

the five international treaties that have been negotiated in the Legal Subcommittee of the COPUOS. The most important and innovative provision of this treaty deals with possible equitable sharing of the benefits from the exploitation of the natural resources of the Moon and other celestial bodies. Under Article 11 of the Agreement, the Moon, other celestial bodies, and their natural resources are declared the "common heritage of mankind" (CHM). The concept of CHM was first proposed by Aldo Armando Cocca, representative of Argentina, during the 1967 discussions in the Legal Subcommittee of the COPUOS. This concept was later taken up by the Ambassador of Malta in the discussion on the equitable sharing of the resources of the high seas and finally was included in the 1982 Convention on the Law of the Sea. For the first time, the concept of CHM was transformed into a principle of international law and was included in the Moon Agreement in 1979. Under the Agreement, an international régime needs to be established to govern the exploitation of natural resources of the Moon. Such a regime must include provisions relating to an "equitable sharing by all States Parties in the benefits derived from those resources, whereby the interests and needs of the developing countries, as well as the efforts of those countries which have contributed either directly or indirectly to the exploration of the Moon, shall be given special consideration."²²⁰ This provision of the Moon Agreement needs to be respected only after the establishment of a detailed international regime (perhaps covering both a expanded treaty and an organization), which is mandated at that point in the future when the exploitation of the natural resources of the Moon would be "about to become feasible." Before the establishment of such a regime, the provisions of Article 6 (2) remain applicable. They state that:

In carrying out scientific investigations and in furtherance of the provisions of this Agreement, the States Parties shall have the right to collect on and remove from the Moon samples of its mineral and other substances. Such samples shall remain at the disposal of those States Parties which caused them to be

²²⁰ Moon Agreement, *supra* note 2, at art. 11(7)(d).

collected and may be used by them for scientific purposes. States Parties shall have regard to the desirability of making a portion of such samples available to other interested States Parties and the international scientific community for scientific investigation. States Parties may in the course of scientific investigations also use mineral and other substances of the Moon in quantities appropriate for the support of their missions.²²¹

Since this provision is supportive of private entities during the period of explorations of natural resources of the Moon, one should not read the Moon Agreement as being against private initiatives, investment, and interests. Unfortunately, there exists some misinformation about the application of the Moon Agreement, even in some official circles. For example, the U.S. Army Space Reference Text on Space Policy and Law mentions that the 1979 Moon Agreement "was signed by five countries but not the United States or the Soviet Union. It states that the Moon is a common heritage for all mankind which implies that all nations would share equally in any benefits derived from Moon exploration. If the U.S. signed this treaty it would be hard to get private firms to invest in future Moon projects if they had to divide the profits."²²²

While the CHM is the most significant principle of the Moon Agreement, it is also the most controversial one. It is generally believed that because of this principle the Moon Agreement attracted only a limited number (i.e. eleven) of ratifications. However, the low number of ratifications has in fact been primarily due to two other factors: first, the exploration of the Moon has almost ended about thirty years ago; and second, there is a general lack of interest in the international space re-

²²¹ *Id.* at art. 6(2) (emphasis added).

²²² Space Division, HQ TRADOC, *Space Policy and Law, in ARMY SPACE REFERENCE TEXT*, ch. 3, http://www.fas.org/spp/military/docops/army/ref_text/chap3im.htm (last visited July 11, 2006). Recommended changes should be submitted on DA Form 2028 to: Commander, U.S. Army Training and Doctrine Command, ATTN: ATCD-HS, Fort Monroe, VA 23651-5000. The purpose of this Reference Text is to provide information on space systems and their use as they relate to U.S. Army operations. The intended users are U.S. Army commanders, staff officers and Noncommissioned Officers, students attending Army courses of instruction and their instructors.

gime, both in developing and developed countries. Nevertheless, this situation may change once European States, China, India and others succeed in launching their missions to the Moon.²²³ That development will dramatically alter the geopolitical perception of the Moon and a global interest will grow for the development of a legal regime to govern the Moon and other celestial bodies. The 2004 American decision to resume exploration of the Moon and to use its resources for missions to Mars has already rekindled interest in the politics and appropriate regulatory regime for these celestial bodies.²²⁴ The recent ratification of the Moon Agreement by Belgium on 29 June 2004 (effective on 29 July 2004) may be the start of a new trend in increased interest in Moon exploration and the 1979 Moon Agreement. Added interest in the Agreement is provided by the activities of several private entities in the U.S. and other countries that are “selling” pieces of land on the Moon.²²⁵ Irrespective of the fact that such “selling” has no legal basis,²²⁶ global public interest in

²²³ *Europe's Moon mission blasts off*, CNN.COM, Sept. 28, 2003, <http://www.cnn.com/2003/TECH/space/09/28/moon.launch/index.html> (last visited July 11, 2006); *Europe's lunar adventure begins*, BBC NEWS, Sept. 28, 2003, <http://news.bbc.co.uk/2/hi/science/nature/3136004.stm> (last visited July 11, 2006); David Whitehouse, *China sets its sights on the Moon*, BBC NEWS, Dec. 3, 2003, <http://news.bbc.co.uk/2/hi/science/nature/3288043.stm> (last visited July 11, 2006); *China Outlines 4 Scientific Goals For Moon Project*, SPACE DAILY, Nov. 10, 2003, <http://www.spacedaily.com/news/china-03zy.html> (last visited July 11, 2006); Wei Long, *China Eyes Territorial Claim Of Outer Space*, SPACE DAILY, Jan. 21, 2002, <http://www.spacedaily.com/news/china-02f.html> (last visited July 11, 2006); *Indian cabinet approves proposal for unmanned Moon mission*, SPACE DAILY, Sep. 11, 2003, <http://www.spacedaily.com/2003/030911164033.fm12qa0c.html> (last visited July 11, 2006); *Unmanned Moon mission could catapult India to global league: space chief*, SPACE DAILY, Apr. 29, 2003, <http://www.spacedaily.com/2003/030429012615.mjvka2bc.html> (last visited July 11, 2006); Pratap Chakravarty, *India Craves The Moon To Crown Its Space Odyssey*, SPACE DAILY, Mar. 12, 2001, <http://www.spacedaily.com/news/india-00d.html> (last visited July 11, 2006).

²²⁴ *Bush proposal to send man to Mars*, BBC NEWS, Jan. 9, 2004, <http://news.bbc.co.uk/2/hi/science/nature/3381531.stm#text> (last visited July 11, 2006); *Bush unveils vision for Moon and beyond: President seeks \$1 billion more in NASA funding*, CNN.COM, Jan. 14, 2004, <http://www.cnn.com/2004/TECH/space/01/14/bush.space/index.html> (last visited July 11, 2006).

²²⁵ Richard Stenger, *Prime lunar real estate for sale - but hurry*, CNN.COM, Nov. 20, 2000, <http://www.cnn.com/2000/TECH/space/11/20/lunar.land/index.html> (last visited July 11, 2006).

²²⁶ See International Institute of Space Law, Statement by the Board of Directors Of the International Institute of Space Law (IISL) On Claims to Property Rights Regarding The Moon and Other Celestial Bodies, 2004 [hereinafter Statement by IISL Board],

outer space necessitates that clear rules must be established both at international and national levels.

It is impossible to predict whether the nature and scope of the future regime governing activities on the Moon will be based exclusively on the current Moon Agreement or on a new agreement. Whatever the substance of the future lunar regime, it should include the principle of CHM. If the principle of CHM could be retained in the Law of the Sea Convention, there is no logical reason for excluding this principle from the future legal regime to govern the exploitation of the natural resources of the Moon and other celestial bodies.

The Moon Agreement has incorporated global public interest in the exploration and use of the Moon and certainly contains a "balance of interests" of the space powers (which would be engaged in the exploration and eventual exploitation of natural resources of Moon) and those of the rest of the international community. Therefore, all States should ratify the Moon Agreement as soon as possible.

