



# Organizational and Personal Conflict of Interest

Vendor Conference  
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# Agenda

- ▶ **OCI Introduction/Scenarios**
- ▶ **Contracting Officer Requirements**
- ▶ **What is expected of the contractor**
- ▶ **Mitigation**
- ▶ **Pending New Rule**
- ▶ **Compliance**
- ▶ **Q&A Discussion**

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Sources for the OCI presentation:

Some excerpts of the information contained in “CMS Organization Conflicts of Interest Workshop – 2012” by Fred W. Geldon, JD, Professor, George Mason University was utilized, with permission, in the preparation of this presentation.

# What is an Organizational Conflict of Interest (OCI)

- ▶ FAR 2.101 Definition: 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.

# In other words.....

- ▶ An OCI arises when work performed on one contract creates an unfair advantage in competing for another, or the contractor cannot perform impartially because of its other interests.
- ▶ An OCI could exist with respect to existing procurement, or with respect to a future procurement.

# FAR 9.502 – Applicability

- ▶ Applies to profit and non-profit organizations and more likely to occur in service contracts
- ▶ OCI may result when factors create an actual or potential conflict of interest on a 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
- ▶ OCI must be avoided, neutralized or mitigated (definitions on slide 78)
- ▶ Each individual contracting situation should be examined on the basis of its particular facts and the nature of the proposed contract

# What is a Personal Conflict of Interest

- ▶ FAR 3.1101 Definition: Personal conflict of interest means a situation in which a covered employee has a financial interest, personal activity, or relationship that could impair the employee's ability to act impartially and in the best interest of the Government when performing under a contract (A de minimis interest that would not "impair the employee's ability to act impartially and in the best interest of the Government" is not covered under this definition.
- ▶ Note – In FAR 3.1101 the covered employee means an individual who performs an acquisition function closely associated with inherently governmental functions

# How does a Personal Conflict of Interest pertain to you?

- ▶ At a minimum, companies need to review personal conflicts of interest of its staff to ensure the staffs impartially in performing the work is not impaired.
- ▶ Typically this is done through individual disclosures on a scheduled basis completed by the staff and reviewed by the company compliance officer.
- ▶ CMS often requests these individual disclosures from company managers, directors and/or key personnel working on the contract.



# Three Forms of OCIs

- ▶ Unequal Access to Information
- ▶ Biased Ground Rules
- ▶ Impaired Objectivity

# Unequal Access to Information (unfair access to non-public information)

Unequal Access to Information (“unfair” access to non-public information) – Consists of situations in which a firm has access to nonpublic information (including proprietary information and non-public source-selection information) as part of its performance of a Government contract and that information may provide the firm with a competitive advantage in a later competition for a Government contract. In these “unequal access to information” cases, the concern is limited to the risk of the firm gaining an unfair competitive advantage; there is no issue of bias.

# Unequal Access to Information...in other words.....

- ▶ Arises when a contractor, as part of its performance, has access to nonpublic information that will give it an unfair competitive advantage over other offerors.
- ▶ As a general rule, being an incumbent (and thereby having a better understanding of the customer and/or work) does not create an OCI. Experience is considered a natural advantage of incumbency.
- ▶ This OCI will arise when an incumbent contractor has proprietary information, source selection information, or other nonpublic information not provided to competitors that gives the contractor unique insight into the bidding or evaluation process.
- ▶ An unfair competitive advantage may be presumed if contractor has access to non-public information, without having to show that the information was used.

# Biased Ground Rules

Biased Ground Rules – Consists of situations in which a firm, as part of its performance of a Government contract, has helped (or is in a position to help) set the ground rules for another Government contract by, for example, writing the statement of work or the specifications, or establishing source–selection criteria. In these “biased ground rules” cases, the primary concern is that the firm could skew the competition, whether intentionally or not, in favor of itself and/or its affiliates. These situations may also involve a concern that the firm, by virtue of its special knowledge of the agency’s future requirements, would have an unfair competitive advantage in the competition for those requirements.

# Biased Ground Rules – in other words....

- ▶ Arises when contractor has the ability to set the ground rules for another procurement. Unfair advantage is presumed.
- ▶ Gov'ts primary concern is that the contractor could 1) skew the competition in its own favor; 2) by virtue of its special knowledge of the agency's future requirements, gain an unfair advantage in the competition for those requirements.
- ▶ Example would be where the contractor writes the specifications or SOW.

