

Chapter 34
**Responsibility, Timeliness, and
Organizational Conflict of
Interests (OCI)**



2014 Contract Attorneys Deskbook

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CHAPTER 34

RESPONSIBILITY, TIMELINESS, AND ORGANIZATIONAL CONFLICTS OF INTERESTS (OCIs)

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CHAPTER 34

RESPONSIBILITY, TIMELINESS, AND ORGANIZATIONAL CONFLICTS OF INTERESTS (OCIs)

I. INTRODUCTION

Responsibility, timeliness, and OCIs are great examples of government contract concepts that apply to multiple procurement methods. Specifically, these concepts are applicable in FAR Part 14 and 15 procurements (sealed bidding and negotiated procurements). As a result, understanding these concepts and their applicability to each procurement method is necessary for comprehensive understanding of government contracting.

II. RESPONSIBILITY

A. Overview:

1. Chief concern: Does the company have the technical ability and capacity to perform the contract? (Differs from “responsiveness” as discussed in the Sealed Bidding Outline. Responsiveness concerns whether the bid conforms to the essential, material requirements of the IFB, while, responsibility describes the contractor’s capacity to perform.)
2. Government acquisition policy requires that the contracting officer make an affirmative determination of responsibility prior to award. FAR 9.103.
3. General rule. The contracting officer may award only to a responsible bidder. FAR 9.103(a); Theodor Arndt GmbH & Co., B-237180, Jan. 17, 1990, 90-1 CPD ¶ 64 (responsibility requirement implied); Atlantic Maint., Inc., B-239621.2, June 1, 1990, 90-1 CPD ¶ 523 (an unreasonably low price may render bidder nonresponsible); but see The Galveston Aviation Weather Partnership, B-252014.2, May 5, 1993, 93-1 CPD ¶ 370 (below-cost bid not legally objectionable, even when offering labor rates lower than those required by the Service Contract Act).

B. Definition.

1. Responsibility refers to an offeror’s apparent **ability** and **capacity** to perform. To be responsible, a prospective contractor must meet the

standards of responsibility set forth at FAR 9.104. Kings Point Indus., B-223824, Oct. 29, 1986, 86-2 CPD ¶ 488.

2. Responsibility is determined at any time prior to award. Therefore, the bidder may provide responsibility information to the contracting officer at any time before award. FAR 9.103; FAR 9.105-1; ADC Ltd., B-254495, Dec. 23, 1993, 93-2 CPD ¶ 337 (bidder's failure to submit security clearance documentation with its bid is not a basis for rejection of bid); Cam Indus., B-230597, May 6, 1988, 88-1 CPD ¶ 443.

C. Types of Responsibility.

1. **General** standards of responsibility. FAR 9.104-1.
 - a. Definition. Minimum contractor qualification standards.
 - b. Financial resources. The contractor must demonstrate that it has adequate financial resources to perform the contract or that it has the ability to obtain such resources. FAR 9.104-1(a); Excavators, Inc., B-232066, Nov. 1, 1988, 88-2 CPD ¶ 421 (a contractor is nonresponsible if it cannot or does not provide acceptable individual sureties).
 - (1) Bankruptcy. Nonresponsibility determinations based solely on a bankruptcy petition violates 11 U.S.C. § 525. This statute prohibits a governmental unit from denying, revoking, suspending, or refusing to renew a license, permit, charter, franchise, or other similar grant to, or deny employment to, terminate employment of, or discriminate with respect to employment against, a person that is or has been a debtor under 11 U.S.C. § 525, solely because such person has been a debtor under that title. Bender Shipbuilding & Repair Company v. United States, 297 F.3d 1358 (Fed. Cir. 2002) (upholding contracting officer's determination that awardee was responsible even though awardee filed for Chapter 11 Bankruptcy reorganization); Global Crossing telecommunications, Inc., B-288413.6, B-288413.10, June 17, 2002, 2002 CPD ¶ 102 (upholding contracting officer's determination that a prospective contractor who filed for Chapter 11 was not responsible where the pre-award survey included a detailed financial analysis and the contracting officer reasonably

concluded that the firm's poor financial condition made the firm a high financial risk).

- (2) The courts have applied the bankruptcy anti-discrimination provisions to government determinations of eligibility for award. In re Son-Shine Grading, 27 Bankr. 693 (Bankr. E.D.N.C. 1983); In re Coleman Am. Moving Serv., Inc., 8 Bankr. 379 (Bankr. D. Kan. 1980).
 - (3) A determination of responsibility should not be negative **solely** because of a prospective contractor's bankruptcy. The contracting officer should focus on the contractor's ability to perform the contract, and justify a nonresponsibility determination of a bankrupt contractor accordingly. Harvard Interiors Mfg. Co., B-247400, May 1, 1992, 92-1 CPD ¶ 413 (Chapter 11 firm found nonresponsible based on lack of financial ability); Sam Gonzales, Inc.—Recon., B-225542.2, Mar. 18, 1987, 87-1 CPD ¶ 306.
- c. Unpaid Tax Liability: Appropriated funds cannot be used to enter into a contract with a corporation that has unpaid federal tax liability (after exhaustion of remedies) or was convicted of a felony criminal violation in the preceding 24 months, unless the agency considered suspension or debarment and decided this action was not necessary to protect the interests of the Government. DFARS 252. 209-7999.
 - d. Delivery or performance schedule: The contractor must establish its ability to comply with the delivery or performance schedule. FAR 9.104-1(b); System Dev. Corp., B-212624, Dec. 5, 1983, 83-2 CPD ¶ 644.
 - e. Performance record: The contractor must have a satisfactory performance record. FAR 9.104-1(c). Information Resources, Inc., B-271767, July 24, 1996, 96-2 CPD ¶ 38; Saft America, B-270111, Feb. 7, 1996, 96-1 CPD ¶ 134; North American Constr. Corp., B-270085, Feb. 6, 1996, 96-1 CPD ¶ 44; Mine Safety Appliances, Co., B-266025, Jan. 17, 1996, 96-1 CPD ¶ 86.
- (1) The contracting officer **shall presume** that a contractor seriously deficient in recent contract performance is nonresponsible. FAR 9.104-3(b).

- (2) See Schenker Panamericana (Panama) S.A., B-253029, Aug. 2, 1993, 93-2 CPD ¶ 67 (agency justified in nonresponsibility determination where moving contractor had previously failed to conduct pre-move surveys, failed to provide adequate packing materials, failed to keep appointments or complete work on time, dumped household goods into large containers, stacked unprotected furniture onto trucks, dragged unprotected furniture through hallways, and wrapped fragile goods in a single sheet of paper; termination for default on prior contract not required). See also Pacific Photocopy & Research Servs., B-281127, Dec. 29, 1998, 98-2 CPD ¶ 164 (contracting officer properly determined that bidder had inadequate performance record on similar work based upon consistently high volume of unresolved customer complaints).
- (3) See Ettfaq-Meliat-Hai-Afghan Consulting, Inc. v. United States, 106 Fed. Cl. 429 (2012) (Contracting Officer's decision to find contractor nonresponsible based upon an intelligence report that stated contractor submitted fraudulent statements and credentials, failed to meet delivery requirements on a previous contract was reasonable).

- f. Business ethics: The contractor must have a satisfactory record of business ethics. FAR 9.104-1(d); FAR 9.407-2; FAR 14.404-2(h); Interstate Equip. Sales, B-225701, Apr. 20, 1987, 87-1 CPD ¶ 427. See Ettfaq-Meliat-Hai-Afghan Consulting, Inc. v. United States, 106 Fed. Cl. 429 (2012) (Contracting Officer decision to find a contractor nonresponsible must be rational and reasonable; given issues with contractor's performance in previous contract and submission of fraudulent statements, credentialing, and non-compliance, a Contracting Officer does not need to look at each instance to determine if the instance supports nonresponsibility, but at the totality of circumstances to find nonresponsibility).
- g. Management/technical capability: The contractor must display adequate management and technical capability to perform the contract satisfactorily. FAR 9.104-1(e); TAAS-Israel Indus., B-251789.3, Jan. 14, 1994, 94-1 CPD ¶ 197 (contractor lacked design skills and knowledge to produce advanced missile launcher power supply).

