



“BY FAR THE BEST!”

DAU's OT Counsel's Corner

ADK

OCI IN OTs

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Questions driving this discussion

- ❖ OCI in OT Agreements: What Should the Government Do?
- ❖ OCI in OT Agreements: Remain Silent at Your Own Peril?
- ❖ OCI in OT Agreements: Hidden Speed Bumps or Deal Breaker?



Sinking of the RMS Titanic
Disaster

Starting with the WHY

- ❖ The conference report (H.Rept. 109-676) stated “[concern] with the continued use of OTA contracts by the Missile Defense Agency, as such contracts “lack the customary safeguards found under FAR-based contracts for organizational conflict of interest, truth in negotiations and submission of cost and pricing data.”

- DoD Appropriations Act, 2007

No safeguards? From what?

Baseline

- FAR does not apply to OTs for a reason – speed, ease of execution, flexibility
- Should OCI provisions/clauses be included in OTs? Yes or No.
 - What about policy considerations?
 - Desiderata and FAR Part 3
- Thinking about OCI can help create a framework for other provisions/clauses

FAR Subsection 3.101-1

Government business shall be conducted in a manner **above reproach** and . . . with **complete impartiality** and with **preferential treatment for none**. Transactions relating to the expenditure of public funds require the **highest degree of public trust** and an **impeccable standard of conduct**.

The general rule is to **avoid strictly** any **conflict of interest** or even the appearance of a conflict of interest in Government-contractor relationships.

FAR Creep vs. Price Increases? Less Competition?



Kurdish fighters build makeshift tanks in defense against ISIS

Kurdish forces have begun to convert trucks, bulldozers and agricultural vehicles into makeshift armored vehicles

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Kurdish forces have begun to convert trucks, bulldozers and agricultural vehicles into makeshift armored vehicles. (Photo courtesy of Twitter)

Fair analogy?

