Organizational Conflicts of Interest

Industry Meeting

To: MDA Industry Partners

By: Mr. Michael O’Neill, Competition Advocate
Mr. John Withers, Deputy Director Policy (CTP)

Missile Defense Agency
October 25, 2022
Missile Defense
Evolving Threat Environment

New missiles & existing system improvements
- Precision strike
- Decoys and jammers

Maneuvering in midcourse or terminal phase
- Depressed Ballistic Trajectories
- Multiple Independent Reentry Vehicle (MIRV)
- Maneuvering Reentry Vehicle (MaRV)
- Global Hypersonic Glide Vehicles (HGV)
- Long Range Hypersonic Cruise Missiles (HCM)

Integrated ballistic, hypersonic, air, cruise missile, unmanned and non-kinetic attacks

Notional Representation

(Mach) 1 5 10 25
(MPH) 770 3,800 7,700 19,200

Subsonic Supersonic Hypersonic High Hypersonic

North Korea IRBM Hwasong-8
Iran Multiple MRBMs
China DF-15 SRBM
Russia Tsirkon HCM

Ref: 2022 Missile Defense Review
To develop and deploy a **layered**, Integrated Missile Defense System to defend the **United States, its deployed forces, allies, and friends** from missile attacks in **all phases of flight**.
Today’s Active, Layered Missile Defense System

BATTLE 1
HOMELAND DEFENSE

BATTLE 2
REGIONAL DEFENSE

BATTLE 3
SELF DEFENSE

SENSORS

Surveillance & BMDS Overhead Persistent Infrared (OPIR) Architecture (BOA)

Cobra Dane Radar

UEWR Radars

Sea-Based X-Band Radar

TPY-2 Forward Based Radars

AEGIS BMD SPY-1 Radars

THAAD TPY-2 Radars

Patriot MPQ-65 Radars

COMMAND & CONTROL, BATTLE MANAGEMENT & COMMUNICATIONS (C2BMC)

COMBATANT COMMANDS, JOINT STAFF, SERVICES & MDA

GMD

AEGIS

THAAD

Patriot

WARFIGHTING ASSETS

Ground-based Midcourse Defense (GMD)

AEGIS Ashore

AEGIS

THAAD

Patriot

WEAPONS

GBI

Ground Based Interceptor

SM-3

BLK IIA

SM-3

BLK IIA/B

THAAD

Terminal High Altitude Area Defense

SM-6

Sea Based Terminal

MSE

PAC-3

Missile Segment Enhancement

PAC-3

Patriot

Advanced Capability-3
Agenda

• Purpose and Objectives
• Policy and Guidance
• Responsibilities of the Agency
• Responsibilities of the Contractor
• Source Selection Process
• Scenarios
• Questions
Purpose / Objectives

• **Purpose:**
  – Provide an explanation of current MDA OCI policy
  – Discuss importance of OCI Management Plan
  – Discuss how MDA evaluates potential OCIs
  – Discuss considerations for possible MDA policy changes

• **Objectives:**
  – Define OCI
  – Describe MDA OCI policy and guidance
  – Describe MDA OCI policy implementation
  – Discuss actions necessary to prepare an effective OCI Management Plan
  – Provide an example of Request for Proposal (RFP) sections L&M language for evaluation
  – Provide a list of considerations for use during evaluation
    • Considerations must align with sections L&M requirement to be used during source selection evaluation
• FAR Subpart 9.5, Organizational and Consultant Conflicts of Interest
• DFARS Subpart 209.5 Organizational and Consultant Conflicts of Interest
  — DFARS 209.571 Organizational conflicts of interest in major defense acquisition programs
• MDA Instruction 5013.78-INS Organizational Conflict of Interest
• Local Clause H-09 Organizational Conflict of Interest (Apr 2020)
• Guiding Principles for TEAMS-Next Organizational Conflicts of Interest (September 15, 2020)
Scenario #1

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?
Organizational Conflicts of Interest (OCI)

- OCI is defined in FAR 2.101
  “OCI 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.”

