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Legal Sidebar

Federal Procurement Restrictions on Organizational Conflicts of Interest

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Recent congressional reports and news articles have raised concerns about potential conflicts of interest when a company that provides consulting or advisory services to a federal regulatory agency through a procurement contract is also simultaneously consulting for private sector companies that are regulated by the same federal agency. As federal contractors, such consulting firms are generally subject to laws and regulations that are designed to identify, mitigate, and resolve apparent or actual "organizational conflicts of interest" (OCI). According to the Federal Acquisition Regulation (FAR), OCI arises when, "because of other activities or relationships with other persons, a person is unable or potentially unable to render impartial assistance or advice to the Government, or the person's objectivity in performing the contract work is or might be otherwise impaired, or a person has an unfair competitive advantage."

This Legal Sidebar analyzes federal procurement laws and regulations governing OCI to assist in understanding the current applicable rules and concludes with considerations for Congress.

Federal Procurement OCI Standards

One of the guiding principles of federal acquisition law is that "[g]overnment business shall be conducted in a manner above reproach and, except as authorized by statute or regulation, with complete impartiality and with preferential treatment for none." The FAR, which generally governs most federal agency procurements, further provides that "[t]he general rule is to avoid strictly any conflict of interest or even the appearance of a conflict of interest in Government-contractor relationships" in order to maintain "the integrity of the procurement system."

The FAR addresses two different types of conflicts of interest: personal and organizational. A personal conflict of interest means "a situation in which a covered employee has a financial interest, personal activity, or relationship that could impair the employee's ability to act impartially and in the best interest of the Government when performing under the contract." OCI, as described in the FAR, falls into three major categories: (1) unfair competitive advantage, (2) impaired objectivity, and (3) biased ground rules. A contractor might have an *unfair competitive advantage* if the contractor has unequal access to information that could help the contractor win a federal contract. Such an advantage could present itself if a contractor either impermissibly acquires proprietary information from federal personnel or obtains confidential or otherwise nonpublic information—referred to as "source selection information"—that is

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not accessible by its competitors. A contractor may have *impaired objectivity* or judgment when contract performance could affect the contractor's financial or other outside interests. *Biased ground rules* might exist when a federal contractor, through its performance of a federal contract, plays a role in establishing the rules for competition for another federal contract. While the FAR OCI provisions are generally applicable to most federal procurements, as noted in the regulations, OCI commonly arises in the context of federal contracts for consultation, professional advisory, management support, and federal contract performance services.

FAR Section 9.508 provides a number of illustrative OCI examples. An unfair competitive advantage example provides that, if an agency requests private companies to share proprietary information to support a research study conducted pursuant to a government contract, then the agency must generally require the contractor conducting the study to sign nondisclosure and confidentiality agreements requiring it to protect any proprietary information received and to use that information only for the purposes stipulated in the procurement contract. One impaired objectivity example notes that, if a contractor is hired by a federal regulatory agency to help the agency create a system for reviewing and processing industry license applications, then that contractor "should be prohibited from acting as a consultant to any of the applicants during its period of performance and for a reasonable period thereafter." A biased ground rules example notes that a contractor that is hired to develop a highly technical training program curriculum for agency personnel "may not be awarded a contract to conduct the training."

OCI Mitigation Responsibilities of Agencies and Contractor

FAR Subpart 9.5 imposes OCI-related responsibilities on both federal procurement personnel and contractors to identify, mitigate, and resolve apparent and actual OCI. Under the regulations, as early as possible in the procurement process, federal acquisition personnel must assess potential OCI and take measures to "[a]void, neutralize, or mitigate significant potential conflicts before contract award." In making the assessment, the contracting officer should generally solicit the advice of procurement counsel and technical specialists within the agency and evaluate other relevant information about the pool of prospective contractors who will likely bid on the contracts. To comply with this mandate, contracting officers can, and frequently do, require prospective contractors to include in contract proposal applications information "necessary to identify and evaluate potential organizational conflicts of interest or to develop recommended action." The FAR cautions, however, that "contracting officers first should seek [such] information from within the Government or from other readily available sources," such as publicly available trade publications or prior procurement contract-related information held by its own agency or other federal agencies. Additionally, "contracting officers should avoid creating unnecessary delays, burdensome information requirements, and excessive documentation."

When a contracting officer determines that an "acquisition involves a significant potential organizational conflict of interest," the officer must submit to the agency official overseeing the contract a written explanation of the potential OCI; a proposal for limiting, mitigating, or eliminating the OCI; a proposed OCI solicitation clause; and, if warranted, a draft OCI contract clause. The agency official must review the contracting officer's written proposal and either approve, amend, or reject it after assessing the costs and benefits of the proposal from both the contractor's and government's perspectives.