- h. Equipment/facilities/production capacity: The contractor must maintain or have access to sufficient equipment, facilities, and production capacity to accomplish the work required by the contract. FAR 9.104-1(f); IPI Graphics, B-286830, B-286838, Jan. 9, 2001, 01 CPD ¶ 12 (contractor lacked adequate production controls and quality assurance methods).
 - i. Be otherwise qualified and eligible to receive an award under applicable laws and regulations. FAR 9.104-1(g); Active Deployment Sys., Inc., B-404875, May 25, 2011; Bilfinger Berger AG Sede Secondaria Italiana, B-402496, May 13, 2010, 2010 CPD ¶ 125.
2. **Special** or definitive standards of responsibility. FAR 9.104-2(a).
- a. Definition: Specific and objective standard established by a contracting agency in a solicitation to measure an offeror's ability to perform a given contract. They may be qualitative or quantitative. D.H. Kim Enters., B-255124, Feb. 8, 1994, 94-1 CPD ¶ 86.
 - b. To be a definitive responsibility criterion, the solicitation provision must reasonably inform offerors that they must demonstrate compliance with the standard as a precondition to receiving the award. Public Facility Consortium I, LLC; JDL Castle Corp., B-295911, B-295911.2, May 4, 2005, 2005 CPD ¶ 170 at 3.
 - c. Evaluations using definitive responsibility criteria are subject to review by the Small Business Administration (SBA) through its Certificate of Competency process. FAR 19.602-4.
 - d. Examples:
 - (1) Requiring that a prospective contractor have a specified number of years of **experience** performing the same or similar work is a definitive responsibility standard. J2A2JV, LLC, B-401663.4, Apr. 19, 2010, 2010 CPD ¶ 102 (did not meet definitive responsibility criterion requiring at least 5 years experience and solicitation language may not reasonably be interpreted as permitting use of a subcontractor's experience); M & M Welding & Fabricators, Inc., B-271750, July 24, 1996, 96-2 CPD ¶ 37 (IFB requirement to show documentation of at least three previously completed

projects of similar scope); D.H. Kim Enters., B-255124, Feb. 8, 1994, 94-1 CPD ¶ 86 (IFB requirements for 10 years of general contracting experience in projects of similar size and nature and for successful completion of a minimum of two contracts of the same or similar scope within the past two years, on systems of a similar size, quantity and type as present project); Roth Brothers, Inc., B-235539, 89-2 CPD ¶ 100 (IFB requirement to provide documentation of at least three previously completed projects of similar scope); J.A. Jones Constr. Co., B-219632, 85-2 CPD ¶ 637 (IFB requirement that bidder have performed similar construction services within the United States for three prior years); Hardie-Tynes Mfg. Co., B-237938, Apr. 2, 1990, 90-1 CPD ¶ 587 (agency properly considered manufacturing experience of parent corporation in finding bidder met the definitive responsibility criterion of five years manufacturing experience); BBC Brown Boveri, Inc., B-227903, Sept. 28, 1987, 87-2 CPD ¶ 309 (IFB required five years of experience in transformer design, manufacture, and service - GAO held that this definitive responsibility criterion was satisfied by a subcontractor).

- (2) Requirement for an offeror to demonstrate in its proposal the capability to pass an audit by completing and submitting prescreening audit forms is **not** a definitive responsibility standard because it did not contain a specific and objective standard. It relates only to the general responsibility of the awardee, that is its ability to perform the contract specific with all legal requirements. T.F. Boyle Transportation, Inc., B-310708; B-310708.2, Jan. 29, 2008.
- (3) Requirement for an offeror to “specify up to three contracts of comparable magnitude and similar in nature to the work required and performed within the last three years,” was **not** a definitive responsibility criterion, but an informational requirement. Nilson Van & Storage, Inc., B-310485, Dec. 10, 2007. Compare Charter Envtl., Inc., B-207219, Dec. 5, 2005, 2005 CPD ¶ 213 at 2-3 (standard was definitive responsibility criterion where it required offeror to have successfully completed at least three projects that included certain

described work, and at least three projects of comparable size and scope).

D. **Subcontractor** responsibility issues.

1. Overview

- a. The agency may review subcontractor responsibility. FAR 9.104-4(a).
- b. Subcontractor responsibility **is determined in the same fashion as** is the responsibility of the prime contractor. FAR 9.104-4(b)

2. Statutory/Regulatory Compliance.

a. Licenses and permits.

- (1) When a solicitation contains a **general** condition that the contractor comply with state and local licensing requirements, the contracting officer need not inquire into what those requirements may be or whether the bidder will comply. James C. Bateman Petroleum Serv., Inc., B-232325, Aug. 22, 1988, 88-2 CPD ¶ 170; but see International Serv. Assocs., B-253050, Aug. 4, 1993, 93-2 CPD ¶ 82 (where agency determines that small business will not meet licensing requirement, referral to SBA required).
- (2) On the other hand, when a solicitation requires **specific** compliance with regulations and licensing requirements, the contracting officer may inquire into the offeror's ability to comply with the regulations in determining the offeror's responsibility. Intera Technologies, Inc., B-228467, Feb. 3, 1988, 88-1 CPD ¶ 104.

b. Statutory certification requirements.

- (1) Small business concerns. The contractor must certify its status as a small business to be eligible for award as a small business. FAR 19.301.
- (2) Equal opportunity compliance. Contractors must certify that they will comply with "equal opportunity" statutory requirements. In addition, contracting officers

must obtain pre-award clearances from the Department of Labor for equal opportunity compliance before awarding any contract (excluding construction) exceeding \$10 million. FAR Subpart 22.8.

Solicitations may require the contractor to develop and file an affirmative action plan. FAR 52.222-22 and FAR 52.222-25; Westinghouse Elec. Corp., B-228140, Jan. 6, 1988, 88-1 CPD ¶ 6.

(3) Submission of lobby certification. Tennier Indus., B-239025, July 16, 1990, 90-2 CPD ¶ 25.

c. Organizational conflicts of interest. FAR 9.5. Government policy precludes award of a contract, without some restriction on future activities, if the contractor would have an actual or potential unfair competitive advantage, or if the contractor would be biased in making judgments in performance of the work. Necessary restrictions on future activities of a contractor are incorporated in the contract in one or more organizational conflict of interest clauses. FAR 9.502(c); The Analytic Sciences Corp., B-218074, Apr. 23, 1985, 85-1 CPD ¶ 464.

E. Responsibility Determination Procedures.

1. Sources of information. The contracting officer must obtain sufficient information to determine responsibility. FAR 9.105.
2. Contracting officers may use pre-award surveys. FAR 9.105-1(b); FAR 9.106; DFARS 209.106; Accurate Indus., B-232962, Jan. 23, 1989, 89-1 CPD ¶ 56.
3. Contracting officer must check the list entitled "Parties Excluded from Procurement Programs." FAR 9.105-1(c); see also AFARS 9.4 and FAR Subpart 9.4. But see R.J. Crowley, Inc., B-253783, Oct. 22, 1993, 93-2 CPD ¶ 257 (agency improperly relied on non-current list of ineligible contractors as basis for rejecting bid; agency should have consulted electronic update).
4. Contracting and audit agency records and data pertaining to a contractor's prior contracts are valuable sources of information. FAR 9.105-1(c)(2).
5. Contracting officers also may use contractor-furnished information. FAR 9.105-1(c)(3). International Shipbuilding, Inc., B-257071.2, Dec. 16, 1994, 94-2 CPD ¶ 245 (agency need not delay award indefinitely until the offeror cures the causes of its nonresponsibility).

