Walking the Line with OCI

Industry Engagement in Development Planning

NDIA Mission Analysis Committee

October 30, 2013
Agenda

- Background
- Early SE Industry Input
- Current State of OCI
- OCI Definitions
- Future of OCI
## Mission Analysis Committee
### 2013 Task Plan

#### Proposed 2013 Tasks:

- Support NDIA SED DPWG activities
  - Complete S&T/IRAD Final Report
  - OCI Discussion Forum
  - ASD R&E Defense Marketplace Innovation Engagement WG
  - Lab Engagement WG
- Pre-MDD Architecture Tradespace
- Pre-Milestone A Program Protection Planning

#### Deliverables/Products

- Final report on the Integration of S&T/IRAD to support Development Planning
- Final report Addendums following 2013 follow-on WGs/Forums

#### Schedule / Resources

- Working Groups/Forums
  - ASD R&E Defense Marketplace Innovation Engagement WG – April ‘13
  - OCI Discussion Forum – June ‘13
  - Lab Engagement WG – August ‘13
- Reports
  - Complete S&T/IRAD Final Report – February ‘13
  - Addendums – 60 days after WG/Forum Completion

#### Issues / Concerns:

- Diminishing number of contributing committee members
- Inadequate resources to work both DPWG and assigned committee efforts
NDIA DPWG Workshops

- June 8\textsuperscript{th} & 9\textsuperscript{th} 2010
- June 21\textsuperscript{st} & 22\textsuperscript{nd} 2012

OCI identified as potential barrier every time

“The number one barrier to early collaboration is OCI”
- Development Planning Report
  January 2011
# 2012 DPWG Workshop

## Action Items

<table>
<thead>
<tr>
<th>Action</th>
<th>Action Team</th>
<th>Status</th>
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<tbody>
<tr>
<td>1. Generate the DPWG Workshop Formal Report</td>
<td>NDIA</td>
<td>Draft report in work</td>
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<tr>
<td>2. Address the Issue of OCI (as a barrier to collaboration)</td>
<td>NDIA</td>
<td>Identifying “genuine” OCI requirements and key language</td>
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<td>3. Address the Issue of IP (as a barrier to collaboration)</td>
<td>NDIA</td>
<td>DPWG Industry team collecting Industry input</td>
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<td>4. Improve and Communicate the Systems Engineering Process in the Development Planning Timeframe (including SE as a part of S&amp;T/IR&amp;D)</td>
<td>NDIA</td>
<td>Applying NDIA DPWG Development Planning Analytics Table</td>
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<td>5. Identify Methods to Better Leverage Tactical and Strategic S&amp;T/IR&amp;D in Development Planning</td>
<td>NDIA</td>
<td>Initial efforts in work</td>
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<tr>
<td>6. Identify Methods of Collaboration and Communication Mechanisms</td>
<td>NDIA/Gov’t</td>
<td>Partnering with AFRL for 2013 continued efforts</td>
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<td>7. Provide Suggestions for Improving the 6.1/6.2 Investment Strategy</td>
<td>NDIA/Gov’t</td>
<td>Partnering with OASD R&amp;E for 2013 continued efforts</td>
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<tr>
<td>8. Collaborate Across Government and NDIA DPWGs</td>
<td>NDIA/Gov’t</td>
<td>Partnering with the Gov’t DPWG for 2013 continued efforts</td>
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All Efforts To Be Coordinated Across Government and Industry
Finding: The issue of OCI is seen as a barrier to collaboration – an excerpt

- **Clear & concise** understanding of OCI language needed
  - Enables Industry participation in development planning activities
  - Current approach: use lowest-risk interpretation of language
    - Typically causes exclusion of Industry participation

- Review DoD Source documentation
  - Identify key language and “genuine” OCI requirements

- Provide recommendations that are practical and feasible
  - Clear guidance on what type of Industry involvement IS and IS NOT allowed would help mitigate the current reluctance

- Communicate the results

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This finding suggests clarifying the OCI provisions, not loosening them
Top 3 Gov’t Misconceptions

1. Misconception – “We can’t meet one-on-one with a potential offeror.”
   • Fact – Government officials can generally meet one-on-one with potential offers as long as no vendor receives preferential treatment.

2. Misconception – “Since communication with contractors is like communication with registered lobbyists, and since contact with lobbyists must be disclosed, additional communication with contractors will involve a substantial additional disclosure burden, so we should avoid these meetings.”
   • Fact – Disclosure is required only in certain circumstances, such as for meetings with registered lobbyists. Many contractors do not fall into this category, and even when disclosure is required, it is normally a minimal burden that should not prevent a useful meeting from taking place.

3. Misconception – “A protest is something to be avoided at all costs - even if it means the government limits conversations with industry.”
   • Fact – Restricting communication won’t prevent a protest, and limiting communication might actually increase the chance of a protest – in addition to depriving the government of potentially useful information.

“Myth-Busting”: Addressing Misconceptions to Improve Communication with Industry during the Acquisition Process (Memo) 2 February 2011

-Daniel I. Gordon, Administrator for Federal Procurement Policy
Why Have Early Industry Input?

Access to current market information is critical for agency program managers as they define requirements and for contracting officers as they develop acquisition strategies, seek opportunities for small businesses, and negotiate contract terms. Our industry partners are often the best source of this information, so productive interactions between federal agencies and our industry partners should be encouraged to ensure that the government clearly understands the marketplace and can award a contract or order for an effective solution at a reasonable price.

