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[Proposed Rules]
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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 2, 3, 4, 7, 9, 11, 12, 13, 14, 15, 16, 18, 37, 42, 52,
and 53

[FAR Case 2011-001; Docket 2011-0001; Sequence 1]
RIN 9000-AL82

Federal Acquisition Regulation; Organizational Conflicts of
Interest

AGENCIES: Department of Defense (DoD), General Services Administration
(GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule.

SUMMARY: 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. Section 841 of the Duncan Hunter
National Defense Authorization Act for Fiscal Year 2009 required a
review of the FAR coverage on OCIs. This proposed rule was developed as
a result of a review conducted in accordance with Section 841 by the
Civilian Agency Acquisition Council and the Defense Acquisition
Regulations Council (the Councils) and the Office of Federal
Procurement Policy (OFPP), in consultation with the Office of
Government Ethics (OGE). This proposed rule was preceded by an Advance
Notice of Proposed Rulemaking (ANPR), under FAR Case 2007-018 (73 FR
15962), to gather comments from the public with regard to whether and
how to improve the FAR coverage on OCIs.

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DATES: Interested parties should submit written comments to the
Regulatory Secretariat at one of the addressees shown below on or
before June 27, 2011 to be considered in the formation of the final
rule.

ADDRESSES: Submit comments in response to FAR case 2011-001 by any of

the following methods:

Regulations.gov: <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by inputting ``FAR Case 2011-001'' under the heading ``Enter Keyword or ID'' and selecting ``Search.'' Select the link ``Submit a Comment'' that corresponds with ``FAR Case 2011-001.'' Follow the instructions provided at the ``Submit a Comment'' screen. Please include your name, company name (if any), and ``FAR Case 2011-001'' on your attached document.

Fax: (202) 501-4067.

Mail: General Services Administration, Regulatory Secretariat (MVCB), Attn: Hada Flowers, 1275 First Street, NE., 7th Floor, Washington, DC 20417.

Instructions: Please submit comments only and cite FAR Case 2011-001, in all correspondence related to this case. All comments received will be posted without change to <http://www.regulations.gov>, including any personal and/or business confidential information provided.

FOR FURTHER INFORMATION CONTACT: Mr. Anthony Robinson, Procurement Analyst, at (202) 501-2658, for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501-4755. Please cite FAR Case 2011-001.

SUPPLEMENTARY INFORMATION:

I. Background

A. Current FAR Subpart 9.5, Organizational and Consultant Conflicts of Interest

The integrity of the Federal acquisition process is protected, in part, by OCI rules currently found in FAR subpart 9.5. These rules are designed to help the Government in identifying and addressing circumstances in which a Government contractor may be unable to render impartial assistance or advice to the Government or might have an unfair competitive advantage based on unequal access to information or prior involvement in setting the ground rules for an acquisition. FAR 9.504 directs contracting agencies to ``identify and evaluate potential OCIs as early in the acquisition process as possible'' and ``avoid, neutralize, or mitigate significant potential conflicts before contract award.''

FAR coverage on OCIs has remained largely unchanged since the initial publication of the FAR in 1984. The FAR coverage was adapted from an appendix to the Defense Acquisition Regulation, which dated back to the 1960s.

B. Origins of This Case

1. Changes in Government and Industry. In recent years, a number of trends in acquisition and industry have led to the increased potential for OCIs, including--

Industry consolidation;

Agencies' growing reliance on contractors for services, especially where the contractor is tasked with providing advice to the Government; and

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.

2. SARA Panel. In its 2007 report, the Acquisition Advisory Panel (established pursuant to section 1423 of the Services Acquisition Reform Act of 2003) (SARA Panel) concluded that the FAR does not adequately address "the range of possible conflicts that can arise in modern Government contracting." The SARA Panel observed that the FAR provides no detailed guidance to contracting officers regarding how they should detect and mitigate actual and potential OCIs and called for improved guidance, to possibly include a standard OCI clause or set of clauses. See Report of the Acquisition Advisory Panel (January 2007), available at https://www.acquisition.gov/comp/aap/24102_GSA.pdf, at pp. 405-407, 417, 422.

3. Duncan Hunter National Defense Authorization Act for Fiscal Year 2009. Congress subsequently directed, in Section 841 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (Pub. L. 110-417), a review of the conflicts of interest provisions in the FAR. Section 841 required that appropriate revisions, including contract clauses, be developed as necessary, pursuant to that review.

C. Evaluation of FAR Subpart 9.5

The Councils have worked with OFPP and consulted with OGE to evaluate FAR subpart 9.5. This evaluation was informed, in part, by the following:

1. A review of recent case law and opinions from the Government Accountability Office (GAO) and Court of Federal Claims (CoFC). Collectively, this review indicated that, when addressing OCIs, agencies do not always perform adequate, case-by-case, fact-specific analysis.

2. The findings of the SARA Panel, which concluded that contracting officers and agencies have encountered difficulties implementing appropriate OCI avoidance and mitigation measures.

3. Responses to a 2008 ANPR which sought comment on whether the current guidance on OCIs adequately addresses the current needs of the acquisition community or whether providing standard provisions and/or clauses might be beneficial. The ten respondents to the ANPR offered a range of views, from the complete rewrite of FAR subpart 9.5, to maintaining the current coverage largely as is. Several respondents encouraged the Councils to adopt already-existing agency-level regulations, while two respondents stated that the regulations should consider providing Governmentwide standard clauses that allow agencies to add more stringent requirements, if needed, on a procurement-specific basis. One respondent suggested that any change to FAR subpart 9.5 should be consistent with existing case law on OCIs, as developed by GAO and the CoFC. Copies of all responses may be obtained at <http://www.regulations.gov>.

4. Public comments provided in response to Defense Federal Acquisition Regulation Supplement (DFARS) Proposed Rule 2009-D015, published in the Federal Register on April 22, 2010 (see 75 FR 20954-20965). DFARS Proposed Rule 2009-D015 was designed to implement section 207 of the Weapons System Acquisition Reform Act of 2009 (WSARA) (Pub. L. 111-23), which requires DoD to revise the DFARS to provide uniform guidance and tighten existing rules regarding OCIs concerning major defense acquisition programs. To implement section 207 in the most effective manner possible, DoD concluded that the basic principles, policies, and practices governing OCIs must be clearly understood. DoD

reviewed the FAR coverage and issued the proposed rule that clarified the prescribed general rules and procedures for identifying, evaluating, and resolving OCIs. As with the ANPR, respondents to the DFARS proposed rule provided a range of views regarding the proposed coverage.

II. Overview

Based on their review, the Councils and OFPP reached the following main conclusions regarding OCIs:

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A. Opportunity for Public Comment on Two Alternative OCI Frameworks

Because the proposed DFARS rule (2009-D015) not only addressed the requirements of the WSARA but also contained a comprehensive OCI framework, the public now has a unique opportunity to comment on two distinct options for revising the regulatory coverage on OCIs. To this end, this proposed rule diverges substantially from the framework presented in the proposed DFARS rule, and we are seeking specific feedback regarding which course of action, or whether some combination of the two, is preferable.

B. OCI Case Law

The fundamental approach provided in the proposed DFARS rule is sound and provides a regulatory framework that thoroughly implements the established OCI case law. However, the fact that the OCI regulations are not primarily based in statute means that revisions to the regulations need not conform with existing case law. Rather, substantive departures from the case law should be considered if such changes will produce an OCI framework that is clearer, easier to implement, and better suited to protecting the interests of the Government.

C. Similarities of Proposed FAR Rule to Proposed DFARS Rule

Both this proposed FAR rule and the proposed DFARS rule propose coverage that recognizes the present-day challenges faced by acquisition officials in identifying and addressing OCIs in the procurement of products and services to satisfy agency requirements. In particular, both this proposed rule and the proposed DFARS framework--

1. Reorganize and move OCI coverage to FAR part 3, so that OCIs are addressed along with related issues, namely other business practices and personal conflicts of interest (on which final coverage is pending under FAR Case 2008-025);

2. Clarify key terms and provide more detailed guidance regarding how contracting officers should identify and address OCIs while emphasizing that each OCI case may be unique and therefore must be approached with thoughtful consideration;

3. Provide standard OCI clauses, coupled with the opportunity for contracting officers to tailor the clauses as appropriate for particular circumstances; and

4. Address unique policy issues and contracting officer responsibilities associated with OCIs arising in the context of task- and delivery-order contracts.

D. Differences Between Proposed FAR Rule and Proposed DFARS Rule

The coverage in this proposed rule differs from that provided by the framework presented in the DFARS rule by--

1. Providing an analysis of the risks posed by OCIs, and the two types of harm that can come from them, i.e.,--

Harm to the integrity of the competitive acquisition system; and

Harm to the Government's business interests;

2. Recognizing that harm to the integrity of the competitive acquisition system affects not only the Government, but also other vendors, in addition to damaging the public trust in the acquisition system. The risk of such harm must be substantially reduced or eliminated. In contrast, the risk of harm to the Government's business interests may sometimes be assessed as an acceptable performance risk;

3. Moving coverage of unequal access to nonpublic information and the requirement for resolving any resulting unfair competitive advantage out of the domain of OCIs and treating it separately in FAR part 4. Competitive integrity issues caused by unequal access to nonpublic information are often unrelated to OCIs. Therefore, treating this topic independently will allow for more targeted coverage that properly addresses the specific concerns involved in such cases; and

4. Adding broad coverage regarding contractor access to nonpublic information, to provide a more detailed framework in which to address the topic of unequal access to nonpublic information.

III. Proposed OCI Coverage

The Councils propose the following FAR coverage on OCIs:

A. Placement of Coverage in the FAR

As noted above, OCIs are currently addressed in FAR subpart 9.5, which deals with contractor qualifications. While the ability to provide impartial advice and assistance is an important qualification of a Government contractor, the larger issues that underlie efforts to identify and address OCIs are more directly associated with some of the business practices issues discussed in FAR part 3. For this reason, the Councils propose to relocate the FAR coverage on OCIs from FAR subpart 9.5 to a new FAR subpart 3.12.

B. Changes To Provide Greater Clarity of Purpose and Policy

This proposed rule makes the following changes to clarify OCI policy:

1. Definitions

a. Organizational Conflict of Interest. The proposed FAR rule establishes a clearer definition for ``organizational conflict of interest'' (which is included in FAR part 2 and applies throughout the FAR). The definition of ``organizational conflict of interest'' is refined to reflect the two types of situations that give rise to OCI concerns.

b. Address. The verb ``address'' is defined in FAR subpart 3.12, for the purposes of the subpart, to provide a summary term for the various approaches for dealing with the risks and preventing the harms that may be caused by OCIs; each of those approaches is then explained

in more detail in FAR 3.1204.

c. Marketing consultant. In addition, the existing definition of ``marketing consultant'' in FAR subpart 9.5 is removed as unnecessary because the proposed coverage is expanded beyond contracts for these entities.

2. Policy. Within the new policy section at FAR 3.1203, the proposed rule explains the harm OCIs can cause and the actions the Government must take to address the risks of such harm. This involves an expanded discussion of the two types of harm that OCIs cause to the procurement system--harm to the integrity of the competitive acquisition process and harm to the Government's business interests.

a. Harm to the Integrity of the Competitive Acquisition Process. In cases where there is a risk of harm to the integrity of a competitive acquisition process, both the Government's interests and the public interest in fair competitions are at risk. For this reason, such risks must be eliminated to the maximum extent possible. In the extremely rare case that such a risk cannot be eliminated, but award is nonetheless necessary to meet the Government's needs, a waiver provision that requires approval at the head of the contracting activity level or above is provided.

b. Harm to the Government's Business Interests. In cases where the potential harm from an OCI threatens only the Government's business interests, it may be appropriate to accept this potential harm as a performance risk. Acceptance of performance risk represents a novel means of addressing OCIs and will often only be appropriate after other steps to reduce the risk have been taken, either by the contractor (e.g., implementation of a mitigation plan) or by the Government (e.g., additional contract management steps or oversight).

