

CONFLICT AND INTRIGUE IN GOVERNMENT
CONTRACTS: A GUIDE TO IDENTIFYING AND
MITIGATING ORGANIZATIONAL CONFLICTS
OF INTEREST

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I. INTRODUCTION

An organizational conflict of interest (OCI) arises when a contractor possesses (1) an economic incentive that renders it unable, or potentially unable, to provide impartial assistance or advice; or (2) an unfair competitive advantage in obtaining a contract as the result of access to nonpublic information about a competitor or a procurement.¹ The existence of an OCI may have

1. FAR 2.101 defines an OCI as follows:

Organizational conflict of interest means that because of other activities or relationships with other persons, a person is unable or potentially unable to render impartial assistance or advice to the Government, or the person's objectivity in performing the contract work is or might be otherwise impaired, or a person has an unfair competitive advantage.

FAR 2.101. The use of the word "person" is somewhat misleading as OCIs arise at the organizational, rather than the personal, level.

significant implications for a contractor, ranging from disclosure obligations² to disqualification from contract award.³

Detailed regulatory guidance and restrictions regarding OCIs have existed since the early 1960s.⁴ Over the past decade, however, OCIs have received increased attention throughout the procurement community.

Commentators have offered a number of potential explanations for the increased prevalence of OCIs. The most popular theories include consolidation within industries that serve the Government⁵ and the Government's increased reliance on the advice and judgment of contractors.⁶

Whatever the explanation, the recent focus on OCIs has made it more important than ever for contractors to understand how to identify and mitigate such conflicts. From a compliance perspective, an understanding of OCIs is critical. For example, solicitations frequently require a contractor to certify that it is not aware of, or has disclosed, all facts that could give rise to an OCI.⁷ The failure to provide an accurate and complete OCI certification may result in consequences ranging from default termination⁸ to liability under the False Claims Act.⁹

Identifying and planning for OCIs also is necessary to the development of sound business strategy. Contractors must make informed decisions regarding whether to bid on contracts that contain preclusion clauses or that could create an OCI with regard to future procurements. Conversely, the ability to draft an effective mitigation plan may enable a contractor to perform engagements for which it otherwise would not be eligible.¹⁰

2. See *infra* Part II.D.1.

3. See FAR 9.505 *et seq.*

4. See James W. Taylor, *Organizational Conflicts of Interest in Department of Defense Contracting*, 14 PUB. CONT. L.J. 158, 159 (1983) (discussing the history of OCIs in defense acquisitions). For other historical perspectives, see Charles D. Woodruff, *Organizational Conflicts of Interest—Not What It's Been Said to Be*, 16 PUB. CONT. L.J. 213 (1986) (analyzing the scope of FAR subpart 9.5); James W. Taylor & B. Alan Dickson, *Organizational Conflicts of Interest Under the Federal Acquisition Regulation*, 15 PUB. CONT. L.J. 107 (1984) (analyzing the historical development of OCI regulations and the then recently promulgated provisions of FAR subpart 9.5); James W. Taylor, *Conflicts of Interest/Edition II*, BRIEFING PAPERS, Aug. 1984, at 1 (same).

5. See, e.g., Daniel I. Gordon, *Organizational Conflicts of Interest: A Growing Integrity Challenge*, 35 PUB. CONT. L.J. 25, 26–27 (2005) (attributing the increase in OCIs to consolidation within the defense and information technology industries); Diane K. Whitmoyer, *Managing Organizational Conflicts of Interest: Keeping Your Organization Competitive by Understanding and Managing Organizational Conflicts of Interest*, CONT. MGMT., June 2004, at 16 (mergers and acquisitions in the defense industry); Thomas J. Madden et al., *Organizational Conflicts of Interest/Edition III*, BRIEFING PAPERS, July 1994, at 1–2 (downsizing and consolidation in the defense industry).

6. See, e.g., Gordon, *supra* note 5, at 27; Eliza Nagel, *Appearance Is Everything Regarding Conflicts of Interest*, WASH. TECH., Apr. 18, 2005, at 12 (predicting an increase in the prevalence of OCIs as agencies continue to rely on contractors to draft specifications and evaluate proposals).

7. See, e.g., EPAR 1552.209-70(a)-(b).

8. See *infra*, note 48 and accompanying text.

9. See *United States ex rel. Harrison v. Westinghouse Savannah River Co.*, 352 F.3d 908 (4th Cir. 2003) (affirming FCA judgment against a contractor based upon its failure to disclose a proposed subcontractor's OCI).

10. Compare *Johnson Controls World Servs., Inc.*, Comp. Gen. B-286714.2, Feb. 13, 2001,

An understanding of OCI regulations also is required to analyze the desirability of business transactions involving government contractors. Where both parties operate in related business areas, a merger or acquisition may create an OCI that could jeopardize existing and future business.¹¹ Therefore, prior to any business combination, a contractor must determine both whether an OCI will arise and whether resolving that conflict will require a simple mitigation plan or more drastic measures such as the divestiture of business units.¹²

Finally, a working knowledge of OCI regulations may permit a contractor to use the bid protest process to minimize the probability that it will lose a contract as the result of unfair competitive advantage or improper disqualification from award arising out of OCI issues.

Despite the importance of identifying and mitigating OCIs, few recent articles have addressed these topics in detail.¹³ In the past decade, however, the Government Accountability Office (GAO) and the Court of Federal Claims (Court) have developed a rich body of case law interpreting current OCI regulations and analyzing various mitigation strategies.

Informed by recent OCI cases from the GAO and the Court, this article provides a detailed analysis of issues related to the identification and mitigation of OCIs. Part II introduces the regulatory framework that governs OCIs, with particular emphasis on FAR subpart 9.5. Part III addresses the identification of OCIs, focusing on recent cases that illustrate the most common types of conflicts. Part IV analyzes the GAO's and the Court's treatment of various mitigation strategies. Finally, Part V concludes by offering practical guidance for identifying OCIs and evaluating mitigation strategies.

II. REGULATORY FRAMEWORK

A. Scope

FAR subpart 9.5 applies to most procurement contracts. It applies to all types of acquisitions,¹⁴ contractors, as well as subcontractors,¹⁵ nonprofit or-

2001 CPD ¶ 20 [hereinafter *Johnson Controls I*] (sustaining protest alleging that the awardee possessed an OCI), with *Johnson Controls World Servs., Inc.*, Comp. Gen. B-286714.3, Aug. 20, 2001, 2001 CPD ¶ 145 [hereinafter *Johnson Controls II*] (denying protest of the same procurement after the awardee implemented an OCI mitigation plan).

11. See Agnes P. Dover, *Mergers & Acquisitions—Special Issues When Purchasing Government Contractor Entities*, BRIEFING PAPERS, July 2004, at 5–8 (discussing the importance of conducting OCI due diligence, particularly where a party performs advisory and assistance services).

12. During merger negotiations with Lockheed Martin Corporation, OCI concerns led The Titan Corporation to cease work under, and in some cases divest, certain programs in which Lockheed also was involved. See *Titan's Growth Remains Solid but Large Losses Expected in Second Quarter*, DEF. DAILY, July 12, 2004.

13. But see Gordon, *supra* note 5.

14. FAR 9.502(b); see also *SSR Eng'rs, Inc.*, B-282244, June 18, 1999, 99-2 CPD ¶ 27 (rejecting protestor's argument that FAR subpart 9.5 does not apply to architect-engineer services procured under FAR part 36).

15. See generally FAR 9.505 *et seq.*

ganizations, and entities created “largely or wholly” with government funds.¹⁶ The reach of OCI regulations is further extended by the fact that contractors and their affiliates typically are analyzed as a single entity for OCI purposes.¹⁷

The scope of FAR subpart 9.5, although quite broad, is subject to certain limitations. FAR subpart 9.5 does not extend to acquisitions subject to certain unique OCI statutes.¹⁸ Nor does it apply to agencies, such as the Federal Aviation Administration,¹⁹ that are not subject to the FAR.

Although FAR subpart 9.5 is not limited to any particular type of procurement, FAR 9.502 notes that OCIs are most likely to arise in contracts involving the following types of services:

- (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.²⁰

FAR 9.502 also cautions that the analysis of OCIs is both retrospective and prospective, explaining as follows:

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.²¹

Thus, an offeror may be excluded from award either because an OCI has tainted the procurement or because performance of the contract is likely to create a future OCI.²²

16. FAR 9.502(a). In addition, the GAO and the Court have looked to FAR subpart 9.5 for guidance in protests alleging that agency personnel possessed an impermissible conflict, within the meaning of FAR 3.101, in the context of Office of Management and Budget (OMB) Circular A-76 procurements. *See, e.g.,* JWK Int'l Corp., 52 Fed. Cl. 650 (2002); Jones/Hill Joint Venture, Comp. Gen. B-286194.4, et al., Dec. 5, 2001, 2001 CPD ¶ 194; IT Facility Servs.—Joint Venture, Comp. Gen. B-285841, Oct. 17, 2000, 2000 CPD ¶ 177; DZS/Baker LLC, Morrison Knudsen Corp., Comp. Gen. B-281224, et al., Oct. 17, 2000, 99-1 CPD ¶ 19; *see also* FAR 3.101 (“Government business shall be conducted in a manner above reproach and, except as authorized by statute or regulation, with complete impartiality and with preferential treatment for none.”).

17. *See* Aetna Gov't Health Plans, Found. Health Fed. Servs., Inc., Comp. Gen. B-254397, et al., July 27, 1995, 95-2 CPD ¶ 129 (“While FAR subpart 9.5 does not explicitly address the role of affiliates in the various types of organizational conflicts of interest, there is no basis to distinguish between a firm and its affiliates, at least where concerns about potential biased ground rules and impaired objectivity are at issue.” (citing ICF Inc., Comp. Gen. B-241372, Feb. 6, 1991, 91-1 CPD ¶ 124)).

18. FAR 9.502(d).

19. *See* 49 U.S.C. § 40110(d) (2000).

20. FAR 9.502(b)(1)–(4).

21. FAR 9.502(c).

22. *See* Gordon, *supra* note 5, at 32–37.

B. Restrictions

FAR 9.505 establishes both the general principles that govern the analysis of OCIs and specific restrictions upon particular types of conflicts.

FAR 9.505 sets forth the following guiding principles:

- (a) Preventing the existence of conflicting roles that might bias a contractor's judgment; and
- (b) Preventing unfair competitive advantage.²³

FAR 9.505-1 through 9.505-4, discussed at length in Part III, applies these principles to certain recurring fact patterns.

