities, general rules, and procedures for identifying, evaluating, and resolving organizational conflicts of interest."[2]

The organizational conflict of interest regulations apply to both for-profit and nonprofit organizations.[3] While organizational conflicts of interest can occur with any type of acquisition, the FAR advises that they are most likely to occur in contracts involving management support services, consultant or other professional services, contractor performance of assistance in technical evaluations, or systems engineering and technical direction work performed by a contractor that does not have overall contractual responsibility for development or production.[4]

Contracting officers must "avoid, neutralize, or mitigate significant potential conflicts before contract award."[5] Contractors should note that the

[1] 48 C.F.R. § 9.5.
[2] 48 C.F.R. § 9.500(a).
[3] 48 C.F.R. § 9.502(a).
[4] 48 C.F.R. § 9.502(b).
[5] 48 C.F.R. § 9.504(a)(2).

regulations apply to *potential* as well as actual conflicts; however, a conflict must be *significant* before a contracting officer is required to act. If a significant, actual or potential conflict exists that cannot be avoided, neutralized or mitigated, then a contracting officer is required to withhold award from the contractor.[6]

Organizational conflicts of interest affecting a contractor's affiliates, subcontractors, or subcontractor's affiliates will be imputed to the contractor.[7] Consequently, contractors have to be aware of activities across the corporate family to which the contractor belongs.

Generally speaking, there are three categories of organizational conflicts of interest:

i. unequal access to information conflicts;
ii. biased ground rules conflicts; and
iii. impaired objectivity conflicts.[8]

In unequal access to information cases,

i. a contractor has access to non-public information;
ii. the contractor's access to such information results from its performance of a government contract; and
iii. the contractor's access to such non-public information may provide the contractor with a competitive advantage in a later procurement competition[9]

Contractors should be aware, however, that the organizational conflict of interest rules related to unequal access to information do *not* provide contractors with a remedy against misappropriation of proprietary information by the contractor's former employees.

For example, in *Geo Group, Inc. v. U.S.*, the plaintiff claimed that a former employee misappropriated bid and proposal information and used that

[6] 48 C.F.R. § 9.504(e).
[7] *Aetna Health Plans, Inc.*, B-254397.15, 95-2 CPD ¶ 129 (Comp. Gen. July 27, 1995).
[8] *Id.*
[9] *Aetna Health Plans, Inc.*, B-254397.15, 95-2 CPD ¶ 129 (Comp. Gen. July 27, 1995).

information in developing the intervenor-awardee's proposal.[10] The Court of Federal Claims held that the FAR makes "clear that a conflict based upon unequal access to information arises only where the information is obtained through the performance of a government contract."[11] *Geo Group*, among several other cases, stands for the proposition that the organizational conflict of interest regulations do not implicate improper disclosure of information not facilitated in some way by the government.[12] Rather, disputes over the misappropriation of contractor information must be resolved through direct action against the former employee and his or her new employer.[13]

A biased ground rules conflict arises when a contractor, in the performance of a government contract, has defined the rules for a different procurement.[14] The classic example of a biased ground rules conflict is a contractor writing the statement of work or other specifications for an acquisition. The concern underlying this type of organizational conflict of interest is that the contractor had the opportunity to establish the rules of the procurement to favor it or its affiliate, whether intentionally or unintentionally. It is important to note that organizational conflicts of interest do not generally arise just because of a firm's prior experience with a particular project or product because such prior experience does not constitute an "unfair competitive advantage."[15] "The mere existence of a prior or current contractual relationship between a contracting agency and a firm does not create an unfair competitive advantage, and an agency is not required to compensate for every competitive advantage gleaned by a potential offeror's prior performance of particular requirement."[16] Consequently, a contractor's mere status as an incumbent does not give rise to an organizational conflict of interest.