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C. Changes To Improve Policy Implementation

This proposed rule assists contracting officers in implementing the Government's OCI policy by amending existing FAR coverage in two ways: consolidating the contracting officer's responsibilities regarding OCIs; and providing standard, but customizable, solicitation provisions and contract clauses related to OCIs.

1. Consolidated Discussion of Contracting Officer Responsibilities. This proposed rule creates a new section FAR 3.1206 that provides a consolidated discussion of contracting officer responsibilities, including the steps a contracting officer must take during the different phases of an acquisition to identify and address OCIs.

FAR section 3.1206-2 addresses OCI-related responsibilities associated with presolicitation activities and requires the contracting officer to determine whether an acquisition has the potential to give rise to an OCI early enough in the acquisition process to include an appropriate provision in the solicitation, if necessary.

FAR section 3.1206-3 provides guidance related to evaluating information from the offeror and other sources to determine if an OCI is present during the evaluation phase and to then address or waive any OCI before making a contract award.

FAR section 3.1206-4 addresses OCI-related responsibilities associated with contract award.

FAR section 3.1206-5 addresses task- and delivery-order contracts, and requires the contracting officer to consider OCIs both

at the time of award and at the time of issuance of each order.

[cir] For interagency acquisitions where the ordering (customer) agency places orders directly under another agency's contract (a ``direct acquisition''), the ordering agency would be responsible for addressing OCIs.

[cir] For interagency acquisitions where the servicing agency performs acquisition activities on the requesting agency's behalf (an ``assisted acquisition''), the interagency agreement entered into between the servicing and requesting agency to establish the terms and conditions of the assisted acquisition would need to identify which party is responsible for carrying out these responsibilities.

By providing a more complete description of the steps involved in addressing OCIs, the rule will better equip contracting officers to identify conflicts and work with contractors to address them. This approach should also help to address the criticism with current FAR coverage that describing OCIs only through examples misleads contracting officers to believe that OCIs do not exist in contract actions that do not fall within the scope of an identified example.

2. New Solicitation Provision and Contract Clauses Related to OCIs. This proposed rule contains a new solicitation provision and three new contract clauses related to OCIs. Existing FAR coverage anticipates appropriate handling of OCI issues through solicitation provisions and contract clauses, but does not provide a standard format (see FAR 9.507). The Councils determined that it was desirable to provide contracting officers with standard language that can be used or tailored as appropriate. The Councils used the requirements currently in FAR 9.506 and 9.507 as the basis for the proposed provision and clauses on OCI, providing specific fill-ins the contracting officer must complete, and language that incorporates any mitigation plan by reference.

The proposed solicitation provision and clauses are as follows:

FAR 52.203-XX, Notice of Potential Organizational Conflict of Interest. This provision--

[cir] References the definition of ``organizational conflict of interest;''

[cir] Provides notice to offerors that the contracting officer has determined that the nature of the work is such that OCIs may result from contract performance;

[cir] Requires an 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;

[cir] 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; and

[cir] Identifies the clauses that may be included in the resultant contract, depending upon the manner in which the OCI is addressed (i.e., FAR 52.203-YY or 52.203-YZ, described below);

FAR 52.203-ZZ, Disclosure of Organizational Conflict of Interest After Contract Award. The Councils recognize that events may occur during the performance of a contract that give rise to a new conflict, or that a conflict might be discovered only after award has been made. This clause, which is included in solicitations and contracts when the solicitation includes the provision FAR 52.203-XX, Notice of Potential Organizational Conflicts of Interest, includes by reference the definition of ``organizational conflict of interest'' and 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. This clause is generally intended to be used when the contract may involve an OCI that can be addressed by an acceptable contractor-submitted mitigation plan prior to contract award. The clause--

[cir] Includes a reference to the definition of ``organizational conflict of interest;''

[cir] Incorporates the mitigation plan in the contract;

[cir] Addresses changes to the mitigation plan;

[cir] Addresses noncompliance with the clause or with the mitigation plan; and

[cir] Requires flowdown of the clause.

FAR 52.203-YZ, Limitation of Future Contracting. This clause is intended for use 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.

D. Other Remarks

In addition to the changes described above, the Councils note the following proposed coverage:

This rule continues to apply to contracts with both profit and non-profit organizations (current FAR 9.502(a)).

This rule does not exclude the acquisition of commercial items, including commercially available off-the-shelf (COTS) items. This proposed rule only requires use of the provision and clauses in solicitations when the contracting officer determines that the work to be performed has the potential to give rise to an OCI. Therefore, use in acquisitions of commercial items, especially COTS items, will probably not be frequent. The Councils decided that allowing this discretion to the contracting officer is better than an outright exclusion of applicability to contracts for the acquisition of commercial items.

This rule applies to contract modifications that add additional work. The Councils recognize that contracting officers may not be able to identify conflicts arising from all future modifications to a contract at the time of contract award.

This rule adds a requirement at FAR 7.105(b)(18) to consider OCIs when preparing acquisition plans.

IV. Access to Nonpublic Information

FAR subpart 9.5 and the GAO and CoFC cases interpreting the subpart

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currently treat situations involving contractors having an unfair competitive advantage based on unequal access to nonpublic information as OCIs. However, the Councils recognized that these situations do not actually involve conflicts of interest at all, and may arise from circumstances unrelated to conflicts of interest, such as where a former Government employee (who has had access to competitively useful nonpublic information) has been hired by a vendor. Further, the Councils observed that the methods available to resolve situations

involving unequal access to information differ from those available to address actual OCIs. For these reasons, the Councils determined that separating the coverage of unfair competitive advantage based on unequal access to nonpublic information from the general coverage of OCIs is a desirable outcome, as it will remove some of the confusion often associated with identifying and addressing OCIs.

In developing coverage to treat situations involving unfair competitive advantage based on unequal access to information, the Councils recognized that much of such access comes from performance on other Government contracts. Accordingly, if appropriate contractual safeguards are established prior to, or at the time of, such access, the number of situations where unequal access to information will taint a competition can be minimized. For this reason, this proposed rule provides a new uniform Governmentwide policy regarding the disclosure and protection of nonpublic information to which contractors may gain access during contract performance. This coverage provides substantial safeguards designed to address some of the concerns created by unequal access to nonpublic information, while leaving it to the contracting officer to determine, for any given acquisition, whether the protections are adequate, or if a situation involving an unfair competitive advantage remains to be resolved. Because protection and release of information are administrative matters, this coverage has been placed in FAR part 4.

The coverage provides--

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; and

Appropriate solicitation provisions and contract clauses.

A. Definition

The definition of ``nonpublic information'' provided by this proposed rule includes information belonging to either the Government or a third party that is not generally made publicly available, i.e., information that cannot be released under the Freedom of Information Act, or information for which a determination has not yet been made regarding ability to release.

B. Contractor Access to Nonpublic Information

The SARA Panel recommended that the Federal Acquisition Regulatory (FAR) Council review existing rules and regulations and, to the extent necessary, create uniform, Governmentwide policy and clauses dealing with protection of nonpublic information. Additionally, a recent GAO report, ``Contractor Integrity: Stronger Safeguards Needed for Contractor Access to Sensitive Information'' (GAO-10-693), recommended that OFPP act with the FAR Council to provide more thorough protections when contractors are allowed access to sensitive information. These recommendations, combined with the need to provide preventive protections in dealing with cases of unfair competitive advantage based on unequal access to information, have prompted the Councils to develop the coverage in this section.

Traditionally, the Government has relied primarily on civil

servants to perform the functions that require access to third-party contract information and other information in the Government's possession that requires protection from unauthorized use and disclosure. However, in recent years, the Government has significantly increased its use of contractors to assist in performing many such functions. In addition, some agencies now utilize contractors to perform research studies that require the contractors to access third-party information. With the increasing need for contractor access to nonpublic information, this rule seeks to establish a uniform, and more streamlined and efficient approach.

The Councils are proposing that contractors should be contractually obligated to protect all nonpublic information to which they obtain access by means of contract performance (whether information from the Government or a third party), with certain exceptions (e.g., the information was already in the contractor's possession) (see FAR 52.204-XX(c)). Further, the Councils are proposing that contractors should require all employees who may access nonpublic information to sign nondisclosure agreements and that the obligations arising from these agreements will be enforceable by both the Government and third-party information owners. By implementing these protections as the default position, the proposed approach substantially enhances the protection for third-party and Government information provided by the FAR.

Many contracts of the type described above involve not only multiple subcontractors, but also many lower-tier subcontracts. The current ad hoc approach employed by Government agencies for ensuring that all of these contractors have properly executed nondisclosure agreements among themselves has resulted in the existence of a substantial number of overlapping, but not necessarily uniform, agreements--and oftentimes confusion and misunderstandings between the Government and its contractors. The Councils have determined that the approach of requiring inclusion of an ``access'' clause to protect information disclosed to a contractor, and a ``release'' clause to notify third-party information owners of their rights when their information is improperly used or disclosed should provide thorough protection while eliminating the need for many interconnecting nondisclosure agreements.

1. Access Clause. The first element of this new approach is the proposed Access clause at FAR 52.204-XX, Access to Nonpublic Information. The purpose of the Access clause is to preclude contractors from using Government or third-party information for any purpose unrelated to contract performance. This clause requires that contractors receiving access to nonpublic information must limit the use of such nonpublic information to the purposes specified in the contract, safeguard the nonpublic information from unauthorized outside disclosure, and inform employees of their obligations and obtain written nondisclosure agreements consistent with those obligations. The clause also sets forth certain exceptions (relating to the applicability of the contractor's obligations), but the exceptions do not apply unless the contractor can demonstrate to the contracting officer that an exception is applicable.

The Access clause is subordinate to all other contract clauses or requirements that specifically address the access, use, handling, or disclosure of nonpublic information. If any restrictions or authorizations in the clause are inconsistent with any other clause or requirement of the contract,

the other clause or requirement takes precedence.

This rule proposes, as the default position, mandatory use of the Access clause in solicitations and contracts when contract performance may involve contractor access to nonpublic information. However, the prescription allows agencies to provide otherwise in their procedures. The Access clause is prescribed on the same basis for use in solicitations and contracts for the acquisition of commercial items and in simplified acquisitions.

2. Alternate to the Access Clause

a. Alternate I. Alternate I is prescribed for use if the contracting officer anticipates that there may be a need for executing confidentiality agreements between the contractor and one or more third parties that have provided nonpublic information to the Government. This alternate 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 to which the contractor must now have access to perform its obligations under the contract.

b. Alternate II. Alternate II is for use if the contracting officer anticipates that the contractor may require access to a third party's facilities or nonpublic information that is not in the Government's possession. This alternate 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.

3. Release Clause. The purpose of the Release clause at FAR 52.204-YY, Release of Nonpublic Information, 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.

Unless agency procedures provide otherwise, the contracting officer must use the Release clauses in all solicitations and contracts, including solicitations and contracts for the acquisition of commercial items and below the simplified acquisition threshold.

A solicitation provision at FAR 52.204-XY, Release of Nonpublic Information, that provides similar coverage is prescribed for all solicitations.

C. Unequal Access to Nonpublic Information

1. Policy. FAR section 4.402 addresses situations in which access to nonpublic information constitutes a risk to the competitive integrity of the acquisition process. It includes a policy section, expressing the Government's policy that contracting officers must take action to resolve situations where one or more offerors hold an unfair competitive advantage. The policy section also states that disqualification of an offeror is the least-favored approach and should only be adopted if no other method of resolution will adequately protect the integrity of the competition.

2. General Principles. FAR subsection 4.402-3 contains general principles for determining when access to nonpublic information requires resolution. Specifically, the access must be Government-

provided, the access must be unequal (that is, not all of the prospective offerors have access), the information must be competitively useful, and the competitive advantage must be unfair.