- FAR 9.505-1 prohibits a contractor that has provided systems engineering and technical direction (SETA) services for a system for which it does not have overall contractual responsibility from supplying, or providing consulting services regarding, that system or any of its major components.²⁴
- FAR 9.505-2, subject to certain exceptions, prohibits a contractor from competing for an opportunity for which it has drafted materials incorporated into the specifications or statement of work.²⁵
- FAR 9.505-3 prohibits awarding a contract for the evaluation of offers for products or services to a contractor that will evaluate its own offers, or those of its competitors, without proper safeguards to ensure objectivity and to protect the Government's interests.²⁶
- FAR 9.505-4 sets forth certain restrictions applicable to contractors that require access to the proprietary information of others to perform a government contract.²⁷

These restrictions are not exhaustive.²⁸ Rather, an OCI may exist whenever a contractor would be placed in conflicting roles or receive an unfair competitive advantage as the result of access to nonpublic information. Thus, FAR 9.505 emphasizes a case-by-case approach based upon the application of "common sense, good judgment, and sound discretion" to the "particular facts and the nature of the proposed contract."²⁹

C. Procedures and Responsibilities

FAR 9.504 and 9.506 set forth the contracting officer's obligations to identify and mitigate OCIs.

A contracting officer is required to analyze planned acquisitions in order to (1) identify and evaluate potential OCIs "as early in the acquisition process as possible" and (2) "avoid, neutralize or mitigate significant potential con-

23. FAR 9.505(a)-(b).

24. FAR 9.505-1(a).

25. FAR 9.505-2(a)(1), (b)(1).

26. FAR 9.505-3.

27. FAR 9.505-4.

28. FAR 9.505.

29. *Id.*

flicts before contract award.”³⁰ If the contracting officer determines that no “significant” potential conflict exists, no additional action or documentation is required.³¹ If a “significant” potential OCI may be present, however, the contracting officer must prepare and submit certain documentation for approval by the head of the contracting activity (HCA).³² At a minimum, such documentation must include

- A written analysis, including recommendations for avoiding, neutralizing, or mitigating the OCI;
- A draft solicitation provision calling the attention of prospective offerors to the potential conflict; and
- If appropriate, a contract clause that precludes the awardee from performing certain related opportunities for a specified period.³³

The HCA must review the contracting officer’s analysis and approve, modify, or reject his or her recommendations in writing.³⁴ The contracting officer, in turn, is required to resolve the OCI in a manner consistent with the approval or other directions of the HCA.³⁵

Before withholding an award based on an OCI, the contracting officer must notify the contractor and allow a reasonable opportunity to respond.³⁶ If the apparent successful offeror possesses an OCI that can be avoided or mitigated, the contracting officer must make an award to that offeror.³⁷ If the OCI cannot be avoided or mitigated, the head of the agency or his or her designee may waive the OCI and permit the conflicted contractor to participate in the procurement. This waiver can be granted only if the head of the agency or his or her designee determines that it is in the best interest of the Government to award the contract notwithstanding the OCI.³⁸ The contracting officer may not make an award to a contractor that possesses an OCI that has not been avoided, mitigated, or waived.³⁹

D. Solicitation Provisions and Contract Clauses

The FAR contemplates that contracts may include OCI disclosure and preclusion clauses.⁴⁰ Disclosure clauses require the contractor to disclose to the contracting officer information regarding OCIs that exist at the time of

30. FAR 9.504(a).

31. FAR 9.506(b), 9.504(d).

32. FAR 9.506(b).

33. *Id.*

34. FAR 9.506(c).

35. FAR 9.506(d)(3).

36. *Id.*

37. FAR 9.504(e).

38. *Id.*; see also FAR 9.503; Knight’s Piping, Inc., World Wide Marine & Indus. Servs., Comp. Gen. B-280398.2, B-280398.3, Oct. 9, 1998, 98-2 CPD ¶ 91 (denying protest where the agency properly waived an OCI).

39. See, e.g., Filtration Dev. Co., LLC v. United States, 60 Fed. Cl. 371, 377–78 (2004) (sustaining protest where the agency failed to waive or mitigate an OCI).

40. See generally FAR 9.507-1 (solicitation provisions), 9.507-2 (contract clauses).

award or that may arise thereafter.⁴¹ Preclusion clauses are used as a prophylactic measure to prohibit contractors from participating in certain types of related future procurements.⁴² The consequences of failing to comply with either type of clause may range from termination for default to suspension or debarment.⁴³

1. Disclosure Clauses

Many agencies have adopted standard OCI disclosure clauses and certifications. Although these clauses differ by agency and procurement, most include one or more of the following features:

- A provision requiring the contractor to disclose, and in some cases to certify that it has disclosed or does not possess, any OCIs with regard to the procurement.⁴⁴
- A provision stating that the contractor may be disqualified from award if it fails to provide, or makes any misrepresentation in connection with, required OCI certifications or disclosures.⁴⁵
- A provision requiring the contractor to disclose, and in some cases to certify that it will disclose, all OCIs that arise after award.⁴⁶
- A provision clarifying that the agency may terminate the contract for convenience if an OCI arises after award.⁴⁷
- A provision stating that misrepresenting or failing to disclose information related to OCIs may result in termination for default, debarment, prosecution for the making of false statements, or other severe consequences.⁴⁸

41. *See, e.g.*, VAAR 852.209-70(a); EPAR 1509.505-70(a)-(b), 1552.209-70(a), 1552.209-72, 1552.209-71(a)-(b); HUDAR 2452.209-70(c), 2452.209-72(a); HSAR 3052.209-72(a)-(c), (e).

42. *See, e.g.*, DEAR 952.209-72(b)(1).

43. *See, e.g.*, VAAR 852.209-70(c); DEAR 952.209-8(d); HUDAR 2452.209-72(c); HSAR 3052.209-72(e); DEAR 952.209-72(c)(2)-(d).

44. *See* VAAR 852.209-70(a) (required in solicitations for consulting services); DEAR 952.209-8(c)(2) (required in solicitations for advisory and assistance services and management and operating services); EPAR 1509.505-70(a)-(b) (requiring certification in all responses to solicitations and unsolicited proposals); EPAR 1552.209-70(a) (required in all solicitations that exceed the simplified acquisition threshold); EPAR 1552.209-72 (same); EPAR 1552.209-71(a)-(b) (same unless another clause is required); HUDAR 2452.209-70 (c) (required in all solicitations for which the contracting officer has reason to believe that an OCI might exist); HUDAR 2452.209-72(a) (required in all contracts); HSAR 3052.209-72(a)-(c) (permitted where a preclusion clause is warranted); HSAR 3052.209-72(e). Some clauses also require contractors to disclose related business interests of their directors, officers, and other personnel. *See* EPAR 1552.209-70(a).

45. *See* DEAR 952.909-8(d); EPAR 1509.507-70(b); HUDAR 2452.209-70(e); HSAR 3052.209(e).

46. *See* AIDAR 752.209-71(a) (required in all solicitations that include any OCI provision or clause); DEAR 952.209-72(c)(1) (required in solicitations for advisory and assistance services that exceed the simplified acquisition threshold and with Alternate I in solicitations for management and operating (M&O) services); EPAR 1552.209-71(c); EPAR 1552.209-75 (required in all Superfund contracts that exceed the simplified acquisition threshold and that do not otherwise require the contractor to complete OCI certifications during performance); HUDAR 2452.209-72(b).

47. *See* AIDAR 752.209-71(b); DEAR 952.209-72(c)(1); EPAR 1552.209-71(d); HUDAR 2452.209-72(b); HSAR 3052.209-72(e).

48. *See* VAAR 852.209-70(c); DEAR 952.209-8(d), 952.209-72(d); HUDAR 2452.209-72(c); HSAR 3052.209-72(e).

- A provision requiring the contractor to flow down to its subcontractors certain OCI restrictions.⁴⁹

2. Preclusion Clauses

If, as a condition of award, the contractor's eligibility for future opportunities will be restricted or if the contractor must agree to some other restraint, FAR 9.507 requires the contracting officer to include in the solicitation a provision and proposed contract clause to this effect.⁵⁰ The solicitation provision must state the nature of the perceived conflict and proposed restraint and indicate whether the terms of any proposed clause are subject to negotiation.⁵¹

If future restrictions on a contractor's activities are contemplated, the solicitation also must include a clause that specifies the nature and duration of the proposed restraint.⁵² This clause, as amended by negotiations if applicable, must be included in the awardee's contract,⁵³ and must specify termination by a specific date or upon the occurrence of an identifiable event.⁵⁴

OCI preclusion clauses are used most frequently in solicitations for advisory and assistance services. Although the precise language of such clauses varies by agency and procurement, the standard Department of Energy Acquisition Regulation (DEAR) preclusion clause illustrates the types of restrictions that may be included. Among other things, the preclusion clause prohibits the contractor and its affiliates from

- Participating in any capacity, for a specified duration, in Department of Energy Procurements (DoE) that "stem directly from the contractor's performance of work under [the] contract";⁵⁵
- Performing advisory and assistance services on any of its products or services or any other products or services it has developed or marketed, unless directed otherwise;⁵⁶
- Participating in any competitive procurement for which it may prepare a statement of work under the contract;⁵⁷
- Using or releasing nonpublic information received under the contract except under limited conditions;⁵⁸ and
- Using proprietary or confidential information received under the contract in a manner inconsistent with any restrictions imposed on such data.⁵⁹

If the contractor breaches any of these restrictions, the DoE may terminate the contract for default, disqualify the contractor from "related contractual

49. See DEAR 952.209-72(e)(1) (Alternate I); EPAR 1552.209-71; HUDAR 2452.209-72(d).

50. FAR 9.507-1, 9.507-2.

51. FAR 9.507-1.

52. FAR 9.507-2(a).

53. *Id.*

54. FAR 9.507-2(b).

55. DEAR 952.209-72(b)(1)(i).

56. *Id.*

57. DEAR 952.209-72(b)(1)(ii).

58. DEAR 952.209-72(b)(2)(i).

59. DEAR 952.209-72(b)(2)(ii).

efforts,” and “pursue such other remedies as may be permitted by law or [the] contract.”⁶⁰

III. IDENTIFYING ORGANIZATIONAL CONFLICTS OF INTEREST

Identifying OCIs requires answering three preliminary questions:

- Has the contractor, any of its affiliates, or subcontractors obtained from the Government, under a separate contract, information that other contractors do not possess and that places the contractor at an unfair competitive advantage in the instant procurement?
- Has the contractor, any of its affiliates, or subcontractors provided to the Government or a prime contractor, under a separate contract, services that establish the ground rules for the instant procurement?
- Does the contractor possess, as the result of other contracts or business relationships, an incentive to provide, whether intentionally or unintentionally, biased advice under the instant contract?

These questions correspond to the three general categories of OCIs identified by the GAO and the Court: (1) “unequal access to information” OCIs, (2) “biased ground rules” OCIs, and (3) “impaired objectivity” OCIs, respectively.⁶¹

Using the foregoing categories of OCIs as a framework, this part analyzes in detail the restrictions set forth in FAR subpart 9.5, as well the recent GAO and Court opinions that have interpreted those restrictions. Subpart A addresses “unequal access to information” OCIs, subpart B “biased ground rules” OCIs, and subpart C “impaired objectivity” OCIs.

