



**DEPARTMENT OF DEFENSE**

**GENERAL SERVICES ADMINISTRATION**

**NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

48 CFR parts 1, 2, 3, 7, 8, 9, 10, 11, 12, 13, 15, 16, 17,  
18, 37, 42, 50, and 52

[FAR Case 2023-006, Docket No. FAR-2023-0006, Sequence No.  
1]

**RIN 9000-A054**

**Federal Acquisition Regulation: Preventing Organizational  
Conflicts of Interest in Federal Acquisition**

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

**ACTION:** Proposed rule.

**SUMMARY:** DoD, GSA, and NASA are proposing to amend the  
Federal Acquisition Regulation (FAR) to implement the  
Preventing Organizational Conflicts of Interest in Federal  
Acquisition Act. The statute requires the FAR to provide  
and update definitions, guidance, and examples related to  
organizational conflicts of interest, including the  
creation of solicitation provisions and contract clauses to  
avoid or mitigate organizational conflicts of interest.  
The statute also requires the FAR to permit contracting  
officers to consider professional standards and procedures

to prevent organizational conflicts of interest to which an offeror or contractor is subject.

**DATES:** Interested parties should submit written comments to the Regulatory Secretariat Division at the address shown below on or before **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]** to be considered in the formation of the final rule.

**ADDRESSES:** Submit comments in response to FAR Case 2023-006 to the Federal eRulemaking portal at <https://www.regulations.gov> by searching for "FAR Case 2023-006". Select the link "Comment Now" that corresponds with "FAR Case 2023-006". Follow the instructions provided on the "Comment Now" screen. Please include your name, company name (if any), and "FAR Case 2023-006" on your attached document. If your comment cannot be submitted using <https://www.regulations.gov>, call or email the points of contact in the FOR FURTHER INFORMATION CONTACT section of this document for alternate instructions.

Instructions: Please submit comments only and cite "FAR Case 2023-006" in all correspondence related to this case. Comments received generally will be posted without change to <https://www.regulations.gov>, including any personal and/or business confidential information provided. Public comments may be submitted as an individual, as an organization, or anonymously (see frequently asked questions at <https://www.regulations.gov/faq>). To confirm

receipt of your comment(s), please check <https://www.regulations.gov>, approximately two to three days after submission to verify posting.

**FOR FURTHER INFORMATION CONTACT:** For clarification of content, contact Ms. Mahruba Uddowla, Procurement Analyst, at 703-605-2868 or by email at [Mahruba.Uddowla@gsa.gov](mailto:Mahruba.Uddowla@gsa.gov).

For information pertaining to status, publication schedules, or alternate instructions for submitting comments if <https://www.regulations.gov> cannot be used, contact the Regulatory Secretariat at 202-501-4755 or [GSAREgSec@gsa.gov](mailto:GSAREgSec@gsa.gov). Please cite "FAR Case 2023-006."

**SUPPLEMENTARY INFORMATION:**

**I. Background**

DoD, GSA, and NASA are proposing to revise the FAR to implement the Preventing Organizational Conflicts of Interest in Federal Acquisition Act (Pub. L. 117-324, 41 U.S.C. 2303 note), enacted December 27, 2022. The statute directs the Federal Acquisition Regulatory Council to revise the FAR to provide and update—

- Definitions, to include those related to specific types of organizational conflicts of interest (OCIs), including unequal access to information, impaired objectivity, and biased ground rules;
- Guidance and illustrative examples related to relationships of contractors with public,

private, domestic, and foreign entities that may result in OCIs;

- Illustrative examples of situations related to the potential for OCIs.

The statute also requires that the FAR be revised to provide agencies with tailorable solicitation provisions and contract clauses to avoid or mitigate organizational conflicts. The statute provides agencies the ability to take agency-specific needs into consideration when addressing risk that may be unique to the agency.

The statute instructs the Federal Acquisition Regulatory Council to require executive agencies to establish or update agency conflict of interest procedures to implement these revisions to the FAR. Agencies will be instructed to develop or update procedures to reflect the requirements of this new regulatory coverage when it is finalized.

DoD, GSA, and NASA published a proposed rule under FAR Case 2011-001, Organizational Conflicts of Interest, on April 26, 2011 (76 FR 23236) intended to amend the FAR coverage of OCIs and provide additional coverage regarding unequal access to nonpublic information. However, given the amount of time that had passed since publication of the proposed rule, and potential changed circumstances, a decision was made not to proceed with finalization of that

rule. As a result, the proposed rule was withdrawn and the case was closed on March 19, 2021 (86 FR 14863).

## **II. Discussion and Analysis**

This rule proposes to create a new FAR subpart 3.12, Organizational Conflicts of Interest, to reflect the direction of the statute. A summary of the proposed changes follows:

### **A. Placement of OCI coverage**

This rule proposes to move OCI coverage from FAR subpart 9.5 to a new subpart in FAR part 3. Part 9 addresses contractor qualifications. While the ability to provide impartial advice and assistance is an important qualification of a Government contractor, the larger issues that underlie efforts to identify and address OCI are more directly associated with some of the business practice topics discussed in FAR part 3. Part 3 is already the home of coverage on personal conflicts of interest. As a result, FAR subpart 9.5 is proposed to be marked "reserved" and the coverage of OCIs in 9.000, Scope of part, is removed.

To reflect the broader scope of part 3, this rule proposes to change the title from "Improper Business Practices and Personal Conflicts of Interest" to "Business Ethics and Conflicts of Interest." As a result, the proposed rule also revises section 3.000, Scope of part, to reflect the new scope.

## B. Definitions

The proposed rule updates definitions and creates several new definitions. The definition of OCI in FAR part 2 is revised to address "unequal access to information, impaired objectivity, and biased ground rules," in accordance with the statute. For clarity, a definition of "entity" is created for the context of OCIs. The definition is refined to clearly reflect the two types of situations that result in OCI concerns: impaired objectivity and unfair competitive advantage.

A new definition is added for impaired objectivity, which is a type of OCI in which an entity or its affiliate has or may have financial or other interests or an incentive to provide other than impartial advice to the Government, or the entity or its affiliate's objectivity in performing the contract work is or might be otherwise impaired. In the context of these definitions related to OCIs, "entity" can mean an individual, a corporation or other organization.

Unfair competitive advantage in turn can result from biased ground rules or unequal access to information. The proposed rule adds a definition for "biased ground rules" that describes a situation in which an entity or its affiliate, as part of its performance of a Government contract, has or may have materially influenced the development of the requirement, evaluation criteria, or

other source selection procedures for another Government contract. The primary concern is that the entity could skew the future competition, whether intentionally or not, in favor of itself.

A new definition for "unequal access to information" describes situations in which an entity or its affiliate has or may have an unfair competitive advantage because they have access to Government-provided information that all potential offerors do not have. That information may assist the entity in obtaining the contract.

The proposed rule also adds a definition of "firewall" to new section 3.1201 since the term reflects an important mitigation strategy for addressing OCI resulting from unequal access to information in the new subpart.

#### C. General policy

The new OCI coverage at FAR subpart 3.12 provides updated statutory citations and a more concise depiction of the applicability of the requirements. While the requirements are applicable to most procurements, acquisitions below the simplified acquisition threshold (SAT) and those for commercial products are exempt, as well as subcontracts for commercial products or commercial services.

Within the new policy section at FAR 3.1203, the proposed rule explains the two types of harm that OCIs may cause to the procurement system: harm from impaired

objectivity and harm to the integrity of the competitive acquisition process. The discussion provides the actions that the Government and agency contracting officers should take to address or prevent harm.

The rule describes the role a contractor's advantage can play in OCIs. Proposed language clarifies that the mere fact that a contractor has a competitive advantage in an acquisition on the basis of having previously performed work for the Government (i.e., "natural advantage") does not mean that the contractor has an OCI or that the contractor's advantage is unfair. Guidance is provided to contracting officers on the hard facts needed (vs. innuendo and supposition) to determine the presence of OCIs in a procurement.

The new section directs contracting officers to address situations where one or more offerors hold an unfair competitive advantage due to unequal access to information. The rule directs contracting officers to explore all available methods to address an OCI based upon unequal access to information before selecting disqualification of an offeror to alleviate unfair competitive advantage. Language in this section contains general principles for determining when access to information is "unequal," constitutes an OCI, and needs to be addressed.

#### D. Examples

As required by the statute, the proposed rule provides "illustrative examples" of potential OCIs that could result from "relationships of contractors with public, private, domestic, and foreign entities" at section 3.1204. The rule also provides examples of potential OCIs that result from a "Federal regulatory agency" awarding a contract for consulting services to a contractor in which "employees of the contractor performing work under such contract are permitted by the contractor to simultaneously perform work under a contract for a private sector client under the regulatory purview of such agency."

For clarity, the examples are broken out by the two sources of OCIs: impaired objectivity and unfair competitive advantage. The examples of impaired objectivity include situations in which a firm's relationships with other entities can create undue influence or otherwise impair their performance on a Government contract. The examples of unfair competitive advantage are broken out by when the advantage is created from biased ground rules and from unequal access to information.

#### E. Methods of addressing OCIs

The proposed rule provides guidance at 3.1205 on the various methods for addressing OCIs. Agencies are advised that OCIs and their associated risks may be addressed by means of avoidance; limitations on future contracting;

mitigation; and/or the Government's assessment that the risk inherent in the conflict is acceptable.

The rule explains the methods of avoiding OCIs at 3.1205-1 and advises contracting officers to work with the program office or requiring activity early in the acquisition process to successfully implement an avoidance strategy. Similar to current FAR 9.505-2 language, the rule lists techniques for avoidance such as developing a statement of work that does not require contractors to utilize subjective judgment and, when required, soliciting advice from more than one contractor rather than relying on the advice of a single contractor. The coverage recognizes that the available tools and appropriate use of avoidance by disqualification of an offeror depend on the circumstances involved.

The rule also provides guidance at 3.1205-2 for addressing OCIs by using a limitation on future contracting. Such limitations apply when the contractor's work on a current contract could be impaired by virtue of its expectation of future work or could jeopardize the integrity of the competitive process. As a result, a contractor and its affiliates may be precluded from entering into certain future contracts, either as a prime contractor or subcontractor. Similar to current FAR 9.507-2 language, the rule directs contracting officers to place a reasonable duration for the limitation that is sufficient

to neutralize the OCI. Contracting officers are advised to provide a specific end date for the limitation or indicate that the limitation would end upon occurrence of an identifiable event.

The rule provides guidance at 3.1205-3 on techniques that can reduce, or mitigate, OCI risk. These techniques may require Government action, contractor action, or a combination of both. The new text requires that, when mitigation is used to address OCIs, the offeror-submitted and Government-approved mitigation plan be incorporated into the contract. The mitigation plan must reflect all actions the offeror has agreed to take to mitigate OCIs. The proposed rule describes several mitigation techniques and explains when the techniques should be used.

The proposed rule provides direction at 3.1205-4 for instances in which the Government determines that the risk of harm from impaired objectivity is an acceptable performance risk. In making such a determination, the contracting officer will assess whether some or all of the performance risk is acceptable because the risk is outweighed by the expected benefit of having the offeror perform the contract, and whether the performance risk is manageable. The rule provides agencies the flexibility to set approval levels for such determinations above the contracting officer in agency procedures. When making a determination that the risk is acceptable, contracting

officers should use a combination of methods to address OCIs, particularly mitigation.

The proposed rule adds new FAR section 3.1206 to provide guidance on waivers, much of which is similar to the coverage currently in FAR 9.503. Agencies have the authority to pursue a waiver from a preexisting limitation on future contracting or from the requirements to address OCIs in a particular acquisition when certain circumstances exist. The new text provides the minimum requirements for each waiver and specifies that the approval authority is the agency head, without delegation below the head of the contracting activity.

