



Avoiding a Bid Protest Based on Key Personnel Issues:

The Internet protest ground – Is your company one click away from losing its contract award?



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Background

- Key personnel protest grounds frequently arise in one of two scenarios:
 - A competitor searches an awardee's current employment openings posted to its website for positions that appear to be for a key position under a certain procurement.
 - A protester's outside counsel receives a copy of your technical/staffing proposal as part of the Agency Report in a bid protest and reviews the current job status and/or qualifications of the awardee's key personnel to ensure they meet the requirements set forth in the solicitation.
 - On occasion, an unsuccessful offeror or its employee may acquire first-hand information that indicates the unavailability of an awardee's key personnel.
- As long as a protester has "some evidence" of the unavailability of an awardee's key personnel, a protest ground can be raised.

Background

- Why are key personnel protest grounds so challenging?
- Overview of common key personnel requirements in a solicitation
- Responsiveness vs. contract administration
- GAO's 100-day calendar to resolve a protest
- Agency takes corrective action and places the timeline for the award decision in limbo
- Many companies simply cannot afford to maintain a standing army while corrective action is pending
- Employees can become worried that the contract award may be overturned

Sample Solicitation Provisions Concerning Key Personnel

- Section L Instructions
 - Staffing Plan Including Key Personnel
 - (a) Propose a staffing plan that describes how it will satisfy contract requirements, including how it will acquire and retain qualified and experienced personnel. The Offeror shall provide a Staffing Matrix using the format provided in Attachment N.
 - (b) Provide résumés for all proposed Key Personnel. The résumé must include:
 - Employment history, including employer's name, position title, dates of employment (MM/YYYY-MM/YYYY), duties, and responsibilities;
 - Applicable skills, experience, expertise, and qualifications; and
 - Relevant education, any credentials and/or certifications (CAP, CISSP, OCP, COBIT, etc.)
 - (c) Provide commitment letter with signatures of Key Personnel confirming their intention to serve in the stated position at contract award.
- Section M Evaluation Criteria
 - Key Personnel / Personnel Qualifications: The Offeror shall detail in its technical proposal how it shall meet the requirements stated in the Statement of Work (SOW). Proposals must include résumés of key personnel; the minimum education level required of individual personnel for successful performance; the knowledge, skill, and degree of expertise required for successful performance; the current, quality of, and depth of experience of individual personnel required for successful performance.

Common Key Personnel Qualifications and Proposal Requirements

- Résumés
 - Education
 - Experience
 - Certifications
- Letters of Commitment/Letters of Intent

What if One of My Key Personnel Resigns?

- Departure of any key person can be detrimental to an offeror's chances of receiving and/or maintaining an award.
- Key personnel are a material requirement; thus the unavailability of a key person can render a proposal technically unacceptable and, as a result, unawardable.
- Moreover, failure to provide required résumés or letters of commitment for key personnel can render a proposal technically unacceptable.
 - When required by the solicitation, résumés are a material requirement. *See Pioneering Evolution, LLC*, B-412016, B-412016.2, Dec. 8, 2015, 2015 CPD ¶ 385 at 8 (“When a solicitation requires résumés for key personnel, these form a material requirement of the solicitation.”).
 - Letters of commitment/intent also constitute material solicitation requirements. *See Datasource, Inc.*, B-412468, Feb. 16, 2016, 2016 CPD ¶ 59 at 2; *see also Special Operations Group, Inc.*, B-287013, B-287013.2, Mar. 30, 2001, 2001 CPD ¶ 73 at 4 (finding failure to comply with letter of intent requirement for proposed project manager rendered proposal technically unacceptable).

