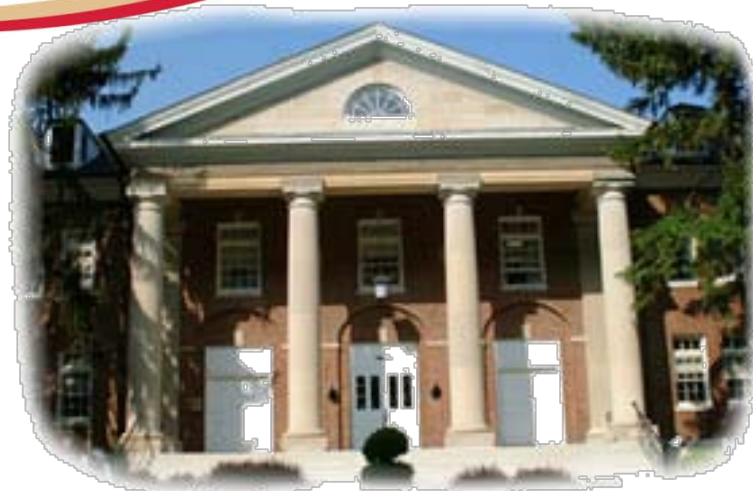




Defense Acquisition University



Organizational Conflicts of Interest

Presented by:
Richard Fowler (703)805-5809

Agenda

- What is an Organizational Conflict of Interest
- Potential Problem
- Policy
- Proposed Rule
- FAR v. DFARS

What is it?

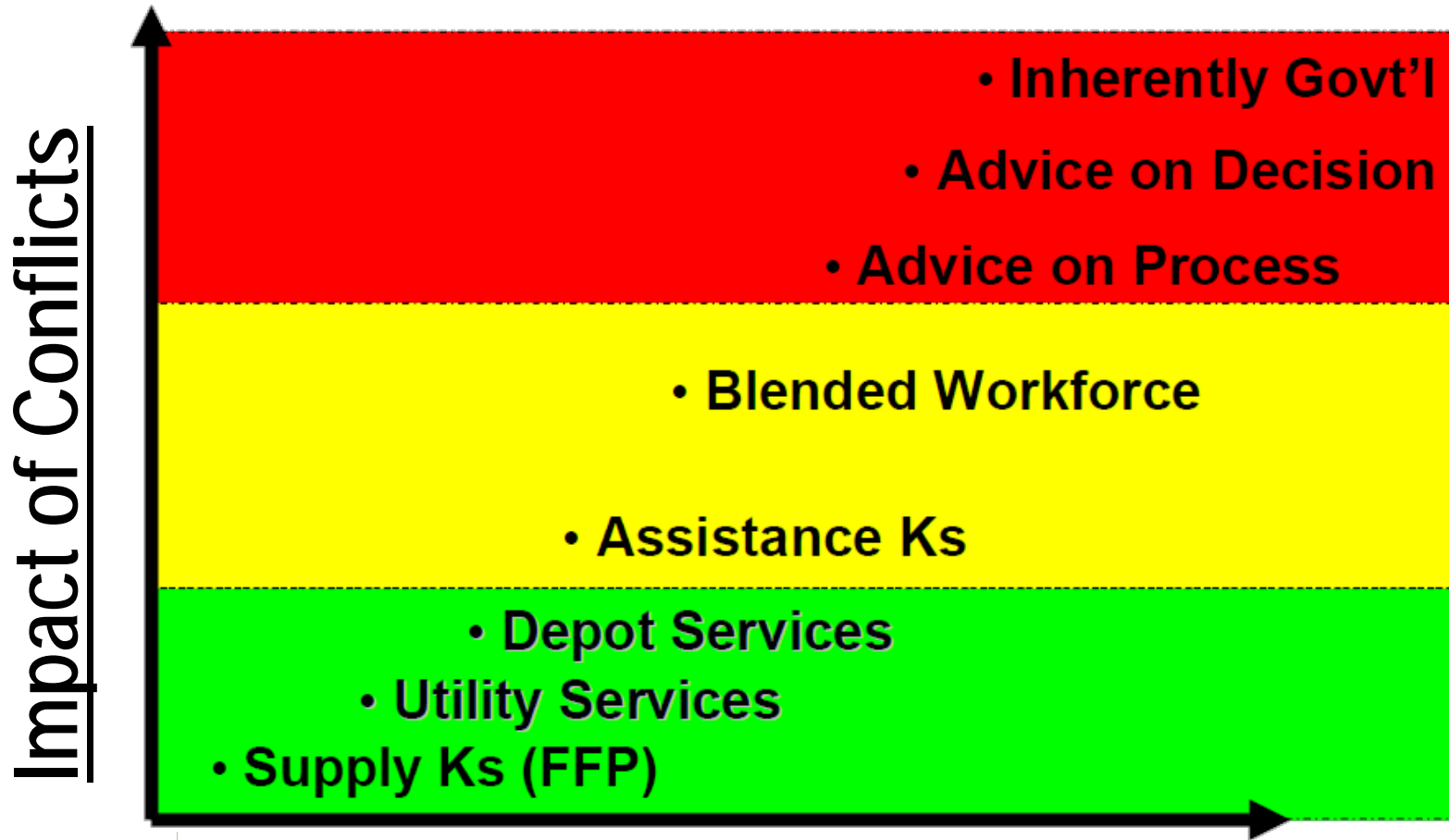
FAR Sub part 9.505 general rules. ...Each individual contracting situation should be examined on the basis of its particular facts and the nature of the proposed contract. The exercise of common sense, good judgment, and sound discretion is required in both the decision on whether a significant potential conflict exists and ... the development of an appropriate means for resolving it.

