

Identifying Latent Organizational Conflicts of Interest

Significant improvements can be achieved by employing a systematic approach that shifts the primary effort involved in OCI analysis to the pre-solicitation phase.

ORGANIZATIONAL CONFLICTS OF INTEREST (OCIs) THAT ARISE

when contractors are required to perform multiple inconsistent roles under one or more contracts pose a perpetual trap for the unwary acquisition professional. The challenge is further complicated by the increased “contracting out” of advisory and technical services and a trend toward consolidation within the defense industry. Recently, agencies and industry alike have hailed a new line of Government Accountability Office (GAO) decisions that breathe new life into the “mitigation plan”¹ as a workable strategy for addressing these conflicts.²

Unfortunately, the mitigation plan is by no means a “magic bullet” capable of neutralizing all OCI-related threats. Some conflicts will resist mitigation due to their magnitude³ and some mitigation plans are inadequate to manage all OCIs presented.⁴ However, mitigation plans often fail for a far more basic reason, i.e., the government’s failure to fully identify the underlying OCI to be mitigated in the first place.⁵ These so-called “latent OCIs”—those the government ignores or overlooks in its evaluation—continue to be the basis for many sustained protests.⁶ Even where this ultimate disaster is averted, latent OCIs often remain hidden until the eve of award, confronting agencies with the dilemma of rejecting an otherwise successful proposal, or accepting makeshift workarounds to keep an acquisition on track.

All roads lead to one conclusion: regardless of the method used to resolve OCIs, their early and accurate detection is more fundamental than ever to a well-executed acquisition.⁷

About the Author

SARAH M. MCWILLIAMS is an attorney-advisor with the U.S. Army CECOM Life Cycle Management Command, Office of General Counsel (Fort Belvoir Division); and a member of the Virginia and District of Columbia Bars. She received her A.B. and J.D. degrees from the College of William and Mary, where she served on the editorial board of the William and Mary Law Review. Views expressed in this article are those of the author and do not necessarily represent the official position of the U.S. Army. Send comments to cm@ncmahq.org.

A

Step Program

BY SARAH M. MCWILLIAMS

This article presents practical approaches that federal acquisition professionals—as “first responders” to any OCI crisis—may employ to root out the latent OCI at an early date, when prospects for resolution are optimal. The article summarizes guidance applicable to OCIs, describes common OCI scenarios, identifies the organizational barriers that mask OCIs, and proposes a cradle-to-grave protocol to breach these barriers and promote timely OCI detection.

What Are OCIs and When Do They Occur?

Understanding what constitutes an OCI in any given situation is a challenging task; a few simple principles, however, warrant particular emphasis. Simply described, OCIs fall into two broad groups⁸—informational and bias-type.

Informational OCIs (referred to by GAO as “unequal access OCIs”⁹) are the easiest to spot, the most straightforward to understand, and the easiest to resolve. These exist whenever one contractor will, in the performance of its contract obligations, receive access to nonpublic information—usually in the form of another contractor’s proprietary data.¹⁰

Bias-type OCIs (referred to by GAO as “biased ground rules” and “impaired objectivity OCIs”¹¹) are conceptually more difficult, elusive to detect, and challenging to remediate.¹² Essentially, these arise whenever a single contractor—due to a combination of past, present, or proposed contractual obligations—would be required to undertake multiple, inconsistent roles, and where the result would compromise a contractor’s judgment or confer an unfair advantage.¹³ Examples of bias-type OCIs include requiring a contractor to:

- Oversee, evaluate, review, inspect, comment on, or troubleshoot deliverables or other elements of its own or an affiliate’s performance under a separate contract;
- Provide recommendations on modifications that it or its affiliates propose under a separate contract;
- Prepare or recommend test/inspection procedures that will be applied to itself or its affiliates under a separate contract;
- Draft statements of work, purchase descriptions, performance/design specifications, or cost/workload estimates for new procurement actions, on which the contractor or its affiliates would be likely competitors; or
- Provide input or analysis into policy decisions, or strategic selection of technological approaches to be emphasized or favored in future acquisitions, where the contractor is active in the industries affected.