Allegations of Bait-and-Switch of Key Personnel

- A commonly raised protest ground concerning key personnel is that the awardee has engaged in a “bait-and-switch,” which is an intentional misrepresentation concerning proposed personnel’s availability for performance.
- The GAO “will consider allegations that an offeror proposed personnel that it did not have a reasonable basis to expect to provide during contract performance in order to obtain a more favorable evaluation, as such a material misrepresentation has an adverse effect on the integrity of the competitive procurement system.” *T3I Sols., LLC*, B-418034, B-418034.2, Dec. 13, 2019, 2019 CPD ¶ 428 at 5; *see also Patricio Enterprises Inc.*, B-412738, B-412738.2, May 26, 2016, 2016 CPD ¶ 145 at 4.
- In order to establish an impermissible “bait and switch,” a protester must show: “(1) that the awardee either knowingly or negligently represented that it would rely on specific personnel that it did not have a reasonable basis to expect to furnish during contract performance, (2) that the misrepresentation was relied on by the agency, and (3) that the agency’s reliance on the misrepresentation had a material effect on the evaluation results.” *Id.*
- Moreover, an offeror “may not represent the commitment of incumbent employees based only on a hope or belief that the offeror will ultimately be able to make good on its representation.” *Sev1tech, Inc.*, B-416811, B-416811.2, Dec. 18, 2018, 2018 CPD ¶ 429 at 5.

Key GAO Decisions Concerning Key Personnel

Paradigm Techs., Inc., B-409221.2, B-409221.3, Aug. 1, 2014, 2014 CPD ¶ 257

- In 2014, the GAO sustained a protest by Paradigm Technologies, Inc. (“Paradigm”), challenging the Missile Defense Agency’s (MDA) award of a contract to Booz Allen Hamilton, Inc. (“Booz Allen”), where Booz Allen’s proposed contract program manager (PM), a key personnel position, became unavailable after the time for submission of proposals, but before the award. Booz Allen only informed the agency of the PM’s departure after they received the award.
- Paradigm protested, alleging that Booz Allen knew of the PM’s unavailability as soon as they were aware she accepted a position at another firm. MDA took corrective action, leading the GAO to dismiss Paradigm’s first protest.
- After reevaluation, the agency re-awarded the contract to Booz Allen. Therein, MDA assessed Booz Allen the same adjectival rating for the key personnel subfactor, only assigning a weakness for its failure to provide one of the two required key personnel under the solicitation. Specifically, the agency noted that the increased risk caused by Booz Allen’s failure to provide a PM was somewhat mitigated by Booz Allen’s demonstrated recruiting and hiring abilities.
- Paradigm protested the new award, alleging that Booz Allen should have been found unacceptable and unawardable for failure to adhere to material solicitation requirements.
- The GAO agreed, finding that the key personnel requirement was a material solicitation requirement, and that a simple reevaluation of the Booz Allen proposal without proposal revisions should have led the agency to find Booz Allen ineligible for award. The GAO recommended that MDA either disqualify Booz Allen from the existing competition, or reopen the competition and request new proposal revisions.
- **Key Takeaway: The GAO emphasized that “it is an offeror’s obligation to inform a procuring agency of changes in proposed staffing and resources, even after submission of proposals.”**

Key GAO Decisions Concerning Key Personnel

URS Federal Services Inc., B-413034, B-413034.2, B-413034.3, July 25, 2016, 2016 CPD ¶ 209

- The GAO's holding in *Paradigm* was highlighted in *URS Federal Services Inc.* In this matter, protester URS challenged the issuance of a task order to SimVentions, Inc.
- One of URS's key persons, who was proposed to fulfill the 0.5 FTE ("full-time equivalent") senior software engineer key personnel requirement, departed from URS after the submission of proposals, but before award.
- As a result, the agency eliminated URS from the competition, finding URS's proposal technically unacceptable for failure to meet material key personnel requirements.
- In response, URS argued that the agency's assignment of an unacceptable rating to URS's technical proposal was unreasonable because the departure of the proposed key person was not the fault of URS. URS also claimed that personnel substitution was a "ministerial action" under the contract, and the departure "could not reasonably be said to constitute a deficiency."
- Even though it acknowledged that the key person's departure was not the fault of URS, the GAO found that the agency acted reasonably in (1) deeming URS unacceptable and (2) eliminating URS from the competition.
- **Key Takeaway: The GAO emphasized that key personnel requirements are a material solicitation requirement and that in such situations, agencies have two options, either: (1) evaluate the proposal as submitted, where the proposal would be rejected as technically unacceptable for failing to meet a material requirement, or (2) reopen discussions to permit the offeror to correct the deficiency.**

