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ORGANIZATIONAL CONFLICTS OF INTEREST/EDITION IV

By Daniel A. Cantu

Organizational conflicts of interest—which arise when a Government contractor is found “unable to render impartial assistance or advice to the government” or has an “unfair competitive advantage”¹—are notoriously difficult to define with precision.² Indeed, the Federal Acquisition Regulation reinforces this perception by leaving the identification and amelioration of a conflict to the discretion of the Contracting Officers, who are to exercise “common sense, good judgment, and sound discretion” in both identifying a significant potential conflict and the appropriate means to resolve it.³

Notwithstanding this historical confusion and the wide latitude allocated to the CO under the FAR, an analytical framework has begun to emerge from the decisions of the Government Accountability Office, beginning with the seminal case of *Aetna Government Health Plans, Inc.*⁴ in 1995. In *Aetna*, the GAO recognized that the term “organizational conflict of interest” is really an

umbrella that covers three analytically distinct conflict scenarios that render a contractor unable to provide impartial assistance to the Government or give the contractor an unfair advantage in the competition. The first of these scenarios is called “unequal access to information.” It occurs where a firm “has access to nonpublic information as part of its performance of a government contract” that leads to “a competitive advantage in a later competition for a government contract.”⁵

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The second is known as the “biased ground rules” category. It occurs where “a firm, as part of its performance of a government contract, has in some sense set the ground rules for another government contract by, for example, writing the statement of work or specification.”⁶

The third category of organizational conflict of interest, for “impaired objectivity,” exists where a contract requires the exercise of judgment, and the economic interests of the firm—broadly defined—may be harmed through the free and unbiased exercise of that judgment.⁷

This is the fourth BRIEFING PAPER to address the subject of organizational conflicts of interest. The first, published in 1964, discussed the rules in effect before the issuance of the FAR; the second, published in 1984, discussed the rules in the then newly promulgated FAR; the third, published in 1994, discussed the emerging interpretations of the conflict-of-interest rules.⁸ This PAPER, the fourth in the series, focuses on the framework for analyzing conflicts of interest that has emerged from the GAO decisions of the last decade.

Key Principles

The FAR sets forth two key principles underlying the detection and amelioration of organizational conflicts of interest:⁹

- (1) Preventing the existence of conflicting roles that might bias a contractor’s judgment.
- (2) Preventing unfair competitive advantage.

Under the FAR, the CO has primary responsibility to “[i]dentify and evaluate potential organizational conflicts of interest” and to “[a]void, neutralize, or mitigate significant potential conflicts before contract award.”¹⁰ “The exercise of common sense, good judgment, and sound discretion is required in both the decision on whether a significant potential conflict exists and, if it does, the development of an appropriate means for resolving it.”¹¹ When a significant conflict is identified, such conflicts “are normally resolved by imposing some restraint, appropriate to the nature of the conflict, upon the contractor’s eligibility for future contracts or subcontracts.”¹²

Although there are no specific disclosure requirements in the FAR, prospective contractors should identify potential organizational conflicts and propose a mitigation plan to the Government. This plan must cover the firm’s parent company and subsidiaries, affiliates, joint venture partners, and other related entities. Although the FAR does not explicitly discuss organizational conflicts that arise because of related entities, the decisions of the GAO leave no doubt that related entities are an essential part of the analysis. Options for mitigating potential conflicts include:¹³

- (a) Imposing organizational barriers (or firewalls) within the firm’s corporate structure or between various members of the contracting team.
- (b) Isolating subcontractors from planning or developmental aspects of the contract.



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- (c) Segregating records, personnel, or contracting teams.
- (d) Altering corporate structures, divisions, or entities to reduce the impact of an organizational conflict, including the sale of smaller units that may give rise to the conflict.

In describing specific instances of organizational conflicts of interest, the FAR sets forth a complicated set of examples, illustrating nine possible scenarios.¹⁴ Although these scenarios are valid law (if somewhat confusing), the GAO in *Aetna* simplified the analysis into three categories: (1) unequal access to information, (2) biased ground rules, and (3) impaired objectivity. Each of these categories has its own unique characteristics and remedies. The following discussion describes each of these categories and illustrates them with examples of cases adjudicated by the GAO.