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[10] *Geo Grp., Inc. v. United States*, 100 Fed. Cl. 223, 227 (2011).
[11] *Id.*; *see also* 48 C.F.R. § 9.505(b).
[12] *See Ellwood Nat'l Forge Co.*, B-402089.3, 2010 CPD ¶ 250 (Comp. Gen. Oct. 22, 2010) ("[W]here information is obtained by one firm directly from another firm- by, for example, dissemination of information by former employees- this essentially amounts to a dispute between private parties that we will not consider absent evidence of government involvement.")
[13] The same analysis applies to alleged violations of the Procurement Integrity Act. *See Geo Grp., Inc.*, 100 Fed. Cl. at 227.
[14] *Aetna Health Plans, Inc.*, B-254397.15, 95-2 CPD ¶ 129 (Comp. Gen. July 27, 1995).
[15] *Linc Gov't Servs., LLC v. United States*, 108 Fed. Cl. 473, 506-07 (2012).
[16] *ARINC Eng'g Servs., LLC v. United States*, 77 Fed. Cl. 196 (2007) (quoting, *Snell Enters, Inc.*, B-290113.2, 2002 CPD ¶ 115 at 8 (Comp. Gen. June 10, 2002)).

Impaired objectivity conflicts occur where a contractor's ability to provide impartial advice is compromised. Examples of impaired objectivity conflicts are:

i. where a contractor may be required to evaluate its own or its affiliate's performance under another contract;[17]
ii. where a contractor would be required to perform analysis and make recommendations regarding products that might be manufactured by it or its competitors;[18] or
iii. where a firm would help establish standards for the performance and monitoring of tests, while the firm was also responsible for conducting tests subject to those standards.[19]

Significant Cases Illustrating Organizational Conflict of Interest Concepts

Several bid protest cases in both the US Court of Federal Claims (COFC) and the US Government Accountability Office (GAO) have interpreted the organizational conflict of interest regulations set forth in the FAR and better illuminate the principles discussed above. As a threshold matter, contractors desiring to challenge an award of a federal contract based on the awardee having an organizational conflict of interest must demonstrate the existence of "hard facts" rather than the mere suspicion of a conflict. These facts must show the existence of an actual or potential conflict.[20]

Aetna

The *Aetna* protest provides a useful example of an impaired objectivity OCI and how the OCI rules implicate subcontractor and affiliate relationships. In *Aetna*, the protestors protested an award to QualMed, Inc. by the Office of the Civilian Health and Medical Program of the Uniformed Services (OCHAMPUS**)**. The protestors' allegations centered on a consultant

[17] *L-3 Servs., Inc.*, B-400134.11, 2009 CPD 171 at 11 (Comp. Gen. Sept. 3, 2009) (citing *Alion Sci. & Tech. Corp.*, B-297022.3 2006 CPD ¶ 2 (Jan. 9. 2006)).
[18] *L-3 Servs., Inc.*, B-400134.11, 2009 CPD 171 at 11 (Comp. Gen. Sept. 3, 2009) (citing *Alion Sci. & Tech. Corp.*, B-297022.3 2006 CPD ¶ 2 (Jan. 9. 2006)).
[19] *Id.* (citing *Ktech Corp.*, B-285330.2, 2002 CPD ¶ 77 (Aug. 17, 2000)).
[20] *Aetna Health Plans, Inc.*, B-254397.15, 95-2 CPD ¶ 129 at 12 (Comp. Gen. July 27, 1995).

engaged by OCHAMPUS to help the agency evaluate proposals submitted for the procurement. The consultant, Lewin-VHI, was a subsidiary of Value Health, Inc. (VHI). QualMed's proposed subcontractor, VHS, was also a subsidiary of VHI. Consequently, OCHAMPUS's use of Lewin-VHI resulted in one corporate subsidiary of VHI evaluating QualMed's proposal under which another corporate subsidiary of VHI stood to benefit as a subcontractor. The protestors argued that such an arrangement constituted an impermissible conflict under FAR 9.5. GAO agreed with the protestors and ruled that the organizational conflict of interest mitigation plan and the agency's acceptance of that plan was unreasonable because the agency relied solely on the representations of VHS and VHI instead of undertaking an independent evaluation.