- F. GAO review of responsibility determinations.
1. Prior to 1 January 2003, GAO would not review any **affirmative** responsibility determinations absent a showing of bad faith or fraud. 4 CFR § 21.5(c) (1995); see Hard Bottom Inflatables, Inc., B-245961.2, Jan. 22, 1992, 92-1 CPD ¶ 103.
 2. Today, as a general matter GAO **still** does not review an affirmative determination of responsibility. 4 C.F.R. § 21.5(c); Active Development Sys., Inc., B-404875, May 25, 2011; Navistar Defense, LLC; BAE Sys., Tactical Vehicle Sys. LP, B-401865 et al., Dec. 14, 2009, 2009 CPD ¶ 258.
 3. However, there are two **exceptions**:
 - a. **Definitive** responsibility criteria in the solicitation that are not met, as opposed to general responsibility criteria. 4 C.F.R. § 21.5(c); Active Development Sys., Inc., B-404875, May 25, 2011; T.F. Boyle Transp., Inc., B-310708, B-310708.2, Jan. 29, 2008, 2008 CPD ¶ 52.
 - b. Evidence is identified that raises serious concerns that, in reaching a particular responsibility determination, the contracting officer unreasonably failed to consider available relevant information or otherwise violated statute or regulation. 4 C.F.R. § 21.5(c); 67 Fed. Reg. 79,833 (Dec. 31, 2002); Active Development Sys., Inc., B-404875, May 25, 2011; T.F. Boyle Transp., Inc., B-310708, B-310708.2, Jan. 29, 2008, 2008 CPD ¶ 52. American Printing House for the Blind, Inc., B-298011, May 15, 2006, 2006 CPD ¶ 83 at 5-6; Government Contracts Consultants, B-294335, Sept. 22, 2004, 2004 CPD ¶ 202 at 2. See Impresa Construzioni Geom. Domenico Garufi, 52 Fed. Cl. 421 (2002) (finding the contracting officer failed to conduct an independent and informed responsibility determination); Southwestern Bell Tel. Co., B-292476, Oct. 1, 2003, 2003 CPD ¶ 177 at 7-11 (GAO reviewed allegation where evidence was presented that the contracting officer failed to consider serious, credible information regarding awardee's record of integrity and business ethics).
 4. Nonresponsibility determinations:
 - a. GAO **will** review nonresponsibility determinations for reasonableness. Schwender/Riteway Joint Venture, B-250865.2, Mar. 4, 1993, 93-1 CPD ¶ 203 (determination of

nonresponsibility unreasonable when based on inaccurate or incomplete information).

III. TIMELINESS

- A. Overview. This timeliness section discusses two areas of government contracting that are most affected by timing requirements: first, **contract actions must be publicized a minimum period of time**, and second, bids and proposals must be **submitted on time**. Government errors in either area can significantly delay contract performance and/or end the acquisition effort.
- B. **Publicizing Contract Actions.** FAR 5.002. Prior to awarding government contracts, agencies must comply with the publicizing requirements of FAR Part 5. Publicizing contract actions increases competition, broadens industry participation, and assists small business concerns in obtaining contracts and subcontracts.
 1. Definitions:
 - a. Publicizing: Disseminating information in a public forum so that potential vendors are informed of the agency's need, and the agency's proposed contract action.
 - b. Posting: A limited form of publicizing where a contracting officer informs the public of a proposed contract action by displaying a synopsis or solicitation in a public place (usually a "contract action display board" outside the contracting office), or by an equivalent electronic means (usually a contracting office webpage).
 - c. Synopsis: A notice to the public which summarizes the anticipated solicitation.
 - d. Solicitation: A request for vendors to fulfill an agency need via a government contract.
 2. Publicizing Requirements. To determine the publicizing requirement for an acquisition, one must first decide if the item is a commercial item and, next, decide the dollar threshold for the acquisition. (This determination is necessary regardless of whether the agency uses sealed bidding or negotiated procurement.)
 - a. **Non-Commercial Items**: Contracting officers must publicize proposed contract actions as follows:

- (1) For proposed contract actions expected to exceed the simplified acquisitions threshold, agencies must synopsise on the Government-wide point of entry (GPE)¹ for at least **15 days**, and then issue a solicitation and allow at least **30 days** to respond. FAR 5.101(a)(1), 5.203(a) & (c).
- (2) For proposed contract actions expected to exceed \$25,000 but less than the simplified acquisitions threshold, agencies must synopsise on the GPE for at least **15 days** and then issue a solicitation and allow a “reasonable opportunity to respond.” *This can be less than 30 days.* FAR 5.201(b)(1)(i) and FAR 5.203(b).
- (3) For proposed contract actions expected to exceed \$15,000, but not expected to exceed \$25,000, agencies must post (displayed in a public place or by an appropriate and equivalent electronic means), a synopsis of the solicitation, *or the actual solicitation*, for at least **10 days**. If a contracting officer posts a synopsis, then they must allow “a reasonable opportunity to respond” after issuing the solicitation. FAR 5.101 (a)(2).
- (4) For proposed contract actions less than \$15,000 and/or the micro-purchase threshold, there are no required publicizing requirements.

b. Commercial Items:

- (1) The publicizing requirements for commercial items under \$25,000 are the same as for non-commercial items. See above.
- (2) Commercial items over **\$25,000**: The contracting officer may publicize the agency need, at his/her discretion, in one of two ways:
- (3) Combined synopsis/solicitation: Agencies may issue a combined synopsis/solicitation on the GPE in accord with FAR 12.603. The agency issues a combined synopsis/solicitation and then provides a “reasonable

¹ The GPE is available online at the Federal Business Opportunities (FedBizOpps) website, *available at* www.fbo.gov.

response time.” See FAR 5.203(a)(2), FAR 12.603(a) and 12.603(c)(3)(ii).

- (4) Shortened synopsis/solicitation: Agencies may issue a separate synopsis and solicitation on the GPE. The synopsis must remain on the GPE for a “reasonable time period,” *which may be less than 15 days*. The agency should then issue the solicitation on the GPE, providing potential vendors a “reasonable opportunity to respond” to the solicitation, *which may be less than 30 days*.

C. Late Bids and Proposals.

1. Definition of “late.”

- a. A “late” bid/proposal, modification, or withdrawal is one that is received in the office designated in the IFB or RFP **after** the exact time set for bid opening. FAR 14.304(b)(1); FAR 15.208.
- b. If the IFB or RFP does not specify a time, the time for receipt is 5:00 P.M., local time, for the designated government office. FAR 14.304(b)(1); FAR 15.208.

2. General rule → **LATE IS LATE**; FAR 14.304(b)(1); FAR 15.208; FAR 52.214-7.

- a. Lani Eko & Company, CPAs, PLLC, B-404863, June 6, 2011 (it is an offeror’s responsibility to deliver its proposal to the place designated in the solicitation by the time specified, and late receipt generally requires rejection of the proposal); O.S. Sys., Inc., B-292827, Nov. 17, 2003, 2003 CPD ¶ 211; Integrated Support sys., Inc., B-283137.2, Sept. 10, 1999, 99-2 CPD ¶51; The Staubach Co., B-276486, May 19, 1997, 97-1 CPD ¶ 190, citing Carter Mach. Co., B-245008, Aug. 7, 1991, 91-2 CPD ¶ 143.
- b. There are **exceptions** to the late bid rule. These exceptions, listed below, only apply if the contracting officer receives the late bid **prior to contract award**. FAR 14.304(b)(1), FAR 15.208.

3. **Exceptions to the Late Bid/Proposal Rule.** Commonalities among FAR exceptions and judicially created exceptions are: bid/proposal must get to agency before award, bid/proposal must be out of bidder’s

control, accepting the late bid/proposal must not unduly delay the acquisition.

