

Organizational Conflicts of Interest a/k/a “OCI”

Facility Directors Conference 2015

Organizational Conflicts of Interest

- Introductory overview only.
- Intended to get you thinking & asking questions.

Organizational Conflicts of Interest

- Nutshell / Most Common Facts
 - Disallowing an entity from offering on work it helped design or an RFP it helped write (biased ground rules)
 - Disallowing an entity from offering on an acquisition on which it is evaluating offers (biased ground rules)
 - Disallowing an entity from offering on an acquisition when it is unfairly advantaged due to unequal access to government information (unequal access)
 - Disallowing an entity from receiving a contract to review or evaluate its own performance on a prior contract (conflict of interest)

Organizational Conflicts of Interest

- What makes it complicated?
 - Relationships – how are the players interrelated.
 - A/E sub consultants
 - Parent / Sister / Subsidiary businesses
 - Contractors, Subcontractors
 - Ownership interests

Types - Conceptually

- Unfair Competitive Advantage
 - Unequal access to information
 - Biased ground rules
- Conflict of Interest
 - Conflicting roles that might bias contractor's judgment

Rules by Source Selection Method

- Design-Bid-Build
 - Statutory Framework – 11-35-3245(a)
 - **Hard rule imposed by legislature.**
- CM/AR & DBx
 - Statutory Framework – 11-35-3005(3)
 - Policy Framework
 - embodied in bidding documents applicable to DBx & CM/AR

Design-Bid-Build

Design-Bid-Build

- Statutory Framework Only – 11-35-3245(a)
 - **Hard rule imposed by legislature.**
- An **architect or engineer performing design work**, or a **construction manager performing construction management services**, both as described in Section 11-35-2910(1) and (3), under a contract awarded pursuant to the provisions of Section 11-35-3220 or Section 11-35-3230, **may not perform *other work***, by later amendment or separate contract award, ***on that project as a contractor or subcontractor*** either directly or through a business in which he or his architectural engineering or construction management firm has greater than a five percent interest.

Design-Bid-Build

- (c) This section applies only to procurements for construction using the design-bid-build project delivery method.
- Deconstructed – next screen

- An architect or engineer performing design work, or a construction manager performing construction management services,
- both as described in Section 11-35-2910(1) and (3),
- under a contract awarded pursuant to the provisions of Section 11-35-3220 or Section 11-35-3230,
- may not perform other work,
- by later amendment* or separate contract award,
- on that project as a contractor or subcontractor
- either directly or through a business in which he or his architectural engineering or construction management firm has greater than a five percent interest.
- applies only to procurements for construction using the design-bid-build project delivery method.

Design-Bid-Build

- Nutshell:
 - “no person or company involved in providing architectural or engineering services on the design work of a project may bid on the construction of that project”
 - Protest of Carolina Green, 2005-10 (quoting Margaret Jordan)

Design-Bid-Build

- More Specifically:
 - When conducting a procurement for construction using the design-bid-build project delivery method, you cannot award to either
 - an entity that performed design work on the project for which the construction is acquired or
 - a contractor that subcontracts with an entity that performed design work on the project for which the construction is acquired.
 - Restriction extends to an entity in which the designer “has greater than a five percent interest.”

Design-Bid-Build

- Other Notes
 - May not capture design or CM work performed under an IDC.
 - Unintentional gap? Do IDC forms address?
 - Early version of restriction extended to design work performed “under any provision of this chapter”
 - Current version applies to design work performed “under a contract awarded pursuant to the provisions of Section 11-35-3220 [a/e selection] or Section 11-35-3230 [small a/e],” but does not reference 11-35-3310 [IDC]

Design-Bid-Build

- Do restriction extend to all members of the design team, e.g., A/E's sub consultants?
 - Yes. Protest of Carolina Green, 2005-10 (next slide)

Design-Bid-Build

- *Protest of Carolina Green, Case No. 2005-10*
 - Under prior version of statute
- Facts
 - USC seeks to improve intramural fields.
 - Carolina Green is a licensed contractor whose business specializes in athletic facility construction. They employ no architects or engineers
 - For free, Carolina Green worked up a design for USC including suggestions on how to fix existing problems

Design-Bid-Build

- Facts (continued)
 - USC later contracted with Garvin Design Group to develop the construction documents for the project. Carolina Green was part of the team consulting with Garvin who provided design services. Morgan Grimball, the landscape architect on the design project, used Carolina Green's previous plan to work up its plan. The specifications ultimately included in the Invitation for Construction Bids were based in significant part on the input provided by Carolina Green.
 - Carolina Green was not allowed to bid.
 - Anyone subcontracting with Carolina Green was barred.

Design-Bid-Build

- Ruling
 - “Clearly, the purpose of the statute is to avoid giving a company **an unfair advantage** on bidding for a project that it had helped create. . . . Carolina Green argues that it is not prohibited from bidding on the construction by the statute because it is not an architect, engineer or construction manager. The CPO argues that the only reasonable explanation of the statute is that it include the architect's or engineer's design team. Otherwise, the potential for abuse that the statute seeks to avoid is still present. We agree.”

