Conflict of Interest – Protest Decision Summaries

**Point of Contact: Darryl Grant**

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# ****Detica – B-400523 (Dec. 2, 2008)****

The existence of an OCI must be supported by hard facts, not mere suspicion. Protest that successful vendor has an impermissible “biased ground rules” type of organizational conflict of interest is denied, where record shows that, contrary to protester’s assertion, former agency official working for successful vendor did not participate in planning the acquisition or preparing the solicitation. Protest that agency evaluator was biased in favor of successful vendor is denied where protester presents no evidence to support its assertion and record shows that evaluator in question rated protester’s and successful vendor’s quotations consistently. The protestor must show that the alleged bias translated into action that unfairly affected the protester’s competitive position.

# ****The CNA Corp. v. US (April 30, 2008) – US Ct. of Federal Claims****

**Participated “Personally and Substantially”** For imposition of the post-employment restrictions, the former employee must have participated “personally and substantially” during federal employment in the matter, in this case the NCS. See 18 U.S.C. § 207(a)(1)(B The ethics decision with respect to a particular individual, however, cannot be reached without careful and individualized attention to the standard in 18 U.S.C. § 207(a)(1)(B) to determine whether the individual participant participated “personally and substantially” in the particular matter after the clock began to run. Application of these last two criteria is very personal and fact specific, in this case to Dr. Friedman. OGE regulations provide that participating “personally” means participating directly, which Dr. Friedman did. See 5 C.F.R. 2637.201(d)(1). Participating“substantially” in a program of this size and scope is another matter. OGE regulations provide that substantially means that the employee’s involvement must be of significance to the

matter, or form a basis for a reasonable appearance of such significance. It requires more than official responsibility, knowledge, perfunctory involvement, or involvement on a administrative or peripheral issue. A finding of substantiality should be based not only on the effort devoted to a matter, but on the importance of the effort. While a series of peripheral involvements may be insubstantial, the single act of approving or participating in a critical step may be substantial.

5 C.F.R. § 2637.201(d)(1).

# ****MASAI Technologies Corporation vs. The United States – (Nov. 29, 2007 – see GAO case below)****

Masai brought this protest in the Ct. of Federal Claims requesting motion for judgment on the administrative record and for preliminary injunction. The Ct. stated that “in the context of “unequal access to information” OCI challenges, courts have examined more broadly: (1) whether an offeror had access to nonpublic information that was unavailable to the protester; (2) whether that nonpublic information was competitively useful in responding to the solicitation; (3) whether, by having unequal access to that information, the awardee was afforded an advantage that was unfair; and (4) whether not having equal access to that information prejudiced the protester. In response to the first GAO bid protest, in which MTC took issue with the participation of BP as a subcontractor to Denysys, the contracting officer took the following actions: (1) he required that all contractors submit an OCI certification; (2) he solicited and received a detailed response to the MTC protest from Denysys; (3) he surveyed three Government technical experts, exploring the potential for an OCI with respect to BP due to its participation in prior contracts; and (4) he interviewed the TEWLS Program Manager and Competency Center Director/Deputy Program Manager. AR 68. In response to the second GAO bid protest, the contracting officer re-investigated the issue whether BP’s participation constituted an OCI. He also analyzed the participation of CompQSoft as a subcontractor to Denysys and analyzed whether MTC’s participation as a prime contractor gave rise to an OCI. The record shows that the contracting officer performed two thorough and comprehensive investigations and carefully documented his conclusion that no OCI existed. The Ct. ruled that the CO’s analysis of the potential for OCI was thorough and thus denied the protest.

# ****VRC, Inc. – B-310100 (Nov. 2, 2007)****

Protest that contracting agency should not have disqualified the protester because of an organizational conflict of interest (OCI) is denied where the agency reasonably found that an OCI existed based on the fact that an individual employed by a company with ownership ties to the protester was assigned to work in the agency’s contracting office in connection with the procurement at issue. Two days after receipt of proposals, the contracting officer rejected the protestor's proposal after learning of ownership ties between the protestor's proposed subcontractor and a consulting firm under contract with the agency to provide acquisition support services to the contracting officer for the procurement. The consulting contractor's employee had access to source selection information, the independent government estimate, the source selection plan, and other offerors' proposals, and provided assistance with the evaluation of competing offers. The protestor argued that regardless of the relationship, there was no OCI because the chief of the contracting division expressed a binding opinion that the relationship did not lead to an OCI. GAO disagreed, citing Federal Acquisition Regulation subpart 9.5, which places responsibility for determining the existence of an OCI solely on the contracting officer, with no provision for redelegation of that authority. The protestor also argued that the agency showed no "hard facts" to demonstrate it had possession of source selection information as a result of the contractor employee's work for the agency. GAO agreed that a determination to exclude an offer must be supported by facts; however, it noted that the facts required are those that establish the existence of the OCI, not its specific impact. Where, as here, the facts demonstrate that an OCI exists, the harm from that conflict, unless it is avoided or adequately mitigated, is presumed to occur. The protestor contended it had "firewall arrangements" in place that the contracting officer should have found sufficient to mitigate any OCI. On this argument, the contracting officer noted that had the business relationship been known before receipt of proposals, mitigation might have been possible, but because it was not brought to her attention until two days afterward, she saw no way to successfully mitigate the OCI. GAO saw no basis to question the reasonableness of this decision.