- a. **Electronically submitted bids.** A bid/proposal may be considered if it was transmitted through an electronic commerce method authorized by the solicitation and was received at the initial point of entry to the Government infrastructure by the Government not later than 4:30 P.M. one working day prior to the date specified for the receipt of bids/proposal. FAR 14.304(b)(1)(i); but see Watterson Constr. Co. v US, 98 Fed. Cl. 84; see also Insight Systems Corp., and Centerscope Technologies, Inc., 110 Fed. Cl. 564, 2013 WL 1875987 (Fed. Cl.).
 - b. **Government control.** A bid/proposal may be considered if there is acceptable evidence to establish that it was received at the Government installation designated for receipt of bids/proposals and was under the Government's control prior to the time set for receipt of bids/proposals. FAR 14.304(b)(1)(ii).
 - (1) J. L. Malone & Associates, B-290282, July 2, 2002 (receipt of a bid by a contractor, at the direction of the contracting officer, satisfied receipt and control by the government).
 - (2) Watterson Constr. Co. v US, 98 Fed.Cl. 84 (recognizing that the express terms of this exception do not apply to proposals submitted by e-mail, court finds, nevertheless, that once an email leaves a bidder's inbox and reaches the government server it is within the government's control; actual receipt by contracting officer is not necessary).
 - (3) Insight Systems Corp., and Centerscope Technologies, Inc., 110 Fed. Cl. 564, 2013 WL 1875987 (Fed. Cl.) (wherein the Court found that a proposal transmitted and received by the government email server prior to the deadline, but not forwarded to the next server in the government email system was covered under the Government Control exception).
4. **The "Government Frustration" Rule.** Note: This rule has no statutory or regulatory basis; rather, the GAO fashioned the rule under its bid protest authority.

- a. **General rule:** If timely delivery of a bid/proposal, modification, or withdrawal that is hand-carried by the offeror (or commercial carrier) is frustrated by the government such that the government is the **paramount cause** of the late delivery, and if the consideration of the bid would not compromise the integrity of the competitive procurement system then the bid is timely. U.S. Aerospace, Inc., B-403464, B-403464.2, Oct. 6, 2010, 2010 CPD ¶ 225 (a late hand-carrier offer may be considered for award if the government's misdirection or improper action was the paramount cause of the late delivery and consideration would not compromise the integrity of the competitive process);
- b. Examples:
- (1) Lani Eko & Co., CPAs, PLLC, B-404863, June 6, 2011 (citing Caddell Constr. Co., Inc., B-280405, Aug. 24, 1998, 98-2 CPD ¶ 50) (improper government action is "affirmative action that makes it impossible for the offeror to deliver the proposal on time").
 - (2) Computer Literacy World, Inc., GSBCA 11767-P, May 22, 1992, 92-3 BCA ¶ 25,112 (government employee gave unwise instructions, which caused the delay); Kelton Contracting, Inc., B-262255, Dec 12, 1995, 95-2 CPD ¶ 254 (Federal Express Package misdirected by agency); Aable Tank Services, Inc., B-273010, Nov. 12, 1996, 96-2 CPD ¶ 180 (bid should be considered when its arrival at erroneous location was due to agency's affirmative misdirection)
 - (3) Richards Painting Co., B-232678, Jan. 25, 1989, 89-1 CPD ¶ 76 (late proposal should be considered when bid opening room was in a different location than bid receipt room, protestor arrived at bid receipt location before the time set for bid opening, the room was locked, there was no sign directing bidder to the bid opening room and protestor arrived at bid opening room 3 minutes late).
 - (4) Palomar Grading & Paving, Inc., B-274885, Jan. 10, 1997, 97-1 CPD ¶ 16 (late proposal should be considered where lateness was due to government misdirection and bid had been relinquished to UPS);

Select, Inc., B-245820.2, Jan. 3, 1992, 92-1 CPD ¶ 22 (bidder relinquished control of bid by giving it to UPS).

- (5) The government may consider commercial carrier records to establish time of delivery to the agency, if corroborated by relevant government evidence. Power Connector, Inc., B-256362, June 15, 1994, 94-1 CPD ¶ 369 (agency properly considered Federal Express tracking sheet, agency mail log, and statements of agency personnel in determining time of receipt of bid).

c. If the government is not the **paramount cause** of the late delivery of the hand-carried bid/proposal, then the general rule applies—late is late.

- (1) U.S. Aerospace, Inc., B-403464, B-403464.2, Oct. 6, 2010, 2010 CPD ¶ 225 (even in cases where the late receipt may have been caused, in part, by erroneous government action, a later proposal should not be considered if the offeror significantly contributed to the late receipt by not doing all it could or should have done to fulfill its responsibility.).
- (2) Lani Eko & Co., CPAs, PLLC, B-404863, June 6, 2011 (paramount cause of late delivery stemmed from the fact that courier arrived at the designated building with one minute to spare; assumed risk that any number of events might intervene to prevent the timely submission of the proposals); Pat Mathis Constr. Co., Inc., B-248979, Oct. 9, 1992, 92-2 CPD ¶ 236.
- (3) B&S Transport, Inc., B-404648.3, Apr. 8, 2011, 2011 CPD ¶ 84 (despite government misdirection to the wrong bid opening room, protester's actions were paramount cause for the late delivery; record shows courier was not entered in the visitor system prior to arrival, did not have appropriate contact information to obtain a sponsor for entry, arrived less than 10 min before proposal receipt deadline).
- (4) ALJUCAR, LLC, B-401148, June 8, 2009, 2009 CPD ¶ 124 (a protester contributed significantly to a delay where it fails to provide sufficient time for delivery at a secure government facility).

- (5) Selrico Services, Inc., B-259709.2, May 1, 1995, 95-1 CPD ¶ 224 (erroneous confirmation by agency of receipt of bid).
- (6) O.S. Sys., Inc., B-292827, Nov. 17, 2003, 2003 CPD ¶ 211 (while agency may have complicated delivery by not including more explicit instructions in the RFP and by designating a location with restricted access, the main reason that the proposal was late was because the delivery driver was unfamiliar with the exact address, decided to make another delivery first, and attempted to find the filing location and the contracting officer unaided, rather than seeking advice concerning the address and location of the contracting officer immediately upon entering the facility).

- d. The bidder must not have contributed substantially to the late receipt of the bid; it must act reasonably to fulfill its responsibility to deliver the bid to the proper place by the proper time. Bergen Expo Sys., Inc., B-236970, Dec. 11, 1989, 89-2 CPD ¶ 540 (Federal Express courier refused access by guards, but courier departed); Monthei Mechanical, Inc., B-216624, Dec. 17, 1984, 84-2 CPD ¶ 675 (bid box moved, but bidder arrived only 30 seconds before bid opening).

D. Extension of Bid Opening to Prevent “Late” Bids

- 1. Historically, even if the deadline for proposals had passed, GAO allowed contracting officer’s to extend the closing time for receipt of proposals if they did so to **enhance competition**. The contracting officer simply issued an amendment to the solicitation extending the deadline. GAO permitted this to happen up to five days after the deadline, in some cases. (See below for examples). GAO saw this as a way to enhance competition under the Competition In Contracting Act (CICA). **GAO created exception** to the “Late is Late” Rule.
 - a. Geo-Seis Helicopters, Inc., B-299175, B-299175.2, Mar. 5, 1997 (holding an agency may amend a solicitation to extend closing after the expiration of the original closing time in order to enhance competition); but see Chestnut Hill Constr. Inc., B-216891, Apr. 18, 1985, 85-1 CPD ¶ 443 (importance of maintaining the integrity of the competitive bidding system outweighs any monetary savings that would be obtained by considering a late bid).

