



# Organizational Conflicts of Interest



**NDIA Annual Missile Defense Small Business Conference**

**Fred Schlich and Brian Chapuran  
Missile Defense Agency  
June 25, 2019**



# Agenda

---

- **Introduction**
- **Types of OCIs and Scenarios**
- **Responsibilities of Agency**
- **Responsibilities of Contractor**
- **Mitigation Plans**
- **OCI Exchanges**
- **Questions**



# 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)**



# Impact

**MDA is concerned about OCIs negative impact on the acquisition process:**

- **Distorted results of contract competitions**
  - **Contractors could be chosen due to an unfair competitive advantage rather than genuine technical and value superiority**
- **Misplaced contractor motivation during contract performance**
  - **Conflicting roles might bias a contractor's judgment and advice**



# Types of OCIs

---

- **Unequal Access to Information**
- **Biased Ground Rules**
- **Impaired Objectivity**



# Unequal Access to Information

- **Contractor obtains non-public information (proprietary or source-selection sensitive) through performance of a contract that may provide a competitive advantage**
- **Access to information is sufficient, proof of use not necessary**
- **Information must be real, substantial, competitively useful, and non-public**
- **Natural advantage of incumbency is not sufficient, by itself . . .**



# Unequal Access to Information

- **Subcontractor actions or knowledge can create an OCI**
- **No OCI if information not obtained through Government contract**
- **But, information obtained from Government employees or former employees treated as if obtained through contract**
- **GAO will not presume access to non-public competitively sensitive information but, once shown, GAO will presume that access prejudiced other offerors**



# Scenario

**While performing a support services contract, Company had access to the agency's network that contained budget information about contracts (including labor categories, rates, estimated hours, and funding) as well as historical workload information.**

**Any issues with the Company's access to this information?**



# Impaired Objectivity

- **The nature of a contractor's work on one contract could give it the opportunity to benefit on other contracts**
  - For example, evaluating itself, an affiliate, or a competitor
- **Issue is not whether biased advice was actually given but whether a reasonable person would find that the contractor's objectivity could have been impaired.**
- **Look at relationships and activities**
  - Some relationships are too remote to create an OCI
  - Some activities are too ministerial (administrative activities with limited independent judgment)



# Scenario

**Agency seeks to award a contract for analytical and technical support services to assess undersea warfare systems. The company selected for award manufactures 12 of the 59 systems to be tested.**

**Can the Agency make the award?**



# Scenario

**RFP for consolidated IT operations and maintenance services. The awardee would also provide configuration reviews and recommendations regarding the Agency's IT system and proposed changes to that system. Proposed awardee has an existing contract to provide the IT system to the Agency.**

**Any issues with the Agency making the award?**



# Biased Ground Rules

- **When a contractor, through its performance on a government contract, helped (or was in a position to help) set the ground rules for another acquisition**
  - **Examples – writing PWS or specifications, establishing source selection criteria**
- **Contractor's preferences, reflected in source selection criteria or specifications, could provide a future unfair competitive advantage**
- **Relevant concern is whether contractor could skew the procurement in its favor, intentionally or unintentionally**



# Scenario

**Company A is currently a sub-contractor providing A&AS support to a program office, including working on requirement development. Company B subsequently proposes new technology to support that program office, with Company A listed as a sub-contractor.**

**Can the agency award a contract to Company B for the new technology?**



# Responsibilities of Agency

- **Avoid, neutralize, or mitigate potential significant conflicts of interest to prevent an unfair competitive advantage or the existence of conflicting roles that might impair a contractor's objectivity**
  - ***Avoid*** – includes excluding certain sources or eliminating 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 through a Mitigation Plan