# ****Axiom Resource Mgt. Inc. v. The United States (Sept. 28,2007)****

The federal government’s increased use of and dependence on outside contractors to perform essential government functions, often entails providing these contractors with governmental, business proprietary, and otherwise private information to perform their duties. This has increased potential and actual conflicts of interest regarding how, and the extent to which, such information is utilized in performing contract services and otherwise. *See* Ralph C. Nash, *Organizational Conflicts of Interest: An Increasing Problem*, 20 No. 5 NASH & CIBINIC REPORT ¶ 24 (May 2006). Establishing the parameters of access to and use of this information will be among the most important decisions that the United States Court of Federal Claims and the United States Court of Appeals for the Federal Circuit will make in the next few years – not only for government contract jurisprudence, but to maintain competition in this growing segment of the economy. FAR § 9.504(e) provides the Contracting Officer with no specific guidance about “what type of solicitation restraints are appropriate. Basically, COs are left to figure it out for themselves.” Ralph C. Nash, *Conflicts of Interest: The Guidance in the FAR*, 15 No. 1 NASH & CIBINIC REPORT ¶ 5 (Jan. 2001). Axiom had filed 3 GAO protests which were all dismissed. They subsequently filed this complaint in the U.S. Ct. of Federal Claims alleging that the Army violated FAR 9.5 by not appreciating the nature of the OCI and relying on Lockheed’s mitigation plan for the CO’s decision. The U.S. Ct. of Federal Claims has jurisdiction to review both pre-award and post-award bid protests pursuant to 28 U.S.C. § 1491(b), enacted as part of the Administrative Dispute Resolution Act of 1996. Axiom met the 2 prong test for filing this claim in the Ct. of Federal Claims (1) that it is an interested party and (2) that is had a direct economic interest in the procurement. The U.S. Ct. of Appeals for the Federal Circuit, however, has held that a protestor can establish prejudice by showing a “substantial chance” that it would have received the award, if the alleged error was corrected. *See Bannum, Inc.* v. *United States*, 404 F.3d 1346, 1353 (Fed. Cir. 2005) The CO has the responsibility to identify and evaluate potential COI as early as possible in the acquisition process. Here, the CO did not do so. An organizational conflict of interest may result when factors create an actual or *potential* conflict of interest on an instant contract, or when the nature of the work to be performed on the instant contract creates an actual *or potential conflict of interest on a future acquisition.* In the latter case, some restrictions on future activities of the contractor may be required. 48 C.F.R. § 9.502(c). Relying on the Contractor’s OCI assessment in and of itself was also not sufficient. The Ct. also determined that the remedy to split up the work was also not an appropriate mitigation. The FAR specifies that the CO “shall award the contract to the apparent successful offeror unless a conflict of interest is determined to exist that cannot be avoided or mitigated.” 48 C.F.R. § 9.504(e). Therefore, whichever offeror has the superior proposal, based on all factors, should be awarded the contract, *unless* an OCI cannot be mitigated. [Note - s*ee* Keith R. Szeliga, *Conflict an* 26 *d Intrigue in Government Contracts: A Guide to Identifying and Mitigating Organizational Conflicts of Interest*, 35 PUB. CONT. L.J. 639, 667-68 (2006) (“‘Impaired objectivity’ OCIs often can be mitigated by recusal of the contractor that possesses the OCI, with the most effective recusal strategies incorporating mechanisms for detecting the OCI in advance so that the work is not assigned to the conflicted contractor.”)]. The Ct. determined that the CO abused his discretion in violation of FAR9.5 by awarding the Task Order to Lockheed Martin, without developing a mitigation plan that does not afford Lockheed Martin any significant competitive advantage. Plaintiff’s July 25, 2007 Motion for Summary Judgment on the Administrative Record was denied. The Ct. thereby requested review by the Bureau of Competition of the Federal Trade Commission on the issued herein as amicus curiae on or before Dec. 15, 2007, after which time the Ct. will issue a Memorandum Opinion and Final Order as to whether a permanent injunction should be entered and the scope thereof.

# ****MASAI Technologies Corporation - B-298880.3, B-298880.4 (Sept. 10, 2007)****

MTC argues that, by virtue of this performance of other contracts, Denysys had unequal access to information that gave it an unfair competitive advantage. It is well-settled that an offeror may possess unique information, advantages and capabilities due to its prior experience under a government contract--either as in incumbent contractor or otherwise; further, the government is not necessarily required to equalize competition to compensate for such an advantage, unless

