Survey of Organizational Conflicts of Interest In Government Contracting

March, 2011

I. Introduction

According to the Federal Acquisition Regulation (FAR), organizational conflict of interest (OCI) means that "because of other activities or relationships with other persons, a person is unable or potentially unable to render impartial assistance or advice to the government, or the person's objectivity in performing the contract work is or might otherwise be impaired, or a person has an unfair competitive advantage. "Person" in this definition includes companies and other contracting entities. (Subpart 2.101: Definitions)

Compliance with OCI rules has become more difficult for companies because of changes in the market place and government processes. For instance, there has been consolidation within the industries that serve the U.S. Government, which has increased the services the consolidated contractors provide and increased the possibilities for OCIs. Additionally, the government is using more indefinite-delivery/ indefinite -quantity contracts that have less specific statements of work, allowing for more potential conflicts of interest over the life of the contract.

Rules to amend the FAR OCI rule are pending. As described below the FAR Council is expected to release amendments to the civilian FAR soon. Additionally, FAR Case 2011-011, entitled "Organizational Conflict of Interest and Contractor Access to Nonpublic Information" is currently progressing through the approval process. It would implement section 841 of the National Defense Authorization Act (NDAA) for Fiscal Year 2009 (Public Law 110-417) that requires consideration of the current needs of the acquisition community with regard to OCI. Additionally, it addresses issues relating to unequal access to information. As of February 24, 2011, the Civilian Agency Acquisition Council has sent the draft proposed rule to Office of Information and Regulatory Affairs for review.

OCI is often cited in bid protests as a reason to rescind and rebid an awarded contract. In the bid protest process, the protesting party has four options to seek a decision: the procuring agency, the Government Accountability Office (GAO), the US Court of Federal Claims (COFC) and the contractor's local federal district court. Although independent of each other, both the GAO and the COFC have rendered many decisions that have entered into case law regarding organizational conflict of interest. This paper will outline some of these decisions and discuss how they have led to the current understanding of OCI.

Additionally, several federal agencies have developed policies outside the FAR to address issues specific to their interests. The Department of Defense recently adopted a new policy relating to OCIs in major defense acquisition programs, after having released a much broader proposal initially. Because the Federal Acquisition Regulation Council is expected

to issue its own OCI modifications for civilian agencies "soon," some have suggested the DoD scaled back its proposed rule because it may have been a precursor for those FAR Council OCI revisions. This paper will outline both the final and proposed changes to the Defense Federal Acquisition Regulation Supplement (DFARS) and provide an overview of the FAR Council. The Department of Health and Human Services has developed the HHS Acquisition Regulation System to supplement the FAR as well. However, the variances from and additions to the FAR do not relate to organizational conflicts of interest.

Additionally, although many of its policies relate to individual conflict of interest, the National Institutes of Health has proposed new rules to enhance effective institutional oversight as well. Under current regulation, grantee institutions must assure that it any conflicts of interest have been managed, reduced, or eliminated. This review includes a summary of proposed changes.

Also, the authorizing legislation of some programs includes specific conflict of interest language applicable to the contractors who perform services for those programs. Three examples relating to the Medicaid program are included in this review.

Furthermore, many states have their own conflict of interest policy. While this survey does not address these policies, the National Conference of State Legislators has compiled a table of states' conflict of interest definitions.

II. Overview of Government Accountability Office Case Law

The Government Accountability Office (GAO) oversees the bid protest process, through which bidders and offerors file protests arguing that contracts have been awarded in violation of the laws and regulations that govern federal government procurement. Most protests challenge the acceptance or rejection of a bid or proposal and the award or proposed award of a contract, but GAO considers protests of defective solicitations (*e.g.*, allegedly restrictive specifications, omission of a required provision, and ambiguous or indefinite evaluation factors), as well as certain other procurement actions (*e.g.*, the

cancellation of a solicitation).[1] Therefore the GAO reviews protests regarding allegations of improper bid evaluation such as alleged improper cost or price evaluation, perceived misevaluation of past performance and unaddressed organizational conflicts of interest.

Over the years, GAO has developed a substantial body of law and standard procedures for considering bid protests much of it applicable to organizational conflict of interest. GAO categorizes organizational conflict of interest, as addressed in FAR subpart 9.5[2] and GAO decisions, into three broad categories:

1. **Unequal Access To Information Cases** -- "Situations in which a firm has access to nonpublic information as part of its performance of a government contract and where that information may provide the firm an unfair competitive advantage in a later competition for a government contract". In these "**unequal access to information"** cases, the concern is limited to the risk of the firm gaining a competitive advantage. (FAR § 9.505-4)
    a. **Unfair Competitive Advantage** -- A guiding principle established by the court decisions and the GAO is "the obligation of the contracting agencies to avoid even the appearance of impropriety in government procurements". Among other issues, the GAO sustained this protest based on the absence of any consideration of the issues stemming from the awardee's use of a competitor's high-level former employee in the preparation of its proposal. (Health Net Federal Service, LLC, B-4016252.3; B401652.5; November 4, 2009)
    b. **Access to Non-Public Information --** GAO found an "unequal access to information" OCI where the record shows that the awardee's design subcontractor, through the firm that was negotiating to purchase it (and did in fact purchase it shortly after contract award) had access to competitively useful, non-public information. (McCarthy/Hunt, JV**,** B-402229.2, February 16, 2010)
2. **Biased Ground Rules** -- "Situations in which a firm, as part of its performance of a government contract, has in some sense set the ground rules for the competition for another government contract." In these **"biased ground rules"** cases, the primary concern is that the firm could skew the competition, whether intentionally or not, in favor of itself. (FAR §§ 9.505.1, 9.505-2)
    a. **Involved in Development of SOW** -- GAO upheld a decision that an organization's preparation of a study that was used by the agency to develop the statement of work (SOW) for the request for proposals (RFP) created a biased ground rules organizational conflict of interest that required the organization to be excluded from the competition. (Energy Systems Group, B-402324, February 26, 2010)
    b. **Involved in Procurement Development --** GAO found a "biased ground rules" OCI where the record shows that the firm that was in negotiations to

[1] "Bid Protests at GAO: a Descriptive Guide, Ninth Edition., 2009", GAO, GAO-09-471SP, page 8.

