

UNDERSTANDING ORGANIZATIONAL CONFLICTS OF INTEREST



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Introduction: Who I Am

David S. Black



- Co-Chair, National Government Contracts Team
- Government contracts counseling and dispute resolution
- Represent contractors in protests and claims and responding to government investigations, audits, False Claims Act investigations and litigations
- Represent subcontractor in negotiating teaming agreements and subcontracts, and in disputes with prime contractors

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Practice

- Government Contracts
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Education

- Georgetown University Law Center, JD
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Bar Admission

- District of Columbia
- Virginia

AGENDA

- The OCI Problem
- Impacts of OCIs
- Types of OCIs
- Mitigation Approaches
- A Helpful Summary
- Required Procedures
- Recent GAO Decisions
- Elements of an Internal OCI Policy & Procedure



The OCI Problem

The OCI Problem

- An 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.”
- (FAR 2.101)



The OCI Problem

- “An organizational conflict of interest may result when
 - factors create an actual or potential conflict of interest on an instant contract, or
 - when the nature of the work to be performed on the instant contract creates an actual or potential conflict of interest on a future acquisition.

In the latter case, some restrictions on future activities of the contractor may be required.”

- (FAR 9.502(c))



The OCI Problem

“Give advice that is
in the best
interests of the
Government.”

“Give the
Government advice
that will help your
company make
\$\$\$\$ under another
contract.”



The OCI Problem

- Primarily Arises in Service Contracts
 - Acquisition Support Services;
 - Advisory and Assistance Services
 - Program Management Support Services;
 - Technical Evaluation Services
 - Systems Engineering and Technical Assistance (SETA) Services



Contracts that call for the contractor to exercise subjective judgment and provide advice



The OCI Problem

- “OCIs...present challenges to the integrity of the procurement system, and they create difficult situations for contracting agencies, for firms that are potentially conflicted, and for their competitors.”
- “The factors leading to OCIs are unlikely to disappear: the consolidation within the industrial sector selling to the Government, mergers and acquisitions., the reliance on umbrella contracts, and public/private competition.”
 - Daniel I. Gordon, *Organizational Conflicts of Interest: A Growing Integrity Challenge*, 37 Pub. Con. L. J. 25, 26 (Fall 2005).
- Increasing reliance on service contractors to supplement the Federal workforce

Impacts of OCIs on Government and Industry

Impacts of OCIs



On Government

- OCIs can taint the competitive “best value” procurement process
- OCIs can diminish the value of services received by the Government
- Regulation of OCIs can limit an agency’s access to skills and experience of certain contractors
- Regulation of OCIs can reduce competition
- Regulation of OCIs can increase the cost to the Government

Impacts of OCIs



On Contractors

- OCIs can slant the competitive playing field
- Regulation of OCIs can:
 - Limit the contracts that may be performed;
 - Limit the availability of teaming partners;
 - Limit the hiring and retention of employees;
 - Limit mergers & acquisitions activity;
 - Impose compliance costs; and

Impacts of OCIs



On Contractors – Enforcement Risk False Claims Act

- United States v. SAIC
- United States ex rel. Magee v. SAIC, et al.
- United States ex rel. Harrison v. Westinghouse Savannah River Co.
- United States ex rel. Parato v. Unadilla Health Care Center, Inc.
- United States ex rel. Ervin and Assoc., Inc. v. Hamilton Securities Group, Inc.
- United States v. Dynamics Research Corp.
- United States ex rel. Martin v. Bald Eagle Realty

Suspension & Debarment

- Booz Allen (San Antonio)
Holland & Knight

Types of OCIs

Three OCI Situations

Biased Ground Rules

A biased ground rules OCI arises where a firm, as part of its performance of a government contract, has set the ground rules for the competition for another government contract.

Impaired Objectivity

An impaired objectivity OCI arises where a firm's ability to render impartial advice to the government would be undermined by the firm's competing interests.

Unequal Access to Information

An unequal access to information type OCI arises when 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 later competition.

OCI: Biased Ground Rules



- **OCI principles:** Bias; Unfair Competition
- The primary concern with a biased ground rules type OCI is that by virtue of its current work a company has the opportunity and ability to skew a future competition in favor of itself, even unintentionally.
- There is also a concern that the company may have an unfair advantage in the future competition because of its advance knowledge of the future requirements.
- There is no basis to distinguish between a firm and its affiliates, at least where concerns about potentially biased ground rules are at issue.

OCI: Biased Ground Rules – Examples and Resources

» Examples:

- Contractor drafts or advises on the statement of work or contract specifications for the future procurement and then seeks to submit a proposal for the future procurement.
- Contractor drafts or advises on the acquisition plans (evaluation criteria, budget, etc.) for the future procurement.