3. Contracting Officer Responsibilities. FAR subsection 4.402-4 contains details covering contracting officer responsibilities. This begins with requirements to collect information regarding unequal access to nonpublic information, both from within the Government and from offerors. If the contracting officer becomes aware that an offeror may have unequal access to nonpublic information, the rule requires that the contracting officer conduct an analysis, consistent with the general principles discussed above, to determine whether resolution is required. If resolution is not required, the contracting officer simply documents the file. If resolution is required, the contracting officer must take action consistent with the section detailing appropriate resolution techniques, which consist of information sharing, mitigation through the use of a firewall, or disqualification.

4. Solicitation Provision. FAR subsection 4.402-5 prescribes a solicitation provision, FAR 52.204-YZ, Unequal Access to Nonpublic Information, that requires offerors to identify, early in the solicitation process, whether it or any of its affiliates possesses any nonpublic information relevant to the solicitation and provided by the Government. It also requires that the contractor certify by submission of its offer that, where a mitigation plan involving a firewall is already in place (addressing nonpublic information relevant to the current competition), the offeror knows of no breaches of that firewall.

V. Solicitation of Public Comment

When commenting on the proposed rule, respondents are encouraged to offer their views on the following questions:

A. Do the policy and associated principles set forth in the proposed rule provide an effective framework for evaluating and addressing conflicts of interest?

B. Is the definition of ``organizational conflict of interest'' sufficiently comprehensive to address all potential forms of such conflicts?

C. Do the enumerated techniques for addressing OCIs adequately address the Government's interests? Are any too weak or overbroad? Are there other techniques that should be addressed?

D. Does the rule adequately address the potential conflicts that may arise for companies that have both advisory and production capabilities? What, if any, improvements might be made?

E. Do the proposed solicitation provisions and contract clauses adequately implement the policy framework set forth in the proposed rule? For example, is a clause limiting future contracting an operationally feasible means of resolving a conflict? Would it be beneficial and appropriate for this information generally to be made publicly available, such as through a notice on FedBizOpps? Do the solicitation provisions and contract clauses afford sufficient flexibility to help an agency meet its individual needs regarding a prospective or actual conflict?

F. Is there a need for additional guidance to supplement the proposed FAR coverage of OCIs (e.g., guidance addressing the management of OCI responsibilities)? If so, what points should the guidance make?

G. Is the framework presented by this proposed rule preferable to the framework presented in the DFARS Proposed Rule 2009-D015 published

in the Federal Register on April 22, 2010 (75 FR 20954-20965)? Why or why not? Would some hybrid of the two proposed rules be preferable?

H. Does the proposed rule strike the right balance between providing detailed guidance for contracting officers and allowing appropriate flexibility for dealing with the variety of forms that organizational conflicts of interest take and the variety of circumstances under which they arise?

Are there certain types of contracts, or contracts for certain types of services,

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that warrant coverage that is more strict than that provided by the proposed rule?

VI. Executive Orders 12866 and 13563

This is a significant regulatory action and, therefore, was subject to Office of Management and Budget review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

In accordance with Executive Order 13563, Improving Regulation and Regulatory Review, dated January 18, 2011, DoD, GSA, and NASA determined that this rule is not excessively burdensome on the public, and is consistent with Section 841 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, which required a review of the FAR coverage on OCIs.

VII. Regulatory Flexibility Act

A. The proposed changes are not expected to result in a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq., because--

1. The requirements of FAR subpart 3.12 do not differ from the burden currently imposed on offerors and contractors by FAR subpart 9.5 and the requirements of subpart 3.12 are not significantly burdensome. It is good business practice to have procedures in place to identify potential organizational conflicts of interest and to have prepared mitigation plans for obvious conflicts. This proposed rule has also reduced the potential burden by--

a. Not including a certification requirement; and
b. Providing for avoidance, neutralization, or mitigation of organizational conflicts of interest or, under exceptional circumstances, waiver of the requirement for resolution.

2. Unless the Access clause is used with Alternate I or Alternate II, this approach standardizes and simplifies the current system of third-party agreements envisioned by FAR 9.505-4. Having each contractor implement specific safeguards and procedures should offer the same or better protection for information belonging to small business entities. Moreover, this rule should ease the burden on most small business entities by not requiring them to enter multiple, interrelated third-party agreements with numerous service contractors. If the Access clause is used with Alternate I or Alternate II, then that is no more burdensome than the current requirements of FAR 9.505-4.

B. However, an Initial Regulatory Flexibility Analysis has

nevertheless been prepared and is summarized as follows:

This proposed rule implements Section 841 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (Pub. L. 110-417) by providing revised regulatory coverage on organizational conflicts of interest (OCIs) and unequal access to information. The rule also provides additional coverage regarding contractor access to nonpublic information, and adds related provisions and clauses.

The objective of the rule is to help the Government in identifying and addressing circumstances in which a Government contractor may be unable to render impartial assistance or advice to the Government or might have an unfair competitive advantage based on unequal access to information or prior involvement in setting the ground rules for an acquisition.

In recent years, a number of trends in acquisition and industry have led to the increased potential for OCIs, including--

Industry consolidation;

Agencies' growing reliance on contractors for services, especially where the contractor is tasked with providing advice to the Government; and

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.

Section 841 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (Pub. L. 110-417) directed a review of the conflicts of interest provisions in the FAR. Section 841 required that appropriate revisions, including contract clauses, be developed as necessary, pursuant to that review.

Competitive integrity issues caused by unequal access to nonpublic information are often unrelated to OCIs. Therefore, treating this topic independently will allow for more targeted coverage that properly addresses the specific concerns involved in such cases; and including broad coverage of contractor access to nonpublic information will provide a framework for the topic of unequal access to nonpublic information.

An OCI is defined as a situation in which a Government contract requires a contractor to exercise judgment to assist the Government in a matter (such as in drafting specifications or assessing another contractor's proposal or performance) and the contractor or its affiliates have financial or other interests at stake in the matter, so that a reasonable person might have concern that when performing work under the contract, the contractor may be improperly influenced by its own interests rather than the best interests of the Government; or a contractor could be viewed as having an unfair competitive advantage in an acquisition as a result of having previously performed work on a Government contract, under circumstances such as those just described, that put the contractor in a position to influence the acquisition. The circumstances that lead to OCIs are most likely to occur in large businesses that have diverse capacity to provide both upfront advice and also a capacity for production. Although a small business might become involved in OCIs through its affiliates, we estimate that the proposed rules on OCIs would not impact a significant number of small entities. Furthermore, this rule is not adding burdens relating to OCIs that are beyond the current expectations of FAR subpart 9.5. It is just providing standard procedures and clauses, rather than requiring each contracting officer to craft unique provisions and clauses appropriate to the situation.

With regard to contractor access to information, the rule will

impact entities that have access to nonpublic information in performance of a Government contract. We estimate that about half of the entities impacted will be small entities (estimated at 25,000 small entities). Typical contracts that may provide access to nonpublic information include services contracts such as professional, administrative, or management support or special studies and analyses. Furthermore, small entities that are submitting offers to the Government must inform the Government, prior to submission of offers, if they possess any nonpublic information relevant to the current solicitation (estimated at 5,750 small entities).

This rule requires the following projected reporting burdens for access to information:

- a. Provide copy of nondisclosure agreement upon request (6,250 respondents x .5 hours per response = 3,125 hours).
- b. Notify contracting officer of violation (250 respondents x 4 hours per response = 1,000 hours).
- c. Notify contracting officer if access information that should not have access to (125 respondents x 1 hour per response = 125 hours).
- d. Explain in solicitation any unequal access to nonpublic information (5,750

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respondents x 3 hours per response = 17,250).

- e. Explain if firewall was not implemented, or breached (rare) (10 respondent x 5 hours per response = 50 hours).

We estimate that the respondents will be administrative employees earning approximately \$75 per hour (+ .3285 overhead).

This rule overlaps, with other Federal rules: FAR Cases 2007-018, 2007-019, 2008-025, 2009-022, and 2009-030; and DFARS Case 2009-D015.

The Councils identified a significant alternative that would accomplish the objectives of the statute and the policies. See the discussion in the rule preamble about DFARS case 2009-D015.

DoD, GSA, and NASA invite comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD, GSA, and NASA will also consider comments from small entities concerning the existing regulations in subparts affected by the rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (FAR Case 2011-001), in correspondence.

VIII. Paperwork Reduction Act

The proposed changes to the FAR impose a new information collection requirement that requires the approval of the Office of Management and Budget under 44 U.S.C. chapter 35, et seq. Under this proposed rule, an offeror may be required to submit information to identify an OCI and propose a resolution, such as a mitigation plan submitted by the offeror with its proposal. While this requirement existed informally since 1984 in FAR subpart 9.5, it is only now being formalized via the new contract provision and clause at FAR 52.203-XX and FAR 52.203-YY.

A. Annual Reporting Burden:

Public reporting burden for this collection of information is estimated to average approximately 4.6 hours per response, including

the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

The annual reporting burden is estimated as follows:

1. Organizational Conflicts of Interest.

Respondents: 30,930.

Responses per respondent: 1.0.

Total annual responses: 30,930.

Preparation hours per response: 6.96.

Total response burden hours: 215,273.

2. Contractor Access to Nonpublic Information.

Respondents: 24,760.

Responses per respondent: 1.

Total annual responses: 24,760.

Preparation hours per response: 2.

Total response burden hours: 49,520.

3. Total.

Respondents: 55,690.

Responses per respondent: 1.

Total annual responses: 55,690.

Preparation hours per response: 4.755.

Total response burden hours: 264,793.

B. Request for Comments Regarding Paperwork Burden

Submit comments, including suggestions for reducing this burden, not later than June 27, 2011 to: FAR Desk Officer, OMB, Room 10102, NEOB, Washington, DC 20503, and a copy to the General Services Administration, Regulatory Secretariat (MVCB), Attn: Hada Flowers, 1275 First Street, NE., 7th Floor, Washington, DC 20417.

Public comments are particularly invited on: Whether this collection of information is necessary for the proper performance of functions of the FAR, and will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected; and ways in which we can minimize the burden of the collection of information on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.

Requester may obtain a copy of the supporting statement from the General Services Administration, Regulatory Secretariat (MVCB), 1275 First Street, NE., 7th Floor, Washington, DC 20417. Please cite OMB Control Number 9000-0178, Organizational Conflicts of Interest, in correspondence.

List of Subjects in 48 CFR Parts 2, 3, 4, 7, 9, 11, 12, 13, 14, 15, 16, 18, 37, 42, 52, and 53

Government procurement.

Dated: April 13, 2011.

Millisa Gary,

Acting Director, Office of Governmentwide Acquisition Policy.

Therefore, DoD, GSA, and NASA propose amending 48 CFR parts 2, 3, 4, 7, 9, 11, 12, 13, 14, 15, 16, 18, 37, 42, 52, and 53 as set forth below:

1. The authority citation for 48 CFR parts 2, 3, 4, 7, 9, 11, 12, 13, 14, 15, 16, 18, 37, 42, 52, and 53 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 2--DEFINITIONS OF WORDS AND TERMS

2. Amend section 2.101 in paragraph (b) (2) by--

a. Removing from paragraph (3) in the definition ``Advisory and assistance services'' ``(see 9.505-1(b))'';

b. Adding, in alphabetical order, the definition ``Nonpublic information''; and

c. Revising ``Organizational conflict of interest.''

The added and revised text to read as follows:

Sec. 2.101 Definitions.

* * * * *

(b) * * *

(2) * * *

Nonpublic information means any Government or third-party information that--

(1) Is exempt from disclosure under the Freedom of Information Act (5 U.S.C. 552) or otherwise protected from disclosure by statute, Executive order, or regulation; or

(2) Has not been disseminated to the general public, and the Government has not yet determined whether the information can or will be made available to the public.