# Impaired Objectivity

Impaired Objectivity – Consists of situations where a firm has an interest (typically financial) that may conflict with the interest of the Government to whom the firm has a contractual obligation, and the firm’s work under the Government contract could give the firm the opportunity to benefit its other business interests. If the firm is using subjective judgment or giving advice, and its other business interests could be affected by that judgment or advice, the firm’s objectivity may be impaired. An example would be if the firm were evaluating itself, an affiliate or a competitor, either through an assessment of performance under another contract or an evaluation of proposals. In these “impaired objectivity” cases, the concern is that the firm’s ability to render impartial advice to the Government could appear to be undermined by its relationship with the entity whose work product is being evaluated.

## Impaired Objectivity – in other words...

- ▶ arises when contract gives contractor ability to benefit its other business interests
- ▶ Example would be if a contractor, under on Government contract is required to evaluate work it performed under a separate contract; performed by a separate entity in which it possess a financial interest; performed by a competitor.
- ▶ Gov'ts primary concern is that contractor will not be able to behave objectively because of other economic pressures and consequences.

# What about Procurement Integrity?

- ▶ Be mindful of Procurement Integrity as specified in FAR 3.104, especially when hiring or consulting with former Government employees.
- ▶ If the Contracting Officer obtains information of a violation or possible violation, he/she must determine if such violation has an impact on the pending award (note – final decisions are made at the Head of Contracting level)
- ▶ If it is determined that an actual violation occurred, the CO may
  - Cancel the procurement
  - Disqualify an offeror
  - Take any other appropriate action in the interests of the Govt
- ▶ Seek advice from the CMS Ethics Office



# When are OCI's more likely to occur?

- ▶ Management Support Services
- ▶ Consultant or other professional services
- ▶ Acquisition activities
- ▶ IV&V

# Impaired Objectivity is the most problematic OCI

Even with firewalls, there is no way, or it is extremely unlikely, to ensure neutral and objective behavior or judgment.

# OCIs are a hot topics in the news

- Increasingly complex area of acquisition
- Industry consolidations and more competitive marketplace
- Area with more and more contract award protests
- Big issue at CMS in large part due to the nature of work and increased GAO interest and scrutiny surrounding them
- Increased transparency

## Grassley Seeks Details of Potential Conflicts of Interest Among CMS Contractors

WASHINGTON – Sen. Chuck Grassley is asking the Centers for Medicare and Medicaid Services to detail any identified conflicts of interest among CMS contractors and any steps taken to minimize and prevent such conflicts of interest. Grassley is concerned that the financial relationships between certain contractors may create conflicting roles that impair a contractor's objectivity when monitoring and reviewing another contractor's work. Such conflicts may also interfere with contractors' aggressive pursuit of fraud, waste and abuse.

Earlier this year, the Government Accountability Office upheld a protest to a CMS decision to give a company the contract to detect and investigate potential fraud, waste and abuse because of the contractor's potential conflict of interest. Specifically, the contract could have put the company in the position of evaluating the work of its parent company, another CMS contractor. Grassley is interested in the extent of more such cases.


"Financial relationships can make contractors less aggressive in overseeing each other than they might be without those relationships," Grassley said. "Transparency and prevention of conflicts of interest could strengthen the detection of fraud, waste and abuse in government health programs and benefit taxpayers."

Previously, Grassley raised concerns about program safety contractors -- who are tasked with locating and addressing waste, fraud, or abuse -- failing to adequately open new investigations or refer cases to law enforcement when appropriate. Grassley also wrote to CMS recently to seek greater transparency from program officials regarding contractor accountability and how much contractors are being paid to identify and investigate potential waste, fraud and abuse.

Grassley is ranking member of the Committee on Finance, with jurisdiction over Medicare and Medicaid.

The text of Grassley's Oct. 15 letter on greater transparency and oversight of anti-fraud contractors is available [here](#).

