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Changes to TMA's Organizational Conflicts of Interest (OCI) Approach



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Objectives



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- Brief recap of OCI fundamentals.
- Understand the evolution of TMA OCI policy, and that the case-by-case approach is applicable *today*.
- Understand what a case-by-case approach requires.
- Discuss the Directive being developed.



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FAR treatment of OCI



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FAR References

FAR 2.01 - “**Organizational Conflict of Interest**” means that 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.”

FAR 9.5 - “An **organizational conflict of interest** may result when factors create an actual or potential conflict of interest on an instant contract, or when the nature of the work to be performed on the instant contract creates an actual or potential conflict of interest on a future acquisition. In the latter case, some restrictions on future activities of the contractor may be required.”

FAR 9.504 - A Contracting Officer shall identify and then avoid, neutralize or mitigate significant **conflicts** before contract award.



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There are three elements to OCI



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- An OCI is comprised of the following three elements:
 - The conflicted party(s)
 - All parties associated with an organization.
 - The conflicted party(s) interest
 - Usually readily identifiable, often times financial.
 - A responsibility to a third party
 - Government, another client, or simply access to fair playing field or judgment.



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And there are several types of OCI



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- GAO protest decisions lay out three primary types of OCI:
 1. Unequal Access to Information
 - Where the contractor has access to nonpublic information.
 - Example – Contractor is aware of the substance of a GCE
 2. Biased Ground Rules
 - Where the contractor could ‘tilt the playing field’ in their favor.
 - Example – Contractor assisted in developing requirements.
 3. Impaired Objectivity
 - Where the contractor has the opportunity to evaluate itself or a partner, either directly or indirectly.
 - Example – Contractor provides input for review of teaming partner.



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Certain situations frequently give rise to OCI



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- Be on the lookout for:
 - Common Ownership
 - Parties sharing ownership are reasonably presumed to have a shared interest.
 - Self-subcontracting
 - Subsidiaries and affiliates – essentially sub-contracting work to yourself.
 - Provision of Evaluation Services
 - Parties participating in source selection or evaluation efforts are particularly susceptible to OCI issues.



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There are three ways to address potential OCI



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- Prior to contract award, the CO must ensure any potential OCI issues have been addressed through:
 - Avoidance
 - Prevent OCI from being created by excluding sources or eliminating portions of work.
 - Mitigation
 - Actions taken to reduce or alleviate OCI.
 - May require Government, Contractor, or Joint action.
 - Neutralization
 - Excluding Contractor participation in source selection and barring access to sensitive information.

- * Not all OCIs can be mitigated or neutralized; these must be avoided.



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What kinds of problems result when OCI is not addressed?



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- Inadequately addressed OCI can lead to:
 - Unfair competition.
 - Increased costs to the Government.
 - Diminished value of an acquisition.
 - Overturning of an award decision.
 - Complicated source selection.
 - Mitigation challenges for contractors.
 - Diminished confidence in the Federal procurement process.



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A robust OCI policy is necessary to avoid these problems



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- A robust OCI policy should:
 1. Prevent the existence of conflicting roles that might bias a contractor's judgment; and
 2. Prevent unfair competitive advantage, which may exist where a contractor competing for award of any federal contract possesses;
 - a) Proprietary information obtained from a Government official without proper authorization; or
 - b) Source selection information relevant to the contract but not available to all competitors, and such information would assist that contractor in obtaining the contract.
 3. Provide for full and open competition to the maximum extent practicable.



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TMA has employed different OCI approaches over the years



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Pre - 2001	2001 - 2009		2009 - Present
Ad Hoc	Category-based*		Case-by-case
+ 0 # + @ 0 # # 0 & & + # @ # 0 0 0 # 0 + 0 # 0	Cat-1	++++	+ + + @ @ 0 0 0 0 0 0 0 0 0 # # # # # # Possible Mitigation Plans
	Cat-2	oooooooooooo	
	Cat-3	#####	