* * * * *

Organizational conflict of interest means a situation in which--

(1) A Government contract requires a contractor to exercise judgment to assist the Government in a matter (such as in drafting specifications or assessing another contractor's proposal or performance) and the contractor or its affiliates have financial or other interests at stake in the matter, so that a reasonable person might have concern that when performing work under the contract, the contractor may be improperly influenced by its own interests rather than the best interests of the Government; or

(2) A contractor could have an unfair competitive advantage in an acquisition as a result of having performed work on a Government contract, under circumstances such as those described in paragraph (1) of this definition, that put the contractor in a position to influence the acquisition.

* * * * *

PART 3--BUSINESS ETHICS AND CONFLICTS OF INTEREST

3. Revise part 3 heading to read as set forth above.

4. Revise section 3.000 to read as follows:

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Sec. 3.000 Scope of part.

This part prescribes policies and procedures for addressing issues

regarding business ethics and conflicts of interest.

Sec. 3.603 [Amended]

5. Amend section 3.603 by removing from paragraph (b) ``subpart 9.5'' and adding ``subpart 3.12'' in its place.

6. Add subpart 3.12 to read as follows:

Subpart 3.12--Organizational Conflicts of Interest

Sec.

3.1200 Scope of subpart.

3.1201 Definition.

3.1202 Applicability.

3.1203 Policy.

3.1204 Methods of addressing organizational conflicts of interest.

3.1204-1 Avoidance.

3.1204-2 Limitation on future contracting (neutralization).

3.1204-3 Mitigation.

3.1204-4 Assessment that risk is acceptable.

3.1205 Waiver.

3.1206 Contracting officer responsibilities.

3.1206-1 General.

3.1206-2 Pre-solicitation responsibilities.

3.1206-3 Addressing organizational conflicts of interest during evaluation of offers.

3.1206-4 Contract award.

3.1206-5 Issuance of task or delivery orders or blank purchase agreement calls.

3.1207 Solicitation provision and contract clauses.

Subpart 3.12--Organizational Conflicts of Interest

Sec. 3.1200 Scope of subpart.

(a) This subpart prescribes policies and procedures for identifying, analyzing, and addressing organizational conflicts of interest (as defined in 2.101). It implements 41 U.S.C. 2304 and section 841(b)(2) of Public Law 110-417.

(b) This subpart does not address unequal access to nonpublic information, which is addressed in 4.402.

Sec. 3.1201 Definition.

``To address,'' as used in this subpart, means to protect the integrity of the competitive acquisition process, as well as the Government's business interests (see 3.1203(a)(2)), by one or more of the following methods:

(1) Avoidance.

(2) Neutralization through limitations on future contracting.

(3) Mitigation of the risks involved.

(4) Assessment that the risk inherent in the conflict is acceptable (either without further action or in conjunction with application of one or more of the other methods listed in paragraphs (a) through (c) of this definition). (See 3.1204.)

Sec. 3.1202 Applicability.

(a) This subpart--

(1) Applies to contracts and subcontracts with both profit and nonprofit organizations, including nonprofit organizations created largely or wholly with Government funds. Contracts include task and delivery orders and modifications that add work; and

(2) Applies to the acquisition of commercial items, including commercially available off-the-shelf items (see 12.301(d)(3)) if the contracting officer determines that contractor performance of the work may give rise to an organizational conflict of interest.

(b) Although this subpart applies to every type of acquisition, organizational conflicts of interest are more likely to arise when at least one of the contracts involved is for acquisition support services or advisory and assistance services.

(c) Application of this subpart is independent of coverage concerning unequal access to nonpublic information (see 4.402). Contracting officers must consider each issue separately in determining whether steps must be taken to protect the interests of the Government.

(d) This subpart shall not be applied in any manner that conflicts with an agency-specific conflict of interest statute.

Sec. 3.1203 Policy.

(a) The Government's interests. It is the Government's policy to identify, analyze, and address organizational conflicts of interest that might otherwise exist or arise in acquisitions in order to maintain the public's trust in the integrity and fairness of the Federal acquisition system. Organizational conflicts of interest have the potential to undermine the public's trust in the Federal acquisition system because they can impair--

(1) The integrity of the competitive acquisition process. The Government has an interest in preserving its ability to solicit competitive proposals and affording prospective offerors an opportunity to compete for Government requirements on a level playing field. In some cases, an organizational conflict of interest will be accompanied by a risk that the conflicted contractor will create for itself, or obtain, whether intentionally or not, an unfair advantage in competing for a future Government requirement. The result may be a seriously flawed competition, which is unacceptable in terms of good governance, fairness, and maintenance of the public trust; and

(2) The Government's business interests. As a steward of public funds, the Government has an interest in ensuring both that it acquires products and services that provide the best value to the Government and that the contractor's performance in fulfilling the Government's requirements is consistent with contractual expectations. In many cases, an organizational conflict of interest will be accompanied by a risk that the conflict will affect the contractor's judgment during performance in a way that degrades the value of its services to the Government. This type of risk is most likely to appear when the exercise of judgment is a key aspect of the service that the contractor will be providing.

(b) Addressing organizational conflicts of interest. (1) Agencies must examine and address organizational conflicts of interest on a

case-by-case basis, because such conflicts arise in various, and often unique, factual settings. Contracting officers shall consider both the specific facts and circumstances of the contracting situation and the nature and potential extent of the risks associated with an organizational conflict of interest when determining what method or methods of addressing the conflict will be appropriate.

(2) If an organizational conflict of interest is such that it risks impairing the integrity of the competitive acquisition process, then the contracting officer must take action to substantially reduce or eliminate this risk.

(3) If the only risk created by an organizational conflict of interest is a performance risk relating to the Government's business interests, then the contracting officer has broad discretion to select the appropriate method for addressing the conflict, including the discretion to conclude that the Government can accept some or all of the performance risk.

(c) Waiver. It is the policy of the Government to minimize the use of waivers of organizational conflicts of interest. However, in exceptional circumstances, the agency may grant a waiver in accordance with 3.1205.

Sec. 3.1204 Methods of addressing organizational conflicts of interest.

Organizational conflicts of interest may be addressed by means of avoidance, limitations on future contracting, mitigation, or the Government's assessment that the risk inherent in the conflict is acceptable. In

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some cases, a combination of methods may be appropriate.

Sec. 3.1204-1 Avoidance.

Avoidance consists of Government action taken in one acquisition that is intended to prevent organizational conflicts of interest from arising in that acquisition or in a future acquisition. In order to successfully implement an avoidance strategy, the contracting officer should work with the program office or requiring activity early in the acquisition process. Methods of avoiding organizational conflicts of interest include, but are not limited to, the following:

(a) Drafting the statement of work to exclude tasks that require contractors to utilize subjective judgment. This strategy may be used to avoid or prevent organizational conflicts of interest both in the instant contract and in future acquisitions. Tasks requiring subjective judgment include--

- (1) Making recommendations;
- (2) Providing analysis, evaluation, planning, or studies; and
- (3) Preparing statements of work or other requirements and solicitation documents.

(b) Requiring the contractor (and its affiliates, as appropriate) to implement structural barriers, internal corporate controls, or both, in order to forestall organizational conflicts of interest that could arise because, for example, the contractor will be participating in

preparing specifications or work statements in the performance of the immediate contract. This avoidance method differs from mitigation in that it is used to prevent organizational conflicts of interest from arising in future acquisitions, rather than addressing organizational conflicts of interest in the instant contract.

(c) Excluding an offeror or offerors from participation in a procurement. (1) Use of this method may be appropriate when the contracting officer concludes that--

(i) The offeror will have an unfair advantage in the competition because of its prior involvement (or an affiliate's prior involvement) in developing the ground rules for the procurement; or

(ii) The risk that the offeror's judgment or objectivity in performing the proposed work will be impaired because the substance of the work has the potential to affect other of the offeror's (or its affiliates') current or future activities or interests is more significant than the Government is willing to accept.

(2) This approach may be used only if the contracting officer has determined that no less restrictive method for addressing the conflict will adequately protect the Government's interest. This determination must be documented in the contract file.

(3) Before excluding an offeror from participation in a procurement on the basis of an organizational conflict of interest that arises because of work done by an affiliate of the offeror (creating an unfair competitive advantage), the contracting officer shall identify and analyze the corporate and business relationship between the offeror and the affiliate. The contracting officer's efforts should be directed toward understanding the nature of the relationship between the entities and determining whether the risk associated with the organizational conflict of interest can be addressed through mitigation (see 3.1204-3). The contracting officer should, at a minimum, examine whether--

(i) The offeror and affiliate are controlled by a common corporate headquarters;

(ii) The overall corporate organization has established internal barriers, such as corporate resolutions, management agreements, or restrictions on personnel transfers, that limit the flow of information, personnel, and other resources between the relevant entities;

(iii) The offeror and affiliates are separate legal entities and are managed by separate boards of directors;

(iv) The corporate organization has instituted recurring training on organizational conflicts of interest and protections against organizational conflicts of interest; and

(v) The affiliate can influence the offeror's performance of its contractual requirements.

Sec. 3.1204-2 Limitation on future contracting (neutralization).

(a) A limitation on future contracting allows a contractor to perform on the instant contract but precludes the contractor from submitting offers for (or participating as a subcontractor in) future contracts where the contractor would have an unfair advantage in competing for award (or could provide the prime contractor with such an advantage). The limitation on future contracting effectively ``neutralizes'' the organizational conflict of interest.

(b) Limitations on future contracting shall be restricted to a

fixed term of reasonable duration that is sufficient to neutralize the organizational conflict of interest. The restriction shall end on a specific date or upon the occurrence of an identifiable event.

Sec. 3.1204-3 Mitigation.

(a) (1) Mitigation is any action taken to reduce the risk that an organizational conflict of interest will undermine the public's trust in the Federal acquisition system.

(2) Mitigation may require Government action, contractor action, or a combination of both.

(b) When this approach is utilized, a Government-approved mitigation plan, reflecting the actions a contractor has agreed to take to mitigate a conflict, shall be incorporated into the contract. The required complexity of the mitigation plan is related to the complexity of the organizational conflict of interest and the size of the acquisition. While implementation of a mitigation plan may rest largely with a contractor, the Government bears responsibility for ensuring that mitigation plans are properly implemented, and the Government must not leave enforcement to the contractor.

(c) Ways of mitigating organizational conflicts of interest include, but are not limited to, the following:

(1) Requiring a subcontractor or team member that is conflict-free to perform the conflicted portion of the work on the instant contract. This technique will not be effective in reducing the risk associated with a conflict unless it is utilized in conjunction with a system of controls that can ensure that the conflicted entity has no input or influence on the work of the subcontractor or team member performing the conflicted portion of the work.

(2) Requiring the contractor to implement structural or behavioral barriers, internal controls, or both. (i) This method can be used to lessen the risk that the potentially conflicting financial interests of an affiliate will influence the contractor's exercise of judgment during contract performance. The choice of specific barriers or controls should be based on an analysis of the facts and circumstances of each case. Examples of such methods include, but are not limited to--

(A) An agreement that the contractor's board of directors will adopt a binding resolution prohibiting certain directors, officers, or employees, or parts of the company from any involvement with contract performance;

(B) A condition for a nondisclosure agreement between the contractor performing the contract and all of its affiliates;

(C) A condition that the contractor's board of directors include one or more independent directors who have no prior relationship with the contractor; and

(D) Creation of a corporate organizational conflict of interest compliance official at a senior level to

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oversee implementation of any mitigation plan.

(ii) A firewall will often be necessary to implement the controls in the previous paragraph (c) (2) (i) of this subsection. However, a firewall that serves only to limit the sharing of information, by itself, is generally not effective in addressing an organizational

conflict of interest.

(3) Obtaining advice from more than one source on a particular issue, so that the Government is not relying solely on the advice of any one of the sources.