The text of Grassley's Oct. 6 letter is available [here](#).

 letter to CMS on contractors' potential conflicts of interest [140.8 KB]

# In the news....

The screenshot shows a web browser window displaying the homepage of The Hill's website. The browser's address bar shows the URL: <http://thehill.com/blog/healthwatch/health-reform-implementation/205650-conflict-of-interest-concerns-raised-as-obama-races-to-implement-health-reform>. The page features a navigation menu with categories like Home/News, Campaign, Business & Lobbying, Opinion, Capital Living, Jobs, Video, and In The Know. A prominent banner at the top reads "The conversation starts here. health care, policy, & innovation" with the LillyPad logo. The main content area displays a news article titled "Conflict-of-interest concerns raised as Obama races to implement health reform" by Alexander Bolton, dated 11/03/12 11:42 AM ET. The article text states: "The Obama administration is relying heavily on outside contractors to implement a core component of healthcare reform as it races to set up a federal health insurance marketplace before 2014. The fast-approaching deadline gives the administration little time to scrutinize private-sector partners for conflicts of interest." A sidebar on the left includes a "Healthwatch" section and a "SIGN UP NOW" button for "THE HILL NEWS ALERTS". A large image of a woman is featured on the right side of the page, with the text "The conversation starts here." and the LillyPad logo below it.

# Evolution of OCI

- CMS handling of OCI matters has changed due to GAO protest decisions.
- For example, on an impaired objective OCI, CMS previously accepted the mitigation strategy of establishment of separate organizations/subsidiaries with separate boards of directions and compliance committees
- GAO decision regarding Nortel Government Solutions B-299522.5 raised the bar in evaluating financial relationships and concluded that firewalls alone almost never avoid, mitigate or neutralize impaired objectivity OCIs. Note – the Nortel protest was about SRA evaluating its own work
- The Nortel case focused on “relationship”

# Evolution of OCI

- After Nortel, establishment of separate subsidiaries was re-evaluated and generally is no longer considered to adequately mitigate an impaired objectivity OCI.

# Contracting Officer Responsibility

- Analyze planned acquisitions for potential OCI prior to issuance of solicitation
- Identify and evaluate potential OCI as early in the acquisition process as possible
- Before issuing a solicitation, recommend a course of action for resolving the OCI to the head of the contracting activity
- Include in solicitation a statement of any restraint on eligibility for future contracts or subcontracts
- Avoid, neutralize or mitigate significant potential conflicts before contract award
- If it is in the best interest of the US to award the contract notwithstanding the OCI concern, a request for waiver may be submitted to the Agency head, who may not delegate waiver authority below the head of the contracting activity.



# Contracting Officer Responsibility

- Before withholding award due to an OCI, notify contractor to allow a reasonable opportunity to respond.
- If unable to mitigate, avoid or neutralize conflict, consider seeking waiver of OCI if it is in the best interest of the Government (waiver is at the head of contracting activity level)

# The Role of GAO

- Contracting Officer's consider GAO decisions in assessing OCI
- GAO typically reviews the reasonableness of the Contracting Officer's actions and analysis related to OCI
- GAO generally found that the use of firewalls to mitigate unequal to access information was reasonable
- GAO generally found that firewalls alone cannot mitigate impaired objective OCIs

# Some examples.....

- CMS is contracting for data analysis activities for the detection of fraud, waste and abuse of Medicare Part B claims in Maryland.
- The prospective contractor disclosed that its parent company also owned 25% of a medical clinic in Maryland.
- The prospective contractor believes this is NOT a conflict of interest because, it does not have a substantial interest in the clinic and the ownership is at the parent company, not the offeror.
- Conflict Concern: This is an impaired objectivity OCI. It is unlikely that this company could remain objective in its fraud waste and abuse related work. It is reasonable to believe that the company would not report (or would look the other way) if it found any fraud waste and abuse activities at the clinic that is owned by its parent company.

# Some examples.....

- CMS is contracting for data analysis activities for the detection of fraud, waste and abuse of Medicare Part B claims in Maryland.
- The prospective contractor is a large business multi-million dollar business with revenues of \$8 billion per year.
- disclosed that it has no ownership interests in providers that could submit claims to Medicare. However, the contractor disclosed that it has several contracts with providers. The contracts are for IT support of the contractors COTS payroll system. They have 5 contracts for \$1,000,000 each.
- The prospective contractor believes this is NOT a conflict of interest to have contracts with these providers because 1) the contracts are not related to the Medicare claims or billing of Medicare; 2) the contracts are for relatively a small dollar value and 3) and the contractor would never be in a position on the CMS contract to evaluate or review the work that it is doing for the providers as it is not relevant to Medicare.
- Conflict Concern: This is a potential impaired objectivity OCI. Could this contractor's objectivity be impaired because it has five \$1,000,000 contracts with providers. The CO will need to weigh the likelihood that this contractor would "look the other way" so not to hurt its client or its financial relationship with its client.