#### F. Contracting officer responsibilities

The proposed rule consolidates the discussion of contracting officer responsibilities to identify, analyze, and address OCIs at FAR 3.1207. The new text provides more detailed guidance than the current coverage at FAR 9.504.

FAR 3.1207-2 requires contracting officers to identify whether an acquisition has the potential to result in an OCI during the presolicitation phase of the acquisition process to decide whether to include an appropriate provision in the solicitation.

New text at section 3.1207-3 provides guidance on analyzing information from the offeror and other sources to determine if an OCI is present during the evaluation phase.

New text at section 3.1207-4 describes the contracting officer's responsibilities in implementing the selected method or methods to reduce or eliminate the risks associated with a particular OCI. Part of addressing, for example, could include negotiating an acceptable mitigation plan. The responsibility to "address" is similar to the requirement to "resolve" in current FAR subpart 9.5 prior to award of a contract or issuance of an order under a contract. The new term reflects the range of flexibilities that are allowed under the new, risk-based approach to OCIs. While existing case law requires the contracting officer to determine that a conflict has been adequately mitigated, the proposed rule allows the contracting officer to accept a risk when the conflict results from impaired objectivity and the risk to performance is low (see proposed FAR 3.1205-4).

New text at FAR 3.1207-5 is similar to current direction at FAR 9.504(e), which requires contracting officers to award to the apparent successful offeror after all OCIs have been addressed or waived. Contracting officers are required to notify the offeror, provide the reason for withholding award, and allow the offeror a reasonable opportunity to respond prior to withholding award due to OCIs.

FAR 3.1207-6 requires contracting officers to consider OCI at the time of award and again when issuing an order.

For interagency acquisitions where the ordering (customer) agency places an order directly under another agency's contract (a "direct acquisition"), the ordering agency is responsible for addressing OCIs on that order. For interagency acquisitions where the servicing agency performs acquisition activities on the requesting agency's behalf (an "assisted acquisition"), the interagency agreement between the servicing and requesting agency to establish the terms and conditions of the assisted acquisition would need to identify which party is responsible for carrying out these responsibilities.

*G. New provisions and clauses*

The proposed rule adds 2 new solicitation provisions and 3 new contract clauses related to OCIs in FAR part 52. Existing FAR coverage anticipates appropriate handling of OCI issues through solicitation provisions and contract clauses, but does not provide a standard format (see FAR 9.507). The statute requires that the FAR provide contracting officers with standard language that can be used or tailored as appropriate. The proposed rule combines the requirements at FAR 9.506 and 9.507 with the statutory direction that the clauses and provisions "require contractors to disclose information relevant to potential organizational conflicts of interest and limit future contracting," in the development of one proposed provision and all the clauses on OCI.

The proposed rule adds a new provision at FAR 52.203-XX, Potential Organizational Conflict of Interest—Disclosure and Representation, to provide notice to offerors that the nature of the work described in the solicitation is such that OCIs may result from contract performance. When using this provision, contracting officers may identify contractors that are disqualified from participation and types of client or industry relationships that may present OCIs for the work to be performed under a contract resulting from that solicitation. This provision requires an offeror, as part of its proposal, to—

(1) Disclose all relevant information regarding any OCI (including active limitations on future contracting and specific clients or industry relationships that may create OCI if identified by the contracting officer);

(2) Disclose any professional standards to which it is subject, or any procedures it has in place, to prevent OCIs;

(3) Represent, to the best of its knowledge and belief, that it has disclosed all relevant information regarding any OCI;

(4) Explain the actions it intends to use to address any OCI (e.g., submit a mitigation plan if it believes an OCI may exist or agree to a limitation on future contracting); and

(5) Update their disclosure(s) for new information not previously disclosed or if there is a change to any relevant facts relating to a previously disclosed OCI.

The proposed rule adds a new clause at FAR 52.203-DD, Postaward Disclosure of Organizational Conflict of Interest, which requires the contractor to make a prompt and full disclosure of any new or newly discovered OCI. The clause is intended to address scenarios in which events occur during the performance of a contract that result in a new OCI, or an OCI is discovered after award. The contractor is informed that in certain circumstances, the newly reported OCI may result in termination of the contract. The clause is required to flow down to subcontracts exceeding the SAT where the work includes or may include tasks that may result in an OCI, except subcontracts for commercial products or commercial services.

The proposed rule adds a new clause at FAR 52.203-MM, Mitigation of Organizational Conflicts of Interest, for contracts that may involve an OCI that can be addressed by an acceptable offeror-submitted mitigation plan prior to contract award. The clause incorporates the mitigation plan in the contract; addresses changes to the mitigation plan; and addresses noncompliance with the clause or with the mitigation plan. The clause is required to flow down to subcontracts exceeding the SAT where the work is

addressed in the mitigation plan, except subcontracts for commercial products or commercial services.

The proposed rule adds a new clause at FAR 52.203-LL, Limitation on Future Contracting, for use when the contracting officer decides to address a potential conflict of interest through a limitation on future contracting. The contracting officer must fill in the nature of the limitation on future contractor activities and the length of any such limitation. The clause provides explicit terms with which the contractor would comply regarding future competitions that would create an OCI. The clause is required to flow down to subcontracts exceeding the SAT for which the work includes tasks that are encompassed by the description of work the contracting officer identified as subject to a limitation, except subcontracts for commercial products or commercial services.

The proposed rule adds a new provision at FAR 52.203-AA, Unequal Access to Information-Representation, which requires the offeror to identify, prior to submission of its offer, whether it or any of its affiliates had unequal access to any information that could provide an unfair competitive advantage. If so, the offeror is required to advise the contracting officer of any actions that the offeror proposes to take to resolve the OCI. The provision also requires offerors to represent, by submission of an offer, that they effectively implemented any agreed-to

mitigation measures and that any firewall that was used to mitigate the OCI has not been breached. The provision requires offerors to check a box if any planned firewall was not implemented or was breached. In the event an offeror checks that box, the provision requires the offeror to provide additional explanatory information.

New prescriptions for the provisions and clauses are added at FAR 3.1208. FAR provision 52.203-XX is prescribed for use in solicitations exceeding the SAT, other than solicitations for commercial products, when the contracting officer identifies the work may have the potential to result in an OCI.

FAR clause 52.203-DD is prescribed for use when provision 52.203-XX is included. Contracting officers are instructed to fill in paragraph (b)(1)(iii) of the clause if they identified specific contractor client and industry relationships that may present a conflict of interest.

FAR clause 52.203-MM is prescribed for use in solicitations exceeding the SAT, other than solicitations for commercial products, when the resulting contract may involve an OCI that can be addressed by an acceptable offeror-submitted mitigation plan. Contracting officers are instructed to only include the clause in the resulting contract if the offeror submits an organizational conflict of interest mitigation plan that will be incorporated into the contract.

FAR clause 52.203-LL is prescribed for use in solicitations exceeding the SAT, other than solicitations for commercial products, when the contracting officer expects that the method of addressing the OCI will involve a limitation on future contracting. The clause is to be included in the resulting contract only if a limitation on future contracting is to be placed on the contractor. In the event the clause is to be included in the contract, prior to award the contracting officer must fill in the clause with the nature and duration of the limitation on future contracting or contractor activities, based on communications with the apparent successful offeror. Contracting officers are instructed to establish a duration sufficient to neutralize the projected organizational conflict of interest, but no longer than necessary.

FAR provision 52.203-AA is prescribed for use in solicitations exceeding the SAT, other than solicitations for commercial products.

#### *H. Conforming and other minor edits*

FAR part 1 is proposed to be amended at 1.106 to reflect the OMB control number associated with the new FAR clauses and provisions that contain an information collection, requiring approval under the Paperwork Reduction Act.

Conforming edits are made to part 2, subpart 3.6, parts 11, 15, 17, 18, 37, 42, and 50 to reflect the

movement of OCI coverage from FAR subpart 9.5 to new subpart 3.12. This includes moving the definition of "contractor team arrangement" out of FAR 9.6 to part 2, since the term will be used in the OCI coverage in part 3, in addition to part 9.

Language flagging applicability of OCI procedures to task orders is added to FAR 8.405, Ordering procedures for Federal Supply Schedules, and FAR 16.505, Ordering.

Revisions to part 12 are proposed to reflect the Federal Acquisition Regulatory Council's determination that it would be in the best interest of the Federal Government to not exempt contracts for the acquisition of commercial services from the statute. Revisions to part 13 are proposed to reflect that the statute does not apply to all acquisitions at or below the SAT in accordance with 41 U.S.C. 1905. See section III of the preamble below for further details.

Language is added to FAR 15.306, Exchanges with offerors after receipt of proposals, to clarify that exchanges about OCIs are not necessarily considered discussions. Exchanges on an offeror's OCI mitigation plan are similar to responsibility determinations when OCI is not an evaluation factor. However, the language requires discussions if the other parts of the technical proposal and/or cost proposal are changed due to the exchanges. The language creates clear direction for both the Government

and offerors regarding the extent to which an OCI mitigation plan may be changed without triggering the requirement to conduct discussions.

**III. Applicability to Contracts at or Below the Simplified Acquisition Threshold (SAT) and for Commercial Products (Including Commercially Available Off-the-Shelf (COTS) Items) or for Commercial Services**

This rule proposes to add new provisions and clauses at—

- FAR 52.203-XX, Potential Organizational Conflict of Interest— Disclosure and Representation;
  - FAR 52.203-DD, Postaward Disclosure of Organizational Conflict of Interest;
  - FAR 52.203-MM, Mitigation of Organizational Conflicts of Interest;
  - FAR 52.203-LL, Limitation on Future Contracting;
- and
- FAR 52.203-AA, Unequal Access to Information— Representation.

These new provisions and clauses implement the requirements of the Preventing Organizational Conflicts of Interest in Federal Acquisition Act (Pub. L. 117-324). The provisions and clauses are prescribed at FAR 3.1208 for use in acquisitions exceeding the SAT, and for acquisitions of commercial services, where OCIs are anticipated. The

provisions and clauses are not prescribed for acquisitions of commercial products (including COTS).

*A. Applicability to Contracts at or Below the Simplified Acquisition Threshold*

41 U.S.C. 1905 governs the applicability of laws to acquisitions at or below the SAT. Section 1905 generally limits the applicability of new laws when agencies are making acquisitions at or below the SAT, but provides that such acquisitions will not be exempt from a provision of law under certain circumstances, including when the Federal Acquisition Regulatory Council makes a written determination and finding that it would not be in the best interest of the Federal Government to exempt contracts and subcontracts in amounts not greater than the SAT from the provision of law.

At this time, the Federal Acquisition Regulatory Council does not intend to make a determination to apply this statute to contracts or subcontracts at or below the SAT. However, the Federal Acquisition Regulatory Council may decide for the final rule to make a determination to apply this statute to certain contracts at or below the SAT, specifically those contracts that subsequently lead to future contracts in amounts greater than the SAT, where OCIs are anticipated. Public comments are welcome on whether it would be in the best interest of the Federal

Government to apply this statute to the subset of contracts at or below the SAT.

*B. Applicability to Contracts for the Acquisition of Commercial Products (Including Commercially Available Off-The-Shelf (COTS) Items) and Commercial Services.*

41 U.S.C. 1906 governs the applicability of laws to contracts for the acquisition of commercial products and commercial services, and is intended to limit the applicability of laws to contracts for the acquisition of commercial products and commercial services. Section 1906 provides that if the Federal Acquisition Regulatory Council makes a written determination that it is not in the best interest of the Federal Government to exempt commercial contracts, the provision of law will apply to contracts for the acquisition of commercial products and commercial services.

41 U.S.C. 1907 states that acquisitions of COTS items will be exempt from certain provisions of law unless the Administrator for Federal Procurement Policy makes a written determination and finds that it would not be in the best interest of the Federal Government to exempt contracts for the procurement of COTS items.