Advantages and Disadvantages of each approach

Advantages	Disadvantages	Advantages	Disadvantages	Advantages	Disadvantages
<ul style="list-style-type: none"> ➤ Maximum flexibility ➤ Maximum competition 	<ul style="list-style-type: none"> ➤ Resource intensive ➤ Difficult to manage ➤ Unrationalized vendor base ➤ Existence of perceived and actual OCI 	<ul style="list-style-type: none"> ➤ Role-based approach ➤ Minimal Gov. oversight ➤ Rationalized vendor base ➤ Good job avoiding OCI 	<ul style="list-style-type: none"> ➤ Lack of flexibility ➤ Decreased competition ➤ Not cost effective 	<ul style="list-style-type: none"> ➤ Expanded potential vendor pool ➤ More Contractor flexibility ➤ Increased competition ➤ More cost effective 	<ul style="list-style-type: none"> ➤ Increased oversight and coordination with TMA and external offices

* Applied to acquisition of non-purchased care services only.



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The category-based* approach was effective for many years



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- TMA created three broad categories for the purposes of identifying, avoiding, and mitigating OCIs in accordance with FAR Subpart 9.5:

Category 1: TMA Internal Support

Services which, by their very nature, give the Contractor access to extensive data about the contracts of all other TMA contractors.

Category 2: Program Management Support

Services which assist TMA in planning and managing its activities and programs.