# Some examples.....

- CMS is contracting for data analysis activities for the detection of fraud, waste and abuse of Medicare Part B claims in Maryland.
- The prospective contractor is a small business with revenues of \$7 million per year.
- disclosed that it has no ownership interests in providers that could submit claims to Medicare. However, the contractor disclosed that it has several contracts with providers. The contracts are for IT support of the contractors COTS payroll system. They have 5 contracts for \$1,000,00 each.
- The prospective contractor believes this is NOT a conflict of interest to have contracts with these providers because 1) the contracts are not related to the provider claims or billing of Medicare; and 2) and the contractor would never be in a position on the CMS contract to evaluate or review the work that it is doing for the providers as it is not relevant to Medicare.
- Conflict Concern: This is a potential impaired objectivity OCI. Could this contractor's objectivity be impaired because it has five \$1,000,000 contracts with providers. The concern here is that 71% of this firms revenue comes from providers. Finding fault with the very providers that this firm has contracts would clearly adversely affect the interests of this company.

# Type of information we may look for you to disclose:

- ▶ Description of all business or contractual relationships or activities that may be viewed by a prudent business person as a conflict of interest
- ▶ Description of methods that will be applied to mitigate any conflicts
- ▶ Description of program to monitor its compliance of its conflict of interest requirements
- ▶ Corporate and organizational structure
- ▶ Financial interests in other entities including percentage of ownership in any other entity and income generated from other sources, list of current or known future contracts with entities that cause conflict

# Type of information we may look for you to disclose:

The list of current or future known contracts could include:

- (1) Identify whether the Offeror is a Prime, Subcontractor, parent company, subsidiary, or other affiliated entity
- (2) Contract Number or Other Identifier
- (3) Period of Performance
- (4) Points of Contact (Project Officer and Contracting Officer)
- (5) Cost
- (6) Short Description of Work
- (7) Whether the identified contract, relationship or activity creates any of the following types of OCIs: (1) Unequal Access to Information, (2) Biased Ground Rule, (3) Impaired Objectivity, and/or (4) Other. If a potential organization conflict of interest is identified, the Offeror must submit a mitigation plan.

(1) Type of Contract	(2) Contract No.	(3) Period of Performance	(4) Points of Contact	(5) Contract Cost	(6) Short Description	(7) *OCI Y/N

# What you don't want to do....

- ▶ Don't make general statements that you do not have any conflicts, without adequate support as to how you reached this conclusion
- ▶ Don't brush off potential conflicts as not conflicts without detailed explanation. Offerors quickly lose credibility when they list potential conflicts and brush them off as 'NOT' being a conflict simply because they have a firewall in place. It is better to identify such a conflict as a "Potential" conflict with a detailed explanation as to why it is not an actual conflict.
- ▶ Don't claim you cannot evaluate your subcontractor because it won't share its conflict of interest information. If you do not have access to subcontractor conflict of interest information, you cannot make an assessment as to your subcontractors conflicts. If you do not know if your subcontractor has conflicts, how do you know if it can do the work.
- ▶ Don't claim you cannot disclose your clients due to non-disclosure agreements. If you have non-disclosure agreements with your clients, ask them if you can disclose them to the Government for purposes of conflict of interest evaluation.



## Be careful....

- ▶ Conflict of Interest should be a consideration before acquiring a company.

# Mitigation

- An Offeror's method of avoiding, neutralizing and mitigating conflicts of interest, if required, will be evaluated on a case-by-case basis. Some examples of mitigation strategies are as follows:
  - • Divestiture of the financial relationship the organization has in another organization;
  - • If the conflict exists because of the financial relationships of individuals within the organization, recusal of the individual from decisions related to the interest or divestiture of the relationships by the individual involved; and,
  - • If the conflict exists because of a subcontractor, limiting access to the subcontractor to only work for which there is no conflict.

# Mitigation

- CMS will not tell you HOW to mitigate your conflicts. CMS will only tell you what the conflict is and why we find it to be a conflict. It is up to each offeror to develop its own mitigation strategy.
- CMS either accepts or rejects the mitigation strategy

# Compliance

# Contractor Compliance Programs

CMS Requirements

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Contractor Compliance Officer  
Centers for Medicare & Medicaid Services

# Our Objectives

All persons will eventually do the right thing ...

# Our Objectives

... after they have exhausted all other alternatives.