3.1204-4 Assessment that risk is acceptable.

(a) The contracting officer shall not use this method of assessment that the risk is acceptable to address conflicts when the conflict could impair the competitive acquisition process (see 3.1203).

(b) The contracting officer may assess that the risk associated with an organizational conflict of interest is acceptable when--

(1) The only risk created by the conflict is a performance risk relating to the business interests of the Government;

(2) The risk is manageable; and

(3) The potential harm to the Government's interest is outweighed by the expected benefit from having the conflicted offeror perform the contract.

(c) This method of addressing conflicts should generally be combined with other methods, particularly mitigation. For example, the contracting officer may require a mitigation plan, and elect to accept the remaining risk if the contracting officer concludes that the mitigation plan does not remove all of the performance risk associated with the conflict.

(d) The contracting officer shall consider all readily available information (see 3.1206-3) before concluding that the risk of harm is acceptable.

(e) All assessments that the risk is acceptable must be in writing, setting forth the extent of the conflict and explaining why it is in the best interest of the Government to accept the risk associated with the conflict.

3.1205 Waiver.

(a) Authority. (1) In exceptional circumstances, the agency head may waive the requirement to address an organizational conflict of interest in a particular acquisition, but only if the agency head first determines that--

(i) Mitigation or other means of addressing the organizational conflict of interest are not feasible (e.g., the agency cannot assess the risk as acceptable because the organizational conflict of interest involves an unfair competitive advantage); and

(ii) The waiver is necessary to accomplish the agency's mission.

(2) The agency head shall not delegate this waiver authority below the head of a contracting activity.

(b) Requirements. (1) Any waiver shall--

(i) Be in writing;

(ii) Cover only one contract action;

(iii) Describe the extent of the organizational conflict of interest;

(iv) Explain why the waiver is necessary to accomplish the agency's mission; and

(v) Be approved by the appropriate official.

(2) The contracting officer shall include the waiver documentation and decision in the contract file.

3.1206 Contracting officer responsibilities.

3.1206-1 General.

(a) The contracting officer shall assess early in the acquisition process whether contractor performance of the contemplated work is likely to create any organizational conflicts of interest (see 3.1206-2 and 7.105(b)(18)).

(b) The contracting officer shall exercise common sense, good judgment, and sound discretion--

(1) In deciding whether an acquisition may give rise to an organizational conflict of interest; and

(2) In developing an appropriate means for addressing any such conflicts.

3.1206-2 Pre-solicitation responsibilities.

(a) Initial assessment. (1) The contracting officer shall review the nature of the work to be performed to decide whether performance by a contractor has the potential to create an organizational conflict of interest (see 3.1202(b)). In addition to evaluating the nature of the work to be performed on the immediate contract, the contracting officer should also consider whether performance of the present contract could cause the contractor to have an organizational conflict of interest in a foreseeable future contract.

(2) As appropriate to the circumstances, the contracting officer should obtain the assistance of the program office, appropriate technical specialists, and legal counsel in identifying the potential for organizational conflicts of interest.

(3) If the contracting officer decides that contractor performance of the contemplated work does not have the potential to create an organizational conflict of interest, the contracting officer shall document in the contract file the rationale supporting the decision.

(4) If the contracting officer decides that contractor performance of the contemplated work has the potential to create an organizational conflict of interest, the contracting officer should consult with the program office or requiring activity to determine whether any organizational conflicts of interest could be avoided by drafting the requirements documents to exclude tasks that require the contractor to exercise subjective judgment during contract performance. If avoiding organizational conflicts of interest is not feasible at this stage, then the contracting officer shall proceed with the pre-solicitation actions described in paragraph (b) of this subsection.

(b) Pre-solicitation actions. (1) When assessing the nature and scope of any organizational conflicts of interest that may arise during contract performance and preliminarily considering how best to address any such conflicts, the contracting officer should weigh the following factors to the extent feasible at this pre-solicitation phase:

(i) The extent to which the contract calls for the contractor to exercise subjective judgment and provide advice.

(ii) The extent and severity of the expected impact of the organizational conflict of interest (for example, whether it is expected to occur only once or twice during performance or to impact

performance of the entire contract).

(iii) The extent to which the agency has effective oversight controls to ensure that the contractor's actions are unaffected by an organizational conflict of interest during performance.

(iv) Whether the organizational conflict of interest risks creation of an unfair competitive advantage.

(v) The degree to which any impairment of the contractor's objectivity may reduce the value of its services to the agency, and the agency's willingness to accept the performance risk of that impairment.

(2) If the contracting officer concludes that the only risk associated with organizational conflicts of interest is a risk to the Government's business interests, the contracting officer may choose one of the following approaches:

(i) Include consideration of potential risks associated with organizational conflicts of interest as an evaluation factor in the technical rating. If the Government determines that treatment of organizational conflicts of interest through use of an evaluation factor is appropriate, an appropriate evaluation factor must be included in the solicitation.

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(ii) Do not include consideration of potential risks associated with organizational conflicts of interest as an evaluation factor in the technical rating. In this case, the Government will address the performance risks associated with any organizational conflicts of interest outside of the evaluation process and may engage in exchanges with offerors in order to understand the conflicts and assess the feasibility of addressing the risks (see 3.1206-3(b)(2)(ii)). Prior to contract award, the source selection team will select the apparent successful offeror independent of any organizational conflict of interest. The contracting officer will then assess whether or not to proceed with award, based on whether any organizational conflict of interest can be addressed (see 3.1206-4(a)). Award to the apparent successful offeror will not be made if any organizational conflict of interest cannot be addressed.

(3) If the contracting officer has decided that contractor performance of the contemplated work has the potential to create an organizational conflict of interest, the contracting officer shall select the appropriate solicitation provisions and contract clauses for the resulting solicitation in accordance with 3.1207.

(i) The contracting officer shall require the program office or requiring activity to identify any contractor(s) that participated in preparation of the statement of work or other requirements documents, including cost or budget estimates. The contracting officer shall review this list to identify the nature and scope of any conflict. The solicitation should, if appropriate, include a provision identifying contractors prohibited from competing as a prime contractor or a subcontractor due to any applicable pre-existing limitations on future contracting.

(ii) The contracting officer shall include in the solicitation a provision and clause as prescribed in 3.1207(a) and 3.1207(b).

(iii) If the contracting officer anticipates that the parties will use a mitigation plan to address an organizational conflict of interest in whole or in part, the contracting officer shall include in the solicitation a clause as prescribed in 3.1207(c).

(iv) When the contemplated work calls for the contractor to

exercise subjective judgment or provide advice which may create an unfair competitive advantage, the contracting officer shall include in the solicitation an appropriate limitation on future contracting as prescribed in 3.1207(d).

3.1206-3 Addressing organizational conflicts of interest during evaluation of offers.

(a) Sources of Information--(1) Information from offerors. The contracting officer shall use information provided by the offerors (see 52.203-XX, Notice of Potential Organizational Conflict of Interest) to identify organizational conflicts of interest. However, the contracting officer should not rely solely on this contractor-provided information.

(2) Other sources of information. The contracting officer should seek readily available information about the financial interests of the offerors, affiliates of the offerors, and prospective subcontractors from within the Government or from other sources and compare this information against information provided by the offeror.

(i) Government sources. Government sources include the files and the knowledge of personnel within--

(A) The contracting office;

(B) Other contracting offices;

(C) The cognizant contract administration, finance, and audit activities; and

(D) The requiring activity.

(ii) Non-Government sources. Non-Government sources include, but are not limited to--

(A) Offeror's Web sites;

(B) Trade and financial journals;

(C) Business directories and registers; and

(D) Annual corporate shareholder reports.

(b) Actions to address organizational conflicts of interest. (1) Consistent with 3.1206-3(a), the contracting officer should analyze both contractor-provided and otherwise available information in determining how to address any organizational conflicts of interest.

(2) If the acquisition involves contractor-submitted mitigation plans, then the contracting officer shall analyze the feasibility of mitigation of the organizational conflict of interest, including both the expected effectiveness of the conflicted entity's proposed mitigation plan and the Government's ability to monitor and enforce the provisions of the plan.

(i) If organizational conflicts of interest were included as an evaluation factor, then communications between the Government and an offeror that could result in changes to the offeror's mitigation plan will constitute discussions. Changes to an offeror's mitigation plan will likely also lead the Government to reassess the technical rating assigned to the offeror.

(ii) If organizational conflicts of interest were not included as an evaluation factor, then communications between the Government and an offeror regarding the offeror's mitigation plan, will not constitute discussions, unless the communications result in changes to evaluated aspects of the offeror's proposal.

3.1206-4 Contract award.

(a) If organizational conflicts of interest were not considered as an evaluation factor, before withholding award from the apparent successful offeror based on conflict of interest considerations, the contracting officer shall--

- (1) Notify the contractor in writing;
- (2) Provide the reasons therefore; and
- (3) Allow the contractor a reasonable opportunity to respond.

(b) Except as provided in paragraphs (c) and (d) of this subsection, the contracting officer shall award the contract to the apparent successful offeror only if all organizational conflicts of interest have been addressed.

(c) If the contracting officer finds that it is in the best interest of the Government to award the contract notwithstanding an unaddressed conflict of interest, a request for waiver shall be submitted in accordance with 3.1205.

(d) For task- or delivery-order contracts or blanket purchase agreements, the contracting officer shall attempt to identify all organizational conflict of interest issues at the time of award of the basic task- or delivery-order contract or blanket purchase agreement. To the extent an organizational conflict of interest can be identified at the time of award of the underlying vehicle, the contracting officer shall include a mitigation plan or limitation on future contracting in the basic contract or agreement, unless the contracting officer decides to accept the risk associated with the conflict without any such actions.

3.1206-5 Issuance of task or delivery orders or blanket purchase agreement calls.

(a) The contracting officer shall consider organizational conflicts of interest at the time of issuance of each order (going through the steps comparable to those in 3.1206-2, except that there is no solicitation involved in issuance of orders). If procedures for addressing an organizational conflict of interest are in the basic task- or delivery-order contract or blanket purchase agreement at the time of its award, the contracting officer may need to appropriately tailor the procedures when issuing an order.

(b) For interagency acquisitions that are facilitated through task- or delivery-

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order contracts, including the Federal Supply Schedules--

(1) If the order is placed as a direct acquisition, the contracting officer for the ordering agency is responsible for determining if a mitigation plan is required, developing a Government-approved plan, if necessary, and administering the plan, if one is developed; or

(2) If the order is placed as an assisted acquisition, the servicing agency and requesting agency shall identify which agency is responsible for the actions identified in paragraph (a) of this section and reflect this understanding in their interagency agreement.

3.1207 Solicitation provision and contract clauses.

(a) (1) The contracting officer shall include a solicitation

provision substantially the same as 52.203-XX, Notice of Potential Organizational Conflict of Interest, upon determining that contractor performance of the work may give rise to organizational conflicts of interest.

(2) The contracting officer shall fill in paragraph (b)(2) of the provision, if the program office or requiring activity has identified any contractors that participated in preparation of the statement of work or other requirements documents, including cost or budget estimates.

(b) The contracting officer shall include in solicitation and contracts a clause substantially the same as 52.203-ZZ, Disclosure of Organizational Conflict of Interest after Contract Award, when the solicitation includes the provision 52.203-XX, Notice of Potential Organizational Conflict of Interest.

(c) The contracting officer shall include in solicitations and contracts a clause substantially the same as 52.203-YY, Mitigation of Organizational Conflicts of Interest, when the contract may involve an organizational conflict of interest that can be addressed by an acceptable contractor-submitted mitigation plan prior to contract award.

(d) The contracting officer shall include in solicitations and contracts a clause substantially the same as 52.203-YZ, Limitation on Future Contracting, when the method of addressing the organizational conflict of interest will involve a limitation on future contracting.

(1) The contracting officer shall fill in the nature and duration of the limitation on future contractor activities in paragraph (a) of the clause.