[2] See Appendix A for language of the Federal Acquisition Regulation Subpart 9.5 pertaining to Organizational and Consultant Conflicts of Interest.

purchase (and ultimately did purchase) the awardee's design subcontractor, provided procurement development services to the agency that put it in a position to affect the competition in favor of the acquired subcontractor. McCarthy/Hunt, JV**,** B-402229.2, February 16, 2010.

c. **Affiliates --** GAO found there is no basis to distinguish between a firm and its affiliates, at least where concerns about potentially biased ground rules and impaired objectivity are at issue. (ICF Inc., B-241372, Feb. 6, 1991)

3. **Impaired Objectivity** -- "Cases where a firm's work under one government contract could entail its evaluating itself or a related entity, either through an assessment or performance under another contract or an evaluation of proposals." In these **"impaired objectivity"** cases, the concern is that the firm's ability to render impartial advice to the government could appear to be undermined by its relationship with the entity whose work product is being evaluated. FAR §9.505-3.
    a. **Self Evaluation --** GAO has determined that "situations that create potential conflicts of interest include situations in which a firm's work under a government contract entails evaluating itself." PURVIS Sys., Inc., B-293807.3, B-293807.4, Aug. 6, 2004
    b. **Mitigation Plans --** GAO has determined that where "the risk of a conflict of interest" is "not great," mitigation plans coupled with increased agency oversight of the contractor are sufficient to protect the government's interest. (Overlook Systems Technologies, Inc. B-298099.4; 298099.5, November 28, 2006)
    c. **Use of a Firewall --** GAO has determined that creating a firewall to manage two contracts using "separate organizations with separate interests" and "distinct business objectives", does not avoid, mitigate or neutralize the impaired objectivity organizational conflict of interest. (Nortel Government Solutions, Inc., B-299522.5; B299522.6, December 30, 2008)
    d. **Evaluating an Affiliate—**GAO found that significant organizational conflict of interest exists where an affiliate of one offeror's major subcontractor evaluates proposals for the procuring agency. In this case, severance of communication between the two affiliates and the absence of direct financial interest by employees of the affiliate performing the evaluation of proposals did not adequately mitigate the conflict. (Aetna Government Health Plans, Inc; Foundation Health Federal Services, Inc., B-254397.15; B-254397.17; B-254397.18; B-254397.19, July 27, 1995)
    e. **Affiliates --** GAO found there is no basis to distinguish between a firm and its affiliates, at least where concerns about potentially biased ground rules and impaired objectivity are at issue. (ICF inc., B-241372, Feb. 6, 1991)

Waiver of OCI -- FAR 9.503 allows agencies to waive organizational conflicts of interest in some cases. **--** The agency head or designee may "waive any general rule or procedure to this subpart (FAR 9.500) by determining that its application in a particular situation would be in the government's best interest. Any request for waiver must be in writing, shall set forth the extent of the conflict, and requires approval by the agency head or a designee".

- GAO affirmed that where a procurement decision, such as whether an OCI should be waived, is committed by statute or regulation to the discretion of the agency

officials, GAO will not make an independent determination of the matter. (Knights' Piping Inc., World Wide Marine & Indus. Servs., B-280398.2, B280398.3, Oct. 9, 1998) MCR Federal, LLC, B-401954.2, August 17, 2010)

GAO published the first bid protest decision in 1926. In fiscal year 2010, the GAO

- Received 2,220 protests (including 52 cost claims) and 79 requests for reconsideration, for a total of 2,299 cases;
- Found that of the 2,299 cases filed, 189 are attributable to GAO's recently expanded bid protest jurisdiction over task orders;
    - These 189 filings represent 61% of the total increase in filings from FY 2009 to FY 2010 (310 cases)
- Closed 2,226 cases during the fiscal year: 2,131 protests (including 64 cost claims), 94 requests for reconsideration, and 1 non-statutory decision;
- Found three instances in which a federal agency did not fully implement a recommendation made by GAO in connection with a bid protest decided the prior fiscal year.

Expansion of Bid Protests to Task Orders: The National Defense Authorization Act of 2008 (PL 110-181) (Section 843 -- "Enhanced Competition Requirements for Task and Delivery Order Contracts") authorized GAO to hear protests of the issuance or proposed issuance of certain task and delivery orders under certain indefinite-delivery/ indefinite - quantity task contracts. The final rule[3] allows contractors to protest the award of task orders in excess of $10 million to the GAO. Previously, the Federal Acquisition Streamlining Act of 1994 (FASA) prohibited task order protests, except in very limited circumstances. Additionally Congress asked GAO to track the number of protests of task orders during that time and to study frivolous or procedurally defective protests.

However, this provision may be short-lived. Congress placed a three-year sunset provision on the task order protest rights (expires May 27, 2011). Congress extended GAO's expanded jurisdiction over Department of Defense task and delivery orders until September 30, 2016, but the language did not extend the GAO's jurisdiction over civilian contract task and delivery orders. ("National Defense Authorization Act for Fiscal Year 2011", Section 825). It is unclear if this was a technical error or oversight, and it remains to be seen whether Congress will address the pending expiration.

III. Role of Court of Federal Claims

The Court of Federal Claims (COFC) can be involved in bid protests regarding organizational conflicts of interest as arbitrator of the protests. Additionally, in many cases after receiving a decision from the GAO, a bid protestor may file a claim with this federal court. The court has nationwide jurisdiction over most suits for monetary claims

[3] "Government Accountability Office, Administrative Practice and Procedure, Bid Protest Regulations, Government Contracts," Federal Register, Vol. 73, No. 111, Monday, June 9, 2008, page 32427-32430.

against the government. As such, the Court has jurisdiction to hear both pre-award and post-award bid protest suits by disappointed bidders on government contracts.

The COFC, like the GAO, uses the Federal Acquisition Regulation Subpart 9.5 pertaining to Organizational and Consultant Conflicts of Interest as the basis of their decisions regarding OCI. However, they are independent, and neither the GAO nor the COFC is required to follow the precedent of the other.

Several recent cases before the COFC have involved OCI:

- PAI Corporation , v. U.S. (COFC No. 09-411C, September 17, 2009). In this post-award bid protest, the Plaintiff argued that Department of Energy (DOE) failed to mitigate an OCI of awardee, that DOE impermissibly considered the corporate experience of the various subcontractors and incorrectly evaluated plaintiff's cost proposal. The COFC rejected the arguments of the plaintiff and found for the government.
- Turner Construction Co. v. U.S (COFC No. 10-195C, July 16, 2010). In this case the court took issue with the GAO's decision-making process. The COFC found the GAO's recommendation to be in error because "the GAO's findings … lacked a rational basis." In this case the contracting officer (CO) determined there were no "unequal access to information" and "biased ground rules" OCIs, but the COFC found the GAO's investigation ignored the CO's findings and based their decision on vague allegations.
- Axiom Resource Management, Inc. v. U.S. (COFC No. 07-532C, September 28, 2007). The COFC found the CO abused his discretion in violation of FAR § 9.5 by awarding the Task Order without developing an OCI mitigation plan that did not afford the awardee any significant competitive advantages or was enforceable (i.e. subject to court order).

