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# Playing the Field: Organizational Conflicts of Interest in Federal Procurement Contracts

NOVEMBER 3, 2021

Blog Post | 110 KY. L. J. ONLINE | November 3, 2021

**Playing the Field: Organizational Conflicts of Interest in Federal Procurement Contracts**

**By: Michaela Taylor, Staff Editor, Vol. 110**



When the government needs outside services, they look to The Federal Acquisition Regulation (FAR) for guidance on how to properly conduct their procurement contracts.[1] Among other restrictions, FAR includes provisions which limit conflicts of interest (OCI) between the government and their contractors. [2] Although the regulations provide this guidance, OCI are still commonplace in the procurement system.

Currently, the federal government does not provide bright line rules to agencies on conducting a pre-contractual auditing process. Under current guidance—outside of “readily available” information and professional judgment—agencies are left to rely on disclosures of OCIs provided by contractors.[3] In 2011, the Department of Defense proposed a new rule to bring clarity to the regulation but withdrew earlier this year due to a lapse in time between proposal and passage.[4]

## Current Events

In recent news, McKinsey & Company, one of the largest consulting firms in the world, reached a \$573 million settlement with 49 states.[5] The suit called into question the firms consulting contracts with government entities, and their contribution to the opioid crisis.[6] Beginning in 2008, McKinsey signed a consulting contract with the Food and Drug Administration (FDA), which included major projects such as developing a prescription drug monitoring system, as well as development of a new drug safety plan. [7]

In the same time period, McKinsey was employed by many of the country’s largest pharmaceutical manufacturers, many of whom made or sold the opioids which caused the epidemic that has moved across the country.[8] Not only was McKinsey employed by these companies, documents from the lawsuit show that McKinsey assisted manufacturers in creating strategies to increase sales and limit FDA oversight.[9] In one instance, Purdue Pharma, an infamous name in the opioid crisis, worked with McKinsey to boost production and profits after the FDA reported Purdue’s marketing of OxyContin was unethical.[10]

For over a decade, McKinsey worked for both camps and never disclosed their competing interest despite the inclusion of a standard disclosure provision in their contract with the FDA.[11] Although the state civil penalties were large, there has been a surprisingly limited number of consequences to the firm by the

federal government.[12]

Shockingly, shortly after the non-disclosure was uncovered, the FDA signed an extension contract with McKinsey in the same drug regulation department, giving the firm over 20 million dollars between 2019 and 2021.[13] However, four Democratic senators recently penned a letter to the FDA asking several questions around the agency's process for maintaining compliance with conflict of interest regulations.[14] The agency's response may give Congress key information to spark potential legislative updates.

## **Conclusion**

The spending of taxpayer dollars warrants a heightened scrutiny of those who stand to benefit from its use. The events uncovered in the McKinsey case poses the idea that OCI disclosures in government procurement contracts should not be left up to the contractors judgement, and that a more rigorous audit process should be implemented. Requiring contractors to file a confidential report of all organizational contracts to an agency such as the Office of Government Ethics may provide safeguards against conflicts of interest. This disclosure of non-public information would allow the government to determine any sources of conflicts of interest themselves rather than relying on the potentially inaccurate disclosures from contractors. In any case, regulators may need to revisit an update to the rule to ensure procurement contracts have increased oversight to make them free from unethical conduct and invasive private interests.

[1] See FAR 1.101 (2019).

[2] See FAR 9.502 (2019) (emphasis omitted) ("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.").

[3] FAR 9.506(a) (2019) ("If information concerning prospective contractors is necessary to identify and evaluate potential organizational conflicts of interest or to develop recommended actions, contracting officers should first seek the information from within the Government or from other readily available sources."); FAR 9.505 (2021) ("The exercise of common sense, good judgment, and sound discretion is required in both the decision on whether a significant potential conflict exists . . .").

[4] See Federal Acquisition Regulation: Organizational Conflicts of Interest, 76 Fed. Reg. 23236, 23239 (proposed Apr. 26, 2011) ("This approach should also help to address the criticism with current FAR coverage that describing OCIs only through examples misleads contracting officers to believe that OCIs do not exist in contract actions that do not fall within the scope of an identified example.").

[5] Ian MacDougall, *McKinsey Never Told the FDA It Was Working for Opioid Makers While Also Working for the Agency*, ProPublica (Oct. 4, 2021, 5:00 AM), <https://www.propublica.org/article/mckinsey-never-told-the-fda-it-was-working-for-opioid-makers-while-also-working-for-the-agency>.

[6] *Id.*

[7] *Id.*

[8] John Hartnett, *Hold consulting firm accountable for role in Pa.'s opioid epidemic*, GoERIE (Sept. 27, 2021, 10:00 PM), <https://www.goerie.com/story/opinion/2021/09/28/mckinsey-must-held-accountable-role-pa-s-opioid-epidemic/5811090001/> (file:///Users/michaelataylor/Dropbox/Mac/Documents/%20https://www.goerie.com/story/opinion/2021/09/28/mckinsey-must-held-accountable-role-pa-s-opioid-epidemic/5811090001); Jef Feeley, *McKinsey Opioid Work Included Advising Distributors, Tribe Says*, Bloomberg (June 3, 2021, 11:14 AM), <https://www.bloomberg.com/news/articles/2021-06-03/mckinsey-opioid-work-included-advising-distributors-tribe-says>.

[9] MacDougall, *supra* note 5.

[10] *Id.*

[11] *Id.* (quoting, U.S. Dep't Health and Human Serv., HHSF223201700022B (Sept. 26, 2017) ("[T]he Contractor agrees it shall make an immediate and full disclosure, in writing, to the Contracting Officer of any potential or actual organizational conflict of interest or the existence of any facts that may cause a reasonably prudent person to question the contractor's impartiality because of the appearance or existence of bias.")).

[12] Michael Forsythe & Walt Bogdanich, *McKinsey Settles for Nearly \$600 Million Over Role in Opioid Crisis*, N.Y. Times, (July 20, 2021), <https://www.nytimes.com/2021/02/03/business/mckinsey-opioids-settlement.html> (<https://www.nytimes.com/2021/02/03/business/mckinsey-opioids-settlement.html>).

[13] *Advanced Search, Spending by Prime Award*, USASpending.gov, <https://www.usaspending.gov/search/?hash=c3a94fe1c525e4818ff26785fe56aa07>.

[14] Tom Murphy, *Senators question FDA on work with opioid maker consultant*, AP News (Aug. 23, 2021), <https://apnews.com/article/business-science-health-coronavirus-pandemic-opioids-9b538987da49f4feed7af61346012e30>.

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(859) 257-1678 | [editors@kentuckylawjournal.org](mailto:editors@kentuckylawjournal.org) | 620 Limestone Lexington, KY 40508

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