Category 1: Unequal Access To Information

The FAR provides that an organizational conflict based on unequal access to information exists where a contractor competing for a award of a Government contract possesses *proprietary information* “that was obtained from a Government official without proper authorization,” or *source selection information* “that is relevant to the contract but is not available to all competitors, and such information would assist that contractor in obtaining the contract.”¹⁵

Notwithstanding the FAR’s definition, the GAO has rephrased this language into a broader concept, holding that an organizational conflict of interest of this type occurs where a firm “has access to *nonpublic information* as part of its performance of a government contract” that leads to “a competitive advantage in a later competition for a government contract.”¹⁶ As interpreted by the GAO, the phrase “nonpublic information” is a term of art. Although incumbent contractors often have access to information not generally available that

lends them an advantage in subsequent competitions, such information does not lead to an organizational conflict of interest. The GAO summarized this principle in *Snell Enterprises, Inc.*: “The mere existence of a prior or current contractual relationship between a contracting agency and a firm does not create an unfair competitive advantage, and an agency is not required to compensate for every competitive advantage gleaned by a potential offeror’s prior performance of a particular requirement.”¹⁷ For purposes of an organizational conflict-of-interest analysis, nonpublic information must be highly specific confidential information that can be identified using “substantial facts and hard evidence”¹⁸ and that would not ordinarily be available to an incumbent. An important subcategory of nonpublic information is proprietary information belonging to another firm that was not disseminated to other firms in the competition.

In examining an “unequal access” conflict, the GAO has focused on the following questions:

- (1) Did the bidder have useful information beyond that of an ordinary incumbent?
- (2) Can the information be identified using “substantial facts and hard evidence”?
- (3) Was the information proprietary to another company, or was it freely disseminated?

All of these factors can be gleaned from a careful examination of recent decisions by the GAO.

■ More Than An Ordinary Incumbent

The first question to address with this type of organizational conflict of interest is whether the bidder had more information than an ordinary incumbent. Answering this question requires a fact-intensive inquiry, as illustrated in *Johnson Controls World Services, Inc.*¹⁹

Johnson Controls involved a protest of an award for logistical services at a military base. The protester alleged that the successful bidder

had nonpublic information through one of its subcontractors and should have been excluded because of an organizational conflict of interest. The subcontractor established and maintained a logistical database for the military and compiled detailed information relating to maintenance activities worldwide. It also provided general assistance to the Government in evaluating logistical needs and planning.

The GAO began its analysis with an examination of whether the information would be of use to a bidder on the contract. This was accomplished by comparing the information available to the subcontractor to that available on the request for proposals. After a detailed analysis, the GAO found that the subcontractor possessed much more detailed information than was available through the RFP. For example, the RFP provided general information relating to the number of weapons and work orders. The subcontractor, however, had access to detailed information relating to the specific types of weapons repaired and the parts used for repair. From this and similar information, the GAO found that the information “would make it possible to refine and reduce staffing levels significantly beyond what would be possible using the RFP information alone.”²⁰ Furthermore, the GAO noted that the subcontractor’s employees were “embedded in [the Government] organization and know everything that goes on to include the number of people [used] to conduct maintenance and supply.”²¹

After identifying the information as valuable, the GAO addressed whether the information possessed by the subcontractor was essentially the same as would be possessed by any incumbent. The agency found this not to be the case. The subcontractor’s work included “provid[ing] the agency with analysis and evaluation of how the work is (and should be) performed.”²² Because an ordinary incumbent would generally not know how the agency evaluates its work, an organizational conflict of interest existed.²³

■ Substantial Facts & Hard Evidence

As a practical matter, the GAO is skeptical of allegations of unequal access to informa-

tion and has emphasized that the conflict must be established using “substantial facts and hard evidence,” as opposed to “mere inference or suspicion of an actual or apparent conflict.”²⁴ This was shown in *Mechanical Equipment Co.*,²⁵ which bears a striking, albeit superficial, resemblance to the facts of *Johnson Controls*.