IV. Department of Defense Supplement to FAR

Because the Department of Defense (DoD) contracts out many activities once performed by members of the military for government employees, potential conflicts of interest are of growing concern. For instance, in November 2009, a DoD Inspector General's report found that a company which developed the Army's Future Combat Systems was also awarded a contract to advise and assist the offices which were testing elements of the same system. While the inspector general said that the advisory service contracts conflicted with Defense regulations, but the department's office of operational test and evaluation and the Army's test command disagreed, based on their interpretations of the regulations.[4]

The "Weapons Systems Acquisition Reform Act of 2009" required DoD to provide guidance and tighten existing requirements for organizational conflicts of interest in major defense acquisition programs. The proposed rule, however, would have applied to all Defense

[4] "Report Questions Conflict Of Interest In Defense Contracts" Washington Post, By Walter Pincus, February 1, 2010

contracts, with the exception of those for commercially available off-the-shelf products. However, the expansion to all contracts was seen as too broad.

In response, on December 29, 2010, DoD issued a final amendment[5] to the Defense Federal Acquisition Regulation Supplement (DFARS) to the FAR relating to OCI in major defense acquisition programs only.

- The new policy only applies to major defense acquisition programs (MDAPs) and pre-MDAPs and was effective immediately. Only contracts relating to major weapon systems and systems engineering and technical assistance will be subject to this new regulation. Information technology and professional services contract are exempt.
- Definitions:
    - MDAP is a Department of Defense (DoD) acquisition program that is not a highly sensitive classified program (as determined by the Secretary of Defense) and that is designated by the Secretary of Defense as a major defense acquisition program, or that is estimated by the Secretary of Defense to require an eventual total expenditure for research, development, test, and evaluation of more than $365,000,000 (updated to FY 2000 constant dollars) or an eventual total expenditure for procurement of more than $2,190,000,000 (updated to FY 2000 constant dollars)
    - A pre-MDAP is in the development phase and has been identified as potentially becoming an MDAP.
    - "Systems Engineering" means an interdisciplinary technical effort to evolve and verify an integrated and total life cycle balanced set of systems, people, and process solutions that satisfy customer needs.
    - "Technical Assistance" means the acquisition support, program management support, analyses, and other activities involved in the management and execution of an acquisition program.
- Companies must voluntarily disclose any possible OCIs before bidding on projects.
- When evaluating organizational conflicts of interest for MDAP or pre-MDAP, contracting officers shall consider:
    - The ownership of business units performing systems engineering and technical assistance, professional services, or management support services to a major defense acquisition program or a pre-major defense acquisition program by a contractor who simultaneously owns a business unit competing (or potentially competing) to perform as
        - The prime contractor for the same major defense acquisition program; or
        - The supplier of a major subsystem or component for the same major defense acquisition program.
    - The proposed award of a major subsystem by a prime contractor to business units or other affiliates of the same parent corporate entity, particularly the

[5] "Defense Federal Acquisition Regulation Supplement: Organizational Conflicts of Interest in Major Defense Acquisition Programs," Final Rule, Department of Defense, Federal Register, Vol. 75, No. 249, December 29, 2010, Page 81908-81915.

award of a subcontract for software integration or the development of a proprietary software system architecture; and
    - The performance by, or assistance of, contractors in technical evaluation.
- Mitigation may require government action, contractor action or a combination of both.
    - If required under the circumstances, an OCI mitigation plan must be incorporated into the contract.
    - If the otherwise successful offeror is unable to mitigate the OCI, the contracting officer shall
        - use another approach to resolve the OCI,
        - select another offeror or
        - request a waiver.
            - Cannot waive the Limitation on Future Contracting Provision: a contract for the performance of systems engineering and technical assistance for a MDAP or a pre-MDAP shall prohibit the contractor or any affiliate of the contractor from participating as a contractor or major subcontractor in the development or production of a weapon system under such program.

As mentioned above, the final rule is much different from the proposed rule the DoD published April 22, 2010. First and foremost, the proposed rule would have extended to all DoD contracts, not just MDAP. Contractors would have been required to disclose all possible organizational conflicts of interest. Additionally, the proposed rule would have adopted the GAO and Court of Federal Claims types of OCI: unfair access to non-public information, biased ground rule, and impaired objectivity. The proposed rule also called on contracting officers to mitigate <u>all</u> conflicts of interest, instead of using another approach, choosing another offeror or requesting a waiver as the final rule allows. The proposed rule also included other provisions that would have overhauled the larger federal OCI statute. Further, the proposed rule defined contractor as the "total contractor organization," which includes the contracting business unit, as well as all subsidiaries and affiliates.

To avoid confusion and the need for changes to the Federal Acquisition Regulation, the DoD stepped back from those provisions. The Federal Acquisition Regulation Council is expected to issue its own OCI modifications for civilian agencies "soon." Some have suggested the DoD proposed rule might have been a precursor for those FAR OCI revisions.

V. Role of FAR Council

The Federal Acquisition Regulatory Council (FAR Council) was established to assist in the direction and coordination of government-wide procurement policy and government-wide procurement regulatory activities in the Federal Government. To this end the Council ensures that procurement regulations promulgated by executive agencies are consistent with the Federal Acquisition Regulations (FAR). Additionally, the Council manages

coordinates controls and monitors the maintenance and issuance of changes in the FAR.

The FAR Council is expected to issue organizational conflict of interest modifications for the civilian agencies soon. As mentioned in the discussion above, the Department of Defense has indicated that it will adopt some of the expected changes that apply to military contractors.

While there is no official word on what the modifications may include, the Acquisition Advisory Panel made many recommendations on how to improve the government procurement process including changes to the OCI rules. (see below) Additionally, it has been suggested the DoD proposed rule might have been a precursor for those revisions. Therefore the FAR Council may address:

- Definition of OCIs
- Types of OCIs
- Required timing of OCI analysis
- Disclosure of information from offerors to assist contracting officers in identifying OCIs
- Guidance about specific mitigation techniques
- Waiver

In accordance with the Office of Federal Procurement Policy Act, the FAR Council membership consists of:

- Administrator for Federal Procurement Policy
    - Daniel Gordon, Administrator for Federal Procurement Policy, Office of Federal Procurement Policy, Office of Management and Budget
- Secretary of Defense
    - Shay D. Assad, Director, Defense Procurement and Acquisition Policy, Department of Defense, Office of the Under Secretary of Defense
- Administrator of National Aeronautics and Space
    - William P. McNally, Assistant Administrator for Procurement, National Aeronautics and Space Administration
- Administrator of General Services.
    - Joseph Neurauter, Chief Acquisition Officer and Senior Procurement Executive, General Services Administration

VI. Acquisition Advisory Panel

The Services Acquisition Reform Act of 2003 authorized the creation of the Acquisition Advisory Panel (AAP) to review and recommend any necessary changes to acquisition laws and regulations as well as government-wide acquisition policies with a view toward ensuring effective and appropriate use of commercial practices and performance-based contracting. The National Defense Authorization Act for Fiscal Year 2006 (Pub. L. No. 109-163, Section 843) extended the deadline for the Panel's final report by six months.