A. *Unequal Access to Information*

An “unequal access to information” OCI arises where “a firm has access⁶² to nonpublic information as part of its performance of a government contract and where that information may provide the firm a competitive advantage⁶³ in a later competition for a government contract.”⁶⁴ In such cases, the primary

60. DEAR 952.209-72(c)(2), (d).

61. See *Vantage Assocs., Inc. v. United States*, 59 Fed. Cl. 1, 10 (2003); *Aetna Gov’t Health Plans, Found. Health Fed. Servs., Inc., Comp. Gen. B-254397*, et al., July 27, 1995, 95-2 CPD ¶ 129.

62. Mere proximity to nonpublic information does not give rise to an “unequal access to information” OCI. See *Mech. Equip. Co., Inc., Highland Eng’g, Inc., Etryre Int’l, Ltd., Kara Aerospace, Inc., Comp. Gen. B-292789.2*, et al., Dec. 15, 2003, 2004 CPD ¶ 192 (denying protest alleging an “unequal access to information” OCI where the awardee was a long-time support services contractor at the facility where the agency developed the solicitation, but there was no evidence that the awardee had access to such information).

63. Cf. *ITT Fed. Servs. Corp.*, B-253740, B-253740.2, May 27, 1994, 94-2 CPD ¶ 30 (denying protest where the protestor failed to explain how an unfair competitive advantage arose from proprietary information that the awardee obtained from a former government employee).

64. *Aetna*, 95-2 CPD ¶ 129, at 12; see also *Vantage Assocs.*, 59 Fed. Cl. at 10.

concern is minimizing the risk that a firm will gain an unfair competitive advantage over other offerors.⁶⁵

The FAR contemplates that an OCI may arise from access to proprietary information and source selection information.⁶⁶ In addition, the GAO has held that an “unequal access to information” OCI may arise from other types of information beyond that available to a typical incumbent contractor.⁶⁷

1. Proprietary Information

FAR 9.505-4 requires a contractor to execute a nondisclosure agreement with any company whose proprietary information the contractor will obtain while performing advisory and assistance services for the Government.⁶⁸ Specifically, the contractor must agree to (1) protect that information from unauthorized use or disclosure for as long as it remains proprietary and (2) refrain from using that information for any purpose other than that for which it was supplied.⁶⁹

FAR 9.504(a) clarifies that these restrictions are not intended to apply to information that has been furnished voluntarily to the Government or that is available from other sources without restriction.⁷⁰ Thus, the GAO has held that an “unequal access to information” OCI does not arise from a contractor’s access to another contractor’s information that was neither marked as proprietary nor submitted in confidence.⁷¹

2. Source Selection Information

“Unequal access to information” OCIs commonly involve allegations that a contractor has obtained, under a separate contract, materials related to the specifications or statement of work for the instant procurement. This fact pattern is illustrated by *GIC Agricultural Group*, in which the agency based the solicitation on a project paper, including budgetary estimates, that the awardee authored under a separate contract.⁷² The GAO sustained the protest, reasoning that preparing the project paper afforded the awardee “information . . . that was unavailable to offerors, and that placed [the awardee] in a unique position to structure a proposal that would meet the agency’s requirements within budgetary constraints.”⁷³

65. *Aetna*, 95-2 CPD ¶ 129, at 12–13; *Vantage Assocs.*, 59 Fed. Cl. at 10.

66. FAR 9.505(b).

67. *Johnson Controls World Servs., Inc.*, Comp. Gen. B-286714.2, Feb. 13, 2001, 2001 CPD ¶ 20 (other information).

68. FAR 9.505-4(b).

69. *Id.*

70. FAR 9.505-4(a)(1)–(2).

71. *Snell Enters.*, Comp. Gen. B-290113, B-290113.2, June 10, 2002, 2002 CPD ¶ 115.

72. *GIC Agric. Group*, 72 Comp. Gen. 14, 92-2 CPD ¶ 263 (1992).

73. *Id.* A similar concern arises in A-76 procurements where members of the most efficient organization (MEO) team have access to nonpublic information regarding the performance work statement (PWS). See *Jones/Hill Joint Venture*, Comp. Gen. B-286194.4, et al., Dec. 5, 2001, 2001 CPD ¶ 194 (sustaining protest based upon a violation of FAR 3.101-1 where an agency employee and private sector consultants participated in drafting both the PWS and the MEO plan, “thus providing [the MEO] with greater access to competitively useful information”).

3. Other Nonpublic Information

In *Johnson Controls I*, the GAO clarified that an “unequal access to information” OCI may result from information that is neither proprietary nor source selection sensitive.⁷⁴ *Johnson Controls I* involved a contract for maintenance and support services at an Army base.⁷⁵ The protestor argued that an OCI arose because the awardee’s subcontractor, under a separate contract for assistance in analyzing the Army’s logistics needs, had access to a database that compiled detailed work order information relating to maintenance activities performed at that same base.⁷⁶ The GAO sustained the protest, holding that an OCI arose because the awardee, and no other offeror, had relevant nonpublic information—beyond that which would be available to a typical incumbent contractor—that would assist it in obtaining the contract.⁷⁷

Johnson Controls I illustrates an exception to the general rule that knowledge and experience gained from the performance of similar government contracts does not give rise to an OCI. In *Snell*, the GAO explained this rule as follows:

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.⁷⁸

Johnson Controls I differs from cases such as *Snell* because the awardee had access to detailed information that went far beyond the know-how typically gained by incumbent contractors.⁷⁹

B. Biased Ground Rules

The second general category of OCIs arises when a contractor, as part of its performance of a government contract, has set the ground rules, in some sense, for another procurement.⁸⁰ In cases of “biased ground rules” OCIs, the

74. Comp. Gen. B-286714.2, Feb. 13, 2001, 2001 CPD ¶ 20.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Snell Enters.*, Comp. Gen. B-290113, B-290113.2, June 10, 2002, 2002 CPD ¶ 115; *see also* *Computer Universal, Inc.*, Comp. Gen. B-291890, B-291890.2, Apr. 8, 2003, 2003 CPD ¶ 81 (OCI did not arise from status as incumbent); *M&W Constr. Corp.*, Comp. Gen. B-288649.2, Dec. 17, 2001, 2002 CPD ¶ 30 (same); *Optimum Tech., Inc.*, Comp. Gen. B-266339, B-266339.2, Apr. 16, 1996, 96-1 CPD ¶ 188 (OCI did not arise from performance of similar requirements); *Gov’t Scrap Sales*, Comp. Gen. B-295585, 2005 WL 596778, at *3 (C.G. Mar. 11, 2005) (same); *Sys. Plus, Inc. v. United States*, 69 Fed. Cl. 757 (2006).

79. 2001 CPD ¶ 20.

80. *Aetna Gov’t Health Plans, Found. Health Fed. Servs., Inc.*, Comp. Gen. B-254397, et al., July 27, 1995, 95-2 CPD ¶ 129; *Vantage Assocs., Inc. v. United States*, 59 Fed. Cl. 1, 10 (2003).

primary concern is that the firm could skew the competition—whether or not intentionally—in its favor.⁸¹

“Biased ground rules” OCIs typically arise in two contexts. The first involves the submission of a proposal by a contractor that has contributed to the specifications or statement of work for a competitive procurement. The second arises when a contractor attempts to supply a system, or a component of a system, for which it has provided SETA services.

1. Preparing Specifications and Work Statements

Subject to certain exceptions,⁸² FAR 9.505-2(a) prohibits a contractor from competing to furnish items for which it has prepared the specifications.⁸³ FAR 9.505-2(b) places similar restrictions upon a contractor’s ability to supply a system or services for which it has drafted the statement of work.⁸⁴ Although both restrictions are designed to ensure that the Government receives objective advice,⁸⁵ each is subject to slightly different exceptions. Accordingly, FAR 9.505-2(a) and (b) are addressed separately below.⁸⁶

a) Specifications

FAR 9.505-2(a) limits a contractor’s ability to supply items for which it has prepared specifications.⁸⁷ In relevant part, FAR 9.505-2(a) provides as follows:

- (1) If a contractor prepares and furnishes *complete specifications* covering *nondevelopmental items*, to be used in a competitive acquisition,⁸⁸ 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*.⁸⁹

81. *Aetna*, 95-2 CPD ¶ 129, at 13 (citing FAR 9.505-1, 9.505-2); *Vantage Assocs.*, 59 Fed. Cl. at 10.

82. See FAR 9.505-2(a)(1)(i)–(ii), (3).

83. FAR 9.505-2(a)(1).

84. FAR 9.505-2(b)(1). Similarly, in protests challenging A-76 procurements, the GAO has held that bias may result where an agency employee participates in drafting both the PWS and the MEO plan. See *Jones/Hill Joint Venture*, Comp. Gen. B-286194.4, et al., Dec. 5, 2001, 2001 CPD ¶ 194 (sustaining protest alleging a violation of FAR 3.101 where an agency employee and private sector consultants participated in drafting both the PWS and the MEO plan, thereby “creating the possibility of a competition with biased ground rules”).

85. FAR 9.505-2(a)(2), (b)(2).

86. FAR 9.505-2(a)(3), (b)(3).

87. See FAR 9.505-2(a)(1).

88. Although no case has addressed the issue, one may interpret this language to render FAR 9.505-2(a) inapplicable where a contractor has prepared specifications for a sole-source procurement.

89. FAR 9.505-2(a)(1) (emphasis added).

Under FAR 9.505-2(a), there are a number of circumstances under which a contractor may furnish supplies for which it has assisted in preparing the specifications. Most cases involving FAR 9.505-2(a) have focused on these exceptions.

(1) Partial Specifications

Pursuant to FAR 9.505-2(a), a contractor is prohibited from providing supplies for which it has prepared and furnished “complete specifications.” The GAO has interpreted this language to permit a contractor to supply items for which it has furnished only partial specifications.⁹⁰

The FAR does not define “complete specifications.” The GAO’s attempt to define the term as “specifications that are necessary and sufficient to inform the solicitation” is only slightly more helpful.⁹¹ It appears, however, that there are at least two key variables in determining whether specifications are complete within the meaning of FAR 9.505-2(a): (1) the similarity of the specifications drafted by the contractor to those ultimately used in the procurement and (2) the extent to which other contractors contributed to those specifications.

