



# ORGANIZATIONAL CONFLICTS OF INTEREST

**RUSS MCMURRY**  
**NCMA**  
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# AGENDA

Organizational Conflicts of Interest - Space Exploration

- **ENVIRONMENT**
- **GAO PERSPECTIVE--PROTESTS**
- **REGULATORY TREATMENT--FAR**
- **TYPES OF OCI**
- **PROTEST EXAMPLES**
- **COMMON OCI MISCONCEPTIONS**
- **DISCUSSION AND QUESTIONS**

# OCI ENVIRONMENT

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**INDUSTRY CONSOLIDATION -- fewer companies, wider range of services provided**

**INCREASED GOVT SERVICES PROCUREMENTS -- that involve judgment and special access to information**

# GAO PERSPECTIVE

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- COMPETITION and LITIGATION
- **GAO**
  - FACT-BASED DETERMINATIONS
  - MORE HEARINGS
  - UPHOLDING GOVT DISQUALIFICATIONS
  - OVERTURNING GOVT DETERMINATIONS THAT NO OCI EXISTS
  - SOMETIMES UPHOLDING USE OF FAR EXCEPTIONS
  - UNPREDICTABLE OUTCOMES

# GAO DEFINITION--TYPES OF OCI

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- **BIASED GROUND RULES**
  - **General Rule to Disqualify**
- **IMPAIRED OBJECTIVITY**
  - **Firewall may be insufficient**
- **ACCESS TO INFORMATION, UNFAIR COMPETITIVE ADVANTAGE**
  - **Most amenable to mitigation by firewall**

# REGULATORY TREATMENT FAR PROVISIONS

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***Avoid, neutralize, or mitigate significant potential Conflicts before contract award.***

## **FAR 2.101 DEFINITION**

*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. An unfair competitive advantage exists where a contractor competing for award of any Federal contract possesses proprietary or source selection information –**

# CONTRACTING OFFICER RESPONSIBILITIES

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- IDENTIFY and EVALUATE OCI
- BEFORE AWARD
  - AVOID
  - NEUTRALIZE
  - MITIGATE

# FAR DEFINED OCI CATEGORIES

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- Providing Systems Engineering and Technical Direction **(9.505-1)**
- Preparation of Specifications or SOW **(9.505-2)**
- Providing Evaluation Services **(9.505-3)**
- Obtaining access to Proprietary Information **(9.505-4)**
  
- EXAMPLES **(9.508)**

# 4 CONTRACT TYPES WHERE OCI LIKELY

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- Management Support Services
  - Consultant or other Professional Services
  - Contractor Performance or Support of Evaluations
  - Systems Engineering and Technical Direction
- 
- **Note: FAR does not limit OCI provisions to only these type contracts**

# SYSTEMS ENGINEERING AND TECHNICAL DIRECTION—BIASED GROUND RULES

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- A firm that provides system engineering and technical direction for a system but does not have overall contractual responsibility for development, integration, assembly, and checkout, or production

SHALL NOT BE AWARDED PRIME OR SUBCONTRACT FOR THE SYSTEM OR ITS MAJOR COMPONENTS

- FAR 9.501

# SYSTEMS ENGINEERING AND TECHNICAL DIRECTION

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## FAR Definition:

- **Technical Direction – developing work statements, determining parameters, directing other contractors' operations, and resolving technical controversies**
- **Systems Engineering – determining specifications, identifying and resolving interface problems, developing test requirements, evaluating test data, and supervising design**

# PREPARING SPECS OR SOW — BIASED GROUND RULES

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- A firm that prepares and furnishes complete specifications covering non-developmental items **CANNOT FURNISH THE ITEMS FOR A REASONABLE PERIOD**
- Contractor that prepares or assists in SOW for competition or provides services leading directly and predictably to the work statement **MAY NOT SUPPLY THE SYSTEM, MAJOR COMPONENTS, OR SERVICES**

# PREPARING SPECS or SOW

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## ■ EXCEPTIONS

- WHERE CONTRACTOR IS SOLE SOURCE for THE SYSTEM
- WHERE CONTRACTOR PARTICIPATED IN DESIGN OR DEVELOPMENT WORK
- MORE THAN ONE CONTRACTOR ENGAGED IN PREPARING COMPETITIVE SOW