In the AAP's final report, they made several recommendations[6] regarding OCI.

- Recommendation 5: The FAR Council should review existing rules and regulations, and to the extent necessary, create new, uniform, government-wide policy and clauses dealing with Organizational Conflicts of Interest, Personal Conflicts of Interest, and Protection of Contractor Confidential and Proprietary Data, as described in more detail in the following sub-recommendations.
- Recommendation 5-1: Organizational Conflicts of Interest ("OCI"). The FAR Council should consider development of a standard OCI clause, or a set of standard OCI clauses if appropriate, for inclusion in solicitations and contracts (that set forth the contractor's responsibility to assure its employees, and those of its subcontractors, partners, and any other affiliated organization or individual), as well as policies prescribing their use. The clauses and policies should address conflicts that can arise in the context of developing requirements and statements of work, the selection process, and contract administration. Potential conflicts of interest to be addressed may arise from such factors as financial interests, unfair competitive advantage, and impaired objectivity (on the instant or any other action), among others.
- Recommendation 5-4: Training of Acquisition Personnel. The FAR Council, in collaboration with the Defense Acquisition University ("DAU") and the Federal Acquisition Institute ("FAI"), should develop and provide (1) training on methods for acquisition personnel to identify potential conflicts of interest (both OCI and PCI), (2) techniques for addressing the conflicts, (3) remedies to apply when conflicts occur, and (4) training for acquisition personnel in methods to appropriately apply tools for the protection of confidential data.
- Recommendation 5-5: Ethics Training for Contractor Employees. Since contractor employees are working side-by-side with government employees on a daily basis, and because government employee ethics rules are not all self-evident, consideration should be given to a requirement that would make receipt of the agency's annual ethics training (same as given to government employees) mandatory for all service contractors operating in the multi-sector workforce environment.

VII. Report by Office of Federal Procurement Policy (OFPP) and the Office of Government Ethics

The Duncan Hunter National Defense Authorization Act (NDAA) for Fiscal Year 2009 (Public Law 110-417, Section 841(b), Ethics Safeguards Related To Contractor Conflicts Of Interest) instructed the Office of Federal Procurement Policy (OFPP) and the Office of Government Ethics to:

1. Develop and issue a standard policy to prevent personal conflicts of interest by contractor employees performing acquisition functions closely associated with

[6] "Report of The Acquisition Advisory Panel to the Office of Federal Procurement Policy and the United States Congress", January 2007, Chapter 6, https://www.acquisition.gov/comp/aap/24102_GSA.pdf

inherently governmental functions (functions) for or on behalf of a federal department or agency;
2. Develop a personal conflicts-of-interest clause for inclusion in federal solicitations and contracts for the performance of such functions;
3. Review FAR with respect to conflicts of interest to determine whether changes are necessary;
4. Work with the Federal Acquisition Regulatory Council to prescribe appropriate revisions, if necessary;
5. Report to specified congressional committees on any FAR revisions that may be necessary; and
6. Develop and maintain a repository of best practices relating to the prevention and mitigation of organizational and personal conflicts of interest in federal contracting.

A DoD final rule issued December 29, 2010[7] reports "neither OFPP nor OGE has issued recommendations to date pursuant to 841(b), but both have worked with the FAR Acquisition Law Team, which includes representatives from DoD and the civilian agencies, to draft a proposed rule on the OCIs under FAR Case 2007-018." FAR Case 2007-018 was closed into FAR Case 2011-011, as described in the introduction.

Under FAR Case 2007-018, the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council sought information that would assist in determining whether the Federal Acquisition Regulation System's current guidance on OCIs adequately addresses the current needs of the acquisition community or whether providing standard provisions and/or clauses, or a set of such standard provisions and clauses, might be beneficial.

- The Office of Federal Procurement Policy (OFPP) in the Office of Management and Budget was established by Congress in 1974 to provide overall direction for government-wide procurement policies, regulations and procedures and to promote economy, efficiency, and effectiveness in acquisition processes. The OFPP Administrator is appointed by the President, confirmed by the Senate and serves on the FAR Council.
- The Office of Government Ethics (OGE) exercises leadership in the executive branch to prevent conflicts of interest on the part of government employees, and to resolve those conflicts of interest that do occur. In partnership with executive branch agencies and departments, OGE fosters high ethical standards for employees and strengthens the public's confidence that the government's business is conducted with impartiality and integrity.
- The Civilian Agency Acquisition Council (CAAC) and Defense Acquisition Regulations Council (DAR Council)
    - The DAR Council is involved in developing and maintaining the Federal Acquisition Regulation (FAR) and the Defense FAR Supplement (DFARS).
    - The CAAC performs the following functions:

[7] Defense Federal Acquisition Regulation Supplement: Organizational Conflicts of Interest in Major Defense Acquisition Programs," page 81908.

- Assists the Administrator of General Services in developing and maintaining the Federal Acquisition Regulation (FAR) System by developing or reviewing all proposed changes to the FAR.
- Solicits the views of agencies, associations, and other interested parties on those proposed changes to the FAR that involve issues of interest to them. Solicitations need not be published in the Federal Register; however, notice of the availability of proposed changes may be published in the Federal Register if requested by a member of the Council.
- Coordinates its activities with the DAR Council. Each Council shall review the FAR changes proposed by the other Council.

VIII. National Institutes of Health COI Regulation

The U.S. Department of Health and Human Services Office of Inspector General (HHS-OIG) reports to the Secretary of Health and Human Services (HHS) and Congress on program and management problems and recommendations to correct them, in order to protect the integrity of HHS. The HHS-OIG has determined that NIH grantee institutions that have written policies and procedures addressing conflicts of interest were more likely to identify conflicts (15 of 69) compared to those that do not (3 of 87).

To strengthen accountability, on May 21, 2010, NIH issued a notice of proposed rule making entitled "Responsibility of Applicants for Promoting Objectivity in Research for Which Public Health Service Funding Is Sought and Responsible Prospective Contractors". NIH asserts that the changes would "expand and add transparency to investigator disclosure of significant financial interests, enhance regulatory compliance and effective institutional oversight and management of investigators' financial conflicts of interests, as well as NIH's compliance oversight."