It is noteworthy that OCHAMPUS argued to GAO that mitigation, in its view, neutralized the OCI because Lewin-VHI employees working on the procurement were "walled-off" from the corporate parent. GAO responded that "[w]hile a [firewall] arrangement may resolve an 'unfair access to information' conflict of interest, it is virtually irrelevant to an organizational conflict of interest involving potentially impaired objectivity."[21] GAO determined that the impaired objectivity conflict in this matter was unmitigatable because of the substantial dollar value of the subcontract at issue ($183,000,000) and the nature and extent of Lewin-VHI's role in the procurement.

Informatics

Infomatics Corp. stands for the proposition that a contracting officer must conduct a reasonable evaluation of an offeror's mitigation plan.[22] The plaintiff in a lowest-price, technically acceptable evaluation method procurement was determined by the agency to be technically acceptable and it had the lowest priced proposal. The plaintiff's offer was not accepted, however, because the agency determined that it had an organizational conflict of interest. The plaintiff was able to successfully challenge the amount of consideration the agency had afforded the plaintiff's conflict mitigation plan. "If FAR 9.504(e) means anything, it is that the contracting officer must determinate that an organizational conflict of interest cannot

[21] *Id.*
[22] *Infomatics Corp. v. United States,* 40 Fed. Cl. 508 (1998).

be avoided or mitigated in order to deny contract award to an otherwise qualified offeror."[23] The court noted "the record reveals little actual consideration of the mitigation plan; in fact, the contracting officer appears to have determined that the perceived OCIs could not be mitigated before she actually saw the mitigation plan…"[24] The court found that the agency had not adequately evaluated the plaintiff's conflict mitigation plan and issued a preliminary injunction against the award to the awardee. The holding of the case clearly follows the mandate of FAR 9.504(e), which provides, in relevant part, "[t]he contracting officer *shall* award the contract to the apparent successful offeror unless a conflict of interest is determined to exist that *cannot* be avoided or mitigated."[25] (emphasis supplied).

L-3 Services, Inc.

L-3 Services, Inc. provides a good analysis of the three main types of organizational conflicts, and also demonstrates some limitations on the effectiveness of conflict mitigation plans.[26] L-3 protested an award to General Dynamics Information Technology (GDIT) under a procurement to consolidate the Air Force Space Command's (AFSPC) operation and maintenance requirements for government-owned networks (the Uni-Comm procurement). The agency required outside contractor assistance in planning and developing the Uni-Comm procurement, and FCI and its subcontractor, SI, performed that task. FCI's contract contained an organizational conflict of interest clause that provided "[t]he scope of this [task order] is to develop a solid requirement and way ahead for the Uni–Comm Program . . . . Therefore, potential contractors shall sign appropriate [organizational conflict of interest] documents excluding them from competing for the Uni–Comm contract."[27] The organizational conflict of interest restriction was binding on SI as FCI's subcontractor.

When the Uni-Comm RFP was issued, GDIT submitted a proposal including SI as a subcontractor. GDIT was selected for the contract award. L-3 filed its protest with GAO alleging that GDIT had three organizational

[23] *Id.*
[24] *Id.*
[25] 48 C.F.R. § 9.504(e).
[26] *L-3 Servs., Inc.*, B-400134.11, 2009 CPD ¶ 171 (Comp. Gen. Sept. 3, 2009).
[27] *Id.* at 2.

conflicts of interest as a result of SI's performance of the development work for the Uni-Comm effort as a subcontractor to FCI. L-3 alleged that by participating in the acquisition planning work, SI obtained non-public, competitively useful information (unequal access to information conflict). Further, L-3 alleged that SI's work created a biased-ground rules conflict because it could have shaped the Uni-Comm procurement in a manner favoring itself or its affiliate.[28]

While the agency originally agreed that SI's performance of the prior effort created an organizational conflict of interest that would prevent SI from participating in the Uni-Comm procurement, the agency subsequently revised its opinion.[29] The agency's revised decision was based on its determination that the SI employee that worked on the prior effort "was not in a position . . . to draft specifications for Uni-Comm that would favor [SI]."[30] GAO concluded there was, in fact, a biased-ground rules OCI and noted that the "concern is not simply whether a firm drafted specifications that were adopted into the solicitation, but, rather, whether a firm was in a position to affect the competition . . . ."[31]

With regard to the alleged unequal access to information conflict, the agency and GDIT asserted:

i. that the information received by SI in the prior procurement was not competitively useful;
ii. to the extent information was competitively useful, it was disclosed to all offerors; and
iii. that to the extent information was not fully disclosed to all offerors, mitigation plans neutralized the organizational conflict of interest.