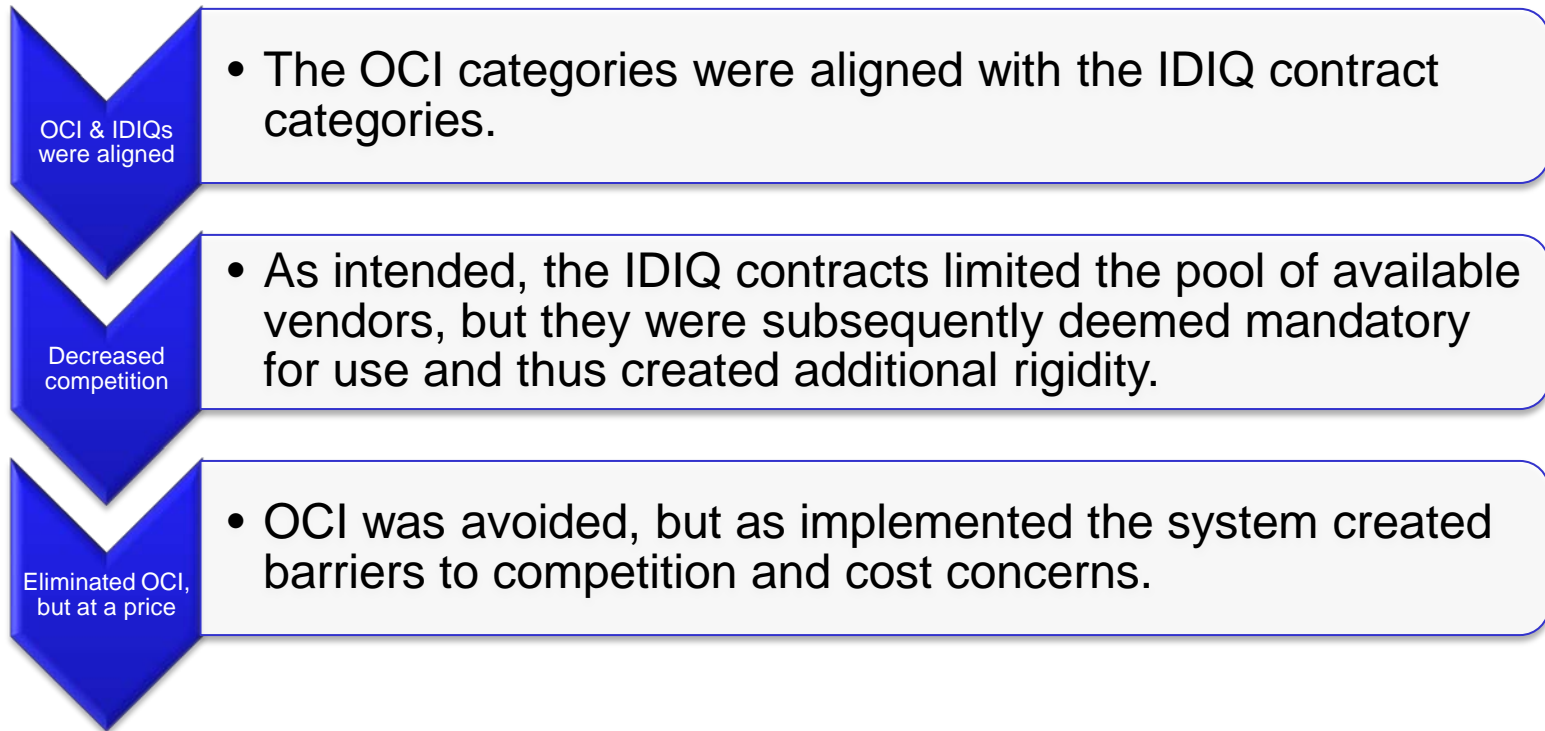
Category 3: Product Support

Services or end items required to meet the mission requirements of TMA's non-purchased care activities and programs

* Applied to acquisition of non-purchased care services only.



But the category-based* approach was not without problems



As a result, TMA rescinded the category-based approach in favor of the current case-by-case approach

* Applied to acquisition of non-purchased care services only.



TMA adopted a case-by-case OCI approach in October 2009



- RADM Hunter's 10/1/09 memo* states-

"[t]his rescission...eliminates the requirement to restrict procurements to existing contracting vehicles with previously established Preferred Contracting Activities"

"[o]rganizational conflicts of interest shall be handled *on a case-by-case basis*"

- TMA Contracting Officers were no longer required to utilize the existing IDIQ contract vehicles or contracting activities, or include category-based OCI clause language in solicitations and awards.
- COs should not wait to perform case-by-case evaluation, even though a Tricare Acquisition Directive (TAD) is being developed.

* Memo, *Policy for the Acquisition of Non-Purchased Care Services*, issued 10/1/09



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TMA's case-by-case OCI approach is built on certain guidelines



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- COs shall apply sound business judgment in evaluating the particular facts of every action, relying upon input from requiring offices, OGC, or other sources, where appropriate.
- Offerors and Contractors must raise potential OCI issues and submit an OCI avoidance or mitigation plan, if warranted, which is evaluated by the CO, Requiring Office, and OGC for sufficiency.
- COs shall use sound discretion and include appropriate clause language in solicitations and contracts where applicable.
- COs shall coordinate with the Competition Advocate before exclusion of a contractor from competition.
- All OCI analysis and determinations, as well as awardee names and services provided will be captured in a central repository.



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AM&S is developing a Directive to formalize a case-by-case approach



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- A Tricare Acquisition Directive (TAD) is being developed to formalize the existing case-by-case OCI policy in accordance with FAR 9.5, DFARS 209.5, and DFARS 203.171 and Adm. Hunter's memo.
- The new OCI policy will require fact-specific evaluations of each individual action.
 - Rather than evaluating actions based solely on a category of service provided to TMA, the new policy will evaluate OCI based on particular facts surrounding an action.
- New OCI clause language will be distributed with the Directive.
 - Clauses will be customizable based upon the nature of the services required.
 - There are currently five options aligned to the support types outlined in FAR 9.5.
 - Clauses will require the Contractor to identify potential OCI issues and submit mitigation plans where appropriate.



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The upcoming Directive will also define several key roles



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- Contracting Officers (CO)
 - Coordinate the overall evaluation and mitigation of potential OCI and provide required documentation.
- Competition Advocate
 - Provide guidance to COs to resolve potential OCI issues, particularly prior to a contractor being eliminated.
- Program Managers
 - Assist COs in identifying and evaluating potential OCI issues and evaluating mitigation plans.
- Office of General Counsel
 - Assist in evaluating potential OCI issues and provide counsel regarding mitigation plans and use of specific language in solicitations and contracts.



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In summary...



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- OCI may give rise to various problems, so all potential OCI must be addressed for every procurement action.
- TMA's historical category-based OCI policy was replaced by a case-by-case OCI approach in October 2009.
- A Directive is being developed to formalize existing policy, develop new mandatory OCI clause language, and define responsibilities.
- As always, COs should coordinate with their Chiefs/Directors to ensure OCI is adequately managed on a case-by-case basis.



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Next Steps



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- Coordinate Directive and adjudicate comments.
- Finalize and solicit signature for Directive.
- Support compliance through case-by-case OCI training.
- Work with external contracting offices to identify strategy for existing Multiple Award Contracts still utilizing the category-based OCI clauses.



Questions?