The *Lucent Technologies* case illustrates the importance of both factors.⁹² There, the protestor argued that it had not prepared “complete specifications” for certain radio devices because the Army had modified the protestor’s specifications prior to incorporating them into the solicitation.⁹³ The Army countered that its modifications were for the limited purpose of removing unduly restrictive, vendor-specific provisions.⁹⁴ The GAO denied the protest, holding that the Army’s modifications did not constitute a “major revision” of the protestor’s specifications because “the vast majority of the technical specifications remain[ed] unchanged.”⁹⁵ In a footnote, the GAO distinguished *American Artisan*,⁹⁶ a case in which it had held that the awardee’s subcontractor had not prepared complete specifications.⁹⁷ The GAO noted that the subcontractor in *American Artisan* was only “one of several contractors” that worked on the project, whereas the awardee in the instant case was the only contractor that contributed to the specifications.

90. See *Am. Artisan Prods., Inc., Comp. Gen. B-292559, B-292559.2, Oct. 7, 2003, 2003 CPD ¶ 176.*

91. *Lucent Techs. World Servs., Inc., Comp. Gen. B-295462, Mar. 2, 2005, 2005 CPD ¶ 55.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Am. Artisan Prods., Inc., Comp. Gen. B-292559, B-292559.2, Oct. 7, 2003, 2003 CPD ¶ 176.*

97. *Lucent Techs. World Servs., Inc., Comp. Gen. B-295462, Mar. 2, 2005, 2005 CPD ¶ 55, at 7 n.6.*

(2) Other Than Nondevelopmental Items

FAR 9.505-2(a) applies to contractors that have prepared specifications for “nondevelopmental items.”⁹⁸ FAR 2.101 defines a “nondevelopmental item” as follows:

- (1) Any previously developed item of supply *used exclusively for governmental purposes* by a Federal agency, a State or local government, or a foreign government with which the United States has a mutual defense cooperation agreement;
- (2) Any item described in paragraph (1) of this definition that requires only minor modification or modifications of a type customarily available in the commercial marketplace in order to meet the requirements of the procuring department or agency; or
- (3) Any item of supply being produced that does not meet the requirements of paragraphs (1) or (2) solely because the item is not yet in use.⁹⁹

This definition excludes items used by commercial entities, as such items are not “used exclusively for governmental purposes.” Read literally, FAR 9.505-2(a) could be interpreted to permit a contractor to supply items for which it has prepared the specifications, provided that at least some commercial entities have used those items.

Despite the definition of “nondevelopmental items” included in FAR 2.101, the GAO has suggested that FAR 9.505-2(1) should, or at least plausibly could, be interpreted to extend to commercial items.¹⁰⁰ In *Lucent Technologies*, the protestor argued that commercial items could not constitute “nondevelopmental items” within the meaning of FAR 9.505-2(a).¹⁰¹ The agency countered that the Federal Acquisition Streamlining Act defines “nondevelopmental items” to include “any commercial item,”¹⁰² and noted that the FAR lists “nondevelopmental items” as one of the eight categories of commercial items.¹⁰³ The GAO resolved the protest on other grounds, but noted in dicta that “an argument could be made that [nondevelopmental items] cannot reasonably be limited to items used exclusively by the government.”¹⁰⁴

(3) Specifications Furnished at the Government’s Request

FAR 9.505-2(a) does not apply to contractors that “furnish at Government request specifications or data regarding products they provide . . .”¹⁰⁵ The rationale for this exception is that the Government is entitled to unbiased specifications only where it has hired a contractor to furnish objective advice.¹⁰⁶

98. FAR 9.505-2(a)(1).

99. FAR 2.101 (emphasis added).

100. *Lucent Techs.*, 2005 CPD ¶ 55.

101. *Id.*

102. *Id.* (citing 41 U.S.C. § 403(13) (2000)).

103. *Id.* (citing FAR 2.101).

104. *Id.*

105. FAR 9.505-2(a)(1)(i).

106. *Id.*

The *Viereck* case illustrates the application of this exception.¹⁰⁷ There, the agency incorporated into a solicitation specifications that it requested, and obtained without cost, from the contractor that supplied the machines to be replaced.¹⁰⁸ The GAO held that the contractor that provided those specifications was not prohibited from supplying the replacement machines because the contractor had not been hired to provide objective advice.¹⁰⁹ The GAO added that vendors commonly supply specifications for their products, and that it is the Government's responsibility to screen such documents for requirements that do not reflect its minimum needs.¹¹⁰

(4) Government Supervision and Control

FAR 9.505-2(a) does not apply to “[s]ituations 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.”¹¹¹ Only two cases have interpreted this so called industry representative exception.¹¹² Both suggest that the exercise of government supervision and control is the most important, if not the only, factor relevant to determining whether the exception applies.¹¹³

The GAO and the Court appear to differ, however, regarding the level of government supervision and control required to trigger the industry representative exception. In *Lucent Technologies*, the GAO declined to apply the exception where the agency was “kept apprised of Lucent’s progress on the . . . specifications, participated in some discussions regarding Lucent’s development of the specifications, and provided some comments or feedback prior to the final version of the specifications.”¹¹⁴ *Lucent Technologies* suggests that the GAO will require evidence that the Government actively participated in, or directed the development of, specifications. In *Vantage Associates*, however, the Court held, without discussion, that the industry representative exception applied simply by virtue of the Government’s approval of a contractor’s drawings.¹¹⁵

b) Statements of Work

Subject to certain exceptions, FAR 9.505-2(b) prohibits a contractor from performing services, or providing a system or components of a system, for

107. *Viereck Co.*, 69 Comp. Gen. 281, 90-1 CPD ¶ 309 (1990).

108. *Id.*

109. *Id.*

110. *Id.*

111. FAR 9.505-2(a)(1)(ii).

112. See *Vantage Assocs., Inc. v. United States*, 59 Fed. Cl. 1, 12 (2003); *Lucent Techs. World Servs., Inc.*, Comp. Gen. B-295462, Mar. 2, 2005, 2005 CPD ¶ 55.

113. See *Vantage Assocs.*, 59 Fed. Cl. at 12; *Lucent Techs.*, 2005 CPD ¶ 55.

114. *Lucent Techs.*, 2005 CPD ¶ 55.

115. *Vantage Assocs.*, 59 Fed. Cl. at 12.

which it has prepared the statement of work.¹¹⁶ In relevant part, FAR 9.505-2(b)—the services contract analog of FAR 9.505-2(a)—provides as follows:

- (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.¹¹⁷

As with FAR 9.505-2(a), most cases addressing FAR 9.505-2(b) involve exceptions to the general prohibition on supplying items for which a contractor has prepared the specifications. An analysis of these exceptions is set forth below.

(1) Materials That Do Not Lead “Directly, Predictably, and Without Delay” to a Statement of Work

FAR 9.505-2(b) applies to contractors that have “prepare[d] or assist[ed] in preparing a work statement” and contractors that have “provide[d] material leading directly, predictably, and without delay to such a work statement.”¹¹⁸ In several cases, protestors have argued that FAR 9.505-2(b) did not apply because the material they provided, although related to the subject matter of the procurement, did not lead “directly, predictably, and without delay” to the statement of work. The resolution of these protests typically hinges on the contractor’s level of involvement in the overall project and the extent to which the statement of work differs from the material provided by the contractor.

GIC Agricultural Group illustrates the circumstances under which materials will be deemed to lead “directly, predictably, and without delay” to a statement of work.¹¹⁹ There, the awardee had prepared a project paper that contained a detailed analysis of the rationale, objectives, suggested activities, implementation, and cost of a project to promote investment in Indian agriculture.¹²⁰ The agency then used that project paper to draft a statement of work.¹²¹ Over half of the background section of the solicitation was based upon the awardee’s project paper, which also addressed each task incorporated in the solicitation.¹²² The GAO sustained the protest, holding that the awardee’s project paper contributed “directly, predictably, and without delay” to the agency’s

116. FAR 9.505-2(b)(1).

117. *Id.* (emphasis added).

118. *Id.*

119. *GIC Agric. Group*, 72 Comp. Gen. 14, 92-2 CPD ¶ 263 (1992).

120. *Id.*

121. *Id.*

122. *Id.*

solicitation.¹²³ The GAO rejected the agency's argument that there were significant differences between the awardee's project paper and the solicitation, noting that these changes reduced the project scope without altering its focus.¹²⁴ The GAO further concluded that the passage of only eight months between submission of the project paper and release of the solicitation satisfied the "without delay" requirement.¹²⁵

On the other hand, an OCI does not arise with respect to all work related to advisory services provided under a prior contract. Rather, an OCI will exist only to the extent that the agency has relied on that work in preparing the solicitation.¹²⁶ In *Abt Associates, Inc.*, for example, the GAO denied a protest alleging that an OCI resulted from the preparation of a project paper by the awardee's employee.¹²⁷ The GAO reasoned that the employee's recommendations arose from a specialized study of only one element of the project, were rejected by the agency, and were not used in the agency's project paper.¹²⁸

(2) Sole-Source Procurements

FAR 9.505-2(b) does not apply to sole-source procurements.¹²⁹ In the only case that has addressed this exception, the GAO rejected, without comment, the protestor's argument that a sole-source award violated FAR 9.505-2(b).¹³⁰

(3) Work Statements Prepared by More Than One Contractor

FAR 9.505-2(b) does not apply where "[m]ore than one contractor has been involved in preparing the statement of work."¹³¹ Although no case has addressed this exception in detail, several GAO opinions suggest that it is not limited to collaborative efforts.¹³² In *S.T. Research Corp.*, the GAO held that the exception applied where multiple contractors separately contributed information allegedly incorporated into different tasks under the same statement of work.¹³³ Likewise, in *Gas Turbine Corp.*, the GAO held that the agency was not required to exclude from the procurement a contractor that had reviewed a report prepared by another contractor that the agency ultimately

123. *Id.*

124. *Id.*

125. *Id.*

126. See, e.g., *CDR Enters., Inc.*, Comp. Gen. B-293557, Mar. 26, 2004, 2004 CPD ¶ 46 (denying protest where the agency personnel that prepared the solicitation disregarded the statement of objectives prepared by the awardee under a separate contract); *Daniel Eke & Assocs., P.C.*, Comp. Gen. B-271962, July 9, 1996, 96-2 CPD ¶ 9 (denying protest where the agency personnel that prepared the statement of work did not rely on the awardee's concept paper).

127. Comp. Gen. B-253220, B-253220.2, Oct. 6, 1993, 93-2 CPD ¶ 269.

128. *Id.*

129. FAR 9.505-2(b)(1)(i).

130. *Litton Computer Servs.*, Comp. Gen. B-256225, et al., July 21, 1994, 94-2 CPD ¶ 36.

131. FAR 9.505-2(b)(1)(iii); see also *SRI Int'l*, 66 Comp. Gen. 35, 86-2 CPD ¶ 404 (1986) (denying protest where the statement of work was based on input from a technical advisory panel including three of the awardee's affiliates).

132. See *S.T. Research Corp.*, Comp. Gen. B-233115, B-233115.2, Mar. 30, 1989, 89-1 CPD ¶ 332; *Gas Turbine Corp.*, Comp. Gen. B-251265, B-251265.2, 93-1 CPD ¶ 400 (1993).