Key GAO Decisions Concerning Key Personnel

A-T Solutions, Inc., B-413652.2, et al., July 5, 2017, 2017 CPD ¶ 214

- The GAO solidified this principle in *A-T Solutions, Inc.*, wherein it denied a protest alleging that the Navy unreasonably declined to reopen discussions where, after submission of final proposal revisions, protester's proposal became technically unacceptable because one of its key personnel became unavailable.
- The Navy issued its solicitation in December 2015 and received proposals in January 2016. The agency then engaged in two rounds of discussions with offerors. After discussions had closed, one of A-T Solutions' proposed key personnel departed the company.
- A-T Solutions notified the agency of this, and in response, the agency advised A-T Solutions that it was no longer considered technically acceptable and would not be further evaluated or considered for award. A-T Solutions protested, arguing that the agency should have reopened discussions to allow it to substitute another individual for the unavailable key person.
- The GAO denied the protest despite the fact that the elimination of the incumbent left only two offerors in the competition.
- **Key Takeaway: Even if an offeror is proactive in telling an agency about the departure of a key employee, the agency still has the discretion to remove that offeror from the competition without allowing proposal revisions.**

Key GAO Decisions Concerning Key Personnel

M.C. Dean, Inc., B-418553, B- 418553.2, June 15, 2020, 2020 CPD ¶ 206

- In *M.C. Dean, Inc.*, the GAO sustained a protest where the awardee, PTSI Managed Services, Inc. (PTSI), improperly failed to notify the agency about the unavailability of a key person.
- Two months after proposal submissions, the awardee’s proposal manager was denied the required security clearance for the contract. While PTSI originally understood that the employee planned to appeal the denial, he ultimately did not.
- The GAO concluded that when an offeror has “actual knowledge” that its proposed key personnel will not be available to perform, it is obligated to inform the agency.
- The GAO found that the awardee had actual knowledge of unavailability but failed to notify the agency of this development. The GAO also emphasized that, even though the program manager had a right to appeal the denial of the security clearance, this did not affect the awardee’s obligation to notify the agency.
- **Key Takeaway: An offeror must have “actual knowledge” of a key person’s unavailability before the obligation to disclose such unavailability to the agency is triggered.**

Key GAO Decisions Concerning Key Personnel

TMPC Inc., B-419554; B-419554.2, Apr. 23, 2021, 2021 CPD ¶ 190

- GAO denied the protester's challenge to the assignment of an Unacceptable rating under the solicitation's key personnel factor due to a failure to satisfy relevant experience and education requirements.
- The solicitation provided that proposed Item Managers were required to have 3 years of experience in item management, 5 years of material management with a logistics information system (LIS), and a combined 10 years of experience with DoD or other federal agency in Financial Management, Program Management, Informational Technology, Material Management or Logistics, and a master's degree in a logistics management, supply chain, or business-related field. The agency found in its evaluation that TMPC's proposed Item Manager did not possess the requisite qualifications across these areas and assigned an Unacceptable rating pursuant to the terms of the solicitation.
- The GAO agreed with the agency's position that it was not evident from the face of the materials submitted that the individual proposed met these qualifications and that finding the proposal compliant would have run contrary to the solicitation.
- **Key Takeaway: Agencies are not required to read between the lines or search through an offeror's proposal to find a proposed key individual meets solicitation requirements when the offeror fails to state such information plainly or adequately.**

Best Practices for Preventing a Protest Challenging Your Key Personnel

- Require key personnel to sign a letter of intent that commits the individual to perform under the relevant contract in the particular position that individual is slotted for if it was awarded.
- Consider offering retention benefits to employees proposed as key personnel to discourage departure prior to award.
- Develop a documented company policy showing that it is your company's practice to list positions as open on your website, even if they have been filled, in order to maintain a backlog of potential replacement candidates.
- To the extent possible, limit the number of additional individuals that your company designates as key personnel in proposals.
- Agree to continue to pay key personnel through the resolution of a bid protest and any corresponding corrective action period.

Best Practices for Preventing a Protest Challenging Your Key Personnel

- Only propose individuals to fill key roles that possess the requisite qualifications and experience for the position as of the date of proposal submission, including clearances, training certifications, education, etc.
- Ensure key personnel résumés and letters of commitment/intent adhere to both the formatting and substantive requirements set forth in the relevant solicitation, including font size, identifying the position the individual is committed to performing if required, and minimum requirements such as certifications and qualifications, years of experience, etc.
- Take all possible steps and precautions to minimize or eliminate doubts of the relevant agency as to the availability of key persons at the time of award.