A point implicit—but perhaps insufficiently understood—is that bias-type OCIs can arise based on a combination of past, present, and/or future events. Examples of potential bias-type OCIs exist in each of the following situations:

- Contractor A simultaneously performs two contracts, one of which requires it to assist in the evaluation of deliverables that it submits under the second.
- Contractor B receives award of a competed services contract, which requires performance of a statement of work that Contractor B drafted under an earlier, now-expired contract.
- Contractor C receives award of a contract to assist in the drafting of technical specifications, which will be used in a future competitive acquisition for which Contractor C is a likely source.

In determining whether a bias-type OCI exists, the interests of an individual contractor, and its corporate or other legal affiliates, must be aggregated.¹⁴ This rule has vast consequences in today’s business environment, where once-independent federal contractors are increasingly consolidated under a single conglomerate umbrella.

Why Are OCIs Hard to Detect?

Informational OCIs are relatively easy to find because they are established by virtue of a single fact: most commonly, one contractor’s access to another’s proprietary information. Bias-type OCIs, however, elude detection for two reasons. First, the existence of bias-type OCIs generally hinges not on a discrete piece of information, but on a combination of many facts, each seemingly insignificant. Second, agency structures may discourage the dispersion of critical information among separate user, contracting, and legal segments. Consider, for example, a typical scenario that may arise as an agency lays the groundwork for a major competitive hardware acquisition. The contracting officer has performed market research indicating that Contractor A is likely to submit a competitive proposal. The user activity knows that in formulating the hardware specification, the agency had extensive input from Contractor B on technical issues. The agency’s legal advisor—based on his participation in an unrelated project—knows that Contractor B’s parent corporation recently purchased the assets of Contractor A, so that the two are now a single legal entity by virtue of affiliation. This information, taken together, clearly indicates a potential OCI if Contractor A is selected to provide the hardware. Unfortunately, that OCI will remain undiscovered unless the separate pieces of information known to individual organizational segments are integrated before a single decision-maker. Too often, this occurs in the final review process, if at all.

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What Is the Solution?

Faced with barriers that inhibit the free flow of information, it falls to the contracting officer to reach out to all organizational elements and orchestrate a centralized, structured fact-finding process. Two points are critical to success:

1. The contracting officer performs best by ensuring interchange of information and management of the OCI analysis at a macro level; and by rejecting the temptation to become bogged down in minutiae. Instead, a “triage” approach should be used to spot possible problems and pass them off to legal advisors and other stakeholders for micro review.
2. It is impossible to overestimate the importance of initiating an OCI review at the earliest stages of acquisition planning for a proposed effort. This not only lightens the burden in the critical phase leading up to contract award, but maximizes the agency’s potential for nipping OCIs in the bud, when options for resolution are at their most flexible.

The 12-step, “cradle to grave” process outlined in the pages to come, and in **Figure 1** on page 14, is built with these principles in mind and provides a useful model for agency acquisition professionals to use in conducting OCI reviews. The steps are designed to be carried out sequentially, beginning with the pre-solicitation phase (Steps 1–8), and continuing through evaluation/pre-award (Steps 9–11) into contract administration (Step 12).

Acquisition Planning/Pre-solicitation Phase

Step 1: Screen Actions to Determine Degree of Risk

Not every acquisition is at equal risk to generate OCIs, and OCI reviews can quickly absorb scarce resources. Therefore, the first step upon receiving a proposed effort for solicitation is to conduct a cursory review to assess the degree of OCI-related risk involved. The following acquisitions, especially, should be flagged as posing high risk to generate OCIs:

- High dollar and complex acquisitions,
- Acquisitions for advisory/technical services,
- Acquisitions for delivery of hardware and systems, and
- Acquisitions originating from organizations that use a significant embedded contractor workforce for performance of technical and management support.

A high-risk action should be thoroughly subjected to the review process set forth in Steps 2–12; for lower-risk actions, a more ad-hoc or informal approach may be justified (although acquisition personnel should remain alert for OCI indicators).