F. Comprehensive Space Treaty

An informal proposal has been before the Legal Subcommittee of the COPUOS recommending the drafting of a single comprehensive outer space convention. China, Greece, and the Russian Federation have submitted a working paper to that effect.²²⁷

http://www.iafastro-iisl.com/additional%20pages/Statement_Moon.htm (last visited July 11, 2006):

according to international law, and pursuant to Article VI [of the Outer Space Treaty], the activities of non-governmental entities (private parties) are national activities. The prohibition of national appropriation by Article II thus includes appropriation by non-governmental entities (i.e., private entities whether individuals or corporations) since that would be a national activity. The prohibition of national appropriation also precludes the application of any national legislation on a territorial basis to validate a "private claim." Hence, it is not sufficient for sellers of lunar deeds to point to national law, or the silence of national authorities, to justify their ostensible claims. The sellers of such deeds are unable to acquire legal title to their claims. Accordingly, the deeds they sell have no legal value or significance, and convey no recognized rights whatsoever.

Id.

²²⁷ U.N. Doc. A/AC.105/C.2/L.236 (2002).

This is an interesting initiative and it merits serious consideration. The main purpose of existing space treaties has been to establish fundamental legal principles to govern the space activities of the States. In general, however, these treaties have become outdated due to changes in the global geopolitical situation and are inadequate to address the challenges posed by increases in the variety of space activities, especially those that are being undertaken for commercial purposes. They need to be updated. It would be in the interest of all States that the general principles of space law, scattered throughout five treaties, be transformed into a single, consistent, modern, and comprehensive legal document to enhance inclusive global public interest and to promote responsible uses of outer space. However, the conclusion of a comprehensive space treaty unfortunately might be considered politically risky at this stage. Some States, particularly those with major space capabilities, might use negotiations over the text of a new agreement to weaken some of the key provisions of the Outer Space Treaty, including those that create global public interest in outer space.

The adoption by the COPUOS of an additional Protocol to the Outer Space Treaty may be an option since it would need to be ratified by only the interested States and not all States Parties to the Outer Space Treaty. Such protocol should include (1) the fundamental legal principles (particularly those that establish the global public interest) that have already been adopted; (2) clear rules of law that would govern all space activities, including those undertaken by private entities and covering issues related to space debris, intellectual property rights, etc.; (3) unambiguous definitions of the terms used; (4) an efficient dispute settlement mechanism; and (5) sufficient provisions for the protocol's amendment.

CONCLUSION

From the beginning of the space age the international community unambiguously recognized global public interest in outer space. This involves the obligation of each State to explore and use outer space and celestial bodies for the benefit and interests of all countries, which accords supremacy for the

inclusive interests of the international community over exclusive rights of individual States. It also entails the right of each State to explore and use outer space and celestial bodies for peaceful purposes, without discrimination of any kind or appropriation by any means. However, due to a lack of sufficiently and precisely developed international law to protect and enhance global public interest in outer space, some States have started adopting national laws and policies to promote their exclusive national benefits and are thereby jeopardizing the inclusive interest of the international community. Freedom of use is being considered as a license for abuse. Unilateral and exclusive space policies pursued and activities undertaken by some States are being rationalized under the principle of (unfettered) freedom of use, without due regard to the corresponding interests of other States. Recent insistence by certain States on arbitrary interpretation of the provisions of the Outer Space Treaty (which establishes global public interest in outer space) poses serious challenges to the current international legal order of outer space and creates grave barriers to the further development of international space law.

The Outer Space Treaty, which achieves a fair balance of interests among space powers and non-space powers by intentionally incorporating numerous innovative legal principles, is not only an international agreement of high importance (as the constitution of outer space) establishing rule of law in outer space, but also a manifesto of genuine expectations of all segments of mankind. It is therefore imperative that not only the letter but also the spirit of the Treaty govern space activities of States. Activities contrary to both the spirit and letter of the Treaty would shatter the belief in the rule of law and in the international democratic law-making process.

The United Nations's COPUOS is the appropriate place to tackle most space-related problems but progress in the Committee is being blocked by the consensus rule. That rule must not be considered sacrosanct, especially when the interests of humankind are at stake. Like-minded nations should become more actively engaged in COPUOS, preferably with the support of major space powers, or even without them if it becomes neces-

sary, to pursue policy and regulatory initiatives on matters of importance to them and other States.

Current international space law consists mainly of general principles. Therefore, sometimes it is difficult to determine if any particular action, or a series of actions, of a State is in violation of any specific provision of an international space treaty, though that action may be contrary to these general legal principles. In certain cases or situations, there may not appear to be a specific dispute that needs to be resolved through the formal legal means of international dispute settlement. In addition, States that are adversely affected by such actions may feel reluctant to bring that matter before a formal judicial tribunal because of political, financial, or other reasons. At the same time, there is no independent and international expert body that could adjudge the actions of States with respect to the exploration and use of outer space. Therefore, an independent international space law tribunal or panel — which may be designated as the International Commission of Space Jurists, or ICSJ — should be established with the mandate to express its opinions on specific matters referred to it by any national or international public or private entity.²²⁸ The proposed tribunal could be created on the same model as the International Commission of Jurists²²⁹ or any other similar international independent panel of legal experts. The opinions of such a tribunal would be available for use by the States members of the Legal Subcommittee of the COPUOS and thus will have extensive persuasive value and impact on the further development of international space law. This process could also help in protecting and promoting

²²⁸ In this regard, the recent drafting by the Board of the IISL of a Statement on the Property Rights on the Moon, is a valuable step in the right direction. See Statement by IISL Board, *supra* note 226.

²²⁹ “The International Commission of Jurists is comprised of sixty lawyers (including senior judges, attorneys and academics) dedicated to ensuring respect for international human rights standards through the law. The Commissioners are all individuals known for their experience, knowledge and fundamental commitment to human rights. The composition of the Commission aims to reflect the gender and geographical diversity of the world and its many legal systems.” International Commission of Jurists, Meet the Commissioners, http://www.icj.org/rubrique.php?id_rubrique=13&lang=en (last visited July 11, 2006).

global public interest in outer space, which has been the foundation and core of international legal order of outer space.

In September 2004, the Secretary General of the United Nations, Kofi Annan, speaking to the General Assembly in New York, portrayed a very dismal current state of the world. The main reason for such a situation, according to him, is humanity's disregard for the rule of law in international affairs:

[T]oday the rule of law is at risk around the world.... At the international level, all States — strong and weak, big and small — need a framework of fair rules, which each can be confident that others will obey. Just as, within a country, respect for the law depends on the sense that all have a say in making and implementing it, so it is in our global community. No nation must feel excluded. All must feel that international law belongs to them, and protects their legitimate interests.²³⁰

The rule of law rather than the rule of unilateral force should apply not only to international relations on the Earth but also to all activities in and from outer space. The first rationale for the creation of the United Nations and the establishment a new global international legal order after the devastating Second World War, as mentioned in the Preamble of the UN Charter, was “to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind.” The same rationale should serve as an urgent motivation to uphold global public interest in the exploration and use of outer space and even the survival of humankind.

²³⁰ Key extracts: *Annan at the UN*, BBC NEWS, Sept. 21, 2004, <http://news.bbc.co.uk/go/pr/fr/-/2/hi/americas/3678030.stm> (last visited July 11, 2006).

ORGANIZATIONAL CONFLICTS OF INTEREST: A PRACTICAL LEGAL ISSUE IN IMPLEMENTING THE VISION FOR SPACE EXPLORATION, A VIEW FROM THE TRENCHES

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I. INTRODUCTION

The subject of organizational conflicts of interest is a practical legal issue associated with implementing the Vision for Space Exploration. Transitioning from the Shuttle Program to programs supporting the vision is one of the biggest challenges the National Aeronautics and Space Administration (NASA) faces, and organizational conflicts of interest influence the manner in which NASA successfully achieves this transition.

The NASA Space Operations Mission Directorate (SOMD), responsible for the current *Shuttle* and *International Space Station* programs, and the Exploration Systems Mission Directorate (ESMD), responsible for the *Vision for Space Exploration*, issued a memorandum dated December 23, 2005 regarding the issue of transition, which states in part:

NASA is currently grappling with several very demanding challenges. First, it must fly out the remaining flight of the Space Shuttle safely, and with maximum efficiency. Second, it must prepare for and meet the objective established in the Vision for Space Exploration and further defined in the Exploration Systems Architecture. To do both concurrently will require not only the development of new capabilities and contract vehicles, but also maximum use of existing resources until those new capabilities and contract vehicles are in place.

