Intelligence and National Security Alliance

Organizational Conflicts of Interest Task Force

Organizational Conflicts of Interest and the Intelligence Community: An Analysis of Public and Private Perspectives

March 2011
ACKNOWLEDGEMENTS

INTELLIGENCE AND NATIONAL SECURITY ALLIANCE

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EXECUTIVE SUMMARY

An Organizational Conflict of Interest (OCI) occurs when a contractor is unable to render impartial advice, has an unfair competitive advantage, or has impaired objectivity in performing its contract because of other activities or relationships with other persons.

The passage of the Weapon System Acquisition Reform Act of 2009 (WSARA), the divestiture of TASC from Northrop Grumman, DOD’s revision to the Defense Federal Acquisition Regulation Supplement (DFARS), and the publication of differing policies across the Intelligence Community has made OCI a major topic of discussion across the government and industries supporting the IC. Each of these events conveys varying points of view on OCI. Does a path to consistency in the interpretation and implementation of OCI regulation exist, and if not, is consistency necessary? INSA formed the OCI Task Force in response to a general consensus among senior Intelligence Community officials and industry leaders that clarity regarding the policies was needed. The purpose was to examine the issues of OCI based on an objective dialogue with the private sector. This Task Force was composed of representatives from INSA member companies representing a broad sample set of companies that support the Intelligence Community.

METHODOLOGY

The Task Force gained an understanding of the legal guidelines and how the laws have been interpreted through extensive research supplemented by interviews with experts from across the public and private sector to assess the evolution of OCI policy to its current state. We identified themes that arose from the interviews that addressed patterns, consensus, and disputes and provided the framework for our findings. The challenge was to develop a coherent answer to whether a path to consistency in the interpretation and implementation of OCI regulation exists, and if not, whether consistency is necessary in a manner that captured the varying perspectives among the Task Force and the interviewees.

THE OCI TASK FORCE DREW SEVERAL CONCLUSIONS INCLUDING THE FOLLOWING:

• **DNI Leadership.** The Director of National Intelligence should provide guidance to create some level of consistency on the analysis and understanding of OCI. Even if the guidance is simply for the agencies to continue with their respective policies as they are, the consensus is that some policy guidance is necessary.

• **OCI Board.** The Task Force recommends that the DNI establish an OCI Board that meets regularly to assess the specific OCI issues facing the contracting officers/agencies within the IC and to facilitate more consistency. INSA can hold a periodic gathering of industry members as a companion to the OCI Board to provide an unfiltered perspective of OCI issues in order to continue open discourse.

• **Differences in OCI Regulation can be Maintained.** The Task Force does not recognize one “correct” method for addressing OCI across the IC. Officials in each agency are best-suited to determine which OCI regulations are most appropriate for them as long as they meet the requirements of the ODNI and their respective departments. In the early stages of our review, we observed that inconsistencies can be problematic, and that OCI policy is currently sub-optimal. However, our interviews among the government procurement executives indicate that flexibility is useful. So, while inconsistencies do exist, it seems to be better to allow for flexibility given the spectrum of contracts across all of the agencies.

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INTRODUCTION

The passage of the Weapon System Acquisition Reform Act of 2009 (WSARA), the divestiture of TASC from Northrop Grumman, DOD's proposed revision to the Defense Federal Acquisition Regulation Supplement (DFARS), and the publication of differing policies across the Intelligence Community (NRO and NGA) has made Organizational Conflicts of Interest (OCI) a major topic of discussion across the government and industries supporting the Intelligence Community. Each of these events conveys varying points of view on OCI. Changes to acquisition policy raise the question of whether a path to consistency in the interpretation and implementation of OCI regulation exists and whether consistency is necessary. The Intelligence and National Security Alliance (INSA) formed the OCI Task Force in response to a general consensus among senior IC officials and industry leaders that clarity regarding the OCI policies was needed. The purpose was to examine the issues of OCI based on an objective dialogue with the private sector. This Task Force was composed of representatives from INSA member companies who represent a diverse and broad sample set of companies that support the Intelligence Community. Given INSA's charter, the Task Force focused the scope of this study to the Intelligence Community, though we reviewed issues related to Department of Defense Acquisition Regulation and OCI given the link between the IC and DOD.

