

National Aeronautics and Space Administration's Guide on Organizational Conflicts of Interest

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Important Notice: This document has been prepared as guidance and is subject to change. In the event of an apparent conflict between this Guide and the FAR/NFS, the FAR/NFS will govern and take precedence.

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PURPOSE

This Guide provides guidance on implementing the requirements in subpart 9.5 of the Federal Acquisition Regulation (FAR) on Organizational and Consultant Conflicts of Interest and provides tools to contracting officers, attorneys, and requiring technical organizations on identifying conflicts and designing resolution strategies that best suit each circumstance.¹ OCIs are governed by regulations such as the FAR Subpart 9.5 and the NASA FAR Supplement (NFS) Subpart 1809.5. OCIs can result in unfair competitive advantages being conferred on a contractor or offeror, which compromises the integrity of the procurement process. Where agencies fail to take appropriate actions to address these unfair advantages, the Government Accountability Office (GAO) and Court of Federal Claims (COFC) have sustained protests based on an agency's violation of the OCI provisions of the FAR.

Subpart 9.505 of the FAR sets forth two underlying principles intended to guide the Government in avoiding OCIs. These are:

- (a) Preventing the existence of conflicting roles that might bias a contractor's judgment, and
- (b) Preventing unfair competitive advantage.

The GAO and the Court of Federal Claims used these principles in section 9.505 as the basis to define the three types of OCIs described in Chapter 1 of this Guide. Since the 1990's, complying with subpart 9.5 has become more difficult as the number of OCIs increase and as certain methods available to resolve OCIs become less effective. There are three major reasons for this phenomenon.

1. **Consolidation within the industries serving the U.S. Government.** Mergers and acquisitions have the dual effect of reducing the number of contractors in a particular market and, at the same time, increasing the scope of goods and services the consolidated contractors provide. Consolidation, therefore, results in fewer contractors providing a greater range of goods and services.
2. **Greater reliance by Government agencies on contractor services requiring contractors to use subjective judgment.** Mr. Daniel I. Gordon in his article entitled, *Organizational Conflicts of Interest: A Growing Integrity Challenge*, 35 PUB. CONT. L.J. 25 (2005) said "rather than merely obtaining computer repair services from private firms, the Government is entering into contracts that include the firms giving the Government advice on which hardware or software to buy." Having a contractor repair a computer usually does not involve the use of subjective judgment; having a contractor recommend requirements for a computer buy always involves the use of subjective judgment.
3. **Greater use of ID/IQ contracts that have broader and less specific statements of work.** Subpart 9.5 requires contracting officers to identify any significant potential conflict of interest that may occur during the life of the contract. The

¹ This Guide does not cover issues associated with personal conflicts of interest.

likelihood for a “significant potential conflict” increases with the breadth of the scope of work in a contract.

Regulations on OCI have existed since the mid-1970’s as an appendix to the Armed Services Procurement Regulation. Subpart 9.5 in the FAR is essentially the same coverage that existed in the mid-1970’s. The chapter on resolution in this Guide explains why no one method of resolution exists to address many OCIs, unlike in the 1970’s and 1980’s when contractors accepted limitations on future competition. The challenge contracting officers now face is how to apply rules written in the 1970’s to the new world of Government contracting. In facing this challenge, contracting officers should understand that no single method of resolution exists to address all OCIs and, instead, the particular facts of the conflict may require a “hand crafted” resolution.

The responsibilities of the contracting officer with regard to OCI have been identified in FAR 9.504. As specified in FAR 9.504(b), it is important that contracting officers seek advice from legal counsel and assistance from technical specialists as soon as possible in evaluating potential conflicts and in developing any necessary solicitation provisions and contract clauses. Thus, once potential OCI issues have been identified, the contracting officer for a particular acquisition shall consult with the legal advisor and the requiring technical organization to fully understand all aspects of potential OCI issues. The legal advisor will work with the contracting officer to develop options for resolving potential OCI issues. The requiring technical organization must stay involved in the process to ensure that any resolution strategies developed and implemented will still allow them to meet their mission requirements. The information contained in the following chapters should be utilized by all parties in carrying out their responsibilities in handling OCIs.

- Chapter 1 deals with the first responsibility of the contracting officer regarding conflicts of interest which is to identify the conflict. This chapter will provide guidance to assist the contracting officer with identifying an OCI.
- Chapter 2 deals with the second responsibility of the contracting officer with regard to conflicts of interest, which is to resolve the conflict prior to award. This chapter will discuss various OCI resolution methods in detail.
- Chapter 3 focuses on actions contracting officers should take regarding OCI issues during the source selection process.
- Chapter 4 discusses specific OCI considerations for sole source contracts.
- Chapter 5 addresses situations when OCI can arise during contract administration, such as indefinite-delivery/indefinite-quantity (ID/IQ) contracts, changes in requirements, and novations.
- Appendix A contains a draft provision that can be used in solicitations and draft clauses that can be used in contracts to address OCI and mitigation plans.
- Appendix B is a draft Data Requirements Document containing requirements for submission of an OCI mitigation plan.

CHAPTER 1 TYPES OF CONFLICTS OF INTEREST

I. Introduction

FAR Subpart 9.5 imposes two primary responsibilities upon the contracting officer. The first responsibility is to identify and evaluate the potential conflict and the second responsibility is to resolve the potential conflict prior to award. In addition, while FAR 9.5 encourages contracting officers to obtain the advice of counsel, seeking such legal advice early in the process is absolutely essential to the successful identification, evaluation, and resolution of all organizational conflicts of interest. FAR section 9.504 requires contracting officers identify and evaluate conflicts as early in the acquisition process as possible. FAR section 9.506 provides guidance contracting officers should use to identify conflicts.

The FAR also provides that “each individual contracting situation should be examined on the basis of its particular facts and the nature of the proposed contract. The exercise of common sense, good judgment, and sound discretion is required in both the decision on whether a significant potential conflict exists and, if it does, the development of an appropriate means for resolving it.”²

It is important to recognize that the scope of this review is broad and involves any significant potential conflict that may arise under a contract.³ Identifying “potential” conflicts can be difficult with ID/IQ contracts since they have broad statements of work. In this situation, “potential” conflicts should include those that could arise under any possible order that the Government may issue under the ID/IQ contract.⁴

GAO addresses the fact that FAR 9.5 pertains to “organizational” rather than “individual” or “personal” conflicts of interest. GAO stated it did not have a *per se* proscription against awarding contracts to companies with a potential organizational conflict of interest if the contracting officer was able to develop a course of action to avoid or mitigate where possible.⁵ However, GAO also indicated that the FAR recognizes that some organizational conflicts of interest cannot be mitigated.⁶

This chapter explains what constitutes an OCI and examines the two primary sources of guidance to identify conflicts – the FAR and case law. The FAR provides the principles behind OCI that are discussed at the beginning of this Guide and examples of organizational conflicts of interest. Case law contains actual definitions of conflicts of interests based upon the underlying principles of avoiding bias and preventing an unfair competitive advantage. Contracting officers are advised to consult legal counsel

² FAR 9.505.

³ See FAR 9.506(b).

⁴ Chapter 4 addresses ID/IQ contracts in more detail.

⁵ See *Aetna Gov't Health Plans, Inc.; Found. Health Fed. Services., Inc.*, B-254397.15, B-276634.16, B-276634.17, B-276634.18, B-276634.19, July 27, 1995, 95-2 CPD 129 (*Aetna*).

⁶ See *id.* See also FAR 9.504(e).

regarding the identification of conflicts because case law provides a wider variety of examples of conflict situations than does the FAR, and counsel is equipped to apply the principles of those decisions to the situation presented by the particular procurement presented.

II. Types of OCI as Defined by Case Law

Generally, GAO decisions pertaining to organizational conflicts of interest can be broadly categorized into three groups: (1) “unequal access to information” cases, (2) “impaired objectivity” cases, and (3) “biased ground rules” cases.⁷ Each group is discussed separately below.

a. Unequal Access to Information

An OCI due to “unequal access to information” is created when a contractor has access to nonpublic information which may provide the firm an unfair competitive advantage in a later competition for a government contract.⁸ In these “unequal access to information” cases, the concern is the risk of the firm gaining a competitive advantage. There is no issue of bias. The difference between an unfair competitive advantage and a natural competitive advantage is discussed later in this chapter.

Conflicts based on “unequal access to information” best correlate to the OCI example in FAR section 9.505-4 regarding obtaining access to proprietary information. Conflicts due to “unequal access to information” involve another contractor’s proprietary data and/or nonpublic Government data such as source selection information as defined in FAR 2.101 or other nonpublic Government data that would be helpful in a future competition. The test for determining whether data confers an unfair competitive advantage requiring resolution is:⁹

- Whether the information was unavailable to potential offerors;
- Whether the nonpublic information would have been useful in responding to a solicitation; and
- Whether the contractor would be afforded an unfair competitive advantage by having access to the nonpublic information.

Situations involving this conflict are commonplace now given the number of support service contracts the agency uses to conduct its business. Implicit in having a large number of support service contracts is the need to have contractors use proprietary data belonging to another contractor. NASA’s contract to assist in the closing out of all completed contracts in the agency illustrates the scope of this issue because the “close-out” contractor must have access to proprietary information from each contractor whose contract is being closed.

⁷ See e.g., *Aetna, supra*; *L-3 Services, Inc.*, B-400134.11; B-400134.12, Sept. 3, 2009.

⁸ See *Aetna, supra*.

⁹ See *ARINC Engineering Services, LLC. V. United States and BAE Systems Analytical Solutions*, 77 Fed. 196, 2007 U.S. Claims LEXIS 205 (2007)

b. Impaired Objectivity

An OCI due to “impaired objectivity” is created when “a contractor’s judgment and objectivity in performing the contract requirements may be impaired due to the fact that the substance of the contractor’s performance has the potential to affect other interests of the contractor.”¹⁰ This conflict contains two elements – the use of subjective judgment by the contractor and whether a contractor has a financial interest in the outcome of its performance. The OCI principle involved here is bias due to the existence of conflicting roles that might influence the contractor’s judgment.¹¹

Conflicts based upon “impaired objectivity” most closely correlate to the example in FAR section 9.505-3 with regards to providing evaluation services; however, the case law definition of “impaired objectivity” is much broader than the example in the FAR. In fact, conflicts based upon “impaired objectivity,” as defined by case law, have become widespread given the type of support service contracts awarded by agencies and all of the consolidations within industry.

The first issue contracting officers must determine is whether the statement of work requires the use of the contractor’s subjective judgment. Two indicia GAO stated that it looks to, in determining whether a statement of work requires the use of subjective judgment are the presence of contract clauses for key personnel and educational requirements.¹² A review of the statement of work is the most important indicator of whether subjective judgment is involved. Words and phrases such as “analyze,” “study,” “develop recommendations,” “develop programs,” “develop strategies,” and “provide advice” are examples of requirements that may require the contractor to use its subjective judgment and are words and phrases commonly found in support service contracts. Contracting officers should investigate whether a conflict of interest based on “impaired objectivity” exists when words/phrases similar to those listed above are present in a statement of work.