Abba Eban, Former Israeli  
Foreign Minister

# Our Objectives

- ▶ Transparency in Dealing With CMS on Contract Matters
- ▶ Commitment to Compliance with all Applicable Laws, Regulations and CMS Requirements
- ▶ Zero Tolerance for Fraud, Waste or Abuse
- ▶ Cooperation with Government authorities



# Compliance Program Elements

- ▶ In the Late 1980s the United States Sentencing Commission stated that a Corporation Facing Criminal Fines Could have its Fines Reduced if it had an Effective Compliance Program in Place at the Time the Criminal Acts Occurred

# Compliance Program Elements

What is an EFFECTIVE Compliance Program?

- ▶ The Commission Identified Seven Basic Elements
- ▶ Those Seven Elements have Remained the Same since First Addressed by the Commission In 1986
- ▶ FAR 3.10 Incorporates these Elements for Federal Contracts Exceeding \$5M in value and 120 Days of Performance

# Compliance Program Elements

- ▶ Code of Conduct and Written Compliance Policies and Procedures
- ▶ Compliance Officer and Compliance Committee
- ▶ Employee Training and Education
- ▶ Process to Receive Complaints Including the Ability to Report Anonymously

# Compliance Program Elements

- ▶ Monitoring and Auditing
- ▶ Enforcement and Discipline
- ▶ Investigation and Prevention of Problems, and the Development of Policies to Address Sanctioned Persons

# CMS Compliance Program Guidance March 2005

## Guidance/Recommendations for Establishing an Effective Compliance Program

- CMS was One of the First Agencies to Publish Compliance Program Guidance
  - <http://www.cms.hhs.gov/MedicareContractingReform/Downloads/compliance.pdf>
- Generally Required for all CMS Contracts
- Follows the Seven Elements Required by the US Sentencing Commission and the OIG for Effective Compliance Programs

# Code Of Conduct

- Written standards of conduct stating the company's ethical values, and its commitment to compliance with all relevant laws, regulations and Medicare contract provisions and program requirements
- Written in an Easy to Read Format
- Employees should have a copy of/access to the Code of Conduct and certify to reading, understanding and abiding by the Code

# Code Of Conduct

- Code should be distribute to subcontractors, vendors and consultants, as appropriate
- Compliance Officer should author an introduction to the Code
- Where an “Enterprise” has developed a Corporate Code of Conduct, CMS contractors should develop their own Medicare specific Code as a supplement to the Enterprise Code, or develop a stand-alone Code

# Written Compliance Policies and Procedures

## Provides Compliance Program Operating Guidelines

- Contractors should have written policies and procedures ranging from simple to comprehensive as appropriate for all major Compliance Program components
- Duties and responsibilities of the Compliance Officer, other compliance department employees and the compliance committee (charter), including reporting requirements to the Board and senior management
- How and when employees will receive general and specialized compliance training



# Written Compliance Policies and Procedures

- How employee reports of non-compliance will be handled at all levels; Compliance Officer should be advised in EVERY case
- How internal investigations will be conducted, including procedures for creating and retaining investigative documents, such as case logs, interview notes and summary statements, persons outside the compliance department who participated in the investigation, deadline for completing an investigation and its outcome
- Guidance on when a compliance investigation should be conducted by an outside entity or person

# Written Compliance Policies and Procedures

- How the compliance department will interact with the other departments, such as internal audit, legal and human resources
- How and when instances of non-compliance will be reported to CMS and/or OIG
- Duties and responsibilities of management in responding to employee reports of non-compliance and in promoting compliance among employees
- Procedures for ensuring that prospective employees, subcontractors, agents and consultants receive appropriate background screening prior to being engaged

# Written Compliance Policies and Procedures

- Procedures for reviewing or revising existing operational policies and procedures following a finding of non-compliance to determine if the policy or procedure was adequate or contributed to the non-compliance
- How compliance will be incorporated into, and become a part of annual performance reviews for managers and employees
- Procedure for conducting periodic reviews of the compliance policies and procedures

# Compliance Officer

## Authority, Independence and Stature Primary Responsibility for the Corporate Compliance Program

- Position should be full time and independent of Human Resources, the Legal Department and/or any Operations/Business Development
- Duties and authority should be clearly detailed in a Position Description, including budget authority
- Compliance Officer should have Primary Responsibility for Detecting and Resolving all Forms of Conflict of Interest

# Compliance Officer

- Compliance Officer must be at a high level and of equal status with similarly positioned executives
- Compliance Officer should be exempt from any employment-at-will rules.
  - In the alternative, any proposed discipline should be subject to approval by the Independent members of the Board of Directors
- Compliance Officer and staff should not have personal relationships with other company employees that may be viewed as a conflict of interest