Bid Protest Series – Organizational and Personal Conflicts of Interest

Avoiding Costly Conflicts Mistakes and Ensuring Accountability in Government Procurements



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Overview

- Introductions
- Summary of Organizational Conflicts of Interest (OCI)
 - Biased Ground Rules
 - Impaired Objectivity
 - Unequal Access to Information (and “Unfair Competitive Advantage”)
- Summary of Personal Conflicts of Interest (PCI)
- Strategies for Avoidance, Neutralization, and Mitigation
- Bid Protest Considerations
 - When to File?
 - The “Hard Facts” Standard
 - Agency Waiver of OCIs
- Questions

Summary of OCIs

General Principles

General Principles on OCIs

- “The exercise of common sense, good judgment, and sound discretion is required in both the decision on whether a significant potential conflict exists and, if it does, the development of an appropriate means for resolving it.” FAR 9.505.
- “The two underlying principles are—
 - “(a) Preventing the existence of conflicting roles that might **bias a contractor’s judgment**; and
 - “(b) Preventing **unfair competitive advantage...**” FAR 9.505(a)-(b).
- In general, “an unfair competitive advantage exists where a contractor competing for award of any Federal contract possesses:
 - “(1) **Proprietary information** that was obtained from a Government official without proper authorization; or
 - (2) **Source selection information** (as defined in 2.101) that is relevant to the contract but is not available to all competitors, and such information would assist that contractor in obtaining the contract.” FAR 9.505(b)(1)-(2).

Summary of OCIs

Biased Ground Rules

Biased Ground Rules

- “A biased ground rules OCI arises where a firm, as part of its performance of a government contract, **has in some sense set the ground rules for the competition** of another government contract by, for example, writing the statement of work or providing materials upon which a statement of work is based.” *AAR Mfg. Inc., d/b/a Aar Mobility Sys.*, B-418339, Mar. 17, 2020, 2020 CPD ¶ 106 at 6.
- “The primary concern with a biased ground rules OCI is that the firm **could skew the competition**, whether intentionally or not, in favor of itself.” *Id.*
- *See* the specific rules in the FAR for providing systems engineering and technical direction at FAR 9.505-1.

Biased Ground Rules

- Situations which do **NOT** create a biased ground rules OCI:
 - “[T]he mere existence of a prior or current **contractual relationship** between a contracting agency and a contractor...unless the alleged advantage was created by an improper preference or unfair action by the procuring agency,” *AAR Mfg. Inc., d/b/a Aar Mobility Sys.*, B-418339, Mar. 17, 2020, 2020 CPD ¶ 106 at 7;
 - The fact that “**general improvement recommendations**” which were “**non-specific**” and came from a “fairly generic study” by a competitor are ultimately found in the performance work statement (PWS), *Systems Made Simple, Inc.*, B-412948.2, July 20, 2016, 2016 CPD ¶ 207 at 11;
 - Providing “the **planning** necessary to build cyber event environments around customer requirements,” **rather than direct “acquisition support,”** *Superlative Techs., Inc.; Atl. Sys. Grp., Inc.*, B-415405 *et al.*, Jan. 5, 2018, 2018 CPD ¶ 19 at 12;
 - The exceptions at FAR 9.505-2(b)(1)(i)-(iii), which permit the contractor who prepared the PWS to supply the relevant system/service if “[i]t is the **sole source**,” or “[i]t has participated in the **development and design work**, or “[m]ore than one contractor has been involved in preparing the work statement.”

Summary of OCIs

Impaired Objectivity

Impaired Objectivity

- “An impaired objectivity OCI, as addressed in FAR subpart 9.5 and the decisions of our Office, arises where a firm’s **ability to render impartial advice** to the government would be undermined by the firm’s competing interests.” *Diversified Collection Servs., Inc.*, B-406958.3, B-406958.4, Jan. 8, 2013, 2013 CPD ¶ 23 at 5.
- “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.” *Id.*
- “[I]n assessing the merits of an alleged impaired objectivity OCI, we look for some indication that there is a **direct financial benefit** to the firm alleged to have the OCI, and there is none in this instance.” *Trident Vantage Sys., LLC; SKER-SGT Eng’g & Sci., LLC*, B-415944 *et al.*, May 1, 2018, 2018 CPD ¶ 166 at 10.
- “Contracts 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 interests.” FAR 9.505-3.