In *Mechanical Equipment*, the protester alleged that a subcontractor had a long-term support services contract with the agency and may have been involved in developing the requirements for the solicitation. Unlike *Johnson Controls*, however, the GAO found no conflict. The GAO determined that the subcontractor “had a very limited role in the [relevant] program that did not provide it with an unfair competitive advantage.”²⁶ Indeed, the key documents for the competition, “including the RFP, the statement of work, the purchase description, the test and evaluation master plan, milestone decisions and the life cycle cost estimate, were created after [the subcontractor’s] contract with [the agency] ended.”²⁷ Moreover, much of the supposedly confidential information obtained by the subcontractor had been publicly released in a *Commerce Business Daily* announcement.²⁸

Failing in this argument, the protester contended that the subcontractor—like the subcontractor in *Johnson Controls*—was “so ‘embedded’ as to provide [the subcontractor] with insight into the agency’s operations beyond that which could be expected of a typical government contractor.”²⁹ The GAO also rejected this argument, stating that “the record before us here, which includes the agency’s credible testimony that [the subcontractor] had very little to do with the [relevant] program, does not support anything beyond speculation that [the subcontractor] may have had access to such information.”³⁰ The GAO noted further that the “mere proximity” to the Government’s estimate of the labor hours to be performed by the subcontractor in the awardee’s proposal did “not rise above innuendo and suspicion” and did not provide a basis to sustain the protest.³¹ The GAO stressed in this decision that “[s]ubstantial facts and

hard evidence are necessary to establish a conflict; mere inference or suspicion of an actual or apparent conflict is not enough,” and that it “will not overturn an agency’s determination as to whether an offeror or potential offeror has a conflict of interest except where it is shown to be unreasonable.”³²

■ Proprietary Information

The FAR provides that “[w]hen a contractor requires proprietary information from others to perform a Government contract...the contractor may gain an unfair competitive advantage unless restrictions are imposed.”³³ Such restrictions are not intended to protect information “[f]urnished voluntarily without limitations on its use” or available from other sources “without restriction.”³⁴

Thus, the use of proprietary, nonpublic information to obtain a contract will create an organizational conflict of interest, unless that information was available to other firms in the competition. In *Snell Enterprises, Inc.*,³⁵ the protester contended that the contract awardee had used proprietary information from another firm to win the contract. The GAO rejected that argument because the information “was furnished voluntarily, with no stated limitations on its use, and all government and [contractor] personnel in attendance understood it to be property of the U.S. Government.”³⁶

■ Implications

As a practical matter, unequal access to information conflicts are most likely to arise where the bidder is using proprietary information belonging to another firm, or where the contractor (or subcontractor or affiliate) provided general advice to the Government that gave it a unique insight into the bidding or evaluation process. This type of conflict should generally be easy to remedy by creating organizational barriers between those corporate divisions, affiliates, or individuals with access to the nonpublic information and those bidding on the new contract. Indeed, the GAO in *Johnson Controls* indicated that a firewall might have been of use in that case,

although the barrier in that particular instance had in fact been breached.³⁷ The presence of proprietary information, particularly information owned by a potential bid protester, complicates mitigation, although this too can be remedied where that information was available to all bidders.

Category 2: Biased Ground Rules

The FAR provides that “[i]f a contractor prepares, or assists in preparing, a work statement to be used in competitively acquiring a system or services...that contractor may not supply the system, major components of the system, or the services unless—(i) [i]t is the sole source; (ii) [i]t has participated in the development and design work; or (iii) [m]ore than one contractor has been involved in preparing the work statement.”³⁸

The GAO has rephrased this language to convey the broader principle that an organizational conflict of this type occurs where “a firm, as part of its performance of a government contract, has in some sense set the ground rules for another government contract by, for example, writing the statement of work or specification.”³⁹ The concern is that “the firm could skew the competition, whether intentionally or not, in favor of itself,” or that the firm “by virtue of its special knowledge of the agency’s future requirements, would have an unfair advantage in the competition for those requirements.”⁴⁰

In identifying whether a “biased ground rules” conflict exists, the GAO has employed the following three-step analysis:

- (1) Did the bidder “set the ground rules” for a competition, either by drafting the specifications or the RFP or by taking a substantial role in doing so?
- (2) Did the firm receive an “actual benefit” in the competition as a result of setting the ground rules?
- (3) Was the firm is responsible for development and design of the overall system?

Each of these questions will be addressed in turn.

■ Setting The Ground Rules

As a rule, it should not be difficult to determine whether a firm set the ground rules for a competition. If the firm wrote the statement of work for a contract or drafted the RFP, the answer is yes. The question is somewhat more difficult, however, when the firm did not write the specifications, but rather advised the Government agency on a related topic.