# Compliance Officer

- Compliance Officer should be located in secure but accessible space and should not share space with other non-compliance employees
- Compliance Officer should provide independent reports directly to senior management, and have direct, unencumbered access to the Independent Members of Board of Directors
- Compliance Officer Must have the Confidence and Respect of the Rank and File to be Effective (i.e., not be perceived as a figurehead)

# Compliance Committee – Board of Director Level

Provides Oversight and Advice to the Compliance Officer

- Contractors should have a Compliance or Audit Committee at the Board of Directors level
- Survey: Board Committees meet two to four times per year
- A quorum of compliance/audit committees should be comprised of a majority of outside directors
- Compliance Officer should provide periodic Written or Oral Reports on compliance activities

# Compliance Committee

- If Compliance Officer presents oral reports, Committee should maintain detailed minutes of the Compliance Officer's report
- Survey: Some contractors also have Executive Compliance Committees that are chaired by the Compliance Officer
  - Meets more frequently than Board Committees
  - Comprised of senior management and heads of departments that are subject to vulnerabilities
  - Tend to be closer to the action than Board Committees



# Training and Education

Educating employees and managers on the structure and the operation of the compliance program and on specific compliance issues

- Provide mandatory general compliance training for new and existing employees
- Have a mechanism to track employee attendance, such as a sign-in roster or on-line registration
- Contractors should consider individual attestation forms that would be placed in the employee's personnel file
- Contractors should consider specialized compliance training for specific job functions or specific risk areas

# Training and Education

- Consider tying general compliance training to specific jobs or corporate mission (relevance to job) and require participant feedback to improve training programs
- Contractors should have specific compliance training for managers
- Contractors should develop training programs that include Medicare specific, real world Medicare integrity issues

# Maintenance of a Process to Receive Complaints

Establish formal protocols so that compliance related reports are logged, evaluated and investigated

- Advise employees to make reports of non-compliance to their immediate supervisors or to a toll free Hotline; emphasize that anonymous reporting is permitted
- Survey: Almost all employees said they would feel comfortable making complaints by either method
- Hotline messages should reiterate the company's confidentiality/non-disclosure, and non-retaliation/non-retribution policies
- A mechanism should be established so that a complainant – even anonymous ones – can obtain the status of an investigation

# Maintenance of a Process to Receive Complaints

- Hotline messages, code of conduct and compliance posters should advise complainants that in certain instances, confidentiality may not be possible– e.g. involvement by law enforcement authorities
- Compliance Officer and other compliance department employees who receive complaints should ensure that their caller ID systems are disabled
- Contractors should consider establishing drop-boxes as another method to receive complaints
- Exit interview forms should be used as another method to elicit information on non-compliance

# Monitoring and Auditing

## Ongoing monitoring and auditing of contractor performance

- Contractors should perform an annual risk assessment and develop an annual audit plan
- Contractors should develop a longer term – e.g. five year – audit plan to ensure that all risk areas are audited at least once during a cycle
- Compliance Officer should be involved in the risk assessment and audit process and have the authority to request specific internal audits

# Monitoring and Auditing

- Compliance program operations should be evaluated periodically by either an internal or external entity
- Contractors formed as subsidiary corporations should maintain their own internal audit function in order to ensure control over the process and lessen the possibility of conflict of interest

# Enforcement and Discipline

Ensuring that consistent disciplinary policies are adhered to in all instances

- Contractors should consider incorporating adherence to, and promotion of, the compliance program as an element of employees' and managers' annual or periodic performance evaluations
- Disciplinary policies should be established for employees who fail to report instances of non-compliance
- Procedures should be established for reporting to CMS when disciplinary actions have an actual or potential effect on contract performance (e.g., Reportable Event)

# Enforcement and Discipline

- Applications for employment should specifically screen prospective applicants to determine if they are ineligible persons (check SAM EPLS and/or HHS/OIG LEIE – exclusions programs)
- Contractors should periodically screen existing employees, subcontractors, agents and consultants against the SAM and OIG exclusion lists to determine if they have become ineligible persons



# Investigation and Prevention of Problems

Responding appropriately to actual, suspected or reported misconduct

- Investigative files must be documented in a consistent, uniform manner, and provide a clear progression of the investigation, the parties involved or the resolution of the case
- Investigations should proceed according to established written procedures and files should contain organized, uniform documentation
- Compliance Officer should track matters which are passed along to other departments for investigation