Under the current regulation, the Institution applying for or undertaking the research project is responsible for complying with the regulations, including maintaining a written and enforced policy; managing, reducing, or eliminating identified conflicts; and reporting identified conflicts to the Public Health Service unit that awards the contract. The Institution must assure that any conflict of interest has been managed, reduced, or eliminated. The individual investigators are responsible for complying with their Institution's written financial conflict of interest policy and for disclosing their significant financial interests (SFIs) to the Institution. The Public Health Service unit that awards the contract is responsible for overseeing institutional compliance with the regulations.

The comment period on the proposed changes closed August 19, 2010. In the proposed rule making, the NIH suggested several changes to current conflict of interest policy which address:

1. The scope of the regulation and disclosure of interests
2. The definition of ''significant financial interest'' (including questions regarding the appropriate de minimis threshold and exemptions to the definition)

3. Identification and management of conflicts by Institutions
4. Assuring institutional compliance
5. Requiring Institutions to provide additional information to the PHS
6. Institutional conflict of interest

More information about the proposed changes is outlined in the chart on the next page.

Major proposed changes to Public Health Service (PHS) financial conflict of interest (FCOI) regulations[1]

Topic	*Current*	*Proposed*
Significant Financial Interests (SFI) definition	- De minimis threshold of **$10,000** for disclosure generally applies to payments **or** equity interests - Exclusions include income from seminars, lectures, or teaching, and service on advisory committees or review panels, for public or nonprofit entities	- De minimis threshold of **$5,000** for disclosure generally applies to payments **and/or** equity interests - Includes **any** equity interest in non-publicly traded entities - Exclusions include income from seminars, lectures, or teaching, and service on advisory or review panels, for government agencies or institutions of higher education
Investigator disclosure requirements	Only SFIs related to **PHS-funded research** as determined by the **Investigator**	- SFIs include financial interests that are related to an Investigator's **institutional responsibilities** - **Institutions** responsible for determining whether SFI relates to PHS-funded research and is a FCOI
Public disclosure	No requirement	Before spending funds for PHS-supported research, an Institution shall post on a publicly accessible **web site** information on certain SFIs that the Institution determines are related to the PHS-funded research and are FCOI < $20K; <$50K; ,$100K;<$250K and >$250K
Management of an identified FCOI by the Institution	Manner of compliance with regulation not specified (manage, reduce or eliminate are indicated as options)	- For all identified FCOI, Institutions must develop and implement a **management plan** (may include reduction or elimination of the SFI) - If FCOI is one that was not disclosed or reviewed in a timely manner, the Institution must also implement a **mitigation plan** which shall include review and determination as to whether any PHS-funded research conducted prior to identification and management of the FCOI was biased
Information on an identified FCOI reported by the Institution to the PHS funding component	- Grant/Contract number - Project Director/Principal Investigator (PD/PI) or Contact PD/PI - Name of Investigator with FCOI - Whether FCOI was managed, reduced, or eliminated	Current requirements, plus: **- Value** of the financial interest $0-4,999;$5K-9,999; $10K-19,999; amts between $20K-$100K by increments of $20K or statement that a value cannot be readily determined. - **Nature of FCOI**, e.g., equity, consulting fees, travel reimbursements, honoraria, and **description** of how FCOI relates to PHS-funded research - Key elements of the Institution's **management plan**
Timing of reporting of an identified FCOI to the PHS-funding component	- Prior to the Institution's expenditure of any funds under the award - Within 60 days for any interest that the Institution identifies as conflicting subsequent to the Institution's initial report under the award	Current requirements, plus **annual updates** on any previously-identified FCOI for the duration of the research project
Scope of the regulation	Does not cover Small Business Innovation Research/Small Business Technology Transfer Research (SBIR/STTR) Phase I applications	Includes **SBIR/STTR Phase I** applications
Investigator training	No requirement	**FCOI training required** for Investigators before engaging in PHS-funded research, and every two years thereafter
HHS authority to inquire about FCOI	The HHS may at any time inquire into the Institutional procedures and actions regarding conflicting financial interests in PHS-funded research	Clarifies that HHS authority applies before, during, or after an award with regard to any Investigator disclosure of financial interests, whether or not the disclosure resulted in the Institution's determination of a FCOI

[1] This summary is for reference purposes only. Please see Federal Register (http://edocket.access.gpo.gov/2010/pdf/2010-11885.pdf) for full text of proposed regulations.

IX. Specific Language Regarding Conflicts of Interest: The Case of the Medicaid Program

A. COI in Medicaid Integrity Program: In addition to the conflict of interests standards and requirements of the Federal Acquisition Regulation (48 CFR subpart 9.5), the Centers for Medicare and Medicaid Services must consider post-award conflicts of interest if one of the following occurs:

1. The contractor or any of its employees, agents, or subcontractors received, solicited, or arranged to receive any fee, compensation, gift (defined at 5 CFR 2635.203(b)), payment of expenses, offer of employment, or any other thing of value from any entity that is reviewed, audited, investigated, or contacted during the normal course of performing activities under the Medicaid integrity audit program contract.
2. CMS determines that the contractor's activities are creating a conflict of interest.

B. COI for Medicaid Managed Care Organizations: The Balanced Budget Act of 1997 (BBA) applied the federal conflict-of-interest standards to state officials involved in Medicaid managed care contracting and required the approval by the Secretary of HHS of all Medicaid managed care contracts in excess of $1 million. This was in order to help prevent awarding contracts to organizations that had the best access to Medicaid contracting officials, key state legislators, or the Governor, and instead awarding contracts based on the accessibility and quality of care.

C. COI for Enrollment Brokers: Enrollment brokers' conflicts of interest were also targeted in the BBA. The statute and regulation allows no financial relationship by an enrollment broker with any providers or health plans. The enrollment broker and its subcontractors must be independent of any health care providers (MCO, PIHP, PAHP, PCCM, or other) that provide coverage of services in the same State in which the broker is conducting enrollment activities. Additionally, a broker or subcontractor must be free from conflict of interest with any individual that

- Has any direct or indirect financial interest in any entity or health care provider that furnishes services in the State in which the broker or subcontractor provides enrollment services;
- Has been excluded from participation under title XVIII or XIX of the Act;
- Has been debarred by any Federal agency; or
- Has been, or is now, subject to civil money penalties under the Act.

Health and Human Services Office of Inspector General

Although, the OIG has included organizational conflicts of interest in this year's work plan, most of the work done by the HHS OIG focuses on individual conflict of interest, rather than organizational conflict of interest. Much of this work was driven by Congressional committees hearings in the early 2000's (the House Committee on Energy and Commerce especially) on COIs. Most of this Congressional attention focused on NIH intramural and extramural researchers.