**FAR 9.505-2**

# Biased Ground Rules—Protest Example

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- **Lucent under IDIQ to Army for Communication in Iraq, recommended certain alternative communication technologies for use by Army**
- **Army asked Lucent to draft specifications for particular radios that would perform in communication zone**
- **Army modified the spec submitted by Lucent and issued an RFP for hand-held radios**
- **A separate division of Lucent sought to compete on radios**
- **Army disqualified Lucent, the entire company, from competing**
- **Army had not identified any OCI and no OCI term in either RFP**
- **GAO Upheld the Agency Contracting Officer Disqualification**

# EVALUATION SERVICES— IMPAIRED OBJECTIVITY

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## Evaluation Services

Contracts for evaluation services shall not be awarded to a contractor that will evaluate its own offer, performance, or test systems or those of a competitor without proper safeguards to ensure objectivity to protect the Government's interests

**FAR 9.505-3**

# COMMON IMPAIRED OBJECTIVITY PROTESTS

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- **When the Contractor establishes the testing environment**
- **When the Contractor tests its own fielded systems as well as a competitor's**

# EVALUATION SERVICES - IMPAIRED OBJECTIVITY PROTEST EXAMPLES

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- **DISA awards contract to ITT (AES) for spectrum services. ITT (another division) has interest in selling systems that ITT AES would be evaluating under the DISA contract.**
- **Protest sustained.**
- **Agency seeks OCI plans from offerors as remedial action in “second” RFP**
- **ITT sets up firewall between divisions, receives second award.**
- **GAO finds that under the task area of technical advice, ITT was required to give subjective advice that could affect the sales of ITT’s own products or those of its competitors**
- **Firewall found insufficient to protect against potential harm to Agency**
- **Award overturned**

# Crossing contractual boundaries enhances complexity of analysis of impaired objectivity

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- **Under Contract A, Space Advancement Corp is asked to evaluate current concepts being offered by all TPS Advanced Development contractors for docking of the dogface rocket to the International Space Port.**
- **Space Advancement Corp is tasked on its prime contract for the International Space Port to write a docking specification for modification to the Space Port.**
- **Problem here?**

# UNFAIR COMPETITIVE ADVANTAGE — UNEQUAL ACCESS TO INFORMATION

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- Firm has access to nonpublic information as a part of its performance of a government contract
- AND
- that information may provide a competitive advantage in later competition

# PROTEST EXAMPLE

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**Subsidiary of Company A supports Government cost and technical evaluation under approved mitigation plan.**

**Another subsidiary of Company A is a subcontractor to Company B**

**Company B receives award.**

**Company B award overturned despite Agency's prior approval of Company A Mitigation Plan because no evidence of Contracting Officer review or review by any other agency official**

- **Aetna Health Plans**

# AGENCY WAIVER AUTHORITY

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- **FAR 9.503**
- **Agency Head or designee**
- **On written request identifying the OCI or P-OCI**
- **Waiver possible, if Agency can show not in the Government's interest to apply OCI rules**
- **Rarely granted due to potential harm to Agency.**

# OCI QUIZ

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- **IS OCI COMPLIANCE A CONTRACTOR RESPONSIBILITY?**
- **IS OCI COMPLIANCE THE CONTRACTING OFFICER'S RESPONSIBILITY?**
- **DO FIREWALLS MITIGATE OCI?**
- **ARE SUBSIDIARIES ARE DIFFERENT COMPANIES FOR OCI ANALYSIS?**
- **DO FIREWALLS DISQUALIFY CONTRACTOR PERSONNEL "FOREVER" FOR PARTICIPATION ON PROPOSAL TEAMS?**
- **ARE SECOND TIER SUBCONTRACTORS RELEVANT TO OCI ANALYSIS OF PRIME CONTRACTOR POSITION?**
- **What's the difference between avoidance, mitigation, and neutralization of OCIs?**

# DISCUSSION/QUESTIONS

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- **EVEN IF NO OCI TERM IN RFP—CONSIDER OCI POTENTIAL**
- **AGENCY—WORK WITH CONTRACTOR**
- **CONTRACTOR-WORK WITH AGENCY**
- **REALIZE “WHO” THE CONTRACTOR IS**
- **REALIZE OCI SHOULD BE ANALYZED IN TERMS OF RISK**
- **RECOGNIZE OCI DETERMINATIONS ARE SUBJECT TO CHANGE AS FACTS AND CIRCUMSTANCES CHANGE**