- Three general categories:
  - **Impaired Objectivity**: a firm’s ability to render impartial advice to the Government would be undermined by the firm's competing interests
    - Primary concern of impaired objectivity is that the contractor has a financial interest in the outcome of its performance and that the conflicting roles might influence the contractor’s judgement
    - This is the most common type of OCI
  - **Biased Ground Rules**: a firm, as part of its performance of a Government contract has set the ground rules for the competition for another Government contract
    - Primary concern is that by virtue of its current work a company has the opportunity and ability to skew a future competition in favor of itself
  - **Unequal Access to Non-Public Information**: a firm has access to nonpublic information as part of its performance of a contract and where that information may provide a competitive advantage in a competition
    - Primary concern with an unequal access to information type OCI is that the contractor had inside information that provides it with an unfair competitive advantage
Why are Organizational Conflicts of Interest a Concern?

MDA Mission: To develop and deploy a layered, Integrated Missile Defense System to defend the United States, its deployed forces, allies, and friends from missile attacks in all phases of flight

We focus on organizational conflicts of interest (OCI) to:

- Prevent the existence of conflicting roles that might bias a contractor’s judgment in helping to develop and deploy our MDS
- Prevent unfair competitive advantage in our acquisitions which will degrade the quality and affordability of developing and deploying our MDS
MDA Policy and Guidance

• MDA policy to ensure all appropriate measures are taken to:
  – Resolve OCIs arising under FAR 9.5 and unfair competitive advantages arising under FAR 3.101-1
  – Prevent the existence of conflicting roles that might bias a contractor's judgement and deprive MDA of objective advice or assistance
  – Prevent contractors from gaining an unfair competitive advantage

• MDA prefers that offerors are free of OCIs

• Mitigation strategies will not be prohibited
  – A high standard will be applied when determining the sufficiency of any proposed strategy

• Agency Head may waive un-mitigatable OCIs
  – OCI waivers will require review and approval by the MDA Director
  – Consequently, industry is encouraged to avoid OCIs to the maximum extent practicable and to submit OCI-free proposals
Responsibilities of the 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

• 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.
Implementing MDA OCI Policy

• Entire acquisition team supports the process of identifying and evaluating OCIs as early as possible in the acquisition process.

• Contractors required to disclose actual or potential OCIs related to offers submitted in response to MDA solicitations and MDA contracts.

• Contractors required to respond to Contracting Officer inquiries regarding actual or potential OCIs and comply with any resulting remedies.

• Actual OCIs and significant potential OCIs identified any time before or after contract award always require resolution by the Contracting Officer.

• “Significant" OCI and "insignificant" OCI, determination made by the Contracting Officer.
  – Contracting Officers shall seek guidance from Program Counsel (GCA) and the OCI Review Panel (ORP) in making a determination on whether or not an OCI is significant.
Responsibilities of the Contractor

• Identify and disclose actual and potential OCIs – proactively (OCI Disclosure Form) and in response to inquiries
• Actively communicate with Contracting Officer 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
OCI Management Plans

Due to the specific activities performed by various industry partners supporting MDA, the OCI potential exists for all awards:

• When required, OCI Management Plans are evaluated during source selection and incorporated in the contract at the time of award

• Prime contractors are contractually bound to follow their OCI management and mitigation plans (if applicable) and manage potential and actual OCIs at all tiers of the supply chain

• Industry must take an active role in OCI management

• MDA expects prime contractors to create an environment at all tiers that emphasizes avoidance of OCIs when possible
  — When avoidance is not possible, industry must support early identification and reporting of OCIs to the Government, along with a proposed mitigation plan (if needed)
  — The Government recognizes that avoidance is not always possible – Contracting Officer and Program Manager will work with industry partner in implementing acceptable mitigation plan

• Industry is strongly encouraged to review FAR, DFARS, and relevant GAO and court cases in the area of OCI prior to submitting proposals for these requirements

• Offerors that submit proposals requiring mitigation risk having their proposals considered un-awardable should the Government determine their mitigation strategy is inadequate
OCI Mitigation Plans

• Written by contractor when its analysis determines mitigation is required through its own analysis

• Each potential OCI and each mitigation plan is reviewed on a case-by-case basis

• OCI may occur prior to award of a contract, or during performance of the contract