This White Paper lays out definitions of key terms and concepts, the methods used by the Task Force to conduct this study, an overview of our findings, and concluding thoughts on the issues surrounding OCI. We conclude by recommending that the DNI provide guidance to create some level of clarity on the understanding of Organizational Conflicts of Interest, even if it means recognizing that differences in OCI regulation can be maintained. The Task Force also recommends that the DNI establish an OCI Board that meets regularly to get a better understanding of the specific OCI issues facing the Contracting Officers/agencies. The private sector could establish a counterpart board that informs the ODNI of industry perspectives.
DEFINITIONS

DEFINING OCI

An Organizational Conflict of Interest occurs when a contractor is unable to render impartial assistance or advice, has an unfair competitive advantage, or has or might have impaired objectivity in performing its contract because of other activities or relationships with other persons. This includes, among other possible issues, evaluating itself or a competitor either through assessment of performance under another contract or through an evaluation of proposals. OCI policy is first and foremost a matter of principles. At its heart, the intent of OCI regulation is to protect the integrity of the government’s procurement process.

CONTRASTING WITH PCI

The difference between OCI and Personal Conflicts of Interest (PCI) lies in the source of the conflict. OCI derives from the structure of the firm that receives the contract. PCI consists of employment or financial relationships that impair the individual employee’s ability to act impartially and in the best interest of the Government. Sources of PCIs include financial interests of covered employees influenced by consulting relationships, scientific and technical advisory board memberships, stock ownership and other investment interests (e.g., stock, real estate), referral fees, research funding, etc., among close family members or colleagues.

OCI RESOLUTION

The four measures of OCI resolution are:

1. **Avoidance**: to prevent the occurrence of an actual or potential OCI through actions such as exclusion of sources or modifications of requirements

2. **Neutralization**: to negate, through a specific action, potential or actual OCI related to contractor objectivity during contract performance or an unfair competitive advantage

3. **Mitigation**: to reduce or alleviate the impact of OCI to an acceptable level of risk so that the Government’s interests with regard to fair competition and/or contract performance are not prejudiced

4. **Waiver**: to bypass Federal Acquisition Regulation restrictions and make an award to a firm that has an OCI if it is in the government’s best interest. A waiver does nothing to minimize or reduce the impact of an identified OCI

We discovered during our research that several government agencies have differing sets of definitions for these terms which results in differing OCI regulations across the IC. The table below is an example of some of the differences.

<table>
<thead>
<tr>
<th>DOD Definitions</th>
<th>Intelligence Agency Definitions</th>
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<td><strong>Avoidance</strong> – In order to remain eligible for future acquisition, a contractor will avoid, or be prohibited from submitting an offer for an “initial” acquisition (e.g. Contractor prevented from bidding on a SETA effort to remain eligible for a related development)</td>
<td><strong>Avoidance</strong> – To prevent the occurrence of an actual or potential OCI through actions such as exclusion of sources or modifications of requirements</td>
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<td><strong>Neutralization</strong> – A limitation on future contracting allows a contractor to perform on the instant contract but precludes the contractor from submitting offers for future contracts where the contractor could obtain an unfair advantage in competing for award (e.g. Exclusion of a contractor on a future development contract when they hold a related SETA contract)</td>
<td><strong>Neutralization</strong> – To negate, through a specific action, potential or actual OCI related to an unfair competitive advantage or contractor objectivity during contract performance</td>
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<td><strong>Mitigation</strong> – Any action taken to minimize an organizational conflict of interest to an acceptable level. Mitigation may require Government action, contractor action, or a combination of both. (e.g. Use of firewalled Non-conflicted Subcontractor permitted to resolve all types of OCI)</td>
<td><strong>Mitigation</strong> – To reduce or alleviate the impact of OCI to an acceptable level of risk so that the Government’s interests with regard to fair competition and/or contract performance are not prejudiced</td>
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Source: OCI Briefing from NRO Procurement Executive
FINDINGS

While Task Force members were not in agreement with all aspects of OCI policy and management, which is not surprising given the diversity of the companies represented, there were four major principles that everyone agreed are both needed and currently missing. These include consistency, clarity, transparency and, most of all, leadership from the DNI.

CONSISTENCY/CLARITY/TRANSPARENCY
One of the guiding themes of our study was discerning whether a lack of consistency is a significant problem for the IC and industry. While inconsistencies are problematic in that they can foster mistakes that jeopardize jobs and contracts, there is a reasonable purpose to differing OCI regulations. The DNI wants a certain degree of clarity so that the private sector can support more than one agency at a time. ODNI plays a critical role in OCI policy development, despite the absence of procurement authority, because it is in a unique position to use its bureaucratic reach to influence the application of OCI regulation across the IC.