Under FAR Section 9.503, agency heads may waive any OCI-related requirement of FAR Subpart 9.5 upon a written determination that applying the requirement "in a particular situation would not be in the Government's interest." FAR Section 9.503 allows agency heads to delegate this waiver authority but only to the agency's lead procurement official or an agency official of a higher rank.

Regarding contractor responsibilities, OCI solicitation clauses often require prospective contractors to disclose in their bid proposals all actual or potential OCI that might arise in the context of performing the

services sought by the government based on the company's past, present, and planned future interests and activities and a proposed plan for limiting, mitigating, or eliminating those conflicts.

When incorporated in a contract, OCI clauses also frequently require contractors to disclose to the contracting officer any actual or potential OCI or certify that no such conflicts exist both before contract performance begins and afterward in a timely fashion. An OCI clause might also establish procedures that the contractor must implement to limit, mitigate, or eliminate conflicts. Such measures can include establishing firewalls that prevent interactions between employees who perform work under the federal procurement contract from those that do not, entering into nondisclosure agreements covering relevant nonpublic procurement information, imposing specific disclosure requirements to aid the government's ability to monitor mitigated conflicts or the development of a new one, and contractual restrictions on the contractor's ability to compete for or obtain future business that might result in OCI.

Enforcement

OCI contract clauses frequently include the potential remedies available to the government for a contractor's failure to comply with OCI responsibilities stipulated in the clause, including contract termination or initiating suspension or debarment proceedings against the contractor. The federal government may also be able to recoup payments made based on false OCI certifications. Under certain circumstances, contractors that submit claims for payment based on either knowingly made false OCI certifications or based on their knowing failure to comply with other OCI requirements could be subject to civil liability under various federal laws. Contractors could be subject to liability, for instance, under the False Claims Act, which generally makes it unlawful to knowingly defraud the federal government, or the Procurement Integrity Act, which generally makes it unlawful to knowingly obtain or disclose non-public, procurement-related "source selection information" or "contractor bid or proposal information."

For example, in the 2003 decision *Harrison v. Westinghouse Savannah River Company*, the U.S. Court of Appeals for the Fourth Circuit (Fourth Circuit) affirmed a district court's False Claims Act judgment against Westinghouse for failing to disclose to the Department of Energy (DOE) OCI that Westinghouse had with a subcontractor. Westinghouse, the prime contractor, drafted briefs seeking DOE's approval to enter into a government subcontract to perform a training program under the prime contract. After reviewing the briefs, DOE approved the subcontract and authorized Westinghouse to solicit bids for the work. Westinghouse ultimately chose General Physics Corporation (GPC) to perform the subcontract over several other companies.

In accordance with Westinghouse's solicitation for bids, GPC was required to certify that it held no OCI in relation to the subcontract for which it was bidding. Westinghouse, pursuant to its prime contract with DOE, was also required to submit a certification to DOE that no OCI existed between Westinghouse and GPC. In other words, Westinghouse could not have selected GPC for the subcontract without GPC's no-OCI certification, and DOE could not have approved the subcontract without Westinghouse's no-OCI certification. Westinghouse ultimately submitted more than $9 million in funding requests to DOE for the subcontract.

Despite both companies submitting no-OCI certifications, one of the three Westinghouse employees who reviewed and played a role in selecting GPC's bid had hired a GPC employee to help draft the briefs used to convince DOE to authorize the training program subcontract for which GPC was hired. Through the GPC employee's work drafting those briefs, the employee gained private, sensitive bid proposal information that was unavailable to the other companies that submitted bids to perform the subcontract, thereby giving GPC an unfair competitive advantage over the other bidders. As a result, a whistleblower filed a False Claims Act lawsuit against Westinghouse.

In order to state a claim under the False Claims Act, a plaintiff must prove:

1. that the defendant made a false statement or engaged in a fraudulent course of conduct;
2. such statement or conduct was made or carried out with the requisite scienter (i.e., knowingly);
3. the statement or conduct was material; and
4. the statement or conduct caused the government to pay out money or to forfeit money due.

The Fourth Circuit affirmed a district court's judgment that Westinghouse violated the False Claims Act because (1) the no-OCI certification was false; (2) at least one Westinghouse employee knew it was false; (3) the no-OCI certification was material because it "plays an important role in the procurement process by ensuring that all government contracts are bid fairly;" and (4) as a prerequisite to approval of the subcontract, the false OCI certification caused DOE to pay millions for its performance.