133. See *S.T. Research Corp.*, 89-1 CPD ¶ 332; *Gas Turbine Corp.*, 93-1 CPD ¶ 400.

incorporated into the work statement.¹³⁴ These cases suggest that the “more than one contractor” exception is not limited to any particular type of contractor involvement.

c) Development and Design Work

FAR 9.505-2(a) and (b) does not apply to contractors that have performed development or design work regarding the subject matter of a procurement.¹³⁵ FAR 9.505-2(a) explains the rationale for this exception as follows:

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.¹³⁶

Several protests have addressed the development and design work exception. Frequently, this argument is rejected with little comment because the prior contract did not require improvement in technology, materials, processes, or method.¹³⁷ In one such case, the GAO noted that the awardee’s preparation of an economic assessment was “not analogous to a contractor who pushes the edges of technology in developing or designing new hardware or processes.”¹³⁸ Notwithstanding this focus on technological development, the GAO has suggested that the exception also applies to low-technology creative endeavors.¹³⁹

Several cases have clarified that the development and design work exception applies only where the contractor has designed or developed the particular supplies or services being acquired. In *Lucent Technologies*, for example, the GAO held that the exception did not apply where the contractor had drafted the specifications for Terrestrial Trunked Radio (TETRA) devices, which it had not designed, to be used in a first responder network, which it had designed under a separate contract.¹⁴⁰ The GAO reasoned that “the exemption [for development or design work] applies to the system or services being competitively acquired, and not other systems or services that the potentially conflicted offeror provides.”¹⁴¹

134. *Gas Turbine Corp.*, 93-1 CPD ¶ 400, at 4 n.4 (denying protest).

135. FAR 9.505-2(a)(3), (b)(3).

136. FAR 9.505-2(a)(3); see also FAR 9.505-2(b)(3).

137. See, e.g., *Basile, Baumann, Prost & Assocs., Inc.*, Comp. Gen. B-274870, Jan. 10, 1997, 97-1 CPD ¶ 15, at 4 (denying protest).

138. *GIC Agric. Group*, 72 Comp. Gen. 14, 92-2 CPD ¶ 263, at 10 n.6 (1992) (sustaining protest).

139. See *Am. Artisan Prods., Inc.*, Comp. Gen. B-292559, B-292559.2, Oct. 7, 2003, 2003 CPD ¶ 176 (denying protest where the awardee had designed museum exhibits under the prior contract).

140. Comp. Gen. B-295462, Mar. 2, 2005, 2005 CPD ¶ 55.

141. *Id.*

Similarly, in *Ressler Associates*, the GAO held that the contracting officer reasonably excluded the incumbent contractor from a procurement after discovering that the contracting officer's technical representative had asked that same contractor to prepare a description of the services it was performing under the existing contract and then provided that description to the contracting officer to be used as the statement of work.¹⁴² The GAO noted that it is not unfair to permit a contractor to compete for a system or services based upon its earlier development and design work because the resulting advantage is both unavoidable and advantageous to the Government.¹⁴³ That rationale did not apply to the protestor, however, because the instant contract was for more of the same development and design services that the protestor was currently performing, and the competitive advantage arose from drafting the statement of work, not performance of the prior contract.¹⁴⁴

2. System Engineering and Technical Direction Services

A contractor that has provided SETA services for a system for which it does not have overall responsibility may not supply that system or components of that system.¹⁴⁵ In this regard, FAR 9.505-1 provides as follows:

- (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.¹⁴⁶

“Systems engineering” is the provision of “substantially all of the following activities: determining specifications, identifying and resolving interface problems, developing test requirements, evaluating test data, and supervising design.”¹⁴⁷ “Technical direction” involves providing “a combination of substantially all of the following activities: developing work statements, determining

142. Comp. Gen. B-274870, Jan. 10, 1997, 97-1 CPD ¶ 15.

143. *Id.* (citing FAR 9.505-2(a)(3)).

144. *Id.*

145. FAR 9.505-1(a).

146. *Id.* A contractor that provides SETA services for a subsystem is not precluded from supplying unrelated components of that system. In this regard, FAR 9.508 provides the following example:

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.

FAR 9.508(a).

147. FAR 9.505-1(b).

parameters, directing other contractors' operations, and resolving technical controversies."¹⁴⁸

FAR 9.505-1(b) explains that a SETA contractor occupies a "highly influential and responsible" position in designing the basic concepts of a system and supervising their execution by other contractors.¹⁴⁹ The purpose of FAR 9.505-1 is to prevent such contractors from abusing these responsibilities by making decisions that favor their own products.¹⁵⁰

Few cases have addressed FAR 9.505-1. Several opinions have clarified that it does not apply to contractors that have overall contractual responsibility for the system for which they have provided SETA services.¹⁵¹ The only cases that have considered FAR 9.505-1 in any detail, however, have analyzed whether an offeror qualifies as a SETA contractor. The outcomes of such cases have depended on two factors: (1) the contractor's level of responsibility, autonomy, and discretion under the contract and (2) at least for the GAO, whether the contractor actually has performed SETA services for the system.

S.T. Research Corp. illustrates the GAO's emphasis on both factors.¹⁵² That case involved a solicitation issued by the Navy for a passive electronic measures (ESM) system designed to detect and identify signals.¹⁵³ The protestor argued that an OCI arose from the awardee's earlier performance of SETA services for the ESM system under a task-order contract. Because it was unclear from that contract whether the awardee had performed SETA services, the GAO examined each task.¹⁵⁴ The GAO concluded that the awardee had provided the following services:

- Fabricating cables and installing an ESM system on a Navy submarine, including hook-up of electrical cables and testing;
- Performing tests, maintenance, repair, alignment, and inventory control duties on a configuration control model of the ESM system; and
- Providing technical and clerical assistance.¹⁵⁵

The GAO denied the protest, holding that these tasks did not constitute SETA services because they were performed in accordance with established procedures, with agency oversight, and in an environment that provided "little opportunity for elaborate engineering or design work."¹⁵⁶

148. *Id.*

149. *Id.*

150. *Id.*

151. See *Vantage Assocs., Inc. v. United States*, 59 Fed. Cl. 1, 11–12 (2003) (denying protest where awardee had overall contractual responsibility for system development, integration, assembly, checkout, and production); *Lockheed Martin Sys. Integration—Owego*, Comp. Gen. B-287190.2, B-287190.3, May 25, 2001, 2001 CPD ¶ 110 (same).

152. *S.T. Research Corp.*, Comp. Gen. B-233115, B-233115.2, Mar. 30, 1989, 89-1 CPD ¶ 332.

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.* at 4.

The GAO's review of individual task orders in the *S.T. Research* case suggests that the applicability of FAR 9.505-1 depends upon whether a contractor actually has provided SETA services. In *Filtration Development*, however, the Court implied that the mere agreement to provide SETA services, without more, is sufficient to trigger the restrictions applicable to SETA contractors.¹⁵⁷ The solicitation in *Filtration Development* required the delivery of engine inlet barrier filter kits for the UH-60 Blackhawk helicopter.¹⁵⁸ The protestor alleged that an OCI arose from the awardee's agreement, under an indefinite-delivery/indefinite-quantity (IDIQ) contract, to provide SETA services for the propulsion systems of various Army helicopters, including the UH-60.¹⁵⁹ In sustaining the protest, the Court suggested that FAR 9.505-1 applies from the moment a contractor becomes contractually obligated to perform SETA services, regardless of whether it ultimately performs such services.¹⁶⁰

C. Impaired Objectivity

"Impaired objectivity" OCIs typically arise where a contractor's work under one government contract could entail evaluating itself, its affiliates, or its competitors either through an assessment of performance under another contract or an evaluation of proposals.¹⁶¹ Such OCIs also may arise where a contractor's outside business relationships create an economic incentive to provide biased advice under a government contract.¹⁶² In these cases, the concern is that the firm's ability to render impartial advice could appear to be undermined by its relationship to the evaluated entity.¹⁶³

1. Evaluation of Offers

FAR 9.505-3 prohibits a contractor from "evaluat[ing] its own offers for products or services, or those of a competitor, without proper safeguards to ensure objectivity to protect the Government's interests."¹⁶⁴ Few cases have addressed FAR 9.505-3, presumably because a contractor's evaluation of its own offer creates such an obvious conflict. In fact, the only case in which the

157. *Filtration Dev. Co. v. United States*, 60 Fed. Cl. 371, 378-80 (2004).

158. *Id.* at 373.

159. *Id.* at 373-75.

160. *Id.* at 379 ("Company A agrees to provide systems engineering and technical direction for the Navy on the powerplant for a group of submarines . . . Company A should not be allowed to supply any powerplant components." (quoting FAR 9.508(a))) (emphasis and omission in original).

161. *Aetna Gov't Health Plans, Found. Health Fed. Servs., Inc., Comp. Gen. B-254397*, et al., July 27, 1995, 95-2 CPD ¶ 129; *Vantage Assocs., Inc. v. United States*, 59 Fed. Cl. 1, 10 (2003).

162. See, e.g., *Wash. Utility Group*, Comp. Gen. B-266333, Jan. 29, 1996, 96-1 CPD ¶ 27 (sustaining protest where an OCI arose from a contractor's commercial business relationships).

163. *Aetna*, 95-2 CPD ¶ 129; *Vantage Assocs.*, 59 Fed. Cl. at 10.

164. FAR 9.505-3.

GAO or the Court has applied FAR 9.505-3 to a private contractor¹⁶⁵ involved a more subtle conflict that resulted from the evaluation of proposals by a sister corporation of the awardee's proposed subcontractor.¹⁶⁶

2. Evaluation of Performance

The most common type of “impaired objectivity” OCI arises when a contractor is required to evaluate work that it has performed under a separate contract.¹⁶⁷ In *PURVIS Systems*,¹⁶⁸ for example, the protestor argued that an OCI would result from permitting the awardee to evaluate undersea warfare systems that the awardee had designed or manufactured under other contracts.¹⁶⁹ The GAO sustained the protest, rejecting the Navy's argument that bias would not arise because the testing involved objective measurements to be performed in the agency's presence.¹⁷⁰ According to the GAO, the contract called for the performance of subjective tasks such as designing tests, evaluating the resulting data, and comparing the performance of competing systems.¹⁷¹ The GAO also rejected the awardee's argument that an OCI did not arise because the tests would not be used in the procurement process, stating that “assessing the performance of systems it has manufactured [is] a classic example of an ‘impaired objectivity’ OCI—without regard to whether the evaluation occurs as ‘part of the procurement process.’”¹⁷²

An “impaired objectivity” OCI also may arise where a contractor is required to evaluate the performance of a separate entity in which it possesses a financial interest. This point is illustrated by the *Greenleaf Construction* case, which involved the protest of a contract for the performance of management and marketing services in connection with the disposition of houses owned

165. In the A-76 context, an analogous conflict may arise where agency personnel serving on the evaluation team could be “directly affected” by the outcome of the procurement. *See, e.g., DZS/Baker LLC, Morrison Knudsen Corp.*, Comp. Gen. B-281224, et al., Oct. 17, 2000, 99-1 CPD ¶ 19 (sustaining protest and recommending reconstitution of the evaluation team where fourteen of the sixteen evaluators held positions under consideration for outsourcing). To prevail in these cases, the protestor must demonstrate at least some likelihood that an evaluator's impaired objectivity prejudiced the overall evaluation. *See, e.g., IT Facility Servs.—Joint Venture*, Comp. Gen. B-285841, Oct. 17, 2000, 2000 CPD ¶ 177 (denying protest based upon a lack of prejudice where the scores assigned by the conflicted evaluator, the spouse of an agency employee whose position was under consideration for outsourcing, did not differ from those of the non-conflicted evaluators); *JWK Int'l Corp.*, 52 Fed. Cl. 650, 658 (2002) (denying protest for lack of prejudice where the protestor received the most favorable ratings under the area supervised by the allegedly conflicted evaluator).

