



# 2020

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**Missile Defense Agency  
Office of Small Business Programs  
Virtual Conference**

# Legal Issues in Source Selections



**To: MDA Small Business Conference**

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# Disclaimer

**The presentation contains factual information about legal issues MDA has encountered in source selections and the guidance regarding those issues from the FAR, DFARS, and case law. It is not intended as, and should not be viewed as, legal advice. MDA General Counsel cannot advise you on the application of the legal principles presented to your specific scenario.**



# Agenda

- **Introduction**
- **Organizational Conflicts of Interest**
- **Unfair Competitive Advantage**
- **Material Misrepresentations**
- **Questions**



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# ORGANIZATIONAL CONFLICTS OF INTEREST



# Organizational Conflicts of Interest

**“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)**



# OCIs - 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**
- **GAO will not presume access to non-public competitively sensitive information but, once shown, GAO will presume that access prejudiced other offerors**



# 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)



# 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**



# 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 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**



# Mitigation Plans

- **Purpose is to protect Government's interest**
- **Typically prospective – usually not possible after the fact**
- **Must consider potential scope of work not just what is being performed**
- **GAO gives substantial deference to plans if**
  - **the agency has investigated**
  - **the plan is tailored to the specific situation**



# 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.**



# UNFAIR COMPETITIVE ADVANTAGE



# Unfair Competitive Advantage

- **Where a firm may have gained an unfair competitive advantage through its hiring of a former government official, the firm can be disqualified from a competition based on the appearance of impropriety which is created by the situation, that is, even if no actual impropriety can be shown, so long as the determination of an unfair competitive advantage is based on facts and not mere innuendo or suspicion.**
- ***Health Net Federal Svcs.*, B-401652.3, 401652.5 (Nov. 4, 2009)**



# Unfair Competitive Advantage

- **GAO cites to FAR 3.101-1 for the proposition that “contracting agencies are to avoid even the appearance of impropriety in government procurements.”**
  - *Obsidian Solutions Group, B-417134, (Mar 1, 2019)*
- **GAO: challenges based on an offeror’s hiring or association with former government employees who are alleged to have had access to non-public, competitively useful information are more accurately categorized as unfair competitive advantages under FAR subpart 3.1**



# Unfair Competitive Advantage

- **Relevant factors to consider include:**
  - **Was the information available to other offerors?**
  - **Is the information competitively useful**
- **Relationship with Post-Government Employment Advice?**
  - **GAO does not review whether an individual violated a criminal statute (18 USC 207)**
  - **Unfair Competitive Advantage does not require determination of whether individual participated “personally and substantially”**



# Unfair Competitive Advantage

	Unequal Access to Information OCI	Unfair Competitive Advantage
FAR Subpart	9.5	3.1
Basis	Access to non-public information through the performance of another government contract	Hiring or association with a former government employee who had access to non-public, competitively useful information
Standard	Hard facts showing access to non-public information	Appearance of impropriety sufficient, so long as based on hard facts
Waiver Possible?	Yes	No



# MATERIAL MISREPRESENTATIONS



# Material Misrepresentation

- **Information in a proposal (or final proposal revision) that is inaccurate and material to the evaluation of the proposal.**
- **Often arises in situations where RFPs call for key personnel**
- **Example – offeror stated they “have contingent employment offers in place” when they had never actually contacted the individual proposed.**
  - *Patricio Enterprises, Inc., B-412738, 412738.2 (2016)*



# Material Misrepresentation

- **Standard – is intent required?**
- **“[a]n offeror’s misstatements, however, need not be intentional ones in order to constitute misrepresentations, and the degree of negligence or intentionality associated with the offeror’s misrepresentation is relevant instead to the remedy we recommend.**
- ***ACS Gov’t Svcs, B-293014 (2004).***



# Material Misrepresentation

- **“There are two components to a material misrepresentation in the procurement context: (1) a false statement; and (2) agency reliance on the false statement to favorably evaluate the proposal.”**
  - **NetCentrics Corp. v. U.S., 145 Fed.Cl. 158 (2019)**
  
- **“regardless of KCA's intent to hire the individuals identified by name in its proposal, the proposal misrepresented the commitment of the non-KCA employees to work for the awardee.”** *-Patricio Enterprises*



# Material Misrepresentation

- **Duty of Offerors?**
- **“submit a proposal that is, to the greatest extent possible, an accurate one.”**
  - **NetCentrics Corp. v. U.S., 145 Fed.Cl. 158 (2019)**
- **“ascertain the continuing availability of key personnel at the time of FPRs”**
  - **Conley & Assoc., Inc. v. U.S., 142 Fed.Cl. 177 (2019), citing OAO Corp. v. U.S., 49 Fed. Cl. 478 (2001).**
- **notify the contracting officer of changes occurring after FPR submission but before award.**
  - ***-Paradigm Tech., Inc., B-409221 (2014)***



# Material Misrepresentation

- **Agency Options?**
- **Reject the proposal**
  - “An offeror’s misrepresentation that materially influences an agency consideration of its proposal is a material misrepresentation that generally provides a basis for proposal rejection”
    - *Insight Tech. Solutions, Inc.*, B-417388 (2019)
- **Open Discussions (with all)**
- **Degree of negligence or intentionality of misrepresentation is relevant to the remedy.**
  - *ACS Gov’t Svcs., Inc.*, B-293014 (2004)



# Questions?