# Investigation and Prevention of Problems

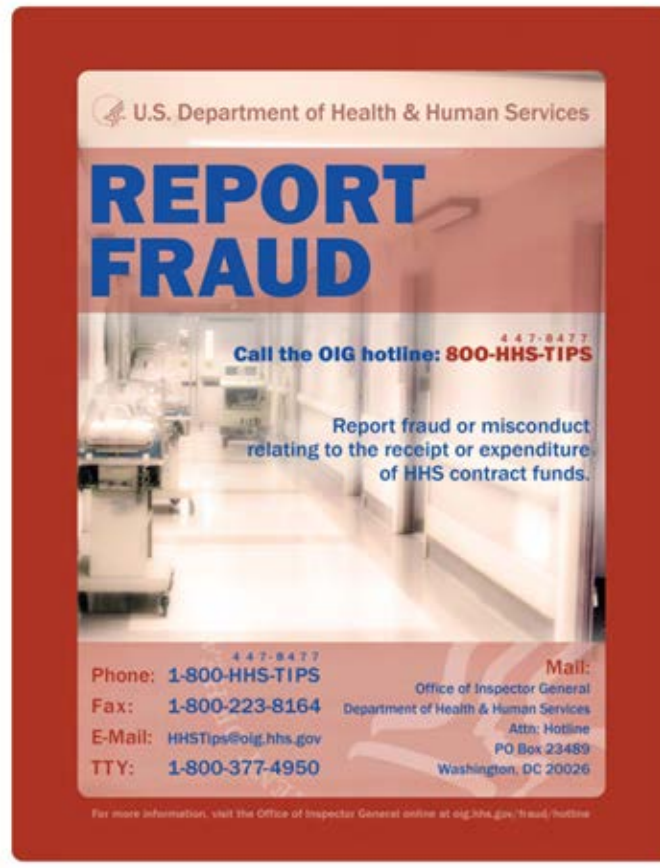
- All investigations referred to other departments for resolution should be returned to the Compliance Officer for trend analysis
- Corrective action should be developed as appropriate
- Follow-up audit of CAP to make certain corrective action is effective

# FAR 3.10 – Code of Business Ethics and Conduct

- FAR 3.10 Incorporates the US Sentencing Commission's Seven Elements
- Mandatory: Code of Business Ethics and Conduct Required of All Federal Contractors where Value of the Contract is \$5M or More and Has 120 days of Performance
- Includes Subcontractors under the Prime Contract

# FAR 3.10 – Code of Business Ethics and Conduct

- Mandatory: Posting of Anti-Fraud Poster (CMS Uses the OIG's)



# FAR 3.10 – Code of Business Ethics and Conduct

- “A contractor may be suspended and/or debarred for knowing failure by a principal to timely disclose to the Government, in connection with the award, performance, or closeout of a Government contract performed by the contractor or a subcontract awarded thereunder, credible evidence of a violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code or a violation of the civil False Claims Act” (FAR 3.1003(a)(3) emphasis supplied).

# FAR 3.10 – Code of Business Ethics and Conduct

- Knowing Failure to Timely Disclose Credible Evidence of any of the above Violations Remains a Cause for Suspension/Debarment until 3 years After Final Payment on a Contract
- Failure to Report the Underlying Violations is an INDEPENDENT Basis for Suspension/Debarment

# FAR 3.10 – Code of Business Ethics and Conduct

- Two Mandatory Contract Clauses
  - Code of Business Ethics and Conduct (52.203–13)
  - Hotline (Fraud) Poster (52.203–14)
  
- Small Business Exceptions to FAR 3.10
  - Internal Controls
  - Training Program

# Conclusion

Consider: If an Employee or Manager has Observed what He or She Perceives to be Illegal Conduct/ Wrongdoing Within the Organization, to Whom do You, the Contractor, Want that Employee or Manager to Report the Matter?



# Conclusion

- The OIG?
- The Department of Justice?
- The Local Qui Tam Attorney?
- Your Compliance Department?