there is evidence of preferential treatment or other improper action. See FAR § 9.505-2(a)(3); Crux Computer Corp., B-234143, May 3, 1989. The existence of an advantage, in and of itself, does not constitute preferential treatment by the agency, nor is such a normally-occurring advantage necessarily unfair. Crofton Diving Corp., B-289271, Jan. 30, 2002. The responsibility for determining whether an OCI exists, and to what extent the firm should be excluded from the competition, rests with the contracting agency, SRS Techs., B-258170.3, Feb. 21, 1995, Where an agency has, in fact, given thorough, documented consideration to an offeror’s activities and their potential to create OCIs, we will not substitute our judgment for the agency’s conclusions drawn from such a comprehensive review, provided the conclusions are otherwise rational and reasonable. Specifically, the contracting officer performed an analysis of the work that would be required under the solicitation at issue. The contracting officer then turned to documenting an extensive review regarding the activities previously performed by Denysys and its subcontractors, and MTC and its subcontractors, under prior contracts. In this regard, the contracting officer noted that the TEWLS system is comprised of software owned by SAP AG and that, in performing its prior contracts, neither Denysys nor its proposed subcontractors have been materially involved in development or customizing the TEWLS system, since that function is performed by SAP itself; that Denysys and its subcontractors have not had a role in developing the requirements for the solicitation at issue; that neither Denysys nor its subcontractors have had access to any underlying software code configuration for TEWLS; that neither Denysys nor its subcontractors provided technical direction for TEWLS; and that neither Denysys or its subcontractors have been involved in any discussions where contract sensitive information has been discussed. We have reviewed the entire record, including documentation of the contracting officer’s review and analysis of the offerors’ prior activities, and conclude that the agency’s review was thorough and comprehensive; in this regard, MTC has not identified any material flaw in the agency’s review.

# ****United States v. SAIC (August 22, 2007)****

The U.S. brought this action against SAIC in the US District Court under the False Claims Act, 31 U.S.C. Sect. 3279, and DC common law, alleging SAIC’s failure to disclose OCI as required under 2 of its contracts with the Nuclear Regulatory Commission (NRC). SAIC promised in both contracts to forego entering into any consulting arrangements with any organizations that could create a COI. The purpose of NRC’s clause was to avoid OCI’s that were, among others, financial, organizational, or contractual. It warranted upon entering both contracts that it had no OCIs. The regulation defined an OCI as “a relationship… whereby a contractor or prospective contractor has present or planned interest related to the work to be performed under an NRC contract which 1) may diminish its capacity to give impartial, technically sound, objective assistance and advice or may otherwise result in a biased work product, or 2) may result in its being given an unfair competitive advantage. SAIC further promised in both contracts to disclose any OCIs it discovered after entering into the contract. It repeatedly certified throughout the terms of the contracts that it had no OCIs and would notify the NRC of any changes resulting in an OCI. The govt. alleged that SAIC breached its obligations under contract by engaging in relationships with an organization that created an appearance of bias in the technical assistance and support it provided the NRC. Generally when a document incorporates outside material by reference, the subject matter to which it refers becomes a part of the incorporating document just as it if were set out in full (US v. Intrados Int’l Mgmt. Group (D.D.C. 2002). Under the controlling definition of OCIs, SAIC was required to disclose not only contracting and consulting relationships, but any relationship which may have compromised its neutrality under the contracts. Therefore the govt. has sufficiently stated a claim under the False Claims Act.

# [****Business Consulting Associates,****](http://www.wifcon.com/cgen/2997582.pdf) ****B-299758.2 (August 1, 2007)****

The issue here is whether the agency reasonably considered the awardee’s proposed mitigation plan. Once an agency has given meaningful consideration to potential conflicts of interest, our Office will not sustain a protest challenging a determination in this area unless the determination is unreasonable or unsupported by the record. Overlook Sys. Techs., Inc., B-298099.4, B-298099.5, Nov. 28, 2006, 2006 CPD para. 185 at 16. In this regard, contracting officer’s are allowed to exercise “common sense, good judgment, and sound discretion” in assessing whether a potential conflict exists and in developing appropriate ways to address it. FAR sect. 9.505; Epoch Eng’g, Inc., B‑276634, July 7, 1997, 97-2 CPD para. 72 at 5. Here, the agency conducted extensive discussions with each offeror about the potential OCIs and the details of each offeror’s proposed mitigation plan. As a result of these discussions, the agency reasonably determined the plans to be “similar.” We have found, in other “impaired objectivity” OCI situations, that subcontracting or transferring work to a separate entity, and establishing a firewall around the impaired entity, can reasonably mitigate these types of OCIs. Deutsche Bank, B‑289111, Dec. 12, 2001, 2001 CPD para. 210 at 4; see also Alion Sci. & Tech. Corp., B‑297022.4, B‑297022.5, Sept. 26, 2006, 2006 CPD para. 146 at 10; Epoch Eng’g, Inc., supra, at 6. Given that the agency thoroughly considered the parties’ potential OCIs and proposed mitigation plans, we find unobjectionable the agency’s determination that MBI’s mitigation plan adequately mitigated the potential OCI.

# ****ARINC Engineering Services LLC. V. United States (June 28, 2007)****

For an OCI to exist based upon unequal information, there must be something more than incumbency. There must be an indication that: (i) the awardee was so embedded in the agency as to provide it with insight into the agency’s operations beyond that which would be expected of a typical govt. contractor; (ii) the awardee had obtained materials related to the specifications or SOW for the instant procurement; or (iii) some other preferred treatment or agency action has occurred. In examining a CO’s determination regarding unequal access, courts have considered four factors: (1) whether an offeror had access to nonpublic info. that was unavailable to the protester; (2) whether the nonpublic info. was competitively useful in responding to the solicitation; (3) whether the unequal access to info. provided the awardee and unfair advantage; and (4) whether not having equal access to info. prejudiced the protester.