However, not all support service contracts involve the use of subjective judgment. For example, the development of a program to provide surveillance with regards to required scheduled maintenance may or may not involve the use of subjective judgment. If the contractor is responsible for determining what maintenance is required or how well the maintenance is to be performed,¹³ then subjective judgment is involved. If not, then subjective judgment may not be involved. Similarly, answering telephone inquiries about

¹⁰ *Alion Science & Technology Corp.*, B-297342, Jan. 9, 2006, 2006 CPD ¶ 1 at 6. (*Alion*). *Alion* broadened the definition of “impaired objectivity,” which previously had been defined as a conflict “where a firm’s work under one government contract could entail its evaluating itself, either through an assessment of performance under another contract or an evaluation of proposals.” *Aetna*, *supra*, citing FAR 9.505-3.

¹¹ See *Alion*, *supra*.

¹² These off the record comments were made at a brown bag lunch GAO conducted shortly after *Alion* to discuss the effects of the decision. GAO orally stated that having key personnel and education requirements in a solicitation were indicia that the agency is more interested in “buying people” and their judgments rather than “buying outcomes.”

¹³ See *Computers Universal, Inc.*, B-292794, Nov. 18, 2003, 2003 CPD ¶ 201 at 2-3.

the operation of a piece of equipment should not raise any significant concern about a conflict of interest if this task “usually involve[s] objective answers to straightforward inquiries that are quickly resolved during the course of a telephone call.”¹⁴

The second element of “impaired objectivity” is whether the contractor has a financial interest in the matter under its review. The potential for bias arises when the contractor has some type of financial interest that may influence how the contractor exercises its judgment.¹⁵ A contracting officer should determine whether a contractor may have multiple interests in the outcome of its advice using the procedures in FAR 9.506 (a). If information concerning prospective contractors is necessary to either (1) identify and evaluate potential organizational conflicts of interest or (2) develop recommended actions, contracting officers first should seek the information from within the Government or from other readily available sources. Government sources include the files and the knowledge of personnel within the contracting office, other contracting offices, the cognizant contract administration and audit activities, and offices concerned with contract financing. Non-Government sources include publications and commercial services, such as credit rating services, trade and financial journals, and business directories and registers. Contracting officers are encouraged to consult their local legal office with any questions about whether a contractor has a financial interest in a particular matter.

c. Biased Ground Rules

An OCI due to “biased ground rules” is created when “a firm, as part of its performance of a government contract, has in some sense set the ground rules for another government contract by, for example, writing the statement of work or the specifications. In these ‘biased ground rules’ cases, the primary concern is that the firm could skew the future competition, whether intentionally or not, in favor of itself.”¹⁶ These situations also involve concerns that a firm, by virtue of its special knowledge of the agency's future requirements, would have an unfair advantage in the competition for those requirements.¹⁷ Thus, both the principles of bias and unfair competitive advantage are present here.

It is important to emphasize that conflicts due to “biased ground rules” can be unintentional because a contractor is naturally biased to view things in a certain manner. GM, for example, can only provide advice to the Government on the GM way of doing something. Another example of this is seen in a decision where GAO sustained a protest regarding the use of outside evaluators to review responses to a broad agency announcement where the potential research involved two different, competing technologies. The protester alleged bias on the part of the review panel because all of the panel members were associated with just one technology; no one on the panel was

¹⁴ *Overlook Systems Technologies, Inc.*, B-298099.4, B-298099.5, Nov. 28, 2006, 2006 CPD ¶ 185 at 12-13 (*Overlook*)

¹⁵ See *Greenleaf Construction Co.*, B-293105.18, B-293105.19, Jan. 17, 2006, 2006 CPD ¶ 79.

¹⁶ *Aetna*, *supra*. See also FAR 9.505-1 and 9.505-2

¹⁷ See *The Pragma Corp.*, B-255236 et al., Feb. 18, 1994, 94-1 CPD ¶ 124.

involved with the competing technology the protester used. Although this is not a classic “biased ground rules” case, it does demonstrate how the bias can exist for other than purely financial reasons.¹⁸

Conflicts based on “biased ground rules” best correlate to the example in FAR section 9.505-2 regarding the preparation of specifications or work statements. In this example, a contractor prepares and furnishes complete specifications covering nondevelopmental items, to be used in a competitive acquisition. The case law definition of “biased ground rules” greatly expands this example to include any effort that in some sense establishes the basis for a future competition such as studies that will either become the basis of a statement of work or be used in evaluation of proposals. In fact, conflicts based upon “biased ground rules” could be viewed as the “Granddaddy” of conflicts since these conflicts involve both the principles of bias and unfair competitive advantage. Contracting officers should take great care regarding the effect this conflict may have on future competition.

In practice, a particular situation may involve more than just one type of OCI or all three types of OCI discussed above. In addition, an affiliate¹⁹ can add another layer of complexity to the identification, analysis, and resolution of an OCI. Generally, there is no basis to distinguish between a firm and its affiliate(s) in cases involving impaired objectivity or biased ground rules.²⁰ Furthermore, other business relationships (e.g., joint ventures, partnerships, memorandums of understanding, etc.) must be scrutinized for potential OCIs. However, some interests (financial, business, or otherwise) may simply be too speculative or too remote to establish a significant OCI in need of resolution.²¹ Insignificant OCIs are discussed later in this chapter.

III. The FAR Examples

FAR section 9.505 contains the general rules regarding OCIs and articulates the principles relative to the conflicts due to bias and unfair competitive advantage. FAR sections 9.505-1 through 9.505-4 illustrate examples of the most classic situations where conflicts may be created. Further examples of conflicts are provided in FAR section 9.508, which states these examples “are not all inclusive, but are intended to help the

¹⁸ See *Celadon Laboratories, Inc.*, B-298533, November, 1 2006. Although GAO did not accept the agency’s contention that the conflict alleged by the protester was too remote, GAO focused upon the contracting officer’s failure to identify the conflict. According to GAO, the presumption is that a conflict exists unless the record establishes the absence of a conflict.

¹⁹ “Affiliates” is defined in FAR 2.101 as “associated business concerns or individuals if, directly or indirectly –

- (1) Either one controls or can control the other; or
- (2) A third party controls or can control both.

²⁰ See, e.g., *Aetna; ICF Inc.*, B-241372, Feb. 6, 1991; *Filtration Development Co. v. U.S.*, 60 Fed. Cl. 371 (2004). But see, *RMG Systems, Ltd.*, B-281006, Dec. 18, 1998. In *RMG*, GAO rejected the protester’s allegation that the conflict between the affiliates was inherent and unremediable on the grounds that the ratings made by the awardee’s affiliate were calculated objectively from publicly available information, the percentage of the overlap in the businesses was very small, the awardee has no financial interest in failing to provide honest inspections, and the awardee will not be reviewing the affiliate’s work.

²¹ See *American Management Systems, Inc.*, B-285645, September 8, 2000, 2000 CPD 163.

contracting officer apply the general rules in FAR 9.505 to individual contract situations.”

While the FAR examples contain valuable guidance contracting officers should use, the three types of conflicts defined in the case law (i.e., “unequal access to information,” “impaired objectivity,” and “biased ground rules”) are more complete and encompassing and should be used to supplement and expand upon the FAR descriptions.

Three of the four FAR examples clearly fall into one of the three types of OCIs defined by case law. However, the first FAR example (i.e., FAR section 9.505-1), related to the provision of systems engineering and technical direction, does not correlate to just one of the conflicts defined in case law. Systems engineering can involve all three types of conflicts. Case law indicates that a systems engineering contractor and the affiliates of the systems engineering contractor are “categorically precluded” from providing their own products in later stages of the program unless the agency obtains a waiver.²²

The second FAR example (i.e., FAR section 9.505-2), related to the preparation of specifications or work statements, involves “biased ground rules.” However, the FAR contains numerous exceptions regarding situations that do not constitute conflicts. The basic statement of the conflict provides that the rule does 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.

The first exclusion to the rule involves situations where the Government purchases a data package from the original manufacturer, which the Government will use as part of future competitions. No conflict is created when an original manufacturer sells the data package to the Government and the data package is used as the requirement for the future competitive acquisition. Moreover, the original manufacturer may participate in the subsequent competition. The second exclusion involves the use of contractors acting as industry representatives to help the Government prepare a statement of work or specifications. In this situation, typically the Government is obtaining the input through an open information call, like an RFI, rather than a task under an existing contract. The “twin evils” associated with “biased ground rules” are attenuated by the fact that the Government is receiving input from multiple contractors.

Additionally, FAR section 9.505-2 contains further exceptions to the conflict regarding the preparation of specifications or work statements for competitive acquisitions. FAR section 9.505-2(b)(1) explains that the contractor that prepared or assisted in the

²² See *Filtration Development Co, supra* at 380.

preparation of the work statement for a competitive competition may not supply that system, unless

- (i) It is the sole source;
- (ii) It has participated in the development and design work; or
- (iii) More than one contractor has been involved in preparing the work statement.

The exceptions in section 9.505-2(b)(1) should be applied in conjunction with the tenets set forth in case law.²³ The most useful of these exceptions involves having more than one contractor prepare the statement of work in order to avoid the elimination of any one contractor from the competition. This exception appears to be very similar to the one regarding receiving input from industry representatives. Contracting officers must remember that the particular facts of the situation will determine whether the use of more than one contractor being involved in the preparation of a work statement sufficiently mitigates the “twin evils” of bias and unfair competitive advantage.

The other two exceptions in FAR section 9.505-2(b)(1) appear more problematic. It seems logical that a sole source contractor may help prepare the statement of work or specification of a contract when that contractor also will perform the future contract on a sole source basis. In this case, the concern with bias or unfair competitive advantage is offset by the basis for the sole source. The conflict described in FAR section 9.505-2, however, pertains to statement of work for competitive acquisitions where both the “twin evils” of bias and unfair competitive advantage may exist. Contracting officers, therefore, are cautioned to examine the particular facts of an acquisition to determine whether a conflict would exist, as defined by case law, when a contractor provides or prepares a work statement for a future competition on a sole source basis (see Chapter 4).

Likewise, the exception with regard to a contractor having participated in development and design work is equally suspect. Again, the tenets of case law may “trump” the automatic application of this “exclusion” to OCIs. Contracting officers must examine the particular facts of acquisition to determine whether such assistance could result in bias and/or unfair competitive advantage in the future competition.

The third FAR example (i.e., FAR 9.505-3) related to the provision of evaluation services involves “impaired objectivity.” The goal here is to avoid potential bias that exists when a company will be evaluating its own offers, products, or services (or those of a competitor) without proper safeguards. This example is a subset of the “impaired objectivity” OCI defined by case law.