The primary reason for the varying standards of OCI policy is that the agencies, each with varying missions and operations, tailor their interpretation of OCI to the nature of their outsourcing and contracting. For example, the CIA tends to engage in development contracts based on a specific mission with a small group of contractors. As a result, avoidance is not a preferred OCI strategy for...

METHODOLOGY

The method of research and analysis the Task Force used took place in four phases.

PHASE 1
Gather facts and relevant information to gain an overarching understanding of the legal guidelines and review executive orders to examine how the laws have been interpreted.

PHASE 2
Place the issues in a historical context through extensive research supplemented by a series of interviews to assess the evolution of OCI policy to its current state. The Task Force met with experts from across the private sector and the executive and legislative branch (see Acknowledgements).

PHASE 3
Synthesize the information to determine patterns of OCI regulation, where consensus or resolvable fault lines exist, and where serious disputes have arisen. During this phase, we identified themes that arose from the interviews including consistency, a pendulum swing in OCI policy, cost analysis, and Organizational versus Personal Conflicts of Interest. These themes addressed patterns, consensus, and disputes and provided the framework for our findings.

PHASE 4
Enumerate clearly the OCI problem and the value-added contributions INSA can make to the debate for the IC and industry members. The challenge was to develop a coherent answer to the question of whether a path to consistency in the interpretation and implementation of OCI regulation exists, and if not, whether it is necessary in a manner that captured the varying perspectives among the Task Force and the interviewees.
the CIA because of the necessity to compartmentalize their contracts. The NSA also leans towards mitigation as a strategy. The NSA senior procurement executive says that while she understands why some senior policy makers err on the side of caution, NSA’s interaction with industry has fostered a comfort zone with mitigation for their contracts. NRO contracts, however, are very different in that they are large platform contracts that require a significant amount of Systems Engineering and Technical Assistance (SETA), and NRO has concluded that no firewall is sufficiently high to mitigate OCI. Therefore, avoidance is the preferred method of OCI resolution.

There are notable differences between the DFARS’ measure of resolution and that of IC agencies in the DOD. The diagram below summarizes the differences in policies at the NRO and those of the recently revised DFARS.1 We cite these definitions and policies and compare them to those of the DOD because the NRO regulations were the most restrictive and were already implemented as policy. Of note, according to some of our interviews, this more restrictive posture has had a tangible effect on actions of the rest of the Intelligence Community. The effect is that the divestiture of large organizations resulting from the NRO’s avoidance strategy influences the services that contractors can provide to the other agencies.

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It is worth highlighting some of the relevant contrasts. Item 2 is the first point of discrepancy in that NRO OCI policy requires a review for all acquisitions, while the DOD OCI policy does not require a review for Commercial off the Shelf (COTS) hardware. In a similar vein, the NRO policy is applicable to all tiers of the supply chain (Item 4), while the DFARS limits Major Defense Acquisition Program (MDAP) prohibitions to prime and major subcontractors. The NRO tailored their regulation to ensure access to the development contractor base with domain experience and expertise, while the DOD has no clear preference to protect SETA or the development contractor base.

Items 5 and 8 get to the heart of the main differences between the policies. Whereas the DFARS provides no limitation on the types of activities that may be mitigated through the use of a non-conflicted, firewalled,

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<th>Intelligence Agency Policy</th>
<th>Proposed DFARS Policy</th>
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<tr>
<td>1. States the Agency’s preference for avoidance</td>
<td>1. States DOD’s preference for avoidance</td>
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<tr>
<td>2. OCI policy and review required for all acquisitions</td>
<td>2. OCI policy and review required for all acquisitions except COTS hardware</td>
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<tr>
<td>3. Aimed at ensuring access to development contractor base with domain experience and expertise</td>
<td>3. No clear preference to protect SETA or development contractor base</td>
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<tr>
<td>4. Policy applicable to all tiers of supply chain</td>
<td>4. MDAP prohibitions limited to prime and major subcontractors</td>
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<td>5. Non-conflicted, firewalled subcontractors may be used as a mitigation approach in defined circumstances</td>
<td>5. No limitation on the types of activities that may be mitigated through the use of a non-conflicted, firewalled, subcontractor</td>
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<tr>
<td>6. Maintains flexibility to access highly specialized skills and expertise</td>
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<td>7. Defines avoidance, neutralization, and mitigation</td>
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<td>8. Provides guidance on what and how particular of OCI may be mitigated</td>
<td>8. Does not limit the type of OCI that may be mitigated</td>
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<td>9. Applicable to entire business organization</td>
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<td>10. Implements corporate OCI program which provides “phase-in” opportunity</td>
<td>10. Allows a limited-time waiver to allow contractor time to digest of conflicting work</td>
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Source: OCI Briefing from NRO Procurement Executive
subcontractor, the NRO policy states that non-conflicted, firewalled subcontractors may be used as a mitigation approach in defined circumstances. The NRO policy provides guidance on what and how particular types of OCI may be mitigated, while the DFARS does not limit the type of OCI that may be mitigated.