This scenario occurred in *Lucent Technologies World Services, Inc.*,⁴¹ in which Lucent protested its exclusion from a competition for wireless radios and equipment. Lucent had prepared technical specifications for certain devices that ultimately formed the basis for the specifications in the RFP. In its protest, Lucent argued that the organizational conflict-of-interest restrictions only apply to “complete specifications” for “non-developmental items.”⁴² The GAO rejected this argument, noting that “contracting officers are given “broad discretion” in the handling of organizational conflicts of interest and the identification of such a conflict under such circumstances “was reasonable.”⁴³

■ Actual Benefit

In general, the GAO presumes that “setting the ground rules” confers an “actual benefit” in the form of a competitive advantage on the bidder.⁴⁴ In *SSR Engineers, Inc.*,⁴⁵ for example, a company protested the Government’s decision to exclude it from bidding on an electrical distribution system at a military base. The company had prepared a long-range plan for such systems and drafted a section of the plan that was used as the statement of work for the protested procurement. The company argued, in part, that it should not be excluded from the competition because it did not derive any competitive advantage from drafting the long-range plan. The company contended, in effect, that setting the ground rules did

not in fact help it because it should have won the competition even if it had not set the ground rules.⁴⁶ The GAO declined to follow this line of reasoning. As the GAO explained in *Lucent Technologies*, “even the appearance of an unfair competitive advantage may compromise the integrity of the procurement process, thus justifying a contracting officer’s decision to err, if at all, on the side of avoiding the appearance of a tainted competition.”⁴⁷

Nevertheless, there is at least one case in which the protester failed to show an actual benefit. In *American Management Systems, Inc.*,⁴⁸ a frustrated bidder protested that the “significant business relationships” based on a “Marketing Alliance Agreement” between KPMG Peat Marwick, the agency’s “integration systems partner,” which had set the ground rules for the contract, and Oracle, the successful bidder for the software procurement, created an organizational conflict of interest that should prevent Oracle from being awarded the contract.⁴⁹ In essence, the protester argued that both firms would benefit in the long run from the success of the other.⁵⁰ The GAO rejected this argument. The marketing agreement expressly stated that “the parties remain independent contractors and that no partnership, joint venture, or agency relationship is created between them.”⁵¹ The GAO explained that “the potential benefit to KPMG here is speculative and too remote from the present procurement to establish a significant organizational conflict of interest that the contracting agency must avoid, neutralize or mitigate pursuant to FAR Subpart 9.5.”⁵²

Thus, although actual benefit is ordinarily presumed when the firm sets the ground rules for the competition, no such benefit will be presumed where that benefit is not based on an actual corporate affiliation.

■ Development & Design Exception

Once it has been established that a firm set the ground rules for a competition, the only practical way to avoid an organizational

conflict of interest is under the development and design exception. Where a company has developed and designed a product or system, that company may bid on subsequent contracts even if it did set the ground rules for the competition.⁵³ The U.S. Court of Federal Claims explained that this exception is a practical necessity in development work.⁵⁴ The court noted, quoting the FAR, that “[i]n development work, it is normal to select firms that have done the most advanced work in the field.”⁵⁵ Such firms can frequently start production earlier and more knowledgeably than firms that did not participate in development.⁵⁶ In many cases, the Government financed the development.⁵⁷ Thus, as the FAR states, “while the development contractor has a competitive advantage, it is an unavoidable one that is not considered unfair; hence no prohibition should be imposed.”⁵⁸

■ Implications

Although this type of conflict is relatively easy to identify where the firm has drafted an RFP or other specifications of the contract, *SSR Engineers, Inc.* shows that this type of conflict can also be created by writing long-range plans or providing general advice to the agency.⁵⁹ As a practical matter, the company should keep track of all contracts for long-range planning or other consulting advice and develop a plan for segregating the offices, divisions, or personnel working on such matters from the rest of the company.