• MDA will consider waivers and exceptions on a case-by-case basis

• Depending on the complexity of the OCI
  — Director for Contracting may approve
  — OCI Review Panel (ORP) may approve
OCI Management Plan
Evaluation During a Source Selection
OCI MANAGEMENT PLAN

Section L – What we may ask industry to provide

a) Description of the organizational unit and position(s) responsible for implementing the contractor’s OCI Management approach (overall management, oversight, and enforcement)

b) The plan to maintain and self-certify an OCI compliant environment during contract performance

c) Procedures for detecting, eliminating, and reporting OCIs at any tier (includes subcontractors at all tiers)

d) Procedures for protecting agency information that could lead to an unfair competitive advantage if disclosed; specifically, collecting disclosure agreements covering all individuals, subcontractors, and other entities with access to Agency-sensitive information, and physical safeguards

e) Promulgation of enforcement mechanisms, procedures and training to all employees of the prime contractor and subcontractors at all tiers, with emphasis on consequences for non-compliance

f) Processes for identifying and eliminating potential conflicts associated with the employment (military or civilian) that may have recently separated federal Government employees had unequal, non-public access to MDA information
• OCI Management Plans evaluated as “Acceptable” or “Unacceptable”
• An OCI Management Plan will be determined to be “Acceptable” if the plan details an approach that properly details all areas noted in Section L
• Purpose is to provide enough detail so that the Contracting Officer can determine if the offeror documents a reasonable management approach to identify and deal with OCI’s during the course of contract execution

TABLE M-7 Technical Acceptable/Unacceptable Rating Method

<table>
<thead>
<tr>
<th>Rating</th>
<th>Definition</th>
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<tbody>
<tr>
<td>Acceptable</td>
<td>Proposal meets the requirements of the solicitation.</td>
</tr>
<tr>
<td>Unacceptable</td>
<td>Proposal does not meet the requirements of the solicitation.</td>
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Offerors Receiving “Unacceptable” Rating for OCI Management Plan May Be NOT Eligible for Award.
Prior to Proposal Receipt

The Government Team:

- Attends Just-in-Time Training, Ethics Training, Virtual Tool and Facility Training to prepare for the source selection
- Reads the RFP and particularly Sections L, M, and the requirements document
- Reads resources listed on Chart 2 of this presentation:
  - FAR Subpart 9.5, Organizational and Consultant Conflicts of Interest
  - DFARS Subpart 209.5 Organizational and Consultant Conflicts of Interest
  - DFARS 209.571 Organizational conflicts of interest in major defense acquisition programs
  - MDA Instruction 5013.78-INS Organizational Conflict of Interest
  - Local Clause H-09 Organizational Conflict of Interest (Apr 2020)
  - Guiding Principles for TEAMS-Next Organizational Conflicts of Interest (September 15, 2020) (if applicable)
- Discusses the evaluation criteria with the Source Selection Evaluation Board (SSEB) prior to reviewing any proposal
### Sample Template for OCI Management Plan Proposal Evaluation