- b. Varicon Int'l, Inc.; MVM, Inc., B-255808, B-255808.2, Apr. 6, 1994, 94-1 CPD ¶ 240 (it was not improper for agency to amend a solicitation to extend the closing time for receipt of proposals five days after the initial proposal due date passed because the agency extended the date to enhance competition and allow two other offerors to submit proposals),
 - c. Institute for Advanced Safety Studies -- Recon., B-21330.2, July 25, 1986, 86-2 CPD ¶ 110 at 2 (it was not improper for agency to issue an amendment extending the closing time 3 days after expiration of the original closing time).
 - d. Fort Biscuit Co., B-247319, May 12, 1992, 92-1 CPD ¶ 440 at 4 (it was not improper for agency to extend closing time to permit one of four offerors more time to submit its best and final offer).
2. **Currently**, COFC does not recognize GAO's exception as valid. There is no CAFC decision reconciling GAO and COFC. COFC's analysis is that the GAO exception is not listed in the FAR. The FAR councils considered an amendment identical to the GAO exception in 1997 and rejected it after public comment. In **Geo-Seis Helicopters v. United States**, COFC rejected the agency's reliance on the GAO exception, 77 Fed. Cl. 633 (2007), and granted the protestor fees under the Equal Access to Justice Act (EAJA), 79 Fed. Cl. 74 (2007), because COFC found that the government's was "not substantially justified" in believing the GAO "ipse dixit" exception was valid law. "GAO precedent could not excuse deviation from explicit, unambiguous regulations that directly contradict that position." 79 Fed. Cl. at 70 (*quoting Filtration Dev. Co. v. U.S.*, 63 Fed. Cl. 612, 621 (2005)).

IV. ORGANIZATIONAL CONFLICTS OF INTEREST (OCI)

- A. Overview. An organizational conflict of interest, or "Unfair Competitive Advantage," arises where "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." FAR 2.101 (*emphasis added*).
1. The contracting agency is responsible for determining whether an actual or apparent conflict of interest will arise, and whether and to what extent the firm should be excluded from the competition. FAR 9.504 & 9.505.

2. An OCI may exist with respect to existing procurement, or with respect to a future acquisition. FAR 9.502(c).

B. The three types of OCIs

1. Unequal Access to Information. (“Unfair access to non-public information”) OCI occurs when, as part of its performance of a government contract, a firm has access to non-public information (including proprietary information and non-public source selection information) that may provide the firm with a competitive advantage in a competition for a different government contract. FAR 9.505-4. Aetna Gov’t Health Plans, Inc., B-254397.15, July 27, 1995, 95-2 CPD ¶ 129. To constitute an OCI it is sufficient that the offeror has access to the information; actual use does not have to be shown.
 - a. GAO sustained a finding of an OCI where awardee employed in its proposal preparation a former high-ranking official of the procuring agency who had participated in planning procurement and had access to non-public competitor and source selection information, and contracting officer was not informed of and therefore did not consider the matter. “Health Net Fed. Servs., LLC, B-401652.3,.5, Nov. 4, 2009, 2009 CPD ¶ 220.
 - b. Johnson Controls World Serv., B-286714.2, Feb. 13, 2001, 2001 CPD ¶ 20 (OCI found in the award of a logistics support contract where the awardee’s subcontractor, under separate contract, had access to a competitively beneficial but non-public database of maintenance activities that was beyond what would be available to a typical incumbent installation logistics support contractor).
 - c. Kellog, Brown, & Root Serv., Inc., Comp. Gen. B-400787.2, Feb. 23, 2009 CPD ¶ 692647 (upholding the contracting officer’s decision to disqualify KBR from competing for two task orders under the LOGCAP IV contract because the KBR program manager improperly accessed rival propriety information erroneously forwarded to the program manager by the contracting officer. The GAO stated, “[W]herever an offeror has improperly obtained proprietary proposal information during the course of a procurement, the integrity of the procurement is at risk, and an agency’s decision to disqualify the firm is generally reasonable, absent unusual circumstances.”).

- d. For there to be an unequal access OCI, the information received must be real, substantial, competitively useful, and non-public.
- (1) When a government employee participates in the drafting an SOW, this does not necessarily demonstrate that the employee's post government work for an offeror created an OCI, where the employee's work was later released to the public as part of the solicitation. Further, the contracting officer could neither "conclusively establish, nor rule out the possibility" that former government employee had access to competitively useful source selection information, determination that appearance of impropriety had been created by the protester's hiring of a former government employee was unreasonable, because determination was based on assumptions rather than hard facts. VSE Corp., B-404833.4, Nov. 21, 2011, 2011 CPD ¶ 268.
 - (2) Raytheon Technical Servs. Co. LLC, B-404655, Oct. 11, 2011, 2011 CPD ¶ 236 (unequal access to information" protest denied where allegations were based upon suspicion rather than "hard facts," and contracting officer conducted reasonable investigation and concluded that awardee did not have access to competitively useful non-public information).
 - (3) CACI Inc., Federal, B-4030642, Jan. 28, 2011, 2011 CPD ¶ 31 (holding no unequal access to information OCI resulted from access to protester's information, where information had been furnished to the Government without restriction as to its use).
 - (4) ITT Corp. – Electronic Sys., B-402808, Aug. 6, 2010, 2010 CPD ¶ 178 (no OCI where the awardee had access to information that the protestor had provided to the government under a Government Purpose Rights license, since the protester had access to same information and government had the legal right to provide it to the awardee).
 - (5) Dayton T. Brown, Inc., B402256, Feb. 24, 2010, 2010 CPD ¶ 72 (finding where protocols were provided to all offerors, awardee with access to protocols did not have unfair access to information OCI).

e. The “natural advantage of incumbency” will not create an OCI by itself.

- (1) Qineti North America, Inc., B-405008, July 27, 2011, 2011 CPD ¶ 154 (holding that an offeror may possess unique information, advantages and capabilities due to its prior experience under a government contract – either as an incumbent contractor or otherwise; 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).
- (2) PAI Corp. vs. United States, 2009 WL 3049213 (Ct. of Fed. Cl. Sept. 14, 2009 (stating that any competitive advantage was result of natural advantage of incumbency rather than access to nonpublic information which had no competitive value; since contracting officer found that no significant OCI existed, she was not required to prepare written analysis), affirmed, 614 F3d. 1347 (Fed. Cir. 2010).
- (3) ARINC Eng’g Servs., LLC, 77 Fed. Cl. 196 (2007) (prejudice is presumed when offeror has non-public information that is competitively useful and unavailable to protester, but in order to prevail the protester must show that contractor had more than just the normal advantages of incumbency – e.g. that 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 government contractor.”)
- (4) Systems Plus Inc. vs. United States, 69 Fed. Cl. 1 (2003) (the natural advantage of incumbency, by itself, does not create an OCI).

f. The actions or knowledge of a subcontractor or other team member can create an OCI.

- (1) Awardee had unequal access to information when subcontractor that it ultimately acquired following contract award had access to competitively useful, non-public information. B.L. Harbert-Brasfield & Gorie, Comp. Gen. B-402229, Feb. 16, 2010, 2010 CPD ¶ 69.

- (2) Maden Techs., B-298543.2, Oct. 30, 2006, 2006 CPD ¶ 167 (potential OCI from awardee's use of subcontractor that had served as evaluator for agency in previous procurement was mitigated where subcontractor had signed nondisclosure agreement and did not aid awardee in preparing proposal)
 - (3) Mech. Equip. Co., Inc., et al, B-292789, Dec. 15, 2003, 2004 CPD ¶ 192 (no unequal access OCI where awardee's subcontractor was long time incumbent services provider but there was no evidence it had advance access to procurement information).
- g. An unequal access to information OCI will not result from information that is not obtained by a government contract. CapRock Govt. Solutions, Inc., B-402490, May 11, 2010, 2010 CPD ¶ 124 (no unequal access to information OCI where information in dispute was not obtained as part of performance of government contract).
 - h. Information from a former Government employee. Where non-public information is obtained from a former government employee, the issue will be treated as if the information had been obtained under a government contract. GAO generally will not presume access to non-public, competitively sensitive information, but will presume prejudicial use of such information once access is shown. TeleCommunication Sys. Inc., B-404496.3, Oct. 26, 2011, 2011 CPD ¶ 229; Unisys Corp., B-403054.2, Feb. 8, 2011, 2011 CPD ¶ 61; Chenega Fed. Sys., B-299310.2, Sept. 28, 2007, 2007 CPD ¶ 70
2. Impaired Objectivity OCI. Occurs when the nature of contractors's work under one contract could give it the opportunity to benefit on other contracts. If the contractor is using subjective judgment or giving advice, and its other business interests could be affected by that judgment or advice, its objectivity may be impaired. An example would be if it were to have the opportunity to evaluate itself, an affiliate, or a competitor, either through an assessment of its performance under another contract or through an evaluation of its own proposal. The issue is not whether biased advice was actually given but whether a reasonable person would find that the contractor's objectivity could have been impaired. Note that a biased ground rules OCI may also involved impaired objectivity. FAR §9.505-3. Aetna Gov't Health Plans, Inc., B-254397.15, July 27, 1995, 95-2 CPD ¶ 129. See Cahaba Safeguard Adm'r, LLC, Comp. Gen. B-401842.2,

Jan. 25, 2010, 2010 CPD ¶ 39 (discussing agency's handling of an impaired objectivity conflict of interest); L-3 Serv., Inc., Comp. Gen. B-400134.11, Sept. 3, 2009, 2009 CPD ¶ 171.