“Myth-Busting”: Addressing Misconceptions to Improve Communication with Industry during the Acquisition Process (Memo) 2 February 2011

-Daniel I. Gordon, Administrator for Federal Procurement Policy
Gov’t / Industry Engagements During Development Planning

➢ Types of mechanisms (tools) is well understood

  – Request for Information
  – Cooperative Research and Development Agreements
  – Study Contracts
  – Industry / Government Working Groups
  – Community of Practice
  – Industry Days
  – Technology Demonstrations and Industry Driven Experiments
  – Broad Agency Announcements
  – Small Business Independent Research
  – Industry “pools” in theater and in acquisition

- NDIA DPWG Workshop June 2010
NDIA DPWG OCI Action Objective

- Develop a clear and concise understanding of OCI language
- No intent to discuss changing any language

Improve Development Planning Industry Engagement
The Regulations

<table>
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<tr>
<th>Federal Acquisition Regulation (FAR)</th>
<th>Defense FAR Supplement (DFARS)</th>
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<tr>
<td>➢ “The primary regulation for use by all Federal Executive agencies in acquisition of supplies and services with appropriated funds”</td>
<td>➢ Implements and supplements the FAR</td>
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<tr>
<td>➢ Principal set of rules in the Federal Acquisition Regulation System</td>
<td>➢ Contains requirements of law, DoD-wide policies, delegations of FAR authorities, deviations from FAR requirements, and policies / procedures that have a significant effect on the public</td>
</tr>
<tr>
<td>➢ Subject to the approval of the Administrator of Federal Procurement Policy</td>
<td>➢ Should be read in conjunction with the primary set of rules in the FAR</td>
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<td></td>
<td>➢ Administered by the Department of Defense (DoD)</td>
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"FAR coverage on OCIs has remained largely unchanged since the initial publication of the FAR in 1984. The FAR coverage was adapted from an appendix to the Defense Acquisition Regulation, which dated back to the 1960s."

-Federal Register Case 2011-001
Volume 76 Number 80
April 26, 2011
Proposed Rules

Proposing revisions to OCI coverage
- Public feedback period ended Fall 2012
- No final revisions made to date, final rule expected November 2013
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 OCI Definitions

**Current FAR 2.101 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 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.

- Federal Acquisition Regulation Subpart 2.1

**Proposed 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 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 vol 76 Issue 80
What Does the FAR Say?

9.505-2 Preparing specifications or work statements

(a)(1) If a contractor prepares and furnishes complete specifications covering nondevelopmental items, to be used in a competitive acquisition, that contractor shall not be allowed to furnish these items, either as a prime contractor or as a subcontractor, for a reasonable period of time including, at least, the duration of the initial production contract.

Source: Federal Acquisition Regulation Subpart 9.5

Interpretation:
If a contractor develops requirements for an RFP, they cannot bid
What Does the FAR Say?

9.505-2 Preparing specifications or work statements

(a)(1) … This rule shall not apply to -

(i) Contractors that furnish at Government request specifications or data regarding a product they provide, even though the specifications or data may have been paid for separately or in the price of the product; or

(ii) Situations in which contractors, acting as industry representatives, help Government agencies prepare, refine, or coordinate specifications, regardless of source, provided this assistance is supervised and controlled by Government representatives.

Source: Federal Acquisition Regulation Subpart 9.5

Interpretation:
Industry can provide inputs to Government
DFARS 2010 Update: OCI in MDAPs

209.571–1 Definitions…
(3) “Systems engineering and technical assistance”

(i) Means a combination of activities related to the development of technical information to support various acquisition processes. Examples of systems engineering and technical assistance activities include, but are not limited to, supporting acquisition efforts such as -
   (A) Deriving requirements;
   (B) Performing technology assessments;
   (C) Developing acquisition strategies;
   (D) Conducting risk assessments;
   (E) Developing cost estimates;
   (F) Determining specifications;
   (G) Evaluating contractor performance and conducting independent verification and validation;
   (H) Directing other contractors’ (other than subcontractors) operations;
   (I) Developing test requirements and evaluating test data;
   (J) Developing work statements (but see paragraph (ii)(B) of this definition).

(ii) Does not include

(A) Design and development work of design and development contractors, in accordance with FAR 9.505-2(a)(3) or FAR 9.505–2(b)(3), and the guidance at PGI 209.571–7; or

(B) Preparation of work statements by contractors, acting as industry representatives, under the supervision and control of Government representatives, in accordance with FAR 9.505–2(b)(1)(ii).

References FAR note on industry representatives

Source: Federal Register Volume 25 Number 249, December 29, 2010
The Future of OCI in the FAR
(FAR Case 2011-001)

- Removes references to contractors acting as industry representatives

- Specifies that OCI takes place if a contractor is on contract to develop SOWs or requirements and wants to bid contract

- Defense Acquisition Regulatory (DAR) Council resolving final FAR rule issues with GSA case manager

DAR Council drafting final FAR rule
Next Steps

➢ 2014 Activities
  ➢ Collaboration between the NDIA DPWG and the Government DPWG to address the OCI topic
  ➢ Develop a clear and concise understanding of the FAR / DFARS language
  ➢ Communicate the findings across Government and Industry
Industry input is necessary during development planning

- Current FAR allows Industry participation
  - Providing it is supervised & controlled by Government Representative

- DARC drafting final FAR rule
  - Expected November 2013

- Clear & concise understanding of OCI language is still needed
  - Enable Industry participation in development planning activities
What questions can I address?