(2) The contracting officer shall ensure that the duration of the limitation is sufficient to neutralize any unfair competitive advantage.

PART 4--ADMINISTRATIVE MATTERS

7. Revise the heading of subpart 4.4 to read as follows:

Subpart 4.4--Safeguarding Information Within Industry

8. Add sections 4.401 through 4.401-4 to read as follows:

4.401 Contractor access to nonpublic information.

4.401-1 Scope.

This section prescribes policies and procedures applicable to contracts that may require, authorize, or permit contractor access to nonpublic information during contract performance.

4.401-2 Policy.

It is the Government's policy--

(a) To preclude contractor use or disclosure of nonpublic information for any purpose unrelated to contract performance;

(b) To ensure that the contractor does not obtain any unfair competitive advantage by virtue of its access to nonpublic information

(see 4.402); and

(c) To allow agencies discretion to prescribe more restrictive policies and regulations regarding the release and disclosure of nonpublic information than are established in this subpart (e.g., limitations on reassignment of personnel, more stringent notification requirements in cases of unauthorized disclosure, etc.).

4.401-3 Restrictions on access to nonpublic information.

(a) The contracting officer shall not permit contractor access to nonpublic information unless--

(1) The Government is authorized to permit such access, e.g., under subpart 24.2.

(2) The access is necessary for performance of the contract; and

(3) Access is limited to persons who require access to that information to perform the contract.

(b) If a contractor reports an unauthorized disclosure or misuse of information in accordance with paragraph (b) (2) (vii) of 52.204-XX, Access to Nonpublic Information, the contracting officer shall--

(1) Review the actions taken by the contractor;

(2) Determine whether any action taken by the contractor has addressed the situation satisfactorily; and

(3) If the contracting officer determines that the contractor has not addressed the situation satisfactorily, take any appropriate action in consultation with agency legal counsel.

4.401-4 Solicitation provision and contract clauses.

Unless agency procedures provide otherwise--

(a) (1) The contracting officer shall insert the clause at 52.204-XX, Access to Nonpublic Information, in solicitations and contracts when the contractor (or its subcontractors) may have access to nonpublic information.

(2) If the contracting officer decides that due to the contract requirements--

(i) There may be a need for executing confidentiality agreements between the contractor and one or more third parties that have provided information to the Government, insert the clause with its Alternate I.

(ii) The contractor may require access to a third party's facilities or proprietary information that is not in the Government's possession, insert the clause with its Alternate II.

(b) The contracting officer shall insert the provision at 52.204-XY, Release of Pre-Award Information, in all solicitations.

(c) The contracting officer shall insert the clause at 52.204-YY, Release of Nonpublic Information, in all solicitations and contracts.

4.402 through 4.404 [Redesignated as 4.403-1 through 4.403-3]

9a. Redesignate sections 4.402 through 4.404 as sections 4.403-1 through 4.403-3, respectively.

9b. Add new sections 4.402 and 4.403 to read as follows:

4.402 Unequal access to nonpublic information.

4.402-1 Scope.

This section prescribes policies and procedures for identifying and resolving situations in which an offeror's access to nonpublic information provides the offeror with an unfair competitive advantage.

4.402-2 Policy.

(a) Because an unfair competitive advantage held by one or more offerors risks tainting the integrity of the competitive acquisition process, the Government must take action to resolve any situations in which an offeror has obtained an unfair competitive advantage because of its unequal access to nonpublic information.

(b) When an offeror has an unfair competitive advantage because of unequal access to nonpublic information, the Government shall disqualify the offeror from a

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competition only when no other method of resolution is appropriate (see 4.402-4(c)).

(c) In competing for follow-on requirements, incumbent contractors will often have a natural advantage that is based on their experience, insights, and expertise rather than any unequal access to nonpublic information. This type of competitive advantage is not considered unfair. This situation must be distinguished from situations in which an incumbent contractor also had access to nonpublic information that could provide it, in a future acquisition, a competitive advantage that is unfair.

4.402-3 General principles.

An offeror's unequal access to nonpublic information may give it an unfair competitive advantage with respect to a particular acquisition. However, not all access to nonpublic information is unequal and, even where access may be unequal, such access will not always result in the offeror obtaining an unfair competitive advantage. Contracting officers shall consider the following factors when determining whether a particular situation involving offeror access to nonpublic information requires resolution:

(a) Whether access to the nonpublic information was provided by the Government. (1) Nonpublic information can come to an offeror from the Government either--

(i) Directly, through, or in connection with, performance on another Government contract; or

(ii) Indirectly, through sources such as former Government employees or employees of other contractors or subcontractors who received the nonpublic information from the Government.

(2) The Government has not provided access to nonpublic information, even indirectly, when an offeror gains access to nonpublic information through market research efforts or by way of private-sector business contacts.

(3) If an offeror gained access to the nonpublic information at

issue in a particular situation through a source other than the Government, then the contracting officer need not take steps to resolve the situation.

(b) Whether the nonpublic information (although provided by the Government) is available to all potential offerors. If the nonpublic information is otherwise available to all potential offerors, then--

(1) The offeror's access to the information is not unequal; and

(2) The contracting officer need not take steps (other than potentially sharing the information with all offerors, see 4.402-4(c)) to resolve the situation.

(c) Whether having unequal access to the nonpublic information would be competitively useful to an offeror responding to a solicitation. (1) In assessing whether nonpublic information would be competitively useful to an offeror, the contracting officer should make a reasonable effort to consult with people with knowledge of the market and the industry.

(2) If the nonpublic information to which an offeror has or had access is not competitively useful, then the contracting officer need not take steps to resolve the situation.

4.402-4 Contracting officer responsibilities.

(a) Sources of information. (1) During acquisition planning, the contracting officer shall ask the relevant contracting activity and requiring activity (as appropriate) to examine whether any potential offerors may have had Government-provided access (see 4.402-3(a)) to nonpublic information relevant to the acquisition.

(2) When initially announcing an acquisition, the contracting officer shall include a statement asking that potential offerors indicate, as early as possible, if they have or had Government-provided access (see 4.402-3(a)) to any nonpublic information relevant to the acquisition.

(i) For contract actions, this statement shall be included in the sources sought notification.

(ii) For orders placed against multiple-award task- and delivery-order contracts or blanket purchase agreements, this statement shall be included in the first announcement to contract-holders regarding the order.

(iii) For Federal Supply Schedule orders, this statement shall be included in the request for quote.

(3) As prescribed at 4.402-5, the contracting officer shall include in the solicitation the provision requiring offerors to state whether they are aware of anyone in their corporate organization, including affiliates, who has gained access to nonpublic information relevant to the acquisition that was made available by the Government.

(b) Analysis. (1) If the Contracting Officer is aware that one or more offerors have or had access to nonpublic information provided by the Government, the contracting officer shall determine whether resolution is required. Consistent with the general principles provided in 4.402-3, the contracting officer must resolve the situation (taking into consideration the policy at 4.402-2(b)) if--

(i) The nonpublic information is available to some, but not all, potential offerors;

(ii) The nonpublic information would be competitively useful in responding to a solicitation; and

(iii) The advantage afforded to the contractor by its access to the

nonpublic information is unfair.

(2) If resolution is not required, the Contracting Officer shall document the file.

(c) Resolution. Unfair competitive advantage resulting from unequal access to nonpublic information may be resolved by information sharing, mitigation through use of a firewall, or exclusion. In some cases, a combination of methods may be appropriate.

(1) Information sharing. Information sharing consists of disseminating the information in question to all potential offerors, either in the solicitation, in a solicitation amendment, or through some other method, such as posting it online.

(i) This method is generally available when the relevant information is Government information. In situations where the information belongs to another party (for instance, a contractor for whom a potential offeror worked as a subcontractor), appropriate permission must be obtained before such information can be shared with other parties, and appropriate protections must be implemented with respect to the shared information.

(ii) For this method to be effective, information must be shared with potential offerors early enough in the acquisition process to allow those offerors to effectively utilize the information.

(2) Mitigation through use of a firewall. In cases where only some of an offeror's employees have or had access to the relevant information, it may be possible for the offeror to create an internal barrier (often called a firewall) to prevent those employees from sharing that information with others. The contracting officer may conclude that this is an acceptable resolution if the result is that none of the offeror's employees who are involved in the competition has access to the nonpublic information.

(i) The contracting officer may determine that the requirements and protections of clause 52.204-XX, Access to Nonpublic Information, constitute an adequate firewall, if nonpublic information was gained directly through performance on another Government contract that included the clause.

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(ii) Creation of a firewall may be proposed by a potential offeror, or it may be proposed by the agency. The contracting officer retains discretion to approve or reject the proposed firewall. Firewalls can consist of a variety of elements, including organizational and physical separation; facility and workspace access restrictions; information system access restrictions; independent compensation systems; and individual and organizational nondisclosure agreements.

(iii) In cases involving mitigation through use of a firewall, the offeror's proposal must include a representation that, to the best of its knowledge and belief, there were no breaches of the firewall during preparation of the proposal or must explain any breach that occurred. (See paragraph (c) of provision 52.204-YZ.)

(3) Disqualification. The contracting officer must disqualify the offeror from consideration for the contract if the contracting officer determines that--

(i) A potential offeror has, or has had, unequal, Government-provided access to nonpublic information;

(ii) The information would provide the potential offeror with an unfair competitive advantage; and

(iii) Neither information sharing nor mitigation through use of a

firewall will serve to protect the fairness of the competition.

(d) Multiple-award contracts. In addition to complying with the requirements outlined in paragraphs (a) through (c) when placing orders under multiple-award contract vehicles (including multiple-award indefinite-delivery/indefinite quantity contracts and multiple-award blanket purchase agreements), contracting officers must take additional steps when awarding such contracts and blanket purchase agreements. The contracting officer shall ensure that the ordering procedures clause requires the inclusion of terms similar to those found in the provision at 52.204-YZ, Unequal Access to Nonpublic Information, in any order competed under the multiple-award contract or blanket purchase agreement (see 16.505(b)).

4.402-5 Solicitation provision.

The contracting officer shall include in all solicitations that exceed the simplified acquisition threshold a provision substantially the same as 52.204-YZ, Unequal Access to Nonpublic Information.

4.403 Safeguarding Classified Information.

4.403-2 [Amended]

9c. In newly redesignated section 4.403-2, remove from paragraph (b) `` (see 4.404) '' and add `` (see 4.403-3) '' in its place.

PART 7--ACQUISITION PLANNING

10. Amend section 7.105 by redesignating paragraphs (b)(18) through (b)(22) as paragraphs (b)(19) through (b)(23), respectively; and adding a new paragraph (b)(18) to read as follows:

7.105 Contents of written acquisition plans.

* * * * *

(b) * * *

(18) Organizational conflicts of interest. Describe any significant potential organizational conflicts of interest (see subpart 3.12) that may exist at time of contract award or may arise during contract performance and explain the proposed method of addressing these conflicts. Briefly identify any solicitation provisions and contract clauses that would be used.

* * * * *

7.503 [Amended]

11. Amend section 7.503 by removing from paragraph (d)(11) ``4.402(b)'' and adding ``4.403-1(b)'' in its place.

PART 9--CONTRACTOR QUALIFICATIONS

12. Revise section 9.000 to read as follows:

9.000 Scope of part.

This part prescribes policies, standards, and procedures pertaining to prospective contractors' responsibility; debarment, suspension, and ineligibility; qualified products; first article testing and approval; contractor team arrangements; and defense production pools and research and development pools.