GAO determined that the agency's original conflict determination expressly found that SI did have access to non-public, competitively useful information. While GAO agreed that much of the competitively useful information to which SI had access was disclosed to the other offerors,

[28] *Id.* at 4.
[29] *Id.* at 6.
[30] *Id.*
[31] *Id.* at 7

there were no mechanisms in place to identify precisely what information SI had been exposed to and there was no record of such information.[32] Accordingly, the agency could not know that all competitively useful information had been disclosed to all offerors. The agency further relied on conflict mitigation plans submitted by two SI divisions. GAO noted that the plans were not submitted until after the development work was completed. Further, one of the plans was not executed for over a year after its submission due to ongoing agency concerns with the adequacy of the plan.[33] GAO found, however, that the agency acted unreasonably because the mitigation plan had not been properly evaluated or put into effect during the relevant time period and, as a result, SI's compliance had not been monitored. Accordingly, information could have passed from the SI employee working on the prior procurement to individuals working on the Uni-Comm procurement.

L-3 also alleged an impaired objectivity OCI because FCI, SI's prime contractor on the evaluation procurement, aided the agency in the evaluation of proposals under the Uni-Comm procurement. GAO determined that SI's prior prime contractor-subcontractor relationship was not sufficient to impute an impaired objectivity OCI to SI as a result of FCI's role in evaluating proposals under the Uni-Comm procurement. The GAO found that no financial benefit would inure to FCI for favorably evaluating GDIT's proposal.

Key points that arise from the *L-*3 protest are:

i. an agency cannot reasonably rely on a contractor's own determination of whether a conflict exists, which is consistent with FAR 9.504, which vests contracting officers with the responsibility of identifying and evaluating organizational conflicts of interest;

[32] *Id.* at 8

[33] The agency's concerns included: "who would decide what qualified as source selection sensitive information, and the other kinds of information that might require protection; how SI's internal computer systems would function to isolate the competitively useful information; how the government would verify that the contractor followed the mitigation plan; how the government would enforce compliance with the mitigation plan; and given that the two divisions of SI were no longer physically separate, how the workspace separation of the employees would be accomplished." *L-3 Servs., Inc.*, B-400134.11, 2009 CPD 171 at 9 (Comp. Gen. Sept. 3, 2009).

ii. the normal remedy for a biased-ground rules OCI that has not been mitigated is the elimination of the affected offeror from the competition; and
iii. unequal access to information conflicts have to be mitigated in a timely manner.

McCarthy/Hunt, JV

The protest of *McCarthy/Hunt, JV* evidences the principle that once the existence of a conflict is established, prejudice to the protestor is presumed, unless the record clearly demonstrates a lack of prejudice.[34] The protestor asserted that the Army Corps of Engineers improperly awarded a contract to Turner Construction Company (Turner) and its design partner Ellerbe Becket (EB) because of biased-ground rules, unequal access to information, and impaired objectivity organizational conflicts of interest.[35] The agency issued the solicitation for the design and construction of a 700,000-square-foot replacement hospital at Fort Benning, Georgia (the Hospital Procurement). The agency contracted with HSMM/HOK Martin Hospital Joint Venture (HSMM) to design the concept of the hospital and provide technical review of the proposals submitted in the Hospital Procurement. Prior to the issuance of the solicitation for the Hospital Procurement, AECOM Technology Corporation (AECOM), the corporate parent of HSMM, entered into negotiations with EB regarding AECOM's possible acquisition of EB by AECOM.