²³ Not much case law exists regarding the exceptions contained in section 9.505 of the FAR. Consequently, it would be prudent to first apply the principles in *Aetna, supra*, and its progeny that (1) financial interest includes the interest of affiliates and (2) the firewalls alone sufficient mitigation for conflicts involving bias before relying upon the exception in section 9.505. Additionally, case law provides that “with respect to the biased ground rules organizational conflict of interest, the ordinary remedy where the conflict has not been mitigated is the elimination of that competitor from the competition.” See *The Jones/Hill Joint Venture*, B-286194.4, Dec. 5, 2001, 2001 CPD 194 at 22 n. 26.

The fourth example (i.e., FAR 9.505-4) related to obtaining access to proprietary information involves “unequal access to information.” The goal here is to avoid giving an unfair competitive advantage to a company having access to proprietary information that is not available to everyone. This example appears to be identical to the “unequal access to information” OCI defined by case law.

IV. Situations that Do Not Constitute Conflicts

a. Natural Competitive Advantage

FAR section 9.505-2(a)(3) explains what is a natural competitive advantage using the example of development work. According to the FAR,

[I]t is normal to select firms that have done the most advanced work in the field. These firms can be expected to design and develop around their own prior knowledge. Development contractors can frequently start production earlier and more knowledgeably than firms that did not participate in the development, and this can affect the time and quality of production, both of which are important to the Government. In many instances the Government may have financed the development. Thus, while the development contractor has a competitive advantage, it is an unavoidable one that is not considered unfair; hence no prohibition should be imposed.

GAO has dismissed allegations of OCI when it finds that there is a natural competitive advantage rather than an unfair competitive advantage, stating:

The mere existence of a prior or current contractual relationship between a contracting agency and a firm does not create an unfair competitive advantage, and an agency is not required to compensate for every competitive advantage gleaned by a potential offeror’s prior performance of a particular requirement. For example, an incumbent contractor’s acquired technical expertise and firsthand knowledge of the costs related to a requirement’s complexity are not generally considered to constitute unfair advantages the procuring agency must eliminate.²⁴

b. Potential of Bad Faith

GAO has stated that the possibility of bad faith alone does not create an OCI. This issue arose in a decision that examined an award to a contractor where a subsidiary company to the awardee performed a related surplus contract. This subsidiary company had a contract to sell useable surplus commercial property and the disputed award involved a contract for scrap property. Although the selected contractor would receive 20% of the distribution of sales from both contracts, the contractor had the ability to earn an

²⁴ *Snell Enterprises, Inc.*, B-290113, B-290113.2, June 10, 2002, 2002 CPD ¶ 115. See also *Optimum Tech., Inc.*, B-266339.2, Apr.16, 1996, 96-1 CPD ¶ 188 at 7

incentive fee up to an additional 10% of distributions under the scrap contract. The protester stated this arrangement constituted an impermissible OCI since the awardee could manipulate the disposition of property to its economic advantage (i.e., the awardee could opt to scrap rather than sell as surplus). GAO rejected this argument because the allegation involved the potential that the awardee would engage in bad faith in performance of the two contracts. GAO stated “there simply is no basis to deny a firm an award due to bad faith that has not occurred but, rather, is a mere theoretical possibility.”²⁵

c. Conflict is “Insignificant”

FAR section 9.504 requires the contracting officer to “avoid, neutralize, or mitigate significant potential conflicts before contract award.” (Emphasis added) GAO has dismissed allegations of OCI because the conflict was too remote or insignificant.²⁶ However, contracting officers should not rely solely on a determination that the OCI is remote since there can be disagreements as to what constitutes “insignificant” or “remote.” Moreover, contracting officers should be mindful about the seeming inconsistencies in the law case. In one case, GAO has sustained a protest even where the conflict appeared to be insignificant²⁷ and, yet in another decision, it allowed the use of a firewall to mitigate a conflict based upon “impaired objectivity” when GAO was unable to identify an actual conflict.²⁸ Contracting officers, therefore, are advised to identify, evaluate, and document all possible conflicts before determining that the conflict is insignificant and does not need to be resolved.

²⁵ *Government Scrap Sales*, B-295585, Mar. 11, 2005, 2005 CPD 60 at 3.

²⁶ See *American Management Systems, Inc.*, *supra*. In this case, KPMG and Oracle had a standing agreement that (1) detailed a structure for submitting proposals under a prime/subcontractor relationship in response to public sector solicitations when the parties agreed to do so and (2) provided a formula for splitting revenues under contracts resulting from these proposals. The VA determined there was no financial relationship between KPMG and Oracle as it related to the procurements that were the subject of the protest and that the standing relationship between the two companies did not create a significant OCI because no such prime/sub relationship was proposed by these companies and the agreement expressly stated that the parties remained independent contractors.

²⁷ See *Science Applications International Corporation*, B-293601, B-293601.2, B-293601.3, May 3, 2004, 2004 CPD 96, concerning a disputed award for computer support and system engineering services to the EPA with the alleged conflict involving the enforcement of pollution standards. GAO found an OCI due to Lockheed Martin’s significant involvement in activities that are subject to environmental regulations, including the ownership and operation of various facilities dealing with hazardous materials. It is unclear how Lockheed Martin could influence the implementation of environmental regulation by providing EPA with computer support. GAO seemingly rejected the concept that the conflict may have been remote and, instead, focused upon the fact that the EPA failed to identify and evaluate the OCI situation as required by section 9.504 of the FAR.

In a subsequent decision on the same procurement, GAO held that a mitigation plan permitting the project manager to determine whether an actual conflict existed prior to issuing a task order was an adequate measure to correct the conflict in the earlier GAO decision. See *Science Applications International Corporation*, B-293601.5, Sept. 21, 2004, 2004 CPD 196. But see *J&E Associates, Inc.*, B-278771, Mar. 12, 1998, 98-1 CPD 77. In decisions such as *Johnson Controls World Services*, B-286714.2, February 13, 2001, and *J&E Associates, Inc.*, B-278771, March 12, 1998, GAO stated that monitoring or participation by Government, in and of itself, generally is not adequate to address conflicts.

²⁸ See *Overlook*, *supra*.

CHAPTER 2 RESOLUTION

I. Introduction

FAR 9.5 essentially requires contracting officers do two things - the first is to identify OCIs and the second is to resolve any potential significant OCIs prior to award. This chapter addresses resolution. The FAR outlines four basic types of resolution, which are defined as follows:

- Avoid – To prevent the occurrence of an OCI through actions such as exclusion of sources or modification of requirements. Avoidance precludes the conflict.
- Neutralize – To counteract, through a specific action, the effects of a potential or actual OCI. The conflict remains, but the impact of the conflict has been negated.
- Mitigate – To reduce the effects of an OCI to an acceptable level of risk so that the Government’s interests with regard to fair competition and/or contract performance are not impaired. The conflict remains, but action was taken that minimizes the impact of the conflict to an acceptable level of risk.
- Waive – Conflict cannot be successfully avoided, neutralized, or mitigated and retention of offeror and/or contractor is deemed to be in the best interest of the Government. The conflict remains without sufficient resolution.

The differences in the varying types of resolution can be analogized to the handling of a bomb. To avoid an OCI would be like preventing someone from obtaining a bomb. Neutralizing an OCI would be like pulling the fuse out of the bomb or disarming it prior to explosion, but the bomb still exists. Mitigating an OCI would be like placing the ticking bomb in a blast proof box and allowing it to explode while protecting the people and property around it.

BEST PRACTICE: A best practice consists of resolving OCIs by using the following techniques in the order listed: avoidance, neutralization, mitigation, and (only if necessary) waiver. Early involvement in an acquisition gives the contracting officer the most flexibility to resolve OCI since the Government is better able to avoid conflicts. Early involvement by the program/requiring technical office is also necessary since they are in a position to identify the conflict during requirement development and, therefore, are in the position to redefine requirements to avoid a conflict. It is ideal to try to identify conflicts as early as during acquisition strategy development in order to have a proposed resolution developed by the procurement strategy meeting (PSM).

Contracting officers will need to educate program/requirements offices to identify conflicts using the material in Chapter 1 of this Guide. Program/requirements offices should contact their contracting officer and the appropriate Center or HQ legal office as soon as a possible conflict is identified to permit the contracting officer and legal advisor time to resolve conflicts as early as possible. The involvement of the program/requirements office also better meets the intent of FAR section 9.504(a)(1) “to identify and evaluate potential organizational conflicts of interest as early in the

acquisition process as possible.” When a conflict is identified in a competitive procurement, contracting officers should include the suggested resolution as part of the PSM.

The resolution of a conflict may require actions by the contractor, actions by the Government, or actions by both the contractor and the Government. If the resolution requires actions by the contractor, it typically means that mitigation is the technique that is being used to address a conflict. All actions required of the contractor to address a conflict must be reflected in a mitigation plan and the mitigation plan should be incorporated in the contract. Incorporation is necessary to ensure the mitigation plan is a requirement of the contract. Additionally, the resolution of the conflict may involve a combination of the available types of resolution or “tools” in order to adequately address the conflict.

II. Types of Resolution

a. Avoid

Avoiding an organizational conflict of interest is the “cleanest” way to handle organizational conflicts of interest. Avoidance requires actions on the part of the Government and normally is best accomplished early in the process. This is particularly true when avoidance involves modifying requirements, which is one of the most typical ways this type of resolution is used. The Government’s ability to use “avoidance” as a method to resolve OCIs has been limited by the increased use of support service contractors and by consolidations within certain industries. Below are some of the more common methods by which conflicts may be avoided.

1. Ensure the statement of work (SOW) does not require contractors to use subjective judgment: Subjective judgment may be required in tasks that involve analysis, evaluation, or recommendations in areas where divergent views could exist. A conflict is created when the judgment could have a positive or negative effect on other financial interests of the company. It is important, though, to be able to determine when a statement of work in fact does require the use of subjective judgment. GAO has said a contract to develop a quality assurance program to provide surveillance of maintenance, for example, did not constitute use of a subjective judgment since surveillance involved “monitoring” the required schedule and not making decisions as to what maintenance is required.²⁹ However, contracting officers and legal advisors should look at this issue on a case by case basis.³⁰

²⁹ Support contract involving objective judgment as opposed to subjective judgment involve verbs such as “reporting,” “monitoring,” “maintaining,” “testing,” “training,” “integrating,” “operating,” and “administrating.” This is not a place to engage in creative writing. GAO and the CoFC will examine the actual requirement rather than the words in the contract to determine whether the contract requires the use of subjective judgment.

³⁰ See *Alion Science & Technology Corp.*, B-297342, Jan. 9, 2006, 2006 CPD 1 (*Alion*). See also *Overlook Systems Technologies, Inc.*, B-298099.4, B-298099.5, Nov. 28, 2006, 2006 CPD 185; *Computers Universal, Inc.*, B-292794, Nov. 18, 2003, 2003 CPD 201.