» Resources:

- FAR 9.505-1: Providing systems engineering and technical direction
 - FAR 9.505-2: Preparing specifications or work statements
 - FAR 9.508: Examples
 - DFARS 209.571-7: Organizational conflicts of interest in major defense acquisition programs – Systems engineering and technical assistance contracts
- Holland & Knight

OCI: Impaired Objectivity

» OCI principles: Bias



- » The primary concern with an impaired objectivity type OCI 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 successfully challenged through the protest process before GAO (**because facts are most readily available to competitors**).

OCI: Impaired Objectivity – Examples and Resources

» Examples:

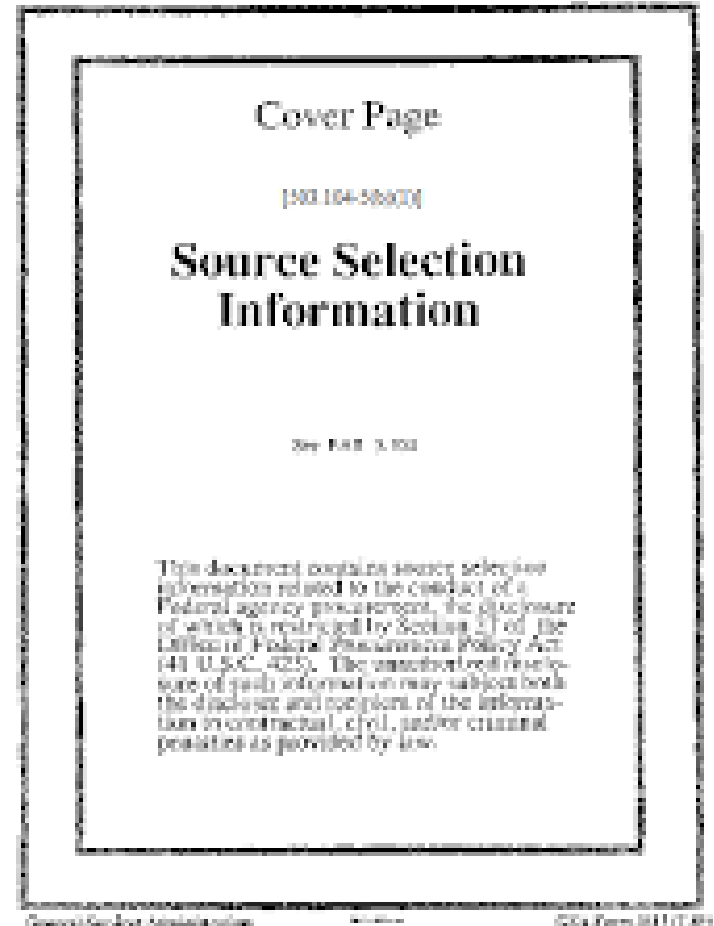
- Contractor is in a position to test, evaluate, or assess the performance of its own product or services, or those of an affiliate or competitor.
- Contractor is in a position to evaluate its own proposals.
- Contractor is in a position to influence policy or regulations regarding services or products provided by the company.

» Resources:

- FAR 9.505-3: Providing evaluation services
- FAR 9.508: Examples

OCI: Unequal Access to Information

- » OCI principles: Unfair Competition
- » The 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.



OCI: Unequal Access to Information – Examples and Resources

» Examples:

- Contractor has access to information about the procurement not available to other contractors (source selection information or other non-public Government information). This information includes, but is not limited to, government estimates, government schedules, and desired attributes.
- Contractor has access to proprietary information belonging to another contractor.

» Resources:

- FAR 9.505-4: Obtaining access to proprietary information
- FAR 9.508: Examples

Mitigation Strategies For OCIs

Mitigating OCIs

- Mitigation Strategies Depend on the Type of OCI
 - Different for impaired objectivity and unequal access to information
 - *Post hoc* mitigation is not possible for biased ground rules
- Mitigation is not “self-help”
 - Requires disclosure to and approval by the Contracting Officer
 - (FAR 9.5 procedures discussed below)



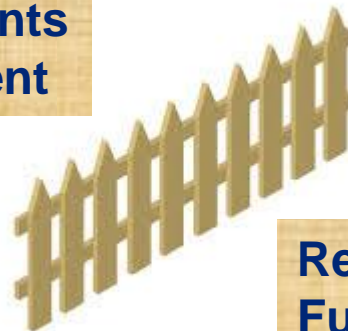


Mitigating OCIs

- **Biased Ground Rules**

- Need to identify this before work on a procurement
- **Avoidance (not performing acquisition support services) is the only method**
 - Not possible to “mitigate” after the work is performed
- **Avoidance requires strategic decision-making**
 - Which side of the “fence” is your company on:

Requirements
Development



Requirements
Fulfillment



Mitigating OCIs

- **Impaired Objectivity**
 - Need to identify this before submission of proposal
 - **Possible mitigation strategies**
 - Proposing to have “conflicted” work performed by a “neutral” subcontractor
 - Not always acceptable to the Government
 - Sometimes “exclusion” is the only acceptable option to the Government
 - May also require choosing the best “side of the fence”



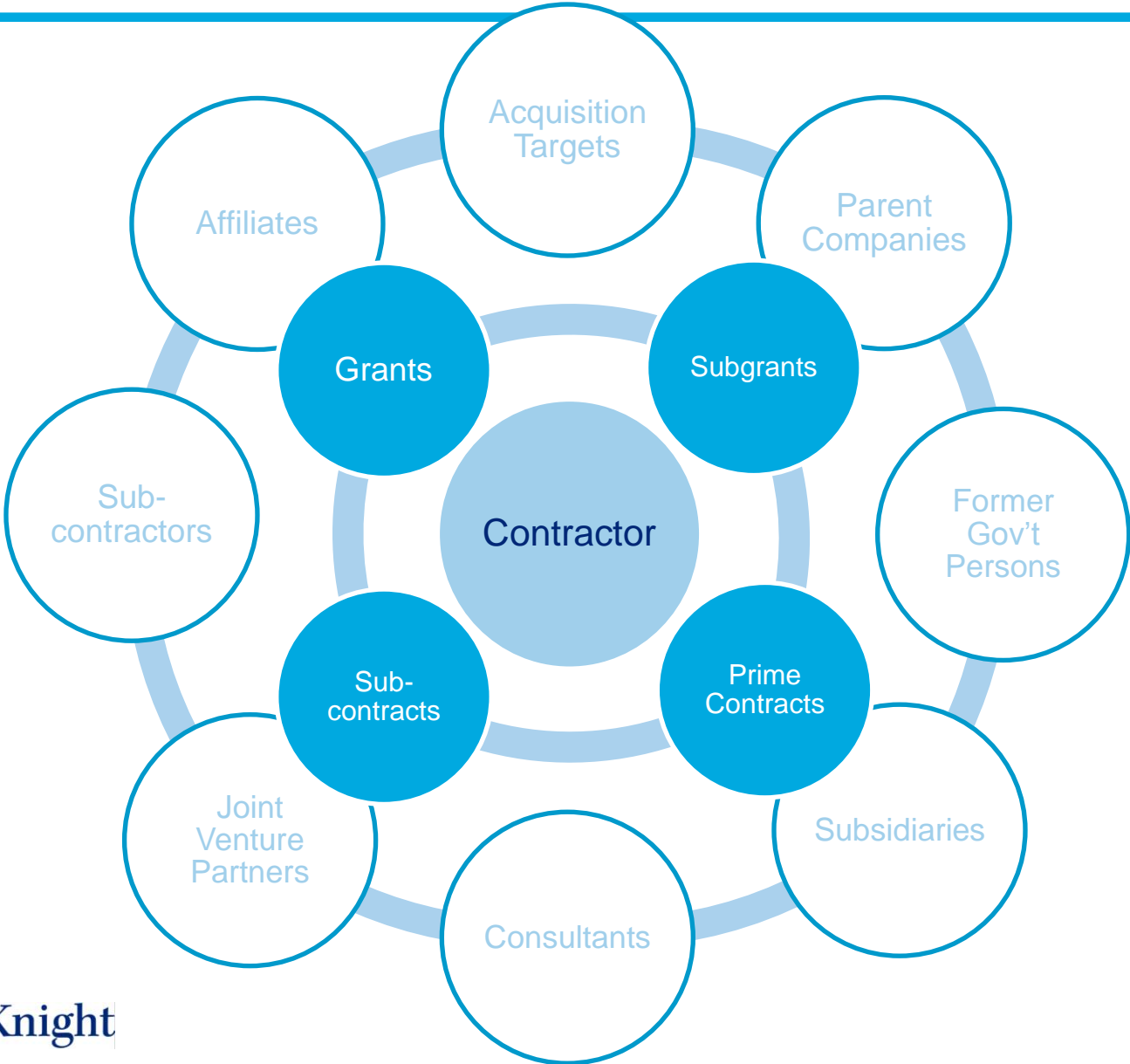
Mitigating OCIs

- **Unequal Access to Information**
 - Need to identify this before *preparation* of proposal (submission may be too late!)
 - Your employees, team members, and consultants
 - Former Federal Employees = Big Risk
 - **Possible Mitigation Strategies**
 - Disclosure to all competitors
 - Nondisclosure but with strict internal firewall: *physical, organizational, and electronic*
 - Sometimes exclusion is the only acceptable option to the Government