Impaired Objectivity

- Situations which do **NOT** create an impaired objectivity OCI:
 - Contractor recommendations **without a sufficient “level of discretion” or “decision-making authority”** and where “all decision-making during test activities resides with” the government, *Trident Vantage Sys., LLC; SKER-SGT Eng’g & Sci., LLC*, B-415944 *et al.*, May 1, 2018, 2018 CPD ¶ 166 at 9-10;
 - Contractor recommendations based on high-level data that are **not able to drive work** towards the contractor;
 - “[A]ctivities, such as monitoring...where the contractor’s responsibilities are **not based on subjective judgments** or evaluations” that could create the potential for impaired objectivity, *Deva & Assocs., PC*, B-415508.11, June 21, 2019, 2019 CPD ¶ 230 at 10-11.

Summary of OCIs

Unequal Access to Information (and “Unfair Competitive Advantage”)

Unequal Access to Information

- “[A]n unequal access to information OCI exists where a firm has access to **nonpublic information** as part of its performance of a government contract, and where that information may provide the firm an unfair competitive advantage in a later competition for a government contract.” *Lion Vallen, Inc.*, B-418503, B-418503.2, May 29, 2020, 2020 CPD ¶ ___ at 16.
- “The concern regarding this category of OCI is that a firm may gain a competitive advantage based on its possession of ‘[p]roprietary information that was obtained from a Government official without proper authorization,’ or ‘[s]ource selection information...that is relevant to the contract but is not available to all competitors, and such information **would assist that contractor in obtaining the contract.**” *Id.*”

Unequal Access to Information

- Situations which do **NOT** create an unequal access to information OCI:
 - “[U]nique information, advantages, and capabilities” gained from “**prior experience under a government contract**—either as an incumbent contractor or otherwise,” absent “evidence of preferential treatment or other improper action,” *M7 Aerospace, LLC*, B-415252.4, B-415252.5, Nov. 9, 2018, 2018 CPD ¶ 387 at 10;
 - “[W]here...information such as historical workload data is **provided to all offerors** or vendors,” *LOGZONE, Inc.*, B-416029, B-416029.2, May 21, 2018, 2018 CPD ¶ 190 at 7;
 - “[W]here a protester complains that the awardee had access to the **same information possessed by the protester**,” *id.*;
 - The information in question is “**stale**” and no longer competitively useful, *see id.*

Unfair Competitive Advantage (Hiring Former Government Officials)

- While “the interpretation and enforcement of **post-employment conflict of interest restrictions** are primarily matters **for the procuring agency and the Department of Justice**, not [the GAO],” the GAO will “within the confines of a bid protest alleging an OCI, determine whether any action of the former government employee may have resulted in an unfair competitive advantage for, or on behalf of, the awardee during the award selection process.” *Liquidity Servs., Inc.*, B-409718 *et al.*, July 23, 2014, 2014 CPD ¶ 221 at 12; *see also, e.g., Dewberry Crawford Group; Partner 4 Recovery*, B-415940.11 *et al.*, July 2, 2018, 2018 CPD ¶ 298 at 23 n.12.
- The GAO “has recognized that **the standard** for evaluating whether a firm has an unfair competitive advantage under FAR subpart 3.1 stemming from its hiring of a former government employee **is virtually indistinguishable from** the standard for evaluating whether a firm has an unfair competitive advantage arising from its **unequal access to information** as a result of an organizational conflict of interest under FAR subpart 9.5.” *General Dynamics Info. Tech., Inc.*, B-417616.2 *et al.*, Mar. 31, 2020, 2020 CPD ¶ 132 at 6.
- Because these situations are analyzed under FAR Subpart 3.1 and not Subpart 9.5, **an agency may NOT waive** an unfair competitive advantage. *Northrop Grumman Sys. Corp.*, B-412278.7, B-412278.8, Oct. 4, 2017, 2017 CPD ¶ 312 at 7-9.

