

ORGANIZATIONAL CONFLICTS OF INTEREST

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AGENDA

- 1) Introduction**
 - a) What is an Organizational Conflict of Interest**
 - b) What are the State and federal laws relating to OCIs**
 - **State: HRS § 103D-405**
 - **Fed: Biased Ground Rules/Unfair Competitive Advantage OCIs**
 - **Fed: Unequal Access to Information/Unfair Competitive Advantage OCIs**
 - **Fed: Impaired Objectivity OCIs**

- 2) Why Are Organizational Conflicts of Interest Important?**
 - a) The nature of SSFM's work**
 - b) On what types of procurements are OCIs encountered**
(examples of types of contracts)
 - c) How OCIs are handled differently by federal agencies vs. State/County agencies**
 - d) Implications for the contractor**

- 3) Mitigation of OCIs**
 - a) Mitigation plans - examples**
 - b) How are mitigation plans implemented**
 - c) Contractors' responsibility to recognize and address OCI's (Cori)**

- 4) Suggestions for Addressing OCIs in the Procurement Process**

HANDOUT

1) HAWAII LAW RE ORGANIZATIONAL CONFLICTS OF INTEREST

- a) Hawaii procurement law addresses only limited circumstances where an OCI exists: it prohibits a contractor who participated in the development of a solicitation package from receiving the follow-on contract.
- b) Hawaii Revised Statutes ("HRS") § 103D-405: "Maximum Practicable Competition"
 - The code provides in relevant part:
 - (a) All specifications shall seek to promote overall economy for the purpose intended and encourage competition in satisfying the State's needs, and shall not be unduly restrictive.
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 - (d) Outside contractors may be utilized to prepare specifications and work statements in the development of a solicitation. Contractors paid for those services shall be precluded from bidding on or receiving a contract when they participated in any way in the development of the solicitation package or any resulting contract.
 - The statute relates to instances where a design contractor prepares a specific solicitation for compensation and then seeks to provide the goods or services defined by the specification.
- c) Hawaii Administrative Rule ("HAR") § 3-122-13(e): "A contractor paid for services to develop or prepare specifications or work statements shall be precluded from submitting an offer or receiving a contract for that particular solicitation."

2) ORGANIZATIONAL CONFLICTS OF INTEREST RECOGNIZED UNDER FEDERAL LAW

- (a) Biased Ground Rules/Unfair Competitive Advantage OCIs
 - "Biased ground rules" provide a contractor an "unfair competitive advantage."
 - This category of OCI is similar to the Hawaii OCI law.
 - Sample situation: a contractor, as part of its performance of one government contract, is in a position to affect the competition, intentionally or not, in favor of itself for another government contract.
 - "This category of OCIs focuses on the concerns that a company may, by participating in the process of setting procurement ground rules, have special knowledge of the agency's future requirements that may skew the competition in its favor." *Turner Construction Co., Inc. v. United States and McCarthy/Hunt JV, et al*, 645 F.3d 1377, 82 (Fed. Cir. 2011).

- Sample case:
The case of *Etek, Inc.*, ¶103,341, Comp. Gen. Dec. No. B-234709, Jul. 11, 1989 illustrates this type of OCI. *Etek* involved a protest of an anticipated award of a contract to Architectural Energy Corporation (AEC) under a Department of Energy request for proposal (RFP). The RFP solicited proposals to provide support services for Task 12 of the International Energy Agency (IEA) program for solar heating and cooling. Task 12 was part of an ongoing program where participating countries worked to design solar energy systems. AEC had previously been awarded a DOE contract to perform a prior IEA Task (Task 8) involving conducting surveys and analyses of design tools for solar energy systems. In finding no conflict of interest, the agency reasoned Task 8, while a forerunner of Task 12, was only one part of the whole planning process for the subsequent task, and EAC had not actually been involved in the development of the Task 12 statement of work or evaluation criteria. The Comp. Gen. said:

. . . a contractor with prior involvement in an ongoing program [is not automatically excluded] from competing for successor contracts . . . only . . . those firms that were in a position to influence, for their own benefit, the development of the statement of work for the follow-on contracts [are disqualified]. (citation omitted) We do not think this was the case here since, again, EAC had no involvement in the preparation of the actual work statement for Task 12, but simply furnished background information regarding its prior work effort.

(b) Unequal Access to Information/Unfair Competitive Advantage OCIs.

- The second category is based on “unequal access to information” leading to an unfair competitive advantage.
- Arises when a contractor has access to nonpublic information as part of a government contract and where that information may provide it an unfair competitive advantage in a later competition for a government contract.
- Under this analysis, an advantage may be an unfair competitive advantage if one offeror, and no other offeror, has competitively useful nonpublic information, that would assist it in obtaining the contract.
- An offeror may possess unique information, advantages, and capabilities due to its prior experience under a government contract – either as an incumbent contractor or otherwise – without it being an “unfair competitive advantage.” *CACI, Inc.* –Fed., B-403064.2, Jan. 28, 2011, 2011 CPD ¶131, at 10. To raise an OCI issue, the contractor must have access to information beyond that ordinarily available to an incumbent contractor and the “hard facts” must show the advantage gained by that information is “significant” and “unfair,” mere innuendo is not enough. *See Turner, supra*, at 1386; *Aetna Gov’t Health Plans, Inc.; Foundation Health Fed. Servs., Inc.*, B-254397.15 et al., July 27, 1995, 95-2 CPD ¶ 129, at 18.
- [F]or an organizational conflict of interest to exist based upon unequal information, there must be something more than mere incumbency, that is, indication that: (i)

the awardee was so embedded in the agency as to provide it with insight into the agency's operations beyond that which would be expected of a typical government contractor; (ii) the awardee had obtained materials related to the specifications or statement of work for the instant procurement; or (iii) some other "preferred treatment or ... agency action" has occurred. *ARINC Engineering Services, LLC v. United States*, 77 Fed.Cl. 196, 203-204 (2007)(Footnotes omitted).