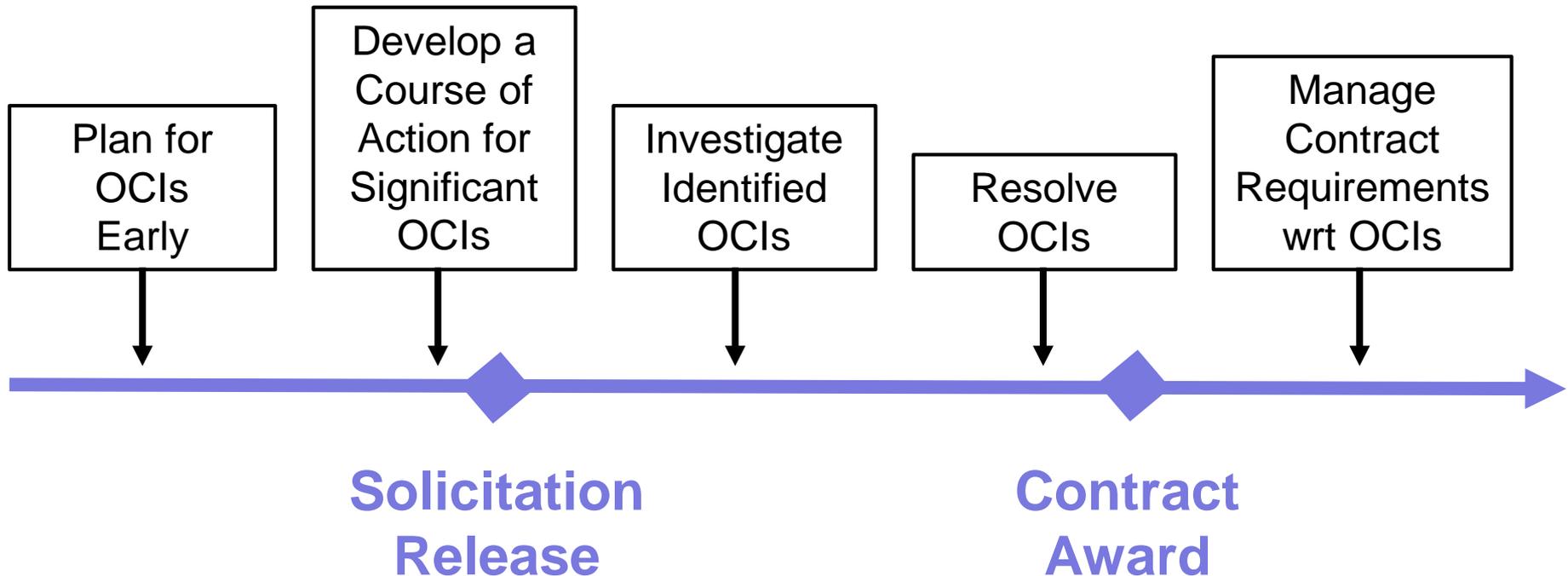
# Responsibilities of Agency

---

- **Examine each potential OCI individually on the basis of its particular facts and the nature of the proposed contract**
- **Exercise common sense, good judgment, and sound discretion.**



# Responsibilities of Agency - Timeline





# Responsibilities of Contractor

- **Identify and disclose actual and potential OCIs – proactively (OCI Disclosure Form) and in response to inquiries**
- **Actively communicate with CO to address potential OCIs**
- **Flow-down MDA OCI Clause to all consulting agreements, subcontracts and teaming agreements at all tiers**
- **Prepare Mitigation Plan, if required**



# Responsibilities of Contractor

## H-09 ORGANIZATIONAL CONFLICT OF INTEREST (Jun 2012)

a. Purpose: The primary purpose of this clause is to aid in ensuring that:

- (1) the Contractor's objectivity and judgment are not biased because of its present or planned interests which relate to work under this contract;
- (2) the Contractor does not obtain unfair competitive advantage by virtue of its access to non-public information regarding the Government's program plans and actual or anticipated resources; and
- (3) the Contractor does not obtain unfair competitive advantage by virtue of its access to proprietary information belonging to others.

c. Access to and Use of Nonpublic Information: If the Contractor, in performance of this contract, obtains access to nonpublic information such as plans, policies, reports, studies, financial plans, or data which has not been released or otherwise made available to the public, the Contractor agrees that without prior written approval of the Contracting Officer, it shall not:

- (1) use such information for any private purpose;
- (2) release such information.



# Responsibilities of Contractor

## H-09 ORGANIZATIONAL CONFLICT OF INTEREST (Jun 2012)

### d. Access to and Protection of Proprietary

Information: The Contractor agrees to exercise diligent effort to protect proprietary information from misuse or unauthorized disclosure in accordance with the provisions of FAR 9.505-4. The Contractor may be required to enter into a written non-disclosure agreement with the third party asserting proprietary restrictions.

e. Subcontracts: The Contractor shall include this clause in consulting agreements, teaming agreements, subcontracts, or other arrangements for provision of services or supplies of any tier.

### f. Representations and Disclosures:

(1) The Contractor represents that it has disclosed to the Contracting Officer, prior to award, all facts relevant to the existence or potential existence of organizational conflicts of interest as that term is used in FAR Subpart 9.5. . . .

(2) The Contractor represents that if it discovers an organizational conflict of interest or potential conflict of interest after award, a prompt and full disclosure shall be made in writing to the Contracting Officer. This disclosure shall include a description of the action the Contractor has taken or proposes to take in order to avoid or mitigate such conflicts.