**Sample template for use during proposal evaluation**

<table>
<thead>
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<tbody>
<tr>
<td>a) A description of the organizational unit and position(s) responsible for implementing the Contractor’s OCI Management approach to include responsibility for overall management, oversight, and enforcement.</td>
<td>Rationale: This approach and understanding is sufficient because adequately describes the organizational unit and position(s) responsible for implementing the Contractor’s OCI Management approach to include responsibility for overall management, oversight, and enforcement.</td>
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<tr>
<td>b) The plan to maintain and self-certify an OCI-free environment during performance of the contract by ensuring that the Prime contractor and subcontractors at all tiers do not support any MDA-funded contract requirements (whether via MDA contracts, or other Government agency contracts which support MDA).</td>
<td>Rationale: This approach and understanding is sufficient because adequately describes their plan to maintain and self-certify an OCI-free environment during performance of the contract by ensuring that the Prime contractor and subcontractors at all tiers do not support any MDA-funded contract requirements.</td>
<td></td>
</tr>
<tr>
<td>c) The procedures for detecting, eliminating, and reporting OCIs at any tier, including procedures the Prime contractor will utilize to ensure its subcontractors at all tiers proactively identify and report conflicts.</td>
<td>Rationale: This approach and understanding is sufficient because adequately describes their procedures for detecting, eliminating, and reporting OCIs at any tier, including procedures the Prime contractor will utilize to ensure its subcontractors at all tiers proactively identify and report conflicts.</td>
<td></td>
</tr>
<tr>
<td>d) The procedures for protecting agency information that could lead to an unfair competitive advantage if disclosed; specifically, collecting disclosure agreements covering all individuals, subcontractors, and other entities with access to agency-sensitive information, and physical safeguards.</td>
<td>Rationale: This approach and understanding is sufficient because adequately describes their procedures for protecting agency information that could lead to an unfair competitive advantage if disclosed; specifically, collecting nondisclosure agreements covering all individuals, subcontractors, and other entities with access to agency-sensitive information, and physical safeguards.</td>
<td></td>
</tr>
<tr>
<td>e) Promulgation of enforcement mechanisms, procedures and training to all employees of the Prime contractor and subcontractors at all tiers, with emphasis on consequences for failing to comply with an OCI-free policy.</td>
<td>Rationale: This approach and understanding is sufficient because adequately describes their promulgation of enforcement mechanisms, procedures and training to all employees of the Prime contractor and subcontractors at all tiers, with emphasis on consequences for failing to comply with an OCI-free policy.</td>
<td></td>
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</table>

**Evaluators:**
- Coordinate with SSEB and Contracting Officer
- Ensure template aligns with RFP Sections L&M

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**Evaluator Signature:**

**Date:**
Source Selection Evaluation Responsibilities

- Conduct a comprehensive review and evaluation of OCI Management Plans based solely on the evaluation criteria outlined in the RFP
- Document the evaluation results
- Support any post-source-selection activities, such as debriefings and post-award reviews/meetings, as required
- Do not perform comparative analysis of the plans; evaluate each proposal on its own merit per the RFP, Sections L & M

Specific responsibilities are discussed in the Just-In-Time Training prior to each Source Selection
OCI Mitigation Plans
Why is OCI Evaluation a requirement?

FAR Guidance

• FAR 9.502 notes:

  — Applicability: Profit and Non-Profit Organizations
  
  — Organizational conflicts of interest are more likely to occur in:

  • Management support services
  
  • Consultant or other professional services
  
  • Contractor performance of or assistance in technical evaluations
  
  • Systems engineering and technical direction work performed by a contractor that does not have overall contractual responsibility for development of production

  — OCI may be the result of actual or potential conflict of interest in a current or future contract
Why is OCI Evaluation a requirement? FAR and DFARS Guidance

• FAR 9.504 requires Contracting Officers to analyze planned acquisitions in order to-
  – Identify and evaluate potential organizational conflicts of interest as early in the acquisition process as possible; and
  – Avoid, neutralize, or mitigate significant potential conflicts before contract award.

• DFARS 209.571-6 requires evaluation for the following:
  (a) The ownership of business units performing systems engineering and technical assistance, professional services, or management support services to a major defense acquisition program or a pre-major defense acquisition program by a contractor who simultaneously owns a business unit competing (or potentially competing) to perform as —
    (1) The prime contractor for the same major defense acquisition program; or
    (2) The supplier of a major subsystem or component for the same major defense acquisition program.
  (b) The proposed award of a major subsystem by a prime contractor to business units or other affiliates of the same parent corporate entity, particularly the award of a subcontract for software integration or the development of a proprietary software system architecture; and
  (c) The performance by, or assistance of, contractors in technical evaluation.
OCI Mitigation Plans

• Reviewed as part of the Contracting Officer’s Responsibility Determination

• Each mitigation plan and each potential OCI is reviewed on a case-by-case basis

• Contracting Officers may communicate with apparent successful offeror to improve mitigation plans

• MDA will consider waivers and exceptions on a case-by-case basis

• Depending on the complexity of the OCI
  – Director for Contracting may approve
  – OCI Review Panel (ORP) may approve
OCI Process w/out OCI Review Panel (ORP)