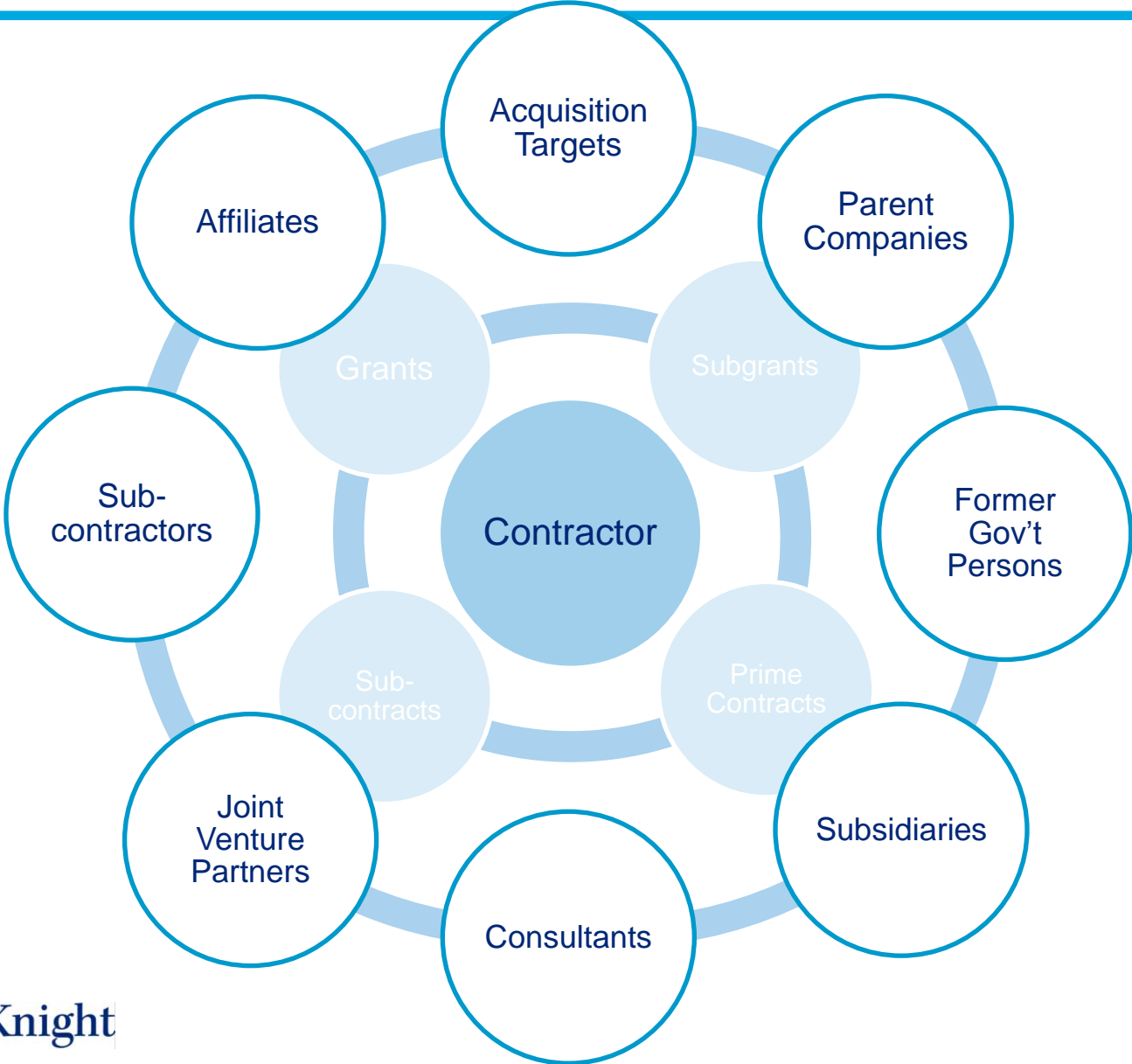
OCI Snapshot

| | Biased Ground Rules | Unequal Access to Information | Impaired Objectivity |
|-----------------------------------|---|---|--|
| Frame of Reference at Time of RFP | Look <u>Backwards</u> : What work did we do before the solicitation was issued? | Look <u>Backwards</u> : What nonpublic information did we have access to before the solicitation was issued? | Look <u>Forward</u> : What work will we be doing if we win the Contract? |
| Type of Work | Technical assistance that helped an agency develop its requirements, prepare SOW, determine estimated cost | Technical assistance or program management office support (access to other contractor's proprietary information or source selection information) | Technical evaluation that involves evaluating the work or performance of another contractor (corporate division or acquisition target) |
| Possible Mitigation Strategies | <ul style="list-style-type: none"> • Exclusion required • Because the tainted work is already done, no other mitigation strategy is feasible | <ul style="list-style-type: none"> • Disclosure of nonpublic information to all offerors; or • Internal firewall to prevent access by proposal team; or • Exclusion from competition | <ul style="list-style-type: none"> • Subcontracting the conflicted evaluation work to a "neutral" subcontractor; or • Exclusion from competition |