The Federal Acquisition Regulatory Council intends to make a determination to apply this statute to acquisitions for commercial services, but not commercial products. The Administrator for Federal Procurement Policy does not

intend to make a determination to apply this statute to acquisitions for COTS items.

*C. Determination*

As defined in this rule in accordance with the statute, OCI occurs when an entity has impaired objectivity or an unfair competitive advantage. Impaired objectivity could result in the Government acquiring products and services that are not the best value or for which the contractor's performance is biased against the Government's interest. Unfair competitive advantage, which is caused by either biased ground rules or unequal access to information, jeopardizes the Government's ability to solicit competitive proposals and removes integrity and fairness from the Federal acquisition process.

Application of Public Law 117-324 to acquisitions of commercial services is in the best interest of the Government. Many of the situations in which the Government is vulnerable to OCI occur when it acquires services from the commercial sector. One such situation explicitly called out in the statute occurs when a "regulatory" agency acquires consulting services-which is a commercial service-from a contractor, and the contractor has the same employees perform both under the agency's contract as well as on a contract with a private sector client that is regulated by said agency. Further, due to the preference of the Government to acquire commercial products and

commercial services (41 U.S.C. 3307), a significant portion of the Government's spend is on these categories; and between the two, commercial services are acquired more often than commercial products. According to data from the Federal Procurement Data System, 61% of the contracts over the SAT awarded in fiscal year 2023 using commercial acquisition procedures were for services.

Given the statute's explicit requirement to protect particular acquisitions of commercial services against OCIs and the prevalence of the Government's acquisition of commercial services, exempting acquisitions of commercial services from application of the statute would result in a failure to completely implement the statute and greatly limit the implementation of the remainder of the statute.

Based on these findings, the Federal Acquisition Regulatory Council intends to determine that it would not be in the best interest of the Federal Government to exempt contracts for the acquisition of commercial services from the applicability of Public Law 117-324.

Considering the nature of commercial products and the fact that protections will be applied against OCIs at the prime contract level for commercial services, it is not in the best interest of the Government to apply Public Law 117-324 to acquisitions of commercial products or to subcontracts for commercial services.

#### **IV. Expected Impact of the Rule**

## **A. Summary of the Rule**

This rule proposes to update the FAR coverage related to OCI. The revisions include moving the coverage from a FAR part that addresses contractor qualifications to a FAR part that addresses contractor business practices. While the ability to provide impartial advice and assistance is an important qualification of a Government contractor, the larger issues that underlie efforts to identify and address OCIs are more directly associated with business practice issues.

The rule also proposes to revise the definition of OCI. Currently, the FAR definition of OCI is at a high level and only mentions that it can cause impaired objectivity or unfair competitive advantage. This rule proposes to provide more details on how OCIs could cause an unfair competitive advantage (i.e., through biased ground rules or unequal access to information) and further defines key terms used in the OCI definition. It is expected that the new definition will clarify what constitutes an OCI for both the acquisition workforce and industry. The rule provides a definition of "firewall" to provide more context to the new coverage related to mitigation strategies for various types of OCIs.

The rule strengthens the OCI coverage by providing updated illustrative examples of what constitutes an OCI, offering an additional way of addressing OCIs, presenting a

consolidated discussion of contracting officer responsibilities that provides more detailed guidance, establishing standardized FAR OCI clauses and provisions, and adding guidance related to situations in which OCI causes an unfair competitive advantage due to someone having unequal access to information. The illustrative examples are updated to reflect current acquisition scenarios and are broken out by the two sources of OCIs: impaired objectivity and unfair competitive advantage. This new coverage is expected to provide clarity and assist contracting officers in identifying the existence of OCIs in their procurement and therefore, take steps to appropriately address OCIs.

The rule provides contracting officers with a new risk-based method of addressing OCIs, i.e., the ability to determine whether an OCI risk involving impaired objectivity is an acceptable risk in certain circumstances.

The new guidance is structured according to the steps a contracting officer must take during the different phases of an acquisition to identify and address OCIs. The more detailed structure in this proposed rule is expected to help contracting officers more effectively identify, analyze, and address OCI for their procurements.

Instead of directing contracting officers to create an OCI provision and a clause that will implement a limitation on future contracting, this rule proposes to establish a

FAR provision that includes OCI disclosure requirements and provides OCI notices to industry as well as a FAR clause that implements limitations on future contracting. In addition, the proposed rule establishes FAR clauses related to postaward OCI disclosures and mitigation plans as well as a FAR provision addressing representations related to an unfair competitive advantage due to unequal access to information. By creating FAR clauses and provisions, it is expected that there will be greater use of standardized OCI terms and conditions across Government procurements. The new guidance related to unequal access to information provides more complete OCI coverage.

## **B. Benefits**

Benefits of this rule, for both the Government and the public, include ensuring fair competition, maintaining integrity of the procurement process, avoiding unfair advantage, protecting Government interests, furthering legal compliance, maintaining public trust, enhancing efficient contract performance, standardizing terms and conditions, and protecting against contract termination.

By revising the OCI coverage, the Government expects to enable fair competition among contractors. Fair competition encourages industry to focus on innovation and quality to stand out among competitors. This emphasis on excellence can result in better project outcomes and

reduced costs associated with addressing issues that may arise from suboptimal performance.

Revising the OCI coverage is expected to help maintain the integrity of the procurement process by furthering the Government's requirement that Federal procurements are conducted impartially and without undue influence. The revised coverage is expected to help the Government identify and address conflicts prior to the receipt of offers. Furthermore, effective OCI management can prevent legal challenges and bid protests related to perceived improprieties in the procurement process. Litigation can be time-consuming and costly for contractors and the Government and avoiding them contributes to overall cost savings for both parties.

The proposed FAR OCI provisions and clauses are intended to prevent contractors from gaining an unfair advantage in current or future acquisitions. When used, potential offerors are notified of reasons for exclusion from receiving a contract award. Cost savings can result from:

- (1) Supporting fair competition, which - promotes an even playing field allowing all eligible contractors to compete;

- (2) Avoiding preferential treatment, which - prevents bid protests, saving legal fees, delays, and re-solicitation costs;

(3) Preventing biased decision making;

(4) Protecting proprietary information to prevent contractors with unfair advantages, such as access to sensitive information through conflicts of interest, from gaining insights into their competitors, which could allow those contractors' to affect pricing; and

(5) Preventing postaward issues - by addressing OCI before the award of a contract, which helps prevent postaward issues that could arise if conflicts are discovered later. Timely management of OCI reduces the risk of protests, disputes, or legal challenges that can disrupt the contract execution phase.

The revised OCI coverage may assist the Government in protecting its own interests by requiring its contractors to act in the best interest of the Government without compromising the effectiveness of the work. If the effectiveness of a contract is compromised, the contractor may be susceptible to price adjustments, delays, litigation, or contract termination. By ensuring the Government's interests are protected, the contractor's interests are protected as well.

The updated OCI coverage is expected to help the Government comply with relevant laws, regulations, and procurement policies designed to promote fairness, competition, and ethical conduct in the procurement process. Compliance prevents costly litigation for both

the Government and industry and allows the Government to avoid the possibility of unintended contract delays.

The revised OCI coverage may contribute to building and maintaining public trust in the Government's procurement processes. It demonstrates a commitment to ethical practices and fairness in awarding contracts. Public trust is closely tied to perceptions of ethical conduct. Contractors with a reputation for ethical conduct are more likely to be trusted by the Government. A positive reputation can lead to increased business opportunities and a higher likelihood of contract awards, reducing the costs associated with extensive marketing efforts to secure contracts.

The proposed OCI provision and clauses provide uniformity in direction across all Federal agencies, which helps to avoid ambiguity, making it easier for each agency to understand the terms and obligations. Standardization helps prospective contractors comply with applicable laws and regulations, reducing the likelihood of legal disputes and noncompliance issues. Standardization of OCI clauses and provisions may streamline the proposal development process. Industry may reuse or modify previous responses to the standardized provisions and clauses across multiple offers. This may result in reductions in the time and resources associated with customizing proposals for each solicitation.

The proposed FAR OCI provisions and clauses provide a clear, comprehensive, and unambiguous description of the rights, responsibilities, and obligations of all parties intended to avoid conditions for termination and resulting consequences. Contract terminations can be costly to contractors as well as the Government.

### **C. Costs**

The proposed revisions in this rule create costs for both the public and the Government, though it is anticipated that the costs will be de minimis considering that many of the new procedures and requirements in this rule will take the place of existing procedures and requirements spread out across the Government such as in agencies' supplements to the FAR. As directed in the Preventing Organizational Conflicts of Interest in Federal Acquisition Act, agencies are required to update their conflict of interest procedures to implement these revisions to the FAR as appropriate. It is expected that since the FAR allows agencies to tailor certain coverage to address risks that are unique to the agency, the FAR coverage will ultimately replace much of the agency-specific OCI requirements that currently exist.

The compliance requirements explicitly proposed in this rule for industry involve mitigation plans and disclosures. While this rule proposes to create a requirement for contractors to comply with any OCI

mitigation plan that has been incorporated into their contract, these contractors are already subject to comparable mitigation plan requirements when contracting with certain agencies, e.g., Defense FAR Supplement 209.571-4(b), Department of Homeland Security's clause 3052.209-72. Similarly, while this rule proposes to create a requirement for contractors to constantly monitor to ensure new OCIs or overlooked OCIs are discovered, these contractors are already subject to comparable disclosure requirements when contracting with certain agencies, e.g., Environmental Protection Agency's clause 1552.209-71, Department of Energy's clause 952.209-72. This rule also proposes to create a number of reporting requirements; see section VII of this preamble. However, since industry is already subject to similar reporting requirements via various agency-specific clauses and provisions, it is expected that the net reporting cost of this proposed rule is less than the estimate in section VII of this preamble.

The proposed rule provides more detailed guidance to the acquisition workforce on OCIs. Current FAR coverage directs contracting officers to "identify," "evaluate," "[a]void, neutralize, [and] mitigate," OCIs; however, there are not many specific procedures provided for contracting officers to follow. The current FAR coverage directs contracting officers to use a provision that addresses OCIs and, when appropriate, to use a clause that can implement a

limitation on future contracting; however, no provision or clause text is provided. For example, the proposed new disclosure and unequal access to information provisions will provide contracting officers with the data necessary to best "identify" and "evaluate" OCIs. The proposed clause regarding a limitation on future contracting will help the contracting officer "avoid" potential OCIs. The proposed mitigation plan clause will help the contracting officer "neutralize" and "mitigate" OCIs.

While this rule is proposing to create new clauses and provisions for contracting officers to use and specific actions for contracting officers to take, the costs associated with these revisions should be offset by the current cost of the FAR coverage: cost of contracting officers having to determine the specific actions to take or write their own clauses and provisions, both of which places the Government at a greater degree of OCI risk. The costs associated with these revisions are also expected to replace the current costs associated with contracting officers following agency-specific guidance instead of contracting officers across the Government using a set of standardized and uniform procedures and terms and conditions.

## **V. Executive Orders 12866 and 13563**

Executive Orders (E.O.s) 12866 (as amended by E.O. 14094) and 13563 direct agencies to assess the costs and

benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is a significant regulatory action and, therefore, was subject to review under Section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993.

## **VI. Regulatory Flexibility Act**

The proposed rule, if finalized, may have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act 5 U.S.C. 601-612. The Initial Regulatory Flexibility Analysis (IRFA) is as follows:

### *1. Reasons for the action*

The Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA) are proposing to revise the Federal Acquisition Regulation (FAR) to implement a statute, which directs the Federal Acquisition Regulatory Council to revise the FAR to provide and update—

- Definitions related to specific types of organizational conflicts of interest;
- Definitions, guidance, and illustrative examples related to relationships of contractors with public, private, domestic, and foreign entities that may cause contract support to be subject to potential organizational conflicts; and
- Illustrative examples of situations related to the potential organizational conflicts identified.