Step 2: Review Proposed Action for Informational OCIs

Once a high-risk action is identified, the next step is to screen the work statement of the proposed effort for informational

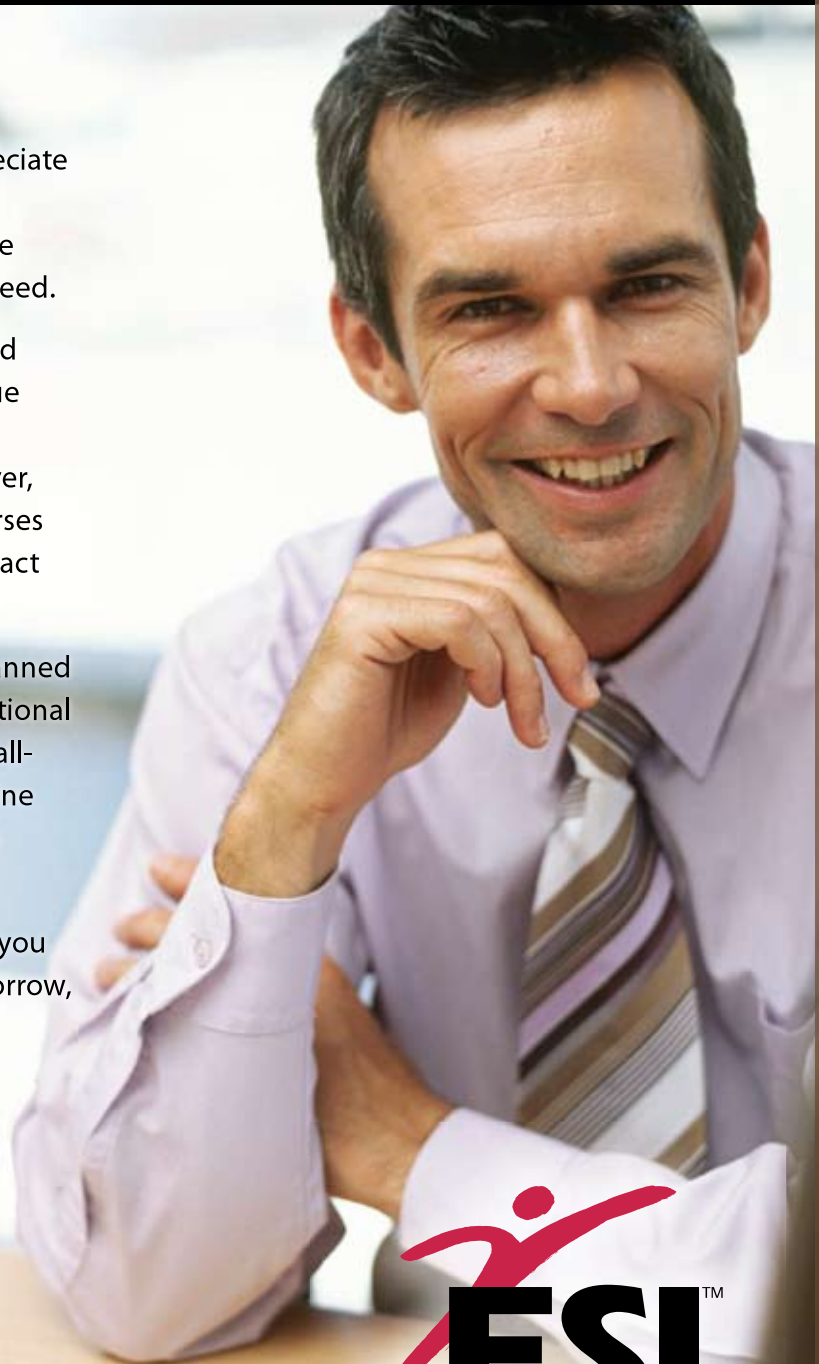
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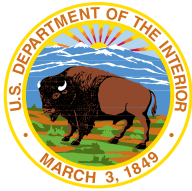
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IDENTIFYING LATENT ORGANIZATIONAL CONFLICTS OF INTEREST: A 12-STEP PROGRAM



Figure 1. A 12-Step Program for Early Detection of OCIs



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OCIs. Fortunately, these are the easiest OCIs to identify because they arise principally from the single fact of one contractor receiving access to another's proprietary information. Unfortunately, work statements prepared by user organizations may not explicitly state such a requirement; so contracting officers should scrutinize, and appropriately follow up, indicators of information transfer. These include requirements to perform acquisition support, processing or review of submittals or data packages, and technical analysis. Any verified instances of informational OCIs should be noted for further analysis.