- a. A protest was sustained where the awardee of a contract for advisory and assistance services and technical analysis sold related products and services and could provide information that might influence acquisition decisions concerning those products. The Analysis Group, LLC, B-401726.2, Nov. 13, 2009, 2009 CPD ¶ 237; The Analysis Group, LLC, B-401726.3, Apr. 18, 2011, 2011 CPD ¶ 166 (protest denied where agency conducted its own investigation and thoroughly analyzed potential OCI, concluding that risk of potential OCI remained but was outweighed by benefit to Government, and properly executed waiver)
- b. Nortel Govt. Solutions, B-299522.5, B-299522.6, Dec. 30, 2008, 2009 CPD ¶ 10 (protest sustained where agency did not give meaningful consideration to a potential impaired objectivity OCI, also noted: firewall is “virtually irrelevant to an OCI involving potentially impaired objectivity,” because the OCI involves the entire organization, not just certain individuals).
- c. Remote relationships. Some relationships are too “remote” to create an impaired objectivity OCI risk, and some activities are too “ministerial” to give the contractor an opportunity to act in other than the government’s interest.
 - (1) Valdez Int’l Corp., B402256.3, Dec. 29, 2010, 2011 CPD ¶ 13 (affirming contracting officer decision, after comprehensive and well documented review, that impaired objectivity OCI was minimal because standardized protocols and processes limited the amount of independent judgment required).
 - (2) Marinette Marine Corp., B-400697 et al., Jan. 12, 2009, 2009 CPD ¶ 16 (holding no impaired objectivity OCI found where entity that helped agency in proposal evaluation provided advice to both awardee and protester, without any contractual or financial arrangement).
 - (3) Leader Comm’ns, Inc., B-298734, Dec. 7, 2006, 2006 CPD ¶ 192 (finding that awardee did not have

impaired objectivity OCI as a result of its performance of separate contract because any services that overlapped would be administrative only).

3. Biased Ground Rules OCI. Occurs when, as part of its performance on a government contract, a firm has helped (or is in a position to help) set the ground rules for procurement of another government contract, for example, by writing the statement of work or the specifications, or establishing source selection criteria. The primary concern is that the firm could skew the competition in its own favor, either intentionally or not. FAR 9.505-1 and 9.505-2. Aetna Gov't Health Plans, Inc., B-254397.15, July 27, 1995, 95-2 CPD ¶ 129.
 - a. The FAR standard is whether the information supplied led “directly, predictably, and without delay” to the statement of work. FAR 9.505-2(b).
 - b. Examples
 - (1) GAO upheld a protestor’s exclusion on the basis of “biased ground rules” OCI. The protestor prepared a report that the agency used to draft the statement of work. Despite the fact that the awardee expected the report to be used only as part of a sole source procurement, rather than competitive procurement, the protestor was properly excluded. There is no “foreseeability” caveat to the rule. Energy Sys. Group, B402324, Feb. 26, 2010, 2010 CPD ¶ 73.
 - (2) The GAO has held that the relevant concern is not whether a firm drafted specifications that were adopted into the solicitation, but whether the firm was in a position to affect the competition, intentionally or not, in favor of itself. Also, it was unreasonable for the agency to rely on a mitigation plan that was undisclosed to, unevaluated by, and unmonitored by the agency. L-3 Servs., Inc., B-400134.11, Sept. 3, 2009, 2009 CPD ¶ 171.
 - (3) Celadon Labs., Inc., B-298533, Nov., 1 2006, 2006 CPD ¶ 158 (sustaining a protest where outside evaluators, retained to review proposals involving two different, competing technologies, were all employed by firms that promoted the technology challenged by protestor’s proposal).

(4) Filtration Dev. Co. LLC, 60 Fed. Cl. 371 (2004) (Systems engineering and technical assistance (SETA) contractor, which was in a position to favor its own products, was precluded from supplying components even though the agency claimed the contractor had not provided services in connection with those products; court held that the OCI had to be evaluated when the contractor became contractually obligated to perform SETA services, regardless of whether it actually performed them).

c. No OCI is created where the contractor has overall systems responsibility, or where input is provided by a developmental contractor or industry representative. Lockheed Martin Sys. Integration – Owego, B-287190.2, May 25, 2001, 2001 CPD ¶ 110; Vantage Assoc., Inc. v. United States, 59 Fed. Cl. 1, 10 (2003).

C. Examples. Subpart 9.5, especially section 9.508, of the FAR describes several situations that illustrate real or potential OCIs:

1. Providing systems engineering and technical direction for a system but not having overall contractual responsibility for its development or for its integration, assembly and checkout, or its production,” the government’s concern is that a contractor performing these activities “occupies a highly influential and responsible position in determining a system’s basic concepts and supervising their execution by other contractors,” and should” not be “in a position to make decisions favoring its own products or capabilities.
2. Preparing and furnishing complete specifications covering non-developmental items- ” the government’s concern is that the contractor “could draft specifications favoring its own products or capabilities,” which might not provide the government unbiased advice. This rule does not apply to:
 - a. contractors who furnish specifications regarding a product they provide (e.g., where the government purchases a data package from the original manufacturer, to use for future competitions);
 - b. situations where contractors act as industry representatives and are supervised and controlled by government representatives (e.g., when the government issues a Request For Information (“RFI”) to potential offerors); or

- c. development contractors (where experienced contractors will have an unavoidable competitive advantage which will improve the time and quality of production).
- 3. Where a contractor prepares a work statement to be used in a competitive acquisition – “or provides material leading directly, predictably, and without delay to such a work statement” – the government’s concern is that the contractor might favor its own products or capabilities. (FAR 9.505-2(b)) Accordingly, the contractor may not supply the system or services unless:
 - a. It is the sole source;
 - b. It participated in the development and design work (where experienced contractors will have an unavoidable competitive advantage which will improve the time and quality of production); or
 - c. More than one contractor helped prepare the work statement.
- 4. A contractor should not be awarded a contract to evaluate its own (or a competitor’s) offers for products or services, without “proper safeguards to ensure objectivity.” (FAR 9.505-3).
- 5. If a contractor requires proprietary information from others to perform a contract, it must agree to protect the information from unauthorized use or disclosure and to refrain from using the information for any other purpose. (FAR 9.505-4).
 - a. The contracting officer is directed to obtain copies of the required confidentiality agreements.
 - b. These restrictions also apply to proprietary and source selection information obtained from “marketing consultants,” who are defined (in FAR 9.501) as independent contractors who provide advice, information, direction or assistance in connection with an offer, not including legal, accounting, training, routine technical services, or “advisory and assistance services” (as defined in Subpart 37.2).
- D. Contractor Responsibilities. FAR Subpart 9.5 is directed principally at the government. Taking the government’s responsibilities into account, however, contractors should do the following:
 - 1. Identify actual and potential OCIs, both proactively and in response to inquiries from the contracting officer.

2. Actively communicate with the contracting officer to agree upon ways to avoid or mitigate potential OCIs.
3. Execute appropriate confidentiality agreements when proprietary information from third parties will be needed to perform a contract.
4. Make necessary inquiries of marketing consultants to ensure that they do not provide an unfair competitive advantage.