What is it?

- FAR sub parts 9.505-1 through 9.505-4 prescribe limitations on contracting as the means of avoiding, neutralizing, or mitigating organizational conflicts of interest
- 9.505-1 Providing systems engineering and technical direction
- 9.505-2 Preparing specifications or work statements
- 9.505-3 Providing evaluation services
- 9.505-4 Obtaining access to proprietary information

Why is Conflict of Interest Important?

Contractor/Employee Conflict Risk



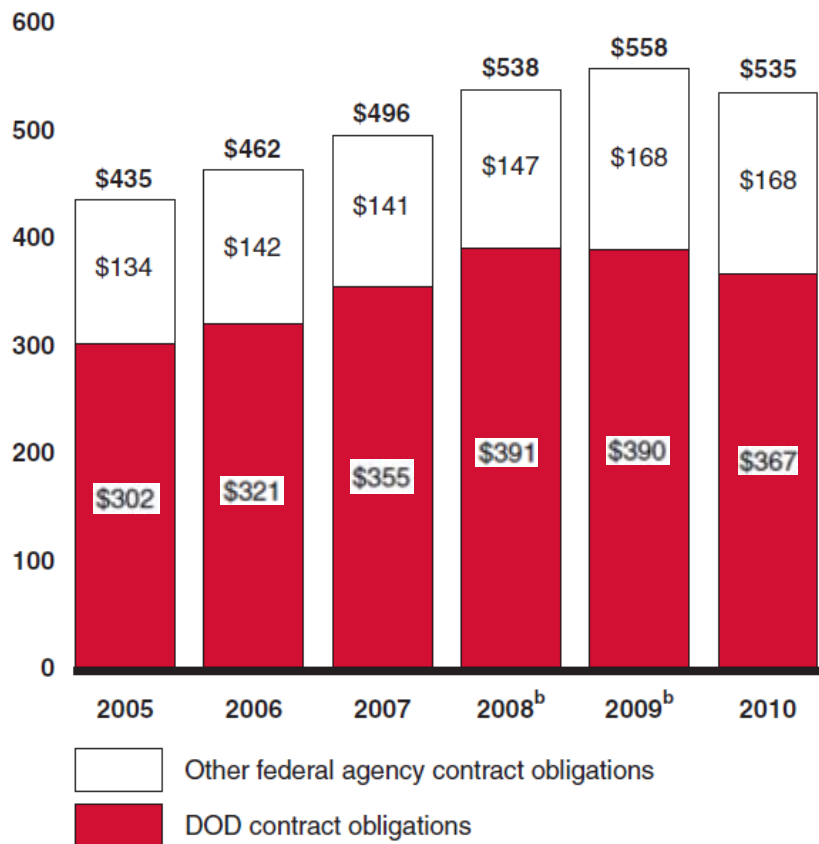
Potential Problem?