The statute also directs that the FAR be revised to—

- Provide agencies with solicitation provisions and contract clauses to avoid or mitigate organizational conflicts, for agency use as needed, that require contractors to disclose information relevant to potential organizational conflicts and limit future contracting with respect to potential conflicts with the work to be performed under awarded contracts;

- Allow agencies to tailor such solicitation provisions and contract clauses as necessary to address risks associated with conflicts of interest and other considerations that may be unique to the agency; and

- Permit contracting officers to take into consideration professional standards and procedures to prevent organizational conflicts of interest to which an offeror or contractor is subject.

## *2. Objectives of, and legal basis for, the rule.*

The objective of this rule is to implement the updates to the FAR as required by the statute.

The legal basis for the rule is the Preventing Organizational Conflicts of Interest in Federal Acquisition Act (Pub. L. 117-324, 41 U.S.C. 2303 note). The promulgation of the FAR is authorized by 40 U.S.C. 121(c); 10 U.S.C. chapter 4 and 10 U.S.C. chapter 137 legacy provisions (see 10 U.S.C. 3016); and 51 U.S.C. 20113.

## *3. Description of and an estimate of the number of small entities to which the rule will apply.*

The proposed rule is expected to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601-612.

The rule is proposed to apply to acquisitions exceeding the simplified acquisition threshold (SAT). The rule is also proposed to apply to the acquisition of commercial services. The rule is not proposed to apply to commercial products, which includes commercially available off-the-shelf (COTS) items.

DoD, GSA, and NASA do not have data on the number of acquisitions that may be affected by organizational conflicts of interest. As of December 3, 2023, there were 361,685 small business registrants (i.e., entities that are small for any North American Industry Classification System code) in the System for Award Management. These registrants may be required to complete the new FAR provisions that are proposed to be created in this rule.

## *4. Description of projected reporting, recordkeeping, and other compliance requirements of the rule.*

This proposed rule includes both preaward and postaward reporting requirements. In terms of preaward requirements, offerors are required to disclose—

- Any relevant limitations on future contracting, the term of which has not yet expired, to which the offeror or potential subcontractor(s) agreed;

- All relevant information of which the offeror is aware regarding financial or other interests that could give rise to an organizational conflict of interest, including information about affiliates and potential subcontracts, except where such disclosure would constitute a violation of law (e.g., the Securities Exchange Act of 1934, 15 U.S.C. 78a et seq.);

- Information withheld pursuant to the previous paragraph as soon as the law no longer prohibits disclosure;

- Any professional standards to which the offeror is subject, or any procedures the Offeror has in place, to prevent organizational conflicts of interest;

- To the extent that either the offeror or the Government identifies any financial or other interests that could give rise to an organizational conflict of interest on the contract resulting from a solicitation, the offeror shall explain the actions it intends to use to address such organizational conflicts of interest, e.g., by submitting a mitigation plan and/or accepting a limitation on future contracting;

- Whether an offeror or any of its affiliates had unequal access to any information that could provide an unfair competitive advantage;

- Any actions that the offeror proposes to take to resolve a situation in which it or its affiliates had unequal access to information that could provide an unfair competitive advantage; and

- Whether any firewall it planned to put in place to mitigate the impact of an unfair competitive advantage due to unequal access to information was not implemented or was breached.

In terms of postaward reporting requirements, contractors are required to make a full disclosure in writing within 5 days to the contracting officer if the contractor identifies financial or other interests that could result in an organizational conflict of interest that was not previously addressed and for which a waiver has not been granted, or a change to any relevant facts relating to a previously identified organizational conflict of interest. The disclosure shall include a description of—

- The organizational conflict(s) of interest in sufficient detail for agency evaluation; and

- Actions to address the organizational conflict(s) of interest that—

- o The contractor has taken or proposes to take; or

- o The contractor recommends that the Government take.

Other postaward reporting requirements include—

- Proposing updates to any mitigation plan incorporated into the contract within 30 days of—
  - o Any changes to the legal construct of a contractor's organization, any subcontractor changes, or any significant management or ownership changes; or
  - o A change to the contract requirements that impacts the mitigation plan; and
- Reporting to the contracting officer any noncompliance with the clause governing mitigation plans or with the mitigation plan itself, whether by the contractor's own personnel, those of the Government, other contractors, or subcontractors.

In addition to the reporting requirements listed above, the rule establishes the following compliance requirements for offerors and contractors:

- If an offeror submits a mitigation plan, the resulting contract will include the Government-approved mitigation plan with which that contractor will be required to comply.
- Contractors must flow down the clauses pertaining to postaward disclosures, mitigation plans, and limitation on future contracting to certain subcontracts for which the work includes or may include tasks that may give rise to an organizational conflict of interest.
- Offerors must determine, to the best of their knowledge and belief, whether they or any of their affiliates had unequal access to any information that could provide an unfair competitive advantage.

The proposed revisions in this rule create costs for industry, though it is anticipated that the costs will be de minimis considering that many of the new procedures and requirements in this rule will take the place of existing procedures and requirements spread out across the Government such as in agencies' supplements to the FAR. As directed in the Preventing Organizational Conflicts of Interest in Federal Acquisition Act, agencies are required to update their conflict of interest procedures to implement these revisions to the FAR as appropriate. It is expected that since the FAR allows agencies to tailor certain coverage to address risks that are unique to the agency, the FAR coverage will ultimately replace much of the agency-specific OCI requirements that currently exist.

*5. Relevant Federal rules which may duplicate, overlap, or conflict with the rule.*

The statute requires agencies to establish or update agency conflict of interest procedures to implement these revisions to the FAR made under the statute and periodically assess and update such procedures as needed to address agency-specific conflict issues. As such, the rule does not duplicate, overlap, or conflict with any other Federal rules.

*6. Description of any significant alternatives to the rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the rule on small entities.*

There are no exemptions from the rule for small entities, because the law does not provide for any such exemption. To minimize impact on small entities, the rule exempts actions at or below the SAT; the rule only applies to those actions above the SAT.

The rule also exempts acquisitions of commercial products, which includes COTS items.

The Regulatory Secretariat Division has submitted a copy of the IRFA to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the IRFA may be obtained from the Regulatory Secretariat Division. DoD, GSA, and NASA invite comments from small business concerns and other interested parties on the expected impact of this proposed rule on small entities.

DoD, GSA, and NASA will also consider comments from small entities concerning the existing regulations in subparts affected by the rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (FAR Case 2023-006), in correspondence.

## **VII. Paperwork Reduction Act**

The Paperwork Reduction Act (44 U.S.C. 3501-3521) applies because the proposed rule contains information collection requirements. Accordingly, the Regulatory Secretariat Division has submitted a request for approval of a new information collection requirement concerning "Preventing Organizational Conflicts of Interest in Federal Acquisition" to the Office of Management and Budget (OMB).

### *A. Public Reporting Burden.*

Public reporting burden for this information collection includes the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

1. The annual reporting burden estimated for the OCI disclosure and representation provision requirements is as follows:

Respondents	1,781
Total annual responses	3,562
Hours/response	x 1
Total burden hours	3,562

2. The annual reporting burden estimated for the OCI disclosure clause requirements is as follows:

Respondents	891
Total annual responses	2,673
Hours/response	x 1
Total burden hours	2,673

3. The annual reporting burden estimated for OCI mitigation plans is estimated as follows:

Respondents	1,114
Total annual responses	3,342
Hours/response	x 0.5
Total Burden Hours	1,671

4. The annual reporting burden estimated for the unequal access to information provision requirements is as follows:

Respondents	357
Total annual responses	357
Hours/response	x 0.5
Total Burden Hours	178.5

*B. Request for Comments Regarding Paperwork Burden.*

Submit comments on this collection of information no later than **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]** through <https://www.regulations.gov> and follow the instructions on the site. All items submitted must cite OMB Control No. 9000-XXXX, Organizational Conflicts of Interest. Comments received generally will be posted without change to <https://www.regulations.gov>, including any personal and/or business confidential information provided. To confirm receipt of your comment(s), please check <https://www.regulations.gov>, approximately two to three days after submission to verify posting. If there are difficulties submitting comments, contact the GSA Regulatory Secretariat Division at 202-501-4755 or [GSARegSec@gsa.gov](mailto:GSARegSec@gsa.gov).

Public comments are particularly invited on:

- The necessity of this collection of information for the proper performance of the functions of Federal

Government acquisitions, including whether the information will have practical utility;

- The accuracy of the estimate of the burden of this collection of information;
- Ways to enhance the quality, utility, and clarity of the information to be collected; and
- Ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

Requesters may obtain a copy of the supporting statement from the General Services Administration, Regulatory Secretariat Division by calling 202-501-4755 or emailing GSAREgSec@gsa.gov. Please cite OMB Control Number 9000-XXXX, Organizational Conflicts of Interest.

**List of Subjects in 48 CFR Parts 1, 2, 3, 7, 8, 9, 10, 11, 12, 13, 15, 16, 17, 18, 37, 42, 50, and 52**

Government Procurement.

William F. Clark,  
Director,  
Office of Government-wide  
Acquisition Policy,  
Office of Acquisition Policy,  
Office of Government-wide Policy.

Therefore, DoD, GSA, and NASA propose amending 48 CFR parts 1, 2, 3, 7, 8, 9, 10, 11, 12, 13, 15, 16, 17, 18, 37, 42, 50, and 52 as set forth below:

1. The authority citation for 48 CFR parts 1, 2, 3, 7, 8, 9, 10, 11, 12, 13, 15, 16, 17, 18, 37, 42, 50, and 52 continues to read as follows:

**AUTHORITY:** 40 U.S.C. 121(c); 10 U.S.C. chapter 4 and 10 U.S.C. chapter 137 legacy provisions (see 10 U.S.C. 3016); and 51 U.S.C. 20113.

#### **PART 1—FEDERAL ACQUISITION REGULATIONS SYSTEM**

2. In section 1.106 amend the table by adding in numerical order entries for "52.203-XX", "52.203-DD," "52.203-MM," and "52.203-AA" to read as follows:

##### **1.106 OMB approval under the Paperwork Reduction Act.**

\* \* \* \* \*

<b>FAR Segment</b>	<b>OMB Control Number</b>
* * * *	* * *
52.203-XX	9000-xxxx
52.203-DD	9000-xxxx
52.203-MM	9000-xxxx
52.203-AA	9000-xxxx
* * * *	* * *

\* \* \* \* \*

#### **PART 2—DEFINITIONS OF WORDS AND TERMS**

3. Amend section 2.101 by—

a. Removing from the definition of "advisory and assistance services" the phrase "(see 9.505-1(b))";

b. Adding in alphabetical order the definition  
"contractor team arrangement"; and

c. Revising the definition of "organizational  
conflict of interest".

The addition and revision read as follows:

**2.101 Definitions.**

\* \* \* \* \*

*Contractor team arrangement* means an arrangement in  
which—

(1) Two or more companies form a partnership or joint  
venture to act as a potential prime contractor; or

(2) A potential prime contractor agrees with one or  
more other companies to have them act as its subcontractors  
under a specified Government contract or acquisition  
program.

\* \* \* \* \*

*Organizational conflict of interest* means that an  
entity or its affiliate(s) has impaired objectivity or an  
unfair competitive advantage as a result of other  
activities or relationships with other entities or their  
affiliates, including with public, private, domestic, and  
foreign entities. An entity or its affiliate may have an  
unfair competitive advantage as a result of biased ground  
rules or through unequal access to information. As used in  
this definition—

(1) *Biased ground rules* means a situation in which an entity or its affiliate, as part of its performance of a Government contract, has or may have materially influenced the development of the requirement, evaluation criteria, or other source selection procedures for another Government contract. The primary concern is that the entity could skew the future competition, whether intentionally or not, in favor of itself;

(2) *Entity* means an individual, corporation, or other organization;

(3) *Impaired objectivity* means a situation in which an entity or its affiliate has or may have financial or other interests or an incentive to provide other than impartial advice to the Government, or the entity or its affiliate's objectivity in performing the contract work is or might be otherwise impaired; and

(4) *Unequal access to information* means a situation in which an entity or its affiliate has or may have an unfair competitive advantage because—

(i) Access to the information was provided to the entity or its affiliate by the Government. Such information may include proprietary and source selection information, e.g., proposals, financial information;

(ii) The information is not available to all potential offerors; and

(iii) Having access to the information would assist the entity in obtaining the contract.