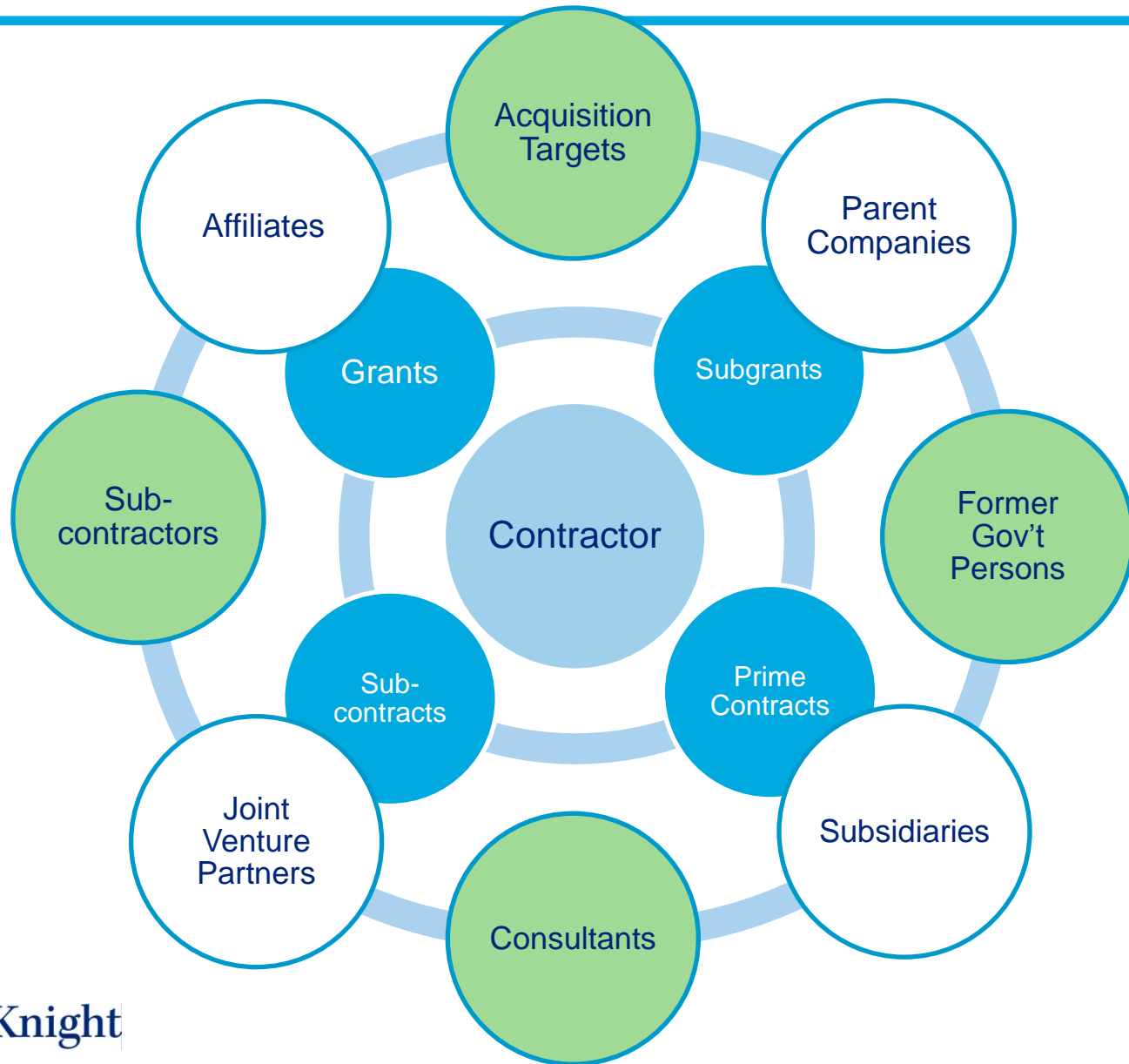
Screening for OCIs



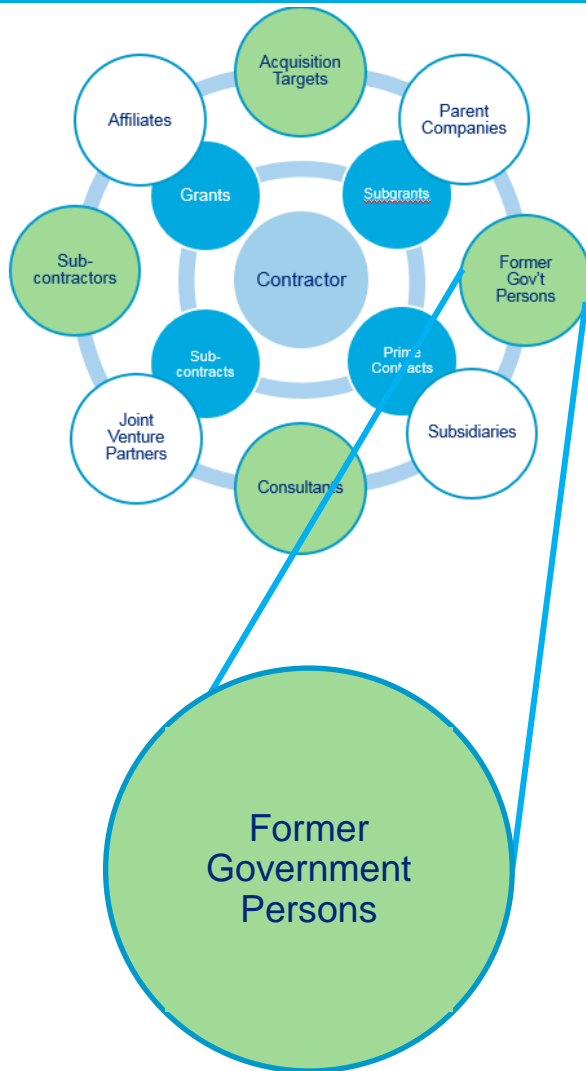
Screening for OCIs



Screening for OCIs



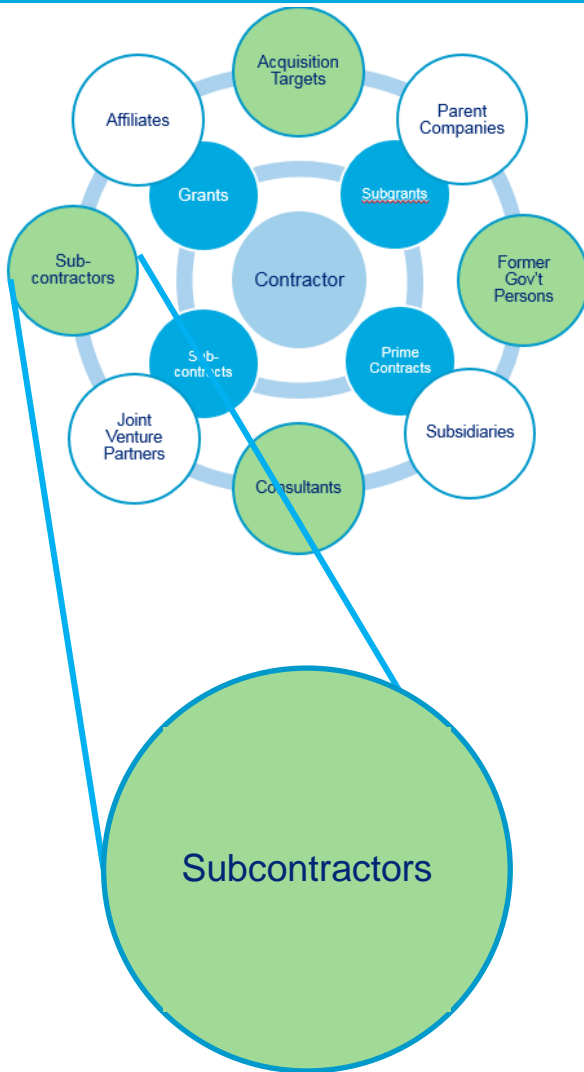
Sources of Organizational Conflicts of Interest



TeleCommunication Systems, Inc., B-404493.3, Oct. 26, 2011, 2011 CPD ¶ 229

- » DISA terminated TCS's contract award based on the CO's conclusion that TCS' hiring of a high-level DISA Program Manager created a presumption of unfair advantage.
- » TCS protested DISA's decision and argued the former gov't employee was hired after its proposal was submitted and walled off once he began work for them.
- » The CO's investigation concluded the former gov't employee had access to non-public information and provided input into TCS's revised proposal.
- » GAO denied the protest, finding there was no need to prove that information was actually used by TCS.