- **FY 2011 HHS OIG Workplan** Conflicts of Interest in the Zone Program Integrity Contracting Process – HHS OIG will review CMS's process for overseeing contractors' organizational conflicts of interest during the ZPIC award process and throughout the period of performance. The FAR (48 CFR subpart 9.5), along with the Health and Human Services Acquisition Regulation (HHSAR) and other authorities, prescribe the responsibilities, general rules, and procedures to identify, evaluate, and resolve organizational conflicts of interest. HHS OIG will determine the extent to which ZPICs disclosed conflicts of interest and examine how they resolved the identified conflicts of interest, as well as determine how CMS addresses personal conflicts of interest among members of the Technical Evaluation Panel used during the awards process. (OEI; 03-10-00300; expected issue date: FY 2011; work in progress)
- **Report: National Institutes Of Health: Conflicts Of Interest In Extramural Research** -- The OIG reviewed NIH's monitoring of COI reports submitted by grantees. They found that 89 percent of the reports provided to NIH lacked information about the nature of the COI and how it was addressed. Based on the findings, the OIG conducted a second study that examined the extent to which the grantees themselves handled COIs. (January 2008, OEI-03-06-00460)
- **Report -- Institutional Conflicts of Interest at NIH Grantees --** The HHS OIG reported that there are no Federal requirements that grantee institutions identify, report, and manage actual or potential institutional conflicts. The OIG found an institutional conflict may arise when an institution's own financial interests (e.g., royalties, equity, stockholdings, and gifts) or those of its senior officials pose risks of undue influence on decisions involving the institution's research. Therefore, OIG recommended that NIH should require grantee institutions to identify, report, and address institutional conflicts in a consistent and uniform manner. It is important that NIH know of the existence of such conflicts so it can ensure that the related research is free from any intended or unintended bias. Therefore, HHS-OIG recommended that NIH promulgate regulations that address institutional financial conflicts of interest. (January 2011, OEI-03-09-00480)
- **Report: How Grantees Manage Financial Conflicts Of Interest In Research Funded By The National Institutes Of Health** -- The OIG examined the nature of financial COIs reported by grantee institutions to NIH and the ways in which grantees addressed these COIs. The OIG found that 90 percent of the grantee institutions reviewed relied solely on the researchers' discretion to determine which of their significant financial interests are related to their research and are

therefore required to be reported. Additionally, grantee institutions did not routinely verify the submitted information. (November 2009, OEI-03-07-00700)

- **Report: The Food and Drug Administration's Oversight of Clinical Investigators' Financial Information**-- In OIG's report on FDA's oversight of clinical investigators' financial interests, they found that among clinical investigators listed in financial forms, 1 percent disclosed at least one financial interest. This represents 206 of the 29,691 clinical investigators listed in financial interest forms. Additionally, they found 42 percent of marketing applications were missing financial information. Some of these applications were missing financial information because sponsors used the due diligence exemption to indicate that they were unable to provide financial information. (January, 2009, OEI-05-07-00730)

Institute of Medicine

Like the HHS OIG, to date the examination of conflicts of interest have focused on individual conflicts.

- In 2007, the Institute of Medicine (IOM) appointed the **Committee on Conflict of Interest in Medical Research, Education, and Practice** to examine conflicts of interest in medicine and to recommend steps to identify, limit, and manage conflicts of interest without negatively affecting constructive collaborations. The committee recommended the implementation of policies and procedures that will reduce the risk of conflicts that can jeopardize the integrity of scientific investigations, the objectivity of medical education, the quality of patient care, and the public's trust in medicine. (Conflict of Interest in Medical Research, Education, and Practice, Consensus Report, April 21, 2009)

Government Accountability Office

The GAO has not studied organizational conflict of interest exclusively since 1995. The Office of Management and Budget implemented the recommendations from that report. The other reports only mention OCI in the context of all FAR provisions or to specifically mention that the report does not address OCI. The GAO reports below are in order of relevance.

- **Government Contractors Selected Agencies' Efforts to Identify Organizational Conflicts of Interest**, GAO/GGD-96-15 October 1995 **--** This report reviews federal agencies' implementation of the Office of Management and Budget's 1989 policy letter entitled "Conflict of Interest Policies Applicable to Consultants." It also reviews organizational conflict of interest requirements applicable to advisory and assistance service contractors, including consultants. GAO (1) determines whether selected agencies have complied with requirements to identify and evaluate potential organizational conflicts of interest and (2) identifies ways that agencies might improve their screening for such conflicts. GAO focuses on the Energy Department, the Environmental Protection Agency, and the Navy because they are among the largest users of contracted advisory and assistance services.

- **Recommendation**: The Director, OMB, should emphasize to heads of agencies the importance of ensuring that contracting officials receive sufficient training to help them to identify and to avoid and mitigate OCI situations.
    - Following the report, the Director of OMB advised GAO by letter dated January 4, 1996, that she agreed with the findings, and she directed the Administrator, Office of Federal Procurement Policy, to send a memorandum to senior agency procurement executives emphasizing the need for training in this area. The Administrator, by memorandum dated February 12, 1996, to senior agency procurement executives and to the Deputy Under Secretary of Defense for Acquisition Reform, brought this matter to the attention of all federal agencies for their information and action.
- **Recommendation**: The Director, OMB, should take steps to avoid the possibility that the federal acquisition regulations might be interpreted to imply that if certificates have been obtained from contractors, agencies should not obtain other information in conducting an evaluation of the potential for conflicts of interest.
    - The Director of OMB advised GAO by letter dated January 4, 1996, that she agreed with the findings, and she directed the Administrator, Office of Federal Procurement Policy, to send a memorandum to senior agency procurement executives emphasizing the need for addressing the possible misinterpretation in the federal acquisition regulations. The Administrator, by memorandum dated February 12, 1996, to senior agency procurement executives and to the Deputy Under Secretary of Defense for Acquisition Reform, brought this matter to the attention of all federal agencies for their information and action.

- **Contractor Integrity: Stronger Safeguards Needed for Contractor Access to Sensitive Information**, GAO-10-693, September 2010 -- This report assesses the (1) extent to which agency guidance and contracts contain safeguards for contractor access to sensitive information, and (2) adequacy of government-wide guidance on how agencies are to safeguard sensitive information to which contractors may have access. The report touches on OCI briefly in a discussion of FAR provisions including certain sensitive-information requirements as part of solicitation and contract provisions that are intended to safeguard procurement integrity, classified information, organizational conflicts of interest, and privacy.
- **Defense Contracting: Additional Personal Conflict of Interest Safeguards Needed for Certain DOD Contractor Employees**, GAO-08-169, March 7, 2008. -- This report focuses specifically on individual, or personal, conflicts of interest among DOD contractor employees as opposed to organizational conflicts of interest.