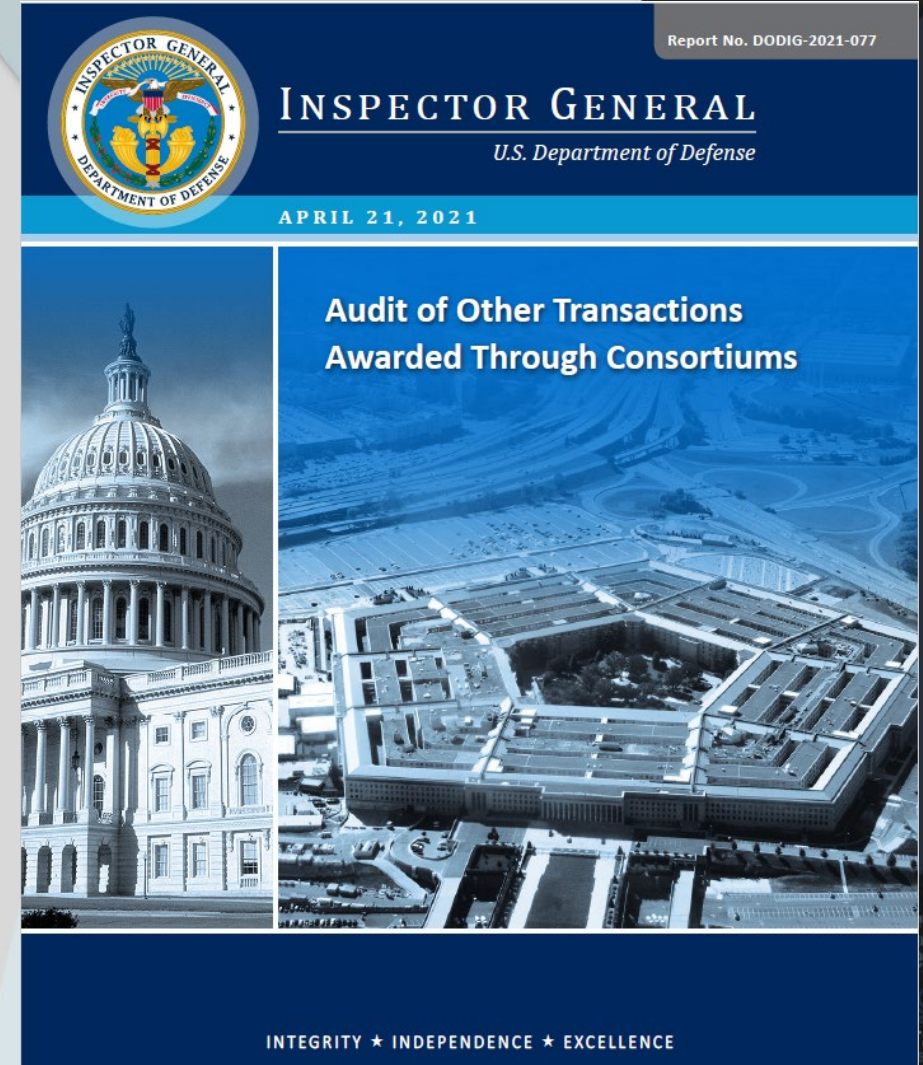
Background Research

Army

The Army Audit Agency found that OTAs did not always have appropriate safeguards to protect Government interests.

AOs generally used proper designation authorities and addressed intellectual property rights. However, the agreements needed safeguards to ensure AOs assessed and mitigated risks to make sure contractors could meet technical, schedule, and cost expectations; made sure contractors met security requirements; and ensured that invoices were supported and properly approved before payment.

“Other Transaction Authority Control Environment,”
February 27, 2020



Background Research

- ❖ The 2018 OT Guide (USD A&S) does not address OCI BUT a new version is coming out (no estimated release date).
- ❖ Without a guide addressing OCI, what are Agreement Officers (AOs) using to draft OTs? Leaving it out?



OTHER TRANSACTIONS GUIDE

Office of the Under Secretary of Defense
for Acquisition and Sustainment

November 2018
Version 1.0

Sample Language

❖ Base Agreement

- [silent]

❖ Objective Requirements Document

- [silent]

❖ Request for Enhanced WPs

- [silent]

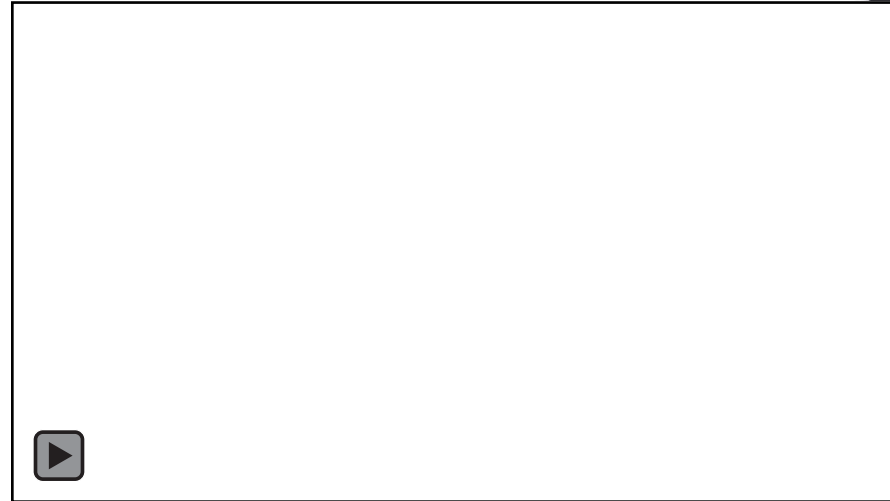
Sample Language (Continued)

❖ Appendix X - OCI

- “If an ABC Consortium (ABCC) Member Entity believes that a potential OCI exists for this proposed agreement; the ABCC Member shall provide a written notification to the Agreements Officer, which indicates that there is a potential or actual OCI.”
- Plus, several paragraphs tracking elements of FAR Subpart 9.5.
- Signed by the ABCC Member

Public Law 117-324 (Dec. 27, 2022)

- ❖ “Preventing OCI in Federal Acquisition Act.”
 - Not later than 18 months
 - Provide and update:
 - Definitions of types (U-I-B)
 - Illustrative examples
 - Solicitation provisions/clauses to avoid or mitigate OCI
 - Tailor provisions/clauses
 - Establish procedures and periodically assess proc.
 - Update FAR Section 9.506



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