\* \* \* \* \*

### **PART 3—BUSINESS ETHICS AND CONFLICTS OF INTEREST**

4. Revise the heading for part 3 to read as set forth above.

5. Revise section 3.000 to read as follows:

#### **3.000 Scope of part.**

This part prescribes policies and procedures for addressing issues regarding business ethics and conflicts of interest.

#### **3.603 [Amended]**

6. Amend section 3.603 in paragraph (b) by removing “subpart 9.5” and adding “subpart 3.12” in its place.

7. Add subpart 3.12 to read as follows:

#### **Subpart 3.12—Organizational Conflicts of Interest**

- 3.1200 Scope of subpart.
- 3.1201 Definition.
- 3.1202 Applicability.
- 3.1203 Policy.
- 3.1204 Examples.
- 3.1205 Methods of addressing organizational conflicts of interest.
- 3.1205-1 Avoidance.
- 3.1205-2 Limitation on future contracting.
- 3.1205-3 Mitigation.
- 3.1205-4 Determination of acceptable risk.
- 3.1206 Waiver.
- 3.1207 Contracting officer responsibilities.
- 3.1207-1 General.
- 3.1207-2 Identification of organizational conflicts of interest.
- 3.1207-3 Analyzing organizational conflicts of interest.
- 3.1207-4 Addressing organizational conflicts of interest.
- 3.1207-5 Award requirements.

- 3.1207-6 Task-order or delivery-order contracts, blanket purchase agreements, basic ordering agreements, and interagency acquisitions.
- 3.1208 Solicitation provisions and contract clauses.

### **Subpart 3.12—Organizational Conflicts of Interest**

#### **3.1200 Scope of subpart.**

(a) This subpart prescribes policies and procedures, and provides illustrative examples, for identifying, analyzing, and addressing organizational conflicts of interest.

(b) This subpart implements—

(1) 41 U.S.C. 2304;

(2) Section 841(b)(2) of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (Pub. L. 110-417); and

(3) The Preventing Organizational Conflicts of Interest in Federal Acquisition Act (Pub. L. 117-324, 41 U.S.C. 2303 note).

#### **3.1201 Definition.**

*Firewall* means a barrier against the unauthorized flow of information. Firewalls may consist of a variety of elements, including organizational and physical separation; facility and workspace access restrictions; information system access restrictions; independent compensation systems; and individual and organizational nondisclosure agreements.

#### **3.1202 Applicability.**

(a)(1) Except as provided in paragraphs (a)(2) and (b) of this section, this subpart applies to—

(i) Contracts, subcontracts, task orders, delivery orders, blanket purchase agreements, basic ordering agreements, and modifications for new work; and

(ii) For-profit and nonprofit organizations, including nonprofit organizations created largely or wholly with Government funds.

(2) This subpart does not apply to—

(i) Contracts and subcontracts at or below the simplified acquisition threshold;

(ii) Contracts for commercial products; or

(iii) Subcontracts for commercial products or commercial services.

(b) Contracting officers shall not apply this subpart where it conflicts with an agency-specific conflict-of-interest statute.

### **3.1203 Policy.**

(a) *General.* It is the Government's policy to identify, analyze, and address organizational conflicts of interest in order to maintain the integrity and fairness of the Federal acquisition system. Organizational conflicts of interest undermine the public's trust in the Federal acquisition system because they can result in the following:

(1) *Impaired objectivity.* The Government's interests are to ensure that—

(i) It acquires products and services that provide the best value to the Government; and

(ii) The contractor's performance fulfills the Government's requirements without bias (see 3.1204(a)).

(2) *Unfair competitive advantage.* Protection against biased ground rules and unequal access to information—

(i) Preserves the Government's ability to solicit competitive proposals; and

(ii) Provides prospective offerors an opportunity to compete for Government requirements, free from organizational conflicts of interest as governed by this subpart (see 3.1204(b)).

(b) *Contractor advantage.* (1) The fact that a contractor may, on the basis of work previously performed, have a natural advantage in competing for a particular Government requirement does not necessarily mean that the advantage is unfair or that it creates an organizational conflict of interest. Although incumbent contractors will often have a natural advantage based on their experience, insights, and expertise, this situation must be distinguished from situations in which an incumbent contractor also has had access to information that could provide an unfair competitive advantage. For example—

(i) Incumbent contractors may have a natural advantage that is not unfair when competing for follow-on contracts because of knowledge and expertise developed during contract performance; and

(ii) Development contractors may have a natural advantage that is not unfair when they have done the most advanced work in a field and may be able to start production earlier, or offer products of a higher quality.

(2) A contracting officer should not disqualify a contractor based on mere innuendo and supposition unsupported by the record (i.e., no hard facts), or when the contractor's advantage is speculative and too remote from the present procurement to establish an organizational conflict of interest. Additionally, any allegation that a contractor could theoretically act in bad faith while performing on a contract is not a basis for a finding of a conflict of interest and therefore not a basis to disqualify an offeror from a competition.

(c) *Unequal access to information.* The Government shall address situations in which it has reason to believe an offeror has obtained or is attempting to obtain an unfair competitive advantage because of its unequal access to information.

(1) Unequal access to information only covers situations in which access to information was provided by the Government either—

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

(ii) Indirectly, through sources such as former Government employees as described in 3.1204(b)(2)(ii) or employees of other contractors or subcontractors who received the nonpublic information from the Government.

(2) Offerors and the Government should take action early to avoid situations where an unfair competitive advantage could be created because of unequal access to information. These actions, for example, may include implementing firewalls or, when appropriate, sharing the information with other interested parties.

(3) The Government shall not disqualify the offeror from a competition on the basis of unequal access to information unless no other method of resolution is appropriate (see 3.1207-4(b)).

(4) An offeror could gain unequal access to information that does not constitute an organizational conflict of interest such as through the offeror's own market research efforts or its private-sector business contacts.

### **3.1204 Examples.**

The examples in this section are intended to help the contracting officer identify potential organizational conflicts of interest. They are not all inclusive.

(a) *Impaired objectivity.* The following contractual tasks illustrate certain situations likely to create an

organizational conflict of interest that could impair or influence the contractor's performance under a Government contract:

(1) A contractor is reviewing or evaluating, for Government approval, the delivery of products or performance of services under an existing contract, when the products or services are its own products or services or those of an affiliate or of a competitor.

(2) A contractor is providing systems engineering or technical direction involving a major system or components thereof when the same contractor or one of its affiliates will be furnishing the same major system or components (or will be a subcontractor or consultant to the contractor furnishing the major system or component).

(3) A contractor is providing systems engineering or technical direction involving a major system or components thereof when the same contractor or one of its affiliates will be testing or verifying the system or a component (or will be a subcontractor or consultant to the contractor furnishing or testing the major system or component).

(4) A contractor is assisting an agency in developing policies or regulatory procedures and the contractor or one of its affiliates may, at some future point, be governed by or subject to (or be a subcontractor or consultant to an entity governed by or subject to) such policies or regulatory procedures.

(5) A contractor is providing consulting services to an agency that is responsible for regulating an industry and the contractor is performing work under a contract for a public or private sector client that is regulated by that agency. Organizational conflict of interest is more likely to occur if the contractor's employees are simultaneously performing work under both contracts.

(6) A contractor is providing support to an agency involving a subject area or issue while it is also performing work for other entities with a competing interest involving the same subject area or issue. For example, a contractor assisting an agency with implementing legislation or regulations may have a conflict if the contractor is also assisting industry with compliance on that same legislation or regulations.

(7) A contractor is providing enforcement support to an agency (e.g., cost recovery, litigation) while also assisting or representing parties subject to those activities. In addition, when a contractor supports enforcement activities for an agency, and those enforcement activities continue beyond the life of the contract, such conflicting client relationships could continue to jeopardize enforcement actions for a time even after the contract ends, especially if the contractor had access to sensitive information about the agency's enforcement or litigation strategy.

(8) A contractor is conducting research for an agency, but that contractor or its researchers has financial or non-financial ties to a foreign entity that seeks capability or advantage related to the topic of that research and is likely to exert undue influence on the contractor. Undue influence in this context describes a situation in which an entity that is not party to a contract, through financial support, position of authority, or other ties, persuades the contractor to take actions that it would not have taken otherwise, such as taking the research in a certain direction or engaging in unauthorized information-sharing with other parties.

(9) A contractor is providing services to an agency related to national security or foreign policy matters, but that contractor is also providing similar services to a foreign government or other foreign entity (e.g., foreign state-owned or private enterprise) with a competing or opposing interest in those matters, which could result in the foreign entity having undue influence on the contractor's performance on the contract.

(b) *Unfair competitive advantage.* (1) The following contractual tasks illustrate situations likely to create an organizational conflict of interest due to unfair competitive advantage through biased ground rules:

(i) A contractor is writing specifications, preparing the Government estimate of cost, or providing draft

evaluation criteria or a draft evaluation plan for a competitive solicitation, and it or one of its affiliates may be in a position to compete for (or perform as a subcontractor) the relevant requirement.

(ii) A contractor is assisting the Government with acquisition planning activities, and the contractor or one of its affiliates or clients may be in a position to compete for (or perform as a subcontractor) the future requirement.

(iii) A contractor is assisting the Government in evaluating technical proposals submitted in response to a competitive solicitation, and one of the contractor's affiliates or clients is among the competitors.

(iv) A contractor is providing advice that could result in a recommendation to purchase particular goods or services, and the contractor or one of its affiliates is a potential supplier of such goods or services (whether as a prime contractor or subcontractor).

(v) A contractor is providing a product or service to the Government and employs a former Government employee who was involved in developing the requirement for the product or service as part of such employee's Government job.

(2)(i) Unequal access to information could provide an offeror with an unfair competitive advantage with respect to a particular competition.

(ii) Unequal access to information could involve information in the possession of a former Government employee when—

(A) The information was obtained by the former Government employee while working for the Government;

(B) The information is, for example, contractor proprietary information or is source selection information; and

(C) The former Government employee is in a position in which use of the information could provide an unfair competitive advantage to an offeror, e.g., working on or being a consultant to a team preparing a proposal in response to a competitive solicitation.

(iii) Unequal access to information may involve a contractor assisting in the closeout of completed contracts gaining access to another contractor's proprietary information.

### **3.1205 Methods of addressing organizational conflicts of interest.**

Contracting officers may address organizational conflicts of interest, and their associated risks, using avoidance (3.1205-1), limitations on future contracting (3.1205-2), mitigation (3.1205-3), or the Government may assess and determine that the risk associated with the conflict is acceptable (3.1205-4). Contracting officers

may address the risks using a combination of these methods.

(See 3.1207-4).

### **3.1205-1 Avoidance.**

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

(a) Developing statements of work and performance work statements that do not require contractors to utilize subjective judgment. Tasks that could require subjective judgment include—

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

(b) Obtaining advice from more than one contractor, so that the Government does not rely solely on the advice of any one contractor.

(c) Disqualifying an offeror or offerors from receiving a contract award. Use of this technique may be appropriate when the contracting officer concludes that—

(1)(i) The offeror could have an unfair competitive advantage because of its—

(A) Prior involvement in acquisition planning for the procurement (e.g., developing the solicitation);

(B) Work on a Government contract that places the offeror in a position to influence the acquisition; or

(C) Unequal access to information that cannot be mitigated.