- OCI concern identified
- PCO opens OCI case & coords with GCA, PDOC, and CTP OCI Analyst
- PCO gathers data and performs analysis to evaluate OCI concern
- PCO writes MFR to document “No OCI”
- PCO and PDOC sign the MFR; if special interest FWD MFR to CT for concurrence
- PCO retains in contract file, notifies CTP OCI Analyst to close case

- Yes OCI
- PCO writes OCI analysis memo IAW FAR 9.5 and coords with GC, PDOC, CTP OCI Analyst
- PCO and PDOC sign the analysis memo and staff to CT for final approval
- PCO retains in contract file, notifies CTP OCI Analyst to close case

Legend
PCO – Procuring Contracting Officer
PDOC – Program Director of Contracts
GCA – Acquisition Law Directorate
CTP – Policy and Compliance Directorate

PCO and PDOC May Request an ORP; CT May Direct an ORP at Any Time

Approved for Public Release
22-MDA-11287 (19 Oct 22)
OCI Review Panel

- Assists Contracting Officers in resolving OCI issues that merit the ORP's review to ensure consistent and uniform treatment of these issues.

- Ensure MDA makes informed and consistent determinations regarding OCI issues across programs.

- To determine if ORP is needed, Contracting Officer consults with:
  - Program Director of Contracts (PDOC)
  - CTP Procurement Analyst
  - CTP OCI Analyst
  - General Counsel (GC)

- CT may direct an ORP any time during OCI process.

- ORP required when seeking OCI waiver from the Director.

- If ORP is requested by the Contracting Officer, or if CT directs the contracting officer to request an ORP, then the Contracting Officer shall:
  - Prepare an ORP briefing in addition to the written analysis memorandum required by FAR 9.506
  - Briefing and analysis describes the OCI and the Contracting Officer's planned course of action to avoid, neutralize, or mitigate the OCI
  - ORP convenes; Contracting Officer briefs
  - ORP chair approves ORP brief; Contracting Officer, PDOC, CT sign/approve final OCI analysis memo
OCI Review Panel Composition

- Director for Acquisition (DA) - Chair
- Director for Contracting (CT) - Chair, if delegated
- Deputy Director for Missiles (Dep CTM) or Deputy Director for Sensors & Services (Dep CTS&S) - Chair, if delegated
- Director, Acquisition Policy & Program Support (DAX)
- Director, Policy and Compliance (CTP)
- Program Manager, Consolidated Support Program Office (CS)
- OCI Analyst (CTP)
- Cognizant Program Director of Contracts
- Cognizant Contracting Officer
- Cognizant GCA Advisor
- Competition Advocate
- General Counsel (GC)/Deputy General Counsel, Acquisition Law (GCA)
- Cognizant Program Executive

Ad hoc ORP Members
- Small Business
- Program Office Support
- Additional GCA Advisors
 OCI Review Panel Process

ORP Required

PCO prepares ORP brief to supplement OCI analysis memo

PCO requests ORP with consent of PDOC & coords with CTP OCI Analyst

CTP OCI Analyst schedules ORP with DA/CT Exec Staff

Exec Staff schedules ORP and sends “private” meeting notice to all attendees

PCO coords with CTP OCI Analyst to send RAH to attendees 48 hours before ORP

ORP convenes; PCO briefs

ORP chair approves ORP brief; PCO, PDOC, CT sign/approve final OCI analysis memo

PCO retains in contract file, notifies CTP OCI Analyst to close case

CTP OCI Analyst closes case and ends process
Scenarios
Scenario #1

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?
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 #3

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?
Scenario #4

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?
Future of OCI Guidance in the Missile Defense Agency
Industry Feedback

✓ Separating ‘Gray Area’ Development from Major Systems Development

✓ Consider Easing Imposed Restricted Areas in Follow-on to TEAMS-Next Series of Contracts
  — Industry feedback: “It is all Government SETA Support…”

✓ Provide clear SBIR/STTR Guidance Relating to OCI’s, especially for Very Small Businesses

✓ Provide overarching OCI guidance, not just TEAMS-Next only

✓ Discussions with MDA prior to RFP Release
  • Specific OCI POC for ALL Issues
  • Discuss Proposed Mitigation Strategy
QUESTIONS
Organizational Conflicts of Interest
Industry Meeting