# ****Axiom Resource Mgt. Inc. – B-298870.3, B-208840.4 (July 12, 2007)****

Contracting agency reasonably determined that the issuance of a task order to a vendor to provide program management support services to the TRICARE Acquisitions Directorate did not create an impermissible organizational conflict of interest (OCI) where the agency reviewed both existing and future support requirements, and concluded that no OCI exists for current support contracts, that any potential future OCIs can be mitigated and that the awardee here will be barred from competing as a prime contractor or subcontractor on future support contracts to provide healthcare benefits directly to TRICARE benefit recipients.  In our view, once an agency has given meaningful consideration to potential conflicts of interest, our Office will not sustain a protest challenging a determination in this area unless the determination is unreasonable or unsupported by the record. Alion Science & Tech. Corp., B‑297022.4, B-297022.5, Sept. 26, 2006. A mitigation plan that includes a firewall may be sufficient to address an “unequal access to information” type OCI.

# [****Operational Resource Consultants, Inc.****](http://www.wifcon.com/cgen/299131.pdf) ****- B-299131.1; B-299131.2 (February 16, 2007)****

The situations in which OCIs arise, as addressed in FAR subpart 9.5 and the decisions of our Office, can be broadly categorized into three groups: biased ground rules, unequal access to non-public information, and impaired objectivity. Contracting officers must exercise “common sense, good judgment, and sound discretion” in assessing whether a potential conflict exists and in developing appropriate ways to resolve it; the primary responsibility for determining whether a conflict is likely to arise, and the resulting appropriate action, rests with the contracting agency. FAR sect. 9.505; Science Applications Int’l Corp., B-293601.5, Sept. 21, 2004, 2004 CPD para. 201 at 4. Once an agency has given meaningful consideration to potential conflicts of interest, our Office will not sustain a protest challenging a determination in this area unless the determination is unreasonable or unsupported by the record. Science Applications Int’l Corp., supra. As relevant to the protester’s allegations, a biased ground rules OCI arises where a firm, as part of its performance of a government contract, has in some sense set the ground rules for the competition for another government contract by, for example, writing the SOW or the specifications. In these cases, the primary concern is that the firm could skew the competition, whether intentionally or not, in favor of itself. FAR sections 9.505-1, 9.505-2. An unequal access to nonpublic information OCI arises where, as part of its performance of a government contract, a firm has access to information that may provide the firm an unfair competitive advantage in a later competition for a government contract. FAR sect. 9.505-4.  Further, even assuming that an Enspier employee was the drafter of this document, the protester does not identify any non-public information that might have been used in its creation, nor does the protester suggest how any such information could have given Enspier an unfair competitive advantage in the competition. In sum, the protester has not provided support for its assertion that the award to Enspier was tainted by an OCI.

# [**OK Produce; Coast Citrus Distributors**](http://www.wifcon.com/cgen/299058.pdf) - B-299058; B-299058.2 (February 2, 2007)

Our role, within the confines of a bid protest, is to determine whether any action of the former government employee may have resulted in prejudice for, or on behalf of, the awardee during the award selection process. See Creative Mgmt. Tech., Inc., B‑266299, Feb. 9, 1996, 96-1 CPD para. 61 at 7. Specifically, we review whether an offeror may have prepared its proposal with knowledge of inside information sufficient to establish a strong likelihood that the offeror gained an unfair competitive advantage in the procurement. PRC, Inc., B‑274698.2, B-274698.3, Jan. 23, 1997, 97-1 CPD para. 115 at 19-20. Our review includes consideration of whether the former government employee had access to competitively useful information, as well as whether the individual’s activities with the firm likely resulted in disclosure of such information. Id. An individual’s familiarity with the type of work required under a solicitation from prior government employment is not, by itself, evidence of an unfair competitive advantage. Id. Consistent with our finding in the Philadelphia case, we conclude here that, even if this individual’s prior employment with DeCA had given him access to inside information regarding the agency’s initial produce procurements, it appears much, if not all, of the alleged inside information has in fact been shared with the produce industry through the agency’s informational roundtables, and thus cannot be characterized as inside information. As we noted in the Philadelphia decision, the consultant signed a non-disclosure agreement certifying that he would not disclose contractor or source-selection information that he may have learned as an evaluator. Moreover, as in that case, there is no indication in this record that the awardee’s proposal was prepared based on any inside information. This advice does not suggest the use of inside information, or, for that matter, any information that could reasonably be found to have provided an unfair competitive advantage to this experienced firm. Rather, the record here shows that the awardee’s favorable evaluation was based on the strength of the firm’s established business operations and experience, described in its comprehensive technical proposal. Accordingly, we have no reason to question the propriety of the awards.

# Leader Communications, Inc. – B-298734 (Dec. 2006)

The Federal Acquisition Regulation (FAR) generally requires contracting officers to avoid, neutralize or mitigate potential significant conflicts of interest so as to prevent unfair competitive advantage or the existence of conflicting roles that might impair a contractor’s objectivity. FAR sections 9.504, 9.505; Snell Enters., Inc., B-290113, B‑290113.2, June 10, 2002, 2002 CPD para. 115 at 3. FAR sect. 2.101 provides that an organizational conflict of interest exists when “because of other activities or relationships with other persons, a person is unable or potentially unable to render impartial assistance or advice to the Government, or the person’s objectivity in performing the contract work is or might be otherwise impaired, or a person has an unfair competitive advantage.” The situations in which organizational conflicts of interest arise, as addressed in FAR subpart 9.5 and the decisions of our Office, can be broadly categorized into three groups.