# Organizational Conflicts of Interest Proposed Changes To FAR OCI Rule

## Outline of Key Points

# Proposed FAR OCI Rule Changes Published in April 2011

Reorders OCI from FAR 9.5 to FAR 3 (Improper Business Practices) and FAR 4 (Administrative Matters)

- FAR 3.12 – Impaired Objectivity and Biased Ground Rules
- FAR 4.4 – Unequal Access to Information (no longer considered a “true” OCI)

# Proposed FAR OCI Rule Changes

Provides a New Definition

Organizational conflict of interest means a situation in which—

- (1) A Government contract requires a contractor to exercise judgment to assist the Government in a matter (such as in drafting specifications or assessing another contractor's proposal or performance) and the contractor or its affiliates have financial or other interests at stake in the matter, so that a reasonable person might have concern that when performing work under the contract, the contractor may be improperly influenced by its own interests rather than the best interests of the Government; or
- (2) A contractor could have an unfair competitive advantage in an acquisition as a result of having performed work on a Government contract, under circumstances such as those described in paragraph (1) of this definition, that put the contractor in a position to influence the acquisition.

FAR 2.101 (alphabetical; emphasis supplied)

# Proposed FAR OCI Rule Changes

The Focus of the Rule is on Two Areas of Government Risk

- Risk to the Government's Business Interests
- Risk to the Competitive Integrity of the Government's Procurement Process

# Proposed FAR OCI Rule Changes

- Changes to provide greater clarity of purpose and policy-clearer definition for OCI which is included in FAR 2 and applies throughout FAR
- Consolidated Discussion of Contracting Officer Responsibilities–new section in FAR 3.1206
- New Rule applies to all businesses: profit, non-profit, partnerships, and any other business entity
- Applies to all contracts, subcontracts, task and delivery orders and modifications that add work
- Applies to the acquisition of commercial items, including commercially available off-the-shelf items if the contracting officer determines that contractor performance of the work may give rise to an organizational conflict of interest.

# Proposed FAR OCI Rule Changes

- FAR 3.12 Appears to Focus Primarily on Government Business Risk post-award with some emphasis on Procurement Integrity both pre and post-award (future restrictions)
- Requires Contracting Officer to determine potential for OCI EARLY in the Procurement Process so that the OCI may be:
  - Avoided (e.g., SOW drafted around OCI; excluding offerors)
  - Neutralized (e.g., Limitation of future contracting)
  - Mitigated (e.g., Any action to reduce the risk)
- Provides more Contracting Officer Discretion to determine level of acceptable Government Business Risk
  - Firewalls and other heretofore unacceptable mitigation plans may be acceptable
  - A combination of plans including waiver, may be employed

# Proposed FAR OCI Rule Changes

- New Solicitation Provision and Contract Clauses related to OCIs – FAR 3.12
  - FAR 52.203–XX–Notice of Potential OCI, Alternate 1 and 2
  - FAR 52.203–ZZ–Disclosure of OCI after Contract Award
  - FAR 52.203–YY– Mitigation of OCI
  - FAR 52.203–YZ–Limitation of Future Contracting
- The mandatory FAR 3 contract clauses will require approximately the same level and depth of disclosure currently required by CMS



# Proposed FAR OCI Rule Changes

- FAR 4.4 appears to be exclusively concerned with Procurement Integrity. As a result, the Contracting Officer has very little discretion to correct unfair competitive advantage (this is also applicable under FAR 3.12 procurement integrity issues). Waiver is NOT available.
- “When an offeror has an unfair competitive advantage because of unequal access to nonpublic information, the Government shall disqualify the offeror from a competition only when no other method of resolution is appropriate” (New FAR 4.4 Policy; emphasis supplied)
- New Solicitation Provision and Contract Clauses related to Contractor Access to Nonpublic Information – FAR 4.4
  - FAR 52.204-XX– Access to Nonpublic Information
  - FAR 52.204-YY–Release of Nonpublic Information
  - FAR 52.204-YZ– Unequal access to nonpublic information

# Proposed FAR OCI Rule Changes

- Resolution of Unequal Access Situations
  - Information sharing (e.g., Sharing of Information with all interested parties)
  - Mitigation through use of a firewall (e.g., Similar to FAR 3.12 mitigation)
  - Disqualification – Three part test; Contracting Officer determines no other remedies adequately protect Procurement Integrity

# Proposed FAR OCI Rule Changes

- Status of Proposed Far OCI Rule
  - Second Public Comment period Ended July 2011
  - Combined FAR Agenda for Action on proposed Rules Dated January 8, 2013 Stated Projected Publication For NEW OCI Rule – April 2013
  - Actual Status ?????
- We KNOW this Rule is Coming – It's just a matter of Time

# Questions.....

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