(ii) In such cases, if the offeror is not already disqualified through a limitation on future contracting (see 3.1205-2), disqualification may be the only appropriate means of addressing the organizational conflict of interest;

(2)(i) The offeror could have an unfair competitive advantage because of an affiliate's—

(A) Prior involvement in acquisition planning for the procurement (e.g., developing the solicitation); or

(B) Work on a Government contract that places the affiliate in a position to influence the acquisition.

(ii) In such cases, the contracting officer should consider the relationship between the offeror and the affiliate in determining whether disqualification of the offeror is appropriate (see 3.1207-4(c)(2) and (d)(2)); or

(3) The risk that an offeror's impaired objectivity poses to the Government's interest is more than the Government is willing to accept, because the substance of

the work has the potential to affect current or future activities or interests of the offeror (or its affiliates or clients). In such cases, disqualification may be used only if less restrictive techniques for addressing the organizational conflict of interest will not adequately protect the Government's interests (see 3.1207-4(b)(2)).

### **3.1205-2 Limitation on future contracting.**

(a) A limitation on future contracting allows a contractor to perform on the current contract but precludes the contractor and its affiliates from entering into or participating as a contractor or subcontractor in certain future contracts. This method applies when the contractor's work on the current contract could be impaired by virtue of its expectation of future work or could jeopardize the integrity of the competitive process. Use this method to address an unfair competitive advantage or to address the risk to the Government's interest posed by impaired objectivity when the risk is greater than the Government is willing to accept.

(b) Restrict limitations on future contracting to a reasonable duration that is sufficient to neutralize the organizational conflict of interest. The restriction shall end on a specific date or upon the occurrence of an identifiable event.

### **3.1205-3 Mitigation.**

(a)(1) Mitigation is an action taken to reduce the risk from an organizational conflict of interest.

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

(b) When this method is utilized, contracting officers shall incorporate into the contract a Government-approved mitigation plan, that reflects the actions an offeror has agreed to take to mitigate an organizational conflict of interest. The mitigation plan should provide sufficient details commensurate with the complexity of the organizational conflict of interest and the value of the acquisition. While implementation of a mitigation plan is the contractor's responsibility, the Government retains the right to review implementation of the plan.

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

(1) Requiring a subcontractor or member of a contractor team arrangement that is free of an organizational conflict of interest to perform the portion of the work that involves an organizational conflict of interest on the current contract. This technique will not reduce the risk associated with an organizational conflict of interest unless it is used in conjunction with controls to ensure that the entity with the organizational conflict of interest has no input or influence on how the party

without the organizational conflict of interest performs the work.

(2) Requiring the contractor to implement structural or behavioral barriers, internal controls, or both.

(i) Barriers and internal controls may reduce the risk that potentially conflicting financial or other interests of an affiliate will influence the contractor's exercise of judgment during contract performance. When appropriate, contracting officers may use barriers and controls to prevent corporate officials with a direct interest in an affiliate's performance from participating in or influencing contract performance. Contracting officers should select specific barriers or controls based on an analysis of the facts and circumstances of each case.

(ii) When appropriate, use a firewall to implement the controls in paragraph (c)(2)(i) of this section. However, a firewall intended to limit the sharing of information may not adequately address an organizational conflict of interest regarding an affiliate.

(iii)(A) For example, if an affiliate anticipates competing for a future related contract, the parties may negotiate a mitigation plan that requires the contractor and its affiliates to implement structural or behavioral barriers, internal controls, or both. The contracting officer for the future contract will determine whether these mitigation measures were sufficient to allow the

affiliate to compete for that contract, in accordance with 3.1207-4(d)(2)(ii).

(B) Since the mitigation techniques in paragraph (c)(2)(iii)(A) of this section are resource intensive, use the techniques when appropriate to allow the affiliate to compete for the future contract when this offers a benefit to the Government (e.g., increased competition in a narrow industry field). Absent such benefit, contracting officers should address this type of organizational conflict of interest using a limitation on future contracting (see 3.1205-2).

(3) Disseminating the information to all potential offerors when there is an organizational conflict of interest as a result of unequal access to information (see 3.1204(b)(2)).

#### **3.1205-4 Determination of acceptable risk.**

(a) Contracting officers shall not determine any risk is acceptable when an organizational conflict of interest involves unfair competitive advantage (see 3.1204(b)).

(b)(1) Contracting officers may determine that some or all of the performance risk associated with an organizational conflict of interest resulting from impaired objectivity is acceptable when—

(i) The risk is outweighed by the expected benefit from having the offeror with an organizational conflict of interest perform the contract; and

(ii) The performance risk is manageable, i.e.—

(A) The performance risk after implementing mitigation measures is minimal; or

(B) The agency has sufficient oversight controls (see 3.1207-3(b)(3)).

(2) The contracting officer determination may require approval by a higher authority in accordance with agency procedures.

(c) Contracting officers should use this method to address organizational conflicts of interests in combination with other methods, such as mitigation. For example, the contracting officer may require a mitigation plan and elect to accept the remaining risk if the contracting officer determines that the mitigation plan does not remove all of the performance risk associated with the organizational conflict of interest.

### **3.1206 Waiver.**

(a) *Authority.* (1) The agency head may waive—

(i) The requirement to address an organizational conflict of interest in a particular acquisition if methods of addressing the organizational conflict of interest are not adequate or feasible (e.g., the agency cannot assess the remaining risk as acceptable because the organizational conflict of interest involves an unfair competitive advantage); or

(ii) A preexisting limitation on future contracting.

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

(b) *Requirements.* (1) All waivers shall—

(i) Be in writing;

(ii) Not include a class of contracts;

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

(iv) Explain why other methods of addressing the organizational conflict of interest are not feasible or not adequate; and

(v) Explain why the waiver is in the Government's interest.

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

### **3.1207 Contracting officer responsibilities.**

#### **3.1207-1 General.**

(a) The contracting officer shall—

(1) Identify as early as possible in the acquisition process whether the facts of an acquisition may result in an organizational conflict of interest;

(2) Analyze the financial and other interests of the offerors and their affiliates to determine whether an organizational conflict of interest exists (see 3.1207-3(a));

(3) Determine whether an organizational conflict of interest exists and whether the organizational conflict of interest can be adequately addressed; and

(4) Address any such organizational conflicts of interest, giving proper consideration to decisions of a prior contracting officer when such decisions are known.

(b) Contracting officers should obtain the assistance of the program office, appropriate technical specialists, and legal counsel in carrying out the responsibilities of this subpart.

(c) Contracting officers are encouraged to consult with potential offerors early in the process (see 3.1207-2(b)).

(d) The contracting officer shall identify, analyze, and address organizational conflicts of interest throughout all phases of the acquisition as required in this subpart.

**3.1207-2 Identification of organizational conflicts of interest.**

(a)(1) The contracting officer shall review the nature of the work to be performed to decide whether performance by a contractor is likely to result in an organizational conflict of interest. In addition to evaluating the nature of the work to be performed on the current contract, the contracting officer should also consider whether performance of the current contract is likely to cause the contractor to have an organizational conflict of interest in an anticipated future contract.

(2) During acquisition planning (see 7.105(b)(18)), the contracting officer shall ask the relevant contracting

activity and requiring activity (as appropriate) to examine whether any potential offerors may have had unequal access to information relevant to the acquisition that could provide an unfair competitive advantage (see 3.1204(b)(2)).

(3) The contracting officer shall identify specific contractor client and industry relationships (e.g., named organization, named industry) that may present a conflict with the work to be performed, especially when the contractor will be providing advisory and assistance services to the agency, or when the work will involve supporting policymaking or adjudicatory functions, assisting with regulatory enforcement and compliance, or performing work related to national security or foreign policy matters. See 3.1204(a) for examples of relationships that may present impaired objectivity. The contracting officer should use the fill-ins at paragraphs (c)(1)(ii) of the provision at 52.203-XX, Potential Organizational Conflict of Interest-Disclosure and Representation, and at paragraph (b)(1)(iii) of the clause at 52.203-DD, Postaward Disclosure of Organizational Conflict of Interest, to identify these contractor relationships and require offerors to disclose them for review and decision by the agency.

(b) When initially announcing an acquisition, the contracting officer shall ask potential offerors if they had unequal access to any information relevant to the

acquisition that could provide an unfair competitive advantage as described in 3.1204(b) (2).

(1) For contract actions, this inquiry should be included in the sources sought notification or the presolicitation notice.

(2) For orders placed against multiple-award contracts, blanket purchase agreements, or basic ordering agreements, this inquiry shall be included in the first announcement to contract holders regarding the order.

(3) For Federal Supply Schedule orders, this inquiry shall also be included in the request for quotations.

(c) If the contracting officer decides that contractor performance of the contemplated work is likely to result in an organizational conflict of interest, the contracting officer should consult with the program office or requiring activity to determine whether avoidance could be used (see 3.1205-1).

(d) Efforts supporting the development of a solicitation that could create an organizational conflict of interest include assistance in preparation of the statement of work or other requirements or the development of cost or budget estimates. If avoiding organizational conflicts of interest is not feasible during the development of the requirement, the contracting officer shall-

(1) Require the program office or requiring activity to identify any contractors that participated in acquisition planning, including development of the solicitation, that do not have a preexisting limitation on future contracting; and

(2) Review the nature and scope of the work performed to determine whether there was adequate mitigation before listing a contractor at paragraph (b)(3) of 52.203-XX, Potential Organizational Conflict of Interest-Disclosure and Representation, in accordance with 3.1205-1(c).

(e)(1) Contracting officers shall identify, to the extent known, any contractors prohibited from competing as a prime contractor or a subcontractor due to an applicable preexisting limitation on future contracting. See 52.203-XX.

(2) To identify applicable preexisting limitations on future contracting, the contracting officer may contact the program office and examine prior acquisition history.

(f) If the contracting officer has not identified the likelihood of an organizational conflict of interest in accordance with this section, the contracting officer shall document the contract file.

### **3.1207-3 Analyzing organizational conflicts of interest.**

(a) *Sources of information*—(1) *Information from offerors.* (i) Contracting officers shall use information provided in response to 52.203-XX to determine whether an

offeror's financial or other interests could result in an organizational conflict of interest. In the absence of conflicting information, the contracting officer may rely on the information provided by an offeror.

(ii) Contracting officers may request additional information from an offeror or obtain information from other sources, if there is reason to believe that the offeror omitted relevant financial or other interests from its disclosure.

(2) *Other sources of information*—(i) *Governmental sources.* Governmental sources include, but are not limited to, the files and the knowledge of personnel within—

- (A) The contracting office;
- (B) Other contracting offices;
- (C) The cognizant contract administration, finance, and audit activities; and
- (D) The requiring activity.

(ii) *Nongovernmental sources.* Nongovernmental sources include, but are not limited to--

- (A) Offeror's websites;
- (B) Trade and financial journals;
- (C) Business directories and registers; and
- (D) Annual corporate shareholder reports.

(b) *Factors to consider.* When analyzing the nature and scope of any organizational conflicts of interest and the associated risks that may arise during contract

performance and considering how best to address any such organizational conflicts of interest, the contracting officer should weigh at least the following factors:

(1) The extent to which the contract requires the contractor to exercise subjective judgment and provide advice.

(2) The extent and severity of the expected impact of the organizational conflict of interest (e.g., whether it is expected to occur only once or twice during performance or to impact performance throughout the entire contract).

(3) The extent to which the agency has effective oversight controls to prevent an organizational conflict of interest from influencing the contractor's actions during contract performance (e.g., postaward monitoring plans).

(4) Whether the organizational conflict of interest involves a risk to the integrity of the competitive process (see 3.1204(b)).

(5) The extent that the risk can be effectively mitigated through the offeror's proposed mitigation plan.