The first group consists of situations in which a firm has access to nonpublic information as part of its performance of a government contract and where that information may provide the firm an unfair competitive advantage in a later competition for a government contract. FAR sect. 9.505-4. In these “unequal access to information” cases, the concern is limited to the risk of the firm gaining an unfair competitive advantage; there is no issue of possible bias. Aetna Gov’t Health Plans, Inc.; Foundation Health Fed. Servs., Inc., B-254397.15 et al., July 27, 1995, 95-2 CPD para. 129 at 12.

The second group consists of situations in which a firm, as part of its performance of a government contract, has in some sense set the ground rules for the competition for another government contract by, for example, writing the statement of work or the specifications. In these “biased ground rules” cases, the primary concern is that the firm could skew the competition, whether intentionally or not, in favor of itself. FAR sections 9.505-1, 9.505-2. These situations may also involve a concern 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. Aetna Gov’t Health Plans, Inc.; Foundation Health Fed. Servs., Inc., supra, at 13.

The third group comprises cases where a firm’s work under one government contract could entail its evaluating itself or a related entity, either through an assessment of performance under another contract or an evaluation of proposals. FAR sect. 9.505-3. In these “impaired objectivity” cases, the concern is that the firm’s ability to render impartial advice to the government could appear to be undermined by the relationship with the entity whose work product is being evaluated. Id.; Aetna Gov’t Health Plans, Inc.; Foundation Health Fed. Servs., Inc., supra, at 13.

Once an agency has given meaningful consideration to potential conflicts of interest, our Office will not sustain a protest challenging a determination in this area unless the determination is unreasonable or unsupported by the record. Science Applications Int’l Corp., supra. In this regard, substantial facts and hard evidence are necessary to establish a conflict; mere inference or suspicion of an actual or apparent conflict is not enough. Snell Enters., Inc., supra, at 4.

# Overlook Systems Technologies, Inc. – B-298099.4 (Nov. 2006)

Protester’s contention that the agency failed to adequately mitigate the risk of organizational conflicts of interest (OCI) associated with the selection of the awardee is denied where the record shows that: the contracting officer reasonably concluded that the risk of a conflict of interest in this procurement is not great; the agency requested a detailed OCI mitigation plan from the awardee and sought additional information about, and modifications to, the plan; and the contracting officer reasonably concluded, after performing a detailed analysis, that the modified plan--together with certain steps designed to increase agency oversight of the contractor--was sufficient to protect the government’s interest.

The regulatory guidance governing OCIs that may arise in the performance of government contracts is set forth in the Federal Acquisition Regulation (FAR) at subpart 9.5. One of the situations that creates a potential OCI is where a firm’s work under a government contract entails evaluating itself or its own products. FAR sections 9.505, 9.508, PURVIS Sys., Inc., B-293807.3, B-293807.4, Aug. 16, 2004, 2004 CPD para. 177 at 7. The concern in such situations is that a firm’s ability to render impartial advice to the government will be undermined, or impaired, by its relationship to the product or services being evaluated; as a result, such situations are often referred to as “impaired objectivity” conflicts of interest. Aetna Gov’t Health Plans, Inc.; Foundation Health Fed. Servs., Inc., B-254397.15 et al., July 27, 1995, 95-2 CPD para. 129 at 13.

When the facts of a procurement raise a concern that a potential awardee might have an OCI, the FAR requires the agency to determine whether an actual or apparent OCI will arise, and to what extent the firm should be excluded from the competition. Id. at 12. The specific responsibility to avoid, neutralize or mitigate a potential significant conflict of interest--and to do so as early in the acquisition process as possible--lies with the CO. Id.; see FAR sect. 9.504.

# Celadon Laboratories – B-298533 (Nov. 2006)

**(real conflict of interest)** 42 C.F.R. Part 52h.[[1]](#footnote-1)[4] 42 C.F.R. sections 52h.1, 52h.5. This regulation specifically contains the following definition of a “real conflict of interest”:

Real conflict of interest means a reviewer or close relative or professional associate of the reviewer has a financial or other interest in an application or proposal that is known to the reviewer and is likely to bias the reviewer’s evaluation of that application or proposal as determined by the government official managing the review (the Scientific Review Administrator, or equivalent), as acknowledged by the reviewer, or as prescribed by this part. A reviewer shall have a real conflict of interest if he/she or a close relative or professional associate of the reviewer:

(1) Has received or could receive a direct financial benefit of any amount deriving from an application or proposal under review;

(2) Apart from any direct financial benefit deriving from an application or proposal under review, has received or could receive a financial benefit from the applicant institution, offeror or principal investigator that in the aggregate exceeds $10,000 per year; . . .

(3) Has any other interest in the application or proposal that is likely to bias the reviewer’s evaluation of that application or proposal. Regardless of the level of financial involvement or other interest, if the reviewer feels unable to provide objective advice, he/she must recuse him/herself from the review of the application or proposal at issue. The peer review system relies on the professionalism of each reviewer to identify to the designated government official any real or apparent conflicts of interest that are likely to bias the reviewer’s evaluation of an application or proposal. 42 C.F.R. sect. 52h.2(q).