2. Ensure that work involving subjective judgment is performed by the Government or by a contractor that is free from conflict: Conflicts from impaired objectivity contain two elements – the use of subjective judgment by the contractor and a financial interest in the outcome of contract performance. When the Government does not have the ability or personnel to perform tasks involving subjective judgment, a contractor without a financial interest in the outcome of the work should be used. Contractors without financial interests may include (1) a Federally Funded Research and Development Corporation (FFRDC)³¹, which by regulation cannot compete against the private sector or (2) a consulting firm, which does not compete directly with NASA’s contractors. A determination of impaired objectivity would need to be made on a case by case basis.

3. Ensure that more than one contractor prepares the specifications or the SOW for a competitive solicitation: FAR section 9.505-2 pertains to conflicts of interest created when a contractor prepares a specification or an SOW that is to be used in a competitive solicitation. This type of work involves the use of the contractor’s subjective judgment. Assuming the contractor wishes to propose on the follow-on competitive solicitation, the contractor has a financial interest in how the specification or SOW is written. FAR section 9.505-2(b)(1)(iii) states that when more than one contractor has been involved in preparing the work statement, an OCI is avoided. It is unclear exactly what criteria are needed to successfully use the exception at FAR 9.505-2(b)(1)(iii) regarding the use of more than two contractors due to the lack of case law on this specific exception to OCIs regarding this method of avoidance.³² It should be noted that more than one contractor must be involved in the preparation of the same part of the specification or SOW for this method of avoidance to work. Having a contractor review another contractor’s proposed specification or SOW does not meet the exception in FAR section 9.505-2(b)(1)(iii) since preparation may have given a contractor much more latitude to influence the requirements document than does approval of a requirements document.

BEST PRACTICE: When using this OCI avoidance method, strive to include as many companies as practicable that are involved in a particular industry to ensure maximum diversity of input into the specification or SOW. The Government should exercise oversight in independently reviewing the SOW to ensure that the requirements document is not biased in favor of a particular approach or product.

³¹ Federally Funded Research and Development Centers (FFRDC) are defined in FAR 2.101 as activities that are sponsored under a broad charter by a Government agency (or agencies) for the purpose of performing, analyzing, integrating, supporting, and/or managing basic or applied research and/or development, and that receive 70 percent or more of their financial support from the Government; and—

- (1) A long-term relationship is contemplated;
- (2) Most or all of the facilities are owned or funded by the Government; and
- (3) The FFRDC has access to Government and supplier data, employees, and facilities beyond that common in a normal contractual relationship.

In addition, FAR 35.017(a)(2) requires FFRDCs to be free from organizational conflicts of interest. Note: Using an FFRDC operated by an industry firm cannot be a method of avoiding an OCI when the parent organization of the independent operating unit has a financial interest in the outcome of the contract.

³² *SRI International*, B-224424, October 7, 1987 cites section 9.505-2(b)(1)(iii) for the proposition that “a contractor need not be excluded where more than one contractor is involved in preparing the work statement.” One of the few decisions that relies upon the exception in section 9.505(b)(1)(iii); however, *SRI* is a very old decision and involves the use of an advisory panel.

4. Eliminate a contractor or a group of contractors: GAO allows a contracting officer to exclude an offeror or a class of offerors from a competition in order to remedy a conflict of interest. Agencies may exclude an offeror from a competition even when no actual impropriety can be found, so long as the agency's decision is based upon fact rather than mere innuendo or suspicion. Although contracting officers are granted wide latitude in their business judgment, GAO requires the contracting officer to ensure impartial, fair, and equitable treatment of all contractors.³³ A recent solicitation for the operation and maintenance of the Michoud Assembly Facility (MAF) provides an example of excluding a class of contractors. The terms of the RFP prevented the prospective operator from being or becoming a user/tenant (e.g., a hardware production contractor) of MAF. The reason for excluding users/tenants of MAF was that the operator of MAF would be in a position to make a number of decisions regarding resource allocations at MAF, decisions that potentially could favor one user/tenant over another when both were performing contracts at the facility. It should be noted the exclusion of a class of contractors did not prevent NASA from obtaining adequate competition for the MAF solicitation.

b. Neutralize

Having a limitation on future competition, or future contracting, is the best example of “neutralizing” a conflict of interest. The elements comprising a conflict due to “impaired objectivity” and/or “biased ground rules” still exist when a contract contains a limitation on future competition. The limitation on future competition contractually prevents the contractor from exploiting its financial interest thereby resolving the conflict. The limitation on future competition resolution method is suggested in FAR 9.5 and was much easier to implement before consolidation in industry.³⁴ When there were five or more companies capable of performing the effort, one of those companies was more likely to be willing to perform the smaller, up-front effort with the understanding it would forego the opportunity to propose on the larger follow-on effort, a restriction required by a limitation on future contracting. Although agreements on limitations on future contracting are more difficult for the Government to obtain when only two or three companies are able to perform the requirement, obtaining a limitation on future contracting still is a highly effective way to resolve conflicts when there are a number of contractors that are capable of performing the requirement.

Contracting officers may use the clause at NFS 1852.209-71, Limitation of Future Contracting, when an OCI is being neutralized. Contracting officers must modify this clause to make it apply to the specific situation and the particular concern to be addressed, whether it is biased ground rules or impaired objectivity. This may be done without requesting a deviation since the prescriptive language uses the phrase

³³ See *Lucent Technologies World Services, Inc.*, B-295462, Mar. 2, 2005, 2005 CPD 55. See also *VRC, Inc.*, B-310100, Nov. 2, 2007, 2007 CPD ¶ 208; *KAR Contracting, LLC*, B-310454, B-310537, Dec. 19, 2007, 2007 CPD 232.

³⁴ Section 9.507-1 of the FAR provides the following:

As indicated in the general rules in 9.505, significant potential organizational conflicts of interest are normally resolved by imposing some restraint, appropriate to the nature of the conflict, upon the contractor's eligibility for future contracts or subcontracts.

“substantially as follows.” It should be noted that the clause as drafted only addresses conflicts when a contractor prepares an SOW or a specification for a future competition. The clause will also need to be modified to indicate a reasonable limitation period. The contracting officer may wish to determine whether the limitation should apply to performance by a first-tier subcontractor as well as the prime contractor.³⁵

c. Mitigate

Mitigating an OCI does not remove the conflict; mitigation reduces the risk of the potential/actual conflict to an acceptable level. Mitigation, therefore, is the most potentially litigated/challenged method of resolution given the degree of subjectivity associated with whether a conflict has been “acceptably” resolved. Resolving a conflict by mitigation involves receiving an OCI mitigation plan from the contractor which should be incorporated in the contract to make it a contractual requirement. The mitigation plan is a negotiable item. The contracting officer, legal advisor, and program office personnel must review the plan and bring those areas of the plan that do not adequately address conflicts to the contractor’s attention. Below are the primary techniques used for mitigating conflicts that may be included in an OCI mitigation plan.

1. Firewalls: Firewalls involve isolating information about a project and personnel with access to protected information in one part of a company, preventing other parts of the company from having knowledge or influence over the project. A firewall should prevent someone with access to proprietary information from another contractor from working on another project where the protected data may be useful. There should be two objectives when creating a firewall: (1) protecting information from inappropriate use or disclosure and (2) controlling the functional responsibilities of personnel having access to protected information. The OCI mitigation plan should contain details regarding how a contractor “constructs” its firewall. GAO has stated that firewalls, in and of themselves, will only resolve conflicts due to “unequal access to information.”³⁶ Nevertheless, firewalls can be and have been used as an important component of broader plans to mitigate other types of OCIs.

Commitments to protect information can be accomplished with nondisclosure agreements (NDAs). An individual NDA³⁷ can be used to obtain an individual commitment to protect information and a corporate NDA, signed by the corporate official with contractual authority, can be used to obtain a corporate commitment to protect

³⁵ *L-3 Services, Inc.* B-400134.11, B-400134.12, September 3, 2009 turns, in large part, on the fact that a previous contract contained a limitation on future contracting which was subsequently waived. This decision should be a warning for contracting officers who include the clause at NFS 1852.209-71, Limitation of Future Contracting, as a “place holder” to address the issue OCI. Instead, NFS 1852.209-71 only should be included to address an actual conflict.

³⁶ See *Aetna Gov’t Health Plans, Inc; Found. Health Fed. Services, Inc.*, B-276634.15, B-276634.16, B-276634.17, B-276634.18, B-276634.19, July 27, 1995, 95-2 CPD 129. See also *Johnson Controls World Services, Inc.*, B-286714.2, Feb. 13, 2001, 2001 CPD 20; *PURVIS Systems, Inc.*, B-293807.3, B-293807.4, Aug. 16, 2004, 2004 CPD 96; and *The LEADS Corp.*, B-292465, Sept. 26, 2003, 2003 CPD 197.

³⁷ In this context, individual NDAs are between contractor employees and their employer.

information. Use of NFS 1852.237-72, Access to Sensitive Information, described below is an alternative way to obtain corporate commitment to protect information.

The NFS contains two companion clauses, NFS 1852.237-73, Release of Sensitive Information and NFS 1852.237-72, Access to Sensitive Information,³⁸ one of which pertains to firewalls. NFS 1852.237-73, Release of Sensitive Information contains an agreement from the contractor and its subcontractors allowing NASA to release sensitive information submitted during the course of the procurement, subject to the enumerated protections in the second clause NFS 1852.237-72, Access to Sensitive Information. The second clause, which can function as a corporate NDA, contains the following protections contractors receiving sensitive information from another contractor are required to follow.

- (1) Utilize any sensitive information coming into its possession only for the purpose of performing the services specified in its contract
- (2) Safeguard sensitive information coming into its possession from unauthorized use and disclosure.
- (3) Allow access to sensitive information only to those employees that need it to perform services under its contract.
- (4) Preclude access and disclosure of sensitive information to persons and entities outside of the service provider's organization.
- (5) Train employees who may require access to sensitive information about their obligations to utilize it only to perform the services specified in its contract and to safeguard it from unauthorized use and disclosure.
- (6) Obtain a written affirmation from each employee that he/she has received and will comply with training on the authorized uses and mandatory protections of sensitive information needed in performing this contract.
- (7) Administer a monitoring process to ensure that employees comply with all reasonable security procedures, report any breaches to the Contracting Officer, and implement any necessary corrective actions.