166. *Aetna*, 95-2 CPD ¶ 129.

167. *See, e.g., KPMG Peat Marwick*, Comp. Gen. B-255224, Feb. 15, 1994, 94-1 CPD ¶ 111 (sustaining protest alleging that an OCI would arise where the awardee would be required to audit for the transferee the same assets that it had audited for the transferor in its capacity as an independent auditor).

168. Comp. Gen. B-293807.3, B-293807.4, Aug. 16, 2004, 2004 CPD ¶ 177.

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

by the Department of Housing and Urban Development (HUD).¹⁷³ To avoid a potential OCI, the awardee's owner had divested his interest in a closing agent whose performance the awardee would be required to evaluate under the resulting contract.¹⁷⁴ The GAO held that the terms of the sale, which required installment payments, gave rise to an "impaired objectivity" OCI.¹⁷⁵ Specifically, the GAO reasoned that the awardee would be in a position to affect the ability of the closing agent's new owner to make payments to the awardee's owner, for example, by failing to report poor performance, overlooking irregularities, and approving improper invoices.¹⁷⁶

Other cases have addressed the subtle distinction between a contractor evaluating its products or services and monitoring objective aspects of its own performance. The former scenario creates an OCI because the objectivity necessary to evaluate performance impartially may be impaired by a firm's interest in itself or the evaluated entity. These concerns may not be implicated, however, when a contractor is responsible for monitoring, rather than evaluating, its performance.¹⁷⁷ Thus, in *Computers Universal*, the GAO denied a protest alleging that an OCI arose where a contractor was required to develop a quality assurance program to monitor the scheduled maintenance that it was performing under another contract.¹⁷⁸ The GAO reasoned that the contractor would not be responsible for making "subjective judgments" as to what maintenance was required or how well the maintenance was being performed.¹⁷⁹

3. Other Business Relationships

Many types of business relationships could create an incentive for a contractor to provide biased advice, for example, by favoring the products or services of its customers. GAO case law, however, suggests that an OCI is most likely to arise where an outside business venture is related directly to the subject matter of the procurement and structured such that there is a real economic incentive for biased performance.¹⁸⁰

The *Washington Utility Group* case illustrates the types of business relationships that may give rise to an "impaired objectivity" OCI.¹⁸¹ There, the DoE

173. *Greenleaf Constr. Co., Inc.*, Comp. Gen. B-293105.18, B-293105.19, Jan. 17, 2006, 2006 CPD ¶ 19.

174. *Id.*

175. *Id.*

176. *Id.*

177. See *Computers Universal, Inc.*, Comp. Gen. B-292794, Nov. 18, 2003, 2003 CPD ¶ 201; *TDS, Inc.*, Comp. Gen. B-292674, Nov. 12, 2003, 2003 CPD ¶ 204, at 5 ("[T]here is nothing inherently improper in a firm's monitoring the activities of a team member . . . or its own activities . . .").

178. 2003 CPD ¶ 201.

179. *Id.* But see *TDS*, 2003 CPD ¶ 204, at 5 ("[W]e do not exclude the possibility in a different context of monitoring activities resulting in an impaired objectivity OCI . . .").

180. See *Wash. Utility Group*, Comp. Gen. B-266333, Jan. 29, 1996, 96-1 CPD ¶ 27; *Am. Mgmt. Sys., Inc.*, Comp. Gen. B-285654, Sept. 8, 2000, 2000 CPD ¶ 163; *RMG Sys., Ltd.*, Comp. Gen. B-281006, Dec. 18, 1998, 98-2 CPD ¶ 153.

181. 96-1 CPD ¶ 27.

had issued a solicitation for the preparation and issuance of requests for proposals for renewable energy projects.¹⁸² The agency excluded the protestor from the procurement based upon the following business relationships of a proposed subcontractor:

- The subcontractor was working with another firm to develop biowaste converter technology, a type of technology that would be considered for financial assistance under the program.¹⁸³
- The protestor's subcontractor was negotiating an agreement to assist utility companies to identify commercial renewable energy opportunities.¹⁸⁴

The GAO denied the protest, stating that these relationships created “numerous and substantial potentials for providing biased advice to DoE.”¹⁸⁵ The GAO emphasized the subcontractor's ability to provide advice that would have a direct economic impact on its financial interests.¹⁸⁶

Other GAO opinions have indicated that an OCI does not arise where an outside business relationship is unrelated to the subject matter of the procurement,¹⁸⁷ or, although related, does not create a sufficient economic incentive for biased performance.¹⁸⁸ *RMG Systems*, which involved a solicitation to perform safety inspections of motor carriers doing business with the Department of Defense (DoD), illustrates the latter point.¹⁸⁹ There, the protestor alleged that an OCI arose from the fact that the awardee's affiliate performed safety rating services for many of the DoD contractors that the awardee would be required to rate under the resulting contract.¹⁹⁰ The GAO denied the protest, reasoning that the structure of the affiliate's business relationships with carriers did not create a sufficient incentive for biased performance.¹⁹¹ The affiliate charged carriers a one-time fee of \$300 and did not possess an ongoing relationship with those carriers.¹⁹² Thus, the awardee had little incentive to approve or disapprove a carrier in hopes of obtaining additional business for its affiliate.¹⁹³ The GAO also noted that the one-time \$300 fee “simply does not appear to be an inducement of a magnitude that warrants assuming that [the awardee] would be influenced to proceed improperly under its contract.”¹⁹⁴

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. See *Am. Mgmt. Sys., Inc.*, Comp. Gen. B-285645, Sept. 8, 2000, 2000 CPD ¶ 163 (denying protest alleging an OCI where the awardee's strategic alliance with the agency's integration contractor did not apply to the instant procurement).

188. See *RMG Sys., Ltd.*, Comp. Gen. B-281006, Dec. 18, 1998, 98-2 CPD ¶ 153.

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

4. Performance Related to Agency Policies and Regulations

An obvious OCI arises where a contractor is required to provide advice regarding policies and regulations that may affect its own financial interests. In the recent *Alion* case, for example, the GAO found that an “impaired objectivity” OCI arose where the awardee—a manufacturer of spectrum-dependent products sold to government, commercial, and foreign customers—had received a contract for electromagnetic spectrum engineering support services.¹⁹⁵ Among other things, the contract required the awardee to make policy recommendations regarding use of the electromagnetic spectrum, to develop spectrum allocation strategies, to evaluate trends in national and international spectrum management policies, and to advocate DoD positions to industry personnel.¹⁹⁶ The GAO found that these tasks created an “impaired objectivity” OCI by requiring the awardee to make subjective judgments that could affect the sale or use of spectrum-dependent products manufactured by the awardee, those manufactured by its competitors, and those deployed by the awardee’s customers.¹⁹⁷

A more subtle OCI may arise where a contractor is tasked to perform services indirectly related to an agency’s policymaking or regulatory functions.¹⁹⁸ *Science Applications International Corp.* illustrates this scenario.¹⁹⁹ There, the protestor argued that an OCI would arise from the awardee’s simultaneous performance of a contract for environmental modeling and ownership of facilities that produce or handle hazardous material subject to environmental regulations.²⁰⁰ The Environmental Protection Agency (EPA) responded that an OCI did not arise because the procurement was for computer support and engineering services, rather than enforcement or regulatory advice.²⁰¹ The GAO rejected the EPA’s argument and sustained the protest, reasoning that the contract would involve the performance of services related to the assessment of environmental conditions, which ultimately could have a regulatory impact upon the awardee.²⁰²

IV. MITIGATING ORGANIZATIONAL CONFLICTS OF INTEREST

The purpose of an OCI mitigation plan is to eliminate, or at least minimize, the impact of an OCI without disqualifying the conflicted, or potentially conflicted, offeror from a procurement. Because it is difficult to mitigate an OCI

195. *Alion Sci. & Tech. Corp.*, Comp. Gen. B-297342, Jan. 9, 2006, 2006 CPD ¶ 1 [hereinafter *Alion I*]. For a similar case, see *Alion Sci. & Tech. Corp.*, Comp. Gen. B-297022.3, Jan. 9, 2006, 2006 CPD ¶ 2 [hereinafter *Alion II*].

196. *Alion I*, 2006 CPD ¶ 1.

197. *Id.*

198. *Sci. Applications Int’l Corp.*, Comp. Gen. B-293601, et al., May 3, 2004, 2004 CPD ¶ 96.

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

after it has affected a procurement, most mitigation strategies focus on addressing prospective OCIs before an actual conflict arises.

This part addresses strategies for mitigating the types of conflicts described in Part III. Section A focuses on “unequal access to information” OCIs, section B on “biased ground rules” OCIs, and section C on “impaired objectivity” OCIs.

A. *Unequal Access to Information*

“Unequal access to information” OCIs may be mitigated by creating a firewall between individuals or business units that possess nonpublic information and the team that will prepare proposals for related opportunities. Where this strategy is not possible, because the information already has been used or disclosed, the agency may mitigate an “unequal access to information” OCI by releasing the information to other offerors.

1. Firewalls

The most common strategy for mitigating “unequal access to information” OCIs is the implementation of a firewall—a combination of procedures and physical security that restricts the flow of confidential information between certain contractor business units and personnel. The purpose of these restrictions is to ensure that the personnel preparing a contractor’s proposal do not have access to nonpublic information that the contractor obtained in the performance of a related contract. This strategy mitigates the harm associated with “unequal access to information” OCIs because a contractor will not be placed at an unfair competitive advantage by information that could be used to enhance its proposal.