- The FY 2012 DoD budget requests a total of \$670.9 billion
- The total FY 2012 budget for the federal government is \$3.729 trillion

Prime Award Spending Data – Contracts

Figure 2: DOD and Other Federal Agency Contract Obligations Related to Actions over \$25,000 for Fiscal Years 2005 through 2010^a

Dollars in billions



GAO-11-331T, February 1, 2011

**CONTRACT AUDITS
 Role in Helping Ensure Effective Oversight
 and Reducing Improper Payments**

Source: GAO analysis of unaudited obligations data from the Federal Procurement Data System.

^aContract obligations are adjusted for inflation using the fiscal year 2010 Gross Domestic Price Index.

^bDOD's reported obligations in fiscal year 2008 and 2009 reflected an approximately \$13.9 billion adjustment to correct an error made in fiscal year 2008.

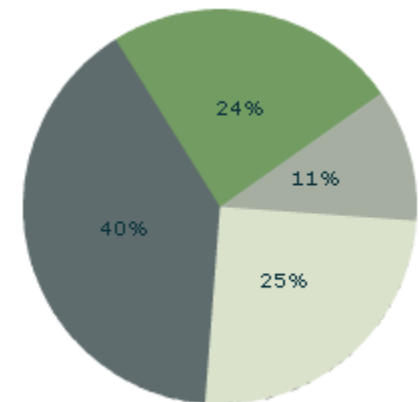


Prime Award Spending Data – Contracts

Agency	Total Dollars ▼
Department of Defense	\$366.7B
Department of Energy	\$25.7B
Department of Health and Human Services	\$19.0B
General Services Administration	\$16.9B
National Aeronautics and Space Administration	\$16.0B
Department of Veterans Affairs	\$16.0B
Department of Homeland Security	\$13.5B
Department of State	\$8.1B
United States Agency for International Development	\$6.4B
Department of Justice	\$6.4B