Category 3: Impaired Objectivity

The third class of organizational conflicts of interest—the “impaired objectivity” category—identifies conflicts where “a firm’s work under one government contract could entail evaluating itself, either through an assessment of performance under another contract or an evaluation of proposals.”⁶⁰ The central concern is that “the firm’s ability to render impartial advice to the government could appear to be undermined by its relationship with the entity whose work product is being evaluated.”⁶¹

The GAO has applied a three-part analysis in identifying the “impaired objectivity” type of conflict:

- (1) Does the contract at issue require the exercise of judgment by the contractor?
- (2) If so, will the firm *ever* be in a position to evaluate itself?
- (3) Even if the firm is not evaluating itself, will providing impartial advice adversely impact *any* of the firm’s economic interests?

These questions will be considered below.

■ Exercise Of Judgment

A contractor exercises judgment whenever it evaluates performance, except for contracts devoted exclusively to data gathering. The key case on this topic is *PURVIS Systems, Inc.*,⁶² which involved a protest of the Navy’s award of a contract to Northrop Grumman Defense Missions Systems, Inc. to provide analytical and technical support to assess the readiness and effectiveness of the Navy’s surface forces. The protester contended that Northrop Grumman had an organizational conflict of interest because the contract called on it to evaluate the performance of under-sea warfare systems that it had manufactured. The Navy responded that the contract required only data gathering, with no exercise of judgment.⁶³ The GAO disagreed. Upon a detailed review of the RFP, the GAO found numerous instances in which Northrop Grumman would be required to exercise discretion. The GAO pointed out, for example, that the contractor was responsible for “drafting scenarios to test specific tactics” and “recommending settings for mine simulators.”⁶⁴ After reciting a number of other, similar examples, the GAO rejected the agency’s contention that subjective judgment was not required.⁶⁵

In *Computers Universal, Inc.*,⁶⁶ by contrast, the protester challenged a contract award for information management services in support of a vehicle tracking system. The alleged organizational conflict of interest arose

because the awardee was also in charge of maintaining the vehicles to be tracked. Although the new contract required the firm to “monitor,” in a sense, its own performance in maintaining vehicles, the GAO found that it was “not responsible for making judgments as to what maintenance [was] required or how well the maintenance [was] being performed.”⁶⁷ As such, no independent judgment was required and there was no organizational conflict of interest.

Taken together, these two cases stand for the principle that a firm will be deemed to be exercising judgment whenever it is either evaluating performance or designing an evaluation system. There is no exercise of judgment, however, when the firm’s role is limited to gathering data.

■ Self-Evaluation

The FAR provides that “[c]ontracts for the evaluation of offers for products or services shall not be awarded to a contractor that will evaluate its own offers for products or services, or those of a competitor, without proper safeguards to ensure objectivity to protect the Government’s interests.”⁶⁸ Any task that would require a contractor to evaluate its own products and services—even old products or those of an affiliate⁶⁹—falls under this restriction.

An examination of *PURVIS Systems, Inc.*,⁷⁰ is instructive on this point. Although Northrop acknowledged that it manufactured 12 of the 59 undersea warfare systems that it would evaluate, the company argued that “mature, fielded” systems do not pose a threat of an organizational conflict of interest.⁷¹ The GAO forcefully rejected this argument, stating that any situation in which a company evaluates itself gives rise to an organizational conflict of interest, whether or not the systems at issue involve new procurements. Indeed, any situation in which a company is responsible for assessing the performance of any system that it manufactured is a “classic example of an ‘impaired objectivity’” organizational conflict of interest.⁷² In such situations, the firm risks having its objectivity impaired by a bias in fa-

vor of its own systems’ performance and against that of its competitors.⁷³

Although the *PURVIS Systems* decision seems to imply that the GAO will, when in doubt, assume that the contractor is evaluating itself, there is a limit to this rule. An analysis of *LeBoeuf, Lamb, Greene & MacRae*,⁷⁴ shows that the self-examination must be a *required* element of the contract, not incidental to it. In *LeBoeuf*, a law firm protested the award by the Department of Energy of a contract for professional legal services in connection with a repository of spent nuclear fuel and high-level radioactive waste. The work included the preparation of written analyses and recommendations related to regulatory and licensing requirements. The protester contended that the law firm awarded the contract suffered from an organizational conflict of interest because it had previously provided the same legal services under an earlier subcontract, and the new contract would necessarily require a review of that earlier work.⁷⁵ The GAO rejected the argument, concluding that a detailed examination of the award revealed that it was nothing more than a continuation of the previous contract that did not require an evaluation of that prior work.⁷⁶

These cases indicate that self-evaluation, if it exists, should be evident on the face of the contract.