The recent *LEADS* case illustrates the components of a successful firewall strategy.²⁰³ There, the agency had issued a solicitation for “contracting personnel,” whose duties would include recommending and implementing acquisition strategies and performing various contract administration services.²⁰⁴ To minimize the risk that the nonpublic information gained by such personnel would create an unfair competitive advantage with regard to future procurements, the awardee proposed a mitigation plan that included the following elements:

- A continuous education program to apprise affected personnel of their obligations under the proposed plan;
- Written nondisclosure agreements;
- Document control strategies; and
- Semiannual audits to ensure compliance.²⁰⁵

203. The *LEADS* Corp., B-292465, Sept. 26, 2003, 2003 CPD ¶ 197.

204. *Id.*

205. *Id.*

The GAO held that these measures were sufficient to reduce the risk that “contracting personnel” would exchange sensitive information with personnel from other business units.²⁰⁶

A firewall that is not implemented and enforced, on the other hand, will not withstand scrutiny. Thus, in *Johnson Controls I*, the GAO sustained a protest alleging an “unequal access to information” OCI where there were several attempted and actual breaches of the awardee’s firewall.²⁰⁷ In particular, members of the awardee’s proposal team had contacted personnel from a firewalled business unit of the awardee’s subcontractor to obtain information that would be useful in preparing the awardee’s proposal.²⁰⁸ In addition, an employee of the subcontractor’s firewalled business unit had accompanied the subcontractor’s business manager on a site visit.²⁰⁹

2. Release of Information

Where the business unit responsible for preparing the offeror’s proposal already has received relevant nonpublic information, a firewall is unlikely to be a successful mitigation strategy.²¹⁰ In such cases, an agency may mitigate the resulting OCI by releasing such information to the other offerors, as an unfair competitive advantage cannot result from information that all offerors possess.²¹¹

The effectiveness of this strategy is illustrated by *Johnson Controls II*, in which the agency sought to mitigate the conflict that arose in *Johnson Controls I* by providing all offerors with access to the database of nonpublic information and by making available agency personnel to assist offerors in understanding and interpreting the contents of the database.²¹² The GAO held that this strategy was sufficient to mitigate the conflict.²¹³

The effectiveness of disclosure strategies is reinforced by cases in which the GAO has recommended release of the nonpublic information as a corrective measure.²¹⁴ For example, in *GIC Agricultural Services*, discussed above, the GAO sustained a protest alleging that an OCI arose from the awardee’s preparation of a project paper that was incorporated into a solicitation.²¹⁵ The GAO recommended that the agency mitigate the conflict by disseminating the project paper to other offerors.²¹⁶

206. *Id.*

207. *Johnson Controls World Servs., Inc., Comp. Gen. B-286714.2*, Feb. 13, 2001, 2001 CPD ¶ 20.

208. *Id.*

209. *Id.*

210. *Id.*

211. *See, e.g., Johnson Controls World Servs., Inc., Comp. Gen. B-286714.3*, Aug. 20, 2001, 2001 CPD ¶ 145.

212. *Id.* at 1–2.

213. *Id.*

214. *See, e.g., GIC Agric. Group*, 72 Comp. Gen. 14, 92-2 CPD ¶ 263 (1992); *see also KPMG Peat Marwick*, 73 Comp. Gen. 15, 93-2 CPD ¶ 272 (1993).

215. 92-2 CPD ¶ 263.

216. *Id.*; *see also KPMG Peat Marwick*, 93-2 CPD ¶ 272, at 2 (sustaining protest alleging that

B. Biased Ground Rules

No case has analyzed the mitigation of “biased ground rules” OCIs in detail. It is questionable, moreover, whether such an OCI could be mitigated once a contractor already has influenced the ground rules for a procurement. If a contractor knows, prior to preparing specifications or a work statement, that it will have the opportunity to compete in the resulting procurement, that contractor will have an incentive to draft specifications or a work statement that favors its own capabilities.²¹⁷ Once the specifications or work statement has been drafted, the OCI is established and the harm already has occurred.

On the other hand, several strategies may permit a contractor to avoid setting the ground rules for a procurement in which the contractor may wish to compete. For example, a contractor submitting a proposal for a contract that could require the preparation of specifications or work statements may request the agency consider a provision that would permit the contractor to be recused from task orders related to goods or services that the contractor may wish to supply. The mechanics of such recusal strategies would be similar to those discussed below in the context of mitigating “biased ground rules” OCIs. Alternatively, when it is unclear whether a solicitation will require the preparation of specifications or a work statement, a contractor may wish to include language in its proposal clarifying that such work will not be required. In these ways, a contractor may reserve the right not to perform services that could preclude it from participating in future, potentially more lucrative, opportunities.²¹⁸

C. Impaired Objectivity

“Impaired objectivity” OCIs often can be mitigated by recusal of the contractor that possesses the OCI,²¹⁹ with the most effective recusal strategies incorporating mechanisms for detecting the OCI in advance so that the work is not assigned to the conflicted contractor.²²⁰ Depending upon the circum-

the agency improperly excluded the protestor from a procurement based upon source selection information obtained through a FOIA request where the less onerous remedy of releasing the information to all offerors would correct the competitive advantage afforded to the protestor).

217. Aetna Gov't Health Plans, Found. Health Fed. Servs., Inc., Comp. Gen. B-254397, et al., July 27, 1995, 95-2 CPD ¶ 129.

218. Of course, a contractor must balance this advantage against the risk of submitting a proposal that may be deemed unacceptable as the result of taking exception to the requirements of the solicitation.

219. See, e.g., Calspan Corp., Comp. Gen. B-258441, Jan. 19, 1995, 95-1 CPD ¶ 28, at 6-8; Epoch Eng'g, Inc., Comp. Gen. B-276634, July 7, 1997, 97-2 CPD ¶ 72; Research Analysis & Maint., Inc., Comp. Gen. B-272261, B-272261.2, Sept. 18, 1996, 96-2 CPD ¶ 131; The LEADS Corp., Comp. Gen. B-292465, Sept. 26, 2003, 2003 CPD ¶ 197; Meridian Corp., Comp. Gen. B-246330, B-246330.4, Sept. 7, 1993, 93-2 CPD ¶ 129; SRS Techs., Comp. Gen. B-258170, B-258170.3, 1995 WL 75807 (C.G. Feb. 21, 1995); Deutsche Bank, Comp. Gen. B-289111, Dec. 12, 2001, 2001 CPD ¶ 210.

220. Compare *The LEADS Corp.*, 2003 CPD ¶ 197, and *Epoch Eng'g*, 97-2 CPD ¶ 72, with *Johnson Controls World Servs., Inc.*, Comp. Gen. B-286714.2, Feb. 13, 2001, 2001 CPD ¶ 20.

stances, other effective mitigation strategies may include agency oversight²²¹ and the standardization of evaluation procedures.²²² As a practical matter, the level of scrutiny applied to each of these strategies is likely to depend upon the dollar value of the goods or services affected by the OCI.²²³

1. Recusal

a) Subcontractor OCIs

Where an OCI exists at the subcontractor level, the most effective mitigation strategy may be performance of the affected work by the prime contractor or another subcontractor that does not possess an OCI. In *SC&A*, for example, the EPA issued a solicitation for oversight of certain uranium waste management programs and development of radiation cleanup standards for contaminated sites.²²⁴ One of the awardee's subcontractors was affiliated with an entity that provided radioactive cleanup services at sites where the EPA would apply the standards developed under the contract.²²⁵ The GAO held that the agency reasonably mitigated this conflict by ensuring that the affected tasks were performed by the awardee or another subcontractor.²²⁶

An effective mitigation plan should include measures to identify those tasks from which the conflicted subcontractor should be recused. Although this monitoring function frequently is performed by the agency,²²⁷ the GAO has approved mitigation strategies that require the prime contractor to monitor the assignment of tasks. This screening method was approved in *Epoch Engineering*, where the awardee was required to analyze the acoustics of submarines and surface ships although one of its subcontractors produced such vessels.²²⁸ The GAO denied the protest based upon a mitigation plan that required the awardee to monitor the tasks assigned to the conflicted subcontractor to ensure that it did not perform work that would create an OCI.²²⁹

221. *Deutsche Bank*, 2001 CPD ¶ 210; D.K. Shifflet & Assocs., Ltd., Comp. Gen. B-234251, May 2, 1989, 89-1 CPD ¶ 419.

222. *D.K. Shifflet*, 89-1 CPD ¶ 419, at 5.

223. *Compare SRS Techs.*, 1995 WL 75807, at *6 (suggesting that OCI concerns were not significant where the affected work represented \$150,000 of a \$2 billion procurement), *with* Aetna Gov't Health Plans, Found. Health Fed. Servs., Inc., Comp. Gen. B-254397, et al., July 27, 1995, 95-2 CPD ¶ 129 (suggesting that an OCI could not be mitigated in part due to the \$183 million value of procurement).

224. *SC&A Inc.*, Comp. Gen. B-270160, B-270160.2, Apr. 10, 1996, 96-1 CPD ¶ 197, at 1-2.

225. *Id.* at 3.

226. *Id.* at 9-10; *see also* Research Analysis & Maint., Inc., Comp. Gen. B-272261, B-272261.2, Sept. 18, 1996, 96-2 CPD ¶ 131 (denying protest where "careful assignment of work to the subcontractor" would mitigate "impaired objectivity" OCI).

227. *See* Meridian Corp., Comp. Gen. B-246330, B-246330.4, Sept. 7, 1993, 93-2 CPD ¶ 29, at 7 (denying protest where the agency had agreed to monitor work assignments to ensure that a subcontractor would not be assigned a task that posed a conflict).

228. *Epoch Eng'g, Inc.*, Comp. Gen. B-276634, July 7, 1997, 97-2 CPD ¶ 72.

229. *Id.* at 6.

b) *Prime Contractor OCIs*

“Impaired objectivity” OCIs at the prime contractor level typically are mitigated through performance of the affected work by a subcontractor or in some cases by the agency.

(1) *Subcontractor Performance*

A prime contractor may mitigate an “impaired objectivity” OCI by ensuring that a nonconflicted subcontractor performs the affected tasks. In addition, a firewall between the prime contractor and the subcontractor may be used to ensure that such work is not influenced by the conflicted prime contractor.²³⁰

The foregoing strategies were approved in *Deutsche Bank*, where the awardee of a contract to manage mortgages and loans for HUD was responsible for assessing several of those properties under a prior contract.²³¹ To mitigate this conflict, the prime contractor proposed to use a subcontractor to evaluate properties that the prime contractor had originally assessed.²³² As an additional layer of protection, the awardee created a firewall whereby the subcontractor would report to HUD directly regarding these properties to eliminate the possibility of influencing the subcontractor’s evaluations.²³³ The GAO held that the contracting officer reasonably determined that this strategy adequately mitigated the awardee’s OCI.²³⁴

The awardee in *Calspan Corp.* proposed a similar solution that required the firewalled subcontractor to report to an intermediary firm, rather than to the Government directly.²³⁵ Because the subcontractor also had a potential conflict with one aspect of the contract, the awardee further proposed performance of the remaining tasks by a “to-be-named” subcontractor or government personnel.²³⁶ The GAO found the plan acceptable despite the multiple layers of management and the possibility that agency employees may be required to perform certain work.²³⁷

(2) *Government Performance*

As suggested by *Calspan Corporation*, an “impaired objectivity” OCI also can be mitigated by performance of the affected work by agency personnel.²³⁸

230. A firewall, standing alone, is insufficient to mitigate an “impaired objectivity” OCI because measures that limit communications do not eliminate a contractor’s financial incentive to make judgments that benefit itself or its affiliates. See *ICF Inc.*, Comp. Gen. B-241372, Feb. 6, 1991, 91-1 CPD ¶ 124, at 3.