Federal Spending FY 2010

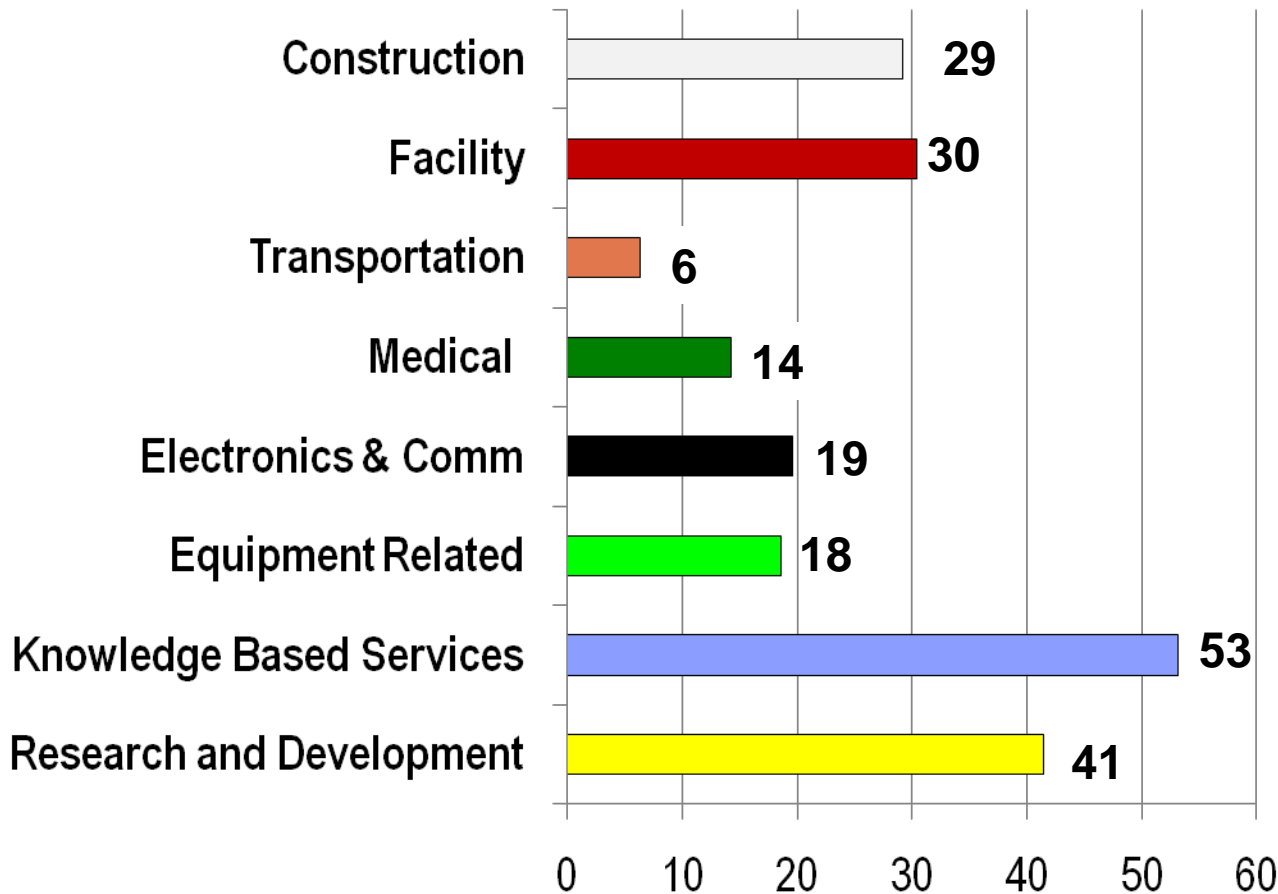
Contracts	\$534.8B
Grants	\$554.5B
Direct Payments	\$880.9B
Insurance	\$237.8B
Loans and Guarantees	\$346.0M
Others	\$2.1B