While use of NFS 1852.237-72 protects sensitive information, the clause alone does not adequately resolve potential unfair competitive advantage situations. First, the clause covers only information and does not prohibit the movement of personnel. A firewall that adequately resolves an OCI based on "unequal access to information" usually also

³⁸ These clauses have been redrafted and the new coverage is at OMB to be released as a proposed rule. The new NFS 1852.227-74, Release of Restricted Information (replacing NFS 1852.237-73, Release of Sensitive Information) still grants the contractor's consent NASA may release a contractor's restricted information to another entity where needed for the performance of a NASA contract. NFS 1852.227-73, Handling and Protection of Restricted Information (replacing NFS 1852.237-72, Access to Sensitive Information) still functions as a contractual non-disclosure agreement when a contractor is provided restricted information. The new clause defines "restricted information" as any recorded information, the use and dissemination of which is restricted, and includes (1) limited rights data, (2) restricted computer software, (3) information incidental to contract administration, such as financial, administrative, cost or pricing, or management information that embody trade secrets or are commercial or financial and confidential or privileged, and (4) information designated by NASA as Sensitive But Unclassified (SBU).

restricts the reassignment of personnel so the personnel cannot work on any other project where that protected information may be useful. This restriction on the reassignment of personnel should continue until the benefits of the unfair competitive advantage no longer exist. Normally, such restrictions on reassignment of personnel continue until contract award, which includes the expiration of the protest period. Second, the clause does not address other important features of a firewall such as: (1) a description of how the contractor will fulfill its obligations under NFS 1852.237-72 and how it will construct the firewall, (2) having a physical separation of workers, (3) having a physical or electronic separation of information, and (4) other matters necessary to ensure that no unfair competitive advantage is gained by information access.

2. Use another contractor that does not have a conflict: This method is frequently used to mitigate a conflict due to impaired objectivity. For example, if a contractor has an impaired objectivity conflict, the contractor can use a subcontractor to perform that portion of the SOW creating the conflict. Similarly, if a subcontractor has an impaired objectivity conflict, the contractor can use another subcontractor to perform that portion of the SOW creating the conflict. Such situations require a documented plan with a clearly defined separation (i.e., a firewall) between the two firms to avoid the improper flow of information to and improper influence by the firm with the conflict. In addition, the firm performing the work must have enough qualified personnel to perform the particular task without being dependent upon the personnel of the firm with the conflict.³⁹ However, the GAO has questioned the wisdom of this technique when the conflict involved a large percentage of the SOW since the use of a firewall may hinder communication between a contractor and its subcontractor.⁴⁰

3. Release of information to the public: The Government can release nonpublic information as another method to resolve the competitive advantage associated with unequal access to information. Centers can establish controlled websites limiting access to pre-approved sources as a means to distribute the information when public release of the information is not appropriate. Special precaution also is necessary when releasing export controlled information. Release of information is often a better method of resolving conflicts associated with unequal access to information than a firewall because this method enables all potential offerors to have knowledge and use of the information. It must be noted that releasing information only addresses the issue of competitive advantage from an “unequal access to information” OCI. Releasing information does not address the issue of impaired objectivity or biased ground rules that may be associated with the information being released.

An example of this mitigation strategy involves sharing information received from one contractor with all potential offerors to resolve a potential “unequal access to information” OCI. In this example, a contractor is awarded a study contract to prepare a report on the different methodologies of obtaining soil samples on Mars. This report does not contain specifications to be used in a solicitation, but rather information for the Government’s use. It is later determined that a competition will be conducted to develop

³⁹ See *Epoch Engineering, Inc.*, B-276634, July 7, 1997, 97-2 CPD 72.

⁴⁰ See *Alion*, *supra*.

and produce the next MARS rover, part of whose mission will be to obtain soil samples. Four contractors are qualified to bid, one of which performed the aforementioned study. Making the results of the study available to all of the offerors mitigated this potential conflict of interest.

The reason this is an example of a mitigation strategy rather than a neutralization strategy is because only the access to information has been addressed. The contractor personnel that drafted the report will still have a better understanding of why the report was written the way it is, however that advantage is not necessarily an unfair competitive advantage depending on such things as: the stage in project when the study was prepared, the extent to which the study was reflected in a competitive solicitation, and the extent to which NASA relied on other sources of information. Consequently, there are not enough facts in this example to know whether preparing the study constitutes a natural competitive advantage or represents an unfair competitive advantage.

4. Monitoring by the Government: A contractor's OCI mitigation plan is only one piece of an acquisition's mitigation strategy. Government monitoring of contractor performance should also be an element in any mitigation strategy.⁴¹ Government monitoring is an internal Government tool and, as such, will not be reflected in a contractor's OCI mitigation plan. Monitoring is particularly effective in an ID/IQ situation where a contracting officer can ensure that orders for work are not performed by the team member possessing the conflict.⁴² Case law indicates Government monitoring or participation, in and of itself, is generally not adequate to address conflicts of interest.⁴³

d. Waive

A waiver does not resolve the conflict and instead permits the agency head or a designee to waive any general rule or procedure of FAR 9.5 by determining that its application in a particular situation would not be in the Government's interest. FAR section 9.503 requires that (1) the authority to waive subpart 9.5 cannot be delegated lower than the head of the contracting activity, (2) the waiver be in writing, (3) the waiver set forth the extent of the conflict, and (4) the waiver explain why applying the provisions of FAR 9.5 is not in the Government's interest. Waivers should be obtained only after all other possible steps have been taken to resolve the conflict, a prerequisite not reflected in the FAR, but one necessary to explain why a waiver of FAR 9.5 is in the Government's interest. NFS 1809.503 delegates the authority to waive OCIs to the Assistant Administrator of Procurement.

Little case law exists on waivers; however, both the GAO and the Court of Federal Claims (COFC) have stated that the outcome of some of their decisions would have been

⁴¹ *The Analysis Group*, B-401726; B-401726.2, November 13, 2009, held that self monitoring by the contractor not is an acceptable resolution.

⁴² See *Informatics Corporation v U.S.*, 40 Fed. Cl. 508, 1998 U.S. Claims LEXIS 51 (1998)

⁴³ See *J&E Associates, Inc.*, B-278771, March 12, 1998, 98-1 CPD 77 and *Science Applications International Corp.*, B-293601, B-293601.2, B-293601.3, May 3, 2004, 2004 CPD 96.

different had the agency waived the OCI in question.⁴⁴ Consequently, no one knows what limitations could be placed upon the waiver authority.

A waiver does not resolve the tension between the program goals and the OCI principles, but instead permits program goals to override OCI principles when doing so is in the Government's interest. In most cases, waivers should be used in conjunction with a mitigation plan. The mitigation plan should address the conflict to the extent practicable and then a waiver should be granted for the residual conflicts that cannot be adequately addressed by the mitigation plan. Waiving only residual conflicts will help an agency justify why the waiver is in the Government's interest. Since a waiver does nothing to resolve the effect of a conflict, it would seem prudent for an agency to attempt to limit the issues creating conflict before contract administration. Steps taken during contract administration also could help justify why it may be in the Government's interest to place program goals before OCI concerns in certain situations.

Organizational conflicts of interest differ in the degree of seriousness, a fact that should influence NASA's use of waivers. Since conflicts involving "unequal access to information" can be easily mitigated with firewalls, waiving such conflicts is not appropriate. Likewise, waiving conflicts involving "impaired objectivity" is not appropriate if the conflict can be easily mitigated (e.g., advice received from a conflicted entity can be independently verified). However, waiving an "impaired objectivity" conflict may be appropriate in those cases where the conflict arises as a result of a remote affiliate.

Additionally, extreme care should be taken when waiving OCIs regarding "biased ground rules" since this conflict affects both the objectivity of the contractor and the fairness of future competitions. Waiving conflicts based upon "biased ground rules," therefore, would appear to place the needs of the program ahead of both the principles in FAR 9.5. Thus, one could argue that waiving a conflict due to "biased ground rules" is only appropriate when the mitigation approach can ensure fairness in the future competition.

III. Example of a Resolution

As stated earlier, successful resolution of an OCI must be done at the earliest possible point in an acquisition and often involves the use of multiple "tools" to resolve the conflict. To illustrate this, below is an example of a resolution of a conflict associated with a solicitation for development and operations support for consolidated mission

⁴⁴ GAO upheld the validity of a properly executed waiver in *Knights' Piping Inc.; World Wide Marine & Industrial Services*, B-280398.2, B-280398.3, October 9, 1998, 98-2 CPD 91 stating:

Where a procurement decision such as a waiver in this case is committed by statute or regulation to the discretion of agency official, our Office will not make an independent determination of the matter. Rather, we will review the agency's explanation to ensure that it is reasonable and consistent with applicable statutes and regulations.

Additionally, GAO and Court of Federal Claims mention the waiver as an acceptable method to address OCIs. See *J&E Associates, Inc.*, B-278771, March, 12, 1998, 1998 CPD 64 and *Filtration Development Co. LLC v. United States*, 60 Fed. Cl. 371, 2004 U.S. Claim LEXIS 102 (2004)

operations services for NASA's human space flight programs. The first step to any resolution is identifying the conflict.

Conflict: The conflict involved conducting a competition for these services while the Mission Operations Directorate (MOD) had a sole source contract to examine MOD practices to determine the best way to reduce its budget. The sole source contract created at least two conflicts. The first conflict involved unequal access to information since the sole source contractor would know how much funding would be available for future competitions. The second conflict involved impaired objectivity since the sole source contractor would be using subjective judgment and could have a financial interest in the outcome of the contracts (e.g., budgeting more funds for areas where the contractor may wish to compete). Although the sole source effort bordered on a conflict based upon biased ground rules, since the effort could influence the nature of the competed requirement, the sole source contractor would not be establishing the basic ground rules for the competition.

Resolution: The following resolution allows for maximum competition without excluding the sole source contractor from future competitions and without obtaining a waiver.

1. Have civil servants work and develop the overall concept of the basic operating plan (doing the strategic thinking) and limit the contractors to work on the details of the plan.

This action is a type of avoidance ensuring civil servants exercise the most important type of subjective judgment and limiting the contractors' subjective judgment to a framework established by the Government. Also, this step involves the use of more than one contractor, which is similar to the exception in FAR section 9.505-2(b)(1)(iii) where the presence of more than one contractor dilutes overall bias.

2. Requiring a firewall between the contractor employees working on reducing the MOD budget and those contractor employees responding to the competitive RFP.

This step of the resolution requires an OCI mitigation plan to provide the details regarding the firewalls. Although firewalls alone are not sufficient mitigation of a conflict regarding impaired objectivity, the firewall does reduce the effect of some of the conflict. The other resolution steps attenuate the effects of the conflict to an acceptable risk level.

3. Disclose the ground rules (strategic thinking by the civil servants) to reduce the MOD budget and to assess the MOD budget process. The release of the ground rules will be in the on-line technical library of the current procurement activity.

This is a type of mitigation by the Government and is not reflected in a mitigation plan that becomes part of the contract. This step of the resolution eliminates any "competitive advantage" the contractors working for MOD may have by knowing the strategic thinking of MOD. Note: Only a limited disclosure will be made since special access is

required to access the information library; however, the disclosure is broad enough to include all parties responding to the solicitation and, thus, effectively eliminates the issue of competitive advantage.

4. Disclose the conflict as part of the current procurement in the draft RFP by identifying the conflict, explaining the steps taken to resolve the conflict, and asking offerors for comments.

This step does not employ any of the resolution tools listed in the FAR, but is a technique to obtain industry buy-in through the comment period and also lessens the protest risk since any protest due to the resolution of this conflict most likely would involve a protest on the face of the solicitation. Protests regarding the nature of an RFP must be filed before receipt of proposals in order to be timely.