Turner and the agency argued that the relationship between EB and AECOM was too attenuated to give rise to any organizational conflict of interest. GAO disagreed, stating that "AECOM's and EB's interests effectively were aligned as a result of the merger/acquisition discussions sufficient to present at least a potential organizational conflict of interest."[36] While the agency pointed to evidence in the record indicating that knowledge of the AECOM-EB negotiations was limited to individuals with a "need-to-know," and that those individuals kept such information confidential, GAO noted that the record contained no information

[34] *McCarthy/Hunt, JV*, B-402229.2, 2010 CPD ¶ 68 (Comp. Gen. Feb. 16, 2010).
[35] *Id.*
[36] *Id.* at 5

indicating that the contracting officer relied on or was even aware of AECOM's efforts to firewall sensitive information.[37]

With respect to the biased-ground rules conflict, the agency further argued there was no evidence that AECOM, through HSMM, skewed the competition in favor of Turner to benefit EB. However, where a conflict exists, prejudice to the protestor is presumed unless the record establishes a lack of prejudice.[38] AECOM was in a position to favor EB in the competition, whether it did so or not. The agency was unable to affirmatively prove that AECOM did not do so. With respect to the impaired objectivity conflict, however, GAO determined the record established that there was no reasonable basis to conclude the protestor had been prejudiced because the HSMM evaluators were "relatively critical" of the Turner/EB proposal.[39] GAO recommended that Turner be eliminated from the competition.

GAO held that "[w]here the record establishes that a conflict of interest exists on the part of the evaluators, to maintain the integrity of the procurement process we will presume that the protester was prejudiced, unless the record establishes the lack of prejudice."[40] In *McCarthy*, GAO presumed prejudice with respect to the biased-grounds conflict, but found that the record established a lack of prejudice with respect to the impaired objectivity conflict because the HSMM evaluators were critical to the firm it was supposed to be biased toward.

NetStar-1

NetStar-1 Government Consulting, Inc. v. United States is instructive, by negative example, as to the proper way to create and implement a conflict mitigation plan. NetStar challenged an award by Unites States Immigration and Customs Enforcement (ICE) of a blanket purchase agreement (BPA) to ALON, Inc. to provide support services to ICE.[41] The request for quotation contained an OCI questionnaire to which ALON responded

[37] *Id.* at 7.
[38] *Id.* at 8.
[39] *Id.* at 10.
[40] *Id.* at 8.
[41] *NetStar-1 Gov't Consulting, Inc. v. United States*, 101 Fed. Cl. 511 (2011), *aff'd*, 2012 WL 3221104 (Fed. Cir. 2012).

stating that it was not aware of any facts that would create an actual or potential conflict of interest. As part of its performance of prior contracts with ICE, ALON had access to ICE's Share Drive and other databases, which contained acquisition planning and procurement documents, including sensitive source selection information. To mitigate its OCI, ALON submitted a mitigation plan that "relied upon the declarations from ALON's employees denying any wrongdoing and assuring that they had complied with their nondisclosure agreements" with ICE.[42]

The court noted the existence of "hard facts here that strongly suggest the existence of an organizational conflict of interest associated with ALON's having had unequal access to information that could have provided it with a significant competitive advantage in obtaining the BPA."[43] The information included the fully loaded labor rates, employee names, and qualifications of ALON's competitors. The court further noted that the contracting officer knew or should have known prior to the issuance of the RFQ that ALON was performing advisory services to ICE and that three of its prior contracts warned of future organizational conflicts of interest. With respect to ALON's mitigation plan, which was adopted by the agency, the court found that "some of the provisions of that plan were defective in their design; others were flawed in their execution; and still others required the contracting officer to rely upon ALON's representations and promises, without any verification whatsoever. . . ."[44]

For example, while ALON provided declarations from some of its employees indicating they had not obtained NetStar's proprietary information or shared any such information with other ALON personnel, ALON did not obtain declarations from the ALON employees that actually had access to NetStar's information. Further, the non-disclosure agreements executed by ALON employees were not compliant with FAR 9.505-4(b), which requires the firms who own the proprietary information to approve the form of the nondisclosure agreements. Other problems identified by the court were that the contracting officer did not verify ALON compliance and that the mitigation plan did not define the firewall procedures ALON proposed to insulate employees with access to

[42] *Id.* at 516.
[43] *Id.* at 520.
[44] *Id.* at 524.

information. The court noted that such a firewall would require detailed procedures, including physical and electronic barriers, to meet the standards identified in the relevant decisional law. Ultimately, the court held that the agency's actions in accepting ALON's mitigation plan amounted to a post-award rationalization of the agency's award decision and was arbitrary and capricious.