- A contracting officer's duty to mitigate the OCI in these circumstances extends only to instances where there are "significant potential conflicts" and not where the finding of an OCI relies on inferences based upon "suspicion and innuendo." *Turner, supra*, at 1386. Moreover, an agency may remedy any potential unequal access to information unfair competitive advantage OCI by disclosing the nonpublic information. *Sierra Military Health Servs., Inc. v. United States*, 58 Fed.Cl. 573, 583 (2003).

(c) Impaired Objectivity OCIs

- The final OCI category identified by the courts and Comptroller General is an "impaired objectivity" OCI.
- Arises in situations where a firm's work under one government contract entails it evaluating its own work under circumstances which might impair the firm's objectivity and ability to render impartial advice to the government.
- The below Comptroller decision provides a meaningful summary of the factors and considerations the government should apply to determine whether any potential OCI is "significant" and warranting exclusion of a contractor from competition. The Comptroller General explained this type of OCI by stating:
- The FAR states that "[c]ontracts for the evaluation of offers for products or services shall not be awarded to a contractor that will evaluate its own offers for products or services, or those of a competitor, without proper safeguards to ensure objectivity to protect the Government's interest." § 9.505-3, Providing Evaluation Services. The FAR advises contracting officers to examine each situation individually and to exercise common sense, good judgment, and sound discretion in assessing whether a significant potential conflict exists and in developing an appropriate way to resolve it. *Id.* at §9.505.

... An impaired objectivity OCI ... arises where a firm's ability to render impartial advice to the government would be undermined by the firm's competing interests. FAR §9.505-3 ... The concern in such impaired objectivity situations is that a firm's ability to render impartial advice to the government will be undermined by its relationship to the product or service being evaluated. (Citations omitted).

Guident Technologies, Inc., ¶113,767, Comp. Gen. Dec. No. B-405112.3, Jun. 4, 2012, at pp. 3-4.

3) MITIGATION OF OCIs

- Contractor should propose procedures to identify, evaluate, report, avoid, neutralize and/or mitigate OCIs when possible (Avoidance or Mitigation Plan)
- Appoint one responsible top executive/managerial person to oversee
- Must train employees to recognize OCIs and implement policies (initial and periodic training)
- Need Contracting Officer approval
- Need monitoring to ensure Plan is being implemented properly
- Need suitable disciplinary action for those not complying
- Should go hand in hand with overall Company ethics program

a) Biased Ground Rules/Unfair Competitive Advantage OCIs

- Need to ensure prior involvement of contractor was truly one where contractor was in a position to influence, for its own benefit, the development of the statement of work (description of the work to be performed under the contract) for the contract being developed.

b) Unequal Access to Information/Unfair Competitive Advantage OCIs

- Make the information public to level the playing field
- Duty to mitigate only kicks in where there is a significant potential conflict- and not an OCI based on suspicion or innuendo

d) Impaired Objectivity OCIs

- Recusal: contractor should not oversee work on its own specifications and designs
- Screen and isolate design staff personnel & subs
- If cannot avoid or mitigate – KO needs to assign work to another contractor (works for task order situation)

4) CONTRACTORS' DUTY TO RECOGNIZE AND ADDRESS OCIS

The individual contractor's reputation for integrity is a critical asset in performing government contract work. A basic requirement is that the contractor must always act with integrity. See applicable state and federal law:

HRS § 103D-101. Requirements of ethical public procurement.

(a) All public employees shall conduct and participate in public procurement in an ethical manner. .

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(b) Any actual or prospective bidder, offeror, [contractor], or business taking part in the conduct of public procurement, shall act in good faith to practice purchasing ethics, and when applicable, display business integrity as a responsible offeror through the public procurement process, including but not limited to the following:

(1) Avoiding the intent and appearance of unethical behavior or business practices;

(2) Refraining from any activity that would create the appearance of impropriety or conflicts of personal interest and the interests of the State or counties;

(3) Identifying and eliminating any conflicts of interest; and

(4) Ensuring that all persons are afforded an equal opportunity to compete in a fair and open environment.

(c) All parties involved in the negotiation, performance, or administration of state contracts shall act in good faith.

FAR 3.1002 Policy

(a) Government contractors must conduct themselves with the highest degree of integrity and honesty.

(b) Contractors should have a written code of business ethics and conduct. To promote compliance with such code of business ethics and conduct, contractors should have an employee business ethics and compliance training program and an internal control system

The contractor's sensitivity to OCIs and actions to inform the government of any potential conflict are a central aspect of the duty to act with integrity and ensure all procurements are fairly competed. Contractor actions to give the government early notice of a potential OCI and the contractor's offer of meaningful OCI avoidance/mitigation plans provide the government confidence in the integrity of the offeror/contractor.