5. Remove the Government team evaluating solicitation responses from the MOD team looking at the budget, but allowing for MOD oversight so that the budget process and the procurement will be coordinated at a high level.

This step of the resolution involves partial firewalls within the Government. The purpose of this firewall is to keep the two projects, the competition of the current procurement and the budget review for MOD, as distinct as possible to further reduce the influence the results of the MOD budget process may have on the competition. Again, firewalls alone are not acceptable to mitigate conflicts based on impaired objectivity, but this firewall is only one of many steps being taken to make the effects of the conflict acceptable.

CHAPTER 3 OCI DURING SOURCE SELECTIONS

I. Introduction

This chapter highlights how the issue of OCIs should be addressed during the source selection process. There is a separate chapter (i.e., Chapter 4) on handling potential OCI in a sole source environment. The primary focus of this chapter is mitigation as the method of resolution. Avoidance typically is done by the Government prior to release of the RFP. Similarly, neutralization is not difficult to implement when it involves the use of a limitation on future contracting – something implemented by including NFS clause 1852.209-71, Limitation of Future Contracting, in a solicitation.

Resolving OCIs during the competition can be complex since typically no two companies will have the same type of conflict. Using mitigation to address conflicts involves obtaining plans from offerors and determining whether those plans are acceptable. Although the competitive process might place certain constraints on communications, the competitive environment also should make it easier to obtain acceptable plans from offerors.

II. Preparing the Solicitation

a. Identifying the Scope of the Conflict

Solicitation provisions regarding OCI are only needed in those solicitations involving a significant potential OCI.⁴⁵ The first thing any contracting officer should do in every competitive procurement situation is analyze the statement of work and determine those areas where a conflict of interest could be created. The contracting officer and legal counsel should also identify the type of conflict that may be created as part of this analysis. It is a good practice to include in a solicitation a provision annotating or otherwise identifying the areas of the statement of work where the potential for an OCI exist. This analysis is consistent with the requirement in section 9.507-1(b) of the FAR that requires solicitations contain a provision that “states the nature of the potential conflict as seen by the contracting officer.” Such a solicitation provision should help establish common expectations among the offerors and the Government with regard to the issue of OCIs.

b. Obtaining Early Input from Industry

Contracting officers should solicit ideas from industry about the nature of identified conflicts and the methods by which the Government can resolve it prior to release of the final RFP. Often the most meaningful exchanges occur during one-on-one sessions. This input may provide insight as to how serious industry views the conflict, provide ideas for acceptable resolutions, and provide some indication whether the conflict may affect competition. These communications also should help foster trust between industry and

⁴⁵ See FAR 9.506 (b)(2).

the agency and assist the contracting officer in devising a resolution that is acceptable for the particular contract.

c. Procurement Strategy Decision: Evaluation Criteria versus Eligibility Criterion

There are two fundamental ways to handle the issue of OCI during competitions⁴⁶ - create an eligibility criterion or evaluate the mitigation plan as part of the selection criteria.

An eligibility criterion for award is evaluated on the basis of pass/fail. An offeror either provides a mitigation plan that minimizes the conflict to an acceptable risk level or fails to submit an acceptable plan. An offeror that fails to submit an acceptable plan will be ineligible for award. See Section IV of this chapter on “Communications after Release of a Solicitation” which addresses case law with respect to eligibility criteria. The downside of this approach is that offerors may attempt to provide only minimal resolution of an OCI.

Evaluating mitigation plans requires the Government to consider the degree of mitigation as a part of the mission suitability factor. This technique gives the Government the ability to give more credit to the contractor with the more thorough plan. The evaluation criteria in Section M should be written in such a way as to emphasize the acceptability of the mitigation plans and also consider the effect the mitigation plans have on the performance of the contract. Evaluating mitigation plans, however, creates the following challenges:

- Determining the mission suitability factor weighting for the mitigation plan can be difficult. In order to ensure the Government receives an acceptable mitigation plan, ample weight should be accorded to the mitigation plan; however, doing this may dilute the other factors relating to the actual performance of the requirement.
- When mitigation plans are evaluated, communications about the plans must be treated as discussions. Communications about mitigation plans, therefore, cannot occur until competitive range is made and agreements as to the acceptability of mitigations plans should occur before discussions end and the request for final proposal revisions (FPRs) is made. Additionally, contracting officers must conduct another round of discussions in the event changes to any mitigation plan are required after receipt of the FPRs.

d. Procurement Strategy Decision: Should the Ability to Waive a Conflict be Reserved?

The agency must adhere to the stated criteria in the RFP. Thus, reserving the right to waive an OCI in the solicitation permits the agency to comply with stated evaluation

⁴⁶ During the award process, contracting officers may not be required to address an OCI further in a competition in those situations where all offerors are required to accept a limitation on future contracting since the limitation on future contracting should completely resolve the OCI. Note: Although requiring a limitation on future contracting usually resolves the identified conflicts associated with a solicitation, a limitation on future contracting may not resolve other conflicts particular offerors could have.

criteria.⁴⁷ The ability to waive FAR 9.5 during a competition is not possible unless the solicitation specifically provides that the agency may waive an OCI. A statement regarding the right to waive FAR 9.5 should be used in those rare situations when market research indicates that most of the offerors in the pool of qualified contractors have an organizational conflict of interest that cannot be adequately mitigated.

III. Solicitation Provisions/Contract Clauses

a. Solicitation Provisions

This Guide does not provide a standard solicitation provision for use in Section L to meet the requirements of FAR section 9.507-1 since each potential conflict as well as the method of resolution probably will differ in each solicitation. Types of solicitation provisions that may be useful are provided below.

- A solicitation provision notifying offerors about the potential that performance of the requirement may create an OCI. Appendix A contains a sample notice provision. Contracting officers must modify this provision to reflect the particular facts of each solicitation. One possible modification would be to refer to an annotated version of the statement of work indicating those areas where the contracting officer believes an OCI could occur.
- A provision explaining the other measures the agency has taken to mitigate the conflict and why the conflict will be adequately resolved if the Government receives an acceptable mitigation plan from the contractor. This type of provision gives the offerors better insight into the OCI issue and helps make the OCI issue one regarding the terms of the solicitation (which must be protested before receipt of proposals) rather than one regarding selection. The notice provision in Appendix A could be modified to reflect this information.
- An eligibility factor in Section M of the solicitation: Appendix A contains sample language informing offerors that submission of an acceptable mitigation plan is an eligibility factor for purposes of award.
- Data Requirements Document (DRD) for an OCI mitigation plan: Contracting officers should include a DRD similar to the one in Appendix B when mitigation is a potential method to resolve conflicts. This DRD, which delineates the basic elements of a mitigation plan, only should be completed when an offeror proposes mitigation as a method of resolution in its proposal. All mitigation plans must be approved by the contracting officer and incorporated in the resulting contract.

b. Contract Clauses

Contracting officers must include an appropriate clause in the contract when the resolution is through (1) mitigation that involves action on the part of the contractor or (2) neutralization via a limitation on future contracting. These methods of resolution are not effective unless they become requirements in the contract. A clause should be

⁴⁷ See *DynCorp*, B-245289, B-245289.2, Dec. 23, 1991.

included in the contract to ensure the mitigation plan is incorporated into the contract. The clause should be tailored to the situation presented for each acquisition. An example is provided in Appendix A.

The clause at NFS 1852.209-71, Limitation of Future Contracting, should be included in a solicitation when the OCI is being resolved through neutralization. Contracting officers should be sure to insert specific language within the clause that defines the potential conflict(s) applicable to their particular procurement. Use of this clause is not necessarily limited to work for developing specifications or statements of work. The language may be tailored to fit other situations where a contracting officer believes it is in the best interest of the Government to resolve an OCI by limiting future contracting.

IV. Communications after Release of a Solicitation

a. Communications about Mitigation Plans

GAO has stated that communications about a mitigation plan do not constitute discussions when a solicitation treats the issue of OCI as a matter of eligibility.⁴⁸ GAO analogized the matter to requests for information relating to an offeror's responsibility in those cases when the solicitation treated OCI as a matter of eligibility.

In the same decision, GAO stated when the issue of OCI is treated as an eligibility factor, communications about an offeror's mitigation plan may occur (1) prior to receipt of the proposals, (2) prior to the establishment of the competitive range and (3) after the receipt of final revised proposals. Communications regarding mitigation plans are considered discussions in those procurements where mitigation plans are included in the factors for evaluation.

b. Addressing Allegations Raised During Competition

The GAO held that a failure to address information provided by an offeror about an alleged conflict creates a presumption that a conflict of interest exists.⁴⁹ Assuming the contracting officer cannot find any credible evidence supporting the allegation, the contracting officer should explain in writing why the facts do not constitute an OCI in order to rebut this presumption. If the contracting officer believes the allegation is credible, then the contracting officer must take the necessary steps to resolve the conflict.

⁴⁸ See *Overlook Systems Technologies, Inc.*, B-298099.4, B-298099.5, Nov. 28, 2006, 2006 CPD ¶ 185. GAO said requests about an offeror's mitigation plan would not constitute discussions since requests for information relating to an offeror's responsibility do not constitute discussions or trigger the requirement to hold discussions with other offerors in the competitive range.

⁴⁹ See *Celadon Laboratories*, B-298533, Nov. 1, 2006, 2006 CPD 158.

c. Communications Prior to Withholding Award

FAR section 9.504(e) provides that “before determining to withhold award based on conflict of interest considerations, the contracting officer shall notify the contractor, provide the reasons there for, and allow the contractor a reasonable opportunity to respond.” Notifying the offeror about an unacceptable OCI may be a necessary step to determining whether an OCI can be resolved. One decision from the Court of Federal Claims turns on the contracting officer’s failure to provide an offeror with “reasonable opportunity to respond.”⁵⁰ The court found that the OCI in question could be mitigated had the contracting officer notified the offeror that its mitigation plan was not acceptable.⁵¹ Other decisions have held the failure to notify an offeror that its mitigation plan is not acceptable will not be the basis to sustain a protest when the Government is able to show there was no way the offeror could have resolved the conflict.⁵²

V. Documentation

a. Documentation When There is a Significant OCI

FAR section 9.506 contains procedures the contracting officer must follow prior to issuing a competitive solicitation when a particular acquisition involves “a significant potential organizational conflict of interest.” These requirements involve:

- A written analysis of the conflict including a recommended course of action to avoid, neutralize, or mitigate the conflict,
- A draft solicitation clause, and
- If appropriate, a proposed contract clause.

The reviewing official, who must be the chief of the contracting office, is required to (1) consider the benefits and detriments to the Government and prospective contractors and (2) approve, modify, or reject the recommendations made by the contracting officer. Section 1809.506 of the NFS provides that this approving official is the procurement officer when the installation has source selection authority and is the Assistant Administrator for Procurement (Code HS) when NASA Headquarters has that authority. Section 9.506 requires the approving official’s actions be in writing, however, this could be done through the approval of minutes of the PSM.