Step 3: Review History of Related Actions

Next, query the user activity (perhaps by means of a written questionnaire) to identify past or ongoing contracts related to the proposed effort that may indicate a potential bias-type OCI. That review should elicit, at a minimum, information responsive to the following concerns:

- Will the solicitation for the proposed effort incorporate a statement of work, design, purchase description, or specification prepared under another contract, or has another contractor provided input or recommendations that influenced preparation of these items?
- Did any contractors provide advice or assistance on matters (i.e., testing or performance criteria, or selection of general technology) that influenced performance standards or requirements for the proposed effort?
- Have other contractors participated in the generation of estimates (workload data, cost estimates) relevant to the proposed effort?
- Will the employees of any other contractor assist in the source selection conducted in conjunction with awarding the proposed effort?
- Will employees of any other contractor assist in the testing, evaluating, inspecting, or processing of deliverables submitted to the government in connection with the proposed effort?

List all contractors (including affiliates) responsible for performing any current or past related effort identified through the analysis outlined above.

Step 4: Review Sources for Proposed Effort

After researching past and current related efforts, review market research to develop a list of likely sources for the proposed effort (including affiliates); and compare that list against the one generated in Step 3. Any matches between the two lists indicates a high and imminent potential that award of the proposed effort will generate a mature bias-type OCI. Legal review should therefore be sought on an im-

mediate and urgent basis so that a plan of action can be developed before final pre-solicitation planning.

Step 5: Review Performance Requirements for Proposed Effort

The next step involves review of the work statement for the proposed effort to screen for functions possibly indicating future potential for bias-type OCIs. The following questions, at a minimum, should be explored:

- Will performance involve review, analysis, inspection, troubleshooting, or evaluation of work, data submittals, products, modification requests, or deliverables submitted under another contract or solicitation?
- Will performance involve providing analysis and advice that may influence the government's choice of technical approach for any contract or group of contracts?
- Will the contractor provide recommendations or advisory support to influence policy-making functions?
- Will the contractor assist or support acquisition or contracting functions?
- Will the contractor have any input into the contents or technical requirements of specifications or statements of work for any other contract(s)?
- Will the contractor be required to perform testing or evaluation services, and will these services be performed as to deliverables under any other contract(s)?

If the proposed effort is determined to contain any OCI-sensitive functions, note those functions for additional review under Step 7.

Step 6: Review Related Future Actions

After reviewing the performance requirements of the proposed effort and current and past related efforts, query the user activity to identify projected future acquisitions that may relate to the proposed effort. Some of these may be follow-on efforts to past and current related contracts identified in Step 3. Some questions to ask include the following:

- If the proposed effort requires drafting of specifications, is a production contract incorporating those specifications likely to follow?
- If the proposed effort is for the award of a production contract, will there be a separate contract awarded to perform technical assistance for deliverables?
- Will there be a separate contract awarded for testing or inspection of deliverables or work performed under the proposed contract effort?

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- Will acquisition support for the proposed effort be performed by another contractor?

Step 7: Review Sources for Future Actions

If the review in Step 6 identified future acquisitions related to the proposed effort, identify likely sources (including affiliates) for those acquisitions and compare them against the list of sources developed for the proposed effort in Step 4. If comparison yields any matches, or even if there is a reasonable likelihood of a later overlap, the contracting officer should note that there is a high risk that the proposed effort may generate OCIs as future acquisition efforts mature; and should refer it for legal review.

