

# Organizational Conflicts of Interest



## NDIA Annual Missile Defense Small Business Conference

**Norb Diaz, Robbie Phifer, Kelli Beene, Flayo Kirk**  
**Missile Defense Agency**  
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# Introduction

**“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 2.101)**



# Types of OCIs

## ❑ Unequal Access to Information

- **Example: Company A provides A&AS services for Agency B's procurement office and has access to the independent government cost estimate for a procurement. Company C, a wholly owned subsidiary of Company A, wants to propose on the procurement**

## ❑ Biased Ground Rules

- **Example: Company A works with Agency B to prepare a statement of work for a RFP for maintenance services. Company A pursues the maintenance services contract.**

## ❑ Impaired Objectivity

- **Example: Division X of Company A has an ongoing contract to provide simulation data analysis for Agency B. Division Z of Company A submits a proposal in response to an Agency B solicitation seeking a contractor to design and develop a rocket engine. Agency B intends to ask Division X of Company A to run simulations on all of the proposals.**



# Responsibilities of Agency

- **Contracting officers are to avoid, neutralize, or mitigate potential significant conflicts of interest so as to prevent an unfair competitive advantage or the existence of conflicting roles that might impair a contractor's objectivity.**
- **Contracting officers shall examine each potential OCI individually on the basis of its particular facts and the nature of the proposed contract.**
- **Contracting officers are to exercise common sense, good judgment, and sound discretion.**
  - ❑ **GAO held that the agency had “broad discretion” to make an OCI determination.**  
**Lucent Technology World Services, Inc., B-295462, March 2, 2005.**



# Responsibilities of Agency

## Key Ways to Resolve OCIs

- **Avoid – includes excluding certain sources from a competition or eliminate a segment of work from a contract.**
- **Neutralize – excluding contractor participation in source selection activities or barring access to sensitive data**
- **Mitigate – Reduce or alleviate the impact of an unavoidable OCI. Contractor creates an OCI Mitigation Plan.**

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# Responsibilities of Contractor

- **Contractor prepares Adequate Mitigation Plan (when one required)**
- **Mitigation Plan Proposes actions to Identify and Reduce Actual or Apparent OCIs to an Acceptable level**
- **Mitigation Plan must be based on Accurate Facts, be Reasonable, and be Followed**
- **Plan should address the steps the Contractor will take to preclude any Perception that it would Favor its own Products or Services**



# Mitigation Plans - Purpose

- **Purpose is to protect Government's interest**
  - **Examples of Inadequate Protection**
    - All OCIs not considered – PURVIS Systems Inc., B-293807.3, B-293807.4, August 16, 2004.
    - “Ad hoc” supervision by Government personnel is not acceptable. Nortel Government Solutions, Inc., B- 299522.5, B-299522.6, December 30, 2008.
- **Some OCIs may not be mitigatable. (Aetna Government Health Plans, Inc., B-254397.15, July 27, 1995)**
  - Biased Ground Rules/Impaired Objectivity
  - The agency head or designee may waive any general rule or procedure of this subpart by determining that its application in a particular situation would not be in the Government's interest. (FAR 9.503)
  - Waiver request must be in writing and set forth the extent of the conflict.





# Mitigation Plans - Considerations

- Is one entity supplying components and the other entity evaluating efficacy of that system?
- Level of analysis is not work being performed but potential scope of work
- Not just prime contracts with the Government
- Joint venture and teaming agreements
- Subcontracts
- Business plans
  - Current and future business



# Mitigation Plans - Common Elements

- **Non-Disclosure Agreements**
- **Controlled Access to Sensitive Information**
- **Establishment of an Employee OCI Awareness/Compliance program**
- **Physical Separation of Contract Employees from Sensitive Data**
- **Organizational Separation**
- **Management Separation**
- **Limitation on Personnel Transfers**

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# Mitigation Plans - Techniques

•Firewalls can resolve unequal access to information OCIs, but not biased ground rules and impaired objectivity OCIs.

Protest on Unequal Access OCI “denied where record shows that the awardee had in place a firewall segregating the team that prepared its price quotation from on-site employees with access to pricing information.”

NetStar-1 Gov’t Consulting, Inc., B-404025.2, May 4, 2011.

“[D]ue to the ultimate relationship of one entity to another, a firewall would not resolve an organizational conflict of interest involving biased ground rules.”

The LEADS Corporation, B-292465, September 26, 2003.

A firewall “does not resolve an OCI involving potentially impaired objectivity.” Overlook Systems Technologies, Inc., B-298099.4, B-298099.5, November 28, 2006.

A firewall is “virtually irrelevant” to an impaired objectivity OCI.

Aetna Gov’t Health Plans, Inc., B 254397.15 et al., July 27, 1995.



# Mitigation Plans - Techniques

## Firewall Elements:

- Define the Information covered**
- Identify Responsibility for Procedural Compliance**
- Agreement on Purposes for which the Information may be used**
- Procedures to Protect the Information (Security, Tracking)**
- Limits on Dissemination (Need to Know)**
- Compliance (Audits, Corrective Actions)**



# Mitigation Plans - Techniques

## Firewalled Contractor:

- **Prime contractor's impaired objectivity OCI.**
  - ❑ **Subcontractor performs conflicted task and reports directly to Agency.**
  - ❑ **"We have found, in other 'impaired objectivity' OCI situations, that subcontracting or transferring work to a separate entity, and establishing a firewall around the impaired entity, can reasonably mitigate these types of OCIs." Business Consulting Associates, LLC, B-299758.2, August 1, 2007.**
  
- **Subcontractor's impaired objectivity OCI.**
  - ❑ **Other team member performs conflicted task.**
  - ❑ **"[A]gency reasonably determined that awardee's plan to transfer the affected work to the other team member (the prime contractor awardee), which was fully capable of performing the work independently of the team member with an OCI, was acceptable." Id.**



# OCI Exchanges are not Discussions Unless

**•GAO has held that where an agency conducts exchanges with an Offeror regarding the Offeror's plan to mitigate identified OCIs, such exchanges do not constitute discussions and, as a consequence, there is no requirement to hold discussions with other offerors.**

**C2C Solutions, Inc.; TrustSolutions, LLC, B-401106.6; B-401106.7, June 21, 2010.**

**• GAO has also opined that reopening discussions would be appropriate where exchanges regarding an Offeror's OCIs and Mitigation strategy result in material changes to the Offeror's proposal in terms of its technical approach or price.**

**Cahaba Safeguard Administrators, LLC, B-401842.2, January 25, 2010.**



# Questions

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