Similar to the False Claims Act, the Procurement Integrity Act and its implementing regulations, among other things, generally bar certain current and former federal employees and individuals who have acted on behalf of or advised the federal government on a procurement matter from obtaining or disclosing without authorization "source selection information" or "contractor bid or proposal information" submitted before the award of the related contract. Contractor bid or proposal information, which involves information provided in a procurement contract bid proposal to an agency, and source selection information, which involves information used by an agency to evaluate bid proposals, may include nonpublic information such as:

- bid prices;
- proprietary manufacturing techniques, processes, and operations;
- proposed costs or prices, including labor costs;
- technical evaluation plans or proposals;
- bid rankings; and
- source selection panel, board, or advisory council reports and evaluations

Violations of the Procurement Integrity Act can result in civil, criminal, and administrative penalties. Specifically, violators could be subject to imprisonment of up to five years and civil penalties of $50,000 per violation (or $500,000 per violation for organizations) "plus twice the amount of compensation the individual [or organization] received or offered for the prohibited conduct." Additionally, the Procurement Integrity Act authorizes federal agencies to initiate suspension or debarment proceedings against violators of the act or to terminate or cancel contracts and recover amounts spent on contracts associated with Procurement Integrity Act violations.

Considerations for Congress

In light of the recently reported concerns of potential conflicts arising from firms advising a federal regulatory agency while simultaneously advising companies that agency regulates, Congress might consider legislation to modify current legal parameters governing OCI. Such legislation could increase transparency over potential contractor OCI or agency administration of FAR Subpart 9.5; eliminate or reduce agency discretion in the implementation of FAR Subpart 9.5 standards; or enhance barriers to government contractor eligibility, either writ large or in relation to a subset of procurement contracts that, in Congress's view, raise heightened OCI concerns. On the other hand, Congress might also consider legislation that would reduce or eliminate some or all of the current OCI legal requirements or enhance federal procurement personnel's discretion to waive OCI standards as a way to make the acquisition process more efficient or to increase the eligible contractor pool. Some potential legislative proposals are discussed below.

From a contractor transparency perspective, Congress might consider imposing additional OCI-related disclosure requirements on contractors. In that vein, the Preventing Organizational Conflicts of Interest in Federal Acquisition Act (S. 3905/H.R. 7602) would, among other things, require the FAR Council to promulgate regulations to update OCI definitions in the FAR specifically to address "contractor relationships with public, private, domestic, and foreign entities that may cause ... undue influence" and to develop new standard OCI solicitation and contract clauses. Relatedly, Congress could also require prospective contractors, in addition to self-disclosing OCI as part of a bid proposal, to disclose proactively specified business interests regardless of whether the company believes such interests raise OCI concerns. Such mandatory disclosures could apply to financial interests above certain monetary thresholds or that are connected to an industry that is regulated by the agency with which the contractor is under contract. Contractors that are awarded federal contracts could also be subject to mandatory contract clauses requiring ongoing updates of their financial interests during contract performance to account for new business activities.

These contractor disclosure proposals could make it easier for agencies to assess and address OCI-related concerns as required under FAR Subpart 9.5. However, they might also increase the administrative costs associated with bidding on a federal contract in the form of the "unnecessary delays, burdensome information requirements, and excessive documentation" concerns that FAR Subpart 9.5 cautions contracting officers to avoid. Moreover, such measures could dissuade companies from bidding on contracts because of the heightened costs or out of a desire to avoid sharing potentially sensitive information on a bid the company is not certain to win.

Congress could also increase transparency of agency implementation of OCI policies by requiring agencies to notify a federal entity, such as the Government Accountability Office (GAO) or congressional committees of jurisdiction, each time they waive OCI-related requirements. GAO, in turn, could be required to issue an annual report on the OCI-related agency disclosures. This information could help Congress evaluate the need for legislative changes and identify areas of interest for congressional oversight and investigations. Congress could also require contractors to comply with OCI mitigation plans as a condition of government contract performance.

Congress might also consider narrowing or eliminating agency authority to waive OCI requirements. Similarly, Congress could impose bright-line rules that make companies ineligible for receiving certain federal contracts if they hold specific business interests. For example, companies could be barred from being awarded contracts or a specified subset of contracts (e.g., those for consulting services) with a federal regulatory agency if they have business ties with private companies under that agency's regulatory jurisdiction. These measures might increase the likelihood that contractors would perform contracts in the government's best interests rather than their own. On the other hand, such measures might make it more difficult for agencies to find contractors capable of performing the contract.

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