

Conflicts of Interest

Written by Nick Sanders
Tuesday, 01 May 2018 00:00

In competitions for government contracts, contracting officers are concerned about *organizational* conflicts of interest. An organizational conflict of interest is a situation where one bidder has a real or potential advantage because it has access to governmental information through its existing contract with the awarding entity. For example, a contractor performing technical support services for the agency may have access to other bidders' proprietary information, and might use that information to gain an unfair advantage in the next competition. Another type of organizational conflict of interest might occur when a contractor is providing evaluation services to the awarding agency—for example, it is evaluating technical approaches in bidders' proposals—and it is one of the bidders. In either case, companies are required to disclose real or potential OCIs to the contracting officer, as well as their mitigation plans. The contracting officer will determine whether the OCI has been effectively mitigated, or not. If not, then the contractor will be excluded from future competitions.

This is all discussed at FAR 9.5, for those interested. But that's not what we want to talk about today. Instead, we want to talk about *personal* conflicts of interest.

A personal conflict of interest is a real or perceived incompatibility between one's private interests and one's public or fiduciary duties. In the corporate world, a conflict of interest exists when an individual's personal interests interfere with the interests of the individual's employer.

Generally, companies that have codes of ethics/business conduct include in those codes a requirement that possible conflicts of interest must be promptly disclosed. Some companies have [lengthy policy statements](#) that go into great depth on the topic, attempting to guide employees towards disclosure. For example, Pacific Gas & Electric's policy states (in part)—

A conflict of interest occurs when your private interests interfere in any way, or even appear to interfere, with the interests of PG&E as a whole. A conflict of interest can arise if you take actions or have interests that may make it difficult for you to perform your company work objectively and effectively. When you represent PG&E, you must avoid any real or apparent conflict between your interests and those of PG&E.

The COI policy goes on to cover such topics as favored treatment, accepting or giving gifts, holding an outside elected/appointed office, and outside employment. That latter topic is

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especially important to Apogee Consulting, Inc., since we have to carefully juggle client engagements with the duties of our full-time job. People frequently ask how we can perform consulting services without creating a conflict of interest with our full-time employer. The answer to that question is “carefully.” To illuminate the issues involved, we’ll quote (again) from the PG&E COI policy.

You must take special care when engaging in outside employment activities. You’re not permitted to have outside activities that compete with products or services offered by PG&E. (If you’re represented by a bargaining unit, this restriction applies only to products or services offered by your line of business.) The types of activities to avoid include the planning, design, manufacture, sale, installation, or maintenance of any commodity, equipment, or service that our lines of business currently provide or have known plans to provide.

Also, even if these requirements are met, you should take the following precautions to avoid a conflict of interest:

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Don’t participate in an outside employment activity that could have an adverse effect on your ability to perform your duties for PG&E.

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Don’t use company time or assets for your own business or other job.

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Don’t solicit work from PG&E for your business or other employer based on inside knowledge of the company or contacts, and don’t solicit PG&E employees, vendors, or customers while at work. Local management has discretion to allow passive solicitation, such as a poster on a bulletin board or a catalogue on a lunchroom table.

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If, during non-business hours, you solicit vendors or customers with whom you interact for PG&E, you must ensure that your solicitation does not create an appearance of impropriety or in any way imply that the vendor’s or customer’s dealings with PG&E will be affected by the response to your solicitation.

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We adhere to those rules (or ones like them) because we do not want to create a conflict of interest with our full-time employer. To those rules we add—as our guiding principles—a prohibition on providing consulting services to any existing supplier, or to any supplier who has submitted a proposal to become a supplier, or to any direct competitor. Living by those principles means that, from time to time, we are required to turn down work. So be it.

Not everybody is as focused on avoiding personal conflicts of interests as we are. For example, in late 2017 we [told](#) readers about an indictment returned against a “procurement officer” at Sandia National Labs. This individual was going to award a contract for moving services. As part of the source evaluation and source selection processes, she (a) created her own company, (b) submitted a bid, (c) evaluated that bid and found it to be the best value, (d) awarded herself a contract, and (e) invoiced and paid herself.

That’s a pretty clear conflict of interest, in our view.

In related news, on April 25, 2018, the Department of Justice [announced](#) that the former SNL “procurement officer” was sentenced “to three years in prison for orchestrating a scheme to obtain approximately \$2.3 million in federal funds through fraudulent means and for laundering the fraudulently obtained proceeds through her father’s companies.” The sentence was apparently the result of a plea agreement.

In other related news, the Amtrak Office of Inspector General [recently reported](#) that a former Lead Contract Administrator for Amtrak “pleaded guilty to one count of federal program bribery.” According to the OIG report, the Contract Administrator (Miller) “steered four fleet maintenance contracts worth more than \$7.6 million to a single vendor in exchange for approximately \$20,000 in bribes, trips, and other items of value. Miller received the payments through a sham consulting company he created in coordination with two executives from the vendor to conceal his relationship with them.”

In other words, Miller created a “sham consulting company” that purportedly provided services to the same supplier to which he was selecting for contract awards. Again, that situation seems to be a clear conflict of interest.

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Given all the above, how does a company check to see if its buyers, other procurement folks, and employees outside of purchasing are steering clear of any personal conflicts of interest? We believe it starts with *identifying* functions and individuals who have an opportunity to create a COI. Obviously, people who make subcontract and supplier awards very much have that opportunity. But are there other functions that also have a COI opportunity?

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What about the engineer or other technical staff member who can list potential or recommended sources on a Purchase Requisition?

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What about members of the technical team who can decide whether a part or service can only be provided by one source (i.e., creators of source-controlled drawings)?

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What about functions or individuals that decide whether or not a supplier can be listed on an Approved Supplier List?

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What about Quality Inspectors—especially supplier inspectors who are embedded deep in the supply chain, often at remote supplier sites?

The point is, it's not just procurement folks you need to be thinking about. But if you don't think about where potential COIs may be found in your organization, you are unlikely to ever detect one.