Step 8: Final Pre-solicitation Planning

Step 8 draws together the data performed in Steps 1–7, which should be completed well before a solicitation is finalized. Before any solicitation release, the contracting officer should:

- Use the data elicited in Steps 1–7 to assure full analysis of OCI issues:
 - If review at Step 2 identified a potential informational OCI, has the agency verified a need for access? If so, the solicitation should be revised to require information security safeguards, including nondisclosure agreements, as an element of performance.
 - If review at Steps 3–4 resulted in a determination that the proposed effort involved a potential bias-type OCI due to its relationship to a current or past contract, has the agency considered whether the acquisition strategy may be structured to preclude the identified OCI altogether? Examples of preventive measures might include competing the requirement under Federal Supply Schedules or other vehicles where a problem source is not a potential offeror; or revising a statement of work to delete OCI-sensitive performance requirements entirely.
 - If review at Steps 6–7 resulted in a finding that the proposed effort might generate a potential bias-type OCI with respect to future acquisitions, has the agency considered including a restrictive clause in the solicitation for the proposed effort?¹⁵ Such a clause may effectively avoid an OCI by barring the awardee of the proposed effort from eligibility for certain future related acquisitions.
- Document fully and in detail any “substantive issues concerning potential OCIs” identified in Steps 1–7 as well as any measures instituted to address and resolve them, and include required higher level approvals.¹⁶ GAO regularly sustains protests where pre-award documentation does not exhaustively identify all potential OCIs.¹⁷

- Ensure the solicitation issued for the proposed effort contains the following coverage:

- Proposal instructions requiring offerors to identify all corporate and other legal affiliates; and to provide any information they wish the agency to consider in conducting the OCI analysis required by FAR Subpart 9.5.
- Restrictive clauses deemed suitable to avoid OCIs based on related future acquisitions (see Step 9).
- Notice of the requirement for the successful awardee to execute nondisclosure agreements with all affected contractors, in the event that performance of the proposed effort may require the awardee to access other contractors’ proprietary information (see Step 2).¹⁸

Evaluation and Pre-award Phase

Step 9: Update Analysis Based on Evaluation

While any major OCI potential should already have been identified before solicitation release in Steps 1–8, the evaluation phase is also critical in the OCI review process. Work here should consist mainly of updating, verifying, and confirming information based on proposals received. Before the final identification of a competitive range and an apparent successful awardee, the contracting officer should:

- Update the information and analysis elicited under Steps 3–4 to reflect new awards to any offerors for the proposed effort, and offers submitted by unanticipated sources.
- Review any solicitation amendments under Steps 5–6 to determine whether they add OCI-sensitive performance elements not identified earlier.
- In the event that award to any offeror in line for award would generate an OCI, determine whether the OCI can be successfully avoided or mitigated, seeking offeror input as required.¹⁹

Step 10: Final Pre-award Review

Once an apparent successful awardee is tentatively selected, but before finalizing award, the contracting officer should:

- Review all OCI analysis conducted to date to ensure that it identifies all OCIs involved;
- Ensure that a workable strategy exists to “avoid, neutralize, or mitigate” significant OCIs identified,²⁰ or that a waiver has been requested;²¹ and

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- If award will be denied to an apparent successful awardee due to OCI concerns, seek that offeror's input before finalizing a determination.²²

Step 11: Final Pre-award Documentation

Before finalizing award, ensure all required documentation is present.

- Update pre-solicitation OCI documentation (Step 8) to address any substantive OCI issues that are identified during the evaluation process, and their disposition;
- Document that mitigation plans adequately address all identified OCIs with detailed supporting rationale;
- If identified OCIs are not fully mitigated, include a copy of the approved waiver; and
- Include all higher-level approvals required at the acquisition planning stage.

Administration Phase

Step 12: Post-award Follow-up

While the bulk of the OCI review is a pre-award function, the agency should be alert to any events after award that may generate new OCIs.

- Modifications that alter performance obligations should be reviewed under Steps 2–8 to identify and address any increased OCI potential presented;
- New contractor affiliations should be carefully monitored, and any resulting OCIs appropriately addressed in considering novation and name-change requests submitted after a contract is awarded;²³ and
- Items that could generate OCIs in future acquisitions should be flagged for appropriate attention when those actions enter the planning phase and the procurement cycle repeats itself.