FAR section 9.506 requires the contracting officer include the approved provisions in the solicitation and/or contract, consider additional information provided by prospective contractors in response to the solicitation or during negotiations, and resolve the conflict or potential conflict in a manner consistent with the approval or other direction by the head of the contracting activity.

⁵⁰ See *Informatics Corporation v. U.S.*, 40 Fed. Cl. 508, 1998 U.S. Claims LEXIS 51 (1998).

⁵¹ See *id.*

⁵² See *DSD Laboratories, Inc. v. U.S.*, 46 Fed. Cl. 467, 2000 U.S. Claims LEXIS 65 (2000).

b. Documentation When There is No Significant OCI

Although FAR section 9.506 only requires a written analysis when the contracting officer determines a particular acquisition involves a significant potential organizational conflict of interest, it may be prudent for contracting officers to prepare a short memo for the file in competitions explaining when a particular situation does not constitute a significant potential organizational conflict of interest or any OCI at all. The significance of a potential OCI will vary in each situation based on the nature of what is being procured, the nature of the conflict for a particular offeror or class of offerors, and the impact of the conflict on an offeror's ability to do the work. Since the definition of significance is very subjective, it is important to have a memo in the file illustrating that a contracting officer analyzed the facts and made a determination of significance. The short memo to the file also should contain the contracting officer's rationale for that determination. Depending on the situation, this information could be captured in the PSM charts or related documentation.

GAO gives contracting officers discretion in how to resolve a conflict, but it tends to sustain protests when contracting officers failed to meet their responsibility to identify the conflict. A short memorandum for the record would indicate that the contracting officer identified a situation that could be a conflict, but concluded no conflict, or no significant conflict, existed. Preparing the memorandum for the record to the file prior to a protest gives the document more credibility since the GAO and courts give less weight to documents created after a protest is filed.

CHAPTER 4 OCI CONSIDERATIONS FOR SOLE SOURCE CONTRACTS

It is important to understand that a contracting officer cannot ignore or overlook the matter of OCI when a contract is awarded in a sole source environment. FAR 9.504 requires contracting officers to identify and evaluate potential OCIs and to resolve them prior to contract award, no matter the nature of the contract.⁵³ FAR 9.5 explains there are basically two things that the principles of OCI are designed to prevent: unfair competitive advantage and bias. The principles of organizational conflicts of interest apply to sole source contracts to the extent that the conflict creates an unfair competitive advantage.

This means that the contracting officers still need to be concerned about conflicts of interest due to unequal access to information and biased ground rules when contracting on a sole source basis. Impaired objectivity, however, typically is not an issue for a contractor awarded a sole source contract since the concern about the bias generally is outweighed by the fact there is only one responsible source capable of performing the Government's requirement. Caution must be exercised when deciding whether to exclude the application of certain OCI principles to a sole source contract. The OCI principles must always be applied to prevent the instant contract from giving a sole source contractor an unfair competitive advantage in future competitions. It can be difficult to discern between a natural competitive advantage and an unfair competitive advantage. Most unfair competitive advantages would involve establishing the ground rules of a future competition in which the contractor also intended to participate.

The concept that FAR 9.5 has a more limited application to sole source contracts best is found in the example of preparing specifications or work statements found in FAR section 9.505-2(b). A contractor cannot prepare or assist in preparing a work statement for the Government to acquire a system or service and then supply that system or service to the Government unless: (1) it is the sole source for the system/service or (2) the contractor participated in the design and development work. Both exceptions essentially recognize the unique qualifications of a contractor trump concerns regarding organizational conflicts of interest. These exceptions in FAR section 9.505-2, however, most likely would not permit a sole source contractor to prepare specifications for a future contract when the sole source contractor also wishes to participate in that future competition.

⁵³ See FAR 9.504(a)

CHAPTER 5 OCI DURING CONTRACT ADMINISTRATION

I. Introduction

This chapter is not meant to dilute the responsibilities of contracting officers to identify and resolve OCIs prior to contract award. FAR 9.504 requires contracting officers to (1) identify and evaluate potential organizational conflicts of interest as early in the acquisition process as possible; and (2) avoid, neutralize, or mitigate significant potential conflicts before contract award.

However, the responsibility of a contracting officer regarding OCI issues does not necessarily end with contract award given the realities of Government contracting. Although contracts must have appropriate clauses and/or mitigation plans in place to address significant potential OCI situations that arise during contract performance, indefinite-delivery/indefinite-quantity (ID/IQ) contracts, changes in requirements, and novations raise OCI concerns that can continue during contract administration.

II. Indefinite-Delivery/Indefinite-Quantity Contracts

An ID/IQ contract is a unique agreement which gives the Government flexibility to order an indefinite quantity, within stated limits, of supplies or services during a fixed period of time. The FAR requires agencies obligate a minimum quantity stated in the ID/IQ contract to create a binding contract. Because the minimum quantity acts as consideration, GAO decisions require agencies issue a minimum order at the time of award. Once there is a binding contract, the contractor is obligated to furnish additional quantities up to the maximum quantity in the contract.⁵⁴

NASA uses two different types of ID/IQ contracts: single award ID/IQ contracts and multiple award ID/IQ contracts. The confluence of OCI and ID/IQ principles affects each of these types of contracts differently resulting in a different balance between the need to resolve at time of award and knowing the actual requirement.

a. Single Award ID/IQ Contracts

At the time of award, a single award ID/IQ contract must include sufficient resolution of conflicts to issue orders without further agreement from the contractor if the potential exists that an order could create an OCI. Issuing orders under a single award ID/IQ contract is most analogous to exercising an option where all of the terms and conditions must be agreed to at contract award. A general resolution of all potential conflicts must occur at time of award to preserve the Government's right to issue subsequent orders under the contract. The resolution(s) at the time of award, however, will be general in nature since the actual nature of the conflict will not be known until the requirements are defined when an order is issued. Examples of general resolutions of potential OCIs include: advance agreements to have the non-conflicted member of the prime

⁵⁴ See FAR 16.504(a)(1).

contractor's team perform certain requirements, advance agreements for a limitation on future contracting if certain requirements are ordered, and/or a limitation on reassigning employees if certain orders are placed.

The contracting officer shall then identify whether an actual OCI exists with any issued order as part of contract administration. If an actual conflict is identified with the order, then the contracting officer should review the general resolution plan in the ID/IQ contract to see if it adequately covers the order. If it does not, then the contracting officer should appropriately tailor the resolution plan to cover the newly identified OCI. Examples of appropriate tailoring include—

- (i) A reasonable time limitation on future contracting;
- (ii) Description of the arrangement where the team member, e.g., the prime contractor or a subcontractor, without the conflict performs the effort. There must be a firewall between the two team members which the tailoring also needs to explain;
- (iii) Description of the nature of the limitation on reassignments often necessary to create a firewall; and/or
- (iv) Identification of the resolution method most appropriate for the order.⁵⁵

b. Multiple Award ID/IQ Contracts

At the time of award, selection of multiple award ID/IQ contracts must be limited to those contractors that demonstrate the ability adequately to resolve conflicts in subsequently issued orders. Each multiple award contract also should contain a general resolution plan (e.g., see the second DRD sample in Appendix B) which would permit the contracting officer to issue an order pursuant one of the exceptions to a fair opportunity for consideration.⁵⁶ These OCI responsibilities are similar to the OCI responsibilities for single award ID/IQ contracts.

The primary difference between single award ID/IQ contracts and multiple award ID/IQ contracts with regard to OCI concerns is the fair opportunity for consideration⁵⁷ associated with multiple award ID/IQ contracts. A fair opportunity for consideration, which can be thought of as a mini competition for the issuance of orders, is the competitive process used to select orders under multiple ID/IQ contracts. A fair opportunity for consideration is the best time for contracting officers to tailor the

⁵⁵ In most cases, the general resolution plan will contain more than one possible method to address OCIs. One type of tailoring, therefore, would be to identify the specific method of resolution selected to address the actual conflict(s) contained in an order.

⁵⁶ Exceptions to the fair opportunity process are found in FAR Section 16.505(b)(2).

⁵⁷ FAR Section 16.505(b)(1) addresses fair opportunities for consideration. This section requires the contracting officer provide each awardee of a multiple award ID/IQ contract “a fair opportunity to be considered for each order exceeding \$3000 issued under multiple delivery-order contracts or under multiple task-order contracts, except as provided for in paragraph (b)(2) of this section.” Paragraph (b)(2) lists the exceptions to the fair opportunity process. Section 16.505(b)(1)(D) provides that the contracting officer shall include procedures regarding how the fair opportunity will be conducted in the solicitation and resulting contracts. The FAR gives the contracting officer broad discretion in developing these procedures and advises the contracting officer to use streamlined procedures keeping submissions at a minimum.

resolution to match the order with regard to multiple award ID/IQ contracts. Multiple award ID/IQ contracts are required to contain the procedures detailing how the fair opportunity for consideration will be conducted. Contracting officers are advised to include the tailoring of resolutions as part of the procedures for a fair opportunity for consideration.

Like single award ID/IQ contracts, this tailoring would permit adapting the general resolution in the ID/IQ contract to the specific conflict created by the order. Tailoring during a fair opportunity for consideration gives a contracting officer more opportunity to direct the method of resolution due to the competitive environment of the process.

In summary, during contract administration, the contracting officer shall identify whether an actual conflict of interest is associated with the order. When an actual conflict is identified and an exception to a fair opportunity for consideration is used, the contracting officer should follow the procedures for a single award ID/IQ contract. When an actual conflict is identified and a fair opportunity for consideration is being conducted, the contracting officer should tailor the general resolution as part of the fair opportunity for consideration. This tailoring may also address subsequently related orders that may be issued pursuant to an exception to conducting a fair opportunity for consideration.

Not using an ID/IQ contract is one way a contracting officer may avoid conflicts; however, this decision is solely the Government's. Giving contractors the ability to refuse performing an order due to OCI concerns undermines the basic tenets of an ID/IQ contract, *i.e.*, the Government has the right to order up to the maximum quantity of supplies or services during a fixed period of time.

III. Changes

FAR 9.504 requires the contracting officer analyze planned acquisitions to identify and evaluate potential organizational conflicts of interest. This initial OCI assessment should include consideration of potential future changes to the statement of work. The ability to accurately predict all future changes, however, requires a crystal ball particularly with contracts where the scope of the changes clause is extremely broad. As part of contract administration, contracting officers are advised to assess whether significant changes to a contract create OCI concerns and, if so, ensure an appropriate resolution is included in the change modification. An example of a modification that may require an additional OCI analysis prior to making the change is giving the NASA Shared Services Center management of the NASA Protective Services contract. No additional OCI assessment is necessary for most changes since these changes would have been included in the initial OCI assessment performed before contract award. The ability adequately to resolve an OCI could affect the contracting officer's ability to make the change.