231. *Deutsche Bank*, Comp. Gen. B-289111, Dec. 12, 2001, 2001 CPD ¶ 210, at 2.

232. *Id.*

233. *Id.* at 4.

234. *Id.* at 5.

235. *Calspan Corp.*, Comp. Gen. B-258441, Jan. 19, 1995, 95-1 CPD ¶ 28.

236. *Id.*

237. *Id.*

238. *See id.*

This strategy has been approved by the GAO in a number of cases.²³⁹ In *LEADS*, for example, the agency had issued an order for support services that involved recommending contracting strategies, implementing such strategies, and monitoring and assessing contracts awarded.²⁴⁰ The awardee had an “impaired objectivity” OCI because it held two contracts that could be evaluated under the instant contract.²⁴¹ To mitigate this OCI, the awardee and the agency proposed, and the GAO found acceptable, the substitution of government contracting specialists for awardee personnel where an OCI otherwise may exist.²⁴²

c) *Limitations*

The GAO has suggested that recusal may not be a realistic mitigation strategy for all types of “impaired objectivity” OCIs. In *Alion I*, the GAO concluded that performance by a firewalled subcontractor was unlikely to mitigate an OCI that arose where the contract required the awardee—a manufacturer of spectrum-dependent technologies—to make policy recommendations regarding use of the electromagnetic spectrum, to develop spectrum allocation strategies, and to advocate DoD positions to industry personnel.²⁴³ The GAO reasoned that the required tasks were so interrelated that it would appear “unrealistic to conclude that activities which create OCIs for [the awardee] can be reasonably identified prior to performance, rationally segregated, and successfully performed by a ‘firewalled’ subcontractor.”²⁴⁴

Unlike the OCI at issue in *Alion I*, which pervaded virtually every aspect of the contract, most “impaired objectivity” OCIs are limited to discrete aspects of performance. For example, a contractor required to evaluate multiple products may possess a conflict only with respect to those products it manufactures. Similarly, a contractor required to evaluate proposals for multiple procurements may have a conflict only with respect to those opportunities for which it desires to compete. In these more common scenarios, it is possible to identify, segregate, and recuse the contractor from particular tasks that create a conflict. Under these circumstances, the reasoning of *Alion I* does not apply, and recusal remains an effective OCI mitigation strategy.

2. Agency Oversight

a) *Strategies*

Recusal is not always required to mitigate an “impaired objectivity” OCI. In *D.K. Shifflet & Associates*, the mitigation strategy relied upon a combination

239. See, e.g., *SRS Techs., Comp. Gen. B-258170, B-258170.3, 1995 WL 75807, at *7 (C.G. Feb. 21, 1995)* (denying protest where agency personnel would perform “limited tasks” that may create OCI for awardee).

240. *The LEADS Corp., B-292465, Sept. 26, 2003, 2003 CPD ¶ 197.*

241. *Id.*

242. *Id.*

243. *Alion Sci. & Tech. Corp., Comp. Gen. B-297342, Jan. 9, 2006, 2006 CPD ¶ 1; see also Alion Sci. & Tech. Corp., Comp. Gen. B-297022.3, Jan. 9, 2006, 2006 CPD ¶ 2.*

244. *Alion I, 2006 CPD ¶ 1.*

of agency oversight and the standardization of evaluation procedures.²⁴⁵ The OCI at issue in that case involved the awardee's evaluation of the effectiveness of communication plans that it had prepared under a separate contract.²⁴⁶ In defending the award, the agency contended that it had developed an evaluation system that required a significant degree of oversight.²⁴⁷ For example, project officers were to work closely with the awardee to review its work carefully, and agency personnel would be provided with the raw data upon which the awardee relied for its conclusions.²⁴⁸ The agency further argued that it had developed standardization procedures that would reduce the possibility of bias.²⁴⁹ For example, multiple offices within the agency would review all research designs, surveys, and questionnaires prepared by the awardee, with the Office of Management and Budget to provide a final review and clearance for those procedures.²⁵⁰ The GAO denied the protest, reasoning that the award was reasonable "based on the numerous safeguards built into the process to prevent [the awardee] from manipulating the design of the survey and interpretation of the evaluation results" and the fact that multiple entities would be reviewing the awardee's proposed surveys and questionnaires for bias.²⁵¹

b) Limitations

While *D.K. Shifflet* suggests that mitigating an "impaired objectivity" OCI may not always require recusal, the case is exceptional given the degree of oversight and standardization present. In a number of cases, the GAO has rejected less comprehensive oversight strategies. *J&E Associates, Inc.*, for example, involved a solicitation for services to advise service members in the selection of educational programs and courses, to refer such individuals to appropriate institutions, and to verify the tuition statements received from those institutions.²⁵² The protestor argued that the solicitation unreasonably failed to exclude educational institutions from the procurement, since such institutions would have an incentive to refer service members to their own classes and would be required to review their own tuition statements.²⁵³ The Army defended the award based upon its strategy of overseeing the contract to identify OCIs.²⁵⁴ The GAO sustained the protest, however, finding the Army's generalized promise of oversight to be inadequate:

²⁴⁵ *D.K. Shifflet & Assocs., Ltd.*, Comp. Gen. B-234251, May 2, 1989, 89-1 CPD ¶ 419, at 5.

²⁴⁶ *Id.* at 1.

²⁴⁷ *Id.* at 4.

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.* at 5.

²⁵² *J&E Assocs., Inc.*, Comp. Gen. B-278771, Mar. 12, 1998, 98-1 CPD ¶ 77.

²⁵³ *Id.*

²⁵⁴ *Id.*

Mere oversight of such a contractor's activities would, at best, only identify specific instances of apparent conflicts of interest as they arise (*e.g.*, when a service member is advised to enroll in a course with the contractor's institution). Such oversight would do nothing to avoid, mitigate, or neutralize such conflicts. Specifically, the contract would not prohibit the contractor from advising a service member to take a course with the contractor's institution. Nor does the agency state that it intends to object to such advice or enrollment or otherwise state any guidelines identifying under what conditions such objections might be made.²⁵⁵

The GAO ultimately recommended that the Army determine how to address these OCI issues prior to continuing with the procurement.²⁵⁶ The GAO suggested that the Army may wish to consider prohibiting the awardee from reviewing its own billing statements or advising service members to enroll in their institutions.²⁵⁷

The *J&E Associates* case teaches that strategies relying on agency oversight are unlikely to be effective unless they include specific procedures for identifying OCIs and mechanisms to resolve such OCIs as they arise. In many cases, some form of recusal will be the most effective, and perhaps the only, reasonable method for accomplishing the latter objective. This point is illustrated by the GAO's informal suggestion, in both *D.K. Shifflet* and *J&E Associates*, that the agency consider a recusal procedure.

V. CONCLUSIONS

This article has analyzed the regulatory framework that governs the identification and mitigation of OCIs. Although quite complex, these regulations may be distilled into the following general principles.

A. Identifying OCIs

- OCI analysis is a fundamental component of sound business strategy. Performing certain types of contracts increases the probability that a contractor will be precluded from performing future, potentially more lucrative, work. Future preclusion is most likely where a contract requires the contractor to (1) obtain nonpublic information, (2) draft specifications or statements of work, (3) provide SETA services, or (4) agree to an OCI preclusion clause.
- In order to determine whether an OCI exists with regard to a particular procurement, one should ask the following questions:
 - Has the contractor, or any of its affiliates or subcontractors, obtained from the Government, under a separate contract, information that other contractors do not possess and that places the contractor at an unfair competitive advantage in the instant procurement?

255. *Id.*

256. *Id.*

257. *Id.*

- Has the contractor, or any of its affiliates or subcontractors, provided to the Government or a prime contractor, under a separate contract, services that establish the ground rules for the instant procurement?
- Does the contractor possess, as the result of other contracts or business relationships, an incentive to provide, whether intentionally or unintentionally, biased advice under the instant contract?
- In asking these questions, one must consider both whether past activities have “tainted” the instant procurement and whether the contemplated performance is likely to create a future conflict. Either type of OCI may result in exclusion from award.
- An affirmative answer to any of the foregoing questions does not necessarily indicate that there will be an OCI. Rather, before concluding that an OCI is likely to exist, a contractor must determine whether any of the exceptions set forth in FAR 9.505 et seq. may apply to the contemplated performance.
- A contractor must strictly comply with any solicitation provision or contract clause that requires a contractor to certify that it does not possess an OCI or to disclose any information that could give rise to an OCI. The provision of false or misleading information or the knowing failure to provide relevant information may result in severe penalties, ranging from termination of the contract for default to prosecution under the False Claims Act.

B. *Mitigating OCIs*

- An adequate OCI mitigation plan may permit a contractor to participate in an opportunity from which it otherwise would be excluded.
- The purpose of an OCI mitigation plan is to minimize the impact of prospective OCIs by establishing strategies to resolve anticipated conflicts before they affect the procurement process. Mitigation plans do not permit a contractor to participate in a procurement that already has been tainted by an OCI.
- Ad hoc mitigation strategies are unlikely to withstand scrutiny.
- The contents of an adequate mitigation plan depend significantly upon the type of OCI sought to be mitigated.
 - The most successful strategies for mitigating an “unequal access to information” OCI typically involve creating a firewall that provides for the organizational, physical, and electronic separation of personnel that possess relevant nonpublic information from personnel participating in the proposal effort. To be effective, such a firewall must be enforced and should be combined with supplemental efforts, including education, nondisclosure agreements, document control, and audits.
 - The best strategies for mitigating an “impaired objectivity” OCI typically involve recusal from the affected tasks. If an OCI exists at the subcontractor level, the affected services may be performed by the prime contractor or another subcontractor. If an OCI exists at the

prime contractor level, the affected services may be performed by a subcontractor or the Government. In the latter scenario, the subcontractor's work should be provided directly to the Government or to a third party that does not possess an OCI.

- The risk of "biased ground rules" OCIs is best mitigated by making an informed decision regarding whether to perform services that may set the ground rules for future procurements and, if appropriate, reserving the right to be recused from tasks that could influence procurements in which a contractor wishes to compete.