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Existing capabilities have their highest and best use where there is significant technical commonality.

While Space Shuttle operations continue, the Crew Exploration Vehicle (CEV) and the Crew Launch Vehicle (CLV) projects, as well as operations at KSC and JSC, may find it beneficial in the short and mid-term to use NASA's existing Shuttle Program contractors' uniquely applicable knowledge, capabilities, and ability to schedule and integrate complementary and compatible Shuttle and Exploration requirements to the maximum extent practical.

This approach does not circumvent the need to evaluate potential contract additions to ensure either effective competition or a proper justification for sole source work.¹

Organizational conflicts of interest (OCI) are one of the major barriers regarding the use of Shuttle contractors, particularly since use of *Shuttle* contractors could affect competitions for future Exploration requirements. The issue also is very important to the contractors performing the near and mid-term Exploration requirements since the Government's failure properly to resolve an OCI could prevent those contractors from competing in future competitions.

II. STATEMENT OF THE PROBLEM

The organizational conflict of interest provisions are found in subpart 9.5 of the Federal Acquisition Regulation (FAR);² however, the regulations do not contain a specific definition of an OCI. Instead, the regulations state that the underlying principles of subpart 9.5 are "preventing the existence of conflicting roles that might bias a contractor's judgment"³ and "preventing unfair competitive advantage."⁴ The General Accountability Office (GAO) and the Court of Federal Claims (COFC) have

¹ Memorandum from the NASA Space Operations Mission Directorate and the NASA Exploration Systems Mission Directorate (Dec. 23, 2005) (on file with author).

² 48 C.F.R. § 9.500-9.506 (2006).

³ *Id.* at 9.505(a).

⁴ *Id.* at 9.505(b).

issued numerous decisions interpreting these two principles, decisions that demonstrate the intricacies of OCI.⁵

The dynamics of the industry and changing practices in government procurement have increased the number of OCI's contracting officers must face. Mr. Dan Gordon, Managing Associate General Counsel at GAO, addressed this trend and identifies⁶ the following reasons for this increase:

- Consolidation within the industries serving the U.S. Government. Mergers and acquisitions have the dual effect of reducing the number of contractors providing a particular good or service and of increasing the range of goods and services the remaining contractors provide.⁷
- Greater reliance by Government agencies on contractor services likely to entail the exercise of judgment. The example in Mr. Gordon's article is "rather than merely obtaining computer repair services from private firms, the Government is entering into contracts that include the firms giving the Government advice on which hardware or software to buy."
- Greater use of umbrella contracts that have broader and less specific statements of work. Broad statements of work for contractor support increase the likelihood that the OCI could occur during contract performance.

All of these factors are present regarding potential OCIs created by using *Shuttle* contractors for Exploration requirements. Mergers and acquisitions have occurred within the aerospace industry, thereby reducing the number of contractors with whom NASA does business. The creation of United Space Alli-

⁵ The dual jurisdiction creates the possibility that GAO and the COFC may treat issues differently. The COFC obtained its protest jurisdiction within the last ten years and, unlike GAO, has authority to grant injunctive relief. Although decisions issued by the COFC cite GAO decisions, it appears earlier GAO decisions apply a slightly more relaxed standard than the COFC regarding OCIs. Past decisions from GAO seem to indicate that its primary concern was that agencies properly recognize an OCI and take reasonable steps to avoid, neutralize, or mitigate the conflict. The COFC, on the other hand, appears to have held that certain OCIs cannot be mitigated short of a waiver.

⁶ Daniel I. Gordon, *Organizational Conflicts of Interest: A Growing Integrity Challenge*, 35 PUB. CONT. L.J. 25 (2005). This article is an invaluable source on OCIs, providing a thorough overview of the subject and containing a useful compendium of GAO decisions regarding OCIs.

⁷ *Id.*

ance, a joint venture between Lockheed Martin Corporation and Rockwell International Corporation, which performs shuttle operations for NASA, illustrates this phenomenon. The Boeing Corporation acquired Rockwell International and the McDonnell Douglas Corporation subsequent to the creation of United Space Alliance. NASA's contract with United Space Alliance for shuttle operations now involves most of the major contractors in the aerospace industry.

Additionally, much of the upfront work associated with Exploration requirements will involve contractor services requiring subjective judgment. At the same time, ESMD intends to conduct competition for its future requirements once those requirements are properly identified. Finally, it is very likely that NASA will award the Exploration work on a task order basis since many of the requirements for Exploration have not been completely defined.

The FAR and case law provide that contractors should be excluded from future competitions when their earlier work creates an OCI that cannot be properly resolved. This paper will explain the responsibilities the contracting officer has with regard to OCIs as interpreted by the GAO and the COFR and what steps NASA could take to resolve these issues to permit contracting with Shuttle contractors to the maximum extent possible.⁸

III. BASIC PRINCIPLES OF OCIS

A. Responsibility of the Agency

Section 9.504 of the FAR requires contracting officers to identify and evaluate potential conflicts of interest as early in the acquisition process as possible. The COFC states that the FAR contemplates the analysis of significant potential OCIs prior to the issuance of the solicitation.

⁸ This paper concentrates on OCIs and will not discuss another hurdle to having Shuttle contractors perform Exploration work, namely, the requirement to comply with the Competition in Contracting Act at 10 U.S.C. § 2304 (2006).

*Science Applications International Corporation (SAIC)*⁹ provides an excellent example that an agency's post-award assertions regarding effectively neutralizing potential conflict will not satisfy the agency's pre-award obligation to "identify and evaluate potential organizational conflicts of interest." In this case, GAO found that the agency failed to recognize that the awardee, Lockheed Martin, would be in the position of assisting the Environmental Protection Agency (EPA) in a wide range of activities while, at the same time, some of Lockheed Martin's affiliates were potential polluters. EPA maintained it could prevent a conflict by carefully monitoring the tasks given to Lockheed Martin in order to neutralize the conflict. Although GAO sustained the protest and required EPA to establish and document a course of action that would effectively avoid, neutralize or mitigate the conflict, the mitigation plan GAO ultimately accepted was similar to the first one EPA proposed, for example, examining task orders prior to issuance to ensure there was no conflict.¹⁰ The only apparent difference between the two decisions is that both Lockheed Martin and EPA accepted responsibility for identifying the potential of a conflict of interest each time a task was awarded.

Section 9.504 of the FAR also requires that the contracting officer notify the contractor and permit a reasonable opportunity to respond before withholding an award based on conflict of interest considerations. *Informatics Corporation v. United States*,¹¹ involves a claim that the U.S. Air Force failed to notify a contractor before the agency excluded its bid from consideration due to organizational conflict of interest concerns. In this decision, the COFC seems to have been more concerned about whether the contractor could avoid or mitigate any potential

⁹ Science Applications International Corporation (SAIC), B-293601, B-293601.2, B-293601.3, May 24, 2004, 2004 CPD 96 (hereinafter SAIC I).

¹⁰ See Science Applications International Corporation, B-293601.5, 2004 CPD 201 (Sept. 21, 2004), available at <http://www.gao.gov/decisions/bidpro/2936015.htm> (last visited July 14, 2006).

¹¹ *Informatics Corporation v. United States*, 40 Fed. Cl. 508, 1998 U.S. Claims LEXIS 51 (1998).

OCI than about the lack of notification.¹² The COFC found for the plaintiff, holding that the OCI in question could be mitigated. Allegations that the contracting officer failed to notify a contractor about an OCI and provide an opportunity to respond will not be successful in those situations where the OCI cannot be properly resolved.¹³ Notifying the contractor about an unacceptable OCI, however, is often a necessary step to determine whether the contractor can avoid or mitigate the OCI.