Summary of PCIs

Problematic Financial Interests, Personal Activity, or Relationships

Personal Conflicts of Interest Defined

- A personal conflict of interest results from 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.” *D&G Support Servs., LLC*, B-419245, B-419245.3, Jan. 6, 2021, 2021 CPD ¶ 15 at 7 (quoting FAR 3.1101).
- But a “**de minimis interest** that would not ‘impair the employee’s ability to act impartially and in the best interest of the Government’ is not covered under this definition.” FAR 3.1101.
- Only applies to a “**covered employee**,” or one who “performs an acquisition function closely associated with **inherently governmental functions**” and is either an employee or a self-employed subcontractor. *Id.*
 - Such functions mean “supporting or **providing advice or recommendations** with regard to” 8 specific “activities of a Federal agency,” including: planning acquisitions, developing statements of work, evaluating contract proposals, and administering contracts. *Id.*
- Implemented by **FAR 52.203-16**, Preventing Personal Conflicts of Interest (JUN 2020).

Situations that Can Create PCIs

- Among the sources of personal conflicts of interest are (FAR 52.203-16(a)):
 - Covered employee's **financial interests** (or close family members'/household's)
 - Compensation (*e.g.*, wages/salaries/commissions, professional fees, business referral fees);
 - Consulting relationships (*e.g.*, commercial/professional consulting/service arrangements, scientific/technical advisory board memberships, serving as expert witness in litigation);
 - Services in exchange for honorariums or travel expense reimbursements;
 - Research funding or other forms of research support;
 - Investment in form of stock/bond ownership or partnership interest (excluding diversified mutual fund investments) and real estate investments;
 - Patents, copyrights, and other intellectual property interests; or
 - Business ownership and investment interests.
 - Other **employment or financial relationships** (including seeking or negotiating for prospective employment or business); and
 - **Gifts**, including travel.



Strategies for Avoidance, Neutralization, and Mitigation

Protecting Contract Awards from Bid Protests

OCI Mitigation Plans

- GAO Deference:
 - The GAO normally defers to OCI mitigation plans where the agency has reasonably investigated and the plan is tailored to the potential OCI.
- Should be detailed, in writing, and established prior to OCI arising.
- Ensure consistency with proposal.
 - The GAO has held that “an agency should consider the effect of an offeror’s OCI avoidance plan on its technical proposal where the information obtained during the review of such a plan clearly contradicts representations in the offeror’s technical proposal.” *Booz Allen Hamilton, Inc.—Costs*, B-414822.4 (May 7, 2018, 2018 CPD ¶ 183 at 10.

OCI Mitigation Plans

- Should provide procedures for **early identification** of potential OCI's, and then state **when and how avoidance or mitigation will occur**.
- Plan and related documents should be kept in appropriate records:
 - Solicitations frequently request such documents
 - Even if not solicited, can help demonstrate to agency that there is no OCI concern
 - Are often critical to maintaining award if there is a bid protest

OCI Mitigation Strategies – Firewalls

- Limit receipt of—and access to—non-public, competitively useful information by employees to individuals who will not be in a position to use it on other matters.
- **Should be specific** to:
 - Contracts to which it applies (by number and agency)
 - Individuals to which it applies (by name and title)
 - Information to which it applies (by source and type)
 - Period of time during which it applies (start and end dates)
- **Can include multiple elements/documents**, such as policy statements, electronic access restrictions, non-disclosure agreements, signed employee receipt of notices, employee representations of measures taken, or mechanisms for reporting (and possible employment consequences for) violations.
- **Maintain documents demonstrating restrictions on access were effective.**

OCI Mitigation Strategies – Firewalls

- Firewalls **are effective** mitigation for:
 - Unequal access to information OCIs
 - Impaired objectivity OCIs (**only when firewalling subcontractors**, see *Social Impact, Inc.*, B-412941, B-412941.2, July 8, 2016, 2016 CPD ¶ 203 at 9)
 - Must prevent awardee from evaluating its own work, competitors' work, or work of its affiliates
 - Risks a lower evaluation score if the subcontractor will be performing large percentage of the contract work
- Firewalls **are NOT effective** mitigation for:
 - Biased ground rules OCIs
 - Impaired objectivity OCIs involving the prime's employees