The regulations do not contemplate that a self‑certification by the evaluator is all that is ever needed to satisfy the requirement that he or she does not have a real conflict of interest, particularly where, as here, specific and colorable allegations of a real conflict of interest on the part of the evaluators were brought to the attention of cognizant agency officials. Under the circumstances present here, NIH was required to specifically determine whether these evaluators had real conflicts of interest under the applicable regulations. However, the record shows that NIH made no such determination. While we do not decide whether the evaluators here had real conflicts of interest, the record shows that the agency failed in its obligation to determine whether these individuals’ employment caused them a real conflict of interest that could bias their evaluation of Celadon’s proposal as contemplated under its applicable regulation.

# [Maden Technologies](http://www.wifcon.com/cgen/2985432.pdf) - B-298543.2 (October 30, 2006)

Contracting officers are required to identify and evaluate potential OCIs as early in the acquisition process as possible, and to avoid, neutralize, or mitigate potential significant conflicts of interest so as to prevent an unfair competitive advantage or the existence of conflicting roles that might impair a contractor's objectivity. In this case, the contracting officer confirmed that Ms. Carter had signed a non-disclosure agreement in connection with her services as an evaluator for DARPA, which prohibited her from disclosing any source selection or proprietary information she may have obtained while serving as an evaluator. Upon reviewing the matter with the SSEB chairperson and agency counsel, the contracting officer concluded that the “potential OCI was effectively mitigated.” AR, Tab 22, Source Selection Significant Event, SSP Deviations, and amend. 4 Justification, at 3-4). Based on this record there is nothing to support Maden’s contention that BAI should have been excluded from the competition based on proposing Ms. Carter as a subcontractor, and Maden has not shown otherwise.

# Alion Science & Technology Corporation – B-297022.4 (Sept. 2006)

Contracting officers are required to identify potential conflicts of interest as early in the acquisition process as possible, and to avoid, neutralize, or mitigate such conflicts to prevent the existence of conflicting roles that might impair a contractor’s objectivity. In assessing potential OCIs, the FAR directs the contracting officer to examine each contracting situation individually on the basis of its particular facts and the nature of the proposed contract, and to exercise common sense, good judgment, and sound discretion with regard to whether a conflict exists and, if so, the appropriate means for resolving it; the primary responsibility for determining whether a conflict is likely to arise, and the resulting appropriate action, rests with the contracting agency. FAR sect. 9.505; RMG Sys., Ltd., B‑281006, Dec. 18, 1998, 98‑2 CPD para. 153 at 4; Epoch Eng’g, Inc., B-276634, July 7, 1997, 97-2 CPD para. 72 at 5. Once an agency has given meaningful consideration to potential conflicts of interest, our Office will not sustain a protest challenging a determination in this area unless the determination is unreasonable or unsupported by the record. SRS Techs., B‑258170.3, Feb. 21, 1995, 95-1 CPD para. 95 at 9.

# [Greenleaf Construction Company, Inc.](http://www.wifcon.com/cgen/29310518.pdf) - B-293105.18; B-293105.19 (January 17, 2006)

Situations that create potential conflicts of interest are identified and discussed in FAR subpart 9.5, and they include situations in which a contractor’s performance of contract requirements may affect the contractor’s other activities and interests. See FAR sections 9.505, 9.508. That is, a contractor’s judgment and objectivity in performing the contract requirements may be impaired if the substance of its performance has the potential to affect other activities and interests of the contractor. Id.; Science Applications Int’l Corp., B‑293601 et al., May 3, 2004, 2004 CPD para. 96 at 4. It is clear that the contracting officer failed to consider the OCI implications of the amended version of the purchase agreement--whether the magnitude of the payments was such as to call into question whether CLF’s judgment and objectivity were likely to be impaired, or whether there were suitable mitigation measures required to address the scope of the potential conflict of interest. In these circumstances, we sustain the protest on the basis that HUD failed to reasonably consider or evaluate a potential OCI that may result from an award to CLF.

# [Government Scrap Sales](http://www.wifcon.com/cgen/295585.pdf) - B-295585 ( March 11, 2005)

As a general rule, OCIs may be broadly categorized into three situations: impaired objectivity, unequal access to information and biased ground rules. American Mgmt. Sys., Inc. , B-285645, Sept. 8, 2000, 2000 CPD 163 at 4. In an unequal access to information situation, there must be some showing that the allegedly conflicted entity has had access to information not available to the other competitors, while in a biased ground rules situation there must be some showing that the entity had an opportunity (such as in preparing the solicitation) to influence the ground rules for the competition. Id. Under the third situation, impaired objectivity, the concern is that, because of the nature of a firm's actual or potential work under another government contract, it may be unable to provide objective advice or judgments to the government. However, there simply is no basis to deny a firm an award due to bad faith that has not occurred but, rather, is a mere theoretical possibility.