Since the regulatory guidance cannot anticipate all situations which pose potential conflicts of interest, section 9.505 of the FAR advises contracting officers to examine each situation individually and to exercise "common sense, good judgment, and sound discretion" in assessing whether a significant potential conflict exists and, if so, in fashioning an appropriate resolution. Substantial facts and hard evidence are necessary to establish a conflict; mere inference or suspicion of an actual or apparent conflict is not enough. The responsibility for determining whether an actual or apparent conflict of interest will arise if a particular firm is awarded a contract, and to what extent the firm should be excluded from the competition, or how the conflict should be mitigated rests with the contracting agency; GAO will not overturn the agency's judgment in this regard unless it is shown to be unreasonable.

B. FAR Guidance on Types of OCI

In addition to explaining the underlying principles of an OCI, the FAR describes four common situations where organizational conflicts of interest exist. The first example is in section 9.505-1 of the FAR and involves systems engineering and technical directions. This OCI involves "[a] contractor that provides systems engineering and technical direction for a system but

¹² Besides illustrating the "due process" provision in section 9.505 of the FAR, *Informatics* also illustrates the dilemma contracting officers can face resolving OCI issues. *Id.* Most OCI cases seem to involve situations where the Government failed to rigorously implement subpart 9.5 of the FAR; however, *Informatics* represents a case where the contracting officer took too strict a position on an OCI.

¹³ See *DSD Laboratories, Inc. v. United States*, 46 Fed. Cl. 467, 2000 U.S. Claims LEXIS 65 (2000).

does not have overall contractual responsibility for its development, its integration, assembly, and checkout, or its production."¹⁴ Although section 9.501 does not suggest a method by which to resolve this conflict, section 9.505-1 cautions that "[t]herefore this contractor should not be in a position to make decisions favoring its own products or capabilities."¹⁵

Section 9.505-2 of the FAR pertains to conflicts associated with preparing or assisting in preparing specifications or work statements. This section states that agencies should prepare their own work statements since assistance from a contractor can put that contractor in a position to favor its own products or capabilities. Section 9.505-2 also provides that "contractors are prohibited from supplying a system or services acquired on the basis of work statements growing out of their services"¹⁶ since assisting in preparing a statement of work places the contractor "in a position to favor its own products"¹⁷ unless—

- (i) It is the sole source;
- (ii) It has participated in the development and design work; or
- (iii) More than one contractor has been involved in preparing the work statement.¹⁸

Section 9.505-3 pertains to conflicts associated with contracts for the evaluation of offers for products or services where the contractor may be evaluating its own products or services or those of a competitor. The FAR cautions the contracting officer not to enter into such contracts "without proper safeguards to ensure objectivity to protect the Government's interests."¹⁹ As discussed below, it can be difficult to define the proper safeguards needed to protect the Government's interest from potential bias.

The last type of OCI the FAR addresses pertains to conflicts associated with access to proprietary information. Section 9.505-4 of the FAR states that the contractor gaining access to pro-

¹⁴ 48 C.F.R. § 9.505-1(a).

¹⁵ *Id.* § 9.505-1(b).

¹⁶ *Id.* § 9.505-2(b)(2).

¹⁷ *Id.*

¹⁸ *Id.* § 9.505-2(b)(1)(i)-(iii).

¹⁹ *Id.* § 9.505-3.

proprietary information of other companies must agree to protect information from unauthorized use or disclosure for as long the data remains proprietary and must refrain from using this information for any other purpose than that for which it was furnished. The protection of data is normally accomplished through a "firewall" which prevents other company personnel from gaining access to/or using the proprietary data.

C. Types of OCI as Defined by Case Law

GAO broadly categorized organizational conflicts of interest in *Aetna Government Health Plans, Inc.; Foundation Health Federal Services, Inc.*,²⁰ one of the seminal cases on OCIs. According to GAO, the organizational conflicts of interest in subpart 9.5 of the FAR fall into three broad groups. The first group consists of situations where a firm has access to nonpublic information as part of its performance of a government contract and where that information may provide the firm a competitive advantage in a later competition for a government contract.²¹ In these "unequal access to information" cases, the concern is limited to the risk of the firm gaining a competitive advantage; there is no issue of bias. As discussed in this paper, conflicts due to "unfair access to data" are the easiest type of OCI to resolve.

The second group of conflicts occurs when a firm's work under one government contract could entail evaluating itself, either through an assessment of performance under another contract or through an evaluation of proposals.²² 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 its relationship with the entity whose work product is being evaluated.²³

²⁰ *Aetna Government Health Plans, Inc.; Foundation Health Federal Services, Inc.*, B-254397.15 et al., July 27, 1995, 95-2 CPD 129.

²¹ See 48 C.F.R. § 9.505-4.

²² See *id.* § 9.505-3.

²³ It should be noted that monitoring by a contractor, standing alone, does not necessarily create a conflict. Rather, "impaired objectivity" typically arises where a firm is evaluating its own activities because the objectivity necessary to impartially evaluate

The definition in *Aetna* describes this conflict in terms of evaluating one's self. Subsequent GAO decisions²⁴ expanded OCI's based upon "impaired objectivity," indicating this conflict is created when -

a contractor's judgment and objectivity in performing the contract requirements may be impaired due to the fact that the substance of the contractor's performance has the potential to affect other interests of the contractor.²⁵

Conflicts based upon "impaired objectivity" may be the most pervasive type of OCI given the number and breadth of mergers and acquisitions and the nature of the work contractors often perform for agencies.

The third 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 another government contract by 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."²⁶ These situations also involve concerns that a firm, by virtue of its special knowledge of the agency's future requirements, would have an unfair advantage in the competition for those requirements.²⁷

"Biased ground rules" combines both of the principles in the FAR regarding OCI's, for example, "[p]reventing the existence of conflicting roles that might bias a contractor's judgment"²⁸ and "[p]reventing unfair competitive advantage."²⁹ In "biased ground rules," the Government relies upon the judgment and expertise of the contractor when the contractor has a conflicting financial interest in the work it is performing. This is, of course, a classic

performance may be impaired by the firm's interest in the entity being evaluated. See TDS, Inc. B-292674, Nov. 12, 2003, 2003 CPD 204.

²⁴ See, *Alion Science & Technology Corp.*, B-297342, Jan. 9, 2000, 2006 CPD; *PURVIS Sys. Inc.* B-293807.3, B-293807.4, Aug. 4 2004, 2004 CPD 177; and *SAIC*, B-293601 et al., May 3, 2004, 2004 CPD 96.

²⁵ *Alion*, *supra* note 24.

²⁶ See 48 C.F.R. §§ 9.505-1 & 9.505-2.

²⁷ *The Pragma Corp.*, B-255236 et al., Feb. 18, 1994, 94-1 CPD 124.

²⁸ 48 C.F.R. § 9.505(a).

²⁹ *Id.* § 9.505(b).

example of "impaired objectivity." In the case of "biased ground rules," the subjective support the contractor provides also gives it an unfair competitive advantage in future competitions. One could argue, therefore, that conflicts due to "biased ground rules" are the most serious type of OCI in subpart 9.5 of the FAR.

D. Recent Case Law

The FAR recognizes that conflicts are not limited to the situations expressly covered in sections 9.505-1 through 9.505-4 and, therefore, each contracting situation must be examined on the basis of its particular facts and the nature of the proposed contract. Identifying OCIs is not easy and is the first step GAO and the COFC must complete to resolve OCI allegations. GAO issued two recent cases that provide further guidance on OCIs due to "impaired objectivity." The first decision, *Alion Science & Technology Corp.*,³⁰ involves the award of a contract to Advanced Engineering & Sciences, a division of ITT Industries, Inc. (ITT), for spectrum engineering support services. The protester, Alion Science & Technology alleged that this award was improper because the agency failed to reasonably consider ITT's significant involvement in the manufacture and marketing of spectrum-dependent products.

The Defense Information Services Agency (DISA) issued a solicitation to Federal Supply Schedule (FSS) contractors to provide services for the following:

- (1) [p]erform technical studies and mathematical modeling ...to develop long-term spectrum allocation and reallocation strategies ...;
- (2) [d]evise long-term plan and strategies based on regulatory activities and technology development to foster development of DOD polices;
- (3) advocate, based on technical analytical studies, and lead all DOD national/international technical and technology outreach efforts primarily when it relates to the NTIA [National Telecommunications and Information Administration] and FCC

³⁰ *Alion, supra* note 24.