■ Impact Of Impartial Advice On Economic Interests

Even if the contractor is not explicitly evaluating itself, the GAO has found impaired objectivity where impartial advice may adversely impact any of the firm’s economic interests. In *Alion Science & Technology Corp.*,⁷⁷ for example, the protester challenged the award of a contract by the Department of Defense to provide electromagnetic spectrum engineering services. The protester alleged that the awardee had significant interests in the manufacture and marketing of spectrum-dependent products that would impair its objectivity in rendering advice to the Government.

In its review, the GAO found that the company had “multiple financial interests with regard to manufacturing and marketing of spectrum-dependent products to the U.S. government, to foreign governments, and to commercial customers worldwide,” and that its future success depended upon both domestic and foreign regulations, its ability to win contracts, and the development and marketing of new products.⁷⁸ In reviewing the contract, the GAO found that it required the firm to provide general “technical advice,” which involved “analyzing national and international electromagnetic spectrum issues and advising executive decision-makers on the technical viability of policy and implementation options.”⁷⁹ Noting that the DOD “is competing for spectrum access with other users, including industry and foreign governments,” the GAO reasoned that the DOD’s policies, strategies, and regulations might affect the sale of products by the firm and its competitors.⁸⁰ Because the firm might benefit economically from some DOD policies, and be harmed by others, the GAO found that the firm would not be free to provide impartial advice and would therefore be subject to an organizational conflict of interest.⁸¹

Another example of an organizational conflict of interest based on the economic interests of the company, broadly defined, was presented in *Science Applications International Corp.*⁸² That case involved a protest of an award of a contract by the U.S. Environmental Protection Agency to Lockheed Martin Services, Inc. Under the contract, Lockheed would be required to provide “a wide variety” of systems engineering services “to assist EPA in meeting its strategic objections and responsibilities under Federal legislation and executive orders.”⁸³ The protester alleged that Lockheed was subject to an organizational conflict of interest because of its “multiple ongoing activities that are subject to, and potentially in violation of, EPA regulations.”⁸⁴

The EPA responded that there was no conflict of interest because the procurement was for computer and engineering services, “not enforcement or regulatory advice.”⁸⁵ The GAO rejected this argument, finding that the pos-

sibility of an enforcement or regulatory action against Lockheed could affect its ability to perform the contract. The GAO pointed out that the contract called for the design and implementation of questionnaires and surveys to meet EPA requirements. These surveys could be used to determine long-term contaminant ingestion and its corresponding health effects. At the GAO hearing, the Government witness testified that it would be inappropriate for Lockheed Martin to conduct a survey in an area where a Lockheed Martin production facility was located, concluding that such a survey “would clearly be a conflict of interest.”⁸⁶ With this and similar examples, the GAO sustained the protest.

These decisions demonstrate that an organizational conflict of interest may be found *outside* of the four corners of the contract where a protester can raise a plausible argument that the firm may itself be affected by the policy judgments of the federal agency that it advises.

■ Implications

This is the most troubling of the three categories of organizational conflict in that it raises the possibility that large firms with diversified interests may be effectively precluded from bidding on contracts that call on them to provide policy advice or otherwise exercise independent judgment. Interestingly, the GAO in *Alion* raised the possibility that this type of conflict can be ameliorated by a firewall because it remanded the case to the agency for a determination of whether an adequate firewall could be constructed.⁸⁷ Nevertheless, it is difficult to imagine how imposing an organizational barrier that segregates offices providing policy advice from the rest of the firm would address the concerns underlying the conflict. After all, the mere fact that the individuals providing policy advice to the Government are *themselves* aware of the impact of that advice on their own firm may be sufficient to alter the content of that advice. In the final analysis, divestiture of the unit responsible for providing policy advice to the Government may be the only practical way to address the GAO’s concerns.

★ GUIDELINES ★

These *Guidelines* are intended to assist you in identifying and mitigating organizational conflicts of interest. They are not, however, a substitute for professional representation in any specific situation.

1. Each of the three major categories of organizational conflict (unequal access to information, biased ground rules, and impaired objectivity) should be separately addressed in a mitigation plan. Each has separate elements of proof and may require different mitigation strategies.