DOD FY 09 Dollars Spent

DoD Total Contract Spend: \$ 370 Billion

DOD Service Categories Spend in Dollars



Equipment Contracts:
\$158 Billion 43%

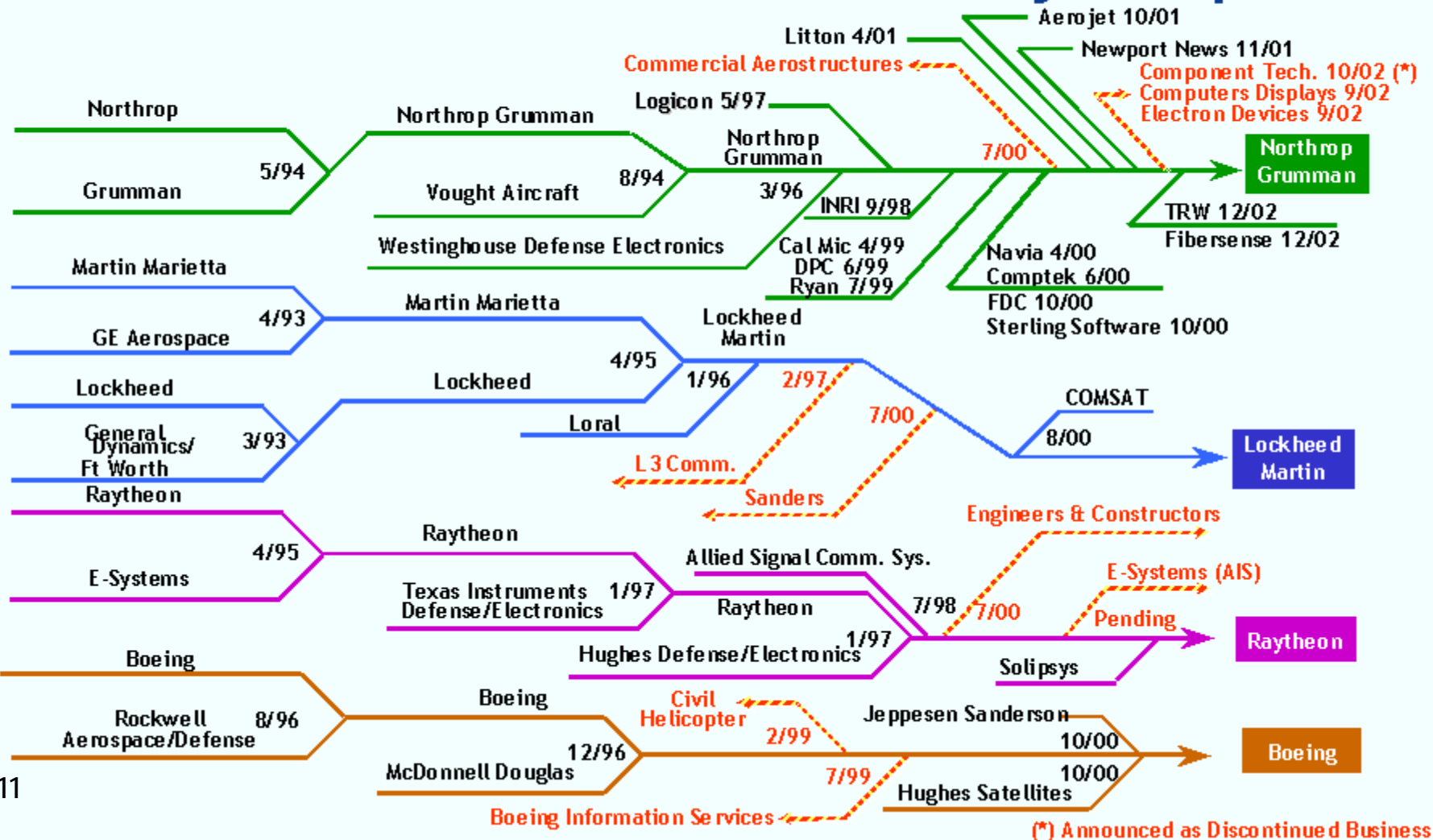
Service Contracts
\$ 212 Billion 57%

Changes in Government and Industry

- Industry consolidation
- Agencies' growing reliance on contractors for services, especially where the contractor is tasked with providing advice to the Government
- The use of multiple-award task- and delivery-order contracts, which permit large amounts of work to be awarded among a limited pool of contractors

Why is Conflict of Interest Important?

Consolidation at Tier I Level Nearly Complete



Policy

- Prevent harm to the Integrity of the Competitive Acquisition Process
- Prevent harm to the Government's Business Interests

Organizational Conflicts of Interest

Proposed rule

DoD, GSA, and NASA are proposing to amend the Federal Acquisition Regulation (FAR) to provide revised regulatory coverage on organizational conflicts of interest (OCIs), provide additional coverage regarding contractor access to nonpublic information, and add related provisions and clauses.