Subpart 9.5 [Removed and Reserved]

13. Remove and reserve subpart 9.5.

PART 11--DESCRIBING AGENCY NEEDS

11.000 [Amended]

14. Amend section 11.002 by removing from paragraph (c) ``Subpart 9.5'' and adding ``subpart 3.12'' in its place.

PART 12--ACQUISITION OF COMMERCIAL ITEMS

15. Amend section 12.301 in paragraph (d) by revising paragraph (2); redesignating paragraphs (3) and (4) as (4) and (5), respectively; and adding new paragraphs (3) and (6) to read as follows:

(d) * * *

(2) Insert the provision and clauses relating to Organizational Conflicts of Interest as prescribed at 3.1207 when applicable.

(3) Insert the provision 52.204-XY, Release of Pre-Award Information, and clauses at 52.204-XX, Access to Nonpublic Information, and 52.204-YY, Release of Nonpublic Information, as prescribed at 4.401-4. Insert a provision substantially the same as 52.204-YZ, Unequal Access to Nonpublic Information, as prescribed in 4.402-5.
* * * * *

(6) Insert the clause at 52.225-19, Contractor Personnel in a Designated Operational Area or Supporting a Diplomatic or Consular Mission outside the United States, as prescribed in 25.301-4.
* * * * *

PART 13--SIMPLIFIED ACQUISITION PROCEDURES

16. Amend section 13.302-5 by adding paragraph (e) to read as follows:

13.302-5 Clauses.

* * * * *

(e) Insert the provision at 52.204-XY, Release of Pre-Award Information, and the clauses at 52.204-XX, Access to Nonpublic Information, and 52.204-YY, Release of Nonpublic Information, as prescribed at 4.401-4. Insert a provision substantially the same as 52.204-YZ, Unequal Access to Non-Public Information, as prescribed in 4.402-5. Insert the provision and clauses relating to Organizational Conflicts of Interest as prescribed at 3.1207 when applicable.

PART 14--SEALED BIDDING

17. Amend section 14.201-6 by adding paragraph (y) to read as follows:

14.201-6 Solicitation provisions.

* * * * *

(y) See the prescription at 4.401-4(b) for use of the provision at 52.204-XY, Release of Pre-Award Information.

18. Amend section 14.201-7 by adding paragraph (e) to read as follows:

14.201-7 Contract clauses.

* * * * *

(e) See the clause prescription at 4.401-4(c) for use of the clause at 52.204-YY, Release of Nonpublic Information.

PART 15--CONTRACTING BY NEGOTIATION

19. Amend section 15.209 by adding paragraph (i) to read as follows:

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15.209 Solicitation provisions and contract clauses.

* * * * *

(i) (1) See the prescription at 4.401-4(b) for use of the provision at 52.204-XY, Release of Pre-Award Information.

(2) See the clause prescription at 4.401-4(c) for use of the clause at 52.204-YY, Release of Nonpublic Information.

20. Amend section 15.604 by revising paragraph (a) (2) to read as follows:

15.604 Agency points of contact.

(a) * * *

(2) Requirements concerning responsible prospective contractors (see subpart 9.1).

* * * * *

PART 16--TYPES OF CONTRACTS

21. Amend section 16.505 by revising paragraph (b) (1) (ii) (C) to read as follows:

16.505 Ordering.

* * * * *

(b) * * *

- (1) * * *
- (ii) * * *

(C) Tailor the procedures to each acquisition, including appropriate procedures for addressing unequal access to nonpublic information (see 4.402);
* * * * *

PART 18--EMERGENCY ACQUISITIONS

22. Amend section 18.000 by revising paragraph (b) to read as follows:

18.000 Scope of part.

* * * * *

(b) The acquisition flexibilities in this part are not exempt from the requirements and limitations set forth in Part 3, Business Ethics and Conflicts of Interest.

* * * * *

PART 37--SERVICE CONTRACTING

23. Amend section 37.110 by revising paragraph (d) to read as follows:

* * * * *

(d) See subpart 3.12 regarding the use of an appropriate provision and clause concerning organizational conflicts of interest, which may at times be significant in solicitations and contracts for services.

* * * * *

PART 42--CONTRACT ADMINISTRATION AND AUDIT SERVICES

24. Amend section 42.1204 by revising paragraph (d) to read as follows:

42.1204 Applicability of novation agreements.

* * * * *

(d) When considering whether to recognize a third party as a successor in interest to Government contracts, the responsible contracting officer shall identify and evaluate any significant organizational conflicts of interest in accordance with subpart 3.12. If the responsible contracting officer determines that a conflict of interest cannot be addressed, but that it is in the best interest of the Government to approve the novation request, a request for a waiver may be submitted in accordance with the procedures at 3.1205.

* * * * *

PART 52--SOLICITATION PROVISIONS AND CONTRACT CLAUSES

25. Add sections 52.203-XX, 52.203-ZZ, 52.203-YY, and 52.203-YZ to read as follows:

52.203-XX, Notice of Potential Organizational Conflict of Interest.

As prescribed in 3.1207(a), insert a provision substantially the same as the following:

Notice of Potential Organizational Conflict of Interest (Date)

(a) Definition. Organizational conflict of interest, as used in this provision, is defined in 52.203-ZZ, Disclosure of Organizational Conflict of Interest after Contract Award.

(b) Notice. (1) The Contracting Officer has determined that the nature of the work to be performed in the contract resulting from this solicitation is such that it may give rise to organizational conflicts of interest (see subpart 3.12, Organizational Conflicts of Interest).

(2) The following contractors participated in the preparation of the statement of work or other requirements documents, including cost or budget estimates:

[Contracting Officer to fill in, if any.]

(c) Proposal requirements. (1) Assessment. Applying the principles of subpart 3.12, the offeror shall assess whether there is an organizational conflict of interest associated with the offer it plans to submit, including any potential subcontracts.

(2) Disclosure. The offeror shall--

(i) Disclose all relevant information regarding any organizational conflicts of interest, including information about potential subcontracts; and

(ii) Describe any relevant limitations on future contracting, the term of which has not yet expired, to which the offeror or potential subcontractor agreed.

(3) Representation. The offeror represents, by submission of its offer, that to the best of its knowledge and belief it has disclosed all relevant information regarding any organizational conflicts of interest as required in paragraph (c)(2) of this provision.

(4) To the extent that either the offeror or the Government identifies any organizational conflicts of interest on the current contract, the offeror shall explain the actions it intends to use to address such conflicts, e.g., by submitting a mitigation plan and/or accepting a limitation on future contracting.

(5) The Contracting Officer is the final authority in determining whether an organizational conflict of interest exists and whether the organizational conflict of interest has been adequately addressed.

(d) Resultant contract. (1) If the offeror submits an organizational conflict of interest mitigation plan, the resultant contract will include the Government-approved Mitigation Plan and a clause substantially the same as 52.203-YY, Mitigation of Organizational Conflicts of Interest.

(2) If the resolution of the organizational conflict of interest involves a limitation on future contracting, the resultant contract will include a clause substantially the same as 52.203-YZ, Limitation on Future Contracting.

(End of provision)

52.203-ZZ, Disclosure of Organizational Conflict of Interest After Contract Award.

As prescribed in 3.1207(b), insert the following clause:

Disclosure of Organizational Conflict of Interest After Contract Award
(Date)

(a) Definition. Organizational conflict of interest, as used in this clause, means a situation in which--

(1) A Government contract requires a contractor to exercise judgment to assist the Government in a matter (such as in drafting specifications or assessing another contractor's proposal or performance) and the contractor or its affiliates have financial or other interests at stake in the matter, so that a reasonable person might have concern that when performing work under the contract, the contractor may be improperly influenced by its own interests rather than the best interests of the Government; or

(2) A contractor could have an unfair competitive advantage in an acquisition as a result of having performed work on a Government contract, under circumstances such as those described in paragraph (1) of this definition, that put the contractor in a position to influence the acquisition.

(b) If the Contractor identifies an organizational conflict of interest that was not previously addressed and for which a waiver has not been granted, or a change to any relevant facts relating to a previously identified organizational conflict of interest, the Contractor shall make a prompt and full disclosure in writing to the Contracting Officer. Organizational conflicts of interest that arise during performance of the contract, as well as newly discovered conflicts that existed before contract award, shall be disclosed. This disclosure shall include a description of--

- (1) The organizational conflict of interest; and
- (2) Actions to address the conflict that--
 - (i) The Contractor has taken or proposes to take; or

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(ii) The Contractor recommends that the Government take.

(c) If, in compliance with this clause, the Contractor identifies and promptly reports an organizational conflict of interest that cannot be addressed in a manner acceptable to the Government, the Contracting Officer may terminate for the convenience of the Government--

(1) This contract, except as provided in paragraph (c) (2) of this clause;

(2) If this is a task- or delivery-order contract, the task or delivery order; or

(3) If this is a blanket purchase agreement, the blanket purchase agreement call.

(d) Subcontracts. The Contractor shall include the substance of this clause, including this paragraph (d), in subcontracts where the work includes or may include tasks that may create a potential for an organizational conflict of interest. The terms ``Contractor'' and ``Contracting Officer'' shall be appropriately modified to reflect the change in parties.

(End of clause)

52.203-YY, Mitigation of Organizational Conflicts of Interest.

As prescribed in 3.1207(c), insert a clause substantially the same as the following:

Mitigation of Organizational Conflicts of Interest (Date)

(a) Definition. Organizational conflict of interest, as used in this clause, is defined in the clause 52.203-ZZ, Disclosure of Organizational Conflict of Interest after Contract Award.

(b) Mitigation plan. The Government-approved Organizational Conflict of Interest Mitigation Plan (Mitigation Plan) and its obligations are hereby incorporated in the contract by reference.

(c) Changes. (1) Either the Contractor or the Government may propose changes to the Mitigation Plan. Such changes are subject to the mutual agreement of the parties and will become effective only upon written approval of the revised Mitigation Plan by the Contracting Officer.

(2) The Contractor shall update the mitigation plan within 30 days of any changes to the legal construct of its organization, any subcontractor changes, or any significant management or ownership changes.

(d) Noncompliance. (1) The Contractor shall report to the Contracting Officer any noncompliance with this clause or with the Mitigation Plan, whether by its own personnel or those of the Government or other contractors.

(2) The report shall describe the noncompliance and the actions the Contractor has taken or proposes to take to mitigate and avoid repetition of the noncompliance.

(3) After conducting such further inquiries and discussions as may be necessary, the Contracting Officer and the Contractor shall agree on appropriate corrective action, if any, or the Contracting Officer shall direct corrective action, subject to the terms of this contract.

(e) Subcontracts. The Contractor shall include the substance of this clause, including this paragraph (e), in subcontracts where the work includes or may include tasks related to the organizational conflict of interest. The terms ``Contractor'' and ``Contracting Officer'' shall be appropriately modified to reflect the change in parties.

(End of clause)

52.203-YZ, Limitation on Future Contracting.

As prescribed in 3.1207(d), insert a clause substantially the same as the following:

Limitation on Future Contracting (Date)

(a) Limitation. The Contractor and any of its affiliates, shall

be ineligible to perform ----- [Contracting Officer to describe the work that the Contractor will be ineligible to perform] as a contractor or as a subcontractor for a period of ---- ----- . [Contracting Officer to determine appropriate length of prohibition.]

(b) Subcontracts. The Contractor shall include the substance of this clause, including this paragraph (b), in subcontracts where the work includes tasks which result in an organizational conflict of interest. The terms ``Contractor'' and ``Contracting Officer'' shall be appropriately modified to reflect the change in parties.

(End of clause)

26. Amend section 52.204-2 by removing from the introductory paragraph ``4.404(a)'' and adding ``4.403-3(a)'' in its place; and revising the introductory texts of Alternate I and Alternate II to read as follows:

52.204-2 Security requirements.

* * * * *

Alternate I (Apr 1984). As prescribed in 4.403-3(b), add the following paragraphs (e), (f), and (g) to the basic clause:

* * * * *

Alternate II (Apr 1984). As prescribed in 4.403-3(c), add the following paragraph (e) to the basic clause:

* * * * *

27. Add sections 52.204-XX, 52.204-XY, 52.204-YY, and 52.204-YZ to read as follows:

52.204-XX, Access to Nonpublic Information.