# [Lucent Technologies World Services Inc.](http://www.wifcon.com/cgen/295462.pdf) - B-295462 (March 2, 2005)

Lucent argues that the contracting officer's OCI determination was flawed because Lucent did not provide "complete specifications" for the TETRA devices, as that term is used in FAR 9.505-2(a). Specifically, Lucent contends that it developed the specifications in Schedule D in conjunction with the agency, and that the agency further altered or revised the specifications in Schedule D when it issued the revised RFP. As a preliminary matter, the FAR does not define the term "complete specifications." A reasonable interpretation of the term suggests that a firm that provides specifications that are necessary and sufficient to inform the solicitation has provided "complete specifications." Based on our review of the record, we agree with the agency that Lucent's Schedule D was the source for the technical specifications in the revised RFP and that the specifications provided by Lucent are nearly identical to those listed in the amended RFP. FAR 9.505-2(a)(1)(ii) provides that the OCI exclusion rule does not apply where contractors prepare specifications under the supervision and control of government representatives.

# [Science Applications International Corporation](http://www.wifcon.com/cgen/2936015.pdf) - B-293601.5, (September 21, 2004)

Here, notwithstanding the agency's broad assertion that "no . . . potential conflicts of interest exist," the record clearly demonstrates that the agency recognizes the potential that conflicts may arise during contract performance, and has in place procedures to safeguard against such occurrences. As noted above, the agency states that, prior to issuing each task order under this contract, the agency project officer will independently consider whether that task order's requirements create a conflict of interest for Lockheed Martin. Specifically, the project officer will "[either] ascertain that no [conflicts of interest] exist within the assigned tasks, or that adequate mitigation strategies are in place and have been discussed with the contracting officer." Agency's Conflict of Interest Analysis, June 9, 2004, at 8. In summary, the record establishes that the agency has requested and received information regarding Lockheed Martin's environmentally-regulated activities, has reasonably considered that information in the context of the solicitation's anticipated requirements, and has accepted responsibility for performing an independent and ongoing assessment of potential conflicts of interest each time a task order is issued. On this record, we deny SAIC's protest that the agency's corrective actions regarding potential conflicts of interest were inadequate.

# [PURVIS Systems, Inc.](http://www.wifcon.com/cgen/2938073.pdf) - B-293807.3; B-293807.4 (August 16, 2004)

As noted above, the solicitation's SOW lists numerous activities that either expressly or inherently involve analysis, evaluation, and judgment on the part of the contractor. The agency record regarding the evaluation of Northrop Grumman's proposal further supports the conclusion that contract performance will require--and that the agency values--subjective contractor input and judgment. Despite recognizing that Northrop Grumman is the manufacturer of a significant portion of the systems to be tested and that the vast majority of the remaining systems are manufactured by companies with whom Northrop Grumman competes, Northrop Grumman’s OCI plan concludes: we have determined that an actual OCI .. . does not currently exist for the envisioned work to be performed under the Contract. Northrop Grumman's conclusion that no OCI issues are created by Northrop Grumman's evaluation of its own mature, fielded systems--or similar systems manufactured by potential competitors--appears to be based on the premise that the work performed under this contract is not part of the procurement process. We reject Northrop Grumman's apparent assumption that impaired objectivity OCIs can arise only within the procurement process. To the contrary, we view a situation where, as here, a company is responsible for assessing the performance of systems it has manufactured as a classic example of an impaired objectivity OCI--without regard to whether the evaluation occurs as part of the procurement process. In such situations, the firm risks having its objectivity impaired by a bias in favor of its own system's performance. Similarly, a company manufacturing systems that are, as a practical matter, competing with similar systems produced by other manufacturers, risks having a negative bias regarding the performance of the competing systems. This is particularly true where, as here, the contract requirements clearly anticipate comparisons between the performance of similar systems manufactured by competing firms.

# [**Research Analysis & Maintenance, Inc.; Westar Aerospace & Defense Group, Inc.**](http://www.wifcon.com/cgen/2925874.pdf) - B-292587.4; B-292587.5; B-292587.6; B-292587.7; B‑292587.8 (November 17, 2003)

It is clear from the record that the agency was fully aware during the evaluation that, in some limited number of instances, an award to NGTS likely would require TSMO to proceed outside the terms of NGTS’s contract and have contract work performed by some other contractor or government entity. This likely outcome does not appear to have been factored into the agency’s evaluation of NGTS’s proposal, despite the agency’s view during its evaluation of RAM’s proposal that RAM’s failure to plan for a merely potential OCI warranted downgrading RAM for performance risk. We conclude that the agency did not evaluate the proposals on an equal basis, and that the evaluation in this regard therefore was unreasonable. Symplicity Corp., B‑291902, Apr. 29, 2003, 2003 CPD ¶ 89 at 5.

# [TDS, Inc.](http://www.wifcon.com/cgen/292674.pdf) - B-292674 (November 12, 2003)

We have no basis on the record before us to find that [deleted] has an impaired objectivity OCI. Contrary to TDS's position, there is nothing inherently improper in a firm's monitoring the activities of a team member such as Northrop here (or its own activities); monitoring, standing alone, does not necessarily create the potential for impaired objectivity. Rather, as noted above, an impaired objectivity conflict typically arises where a firm is evaluating its own activities because the objectivity necessary to impartially evaluate performance may be impaired by the firm's interest in the entity being evaluated. See Johnson Controls World Servs., B-286714.2, Feb. 13, 2001, 2001 CPD ¶ 20 at 11-12.