Types of Conflicts of Interest

Current

- Biased Ground Rules
- Unequal Access to Information
- Impaired Objectivity

Proposed

- Conflicts that arise out of judgmental work performed by a contractor
- Unequal access to competitively sensitive information

Personal Conflicts of Interest—Government

Executive Order 12674

- Section 101. Principles of Ethical Conduct.
 - (b) Financial conflicts of interests
 - (c) Engaging in financial transactions using nonpublic Government information
 - (d) Soliciting or accepting gifts from outside sources
 - (f) Making unauthorized commitments or promises
 - (g) Not use public office for private gain.

Personal Conflicts of Interest—Government

Executive Order 12674

- (h) Act impartially and not give preferential treatment to any private organization or individual.
- (i) Protect and conserve Federal property and not use it for other than authorized activities.
- (j) Not engage in outside employment or activities, including seeking or negotiating for employment, that conflict with official Government duties and responsibilities.
- (k) Disclose waste, fraud, abuse, and corruption to appropriate authorities.

Proposed Rule

- The proposed rule separates OCIs into two categories:
- Conflicts that arise out of judgmental work performed by a contractor and
- Unequal access to competitively sensitive information

Placement of Coverage in the FAR

- Councils propose to relocate the FAR coverage on OCIs from FAR subpart 9.5 to a new FAR subpart 3.12
- Access to Nonpublic Information placed in FAR Part 4

New Definitions

- *Organizational Conflict of Interest*: refined to reflect the two types of situations that give rise to OCI concerns
- *Address*: to provide a summary term for the various approaches for dealing with the risks and preventing the harms that may be caused by OCIs
- *Marketing consultant*: removed as unnecessary because the proposed coverage is expanded beyond contracts for these entities

Consolidated Discussion of Contracting Officer Responsibilities

- Proposed FAR 3.1206 provides a consolidated discussion of contracting officer responsibilities
- Proposed FAR 3.1206–2 addresses OCI-related responsibilities associated with presolicitation activities

Consolidated Discussion of Contracting Officer Responsibilities

- Proposed FAR section 3.1206–3 provides guidance related to evaluating information from the offeror and other sources
- FAR section 3.1206–4 addresses OCI-related responsibilities associated with contract award
- FAR section 3.1206–5 addresses task- and delivery-order contracts

Other Remarks

- This rule continues to apply to contracts with both profit and non-profit organizations
- This rule does not exclude the acquisition of commercial items
- This rule applies to contract modifications that add additional work
- This rule adds a requirement at FAR 7.105(b)(18) to consider OCIs when preparing acquisition plans

FAR 52.203–XX, Notice of Potential Organizational Conflict of Interest

- Contracting officer determined that the OCIs may result from contract performance
- Offeror to disclose all relevant information regarding any OCI (including active limitations on future contracting), and to represent, to the best of its knowledge and belief, that it has disclosed all relevant information regarding any OCI

FAR 52.203–XX, Notice of Potential Organizational Conflict of Interest

- Requires an offeror to explain the actions it intends to use to address any OCI, *e.g., submit a mitigation plan if it believes an OCI may exist or agree to a limitation on future contracting*
- Identifies the clauses that may be included in the resultant contract, depending upon the manner in which the OCI is addressed

FAR 52.203–ZZ, Disclosure of Organizational Conflict of Interest After Contract Award

- Requires the contractor to make a prompt and full disclosure of any new or newly discovered OCI

FAR 52.203–YY, Mitigation of Organizational Conflicts of Interest

- Incorporates the mitigation plan in the contract
- Addresses changes to the mitigation plan
- Addresses noncompliance with the clause or with the mitigation plan
- Requires flow down of the clause

FAR 52.203–YZ, Limitation of Future Contracting

- Used when the contracting officer decides to address a potential conflict of interest through a limitation on future contracting.
- The contracting officer must fill in the nature of the limitation on future contractor activities and the length of any such limitation