E. Government Considerations Related to OCIs.

1. Obligation for oversight

- a. Contracting Officers (and other contracting officials) must identify and evaluate potential OCI as early in the contracting process as possible. FAR 9.504(a)(1). Each individual contracting situation should be examined on the basis of its particular facts and the nature of the proposed contract. QinetiQ North America, Inc., Comp. Gen. B-405008, B405008.2, July 27, 2011, 2011 CPD ¶ 154. Because conflicts of interest may arise in situations not specifically addressed in FAR Subpart 9.5, individuals need to use common sense, good judgment, and sound discretion when determining whether a potential conflict exists. FAR 9.505. See L-3 Serv., Inc., Comp. Gen. B-400134.11, Sept. 3, 2009, 2009 CPD ¶ 171.
- b. Contracting Officers must 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 9.504(a)(2); Energy Sys. Group, Comp. Gen. B-402324, Feb. 26, 2010, 2010 CPD ¶ 73.
- c. The GAO review found the contracting officer failed to adequately analyze whether a biased ground rules OCI existed, and that there were no hard facts to show that awardees' work had put it in a position to materially affect the competition. To succeed the protester must also demonstrate that contracting officer's failure could have materially affected the outcome of the competition. QinetiQ North America, Inc., B-405008, July 27, 2011, 2011 CPD ¶ 154.
- d. The responsibility for determining whether an actual or apparent conflict of interest will arise, and to what extent the firm should be excluded from the competition, rests with the contracting agency. The GAO will not overturn an agency's

determination unless a protestor can show, based upon “hard facts,” that the agency’s OCI determination is arbitrary and capricious. QinetiQ North America, Inc., Comp. Gen. B-405008, B405008.2, July 27, 2011, 2011 CPD ¶ 154.

2. Reasonable consideration of offerors mitigation plan. The contracting officer must reasonably consider a potentially excludable offeror’s OCI mitigation plan.
 - a. The GAO sustained a protest where the agency excluded the protestor from a competition because of a possible impaired objectivity OCI, but the agency failed to give the contractor the opportunity to avoid or mitigate the OCI, and had not given the protestor an opportunity to respond to the agency’s concerns. AT&T Gov’t Solutions, Inc., B-400216, Aug. 28, 2008, 2008 CPD ¶ 170.
 - b. Evaluating proposals evenly (agency improperly downgraded score of protester, based on OCI risk, while failing to evaluate potential OCI of awardees on equal basis) Research Analysis & Maintenance, Inc., Westar Aerospace & Def. Group, Inc., B-292587.4 et al., Nov. 17, 2003, 2004 CPD ¶ 100.
3. Apparent OCI. The contracting officer may exclude an offeror based on an “apparent” OCI, even if there is no evidence of an actual impact.
 - a. An appearance of an unfair competitive advantage based upon hiring of a government employee, without proof of an actual impropriety, is enough to exclude an offeror if the determination of unfair competitive advantage is based upon facts and not on mere innuendo. Health Net Fed. Servs., LLC, B-401652.3, B-401652.5, Nov. 4, 2009, 2009 CPD ¶ 220 at 28; see NKF Eng’g, Inc., v. US, 805 F.2d 372 (Fed. Cir 1986) (overturning lower court’s holding that appearance of impropriety, alone, is not a sufficient basis to disqualify an offeror could be enough, and finding that the agency reasonably disqualified the offeror based upon the appearance of impropriety.)
 - b. VRC, Inc., B-310100, Nov. 2, 2007, 2007 CPD ¶ 202 (contracting officer properly excluded offeror because there was an appearance of a conflict, where an employee of a company with ownership ties to the offeror worked in the agency’s contracting division and had direct access to source selection information).

- c. Lucent Tech. World Servs. Inc., B-295462, Mar. 2, 2005, 2005 CPD ¶ 55 (protest challenging exclusion from the procurement denied where the contracting officer reasonably determined that the protester had an OCI arising from its preparation of technical specification used by agency in solicitation (although Army was kept apprised of Lucent's progress in drafting specifications, it did not exercise supervision and control, the Army's modification was not a major revision, and vast majority of technical specifications remained unchanged)).
- F. Waiver. The Government has the right to waive an OCI requirement. FAR 9.503.
1. The Analysis Group, LLC, B-401726.3, Apr. 18, 2011, 2011 CPD ¶ 166 (protest denied where agency conducted its own investigation thoroughly analyzed potential OCI, concluded that risk of potential OCI remained but was outweighed by benefit to Government, and properly executed waiver).
 2. Cigna Govt. Servs., LLC, B-401068, Sept. 9, 2010, 2010 CPD ¶230 (denying protest challenging agency's waiver of OCI where, in compliance with FAR requirements, waiver request detailed extent of conflict and authorized agency official determined that waiver was in government's interest).
 3. MCR Federal, LLC, B-401854.2, Aug. 17, 2010, 2010 CPD ¶196 (where, in compliance with FAR § 9.504, the agency made a written request for a waiver that described the OCI concerns, the potential effect if not avoided, neutralized, or mitigated, and the government's interest in allowing the offerors to compete for the award notwithstanding the OCI concerns, and the designated official approved the waiver, the agency met waiver requirements)
- G. Mitigating the risk of OCIs. In most cases it is not possible to mitigate an OCI after the fact, so mitigation must address prospective OCIs. In general, GAO will give substantial deference to a mitigation plan, as long as the agency has investigated and dealt with the conflict issues and the plan is tailored to the specific situation.
1. Unequal access OCIs
 - a. Establish a firewall, or a combination of procedures and security measures that block the flow of information between contractor personnel who have access to non-public competitive information and other contractor employees who

are preparing the proposal. The potential competitive advantage resulting from the unequal access will be nullified if the information cannot cross the firewall to be used in a competitive procurement. Enterprise Information Servs., B-405152, Sept. 2, 2011, 2011 CPD ¶ 174; LEADS Corp., B-292465, Sept. 26, 2003, 2003 CPD ¶ 197.

- b. Disclose sensitive information to all offerors. Johnson Controls World Servs., Inc., B-286714.3, Aug. 20, 2001, 2001 CPD ¶ 145; Sierra Military Health Servs., Inc. vs. United States, 58 Fed. Cl. 573 (2003) (sharing information with competing offerors could adequately mitigate the OCI).

2. Impaired objectivity OCIs

- a. Can be mitigated by excluding from work, or even removing, a conflicted subcontractor. Karrar Sys. Corp., B-310661, Jan. 3, 2008, 2008 CPD ¶ 51; Business Consulting Assocs., LLC, B-299758.2, Aug. 1, 2007, 2007 CPD ¶ 134.
- b. In some cases an impaired objectivity OCI can be mitigated by having work performed by a firewalled subcontractor, or even by the agency itself. Cahaba Safeguard Administrators, LLC, B-401842.2; C2C Solution, Inc., B-401106.5,6, Jan. 25, 2010, June 21, 2010, 2010 CPD ¶ 38 and 39; Alion Sci. & Tech. Corp., B-297022.4, Sept. 26, 2006, 2006 CPD ¶ 146. (Alion II) (GAO upheld the agency's analysis and approval of ITT's firewalled subcontractor plan even though one-third of the work would be done by a subcontractor, because the conflicted work could easily be segregated and assigned to the subcontractor).
- c. Increased oversight of work.
 - (1) Valdez Int'l Corp., B402256.3, Dec. 29, 2010, 2011 CPD ¶ 13 (affirming contracting officer decision, after comprehensive and well documented review that impaired objectivity OCI was minimal because standardized protocols and processes limited the amount of independent judgment required, and analysis would be done by subcontractors).
 - (2) Wyle Labs., Inc., B-288892.2, Dec. 19, 2001, 2002 CPD ¶ 12 (deciding that where government personnel, rather than contractor personnel, would be measuring

contractor performance, no OCI was created by the award of multiple contracts to the contractor).

- (3) Deutsche Bank, B-289111, Dec. 12, 2001, 2001 CPD ¶ 210 (finding dispositive that the firewalled subcontractor reported directly to the agency).