(6) The degree to which any impairment of the contractor's objectivity may impact the agency mission or reduce the value of its services to the agency, and the agency's willingness to accept the performance risk of that impairment. For instance, the performance risk of awarding to a contractor with significant financial ties to or other interests in that same industry could be significant and

jeopardize the mission (see examples at 3.1204(a)(4) through (6)). In another example (see 3.1204(a)(9)), an agency involved in addressing certain foreign issues may have significant performance risk awarding to a contractor that also provides advice or assistance to certain foreign entities on the same or similar issues. Significant performance risks such as these may not be acceptable to the agency, regardless of mitigation measures proposed.

(7) Whether the offeror or contractor is required to adhere to certain professional standards or has internal operating procedures intended to prevent conflicts of interest. Contracting officers may consider how professional standards or the contractor's operating procedures will prevent or address organizational conflicts of interest during contract performance. However, an offeror or contractor having professional standards or procedures in place related to organizational conflicts of interest is not, by itself, a mitigation strategy.

(c) *Unequal access to information.* If the contracting officer is aware that one or more offerors had unequal access to information relevant to the acquisition, the contracting officer shall-

(1) Address the situation if access to the information could provide any offeror with an unfair competitive advantage (see 3.1203 and 3.1204(b)(2)); or

(2) Document the file, if the contracting officer does not need to address the situation.

**3.1207-4 Addressing organizational conflicts of interest.**

(a) *General.* (1) Consistent with 3.1207-3(a), the contracting officer should consider relevant information regarding an offeror's financial or other interests in determining how to address any organizational conflicts of interest (see 3.1205). When determining what method or methods of addressing the organizational conflict of interest will be appropriate, contracting officers shall consider the specific facts and circumstances of the contracting situation and the nature and potential extent of the risks associated with an organizational conflict of interest.

(2)(i) When organizational conflict of interest is not an evaluation factor (see 15.304) in a competitive solicitation, exchanges between the Government and an offeror regarding the offeror's mitigation plan or limitation on future contracting are not considered discussions.

(ii) If the exchanges (see 15.306) result in a change to other parts of an offeror's technical proposal or cost proposal, the contracting officer shall either—

- (A) Open discussions;
- (B) Reopen discussions; or
- (C) Eliminate the offeror from further consideration.

(iii) The contracting officer should conduct these exchanges as early as possible in the acquisition process so major changes to a mitigation plan that significantly affect proposed performance can be evaluated; e.g., having a member of a contractor team arrangement that is free of an organizational conflict of interest perform the portion of the work that involves an organizational conflict of interest.

(3) Use of a firewall may address an unfair competitive advantage resulting from unequal access to information. If no firewall was previously required, or an existing firewall was breached, and the offeror has already received an unfair competitive advantage, the contracting officer should explore other methods such as information sharing or a combination of methods.

(b) *Avoidance by disqualifying offerors.* Contracting officers shall refer to the standards for determining when disqualification of an offeror from participation in a competition is appropriate (see 3.1205-1(c)).

(1) *Unfair competitive advantage.* (i) Consistent with 3.1205-1(c), disqualification of an offeror from participation in a contract award is appropriate where there is a risk to the integrity of the competitive process. These organizational conflicts of interest involve the contractor or its affiliates' prior work on a Government contract that places it in a position to

influence the acquisition when a limitation on future contracting was not included in the prior contract.

(ii) The contracting officer shall disqualify the offeror or potential offeror from consideration for the contract if the contracting officer determines that—

(A) Evidence exists that an offeror or potential offeror had an unfair competitive advantage in accordance with 3.1204(b) (2); and

(B) No mitigation strategy will protect the integrity of the competition.

(2) *Impaired objectivity.* Consistent with 3.1205-1(c) (3), when an organizational conflict of interest presents a risk to the Government's interests, the contracting officer shall prepare a written determination that less restrictive techniques for addressing the organizational conflict of interest will not adequately protect the Government's interests before disqualifying an offeror. The contracting officer determination may require approval by a higher authority in accordance with agency procedures.

(c) *Limitation on future contracting.* (1)  
Contracting officers shall include a limitation on future contracting, when the contemplated work requires the contractor to exercise subjective judgment and provide advice, if the advice may create an unfair competitive advantage or result in impaired objectivity by virtue of

the contractor's expectation of future work (see 3.1205-2 and 3.1208(d)).

(2)(i) An offeror that is subject to a preexisting limitation on future contracting as an affiliate can request the agency waive the limitation in accordance with section 3.1206. If the contracting officer determines that the offeror's request has merit, the contracting officer shall process the waiver request.

(ii) In determining whether to process a waiver to remove an affiliate from an existing future limitation on contracting, the contracting officer should analyze the nature of the relationship between the entities to determine whether the risk associated with the organizational conflict of interest should preclude the affiliate from competing. This analysis may include but is not limited to-

(A) Controls put in place, either as the result of other Government contracts or the offeror's own initiative;

(B) The financial relationships, or lack thereof, between the two entities;

(C) The information sharing framework, or barriers to information sharing, between the two entities;

(D) The work performed by the two entities, and whether there is overlap in the areas in which they work; and

(E) The general corporate and control structure between the two entities.

(iii) The contracting officer may also use this analysis with regard to affiliates' participation in situations in which a future limitation on contracting should have been included in the earlier contract.

(d) *Mitigation—(1) General.* Consistent with 3.1205-3, when the acquisition involves offeror-submitted mitigation plans, the contracting officer shall analyze the feasibility of mitigation of the organizational conflict of interest, including the expected effectiveness of the proposed mitigation plan and the Government's ability to review implementation of the provisions of the plan.

(2) *Mitigation to avoid an affiliate's organizational conflicts of interest on future contracts.* Contracting officers may negotiate a mitigation plan, which requires the contractor and its affiliates to implement structural or behavioral barriers, internal controls, or a combination of methods.

(i) This technique is intended to provide a basis for the contracting officer of the future contract to determine whether the organizational conflict of interest has been effectively mitigated with regard to the affiliate on the future contract. Therefore, the contracting officer for the current contract shall document the file regarding how the mitigation plan is intended to address any

organizational conflict of interest such that the affiliate may compete for a future contract.

(ii) The contracting officer of the future contract shall consider the decisions of the contracting officer for the earlier contract when determining whether the risk associated with the organizational conflict of interest has been effectively reduced or eliminated. This analysis may include the factors in 3.1207-4(c)(2)(ii). If the contracting officer determines that the earlier mitigation measures are sufficient to allow the affiliate to participate, then the contracting officer shall prepare a written determination. The contracting officer determination may require approval by a higher authority in accordance with agency procedures.

(iii) This technique is only available for an affiliate.

(3) *Mitigation to avoid unfair competitive advantage resulting from unequal access to information*—(i) *Information sharing.* Contracting officers may use information sharing to avoid an unfair competitive advantage, which results from unequal access to information. Information sharing consists of disseminating the information in question to all potential offerors, either in the solicitation, in a solicitation amendment, or through some other method, such as posting it online. When using this technique, contracting officers shall—

(A) Obtain permission to disseminate information that belongs to a third party; and

(B) Provide such information to potential offerors early enough in the acquisition process to allow those offerors to effectively utilize the information.

(ii) *Use of a firewall.* When some of an offeror's employees or an affiliate had access to the relevant information, the contracting officer may consider the use of a firewall to prevent those employees from sharing that information with employees involved in the competition.

(A) The contracting officer has discretion to approve or reject an offeror's proposed firewall.

(B) If an offeror's proposal includes use of a preexisting firewall as mitigation, the contracting officer shall require the offeror to—

(1) Provide a representation that, to the best of its knowledge and belief, there were no breaches of the firewall during preparation of the proposal; or

(2) Explain any breach that occurred (provided in paragraph (b) at 52.203-AA, Unequal Access to Information-Representation).

(iii) *Safeguarding of proprietary information.* When a contractor gains access to proprietary information of another entity as a result of its performance on a Government contract, the contracting officer shall require

the contractor to execute nondisclosure agreements with each affected entity. Each nondisclosure agreement shall—

(A) Provide protection for each entity's information from unauthorized use or disclosure for as long as it remains proprietary;

(B) Prevent the use of such information for any purpose other than that for which it was furnished; and

(C) Be submitted to the contracting officer for inclusion in the contract file.

(4) *Mitigation to avoid impaired objectivity through use of a firewall.* When impaired objectivity may result in significant performance risk to the agency (see 3.1207-3(b)(6)), contracting officers should not accept use of a firewall as a contractor or its affiliate's sole mitigation strategy. Contracting officers should consider combining additional methods to adequately address the organizational conflict of interest.

(5) *Mitigation plans.* If the contracting officer approves any changes to the mitigation plan after award, the contracting officer shall incorporate the revised plan into the contract (see 52.203-MM(c)).

(e) *Assessment that the risk is acceptable.* (1) If the contracting officer determines that the performance risk resulting from impaired objectivity is acceptable, the contracting officer shall document the file to—

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

(ii) Explain how it meets the conditions of 3.1205-4; and

(iii) Discuss the reasons it is in the best interest of the Government to accept the risk associated with the organizational conflict of interest.

(2) If the contracting officer identifies a performance risk associated with an organizational conflict of interest but cannot make a determination consistent with 3.1205-4, the head of the agency may waive the requirement to address the conflict of interest in accordance with 3.1206, prior to contract award.

**3.1207-5 Award requirements.**

(a) Except as provided in 3.1207-6(a), the contracting officer shall award the contract to the apparent successful offeror after all organizational conflicts of interest have been addressed or the requirement to address the organizational conflict of interest has been waived in writing in accordance with 3.1206.

(b) Before withholding award from the apparent successful offeror based on organizational conflict of interest considerations, the contracting officer shall—

(1) Notify the offeror in writing;

(2) Provide the reasons for withholding award; and

(3) Allow the offeror a reasonable opportunity to respond.

**3.1207-6 Task-order or delivery-order contracts, blanket purchase agreements, basic ordering agreements, and interagency acquisitions.**

(a) *Task-order or delivery-order contracts, blanket purchase agreements, or basic ordering agreements.* The contracting officer shall make a reasonable attempt to identify all organizational conflicts of interest prior to award of the task-order or delivery-order contract or establishment of the blanket purchase agreement or basic ordering agreement. The contracting officer shall address the organizational conflict of interest in the base contract or agreement, to the extent that an organizational conflict of interest can be identified prior to award, using the tools discussed at 3.1205.

(b) *Issuance of task or delivery orders or orders under a blanket purchase agreement or basic ordering agreement.* Before placing an order, the contracting officer shall—

(1) Consider whether the work involved has a potential for an organizational conflict of interest, consistent with the requirements in 3.1207-1 through 3.1207-5;

(2) Supplement, in the order, the procedures for addressing an organizational conflict of interest in the

task-order or delivery-order contract, blanket purchase agreement, or basic ordering agreement, as necessary, to reflect the nature and scope of the order being placed;

(3) Address organizational conflicts of interest or obtain a waiver; and

(4) For orders expected to exceed the simplified acquisition threshold, include terms substantially the same as those found in the provision at 52.203-AA in the—

(i) Notice of fair opportunity under a multiple-award contract (see 16.505(b)(1)(iii)(B));

(ii) Request for quotation provided under a multiple-award blanket purchase agreement (see 8.405-3(c)(2)(iii); or

(iii) Order under a basic ordering agreement (see 16.703(d)).

(c) *Interagency acquisitions.* (1) If the order is placed as a direct acquisition (see 17.502-1), the contracting officer for the requesting agency is responsible for addressing organizational conflicts of interest associated with the order.

(2) If an agency acquires supplies or services by means of an assisted acquisition, the servicing agency and requesting agency shall identify which agency is responsible for the actions identified in 3.1207 and reflect this understanding in the interagency agreement.

### **3.1208 Solicitation provisions and contract clauses.**

(a)(1) If the contracting officer has identified the likelihood of an organization conflict of interest (see 3.1207-2), include in solicitations exceeding the simplified acquisition threshold, except for solicitations for commercial products, a provision substantially the same as 52.203-XX, Potential Organizational Conflict of Interest-Disclosure and Representation.