Appendix A

Federal Acquisition Regulation (FAR)
Includes amendments thru FAC 2005-48, effective January 31, 2011

Subpart 9.5—Organizational and Consultant Conflicts of Interest

9.500 Scope of subpart.

This subpart—

(a) Prescribes responsibilities, general rules, and procedures for identifying, evaluating, and resolving organizational conflicts of interest;

(b) Provides examples to assist contracting officers in applying these rules and procedures to individual contracting situations; and

(c) Implements section 8141 of the 1989 Department of Defense Appropriation Act, Pub. L. 100-463, 102 Stat. 2270-47 (1988).

9.501 Definition.

"Marketing consultant," as used in this subpart, means any independent contractor who furnishes advice, information, direction, or assistance to an offeror or any other contractor in support of the preparation or submission of an offer for a government contract by that offeror. An independent contractor is not a marketing consultant when rendering—

(1) Services excluded in Subpart 37.2;

(2) Routine engineering and technical services (such as installation, operation, or maintenance of systems, equipment, software, components, or facilities);

(3) Routine legal, actuarial, auditing, and accounting services; and

(4) Training services.

9.502 Applicability.

(a) This subpart applies to contracts with either profit or nonprofit organizations, including nonprofit organizations created largely or wholly with government funds.

(b) The applicability of this subpart is not limited to any particular kind of acquisition. However, organizational conflicts of interest are more likely to occur in contracts involving—

(1) Management support services;

(2) Consultant or other professional services;

(3) Contractor performance of or assistance in technical evaluations; or

(4) Systems engineering and technical direction work performed by a contractor that does not have overall contractual responsibility for development or production.

(c) An organizational conflict of interest may result when factors create an actual or potential conflict of interest on an instant contract, or when the nature of the work to be performed on the instant contract creates an actual or potential conflict of interest on a future acquisition. In the latter case, some restrictions on future activities of the contractor may be required.

(d) Acquisitions subject to unique agency organizational conflict of interest statutes are

excluded from the requirements of this subpart.

9.503 Waiver.

The agency head or a designee may waive any general rule or procedure of this subpart by determining that its application in a particular situation would not be in the government's interest. Any request for waiver must be in writing, shall set forth the extent of the conflict, and requires approval by the agency head or a designee. Agency heads shall not delegate waiver authority below the level of head of a contracting activity.

9.504 Contracting officer responsibilities.

(a) Using the general rules, procedures, and examples in this subpart, contracting officers shall analyze planned acquisitions in order 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.

(b) Contracting officers should obtain the advice of counsel and the assistance of appropriate technical specialists in evaluating potential conflicts and in developing any necessary solicitation provisions and contract clauses (see 9.506).

(c) Before issuing a solicitation for a contract that may involve a significant potential conflict, the contracting officer shall recommend to the head of the contracting activity a course of action for resolving the conflict (see 9.506).

(d) In fulfilling their responsibilities for identifying and resolving potential conflicts, contracting officers should avoid creating unnecessary delays, burdensome information requirements, and excessive documentation. The contracting officer's judgment need be formally documented only when a substantive issue concerning potential organizational conflict of interest exists.

(e) The contracting officer shall award the contract to the apparent successful offeror unless a conflict of interest is determined to exist that cannot be avoided or mitigated. Before determining to withhold award based on conflict of interest considerations, the contracting officer shall notify the contractor, provide the reasons therefor, and allow the contractor a reasonable opportunity to respond. If the contracting officer finds that it is in the best interest of the United States to award the contract notwithstanding a conflict of interest, a request for waiver shall be submitted in accordance with 9.503. The waiver request and decision shall be included in the contract file.

9.505 General rules.

The general rules in 9.505-1 through 9.505-4 prescribe limitations on contracting as the means of avoiding, neutralizing, or mitigating organizational conflicts of interest that might otherwise exist in the stated situations. Some illustrative examples are provided in 9.508. Conflicts may arise in situations not expressly covered in this section 9.505 or in the examples in 9.508. 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. The two underlying principles are—

(a) Preventing the existence of conflicting roles that might bias a contractor's judgment;

and

(b) Preventing unfair competitive advantage. In addition to the other situations described in this subpart, an unfair competitive advantage exists where a contractor competing for award of any Federal contract possesses—

(1) Proprietary information that was obtained from a government official without proper authorization; or

(2) Source selection information (as defined in 2.101) that is relevant to the contract but is not available to all competitors, and such information would assist that contractor in obtaining the contract.

9.505-1 Providing systems engineering and technical direction.

(a) A contractor that provides systems engineering and technical direction for a system but does not have overall contractual responsibility for its development, its integration, assembly, and checkout, or its production shall not—

(1) Be awarded a contract to supply the system or any of its major components; or

(2) Be a subcontractor or consultant to a supplier of the system or any of its major components.

(b) Systems engineering includes a combination of substantially all of the following activities: determining specifications, identifying and resolving interface problems, developing test requirements, evaluating test data, and supervising design. Technical direction includes a combination of substantially all of the following activities: developing work statements, determining parameters, directing other contractors' operations, and resolving technical controversies. In performing these activities, a contractor occupies a highly influential and responsible position in determining a system's basic concepts and supervising their execution by other contractors. Therefore this contractor should not be in a position to make decisions favoring its own products or capabilities.

9.505-2 Preparing specifications or work statements.

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

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

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

(2) If a single contractor drafts complete specifications for non-developmental equipment, it should be eliminated for a reasonable time from competition for production based on the specifications. This should be done in order to avoid a situation in which the contractor could draft specifications favoring its own products or capabilities. In this way the government can be assured of getting unbiased advice

as to the content of the specifications and can avoid allegations of favoritism in the award of production contracts.

(3) In development work, it 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.

(b)(1) If a contractor prepares, or assists in preparing, a work statement to be used in competitively acquiring a system or services—or provides material leading directly, predictably, and without delay to such a work statement—that contractor may not supply the system, major components of the system, or the services 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.

(2) Agencies should normally prepare their own work statements. When contractor assistance is necessary, the contractor might often be in a position to favor its own products or capabilities. To overcome the possibility of bias, contractors are prohibited from supplying a system or services acquired on the basis of work statements growing out of their services, unless excepted in paragraph (b)(1) of this section.

(3) For the reasons given in 9.505-2(a)(3), no prohibitions are imposed on development and design contractors.

9.505-3 Providing evaluation services.