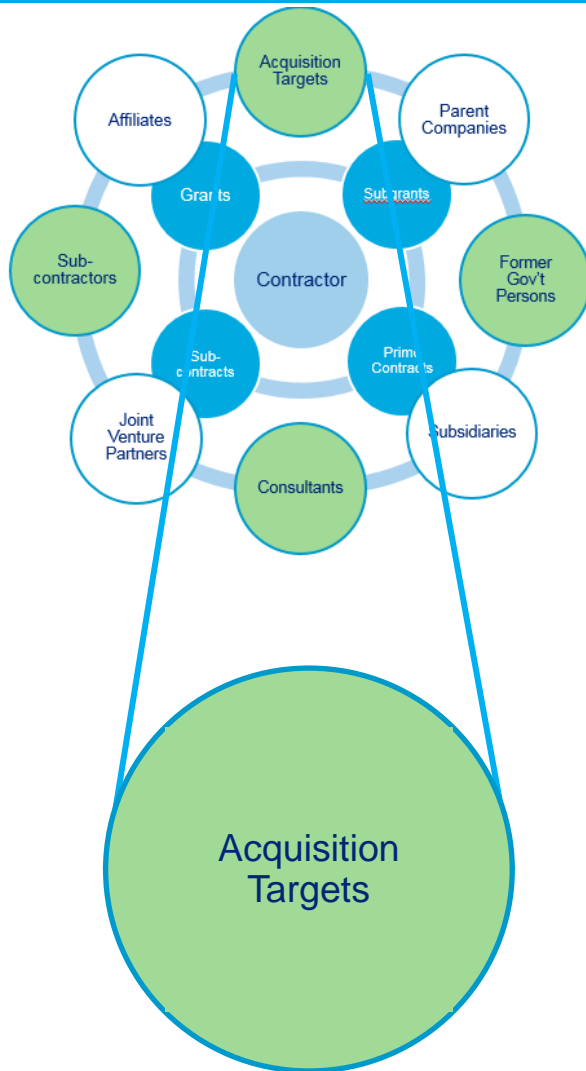
Sources of Organizational Conflicts of Interest



International Business Machines, B-410639, Jan. 15, 2015, 2015 CPD ¶ 41

- » Defense Logistics Agency (DLA) declared IBM ineligible to compete on IT contract to upgrade computer system. IBM denied any OCIs in its proposal to DLA.
- » IBM proposed to team with Booz Allen Hamilton (BAH) in performing the contemplated contract. BAH had a subcontractor, Horizon Industries, who provided certain personnel for the contract, including the person with the alleged conflict (employee #1). IBM offered employee #1 to DLA as one of its proposed subcontractors.
- » GAO denied the protest and held the record supported the CO's finding that employee #1 had "closely involved in developing the ground rules for the procurement" and was "involved in the development of the RFP documents."

Sources of Organizational Conflicts of Interest



Turner Const. v. United States, 645 F.3d 1377 (Fed. Cir. 2011)

- » The Army Corps of Engineers awarded a contract to Turner to build a hospital in Ft. Benning, Georgia. During the procurement, Turner's design subcontractor, EB, had been in discussions with another company, AECOM, regarding a potential merger. The merger between EB and AECOM was finalized after Turner was awarded the contract.
- » AECOM's subsidiary, HSMM, had helped the Corps develop the hospital design and also helped review the technical proposals for the hospital build contract. Competitors protested the award to GAO, who sustained the protest.
- » Turner objected to the termination to COFC, who agreed its contract should not have been terminated. Federal Circuit affirmed.