# [The LEADS Corporation](http://www.wifcon.com/cgen/292465.pdf) - B-292465 (September 26, 2003)

As noted by the protester, while a firewall arrangement may resolve an “unfair access to information” OCI, it is virtually irrelevant to an OCI involving potentially impaired objectivity. See Aetna Gov’t Health Plans, Inc.; Found. Health Fed. Servs., Inc., supra, at 16. Likewise, due to the ultimate relationship of one entity to another, a firewall would not resolve an organizational conflict of interest involving biased ground rules. However, the record indicates that the OCI mitigation approach relied upon by DCC‑W in determining to issue an order to CACI extended beyond CACI’s proposed firewall. The most important feature of the plan was CACI’s proposal to notify the agency of procurements under which CACI was interested in competition, which would allow DCC-W to act to avoid an OCI. The contracting officials testified that potential OCIs on the part of CACI would be handled in the same manner where a government employee has an interest in a matter; CACI contracting specialists would not be assigned to a procurement for which CACI was expected to submit an offer or to a CACI contract, and if CACI submitted an offer for a procurement that already was assigned to a CACI contracting specialist, the procurement would be reassigned to a government contracting specialist. As a result, the mitigation approach addresses the unfair access to information and impaired objectivity OCIs by ensuring that CACI contracting specialists would not be in potential conflict positions.

# [Computers Universal, Inc.](http://www.wifcon.com/cgen/292794.pdf) - B-292794 (November 18, 2003)

Monitoring, standing alone, does not necessarily create the potential for impaired objectivity. Rather, as noted above, an impaired objectivity OCI typically arises where a firm is evaluating its own (or a related firm’s) activities, because the objectivity necessary to impartially evaluate performance may be impaired by the firm’s interest in the entity being evaluated. See Johnson Controls World Servs., Inc., B‑286714.2, Feb. 13, 2001, 2001 CPD ¶ 20 at 11-12. Since the IMS contractor’s responsibilities are not based on subjective judgments or evaluations, there is no basis for finding that the objectivity of the IMS contractor will be impaired under the circumstances here. Cf. Ktech Corp., B-285330, B‑285330.2, Aug. 17, 2002, 2002 CPD ¶ 77 (prohibited OCI found where subcontractor was to establish requirements for tests it or its prime contractor would perform).

# [Johnson Controls World Services, Inc.](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=gao_comptroller_general&docid=f:2867142.txt) - B-286714.2 (February 13, 2001)

Protest that awardee had unfair competitive advantage due to organizational conflict of interest is sustained where awardee's proposed subcontractor possessed information through its work as a government contractor, the information was not available to other offerors, the agency took no steps to identify or mitigate the conflict in advance, and there were no meaningful procedures in place to prevent interaction between the employees possessing the information and the employees preparing the proposal.

# [SSR Engineers, Inc](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=gao_comptroller_general&docid=f:282244.txt).- B-282244 (June 18, 1999)

Agency reasonably excluded protester from participating in procurement where protester has an organizational conflict of interest arising from its preparation of the statement of work and cost estimates used by the agency in the procurement.

# [Electronic Design, Inc](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=gao_comptroller_general&docid=f:2796625.txt). - B-279662.5 (May 25, 1999)

An offeror may not have an unfair competitive advantage over other competitors and, in order to protect the integrity of the procurement system, an agency may go so far as to exclude an offeror from the competition because of the likelihood that it has obtained an unfair competitive advantage. See Compliance Corp., B-239252, Aug. 15, 1990, 90-2 CPD ¶ 126 at 5; Holmes and Narver Servs., Inc./Morrison-Knudson Servs., Inc., a joint venture; Pan Am World Servs., Inc., B-235906, B-235906.2, Oct. 26, 1989, 89-2 CPD ¶ 379 at 8. In seeking competition, however, an agency is not required to construct its procurements in a manner that neutralizes the competitive advantage that some potential offerors may have over others by virtue of their own particular circumstances, such as prior or current government contracts, where the advantages did not result from unfair motives or action on the part of the government. See MCA Research Corp., B-276865, July 29, 1997, 97-2 CPD ¶ 33 at 2-3; Optimum Tech. Inc., B-266399.2, Apr. 16, 1996, 96-1 CPD ¶ 188 at 7; Validity Corp., B-233832, Apr. 19, 1989, 89-1 CPD ¶ 389 at 6; Ross Bicycles, Inc., B-217179, B-217547, June 26, 1985, 85-1 CPD ¶ 722 at 3. EDI has failed to establish that an unfair competitive advantage existed here.

# Aetna Government Health Plans, Inc. – B-254397 (July 27, 1995) (Seminal Case)

Significant OCI exists where an affiliate of one offeror’s major subcontractor evaluates proposals for the procuring agency. While FAR subpart 9.5 does not explicitly address the role of affiliates in the various types of OCI, there is no basis to distinguish between a firm and its affiliates, at least where concerns about potentially biased ground rules and impaired objectivity are at issue. Agency must act reasonable in assessing an OCI by making an independent effort to gather relevant facts. This legal opinion set the parameters for the 3 types of OCI (unequal access to info., biased ground rules, impaired objectivity). The facts that are required to exclude an offeror are those which establish the existence of the OCI, not the specific impact of that conflict. Once the facts establishing the existing of the OCI are present, reasonable steps must be taken to avoid, mitigate, or neutralize the conflict. OCI calls into question the integrity of the competitive procurement process and does not require any special prejudice to be shown to warrant corrective action.

1. [↑](#footnote-ref-1)