As prescribed in 4.401-4(a), insert the following clause:

Access to Nonpublic Information (Date)

(a) Definition. Nonpublic information, as used in this clause, means any Government or third-party information that--

(1) Is exempt from disclosure under the Freedom of Information Act (5 U.S.C. 552) or otherwise protected from disclosure by statute, Executive order, or regulation; or

(2) Has not been disseminated to the general public, and the Government has not yet determined whether the information can or will be made available to the public.

(b) Restrictions on use and disclosure of nonpublic information.

(1) The restrictions provided in this clause are intended to protect both the Government and third-party owners of nonpublic information from unauthorized use or disclosure of such information.

(i) The Contractor shall indemnify and hold harmless the Government, its agents, and employees from every claim or liability, including attorneys fees, court costs, and expenses arising out of, or in any way related to, the misuse or unauthorized modification, reproduction, release, performance, display, or disclosure of any

nonpublic information to which it is given access during performance of this contract.

(ii) Third-party owners of nonpublic information to which the Contractor may have access during performance of this contract are third-party beneficiaries with respect to the terms of this clause who, in addition to any other rights they may have, may have the right of direct action against the Contractor to seek damages from any violation of the terms of this clause or to otherwise enforce the terms of this clause.

(2) With regard to any nonpublic information to which the Contractor is given access in performance of this contract, whether the information comes from the Government or from third parties, the Contractor shall--

(i) Utilize the nonpublic information only for the purposes of performing the services specified in this contract, and not for any other purposes;

(ii) Safeguard the nonpublic information from unauthorized use and disclosure;

(iii) Limit access to the nonpublic information to only those persons who need it to perform services under this contract;

(iv) Inform persons who may have access to nonpublic information about their obligations to utilize it only to perform the services specified in this contract and to safeguard it from unauthorized use and disclosure;

(v) Obtain a signed nondisclosure agreement, which at a minimum includes language substantially the same as that found in paragraph (b) (1) and (b) (2) (i) through (iv) of this clause, from each person who may have access to the nonpublic information;

(vi) Provide a copy of any such nondisclosure agreement to the contracting officer upon request; and

(vii) Report to the contracting officer any violations of requirements (i) through (vi) of this paragraph as soon as the violation is identified. This report shall include a description of the violation and the proposed actions to be taken by the contractor in response to the violation, with follow-up reports of corrective actions taken as necessary.

(3) If the Contractor receives information that is marked in a way that indicates the Contractor should not receive this information, the Contractor shall--

(i) Notify the Contracting Officer;

(ii) Use the information only in accordance with the instructions of the Contracting Officer; and

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(iii) Comply with any other notification provisions contained in this contract.

(c) Applicability. (1) The obligations and prohibitions of paragraph (b) do not apply if the Contractor can demonstrate to the Contracting Officer that the information--

(i) Was in the public domain at the time the information was accessed by the Contractor;

(ii) Was published, after having been accessed by the Contractor, or otherwise becomes part of the public domain through no fault of the Contractor;

(iii) Was lawfully in the Contractor's possession at the time the Contractor accessed it and was not acquired directly or

indirectly--

(A) From the Government; or

(B) Under another Government contract;

(iv) Was received by the Contractor from a party, other than the information owner, who has the authority to release the information and did not require the Contractor to hold it in confidence.

(v) Is or becomes available, on an unrestricted basis in a lawful manner, to a third party from the information owner or someone acting under the control of the information owner;

(vi) Is developed by or for the Contractor independently of the information received from the Government or the information owner and such independent development can be shown;

(vii) Becomes available to the Contractor by wholly lawful inspection or analysis of products offered for sale by the information owner or someone acting under the information owner's control, or an authorized third-party reseller or distributor; or

(viii) Is provided to a third party by the Contractor with the prior written approval of the information owner.

(2) The Contractor may release nonpublic information to which the Contractor is given access in performance of this contract to a third party pursuant to the lawful order or rules of a United States Court or Federal administrative tribunal or body of competent jurisdiction, provided that the Contractor gives to the information owner prior written notice of such obligation and the opportunity to oppose such disclosure. The Contractor shall provide a copy of the notice to the Contracting Officer at the same time as notice is given to the information owner.

(d) Other contractual restrictions on information. This clause is subordinate to all other contract clauses or requirements that specifically address the access, use, handling, or disclosure of information. If any restrictions or authorizations in this clause are inconsistent with a requirement of any other clause of this contract, the requirement of the other clause shall take precedence over the requirement of this clause.

(e) Remedies available to a third-party information owner. The Contractor's failure to comply with the requirements of this clause may provide grounds for independent legal action or other remedies available to a third-party information owner based on the protections of paragraph (b) (1) of this clause (third-party beneficiary).

(f) Subcontracts. The Contractor shall include this clause, including this paragraph (f), in subcontracts under which a subcontractor may have access to nonpublic information. The terms ``contract,' ' ``contractor,' ' and ``contracting officer' ' shall be appropriately modified to preserve the Government's rights.

(End of clause)

Alternate I (Date). As prescribed in 4.401-4(a) (2) (i), add the following paragraph (c) (3) to the basic clause:

(c) (3) The Contractor shall, if requested by the Contracting Officer--

(i) Negotiate and sign an agreement identical, in all material respects, to paragraphs (b) (2) and (c) of this clause, with each entity identified by the Contracting Officer that has provided the Government nonpublic information to which the Contractor must now

have access to perform its obligations under this contract; and

(ii) Supply a copy of the executed agreement(s) to the Contracting Officer [within 30 days].

Alternate II (Date). As prescribed in 4.401-4(a)(2)(ii), add the following paragraph (c)(3) to the basic clause (if Alternate I is also used, redesignate the following paragraph as (c)(4)):

(c)(3) The Contractor shall, if requested by the Contracting Officer--

(i) Execute a Government-approved agreement with each entity identified by the Contracting Officer to whose facilities or nonpublic information the Contractor is given access; and

(ii) Supply a copy of the executed agreement(s) to the Contracting Officer.

52.204-XY, Release of Pre-Award Information.

As prescribed in 4.401-4(b), insert the following provision:

Release of Pre-Award Information (Date)

(a) Definition. Nonpublic information, as used in this provision, means any Government or third-party information that--

(1) Is exempt from disclosure under the Freedom of Information Act (5 U.S.C. 552) or otherwise protected from disclosure by statute, Executive order, or regulation; or

(2) Has not been disseminated to the general public, and the Government has not yet determined whether the information can or will be made available to the public.

(b) The Government may need to release some of the nonpublic information submitted by the offeror in connection with this solicitation. By submission of its offer, the offeror agrees that the Government may, in appropriate circumstances, release to its contractors, their subcontractors, and their individual employees, such nonpublic information, subject to the protections referenced at paragraph (d) of this provision.

(c) This provision does not affect the agency's responsibilities under the Freedom of Information Act or the Procurement Integrity Act.

(d) To receive access to nonpublic information needed to assist in accomplishing agency functions, the contractor that will receive access to the information must be operating under a contract that contains the clause at 52.204-XX, Access to Nonpublic Information, which obligates the contractor to do the following:

(1) Utilize the nonpublic information only for the purposes of performing the services specified in this contract, and not for any other purposes;

(2) Safeguard nonpublic information from unauthorized use and disclosure;

(3) Limit access to the nonpublic information to only those persons who need it to perform services under this contract;

(4) Inform persons who may have access to nonpublic information about their obligations to utilize it only to perform the services specified in this contract and to safeguard that information from unauthorized use and disclosure;

(5) Obtain a signed nondisclosure agreement from each person who may have access to the nonpublic information; and

(6) Report to the Contracting Officer any violations of requirements (1) through (5) of this paragraph as soon as the violation is identified. This report shall include a description of the violation and the proposed actions to be taken by the Contractor in response to the violation, with follow-up reports of corrective actions taken as necessary.

(e) Paragraph (e) of the clause at 52.204-XX, Access to Nonpublic Information, included in the contract of the contractor with access to the nonpublic information provides that the third-party information owner may have the right to pursue third-party beneficiary rights against the contractor with access to the information for breaches of the requirements of that clause.

(End of provision)

52.204-YY, Release of Nonpublic Information.

As prescribed in 4.401-4(c) insert the following clause:

Release of Nonpublic Information (Date)

(a) Definition. Nonpublic information, as used in this clause, means any Government or third-party information that--

(1) Is exempt from disclosure under the Freedom of Information Act (5 U.S.C. 552) or otherwise protected from disclosure by statute, Executive order, or regulation; or

(2) Has not been disseminated to the general public, and the Government has not yet determined whether the information can or will be made available to the public.

(b) The Contractor agrees that the Government may, in appropriate circumstances, release to its contractors, their subcontractors, and their individual employees, nonpublic information provided by the Contractor in the performance of this contract, subject to the protections referenced at paragraph (d) of this clause.

(c) This clause does not affect the agency's responsibilities under the Freedom of Information Act or the Procurement Integrity Act.

(d) To receive access to nonpublic information needed to assist in accomplishing agency functions, the

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contractor that will receive access to the nonpublic information must be operating under a contract that contains the clause at 52.204-XX, Access to Nonpublic Information, which obligates the contractor to do the following:

(1) Utilize the nonpublic information only for the purposes of performing the services specified in this contract, and not for any other purposes;

(2) Safeguard nonpublic information from unauthorized use and disclosure;

(3) Limit access to the nonpublic information to only those persons who need it to perform services under this contract;

(4) Inform persons who may access nonpublic information about

their obligations to utilize it only to perform the services specified in this contract and to safeguard that information from unauthorized use and disclosure;

(5) Obtain a signed nondisclosure agreement from each person who may have access to the nonpublic information; and

(6) Report to the Contracting Officer any violations of requirements (1) through (5) of this paragraph as soon as the violation is identified. This report shall include a description of the violation and the proposed actions to be taken by the contractor in response to the violation, with follow-up reports of corrective actions taken as necessary.

(e) Paragraph (e) of the clause at 52.204-XX, Access to Nonpublic Information, included in the contract of the contractor with access to the nonpublic information provides that the third-party information owner may have the right to pursue third-party beneficiary rights against the contractor with access to the nonpublic information for breaches of the requirements of that clause.

(f) Subcontracts. The Contractor shall insert this clause, including this paragraph (f), suitably modified to reflect the relationship of the parties, in all subcontracts that may require the furnishing of nonpublic information to this agency under the subcontract.

(End of clause)

52.204-YZ, Unequal Access to Nonpublic Information.

As prescribed in 4.402-5, insert a provision substantially the same as the following:

Unequal Access to Nonpublic Information (Date)

(a) Definition. Nonpublic information, as used in this provision, means any Government or third-party information that--

(1) Is exempt from disclosure under the Freedom of Information Act (5 U.S.C. 552) or otherwise protected from disclosure by statute, Executive order, or regulation; or

(2) Has not been disseminated to the general public, and the Government has not yet determined whether the information can or will be made available to the public.

(b) Pre-proposal requirements. Applying the principles of 4.402, the offeror shall inform the Contracting Officer, prior to the submission of its offer, if it or any of its affiliates possesses any nonpublic information relevant to the current solicitation and provided by the Government, either directly or indirectly; the offeror should also advise the Contracting Officer of any actions that the offeror proposes to take to resolve the situation.

(c) Proposal requirements. If a firewall has been used to mitigate the impact of access to nonpublic information, the offeror represents, to the best of its knowledge and belief, that the firewall was implemented as agreed, and was not breached during the preparation of this offer; or, by checking this box [], that the firewall was not implemented or was breached, and additional explanatory information is attached.

(End of provision)

PART 53--FORMS

53.204-1 [Amended]

28. Amend section 53.204-1 by removing from paragraph (a) `` (see 4.403(c)(1).) '' and adding `` (see 4.403-2(c)(1).) '' in its place.

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