Item 10 is another significant difference. The NRO implemented a corporate OCI program which provides a “phase-in” opportunity, while the DFARS allows a limited-time waiver to allow a contractor time to divest of conflicting work. This policy has implications for the timing of contract bids and the decision to divest for large contractors. From the industry perspective, timing is a significant factor. No firm wants to wait too long on avoiding or mitigating OCI, especially when divestiture is likely, because of fiduciary responsibility to shareholders.

Moving to the Intelligence Community at large, another source of inconsistency in the OCI assessment is the varying perspectives and technical skill of CO’s throughout the government. The intentions of the WSARA and the proposed rules for DFARS are to reconstitute the population of competent CO’s capable of assessing possible OCI in a uniform manner. A lack of familiarity with OCI regulation on the part of the CO creates delays in the OCI assessment in some cases causing the assessment to be made after the industry team is formed. The consequences of any subsequent OCI violation discovered after the contract award is retroactive. Also, if there is an inadvertent release of information from the government, it is the industry that pays in terms of loss of revenue or jobs.

This leads us to the next point: allegations of OCI during the procurement process versus OCI occurring in the execution of a contract. Throughout our research, we found no case of the latter. Rather the case laws consisted of protests that reflected OCI during the bidding of a contract. The possibility, or appearance, of conflicts of interest during the procurement phase is enough for some agencies to prefer an avoidance regime. Other agencies express concern that absent clear guidelines, the industry and government agencies may be pushing for divestiture too quickly. The implications are complicated because companies that are involved in programs require a boardroom judgment call on the value of a project.

**IMPACT ON INDUSTRY**

Given that the IC agencies discussed above have differing OCI policies, it is not surprising that the industries that support them also have differing perspectives. In general, the private sector has responded to the position and policies of its key customers, for better or worse, to comply with their regulations. This construct appears to have few short term costs; however, in establishing these laws, regulations and policies, there does not appear to have been a lot of analysis on potential long term impacts. Some people who were interviewed expressed concern that the divestiture of a SETA component from a larger company that produces large platforms may see the divestiture as a loss because board members above the firewall appreciated the insight and profit provided by the SETA component. The SETA company may see it as a slight gain in that it takes OCI off the table. Additionally, they have strong owners from a private equity firm with deep pockets interested in preserving the technical expertise of their organization. Some industry members on the Task Force identified that there is the long term risk of divestiture causing a loss of technical knowledge, organizational memory, and business vitality. This risk could preclude one of the government’s principal SETA contractors from performing its function.
Other potential impacts of divestiture identified during Task Force interviews included:

- A shift in the strategic buyer mix. OCI concerns could reduce prime contractors’ large services acquisitions
- An overall increase in divestitures. Agencies and CO’s drive company-oriented OCI analyses, requiring divestitures of business with perceived conflicts
- More private equity platforms of businesses with significant government advisory components becoming active acquirers of government advisory businesses
- OCI avoidance can rip the core out of what platform/SETA providers can facilitate under a contract

COST ANALYSIS

One of the overarching questions discussed during our Task Force meetings has been the cost of mitigation versus avoidance. Any study on cost analysis should review cost to the Government and industry from all tiers in terms of financial cost and cost attributable to human capital (expertise). There are three costs associated with an OCI avoidance structure: one is a significant overhead cost associated with divestiture. Another is the eventual increase in cost of SETA and other services to the Government resulting from the decrease in contractors authorized to provide them. According to one senior acquisition executive, the steady demand and diminished supply could drive the price of the services to rise as high as 10 to 15%. The third cost is the loss to industry of expertise that engineers gain by working in design and assessment after divestiture. However, there are hidden costs of maintaining a firewall if mitigation is the preferred policy in terms of manpower, resources, and time. These costs affect first tier and second tier companies differently because their respective abilities to absorb the costs or the loss of contracts are different. In the case of smaller to mid-tier companies, the loss of a contract causes layoffs. Big companies have a broader and mixed portfolio allowing them to shuffle people around and avoid extensive layoffs.