[Federal Communication Commission] forums and committees, International Telecommunication Union (ITU) activities, including future World Radiocommunication Conferences (WRCs) and other national/international efforts, in order to promulgate DOD spectrum policy and objectives that are linked to Joint Vision 2020 and are fully integrated in the DOD spectrum architecture;

(4) [d]evelop and integrate enabling ... spectrum ... to maximize spectrum utilization...;

(5) [d]evelop recommendations ... for policies, strategies, regulations, and procedures to support the implementation and integration of emerging technologies to enhance spectrum utilization;

(6) [d]evelop DOD spectrum management architecture ... and a comprehensive roadmap to achieve this objective end-state.³¹

DISA indicated that the award would be without discussions³² and that selection would be made on the basis of best value. The contracting officer asked both ITT and Alion to submit OCI mitigation plans as part of the competition. ITT's mitigation plan involved having a "firewalled" subcontractor perform those contract requirements that created an OCI due to "impaired objectivity." The contracting officer reviewed this plan and concluded ITT would have a conflict in 7.3% of the effort and, therefore, concluded ITT's mitigate plan was reasonable given the limited extent of conflicts. Alion alleged that the agency failed to recognize the extent of the conflicts that would impair ITT's objectivity and failed to reasonably consider the effect of relying upon a "firewalled" subcontractor to perform the conflicted portions of the contract. Moreover, Alion asserted that the quality of the work by the subcontractor would not be the same as the work done by ITT.

³¹ *Id.*

³² As discussed above, the contracting officer has a duty to notify the contractor and permit a reasonable opportunity to respond before withholding an award based on conflict of interest considerations. When contractors are required to submit a plan to mitigate OCI, the concept of awarding without discussions can conflict with the requirement in Section 9.504. This tension may be one reason the contracting officer was willing to accept ITT's mitigation plan as submitted since any change to the plan would have resulted in negotiations.

GAO looked at the nature of the services the contractor was to provide to determine whether there is an OCI based upon "impaired objectivity." The first prong to a conflict based upon "impaired objectivity" is Government reliance upon the judgment/expertise of the contractor. The more subjective the work, the more likely an OCI regarding impaired objectivity may be created since an OCI regarding impaired objectivity exists when the Government is relying upon the judgment/expertise of contractor. The second prong to an OCI based on "impaired objectivity" is finding that the contractor's performance could affect its other interests. *Alion* focuses upon the first prong of an OCI based upon "impaired objectivity." Much of the decision involves a detailed analysis of the statement of work (SOW) in the solicitation issued by DISA to determine the extent to which the SOW required the subjective judgment of the contractor. GAO disagreed with the contracting officer's assessment and found that much more than 7.3% of the SOW required the subjective judgment of the contractor.

Then GAO examined ITT's own Internet website³³ to determine whether the contractor's performance of the contract could affect other its other interests, finding:

Here, it is clear that ITT manufactures and markets multiple spectrum-dependent products to the U.S. government, foreign governments, and commercial customers worldwide. Further, where DOD is competing for spectrum access with the "entire world," it is clear that DOD's policies, strategies, regulations and procedures regarding contentious spectrum-related issues are likely to affect the sales or use of spectrum-dependent products ...³⁴

GAO concluded that DISA failed "to reasonably identify and evaluate potential OCIs associated with ITT's performance".³⁵ In sustaining the protest, GAO recommended DISA reassess the

³³ GAO appears to be suggesting that contracting officers should use the web as a tool to determine the extent of conflicting interests. In addition, GAO indicated that it looks at the level of expertise a solicitation requires as one indicia as to whether the SOW could involve the subjective judgment of the contractor.

³⁴ *Alion*, *supra* note 24.

³⁵ *Id.*

extent of ITT's impaired-objectivity OCI and "evaluate the reasonable impact on the quality of performance" due to the fact that "firewalled" subcontractors would be performing conflicted contract requirements.³⁶

Alion demonstrates why the issue of OCIs is topical. The SOW in *Alion* is typical of the subjective tasks contractors are doing on behalf of the Government. The decision also marks a significant development regarding GAO's view of OCIs. In the past, GAO tended to support the actions of the contracting officer as long as the contracting officer addressed the issue of OCIs. *Alion* signals that GAO is willing to take a more aggressive stance on OCIs and will overturn the actions of a contracting officer who identifies and addresses OCI issues when those actions are not reasonable. The case also questions the use of a "firewalled" subcontractor as a method of mitigation. While *Alion* is not an inappropriate development in the area of OCI, the decision increases the degree of exactness necessary to implement the responsibilities contained within subpart 9.5 of the FAR.

The second recent GAO decision, *Greenleaf Construction Co., Inc.*³⁷ illustrates the second prong of "impaired objectivity," for example, the contractor's other financial interests could have an affect on its performance. *Greenleaf* involves the award of indefinite-delivery, indefinite-quantity contracts for Management and Marketing (M&M) services where the solicitation provided "that the contractor shall not engage in or permit any conflict of interest."³⁸ The solicitation specifically prohibited the M&M contractor from serving as a contractor or subcontractor that performs contract monitoring, oversight or other services related to tasks in the solicitation. The Department of Housing and Urban Development (HUD) awarded the contract for the Ohio/Michigan region to the Chapman Law Firm Company (CPL).

Greenleaf Construction Company protested the award, alleging that Mr. Chapman, the owner of CPL, also owned Lake-

³⁶ *Id.*

³⁷ *Greenleaf Construction Co., Inc.*, B-293105, Jan. 17, 2006, 2006 CPD.

³⁸ *Id.*

side Title, which was HUD's closing agent in the state of Ohio. As part of its proposal, CLF agreed to transfer "full ownership" of Lakeside to another escrow and title attorney. The contracting officer received a copy of a notarized stock transfer agreement and an affidavit indicating Mr. Chapman "no longer [had] any ownership interest or control over Lakeside Title."³⁹ During subsequent litigation, the contracting officer learned the sale of Lakeside Title entitled Mr. Chapman to 50% of the profits from Lakeside through December 2005. As a condition for an affirmative determination of responsibility, the contracting officer required the sale of Lakeside be amended to ensure that Mr. Chapman would receive no future profits. Nevertheless, Greenleaf claimed that the fact the purchaser of Lakeside was required to make significant weekly payments to Mr. Chapman continued to pose an unacceptable OCI.

In sustaining the protest, GAO held that CLF's judgment and objectivity in performing the contract requirements could be impaired if its performance could potentially affect the ability of the owners of the closing agent contractor to make the payments owed to CLF's owner. Although GAO acknowledged that Mr. Chapman would not be obtaining future profits from Lakeside, GAO found that the contracting officer failed to consider the OCI implications of the amended purchase agreement.

OCIs regarding "impaired objectivity" probably are the most pervasive type of conflicts. They are easily created, difficult to identify, and not easily mitigated. Both *Alion* and *Greenleaf* provide good guidance in identifying conflicts due to "impaired objectivity," with *Alion* doing an excellent job of outlining subjective judgment by the contractor and with *Greenleaf* doing an excellent job of discussing the conflicting interests of a contractor.