Conclusion

OCIs present significant challenges, and their successful management depends on early and accurate detection. Significant improvements can be achieved by employing a systematic approach that shifts the primary effort involved in OCI analysis to the pre-solicitation phase. In this manner, agencies can spot the latent OCI at a distance, thereby reducing risk, promoting defensible outcomes, and avoiding last-minute crises that delay the award of critical requirements. **CM**

Endnotes

3. Roughly described, a mitigation plan is a protocol offered by a contractor to manage known, identified OCIs in the context of a specific procurement. The regulatory underpinning for OCI mitigation plans is contained in *Federal Acquisition Regulation* (FAR) 9.504(a)(1), which requires contracting officers to "avoid, neutralize, or mitigate" significant potential OCIs before contract award.

4. Once of questionable utility, well-crafted mitigation plans are now recognized by the U.S. Government Accountability Office (GAO) as appropriate to managing all but the most pervasive OCIs. The only prerequisite is that "meaningful consideration" first be given to identifying and assessing associated OCI potential. See *Business Consulting Associates, LLC*, B-299758.2, 2007 Comp. Gen. LEXIS 133 at 9 (Aug. 1, 2007).

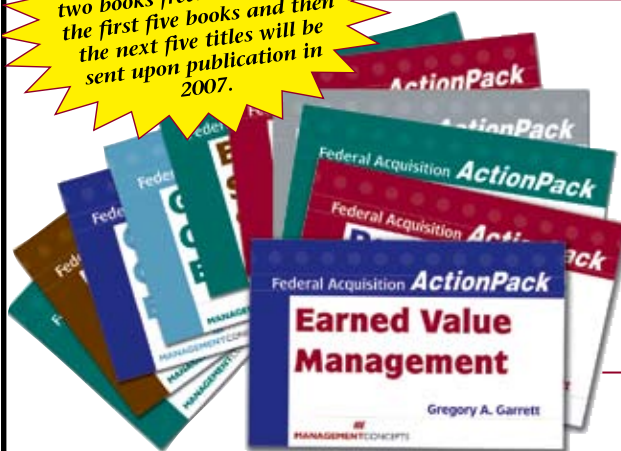
For purposes of mitigation plans, GAO has always distinguished between informational and bias-type OCIs. For "informational" OCIs, GAO has consistently held that mitigation can be successfully achieved through the relatively simple convention of a "firewall" providing for "organizational, physical, and electronic separation" of OCI-sensitive information. See *The LEADS Corp.*, B-292465, 2003 CPD Para. 197 at 12 (Sep. 26, 2003). Historically, however, GAO has been far less hospitable to mitigation protocols designed to address bias-type OCIs, where the potential conflict involves the contractor's ability to make objective judgments. In these cases, GAO has held firewalls "virtually irrelevant" to achieving mitigation. *Id.*; see also *Aetna Government Health Plans, Inc.; Foundation Health Federal Services, Inc.*, B-276634.15, B-276634.16, B-276634.17, B-276634.18, B-276634.19, 95-2 CPD Para. 129 at 31 (Jul. 27, 1995) and *Jones-Hill Joint Venture*, B-286194.4, B-286194.5, B-286194.6, 2001 CPD Para. 194 (Dec. 5, 2001), *aff'd* on reconsideration, *Department of the Navy—Reconsideration*, B-286194.7, 2002 CPD Para. 76 (May 29, 2002). Additionally, several key decisions addressing bias-type OCIs earlier cast doubt on the viability of other mitigation measures as effective strategies for addressing bias-type OCIs. See, e.g., *Johnson Controls World Services, Inc.*, B-286714.2, 2001 CPD Para. 20 (Feb. 13, 2001); *PURVIS Systems, Inc.*, B-293807.3, B-293807.4, 2004 CPD Para. 177 (Aug. 16, 2004); and *Science Applications International Corp.*, B-293601, B-293601.2, B-293601.3, 2004 CPD Para. 96 (May 3, 2004) (hereinafter "SAIC I"). In these decisions, GAO determined that acceptance of mitigation plans was not "reasonable," citing concerns as to the thoroughness of the proposed plans or the plans' potential to handicap contract performance. The past year, however, has seen what may be an increased degree of flexibility on the part of GAO to entertain less-than-perfect solutions in mitigation of bias-type OCIs. GAO continues to apply the same "reasonableness" standard it has always cited in analyzing mitigation plans proposed. Compare *Business Consulting Associates*, supra, 2007 Comp. Gen. LEXIS 133 at 9 (Aug. 1, 2007), with *Aetna*, supra, 95-2 CPD Para. 129 at 32 (Jul. 27, 1995), the result has been a dramatically decreased sustain rate in this area. See *Alion Science and Technology Corp.*, B-297022.4, B-297022.5, 2006 CPD para.146 (Sep. 26, 2006) (hereinafter "Alion II"); and *Overlook Systems Technologies, Inc.*, B-298099.4, B-298099.5, 2006 CPD Para. 185 (Nov. 28, 2006). Whether this trend will be reversed to any extent by the Court of Federal Claims' recent decision in *Axiom Resource*