Access to Nonpublic Information — FAR Part 4

- A definition of “nonpublic information” to clearly identify the scope of information covered
- Coverage of contractor access to nonpublic information during the course of contract performance
- Specific coverage for situations involving unfair competitive advantage based on unequal access to nonpublic information
- Appropriate solicitation provisions and contract clauses

Access to Nonpublic Information

- “Nonpublic information” includes information belonging to either the Government or a third party that is not generally made publicly available
- Contractors **should** be contractually obligated to protect all nonpublic information to which they obtain access by means of contract performance

Unequal Access to Nonpublic Information

- *Policy:* contracting officers must take action to resolve situations where one or more offerors hold an unfair competitive advantage
- *General Principles:* FAR subsection 4.402–3 contains general principles for determining when access to nonpublic information requires resolution

Unequal Access to Nonpublic Information

- *Contracting Officer Responsibilities FAR* subsection 4.402– 4 contains details covering contracting officer responsibilities to collect information regarding unequal access to nonpublic information. If aware that an offeror may have unequal access to nonpublic information, the rule requires that the contracting officer conduct an analysis and to determine whether resolution is required

FAR 52.204–XX, Access to Nonpublic Information

- Requires that contractors receiving access to nonpublic information must limit the use of such nonpublic information to the purposes specified in the contract

Alternate I to the Access Clause

- Requires the contractor, if requested by the contracting officer, to negotiate and sign an agreement identical, in all material respects, to the restrictions on use and disclosure of nonpublic information in the Access clause, with each entity that has provided the Government nonpublic information

Alternate II to the Access Clause

- Requires the contractor, if requested by the contracting officer, to execute a Government-approved agreement with any party to whose facilities or nonpublic information it is given access, restricting the contractor's use of the nonpublic information to performance of the contract

FAR 52.204–YY, Release of Nonpublic Information

- Contractor is to obtain the consent of the original owners of third-party nonpublic information for the Government to release such information to those contractors who need access to it for purposes of contract performance and who have signed up to the conditions of the Access clause.

Differences Between Proposed FAR Rule and Proposed DFARS Rule

- Providing an analysis of the risks posed by OCIs, and the two types of harm that can come from them
 - 1) Harm to the integrity of the competitive acquisition system and
 - 2) Harm to the Government's business interests
- Recognizing that harm to the integrity of the competitive acquisition system affects not only the Government, but also other vendors

Differences Between Proposed FAR Rule and Proposed DFARS Rule

The Proposed FAR Rule would require contractors to disclose relevant information regarding OCIs only if the KO makes an initial determination that an OCI may occur and the KO has included required clauses in the solicitation

Differences Between Proposed FAR Rule and Proposed DFARS Rule

The proposed DFARS Rule would require contractors to disclose information related to OCIs to include:

- 1) Informing the KO of any “potential conflicts of interest” even before preparing its offer and
- 2) Describing any work performed on contracts or subcontracts within the past five years that is associated with the offer it plans to submit

Similarities of Proposed FAR Rule to Proposed DFARS Rule

- Reorganizing and move OCI coverage to FAR part 3
- Clarifying key terms and provide more detailed guidance regarding how contracting officers should identify and address OCIs
- Providing standard OCI clauses
- Addressing unique policy issues and contracting officer responsibilities associated with OCIs

What does case law say?

- Alion Sci. & Tech. Corp., B-297342, Jan. 9, 2006, 2006 CPD ¶ __ (protest is sustained where record does not support the agency's conclusion that awardee's conflicts of interest will be minimal, with limited impact on quality of contract performance, where awardee, a manufacturer of spectrum-dependent products, will perform analysis and evaluation and exercise subjective judgment regarding formulation of policies and regulations that may affect the sale or use of spectrum-dependent products manufactured by the awardee or the awardee's competitors, and those deployed by the awardee's customers).
- Alion Sci. & Tech. Corp., B-297022.3, Jan. 9, 2006, 2006 CPD ¶ __ (protest is sustained where record does not support the agency's assessment regarding the "maximum potential" for organizational conflicts of interest to occur during awardee's contract performance where awardee, a manufacturer of spectrum-dependent products, will perform various activities requiring subjective judgments that may affect the sales or use of spectrum-dependent products of the awardee, the awardee's competitors, and the awardee's customers).