Alion and *Greenleaf*, however, do not indicate that GAO will sustain every allegation involving an OCI. For example, having a natural competitive advantage is different from an OCI as shown in *Snell Enterprises, Inc.*⁴⁰ This case involves the consolidation of services that previously had been performed by the

³⁹ *Id.*

⁴⁰ *Snell Enterprises, Inc.* B-290113, B-290113.2, June 10, 2002, 2002 CPD 115.

awardee, Impact Innovations Group, Inc. and the protester, Snell Enterprises. The protester asserted Impact had an impermissible conflict of interest because, "through its AFIS-HQ contract activities, Impact alone [has] access to complete technical and cost information regarding the information systems at AFIS-HQ."⁴¹

GAO dismissed these allegations and found that Impact enjoyed a natural competitive advantage, stating:

The mere existence of a prior or current contractual relationship between a contracting agency and a firm does not create an unfair competitive advantage, and an agency is not required to compensate for every competitive advantage gleaned by a potential offeror's prior performance of a particular requirement. For example, an incumbent contractor's acquired technical expertise and firsthand knowledge of the costs related to a requirement's complexity are not generally considered to constitute unfair advantages the procuring agency must eliminate.⁴²

*Government Scrap Sales*⁴³ provides another basis GAO has used to find no OCI exists. Government Scrap Sales protested an award because a subsidiary company of the awardee performed a related surplus contract. This subsidiary company had a contract to sell useable surplus commercial property and the disputed award involved a contract for scrap property. Although the selected contractor would receive 20% of the distribution of sales from both contracts, the contractor had the ability to earn an incentive fee up to an additional 10 % of distributions under the scrap contract. The protester stated this arrangement constituted an impermissible OCI since the awardee could manipulate the disposition of property to its economic advantage. GAO rejected this argument because the allegation involved the potential that the awardee would engage in bad faith in performance of the two contracts. GAO stated "there

⁴¹ *Id.*

⁴² *Id.* (citing Optimum Tech., B-266339.2, Apr. 16, 1996, 96-1 CPD 188; Versar, Inc. B-254464.3, Feb. 16, 1994, 94-1 CPD 230).

⁴³ Government Scrap Sales, B-295585, March 11, 2005, 2005 CPD 60.

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.”⁴⁴

Finally, a third basis to dismiss allegations of conflicts is that the OCI is remote or insignificant. Section 9.504 of the FAR requires the contracting officer to “[a]void, neutralize, or mitigate *significant* potential conflicts before contract award.”⁴⁵ *American Management Systems, Inc.*⁴⁶ and *RMG Systems*⁴⁷ represent cases where GAO dismissed the allegation of OCI because the conflict was too remote or insignificant. Contracting officers probably should not rely solely on a determination that the OCI is remote since there can be disagreements as to whether a conflict is truly “insignificant” or “remote.” In these situations, contracting officers are advised to identify, evaluate, and document all possible conflicts before determining that the conflict is insignificant and does not need to be resolved.

Moreover, contracting officers should be mindful of *SAIC I*⁴⁸ where the GAO sustained the protest even though the conflict appeared to be insignificant, i.e., the disputed contract was for computer support and system engineering services while the conflict involved the enforcement of pollution standards. GAO found an OCI due to Lockheed Martin’s significant involvement in activities that are subject to environmental regulations, including the ownership and operation of various facilities dealing with hazardous materials. In the *SAIC I* decision, GAO seemingly rejected the concept that the conflict may have been remote and, instead, focused upon the fact that the EPA failed to identify and evaluate the OCI situation as required by section 9.504 of the FAR.

E. Black Letter Rules on OCI from Case Law

Case law contains two general principles regarding OCIs not reflected in the FAR. The first principle goes to identifying an OCI and provides that, for purposes of OCI based upon “im-

⁴⁴ *Id.*

⁴⁵ 48 C.F.R. § 9.504(a)(2) (emphasis added).

⁴⁶ *American Management Systems, Inc.*, B-285645, Sept. 8, 2000, 2000 CPD 163.

⁴⁷ *RMG Systems*, B-281006, Dec. 18, 1998, 98-2 CPD 153.

⁴⁸ *SAIC I*, *supra* note 9.

paired objectivity” or “biased ground rules,” an affiliate is treated as if it were the contractor or subcontractor performing the contract in question. There are many examples of this principle in case law, one of which is *Filtration Development Co, LLC v. The United States*.⁴⁹ In this case, the COFC stated that affiliates of a systems engineering contractor are “categorically precluded” from providing their own products in later stages of the program. The COFC stated that having a dual role in a program created an actual organizational conflict of interest affecting the organization’s ability to provide impartial advice. When confronting this OCI, the COFC recommended the agency obtain a waiver for the OCI in accordance with section 9.503 of the FAR due to the urgency of the requirement involving the war in Iraq. It is not clear whether the COFC might have found some way to mitigate the OCI without either a waiver or a restriction on future contracting if the agency had “dealt” with the conflict earlier in the procurement process.

The second principle, which is a corollary of first principle, is that firewalls, in and of themselves, will only resolve conflicts due to “unfair access to information.” GAO’s decision in *Aetna*⁵⁰ addresses the use of firewalls. The conflict in this case was due to the fact that one of the subcontractors of the awardee had an affiliate which was responsible for cost evaluation of the solicitation. The awardee recognized this was a conflict and proposed to mitigate it by preventing information from passing between the two affiliates and by precluding any financial incentive between the affiliates that could cause bias on the part of the affiliate contractor assisting the agency with the evaluation.

GAO rejected the concept that isolation of the two groups in terms of communications and personal remuneration would mitigate the conflict, stating that “this view reflects a misunderstanding of the nature of the conflict.”⁵¹ While a “Chinese Wall” arrangement may resolve an “unfair access to information” con-

⁴⁹ *Filtration Development Co, LLC v. The United States*, 60 Fed. Cl. 371, 2004 U.S. Claims LEXIS 102 (2004).

⁵⁰ *Aetna*, *supra* note 20.

⁵¹ *Id.*

flict of interest, it is virtually irrelevant to organizational conflicts of interest involving potentially "impaired objectivity."⁵²

IV. RESOLVING OCI: AVOID, NEUTRALIZE, MITIGATE, AND WAIVE

There are two basic steps required by subpart 9.5 of the FAR. The first step involves identifying a significant OIC and the second step involves resolving the conflict once one is identified. Subpart 9.5 of the FAR requires agencies to "avoid, neutralize, or mitigate" the conflict prior to award when a significant OCI is identified; however, subpart 9.5 fails to define what "avoid, neutralize, or mitigate" means or to explain the differences between these actions. Although the FAR does not state this, a prudent contracting officer probably should view these actions in descending order of preference: avoid, neutralize, mitigate, and waive.

The best resolution is to avoid the conflict situation, and limiting the scope of the contract may be one the easiest ways by which a contracting officer can avoid a conflict. Two ways of limiting a contract to avoid an OCI include: breaking the requirement into a number of contracts or letting Government personnel perform those requirements that create the conflict. Having a Federally Funded Research and Development Center (FFRDC) perform the conflicting work could also be a solution to avoiding certain OCI's since an FFRDC cannot compete against the private sector.

Although the FAR does not define what is meant by "neutralize," one can assume that this term refers to eliminating the effects of an organizational conflict of interest. The use of restrictions on future contracting is probably the best example of "neutralizing" an OCI. A restriction on future contracting does not eliminate the fact that a contractor which assists in preparing a statement of work is also capable of performing the statement of work; the restriction thwarts the effect of conflict since the restriction prevents participation in future contracts. Al-

⁵² See also, *The Leads Corporation*, B-292465, Sept. 26, 2003, 2003 CPD 197, where GAO stated that the firewalls would not resolve the conflict between two affiliates when an OCI involved "biased ground rules."

though the FAR discusses restrictions on future contracting as the way to resolve conflicts associated with performing systems engineering and preparing statements of work, this method of resolution is not easy to implement due to consolidations within various industries.

Consolidation means there are fewer contractors in a certain industry and the remaining contractors have more affiliates. Consolidation, therefore, makes it more difficult for companies to agree to a limitation on future contracting since the limitation also affects affiliates. Additionally, the Government can be reluctant to use limitations of future contracting since these limitations could preclude it from obtaining the expertise needed throughout the program, i.e., the expertise is concentrated and most companies do not want to be excluded from the larger portion of future work to be performed.

Mitigation is the least desirable option to resolve conflicts because, unlike the other methods described above, mitigation does not eliminate all the effects of the conflict. The creation of firewalls is a classic example of mitigation. A firewall can be constructed in a number of ways – from non-disclosure agreements to restructuring an organization to restricting the transfer of information between the organizational units. The creation of a firewall, however, does not address the conflict in the same manner as restrictions on future contracting. There is certainty that restrictions on future contracts will eliminate the conflict. The use of firewalls, on the other hand, is only as good as the compliance by the contractor and firewalls have been known to be porous. Moreover, firewalls do not address the aspect of potential bias which is why case law provides that firewalls are not sufficient mitigation for conflicts dealing with “impaired objectivity” or “biased ground rules.”