OCI Mitigation Strategies – Other Methods

- Separation into New Entities
 - Unlikely to be effective where one entity retains control over the other because OCIs usually carry across the parent-subsidary divide (see *C2C Innovative Sols., Inc.*, B-416289, B-416289.2, July 30, 2018, 2018 CPD ¶ 269)
- Government Authority over Final Decisions
 - The GAO has permitted this as one factor in approving a mitigation plan, but impaired objectivity OCIs can exist even where the government retains final decision-making authority following evaluation by the contractor (see *Safal Partners, Inc.*, B-416937, B-416937.2, Jan. 15, 2019, 2019 CPD ¶ 20 at 10)
- Alternative Solution Proposal
 - Offering to provide alternative products/solutions from competitors to consider may help, but is insufficient to mitigate an impaired objectivity OCI.
- Alternative Contracting Vehicles
 - Government agencies sometimes rely on the availability of other contracting vehicles, or the fact that work is under optional CLINs, to justify their determinations that OCI's have been mitigated. This strategy is unlikely to suffice on its own.

PCI Prevention

- “The Government’s policy is to **require contractors** to:
 - (a) **Identify and prevent** personal conflicts of interest of their covered employees; and
 - (b) **Prohibit** covered employees who have access to **non-public information** by reason of performance on a Government contract from using such information **for personal gain.**” FAR 3.1102(a)-(b).
- Thus, under FAR 52.203-16(b), contractors must:
 - Have **procedures in place to screen** covered employees for potential personal conflicts of interest, including obtaining and maintaining **updated disclosures** of interests;
 - **Prohibit** covered employees from performing tasks which create a PCI;
 - Prohibit use of non-public information from government contracts for personal gain, including through **non-disclosure agreements**, training, oversight, and disciplinary action;
 - **Report to the contracting officer** any personal conflict-of-interest violation by a covered employee as soon as it is identified.

Bid Protests

When to File, The “Hard Facts” Standard, and Agency Waiver of OCIs

Bid Protests – When to File

- “A protester’s allegation that another firm has a conflict of interest is **generally premature when filed before an award** has been made.” *Guident Techs., Inc.*, B-405112.3, June 4, 2012, 2012 CPD ¶ 166 at 5.
- “[A]s a general rule, a protester’s allegation that another firm has an unfair competitive advantage, or other conflict of interest, need not be protested until **after that firm has been selected for award.**” *General Dynamics Info. Tech., Inc.*, B-417616.2 *et al.*, Mar. 31, 2020, 2020 CPD ¶ 132 at 8.
- However, this rule “reflects the underlying principle that a protester is charged with knowledge of the basis for protest at the point where the agency conveys to the protester the agency’s **intent to follow a course of action adverse to the protester’s interests.**” *Id.*
- While “that point typically occurs when the protester is notified of the agency’s selection decision,” *id.*, that is not always the case.
- Thus, “**where an agency specifically advises** a protester before award that it considers the firm with the alleged conflict to be eligible for award,” then “timeliness of the protest **is measured from the date when the protester receives explicit notice** from the agency that the firm with the alleged conflict of interest is considered eligible for award.” *Guident Techs., Inc.*, 2012 CPD ¶ 166 at 6 n.4.

Bid Protests – The “Hard Facts” Standard and OCIs

- “The identification of conflicts of interest is a fact-specific inquiry that requires the exercise of considerable discretion...A protester **must identify hard facts** that indicate the existence or potential existence of a conflict; **mere inference or suspicion** of an actual or potential conflict **is not enough.**” *Lion Vallen, Inc.*, B-418503, B-418503.2, May 29, 2020, 2020 CPD ¶ ___ at 16.
- Again, the GAO gives agencies deference:
 - The GAO “review[s] OCI investigations for **reasonableness**, and where an agency has given meaningful consideration to whether a significant conflict of interest exists, [the GAO] will not substitute [its] judgment for the agency’s absent **clear evidence** that the agency’s conclusion is unreasonable.” *Id.*
 - Note that “contracting officers shall analyze planned acquisitions in order to...[a]void, neutralize, or mitigate **significant** potential conflicts before contract award.” FAR 9.504(a)(2).
 - Contracting officers do not have to mitigate non-significant potential OCIs, and “The CO has **considerable discretion** in determining whether a conflict is significant.” *Turner Const. Co. v. United States*, 645 F.3d 1377, 1386 (Fed. Cir. 2011).