Effective Mitigation Strategies

As indicated by the prior discussion, organizational conflicts of interest arise under various factual scenarios. Effective mitigation strategies will be tailored to address the specific conflicts at issue. Effective mitigation plans do have common elements. Successful plans:

i. provide a detailed discussion of the potential or actual conflict;
ii. set forth detailed procedures;
iii. provide training for contractor employees;
iv. require signed certification from contractor employees subject to the mitigation plan;
v. obligate the contractor to notify the government of any conflicts that arise and contain mechanisms to address such conflicts;
vi. provide for compliance verification methods, such as regular compliance audits; and
vii. receive contracting officer approval.

NASA guidance[45] on organizational conflicts of interest provides that conflict mitigation plans shall include the following elements:

1. "Demonstrate an understanding of

   A. OCI principles and
   B. the full breadth of OCI issues and types of harm that can result;"

2. In addition to describing the actions the contractor will take to mitigate the OCI, the contractor should also describe how its

[45] NASA, NATIONAL AERONAUTICS AND SPACE ADMINISTRATION'S GUIDE ON ORGANIZATIONAL CONFLICTS OF INTEREST (2010), *available at* https://www.hq.nasa.gov/office/procurement/OCIGuide.pdf.

mitigation actions will not adversely affect performance of the contract.
3. Describe the benefits and risks of the OCI mitigation plan.
4. Include a requirement to update the plan.
5. "Define company roles, responsibilities, and procedures for screening…existing and new business opportunities for actual/potential OCIs."
6. "Identify any affiliated companies/entities (e.g., a parent company or a wholly-owned subsidiary) and procedures for coordinating OCIs with such affiliated companies/entities."
7. Describe how the contractor will require subcontractors to comply with the mitigation plan and discuss any affected subcontractors' OCI plan.
8. Establish a training program for employees, including refreshing training and exit training.
9. Provide for sanctions in the event an employee violates the plan.
10. Require periodic audits.
11. Define records related to the plan to be made available to the government upon request.[46]

While the NASA guidance is only prescriptive in NASA contracts, it is a useful resource for contractors developing a conflict mitigation plan.

Unequal Access to Information Conflicts

Firewalls are likely the most common mitigation strategy employed for unequal access to information conflicts.[47] As demonstrated by the *NetStar-1* protest, effective firewalls should be implemented in advance to avoid trying to close "the stable door after the horse has bolted."[48] Firewalls that have withstood scrutiny include detailed and verifiable elements. For example, in the protest of *Leads Corporation*, the approved firewall in question entailed:

[46] *Id.* at 42.
[47] Keith R. Szeliga, *Conflict and Intrigue in Government Contracting: A Guide to Identifying and Mitigating Organizational Conflicts of Interest*, 35 PUB. CONT. L.J. 639, (2006).
[48] *NetStar-1 Government Consulting, Inc. v. United States*, 101 Fed. Cl. 511, 528 (2011), *aff'd*, 2012 WL 3221104 (Fed. Cir. 2012).

i. separating the relevant personnel from other of contractor's business units electronically, organizationally, and physically;
ii. requiring continuous education programs on the topic;
iii. nondisclosure agreements;
iv. implementing document control policies;
v. auditing the firewall's measures semi-annually; and
vi. continually updating the list of ongoing contracts with agency.[49]

In lieu of a firewall, agencies can neutralize unequal access OCIs simply by disclosing the relevant information to all offerors if the OCI is identified early enough in the procurement for the information to be timely disseminated to all interested offerors.[50]

Biased-Ground Rules and Impaired Objectivity Conflicts

While firewalls may be used in conjunction with the mitigation of a biased-ground rules conflict, they are generally not sufficient in and of themselves to neutralize or mitigate the conflict.[51] Because of the nature of biased-ground rules conflicts, the normal remedy is to restrict the future activities of affected contractors to avoid the conflict altogether. Contractors can avoid biased-ground rules by carefully choosing team members that do not have a conflict. Additionally, in the appropriate context, such as a multiple award task order type contract, the contractor and the agency could agree that work for which the contractor would have a conflict would be assigned to other contractors receiving awards under the procurement. Generally, mitigation strategies for biased-ground rules and impaired objectivity conflicts will require ongoing agency involvement and monitoring on the part of the agency. Agencies may not desire to undertake the additional responsibilities that come with some mitigation strategies.