IV. Novations

A novation involving a change of contractor is another contract administration function requiring a new OCI assessment. Section 42.1202(c)(3) of the FAR requires the

responsible contracting officer to determine whether there are “any factors relating to the proposed successor’s performance of the contract . . . that the Government determines would impair the proposed successor’s ability to perform the contract satisfactorily.” If the financial interest of the proposed successor creates a new OCI, this conflict must be resolved prior to the novation.⁵⁸ Section 42.1204(c) of the FAR, which explains what occurs when it is in the Government’s interest not to concur in the transfer, should be followed when an OCI cannot be adequately resolved. According to section 42.1204(c), the Government may require the original contractor remain under contractual obligation and “the contract may be terminated for reasons of default, should the original contractor not perform.”

⁵⁸ Subpart 1842.12 of the NFS contains additional guidance on novations and change-of-name agreements.

APPENDICES

Appendix A: SOLICITATION PROVISIONS AND CONTRACT CLAUSES

1852.209-XX NOTICE OF POTENTIAL ORGANIZATIONAL CONFLICTS OF INTEREST

(a) Notice. The Contracting Officer has determined that this acquisition may give rise to a organizational conflict of interest (OCI). Accordingly, the attention of prospective Offerors is invited to FAR Subpart 9.5 --Organizational Conflicts of Interest. The Contracting Officer shall not award a contract until NASA determines any conflict of interest is reasonably resolved. The Contracting Officer has the sole authority to determine whether an organizational conflict of interest exists and to determine whether the organizational conflict of interest has been reasonably resolved. The OCI plan will not be evaluated as part of mission suitability. However, before being eligible to receive an award, the Offeror shall submit an acceptable OCI plan (including mitigation plans for any identified OCIs). As such, the Government may communicate with any Offeror at anytime during the evaluation process concerning its OCI plan.

(b) Description of Potential Conflict. The nature of this organizational conflict of interest is... *[Describe the nature of the conflict here. The Contracting Officer may also annotate the SOW to indicate where conflicts could arise and include such annotated SOW as an attachment to Section L of the RFP.]*

(c) Responsibility of Offeror. (1) Applying the principles of FAR Subpart 9.5, each Offeror shall assess whether there is an organizational conflict of interest associated with the proposal it submits. The Offeror must explain the actions it intends to use to resolve any organizational conflicts of interest it finds in the Government's assessment and its own assessment. If its proposed resolution involves a proposed limitation on future contracting, the Offeror shall include the clause at NFS 1852.209-71 entitled "Limitation of Future Contracting" in its proposal. If the proposed resolution involves use of mitigation techniques, the Offeror shall include the special clause entitled "Mitigation of Organizational Conflicts of Interest" in its proposal. Offerors may include the clause at NFS 1852.209-71 as well as a mitigation plan when their proposed resolution involves both techniques to address conflicts.

[If the Contracting Officer decides a limitation on future contracting is the appropriate method of resolution, the Contracting Officer shall delete the portion of the last sentence regarding inclusion of a mitigation plan special clause.]

(2) Offerors are encouraged to inform the Contracting Officer of any potential conflicts of interest, including those involving contracts with other Government organizations, in their proposal. The contracting officer will use this information to determine whether resolution of those conflicts will be required.

(3) If the Offeror's proposed action to resolve an organizational conflict of interest is not acceptable, the Contracting Officer will notify the Offeror, providing the reasons why its proposed resolution is not considered acceptable and allow the Offeror a reasonable

opportunity to respond before making a final decision on the organizational conflict of interest.

(d) Representation. By submission of its offer, the Offeror represents, to the best of its knowledge and belief, that –

(1) there are no relevant facts that could give rise to an OCI, as defined in FAR Part 2; or

(2) the Offeror has disclosed all relevant information regarding any actual or potential conflicts of interest.

(e) Termination for default. If the successful Offeror was aware, or should have been aware, of an OCI before award of this contract and did not fully disclose that conflict to the Contracting Officer, the Government may terminate the contract for default.

(f) Waiver. The agency reserves the right to waive the requirements of FAR 9.5, in accordance with FAR 9.503

Alternate I: Add paragraph (g) describing the actions the Government has taken to reduce or minimize any identified conflicts of interest prior to release of the solicitation.

(g) Action Taken to Reduce Conflict. *[Describe any steps the Government has taken to minimize or reduce the conflict(s) of interest, if any.]*

Alternate II: Add paragraph (b)(2) when the contracting officer believes it is in the best interest of the Government to prescribe a common resolution technique for a particular OCI. Examples of common resolution may include (1) the use of a limitation on future contracting clause or (2) a limitation on the reassignment of personnel. A best practice is to solicit input from industry before inserting a common resolution in the RFP. It should be noted that although the common resolution would streamline the SEB process, the common resolution may not address all of the OCIs each Offeror may have.

(b)(2) Required OCI Resolution. *[Describe any common resolution directed by the Contracting Officer.]*

1852.209-YY MITIGATION OF ORGANIZATIONAL CONFLICTS OF INTEREST

[This clause should only be used in contracts where a potential OCI has been identified prior to award and an OCI mitigation plan is involved in the resolution of the OCI.]

- (a) Mitigation plan. The Organizational Conflict of Interest Mitigation Plan and its obligations are hereby incorporated in the contract by reference.
- (b) Changes. (1) Either the Contractor or the Government may propose changes to the Organizational Conflict of Interest Mitigation Plan. Such changes are subject to the mutual agreement of the parties and will become effective only upon incorporating the change into the plan by contract amendment.
- (2) In the event that the Government and the Contractor cannot agree upon a mutually acceptable change, the Government reserves the right to make a unilateral change to the OCI Plan as necessary, with the approval of the head of the contracting activity, subject to Contractor appeal as provided in the Disputes clause.
- (c) Violation. The Contractor shall report any violation of the Organizational Conflict of Interest Mitigation Plan, whether by its own personnel or those of the Government or other contractors, to the Contracting Officer. This report shall include a description of the violation and the actions the Contractor has taken or proposes to take to mitigate and avoid repetition of the violation. After conducting such further inquiries and discussions as may be necessary, the Contracting Officer and the Contractor shall agree on appropriate corrective action, if any, or the Contracting Officer shall direct corrective action.
- (d) Breach. Any breach of the above restrictions or any nondisclosure or misrepresentation of any relevant facts required regarding organizational conflicts of interests to be disclosed may result in termination of this contract for default or other remedies as may be available under law or regulation.
- (e) Subcontracts. The Contractor shall include the substance of this clause, including this paragraph (e), in subcontracts where the work includes or may include tasks related to the organizational conflict of interest. The terms “Contractor” and “Contracting Officer” shall be appropriately modified to reflect the change in parties and to preserve the Government’s rights.

(End of clause)

1852.209-ZZ DISCLOSURE OF ORGANIZATIONAL CONFLICT OF INTEREST AFTER CONTRACT AWARD

[This clause should be inserted in all contracts.]

(a) If the Contractor identifies an actual or potential organizational conflict of interest that has not already been adequately disclosed and resolved (or waived in accordance with FAR 9.503), the Contractor shall make a prompt and full disclosure in writing to the Contracting Officer. This disclosure shall include a description of the action the Contractor has taken or proposes to take in order to resolve the conflict. This reporting requirement also includes subcontractors' actual or potential organizational conflicts of interest not adequately disclosed and resolved prior to award.

(b) Mitigation plan. If there is a mitigation plan in the contract, the Contractor shall periodically update the plan, based on changes such as changes to the legal entity, the overall structure of the organization, subcontractor arrangements, contractor management, ownership, ownership relationships, or modification of the work scope.

(End of clause)

Appendix B: SAMPLE DATA REQUIREMENTS DOCUMENT

XX DATA REQUIREMENTS DESCRIPTION (DRD)

1. **PROGRAM:**
2. **DRD NO.:**
3. **DATA TYPE:**
4. **DATE REVISED:**
5. **PAGE:** 1

6. **TITLE:** Organizational Conflict of Interest Mitigation Plan

7. **DESCRIPTION/USE:** Used when the contractor proposes to resolve an organizational conflict of interest by mitigation.

8. **DISTRIBUTION:** As Determined by the Contracting Officer Per Data Requirements Matrix

9. **INITIAL SUBMISSION:** NLT final proposal due date. *[May be tailored based on specific procurement timeline.]*

10. **SUBMISSION FREQUENCY:** As needed

11. **REMARKS:**

12. **INTERRELATIONSHIP:** H.xx, Organizational Conflict of Interest (OCI)

13. **DATA PREPARATION INFORMATION:**
 - 13.1 **SCOPE:** The Organizational Conflict of Interest (OCI) Plan describes the contractor's approach to mitigate potential OCI issues created by the performance of work in the RFP.
 - 13.2 **APPLICABLE DOCUMENTS:** FAR 9.5
 - 13.3 **CONTENTS:** The Organizational Conflict of Interest (OCI) Mitigation Plan shall:
 1. Demonstrate an understanding of (1) OCI principles and (2) the full breadth of OCI issues and the types of harm that can result.
 2. Describe the actions the contractor intends to take to mitigate the OCIs identified in the RFP. If using a firewall, explain how these actions will operate to successfully address the conflict without adversely affecting performance of the contract. Additionally, identify any potential OCIs created by the requirements of this RFP which the contractor intended to resolve using methods other than mitigation. Specific mitigation strategies shall be appended to the mitigation

plan; specific plans to limit future competition will be reflected in the clause at NFS 1852.209-71, "Limitation of Future Contracting."

3. Require the reporting of all potential/actual OCIs during performance of the contract. An OCI report shall include (1) a description of the conflict, (2) the plan for resolving the conflict, and (3) the benefits/risks vis-à-vis contract performance associated with plan approval/acceptance.

4. Include a requirement to update this plan as necessary to address specific OCIs. All updates to the plan must be approved by the contracting officer and the updates/changes must be incorporated in the contract to be effective.

5. Define company roles, responsibilities, and procedures for screening (i.e., identifying/recognizing, analyzing/evaluating, resolving, and reporting) existing and new business opportunities for actual/potential OCIs.

6. Identify any affiliated companies/entities (e.g., a parent company or a wholly-owned subsidiary) and procedures for coordinating OCIs with such affiliated companies/entities.

7. Explain how the contractor will flow down the provisions of this mitigation plan to any subcontractor that may have a conflict with regard to performing the requirements of this contract. Discuss affected subcontractors' OCI program as it relates to this contract and specifically explain how affected subcontractors will identify, resolve, and report OCIs associated with this contract.

8. Establish and require entrance training for new employees, refresher training for existing employees, and exit training for departing employees.

9. Define organizational and employee sanctions for violations of established OCI procedures/requirements/guidelines.

10. Require periodic self-audits to ensure compliance with established OCI procedures/requirements/guidelines.

11. Define records related to the OCI plan (e.g., training and audit records) that will be made available to the Government upon request.

13.4 **FORMAT:** Contractor format is acceptable.

13.5 **MAINTENANCE:** Changes shall be incorporated as required by change page/s or complete reissue.