2. In drafting a mitigation plan, identify all contracts that involve the use of proprietary information, as well as contracts that provide unusual insight into an agency's decisionmaking process in awarding contracts. Both are essential for identifying and responding to conflicts due to unequal access to information.

3. Track contracts that "set the ground rules" for future procurements. This includes contracts for drafting long-range plans and technical specifications that may form the basis for future contracts. Offices and personnel working on such contracts should be segregated from those who may bid on future procurements.

4. In responding to RFPs that call for the exercise of judgment, broadly defined, determine whether the contract may call on the firm to evaluate itself, its services, or its products. Next, ascertain whether the contract may require the firm to provide advice that may affect the firm's own economic interests. If either self-evaluation or providing potentially adverse (or beneficial) advice is required, consider whether a firewall can be constructed that would mitigate the potential conflict of interest.

★ REFERENCES ★

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| <p>1/ Aetna Gov't Health Plans, Inc., Comp. Gen. Dec. B-254397, 95-2 CPD ¶ 129, at 12; see FAR 2.101, subpt. 9.5.</p> <p>2/ See, e.g., Nash, "Organizational Conflicts of Interest: An Increasing Problem," 20 Nash & Cibinic Report ¶ 24 (May 2006); Gordon, "Organizational Conflicts of Interest: A Growing Integrity Challenge," 35 Pub. Cont. L.J. 25 (Fall 2005).</p> <p>3/ FAR 9.505.</p> <p>4/ Aetna Gov't Health Plans, Inc., Comp. Gen. Dec. B-254397, 95-2 CPD ¶ 129.</p> <p>5/ <i>Id.</i> at 12; see FAR 9.505, 9.505-4.</p> <p>6/ Aetna Gov't Health Plans, Inc., Comp. Gen. Dec. B-254397, 95-2 CPD ¶ 129, at 13; see FAR 9.505-1, 9.505-2.</p> <p>7/ Aetna Gov't Health Plans, Inc., Comp. Gen. Dec. B-254397, 95-2 CPD ¶ 129, at 13; see FAR 2.101, 9.505-3.</p> <p>8/ Madden, Pavlick, Worrall, "Organizational Conflicts of Interest/Edition III," Briefing Papers No. 94-8 (July 1994); Taylor, "Organizational Conflicts of Interest/Edition II," Briefing Papers No. 84-8 (Aug. 1984), 6 BPC 381; Pasley, "Organizational Conflicts of Interest," Briefing Papers No. 64-6 (Dec. 1964), 1 BPC 97; see also Goddard, "Business Ethics in Government Contracting—Part I," Briefing Papers No. 03-6 (May 2003).</p> | <p>9/ FAR 9.505.</p> <p>10/ FAR 9.504(a).</p> <p>11/ FAR 9.505.</p> <p>12/ FAR 9.507-1.</p> <p>13/ See Madden, Pavlick, Worrall, <i>supra</i> note 8, at 9–10.</p> <p>14/ See FAR 9.508.</p> <p>15/ FAR 9.505(b).</p> <p>16/ Aetna Gov't Health Plans, Inc., Comp. Gen. Dec. B-254397, 95-2 CPD ¶ 129, at 12 (emphasis added); see FAR 9.505, 9.505-4.</p> <p>17/ Snell Enters., Inc., Comp. Gen. Dec. B-290113, 2002 CPD ¶ 115, at 8, 44 GC ¶ 305.</p> <p>18/ Mechanical Equip. Co., Comp. Gen. Dec. B-292789.2, 2004 CPD ¶ 192, at 25.</p> <p>19/ Johnson Controls World Servs., Inc., Comp. Gen. Dec. B-286714.2, 2001 CPD ¶ 20, 43 GC ¶ 76.</p> <p>20/ <i>Id.</i> at 5.</p> <p>21/ <i>Id.</i> at 6.</p> <p>22/ <i>Id.</i> at 6–7.</p> <p>23/ <i>Id.</i> at 7.</p> <p>24/ Mechanical Equip. Co., Comp. Gen. Dec. B-292789.2, 2004 CPD ¶ 192, at 25.</p> |