Bid Protests – The “Hard Facts” Standard and PCIs

- The GAO applies the “hard facts” standard to PCIs as well. *See BAE Sys. Tech. Sols. & Servs., Inc.*, B-411810.3, June 24, 2016, 2016 CPD ¶ 174 at 7-8, *recon. denied*, *BAE Sys. Tech. Sols. & Servs., Inc.—Recon.*, B-411810.4, Dec. 26, 2017, 2018 CPD ¶ 9.
- In the “context of individual contractor employees who assist the government during procurements,” where a protester alleges that such an individual “is biased because of his or her past experiences or relationships,” the GAO will “focus on whether the individuals involved exerted improper influence in the procurement on behalf of the awardee, or against the protester.” *Id.*
- As with OCIs, the GAO “reviews the reasonableness of the [PCI] determination,” and “where an agency has given meaningful consideration to whether a conflict exists,” the GAO “will not substitute [its] judgment for the agency’s, absent clear evidence that the agency’s conclusion is unreasonable.” *Id.* at 8.
- While contracting officers must avoid even the “appearance of impropriety” under FAR Subpart 3.1 (which governs PCIs), an “an agency’s efforts or other factors” may sufficiently “mitigate[] the appearance of a conflict of interest” under FAR Subpart 3.1. *See id.* at 11.

Bid Protests – Agency Waiver of OCIs

- “FAR § 9.503 provides agencies the authority to waive ‘**any general rule or procedure**’ of FAR subpart 9.5.” *CACI, Inc.—Federal; Gen. Dynamics One Source, LLC*, B-413860.4 *et al.*, Jan. 5, 2018, 2018 CPD ¶ 17 at 15.
- GAO’s review of an OCI waiver is “**limited** to consideration of whether the waiver complies with the requirements of the FAR, that is, whether it is **in writing**, sets forth the **extent of the conflict**, and is **approved** by the appropriate individual within the agency.” *ARES Tech. Servs. Corp.*, B-415081.2, B-415081.3, May 8, 2018, 2018 CPD ¶ 153 at 4.
- The GAO does **NOT** consider “whether an OCI should be waived.” *Id.*
- Creative attacks on waivers, such as arguing that an agency’s statement of the extent of the OCI was insufficient due to an insufficient OCI investigation, are generally not successful. *See Dell Servs. Fed. Gov’t, Inc.*, B-414461.6, Oct. 12, 2018, 2018 CPD ¶ 374 at 5-11.
- It **does not matter** whether the underlying OCI investigation was reasonable. *CACI, Inc.—Federal*, 2018 CPD ¶ 17 at 13-14.
- It **does not matter** when waiver occurs (including after the alleged OCI harm occurs). *See id.* at 15.

Bid Protests – Agency Waiver of PCIs

- In “**exceptional circumstances**,” if a contractor cannot satisfactorily prevent a PCI under FAR 52.203-16, the contractor may request, through the contracting officer, for the head of the contracting activity to:
 - “Agree to a plan to **mitigate** the personal conflict of interest; or
 - “**Waive** the requirement to prevent personal conflicts of interest.” FAR 3.1104(a).
- “If the head of the contracting activity determines in writing that such action is in **the best interest of the Government**, the head of the contracting activity may impose conditions that provide mitigation of a personal conflict of interest or grant a waiver.” FAR 3.1104(b).
 - The GAO has, in a footnote, summarily held a PCI waiver valid because the head of the agency determined in writing that it was in the **government’s best interest**. *See Owens & Minor Distribution, Inc., B-418223.5 et al.*, Feb. 3, 2021, 2021 CPD ¶ ___ at 10 n.8.

Questions?

We love to talk about OCIs – ask anything!

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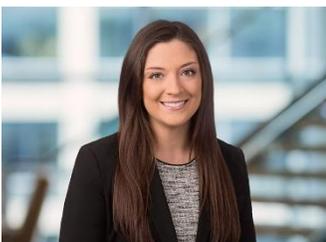
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