- Management, Inc. v. United States*, No. 07-532C (slip op. dated Sep. 28, 2007) is open to question. Nevertheless, it is clear that mitigation plans will continue to play an increasingly prominent role in industry efforts to manage OCIs, and in the government's efforts to balance ethical and practical considerations in public procurement.
5. See, e.g., *Aetna*, supra, 95-2 CPD Para. 129 at 32–33.
 6. See, e.g., *Alion Science and Technology Corp.*, B-297342, 2006 CPD Para. 2 (Jan. 9, 2006) (hereinafter "Alion I").
 7. Examples of protests sustained because of the government's failure to thoroughly identify significant OCIs include *Alion I*, supra; *Greenleaf Construction Co., Inc.*, B-293105.18, B-293105.19, 2006 CPD Para. 19 (Jan. 17, 2006); *Celadon Laboratories, Inc.*, B-298533, 2006 CPD Para. 158 (Nov. 1, 2006); *PURVIS Systems, Inc.*, B-293807.3, B-293807.4, 2004 CPD Para. 177 (Aug. 16, 2004); *Jones-Hill Joint Venture*, B-286194.4, B-286194.5, B-286194.6, 2001 CPD Para. 194 (Dec. 5, 2001), aff'd, *Department of the Navy—Reconsideration*, B-286194.7, 2002 CPD Para. 76 (May 29, 2002); *Johnson Controls World Services, Inc.*, B-286714.2, 2001 CPD Para. 20 (Feb. 13, 2001). In contrast, once an agency has thoroughly and exhaustively performed analysis to identify all possible OCIs, GAO is inclined to give the agency a certain amount of latitude in determining what measures may effectively mitigate those OCIs. Compare "Alion I" with "Alion II," supra; and SAIC I, supra, with *Science Applications International Corp.*, B-293601.5, 2004 Comp. Gen. LEXIS 196 (Sep. 21, 2003).
 8. See note 3, supra.
 9. The FAR itself emphasizes the need for early detection of OCIs. See FAR 9504(a)(1) stating that "contracting officers shall analyze planned acquisitions" in order to "identify and evaluate potential conflicts of interests as early in the acquisition process as possible."
 10. See *Aetna*, supra, 95-2 CPD Para. 129 at 24–25.
 11. Id.
 12. Id.
 13. See note 1, supra.
 14. See FAR 9.505; and *Deutsche Bank*, B-289111, 2001 CPD Para. 210 (Dec. 12, 2001) at 2.
 15. See *Aetna*, supra, 95-2 CPD Para. 129 at 25. (Jul. 27, 1995).
 16. FAR 9.507 authorizes restrictive clauses in appropriate circumstances.
 17. See FAR 9.504(c), 9.506(b).
 18. See *Alion I*, supra, 2006 CPD Para. 2.
 19. See FAR 9.505-4.
 20. See FAR 9.504(e).
 21. See FAR 9.504(1)(2).
 22. See FAR 9.503.
 23. See FAR 9.504 (e).
 24. See FAR 42.1204(d).

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