3. Biased ground rules OCIs. These are difficult to mitigate, because once a party has influenced the specifications the harm has already been done. If the government is not able to obtain input from multiple potential contractors, the best mitigation strategy looking forward may be for the potential contractor to avoid tasks that will create an OCI – either by refraining from submitting a proposal, or by entering into a contract that allows it to recue itself from work that might create a future conflict.

H. Defense FAR Supplement (DFARS) Rule

1. Background. The DFARS Rule addresses the mandate contained in Section 207 of the Weapons System Acquisition Reform Act of 2009 (WSARA), Pub. L. 111-23, 123 Stat. 1704, 41 U.S.C. §2304, which required the Department of Defense “to revise the Defense Supplement to the Federal Acquisition Regulation to provide uniform guidance and tighten existing requirements for organizational conflicts of interest by contractors in **major defense acquisition programs (MDAP)**.”² The DFARS Rule supplements the existing FAR Rule, but takes precedence to the extent that the rules are inconsistent. DFARS 209.571-2(b).
2. Applicability
 - a. The Final Rule applies only to programs which are MDAPs or have the potential to become MDAPs (“Pre-MDAPs”). DFARS 209.571-1, 2.
 - b. MDAPs are defined in 10 U.S.C. §2430 as DoD acquisition programs (excluding highly classified programs) that are so designated by the Secretary of Defense or that are estimated to require an eventual total expenditure for R&D, test and evaluation of more than \$300 Million or total expenditure for procurement of more than \$1.8 Billion, based on FY 1990 dollars.

² WSARA was enacted in response to a report issued by the Defense Science board Task Force on Defense Industrial Structure for Transformation , which expressed concern regarding the acquisition of numerous systems engineering firms by large defense contractors.

- c. Pre-MDAPs are defined as programs that are in the Materiel Solution Analysis or Technology Development Phases preceding Milestone B of the Defense Acquisition System, and have been identified as having the potential to become MDAPs.
- 3. Mitigating OCIs (DFARS 209.571-4)
 - a. Where the contracting officer and contractor have agreed to mitigate an OCI, a Government-approved OCI Mitigation Plan should be incorporated into the contract. This has several benefits. It facilitates enforcement and predictability. Both the contractor and the Government (as well as subsequent contracting officers) will be bound by the plan.
 - b. Where the contracting officer (after consulting with legal counsel) determines that an otherwise successful offeror is unable to effectively mitigate an OCI, the contracting officer shall use another approach to resolve the OCI, select another offeror, or request a waiver (in accordance with the procedure set forth in the FAR).
- 4. Restrictions on SETA (systems engineering and technical assistance) contractors.
 - a. The DFARS Final Rule requires that DoD obtain advice on SETA contractors with respect to MDAPs or Pre-MDAPs from sources that are objective and unbiased, such as Federally Funded Research and Development Centers (FFRDC's)³ or other sources that are independent of major defense contractors. DFARS 209.571-7(a)
 - (1) "Systems engineering" is defined as "an interdisciplinary technical effort to evolve and verify an integrated and total life cycle balanced set of system, people, and process solutions that satisfy customer needs."
 - (2) "Technical assistance" is defined as "the acquisition support, program management support, analyses, and

³ Federally Funded Research and Development Centers (FFRDC) are defined in FAR 2.101 as activities that are sponsored under a broad charter by a Government agency (or agencies) for the purpose of performing, analyzing, integrating, supporting, and/or managing basic or applied research and/or development, and that receive 70 percent or more of their financial support from the Government.

other activities involved in the management and execution of an acquisition program.”

- (3) “Systems engineering and technical assistance” is defined as “a combination of activities related to the development of technical information to support various acquisition processes.”
 - (4) SETA does not include “design and development work of design and development contractors.”
- b. Contracts for SETA services for MDAPs or Pre-MDAPs shall prohibit the contractor (or any affiliate) from participating as contractor or Major Subcontractor⁴ in the development or construction of a weapon system under such program. DFARS 209.571-7(b)(1).
 - c. This prohibition may not be waived. It does not apply, however, if the head of the contracting activity determines that “an exception is necessary because DoD needs the domain experience and expertise of the highly qualified, apparently successful offeror,” and that the apparently successful offeror will be able to provide objective and unbiased advice without a limitation of future participation. DFARS 209.571-7(b)(2).
5. Post Script. As noted, the proposed DFARS OCI rule contained provisions that would have applied to all DoD acquisitions and not just those for MDAPs. Although the Final Rule was limited to MDAPs, after issuing the Final Rule the Defense Acquisition Regulations Council worked with the Civilian Acquisition Regulations Council, OFPP, and OGE as they drafted an amended OCI FAR rule.

I. Venue.

The Court of Federal Claims (COFC) and the GAO have independent protest jurisdiction. As a result, disappointed offerors sometimes seek “two bites at the apple” and file a protest at the COFC after losing at the GAO. While GAO decisions are accorded a high degree of deference by the COFC, they are not binding on it, especially as to questions of law. *Grunley-Walsh Int’l LLC vs. United States*, 78 Fed. Cl. 35 (2007). This can lead to a time consuming and convoluted OCI process.

⁴ A “Major Subcontractor” is defined in DFARS 252.209-7009 as one who is awarded a subcontract that exceeds both the cost and pricing data threshold and 10% of the contract value, or \$50 Million.

V. CONCLUSION

APPENDIX - Publication Timelines

Publicizing Synopsis/Solicitation and Response Time Requirements¹

<u>Amount of Acquisition</u>	<u>Non-Commercial Items</u>	<u>Commercial Items</u>
\$0 – Micro-purchase Threshold ²	NA	NA
>\$3K - \$15K	NA ³	NA
>\$15K - \$25K	Post synopsis or solicitation electronically or in public place for at least 10 days, unless soliciting orally (FAR 5.101(a)(2)). ⁴ If KO posts a synopsis, allow "reasonable opportunity to respond" after issuing solicitation.	Same as >15K - \$25K Non-Comm Items
>\$25K- \$\$SAT ⁵	Synopsisize on GPE ⁶ for 15 days. Then issue solicitation ⁷ and allow a "reasonable opportunity to respond." (FAR 5.201(b)(1)(i) and 5.203(b).	Option #1: Synopsisize on GPE for "reasonable period" (can be less than 15 days). Then, issue solicitation and allow "reasonable opportunity to respond" (can be less than 30 days) (FAR 5.203(a)(1), (b), and (c)). Option #2: Use combined synopsis/solicitation procedure (there is no separate synopsis and solicitation). KO will establish a "reasonable response time." (FAR 5.203(a)(2) and 12.603(a) and (c)(3)(ii).
>\$\$SAT	Synopsisize on GPE for 15 days (FAR 5.203(a)). Issue solicitation and allow 30 days to respond (FAR 5.101(a)(1) and 5.203(c)).	Same as \$25K - \$\$SAT Comm Items above.

1. "Publicizing" or "notice" requirements are satisfied by posting a synopsis (i.e., summary) of a planned solicitation for the required period and in appropriate locations. The "solicitation response time" is the period starting the first day a solicitation is posted or mailed to potential offerors.
2. Generally the micro-purchase threshold is \$3K; for construction it is \$2K; for acquisitions subject to the Service Contracts Act it is \$2.5K; in support of contingency ops/or NBCR defense it is \$15K for inside the U.S. and \$30K for outside the U.S.
3. No written solicitations required. Oral solicitations should be used to the "maximum extent practicable." FAR 13.106-1(c).
4. Oral solicitation for requirements estimated between \$15K - \$25K should be used for non-complex requirements only.
5. "SAT" means "simplified acquisition threshold" under FAR Part 13 – normally \$150K. See simplified acquisition threshold chart on page 2.
6. Government-wide Point of Entry (GPE). The GPE is located at www.fedbizops.com.
7. "Issue solicitation" means to publicize it on GPE, or by other electronic means, or to send it to potential offerors.