[49] *Leads Corp.*, B-292465, 2003 CPD ¶ 197 (Comp. Gen. Sept. 26, 2003).
[50] Szeliga, *supra* note 47, at 666.
[51] "[W]hile a firewall arrangement may resolve an 'unfair access to information OCI, it is virtually irrelevant to an OCI involving potentially impaired objectivity. Likewise, due to the ultimate relationship of one entity to another, a firewall would not resolve an organizational conflict of interest involving biased ground rules." *Leads Corp.*, B-292465, 2003 CPD ¶ 197 at 5 (Comp. Gen. Sept. 26, 2003) (internal citation omitted).

Conclusion

Organizational conflicts of interest occur in a variety of factual scenarios. Consequently, there is no single solution for mitigating conflicts when they occur. When contractors decide to compete for contracts likely to result in a conflict, they should immediately identify a course of action to minimize adverse impacts on their future competitive activities. A proactive, considered approach to identifying and mitigating conflicts of interest will reduce restrictions on contractor activities and increase the effectiveness of conflict mitigation.

Key Takeaways

- Contracting officers must stay vigilant for the first sign of conflicts of interest, because the duty rests on them to avoid, neutralize, or mitigate conflicts before awarding the contract. Regulations apply to potential as well as actual conflicts, with action being required when a conflict is significant. If the conflict cannot be avoided, neutralized or mitigated, the contracting officer must withhold the contract. Look for activities and organizational conflicts of interest across the corporate family of the contractor—affiliates, subcontractors or subcontractor's affiliates—as all conflicts will be imputed to the contractor and must be addressed.
- Avoid unequal access to information conflicts by early identification of situations where contractor personnel will have the ability to access non-public, competitively useful information and compartmentalizing such information through documented, contracting officer-approved firewalls.
- Do not depend on the organizational conflict of interest rules as a remedy against misappropriation of proprietary information by former employees. See the *Geo Group, Inc. v. U.S.,* case, where the court stated that "a conflict based upon unequal access to information arises only where the information is obtained through the performance of a government contract." Disputes over the misappropriation of contractor information must be resolved through direct action against the former employee and the new employer.
- Stay aware of situations where accusations of impaired objectivity conflicts could be lodged, implying a challenge to the contractor's

ability to provide impartial advice. These include times when a contractor may be required to evaluate its own or an affiliate's performance under another contract; a contractor is required to analyze and make recommendations regarding its own or competitors' products; a firm helps establish standards for the performance and monitoring of tests the firm is then responsible for conducting.

- Obtain hard facts before lodging a complaint of conflict of interest, and show the existence of an actual or potential conflict, rather than relying on mere suspicion of a conflict.
- To be effective, tailor your mitigation strategies to address the specific conflicts of interest at issue. However, common elements to all successful plans include: a detailed discussion of the potential/actual conflict; detailed procedures; training for contractor employees; requiring signed certification from contractor employees subject to the mitigation plan and government notification by the contractor of any conflicts that arise, with mechanisms to address them; compliance verification methods; and contracting officer approval.
- Consider using the NASA guidance on organizational conflicts of interest as a resource for developing a conflict mitigation plan, even though it only applies prescriptively to NASA contracts.
- Establish a firewall before there is a need to prevent unequal access to information conflicts. Aspects of effective firewalls include separating the relevant personnel from the contractor's other business units electronically, organizationally, and physically; nondisclosure agreements; implementing document control policies; and auditing the firewall's measures on a regular basis. If a conflict of interest is suspected and a firewall has not been established, the conflict can be neutralized by the government's disclosure of the relevant information to all offerors, but this is only applicable if it is identified early enough in the process for the information to be timely disseminated.

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