OCI Procedures:

Working with the Contracting Officer

OCI Mitigation is NOT Self-Help

NO

YES



Contracting Officer Responsibilities

- The Contracting Officer must:
 - Identify and evaluate potential OCIs as early as possible
 - Avoid, neutralize, or mitigate significant potential OCIs before contract award
 - Obtain advice of counsel and appropriate technical assistance
 - Seek information from readily available sources
 - Document his/her judgment when a substantive OCI issue exists



Contracting Officer Responsibilities

- More CO responsibilities:
 - If an acquisition involves a significant potential OCI, before issuing the RFP, the CO **shall submit a draft solicitation provision** for approval by the head of the contracting office
 - Before withholding award due to OCI, **allow the contractor a “reasonable opportunity”** to respond.
 - **Request a waiver** from agency head if awarding to contract with OCI is in the best interests of the Government



Contracting Officer Discretion

- The responsibility for determining whether an actual or apparent conflict will arise, and to what extent a firm should be excluded from the competition, **rests with the contracting agency.**
- Contracting officers are to exercise "common sense, good judgment, and sound discretion." FAR § 9.505.
- "Hard facts" are necessary to establish a conflict; mere suspicion or innuendo of an actual or apparent conflict is not enough.
- GAO will not overturn the CO except where the determination is "unreasonable"

Elements of an OCI Policy and Procedure



OCI Policy & Procedure

- **Policy: Bring potential OCIs to CO's attention**
- **Establish and empower an OCI Compliance Officer**
 - Assign necessary responsibility and authority
 - Provide adequate training and resources
 - Provide access to necessary information



OCI Policy & Procedure

- Methodically screen regarding biased ground rules and impaired objectivity
- Collect Information
 - Offeror: review work performed under current and past contracts and subcontracts and proposals in the pipeline
 - Affiliates: same
 - Team Members: same
 - M&A Targets: same
- Analyze these efforts against the RFP to look for potential OCIs



OCI Policy & Procedure

- **Methodically screen** regarding **unequal access to information**
- **Collect Information**
 - **Offeror**: access to proprietary info of competitors or source selection information?
 - **Affiliates**: same
 - **Team Members**: same
 - **M&A Targets**: same
 - **Consultants**: same
 - **Former Federal Employees**: same
- **Analyze**: Is it potentially nonpublic and competitively useful?



OCI Policy & Procedure

- Document “no OCI” assessments
- Disclose potential OCIs to the Contracting Officer for evaluation
- Review RFP for OCI provisions and clauses
 - Work with project manager to ensure compliance
- Continue to Assess and Disclose OCIs During Contract Performance
 - Train key employees to spot OCI issues and report to the OCI Compliance Officer for review
- Annual Review of Policy



Recent GAO Decisions



DRS Technical Services, Inc., B-411573 (Nov. 9, 2015)

- Army issued task order to Lockheed Marten for “system engineering, integrated logistics, and fielding/training support services.”
- DRS asserted that LM had an **impaired objectivity OCI** because LM will be required to review and test the work it performs under a different task order (enhancing and integrating DCGS software).
- Agency found No OCI, focusing on § 3.1.2 of PWS, which GAO found reasonable.
- But GAO **sustained** the protest

DRS Technical Services, Inc., B-411573 (Nov. 9, 2015)

- GAO found that Agency “**did not adequately consider**” whether **engineering sections** of PWS would result in impaired objectivity OCI for LM.”
 - The agency’s OCI report did not address PWS requirement to review issues with “**system developer deliverables,**” which could include LM’s work under the other task order.
 - The Agency’s OCI report did not discuss PWS requirement to provide “**software code inspection,**” which could include LM’s work under the other task order.
- **GAO’s Recommendation: terminate LM’s award** and perform a more complete OCI investigation

ASM Research, B-412187 (Jan. 7, 2016)

- VA issued task order to Booz Allen for “operation and maintenance support of cloud enclaves and associated environments” and related “infrastructure software.”
- ASM asserted that Booz had an **impaired objectivity OCI** because Booz will be required to monitor its own performance under two other task orders (software quality assurance and independent verification and validation).
- VA analyzed the issue and found no OCI.
- But GAO **sustained** the protest

ASM Research, B-412187 (Jan. 7, 2016)

- **GAO found that the Agency’s OCI analysis was based on “assumptions as to the requirements under task orders which are at variance with the terms of the actual PWS.”**
- Booz, as the SQA contractor, will test apps that will be hosted in the cloud for which Booz, as the MIS contractor, will be responsible. Therefore, there is a potential impaired objectivity if an app fails to perform as anticipated.
- **Detailed discussion** of nature of cloud enclaves and app review process.
- **GAO’s Recommendation: reconsider OCI analysis.** If OCI is identified, request mitigation plan from Booz or request a waiver.

**Oh, and all of this might
change**

Proposed OCI Rule

PROPOSED OCI RULE

OVERVIEW

- Proposed Rule Issued **April 26, 2011**
- “OCI 2.0”: Nuanced reframing of OCI policy
- New Rigidity and New Flexibility
- More Detailed Rules and Standards
- More Detailed Procedures
- Government: More Guidance, Clarity, and Work
- Contractors: New Compliance Burdens, Legal Risks, and Business Opportunities



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Questions?

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