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- 25/ *Id.*
- 26/ *Id.*
- 27/ *Id.* at 26–27.
- 28/ *Id.* at 27.
- 29/ *Id.*
- 30/ *Id.* at 28.
- 31/ *Id.* at 29.
- 32/ *Id.* at 25.
- 33/ FAR 9.505-4(a).
- 34/ FAR 9.505-4(a).
- 35/ *Snell Enters., Inc., Comp. Gen. Dec. B-290113, 2002 CPD ¶ 115, 44 GC ¶ 305.*
- 36/ *Id.* at 6.
- 37/ *Johnson Controls World Services, Inc., Comp. Gen. Dec. B-286714.2, 2001 CPD ¶ 20, at 9–11, 43 GC ¶ 76.*
- 38/ FAR 9.505-2(b)(1).
- 39/ *Aetna Gov't Health Plans, Inc., Comp. Gen. Dec. B-254397, 95-2 CPD ¶ 129, at 13.*
- 40/ *Id.*
- 41/ *Lucent Techs. World Servs., Inc., Comp. Gen. Dec. B-295462, 2005 CPD ¶ 55, 47 GC ¶ 190.*
- 42/ *Id.* at 3.
- 43/ *Id.* at 6.
- 44/ See *id.* at 9–10.
- 45/ *SSR Eng'rs., Inc., Comp. Gen. Dec. B-282244, 99-2 CPD ¶ 27.*
- 46/ *Id.* at 3.
- 47/ *Lucent Techs. World Servs., Inc., Comp. Gen. Dec. B-295462, 2005 CPD ¶ 55, at 10, 47 GC ¶ 190.*
- 48/ *American Mgmt. Sys., Inc., Comp. Gen. Dec. B-285645, 2000 CPD ¶ 163.*
- 49/ *Id.*
- 50/ *Id.* at 6.
- 51/ *Id.* at 5.
- 52/ *Id.* at 6.
- 53/ See FAR 9.505-2(a)(3).
- 54/ See *Vantage Assocs., Inc. v. United States*, 59 Fed. Cl. 1 (2003).
- 55/ *Id.* at 11–12 (quoting FAR 9.505-2(a)(3)).
- 56/ *Id.*
- 57/ *Id.*
- 58/ *Id.*
- 59/ *SSR Eng'rs., Inc., Comp. Gen. Dec. B-282244, 99-2 CPD ¶ 27.*
- 60/ *Aetna Gov't Health Plans, Inc., Comp. Gen. Dec. B-254397, 95-2 CPD ¶ 129, at 13.*
- 61/ *Id.*
- 62/ *PURVIS Sys., Inc., Comp. Gen. Dec. B-293807.3, 2004 CPD ¶ 177, 46 GC ¶ 362.*
- 63/ *Id.* at 8.
- 64/ *Id.*
- 65/ *Id.* at 9.
- 66/ *Computers Universal, Inc., Comp. Gen. Dec. B-292794, 2003 CPD ¶ 201, 45 GC ¶ 489.*
- 67/ *Id.* at 3.
- 68/ FAR 9.505-3.
- 69/ *Aetna Gov't Health Plans, Inc., Comp. Gen. Dec. B-254397, 95-2 CPD ¶ 129 (finding an organizational conflict of interest where the contract would require evaluation of an affiliate).*
- 70/ *PURVIS Sys., Inc., Comp. Gen. Dec. B-293807.3, 2004 CPD ¶ 177, 46 GC ¶ 362.*
- 71/ *Id.* at 10–11.
- 72/ *Id.* at 11.
- 73/ *Id.*
- 74/ *LeBoeuf, Lamb, Greene & MacRae, Comp. Gen. Dec. B-283825, 2000 CPD ¶ 35.*
- 75/ *Id.* at 7.
- 76/ *Id.* at 8–10.
- 77/ *Alion Science & Tech. Corp., Comp. Gen. Dec. B-297022.3, 2006 CPD ¶ 2.*
- 78/ *Id.* at 6.
- 79/ *Id.* at 9.
- 80/ *Id.* at 11.
- 81/ *Id.*
- 82/ *Science Applications Int'l Corp., Comp. Gen. Dec. B-293601, 2004 CPD ¶ 96, 46 GC ¶ 224.*
- 83/ *Id.* at 2.
- 84/ *Id.* at 4.
- 85/ *Id.* at 5.
- 86/ *Id.* 7–8.
- 87/ *Alion Science & Tech. Corp., Comp. Gen. Dec. B-297022.3, 2006 CPD ¶ 2, at 12.*

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