Finally, waiver is the fourth option available to a contracting officer to address OCI. Section 9.503 of the FAR permits the head of the agency to waive any general rule or procedure in subpart 9.5 of the FAR and states that the authority to waive subpart 9.5 cannot be delegated lower than the head of the contracting activity. Section 9.503 also provides that the waiver must be in writing, must set forth the extent of the conflict and must explain why applying the provisions of subpart 9.5 is not

in the best interests of the Government. Waivers should be obtained only after all other possible steps have been taken to resolve the conflict, a prerequisite not reflected in the FAR, but one that is necessary to explain why a waiver is in the best interests of the Government.

A waiver does not resolve the tension between the program goals and the OCI principles, but instead permits the program goals to override OCI principles when doing so is in the best interests of the Government. In most cases, waivers should be used in conjunction with a mitigation plan. The mitigation plan should address the conflict to the extent practicable and then a waiver should be granted for the residual conflicts not addressed by the mitigation plan. Waiving only residual conflicts will help an agency justify why the waiver is in the best interests of the Government to comply with subpart 9.5 of the FAR.

No case law exists on waiver; however, both the GAO and COFC have stated that the outcome of their decisions would have been different if the agency had waived the OCI in question. Consequently, no one knows what limitations could be placed upon the waiver authority; however, it is safe to assume all waivers must be knowingly made, i.e., the deciding official must know and understand the underlying facts. The requirement of "knowingly" granting a waiver is consistent with the requirement that a waiver set forth the extent of the conflict; something which probably would preclude the use of a blanket waiver where the extent and nature of future conflicts of interest are not identified at the time the waiver is granted.

V. WAYS TO MITIGATE CONFLICTS

Few, firm principles exist regarding how agencies are to resolve organizational conflicts of interest given all the variables. No two conflicts will be identical since facts surrounding each conflict control the seriousness of the OCI. Some conflicts are *de minimis* in nature while other conflicts are substantial. More importantly, program concerns can limit options. Avoiding a conflict is the cleanest way to handle the issue, but doing this could be contrary to the needs of the program. Additionally, limitations on future contracting, which is a suggested

method to resolve conflicts, often are not practical because the contractor with the needed expertise is unwilling to except this limitation and be banned from the larger part of the program. In fact, limitations of future contracting seem somewhat archaic in consolidated industries like the aerospace business.

Given these considerations, mitigation often is the only practical tool contracting officers have to resolve conflicts. The use of this tool, though, can be tricky. Mitigation does not eliminate potential conflicts and, instead, makes the conflict acceptable. GAO will sustain a protest when it does not believe the mitigation is reasonable, as demonstrated by *Alion*. The FAR does not explain what reasonable mitigation is; however, it does recognize certain conflicts cannot be avoided or mitigated.

The following analysis distills selected decisions from GAO and the COFC, emphasizing the effectiveness of various mitigation techniques. This analysis does not include a discussion on firewalls since case law clearly provides that this technique only effectively resolves conflicts based on unfair access to data.

A. *Use of Subcontracts versus Affiliates*

GAO addressed the use of subcontracts in *Epoch Engineering, Inc.*⁵³ a decision involving a contract to provide engineering and technical support services for submarine and surface ship acoustical trials where a subcontractor of the awardee was a shipbuilder and, therefore, might be required to evaluate its own products. The awardee, however, was made up of a team consisting of a prime contractor and two subcontractors and only one team member had the conflict. The proposed mitigation plan acknowledged the possibility that one of the subcontractors might have an OCI related to a particular individual delivery order in which case the proposal stated that the work would be performed by the prime contractor or the other subcontractor. In addition, the proposal stated that the agency had the ability to control the scope of the prime contractor's and subcontractors' work through proper contract administration. GAO agreed with the agency that the mitigation plan contained

⁵³ *Epoch Engineering, Inc.*, B-276634, July 7, 1997, 97-2 CPD 72.

sufficient safeguards to detect and mitigate conflicts if they occurred. Moreover, GAO concurred with the agency's assessment that the prime contractor had enough qualified personnel so that it would not be dependent upon the personnel of the conflicted subcontractor to perform a particular task.⁵⁴

GAO also distinguishes subcontractors from affiliates because, unlike affiliates, no financial relationship exists between a prime contractor and subcontractors. Describing the relationship between subcontractors, GAO said that, as a matter of law, it sees no basis to distinguish between one affiliate and another in conflict of interest situations involving the risk of competing loyalties. GAO states in *Aetna*:

While FAR subpart 9.5 does not explicitly address the role of affiliates in the various types of organizational conflicts of interest, 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. See *ICF Inc.*, B-241372, Feb. 6, 1991, 91-1 CPD 124.⁵⁵

The small size of the affiliates was one of the facts discussed in *Aetna*, so it is possible that GAO might view large corporations differently even though large corporations also share the same corporate officers and directors. GAO stated it did not have a *per se* proscription against awarding contracts to companies with a potential organizational conflict of interest if the contracting officer was able to develop a course of action to avoid or mitigate where possible.⁵⁶ However, GAO also indicated that

⁵⁴ The effect the mitigation plan had on the technical rating may explain the difference between *Epoch Engineering, Inc.* and *Alion*. In *Epoch* the use of subcontractors did not appear to affect the technical rating of the awardee since the prime contractor had enough qualified personnel. On the other hand, in *Alion* GAO agreed with the protester that the use of a subcontractor to perform conflicted portions of the SOW would lower the overall technical score of the awardee.

⁵⁵ *Aetna*, *supra* note 20.

⁵⁶ RMG Systems, represents an exception to the rule regarding affiliates. RMG Systems, *supra* note 47. This case involved the award of a contract for safety inspections of passenger motor carriers that had been approved by MTMC to do business with the Department of Defense (DoD). Although the awardee of the contract was affiliated with MTMC, its business activities with MTMC did not overlap even though there was common control. Moreover, MTMC pledged to do no more business with any carrier that was, or later may become, DoD approved. GAO rejected the protester's allegation that

the FAR recognizes that some organizational conflicts of interest cannot be mitigated.

Mitigation through subcontractors requires the use of indefinite delivery/indefinite quantity (ID/IQ) contracts since the use of ID/IQ contracts enables work to be discretely separated and facilitates proper contract administration to ensure that the work is not influenced by one of the "conflicted" members of the team.

While there is generally no basis to distinguish a firm from its affiliates, this rule does not appear to extend to business relationships with other companies, an issue raised in *American Management Systems, Inc.*⁵⁷ The alleged conflict in this case was due to the fact that the system integration contractor had significant business relationships with other vendors. According to the protester, these business relationships raised concerns about both "biased ground rules" and "impaired objectivity" because the integration contractor "has the potential to influence the agency's selection of a software package in favor of one of the three vendors with whom it has a business relationship." (The protester was in direct competition with the three other vendors.)

The agency reviewed these business relationships prior to selecting the integration contractor, concluded no financial relationship existed and determined these business relationships did not create a significant conflict of interest. All of the agreements expressly stated that the parties remain independent contractors and no partnership, joint venture or agency relationship was created by the agreements. GAO agreed with the agency's assessment, holding that the conflict was too remote from the present procurement to establish a significant organ-

the conflict between the affiliates was inherent and unremediable on the grounds that MTMC's rating was calculated objectively from publicly available information and the percentage of the overlap in the businesses was very small. Consequently, GAO held no financial interest existed indicating the awardee would be inclined to tailor its inspection to match the results of its affiliate.

⁵⁷ *American Management Systems, Inc.*, B-285645, Sept. 8, 2000, 2000 CPD 163.

izational conflict of interest that an agency must avoid, neutralize, or mitigate.⁵⁸

*Alion*⁵⁹ provides a cautionary note regarding the use of “firewalled” subcontractors, indicating that this technique will not always be a reasonable method of mitigation. GAO did not believe the use of “firewalled” subcontractors was acceptable mitigation in this case because of the interrelated nature of the SOW and because a large percentage of the SOW created conflicts of impaired objectivity.