CM/AR & DBx

CM/AR & DBx

- CM/AR & DBx
 - Statutory Framework – 11-35-3005(3)
 - Policy Framework
 - embodied in bidding documents applicable to DBx & CM/AR
 - OSE Manual
 - Appendix C - Clauses For Use On Construction Management At Risk Projects
 - Appendix D - Clauses For Use On Design-build Projects

APPENDIX C

CONSTRUCTION MANAGEMENT AT-RISK CLAUSES

(To be used on CM at Risk Contracting)

C.1 CLAUSES TO BE USED IN REQUEST FOR PROPOSALS

- A. Disclosure of Conflicts of Interest or Unfair Competitive Advantage (2011): You warrant and represent that your offer identifies and explains any unfair competitive advantage you may have in competing for the proposed contract and any actual or potential conflicts of interest that may arise from your participation in this competition or your receipt of an award. Without limitation, an unfair competitive advantage exists where a contractor competing for award possesses either proprietary information that was obtained from a government

APPENDIX D

CLAUSES FOR USE ON DESIGN-BUILD PROJECTS

D.1 CLAUSES TO BE USED IN REQUEST FOR PROPOSALS:

- A. Disclosure of Conflicts of Interest or Unfair Competitive Advantage (2011): You warrant and represent that your offer identifies and explains any unfair competitive advantage you may have in competing for the proposed contract and any actual or potential conflicts of interest that may arise from your participation in this competition or your receipt of an award. Without limitation, an unfair competitive advantage exists where a contractor competing for award possesses either proprietary information that was obtained from a government

CM/AR & DBx

- Statutory Framework – 11-35-3005(3)
 - “Participation in a report or study
 - that is later used in the preparation of ‘**design requirements**’ for a project
 - does not disqualify a firm from participating as a member of a proposing team in a [CM/AR or DBx] procurement
 - unless the participation provides the business with a ‘**substantial competitive advantage.**’”

CM/AR & DBx

- Statutory Framework – 11-35-3005(3)
 - In the Manual for Planning and Execution of State Permanent Improvements, the State Engineer may establish guidance for the application of this item by governmental bodies.
 - As written guidance, does not exist, yet
 - Might consider the analysis applied to the Policy Framework set forth in the bid documents (next slide)
 - “substantial competitive advantage” probably captured by concept of “unfair competitive advantage” referenced in our OCI types above.

CM/AR & DBx

- Policy Framework – Bid Documents
 - Clause entitled
 - Disclosure of Conflicts of Interest or Unfair Competitive Advantage (2011)
 - Break it down
(Next slide)

Framework

“You warrant and represent that your offer identifies and explains
- any **unfair competitive advantage** you may have in competing for the proposed contract and
- any **actual or potential conflicts of interest** that may arise **from** your **participation in this competition** or **your receipt of an award.**”
(more on what these are below)

Consequences

“If you have an unfair competitive advantage or a conflict of interest,
the state may withhold award.”

Process

“Before withholding award on these grounds, an offeror will be notified of the concerns and provided a reasonable opportunity to respond. Efforts to avoid or mitigate such concerns, including restrictions on future activities, may be considered.”

CM/AR & DBx

- Types of Organizational Conflicts of Interest
 - Conceptually (from 2nd slide)
- **Unfair Competitive Advantage**
 - Unequal access to information
 - Biased ground rules
- **Conflict of Interest**
 - Conflicting roles that might bias contractor's judgment

CM/AR & DBx

- Unfair Competitive Advantage
 - Unequal access to information
 - Biased ground rules
- What is “unequal access”
- Guidance in clause itself
 - “Without limitation, an unfair competitive advantage exists where a contractor competing for award possesses either proprietary information that was obtained from a government official without proper authorization or source selection information (as defined in Regulation 19-445.2010(C)) that is relevant to the contract but is not available to all competitors, and such information would assist that contractor in obtaining the contract.

CM/AR & DBx

- Unfair Competitive Advantage
 - Unequal access to information
 - Biased ground rules
- What are “biased ground rules”
 - No guidance in clause
 - No SC persuasive authority
 - Is it covered by this clause?
 - Conceptually

CM/AR & DBx

- What are “biased ground rules”
 - Conceptually
 - draft specifications favoring its own product or services
 - See 11-35-3005(3) regarding ban on substantial competitive advantage arising from participation in a report or study that is later used in the preparation of ‘design requirements’ for a project.
 - Contractor with employee on evaluation panel has OCI

CM/AR & DBx

- Conflict of Interest
- What is a “conflict of interest”
 - Ancient concept.
 - “No man can serve two masters: for either he will hate the one, and love the other; or else he will hold to the one, and despise the other. Ye cannot serve God and mammon.”
 - Mathew 6:24 (King James Bible)

CM/AR & DBx

- What is a “conflict of interest”
 - Guidance in clause
 - “any actual or potential conflicts of interest that may arise from [either:]
 - your participation in this competition or
 - your receipt of an award.”
 - Federal Framework
 - Conflicting roles that might bias contractor’s judgment
 - So called “impaired objectivity”
 - OCM means “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 other impaired”

CM/AR & DBx

- What is a “conflict of interest”
 - Federal Framework – EXAMPLES
 - Business would have an OCI if it contracted with the government to evaluate or test its work, or the work of a “sister corporation,” performed under an earlier contract with the government.
 - Business would have an OCI if it were hired to evaluate proposals for a project and the business also submitted an offer on the project.

OCI

- Starting Point
 - Common Sense
 - Fish Test
 - Newspaper Test