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Other questions critical to cost estimation which were raised by our Task Force included, whether the OCI resolution process would be more efficient if the divestiture and mitigation costs were absorbed by the government and whether industry is better or more trustworthy at mitigation and separation than the government in terms of keeping a divide between advisor and builder. Answering these questions will require the perspectives of a variety of agencies, industries, and policy makers to be integrated into a coherent analysis.

OCI VERSUS PCI

The Task Force sought to gain varying perspectives of Organizational Conflicts of Interest and Personal Conflicts of Interest (PCI) and what the liability of PCI is for industry. The OCI controversy and PCI are intertwined at the advisory level. Yet, PCI can theoretically be applied to an unreasonable degree (e.g. if the spouse of a SETA contractor has stock in the industry of a platform provider). It seems that an agency cannot reasonably create an avoidance regime in terms of PCI. We discussed “particular matter,” a term that implies that a person can provide an advisory role as long as it did not pertain to a specific contract. Aside from that discussion, the vulnerability to PCI violations is mitigated more by the enforcement of laws that already exist as opposed to PCI reform.
CONCLUSION

NEED FOR DNI LEADERSHIP

The Director of National Intelligence should provide guidance to create some level of consistency on the analysis and understanding of Organizational Conflicts of Interest. Even if the guidance is simply for the agencies to continue with their respective policies as they are, the consensus is that some policy is necessary. While the Federal Acquisition Regulation contains provisions requiring acquisition officials to “identify and evaluate potential OCI early in the process,” it does not go further to address the underlying analysis or descriptions of OCI. This would be useful territory for the DNI to provide guidance, and is process focused.

The Task Force recommends that the DNI establish an OCI Board that meets regularly to get a better understanding of the specific OCI issues facing the CO/agencies within the IC and to help facilitate more consistency. INSA can hold a periodic gathering of industry members as a companion to the OCI Board to provide an unfiltered perspective of OCI issues in order to continue open discourse.

SPECTRUM OF OCI REGULATION

The crux of OCI regulation is the language that determines whether mitigation is a preference or alternative to avoidance. The differing nature of contracts among the agencies and varying definitions used in terms of OCI resolution are the roots of inconsistent OCI regulation among the IC. Taken to the extreme, avoidance does not allow a lot of flexibility to develop the best contracts in terms of value and is unrealistic. Excessive mitigation or wavering does not adequately protect the integrity of the government procurement process. That said, the development of process driven protections against unethical people deliberately violating organizational or personal conflicts of interest is problematic. Laws, law enforcement organizations, investigations, prosecutions and punishment systems already exist that make such acts illegal. Stringent enforcement of current regulations may be a more effective solution than a new policy. Another step would be to ensure that Contracting Officers and industry personnel know how to develop, execute and assess OCI mitigation plans in accordance with the existing guidelines.

RECOGNIZE THAT DIFFERENCES IN OCI REGULATION CAN BE MAINTAINED

The Task Force does not recognize one “correct” method for addressing OCI across the IC. For example, the NRO has very large programs with enormous SI/SETA needs while in contrast the CIA, for example, has a number of small programs with narrow mission needs and focus requiring less SI/SETA resources. Officials in each agency will use OCI regulation best suited for them as long as they have the support of their leadership. It is difficult to calculate the cost associated with each OCI structure, but a more thorough analysis could provide an assessment of the optimal policy. In the early stages of our review, we observed that inconsistencies can be problematic, and that OCI policy is currently sub-optimal. However, our interviews among the government procurement executives indicate that flexibility is useful for them. So, while inconsistencies do exist, it seems to be better to allow for flexibility given the spectrum of contracts across all of the agencies.

1 The WSARA required the USD/AT&L to revise DFARS to address OCI’s by contractors in the acquisition of major weapon systems. The DOD will also establish an OCI Review Board that advises the USD/AT&L on policies relating to OCI’s in the acquisition of major weapon systems. The Board also advises program managers on steps to comply with the requirements of the revised DFARS, addresses OCI’s in the acquisition of major weapon systems, and advises appropriate officials of the Department on OCI’s arising in proposed mergers of defense contractors. Based on these requirements, the DOD submitted proposed changes and allowed for discussion on the revisions throughout the summer of 2010.
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