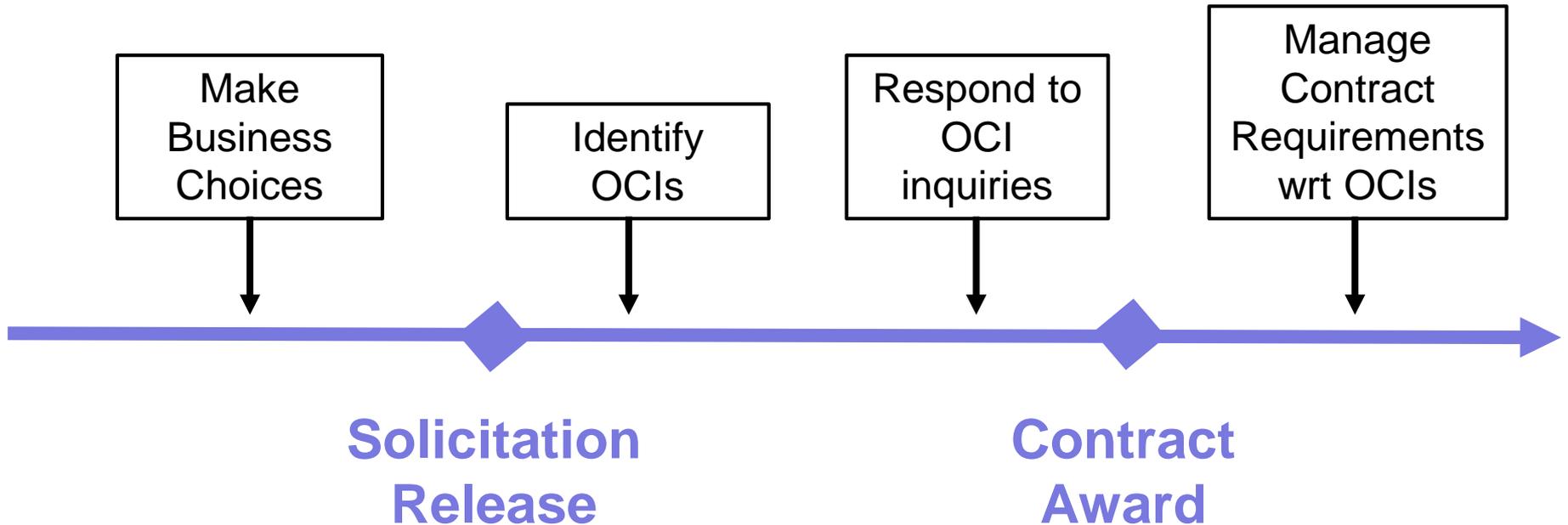
# Responsibilities of Contractor

## OCI ANALYSIS/DISCLOSURE FORM

1. <i>Contract Number</i>		2. <i>Program Title</i>	
3. <i>Contractor Name and Address</i>		4. <i>Telephone Number and POC</i>	
5. <i>Type of work to be performed under this solicitation:</i>			
(a) Providing Systems Engineering and Technical Direction ( ) (b) Preparing Specifications or Work Statements ( ) (c) Providing Technical Evaluation or Advisory & Assistance Services ( ) (d) Performing Ballistic Missile Defense System (BMD) development-related work ( ) (e) Other (include brief description) _____ ( )			
<b><i>Other MDA or BMD-related work requiring analysis and determination:</i></b>		6. <i>Contract Number and Program Title</i>	
7. <i>Brief Summary/Description of work performed under Block 6 action:</i>			
8. <i>Relationship between requirements of Block 1 action and work performed under Block 6 action (If None, State Why):</i>			
9. <i>Offeror/Contractor OCI Evaluation and Assessment (If either answer is yes, attach a copy of the SOW and complete Block 10):</i>			
(a) Does Actual OCI exist? ( ) Yes ( ) No (b) Does Potential OCI exist? ( ) Yes ( ) No			
10. <i>Summary of actual/potential OCI, including actions planned to avoid, neutralize, or mitigate conflict or potential conflict:</i>			
11. <i>Typed Name of Responsible Company Official</i>		12. <i>Signature</i>	13. <i>Date</i>



# Responsibilities of Contractor - Timeline





# Mitigation Plans

- **Purpose is to protect Government's interest**
- **Typically prospective – usually not possible after the fact**
- **GAO gives substantial deference to mitigation plans if**
  - **the agency has investigated**
  - **the plan is tailored to the specific situation**
- **Some OCIs cannot be mitigated**



# 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**
- **Subcontracts, Joint venture and teaming agreements**
- **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**



# 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)**



# Scenario Revisited

**While performing a support services contract, Company had access to the agency's network that contained budget information about contracts (including labor categories, rates, estimated hours, and funding) as well as historical workload information.**

**Any issues with the Company's access to this information?**



# OCI Exchanges

**OCI exchanges with an offeror regarding a mitigation plan are not discussions**

**but . . .**

**reopening discussions would be appropriate where exchanges regarding an offeror's OCIs and mitigation plan result in material changes to the offeror's proposal in terms of its technical approach or price.**



# Questions?