Contracts for the evaluation of offers for products or services shall not be awarded to a contractor that will evaluate its own offers for products or services, or those of a competitor, without proper safeguards to ensure objectivity to protect the government's interests.

9.505-4 Obtaining access to proprietary information.

(a) When a contractor requires proprietary information from others to perform a government contract and can use the leverage of the contract to obtain it, the contractor may gain an unfair competitive advantage unless restrictions are imposed. These restrictions protect the information and encourage companies to provide it when necessary for contract performance. They are not intended to protect information—

(1) Furnished voluntarily without limitations on its use; or

(2) Available to the government or contractor from other sources without restriction.

(b) A contractor that gains access to proprietary information of other companies in performing advisory and assistance services for the government must agree with the other companies to protect their information from unauthorized use or disclosure for as long as it remains proprietary and refrain from using the information for any

purpose other than that for which it was furnished. The contracting officer shall obtain copies of these agreements and ensure that they are properly executed.
(c) Contractors also obtain proprietary and source selection information by acquiring the services of marketing consultants which, if used in connection with an acquisition, may give the contractor an unfair competitive advantage. Contractors should make inquiries of marketing consultants to ensure that the marketing consultant has provided no unfair competitive advantage.

9.506 Procedures.

(a) If information concerning prospective contractors is necessary to identify and evaluate potential organizational conflicts of interest or to 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.
(b) If the contracting officer decides that a particular acquisition involves a significant potential organizational conflict of interest, the contracting officer shall, before issuing the solicitation, submit for approval to the chief of the contracting office (unless a higher level official is designated by the agency)—
(1) A written analysis, including a recommended course of action for avoiding, neutralizing, or mitigating the conflict, based on the general rules in 9.505 or on another basis not expressly stated in that section;
(2) A draft solicitation provision (see 9.507-1); and
(3) If appropriate, a proposed contract clause (see 9.507-2).
(c) The approving official shall—
(1) Review the contracting officer's analysis and recommended course of action, including the draft provision and any proposed clause;
(2) Consider the benefits and detriments to the government and prospective contractors; and
(3) Approve, modify, or reject the recommendations in writing.
(d) The contracting officer shall—
(1) Include the approved provision(s) and any approved clause(s) in the solicitation or the contract, or both;
(2) Consider additional information provided by prospective contractors in response to the solicitation or during negotiations; and
(3) Before awarding the contract, resolve the conflict or the potential conflict in a manner consistent with the approval or other direction by the head of the contracting activity.
(e) If, during the effective period of any restriction (see 9.507), a contracting office transfers acquisition responsibility for the item or system involved, it shall notify the successor contracting office of the restriction, and send a copy of the contract under which the restriction was imposed.

9.507 Solicitation provisions and contract clause.

9.507-1 Solicitation provisions.

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. Therefore, affected solicitations shall contain a provision that—

(a) Invites offerors' attention to this subpart;

(b) States the nature of the potential conflict as seen by the contracting officer;

(c) States the nature of the proposed restraint upon future contractor activities; and

(d) Depending on the nature of the acquisition, states whether or not the terms of any proposed clause and the application of this subpart to the contract are subject to negotiation.

9.507-2 Contract clause.

(a) If, as a condition of award, the contractor's eligibility for future prime contract or subcontract awards will be restricted or the contractor must agree to some other restraint, the solicitation shall contain a proposed clause that specifies both the nature and duration of the proposed restraint. The contracting officer shall include the clause in the contract, first negotiating the clause's final terms with the successful offeror, if it is appropriate to do so (see 9.506(d) of this subsection).

(b) The restraint imposed by a clause shall be limited to a fixed term of reasonable duration, sufficient to avoid the circumstance of unfair competitive advantage or potential bias. This period varies. It might end, for example, when the first production contract using the contractor's specifications or work statement is awarded, or it might extend through the entire life of a system for which the contractor has performed systems engineering and technical direction. In every case, the restriction shall specify termination by a specific date or upon the occurrence of an identifiable event.

9.508 Examples.

The examples in paragraphs (a) through (i) following illustrate situations in which questions concerning organizational conflicts of interest may arise. They are not all inclusive, but are intended to help the contracting officer apply the general rules in 9.505 to individual contract situations.

(a) Company A agrees to provide systems engineering and technical direction for the Navy on the powerplant for a group of submarines (*i.e.,* turbines, drive shafts, propellers, etc.). Company A should not be allowed to supply any powerplant components. Company A can, however, supply components of the submarine unrelated to the powerplant (*e.g.,* fire control, navigation, etc.). In this example, the system is the powerplant, not the submarine, and the ban on supplying components is limited to those for the system only.

(b) Company A is the systems engineering and technical direction contractor for system X. After some progress, but before completion, the system is canceled. Later, system Y is developed to achieve the same purposes as system X, but in a fundamentally different fashion. Company B is the systems engineering and technical direction contractor for system Y. Company A may supply system Y or its components.

(c) Company A develops new electronic equipment and, as a result of this development, prepares specifications. Company A may supply the equipment.
(d) XYZ Tool Company and PQR Machinery Company, representing the American Tool Institute, work under government supervision and control to refine specifications or to clarify the requirements of a specific acquisition. These companies may supply the item.
(e) Before an acquisition for information technology is conducted, Company A is awarded a contract to prepare data system specifications and equipment performance criteria to be used as the basis for the equipment competition. Since the specifications are the basis for selection of commercial hardware, a potential conflict of interest exists. Company A should be excluded from the initial follow-on information technology hardware acquisition.
(f) Company A receives a contract to define the detailed performance characteristics an agency will require for purchasing rocket fuels. Company A has not developed the particular fuels. When the definition contract is awarded, it is clear to both parties that the agency will use the performance characteristics arrived at to choose competitively a contractor to develop or produce the fuels. Company A may not be awarded this follow-on contract.
(g) Company A receives a contract to prepare a detailed plan for scientific and technical training of an agency's personnel. It suggests a curriculum that the agency endorses and incorporates in its request for proposals to institutions to establish and conduct the training. Company A may not be awarded a contract to conduct the training.
(h) Company A is selected to study the use of lasers in communications. The agency intends to ask that firms doing research in the field make proprietary information available to Company A. The contract must require Company A to—

(1) Enter into agreements with these firms to protect any proprietary information they provide; and

(2) Refrain from using the information in supplying lasers to the government or for any purpose other than that for which it was intended.

(i) An agency that regulates an industry wishes to develop a system for evaluating and processing license applications. Contractor X helps develop the system and process the applications. Contractor X should be prohibited from acting as a consultant to any of the applicants during its period of performance and for a reasonable period thereafter.

From: https://www.acquisition.gov/far/index.html