B. Monitoring/Participation by the Government

The cases reveal that monitoring or participation by Government, in and of itself, generally is not adequate to address conflicts, something illustrated in *J&E Associates, Inc.*⁶⁰ *J&E Associates* involved a contract for educational and technical support services for an Army base. The contracting officer recognized that educational institutions in the local area, as well as other institutions currently offering courses at the base, could have “impaired objectivity” since these institutions naturally would recommend their curriculum over courses offered by other institutions. Nevertheless, the contracting officer did not restrict the competition to preclude these institutions from the competition because she felt that the institutions could offer objective advice and assistance to service-members and that any potential bias in assisting in a service-member’s selection of courses and programs could be mitigated by the Army’s direct oversight of the contractor.

First, GAO addressed the Army’s argument that the educational institutions would provide objective advice because the terms of the contract required the contractor to act in the best interests of the service-member and not in the best interests of the institution. GAO stated that subpart 9.5 of the FAR contemplates that a potential organizational conflict of interest

⁵⁸ GAO may have reached a different conclusion in *American Management Systems, Inc.*, if the integration contractor only had a significant relationship with one firm as opposed to three firms. *American Management Systems, Inc.*, *supra* note 57.

⁵⁹ *Alion*, *supra* note 24.

⁶⁰ *J&E Associates, Inc.*, B-278771, March 12, 1998, 98-1 CPD 77.

arises from a person's (including a contractor's) relationship to other entities, regardless of the person's good faith and adherence to contract requirements and the agency must determine how this conflict would be avoided, neutralized, or mitigated.

Second, GAO rejected the concept that oversight by the Army was a sufficient way to resolve the conflict, stating

[M]ere oversight of a contractor's activities would, at best, only identify specific instances of apparent conflict of interest as they arise. ... Such oversight would do nothing to avoid, mitigate, or neutralize such conflicts. Specifically, the contractor would not prohibit the contractor from advising a service-member to take a course with the contractor's institution. Nor does the agency state that it intends to object to such advice or enrollment, or otherwise state any guidelines identifying under what conditions such objections might be made.⁶¹

Although GAO found that mitigation plan was unreasonable, GAO agreed with the Army that the OCI could be avoided or otherwise mitigated without eliminating offerors with potential conflicts from the competition. GAO suggested that one possible restraint could be a contract clause that precluded an educational institution awarded the contract from advising service-members to enroll in its course or from reviewing its billing statements. GAO also stated that another possibility involved a waiver of organizational conflicts of interest in accordance with section 9.503 of the FAR.

*GIC Agricultural Group*⁶² involves a situation where a contractor was selected for a competitive procurement even though the statement of work was based upon a project paper the contractor prepared under a separate contract. The agency argued that it did not have to disqualify the awardee from the competitive solicitation because the agency had taken certain actions to ensure the awardee had not gained a competitive advantage over other offerors as a result of having written the project paper. According to the agency, it had significantly modified the recommended approach contained in the project paper when

⁶¹ *Id.*

⁶² *GIC Agricultural Group*, B-249065, Oct. 21, 1992, 92-2 CPD 263.

preparing the statement of work and the statement of work in the solicitation was more specific than the project paper.

GAO rejected these arguments, finding that the agency's review of the statement of work imposed few changes and did not refute the analysis of background work provided in the project paper and, consequently, the actions of the agency did not remove the situation from the admonitions in the FAR against OCI. The FAR restriction on precluding contractors from providing services or systems in cases where a contractor has assisted the Government in defining its requirement was intended to: 1) avoid the possibility of bias in situations where a contractor would be in a position to favor its own capabilities and 2) to avoid the possibility that the contractor, by virtue of its special knowledge of the agency's future requirements, would have an unfair advantage in the competition for those requirements. GAO recommended reopening the competition and, at a minimum, providing all of the offerors with a copy of the project paper the awardee had drafted.

*Informatics Corporation v. United States*⁶³ illustrates how monitoring by the Government can be one element in an effective mitigation plan. *Informatics* involved a solicitation for two systems engineering and technical assistance (SETA) contractors to support an Air Force Center for Environmental Excellence. One proposal contained conflicts because one of the proposed subcontractors had subcontracts to do environmental remedial work at Otis Air Force Base and the prime contractor had a subcontract to perform "community relations" work with respect to base-closure programs. This proposal recognized the conflict and contained a mitigation plan. The primary elements of the proposed mitigation included commitments that the prime (not the conflicted subcontractor) would perform any work involving Otis Air Force Base and that the prime would assign work to other team members in the event its "community relations" work required SETA involvement.

The offeror protested to the COFC after it learned that the contracting officer had excluded its proposal from the competi-

⁶³ *Informatics Corporation, supra* note 11.

tion because of a perceived OCI. Section 9.504(e) of the FAR allows contracting officers to exclude a qualified offeror from a competition when OCI cannot be avoided or mitigated. The contracting officer excluded the offeror based on the solicitation's requirement that the SETA contractor be eligible/qualified to perform all orders issued under the resulting contract. Although the COFC agreed that the offeror's proposal contained OCIs, it also believed that these OCIs could be mitigated by the Air Force through assignments of work to the second SETA contractor and by ensuring the conflicted subcontractor did not perform any SETA work involving Otis Air Force Base. In granting relief for the plaintiff, the COFC stated that it had to weigh the cost savings offered by the plaintiff's proposal against the Air Force's potential obligation to monitor these few activities and to approve substitutions.

C. Voluntary Release of Data

The alleged conflict in *SRI International*⁶⁴ involved a concern that three individuals on the awardee's proposed team had served on a ten-member technical advisory panel which recommended the evaluation methodology the agency adopted for the procurement. The agency stated that the awardee did not gain any unfair competitive advantage because the advisory panel's final report, appendices to the report and meeting minutes were made available to all firms. In addition, the agency explained the advisory panel merely acted as an industry representative and set out broad evaluation factors rather than writing the actual statement of work. In finding for the agency, GAO stated "we note that a contractor need not be excluded where more than one contractor is involved in preparing the work statement." This case illustrates how making data available to all offerors can be an element to mitigate a conflict and how the exception in section 9.505-2(b)(1)(iii), which involves having more than one contractor assist with a statement of work, operates.

⁶⁴ *SRI International*, B-224424, Oct. 7, 1986, 86-2 CPD 404.

The technique of disseminating data begins to address the issue of having an unfair competitive advantage. Disseminating data to the public does not entirely negate the issue of an unfair competitive advantage since the "conflicted" contractor will have obtained the data earlier than the other contractors. More importantly, this technique does not address the issue of bias which is why GAO also relies on the fact that more than one contractor was involved on the technical advisory panel in *SRI International*.

*Snell Enterprises, Inc.*⁶⁵ involves an allegation that the awardee should have been excluded from the competition because it gained access to certain proprietary data through its performance of another contract. GAO dismissed this claim finding that protester had provided the data voluntarily and without restrictions on its use.

D. Mitigation Plans Obtained During a Competition

Although not pertinent to the immediate transition issues NASA faces, conflicts often arise during a competition. During competitions, an agency should expect that each offeror will have different conflicts and will have different methods of resolving those conflicts. Obtaining mitigation plans during the competition is often the only method an agency can use to resolve conflicts. It appears there are three ways agencies can do this: 1) evaluate on a "go/no go" basis, 2) evaluate as part of selection criteria, or 3) consider, but not evaluate as part of selection.

The use of a "go/no go" factor ensures each offeror will mitigate all conflicts in its proposal and is a technique that works best when the agency knows there will be adequate competition and believes that it is possible to reasonably mitigate all OCIs.⁶⁶ Although GAO suggested otherwise, the "go/no go" criterion may

⁶⁵ *Snell Enterprises, Inc.*, *supra* note 40.

⁶⁶ *The Leads Corporation* is an example of OCI mitigation plans being evaluated on the basis of go/no go in which GAO stated "there was no basis for taking OCI into account for purposes of evaluation because the RFP clearly provided that the vendors' OCI mitigation plans were to be evaluated on the basis of pass/fail." *The Leads Corporation*, *supra* note 52.