Portfolio Media. Inc. | 860 Broadway, 6th Floor | New York, NY 10003 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Big Teams Don't Mean Big Conflict-Of-Interest Problems

Law360, New York (September 17, 2012, 12:07 PM ET) -- A recent news story about the decision by Science Applications International Corporation to split into two separate companies in order to mitigate the risk of organizational conflicts of interest ("OCIs") (see "SAIC Says Spinoff Will Help To Quash Conflicts Of Interest," Law360, Sept. 4, 2012) got us thinking about the challenges of applying OCI rules to a method of contracting that the government seems to be using more and more with each passing year.

We refer here to multiple-award task-order vehicles such as the U.S. General Services Administration's governmentwide acquisition contracts and the U.S.Department of the Army's Rapid Response Third Generation contracts, among many others. These contracts entitle the awardees to little more than a chance to market their services to agencies and then to bid on task orders, which is why some contractors refer to them as "hunting licenses."

The reason these contracts raise an interesting OCI question is that the sheer size of the teams — they may range from a few members to 100 or more members — make it virtually impossible for any one team member, even the lead member, to know what all of the other team members are up to. The question is: Must they know? Can agencies awarding task orders demand assurances from one team member that the team as a whole has no organizational conflicts of interest? Or, would it be unreasonable for an agency to attribute to the lead team member or all team members the interests of all other team members?

As far as we can tell, these questions have not yet been discussed in any bid protest or contract dispute decision. Nor has any agency issued generally applicable guidance for such a situation (though it might, of course, be addressed in clauses in individual contracts). But, it surely will come up sooner or later. When it does, we think the answer should be that agencies should not — perhaps even, may not — ask for broad assurances from one team member that the team as a whole has no OCIs. Here's why:

Federal Acquisition Regulation ("FAR") § 9.505, entitled "General Rules," states: "Each individual contracting situation should be examined on the basis of its particular facts and the nature of the proposed contract. The exercise of common sense, good judgment, and sound discretion is required in both the decision on whether a significant potential conflict exists and, if it does, the development of an appropriate means for resolving it." Thus, in effect, an OCI inquiry is a two-part analysis: (1) whether a significant potential conflict exists, and (2) whether there are appropriate means for resolving it.

A potential OCI exists where, because of a contractor's other activities, the contractor may enjoy an unfair competitive advantage, or where award of the subject contract could put the contractor in the position of performing conflicting roles that might bias the contractor's judgment.[1] The U.S. Government Accountability Office has said that OCI situations can be grouped into three general categories, depending on the impact of the OCI. These are:

- unequal access to information;
- impaired objectivity; and
- biased ground rules.[2]

Contracting officers are supposed to "(1) Identify and evaluate potential organizational conflicts of interest as early in the acquisition process as possible; and (2) Avoid, neutralize, or mitigate significant potential conflicts before contract award."[3] This is not always easy. However, the OCI regulations contemplate "flexibility," and this precludes contracting officers from excluding contractors from a competition without giving them at least the opportunity to mitigate potential OCIs.[4] This is consistent with the instruction in FAR § 9.505, noted above, that contracting officers exercise common sense, good judgment, and sound discretion, not only regarding whether a significant potential conflict exists, but also regarding the appropriate means for resolving it.

One of the classic means of mitigating certain kinds of potential OCIs is to create a so-called "firewall" which shields one side of a business from the goings-on in another side of the business.[5] For example, if a company has access through a government contract to nonpublic information that could give it a competitive advantage in a procurement, an "unequal access to information" OCI might be mitigated by ensuring that the personnel, computer systems, etc. that are involved in the first contract are physically and operationally separated from those involved in the second contract.

Likewise, if the design side of a contractor or contractor-team for a communications-related task order contract doesn't know whether the manufacturing side of the contractor or team has the capability or interest to bid on a task order for a particular system, an "impaired objectivity" OCI might be mitigated, since the design side of the team will have less of a temptation to favor its team's products in the design.

Some OCIs also can be mitigating by having the ability to decline a specific task order. If the manufacturing side of the hypothetical communications contractor mentioned above can (or must) decline specific task order opportunities, there may be less risk that the contractor will benefit in non-competitive ways from the fact that it or its team member designed the project or had access to nonpublic information.

Under this logic, the larger and more varied the team, the easier it may be to mitigate OCIs, since it will be less likely that one member knows the capabilities and business plans of all of the other members. Also, the bigger the team, the less any individual member is likely to benefit financially from tasks performed by another member. Of course, a lot depends on how the teaming agreement is structured, both in terms of information-sharing and profit-sharing. In theory, though, a team can be designed so that no team member has or even appears to have any incentive to perform a contract in a way that benefits any other team member, in which case there is little or no risk of a significant potential impaired objectivity OCI.

Likewise, steps can be taken so that no member has any incentive to perform a contract in a way that would create biased ground rules in another procurement on which another team member may bid; thus, there arguably would be little or no risk of a significant potential biased ground rules OCI. And, if team members don't share competition sensitive information with each other, then there would be little or no risk of a significant potential unequal access to information OCI.

Contracting officers and contractors must be vigilant to ensure the continued integrity of the procurement system. As the Court of Federal Claims noted not too long ago, “The process of identifying and mitigating a conflict is not a bureaucratic drill, in which form is elevated over substance, and reality is disregarded. Nor is it a check-the-box exercise, in which the end result — that the OCI is mitigated — is all but preordained. Rather ... the FAR calls upon the CO to conduct a timely and serious review of the facts presented.”[6] At the same time, as the procurement system becomes more complex, exercising common sense and good judgment becomes even more important. Either way, we expect to see more decisions addressing these issues.

--By Kenneth B. Weckstein and Shlomo D. Katz, Brown Rudnick LLP

Kenneth Weckstein is a partner and Shlomo Katz is a member in Brown Rudnick's Washington, D.C., office.

[1] FAR §§ 9.501, 9.505.

[2] See, e.g., Aetna Gov’t Health Plans Inc.; Foundation Health Fed. Servs. Inc., B–254397.15 et al., July 27, 1995, 95–2 CPD ¶129 at 12–13.

[3] FAR § 9.504(a).

[4] Informatics Corp. v. United States, 40 Fed.Cl. 508 (1998).

[5] See, e.g., Nortel Government Solutions Inc., B-299522.5, 2009 CPD ¶ 10.

[6] NetStar-1 Government Consulting Inc. v. United States, 101 Fed.Cl. 511, 519 (2011).