What does case law say?

- Greenleaf Constr. Co., Inc., B-293105.18, B-293105.19, Jan. 17, 2006, 2006 CPD ¶ __ (protest is sustained where Department of Housing and Urban Development failed to reasonably consider or evaluate potential organizational conflict of interest arising due to the fact that the owner of the management and marketing (M&M) services contractor in Ohio will be receiving payments from the owner of the closing agent contractor for Ohio, the activities of which the M&M contractor will oversee).
- PURVIS Sys., Inc., B-293807.3, B-293807.4, Aug. 16, 2004, 2004 CPD ¶ 177 (protest is sustained where agency failed to reasonably consider or evaluate potential conflicts of interest that would be created by awardee's involvement in evaluating the performance of undersea warfare systems that had been manufactured by the awardee or by the awardee's competitors, even if such evaluations were not "part of of the procurement process").

What does case law say?

- Science Applications Int'l Corp., B-293601 et al., May 3, 2004, 2004 CPD ¶ 96 (where agency acknowledges that awardee's substantial involvement in activities subject to environmental regulations could create conflicts of interest in performing certain tasks contemplated by the solicitation's scope of work, and where agency gave no consideration to the impact of such potential conflicts in making award, agency failed to comply with Federal Acquisition Regulation requirement that it "identify and evaluate potential organizational conflicts of interest").
- Science Applications Int'l Corp., B-293601.5, Sept. 21, 2004, 2004 CPD ¶ 201 (where agency previously failed to give any consideration to potential conflicts of interest between awardee's performance of contract requirements and awardee's involvement in environmentally-regulated activities, agency's corrective actions adequately remedy prior procurement flaws where agency has reviewed additional information regarding the ongoing, environmentally-regulated activities of the awardee, has considered that information in the context of the scope of work reasonably contemplated under the contract, and has procedures in place for the agency's independent assessment of potential conflicts between each task order's requirements and the awardee's ongoing activities).

What does case law say?

- Deutsche Bank, B-289111, Dec. 12, 2001, 2001 CPD ¶ 210 (protest is denied where, in a procurement for loan support services, record showed that the agency reasonably determined that the awardee's proposal adequately mitigated any conflict of interest through the use of a subcontractor to perform loan servicing on those properties where awardee had previously been involved in handling administrative matters for the agency related to the same properties).
- Ktech Corp., B-285330, B-285330.2, Aug. 17, 2002, 2002 CPD ¶ 77 (conflict was found where the record showed that the awardee's subcontractor may have obtained and used information obtained from the protester as a result of the subcontractor's oversight role on the protester's predecessor contract; protest sustained where the agency did not consider or mitigate this conflict).

What does case law say?

- Lucent Tech. World Servs. Inc., B-295462, Mar. 2, 2005, 2005 CPD ¶ 55 (protest challenging protester's exclusion from participation in a procurement denied where the contracting officer reasonably determined that the protester had an organizational conflict of interest arising from its preparation of technical specification used by the agency in the solicitation).
- LEADS Corp., B-292465, Sept. 26, 2003, 2003 CPD ¶ 197 (agency reasonably determined not to reject the quotation from the vendor selected to receive an order for augmentation of the agency's procurement staff on the basis of organizational conflicts of interest where any potential conflict can be avoided by the careful assignment of work under the contract to ensure that the vendor's contracting specialists do not handle matters (procurements or contracts) in which the vendor has an interest).
- Decisions are available on GAO's Website: www.gao.gov.