(2) The contracting officer shall fill in paragraph (b)(2) of the provision as instructed in the provision to identify contractors who have a known preexisting limitation on future contracting and that preexisting limitation has not been waived.

(3) The contracting officer shall fill in paragraph (b)(3) of the provision, if any contractors have been identified as having participated in the development of the solicitation (see 3.1207-2(d)), and do not have a preexisting limitation on future contracting, but have been disqualified from the competition.

(4) The contracting officer shall fill in paragraph (c)(1)(ii)(B) of the provision if the contracting officer has identified specific contractor client and industry relationships that may present a conflict with the work to be performed.

(b)(1) Include in solicitations and contracts a clause substantially the same as 52.203-DD, Postaward Disclosure of Organizational Conflict of Interest, when the

solicitation includes the provision at 52.203-XX, Potential Organizational Conflict of Interest-Disclosure and Representation.

(2) The contracting officer shall fill in paragraph (b)(1)(iii) of the clause if the contracting officer has identified specific contractor client and industry relationships that may present a conflict of interest.

(c)(1) Include in solicitations exceeding the simplified acquisition threshold, except for solicitations for commercial products, a clause that is substantially the same as 52.203-MM, Mitigation of Organizational Conflicts of Interest, when the resulting contract may involve an organizational conflict of interest that can be addressed by an acceptable offeror-submitted mitigation plan prior to contract award.

(2) Include in the resulting contract a clause that is substantially the same as 52.203-MM, Mitigation of Organizational Conflicts of Interest, only if the offeror submits an organizational conflict of interest mitigation plan that will be incorporated into the contract.

(d)(1) Include in solicitations exceeding the simplified acquisition threshold, except for solicitations for commercial products, a clause that is substantially the same as 52.203-LL, Limitation on Future Contracting, when the contracting officer expects that the method of addressing the organizational conflict of interest will

involve a limitation on future contracting (see 3.1207-4(c)).

(i) The contracting officer shall establish a duration sufficient to neutralize the projected organizational conflict of interest, but no longer than necessary (see 3.1205-2(b)).

(ii) Prior to contract award, the contracting officer shall fill in the nature and duration of the limitation on future contracting or contractor activities in paragraph (a) of the clause for incorporation into the contract, based on communications with the apparent successful offeror.

(2) Include in the resulting contract a clause that is substantially the same as 52.203-LL, Limitation on Future Contracting, when a limitation on future contracting is used to address an organizational conflict of interest.

(e) Include in solicitations that exceed the simplified acquisition threshold, except for solicitations for commercial products, a provision that is substantially the same as 52.203-AA, Unequal Access to Information-Representation.

## **PART 7-ACQUISITION PLANNING**

8. Amend section 7.105 by-

- a. Redesignating paragraphs (b)(18) through (b)(22) as paragraphs (b)(19) through (b)(23); and
- b. Adding a new paragraph (b)(18).

The addition reads as follows:

**7.105 Contents of written acquisition plans.**

\* \* \* \* \*

(b) \* \* \*

(18) *Organizational conflicts of interest.* (i)

Discuss the potential for organizational conflicts of interest (see 2.101 and 3.1207-2) that may—

(A) Exist at time of contract award;

(B) Occur during contract performance; or

(C) Occur in a future acquisition.

(ii) Discuss the proposed method or methods of addressing these organizational conflicts of interest.

Also address unequal access to information (see 3.1207-2 through 3.1207-4). Identify any solicitation provisions and contract clauses that would be used.

\* \* \* \* \*

**PART 8—REQUIRED SOURCES OF SUPPLIES AND SERVICES**

9. Amend section 8.404 by—

a. Removing from the end of paragraph (c) (2) “and”;

b. Redesignating paragraph (c) (3) as paragraph (c) (4);

c. Adding a new paragraph (c) (3); and

d. Removing from newly redesignated paragraph (c) (4) “Must” and adding “Shall” in its place.

The addition reads as follows:

**8.404 Use of Federal Supply Schedules.**

\* \* \* \* \*

(c) \* \* \*

(3) Shall comply with the requirements on organizational conflicts of interest (see subpart 3.12); and

\* \* \* \* \*

10. Amend section 8.405-1 by—

a. Redesignating paragraphs (d)(3) and (4) as paragraphs (d)(4) and (5) respectively; and

b. Adding a new paragraph (d)(3).

The addition reads as follows:

**8.405-1 Ordering procedures for supplies, and services not requiring a statement of work.**

\* \* \* \* \*

(d) \* \* \*

(3) When ordering services, the ordering activity contracting officer shall require schedule contractors planning on submitting a quote to disclose if they had unequal access to any information relevant to the acquisition that could provide an unfair competitive advantage (see 3.1207-2(b)).

\* \* \* \* \*

11. Amend section 8.405-2 by revising paragraph (c)(3)(ii) to read as follows:

**8.405-2 Ordering procedures for services requiring a statement of work.**

\* \* \* \* \*

(c) \* \* \*

(3) \* \* \*

(ii) The ordering activity contracting officer shall provide an RFQ that includes a statement of work, the evaluation criteria, and a request that schedule contractors planning on submitting a quote indicate as early as possible whether they had unequal access to any information relevant to the acquisition that could provide an unfair competitive advantage (see 3.1207-2(b)).

\* \* \* \* \*

#### **PART 9—CONTRACTOR QUALIFICATIONS**

12. Revise section 9.000 to read as follows:

##### **9.000 Scope of part.**

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

##### **Subpart 9.5 [Removed and Reserved]**

13. Remove and reserve subpart 9.5.

##### **9.601 [Removed and Reserved]**

14. Remove and reserve section 9.601.

#### **PART 10—MARKET RESEARCH**

15. Amend section 10.001 by—

- a. Removing from paragraph (a) (3) (viii) "and";
- b. Removing the period from the end of paragraph (a) (3) (ix) and adding "; and" in its place; and
- c. Adding paragraph (a) (3) (x) .

The addition reads as follows:

#### **10.001 Policy.**

(a) \* \* \*

(3) \* \* \*

(x) Determine if potential offerors had unequal access to any information relevant to the acquisition that could provide an unfair competitive advantage (see 3.1207-2 (b) ) .

\* \* \* \* \*

### **PART 11—DESCRIBING AGENCY NEEDS**

#### **11.002 [Amended]**

16. Amend section 11.002 by removing from paragraph (c) "subpart 9.5" and adding "subpart 3.12" in its place.

### **PART 12—ACQUISITION OF COMMERCIAL PRODUCTS AND COMMERCIAL SERVICES**

17. Amend section 12.301 by—

- a. Redesignating paragraphs (d) (1) through (d) (14) as paragraphs (d) (3) through (d) (16); and
- b. Adding new paragraphs (d) (1) and (2) .

The additions read as follows:

**12.301 Solicitation provisions and contract clauses for the acquisition of commercial products and commercial services.**

(d) \* \* \*

(1) Insert a provision substantially the same as 52.203-XX, Potential Organizational Conflict of Interest-Disclosure and Representation, as prescribed in 3.1208(a).

(2) Insert a provision substantially the same as 52.203-AA, Unequal Access to Information-Representation, as prescribed in 3.1208(e).

\* \* \* \* \*

18. Amend section 12.504 by adding paragraph (a) (3) to read as follows:

**12.504 Applicability of certain laws to subcontracts for the acquisition of commercial products and commercial services.**

(a) \* \* \*

(3) 41 U.S.C. 2303 note, Preventing Organizational Conflicts of Interest in Federal Acquisition (Pub. L. 117-324) (see 52.203-XX, 52.203-DD, 52.203-MM, 52.203-LL, and 52.203-AA).

\* \* \* \* \*

19. Amend section 12.505 by adding paragraph (d) to read as follows:

**12.505 Applicability of certain laws to contracts for the acquisition of COTS items.**

\* \* \* \* \*

(d) 41 U.S.C. 2303 note, Preventing Organizational Conflicts of Interest in Federal Acquisition (Pub. L. 117-

324) (see 52.203-XX, 52.203-DD, 52.203-MM, 52.203-LL, and 52.203-AA) .

#### **PART 13—SIMPLIFIED ACQUISITION PROCEDURES**

20. Amend section 13.005 by redesignating paragraph (a) (7) as paragraph (a) (8) and adding new paragraph (a) (7) to read as follows:

**13.005 List of laws inapplicable to contracts and subcontracts at or below the simplified acquisition threshold.**

(a) \* \* \*

(7) 41 U.S.C. 2303 note, Preventing Organizational Conflicts of Interest in Federal Acquisition (Pub. L. 117-324) (see 52.203-XX, 52.203-DD, 52.203-MM, 52.203-LL, and 52.203-AA) .

\* \* \* \* \*

#### **PART 15—CONTRACTING BY NEGOTIATION**

##### **15.206 [Amended]**

21. Amend section 15.206 by removing from paragraph (d) introductory text "15.306(e)" and adding "15.306(f)" in its place.

22. Amend section 15.306 by—

- a. Removing from paragraph (d) (3) the phrase "and (e)" and adding "and (f)" in its place;
- b. Redesignating paragraph (e) as paragraph (f); and
- c. Adding a new paragraph (e) .

The addition reads as follows:

### **15.306 Exchanges with offerors after receipt of proposals.**

\* \* \* \* \*

(e) Exchanges with offerors to address organizational conflicts of interest. Exchanges between the Government and an offeror regarding an offeror's mitigation plan or limitation on future contracting do not constitute discussions as long as—

(1) The organizational conflict of interest is not an evaluation factor; and

(2) The exchanges did not result in a change to other parts of the offeror's technical or cost proposal (see 3.1207-4(a)(2)).

\* \* \* \* \*

### **15.604 [Amended]**

23. Amend section 15.604 in paragraph (a)(2) by removing "subpart 9.5" and adding "subpart 3.12" in its place.

### **PART 16—TYPES OF CONTRACTS**

24. Amend section 16.505 by—

a. Removing from the end of paragraph

(b)(1)(iii)(B)(1) "and";

b. Redesignating paragraph (b)(1)(iii)(B)(2) as paragraph (b)(1)(iii)(B)(3); and

c. Adding new paragraph (b)(1)(iii)(B)(2).

The addition reads as follows:

### **16.505 Ordering**

\* \* \* \* \*

(b) \* \* \*

(1) \* \* \*

(iii) \* \* \*

(B) \* \* \*

(2) If appropriate, follow the procedures for addressing unequal access to information (see 3.1207-6); and

\* \* \* \* \*

## **PART 17—SPECIAL CONTRACTING METHODS**

### **17.605 [Amended]**

25. Amend section 17.605 by removing from the third sentence in paragraph (a) “adequately covered” and adding “addressed” in its place.

## **PART 18—EMERGENCY ACQUISITIONS**

### **18.000 [Amended]**

26. Amend section 18.000 by removing from paragraph (b) “FAR Part 3, Improper Business Practices and Personal Conflicts of Interest” and adding “part 3” in its place.

## **PART 37—SERVICE CONTRACTING**

### **37.102 [Amended]**

27. Amend section 37.102 in paragraph (g) by adding (see subparts 3.11 and 3.12)” after “conflicts of interest”.

### **37.110 [Amended]**

28. Amend section 37.110 by removing paragraph (d) and redesignating paragraph (e) as paragraph (d).

**PART 42—CONTRACT ADMINISTRATION AND AUDIT SERVICES**

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

**42.1204 Applicability of novation agreements.**

\* \* \* \* \*

(d) When considering whether to recognize a third party as a successor in interest to Government contracts, the responsible contracting officer shall identify, analyze, and address any organizational conflicts of interest in accordance with subpart 3.12. If the responsible contracting officer determines that an organizational conflict of interest cannot be addressed in accordance with 3.1207-4, but that it is in the best interest of the Government to approve the novation request, a request for a waiver may be submitted in accordance with the procedures at 3.1206.

\* \* \* \* \*

**PART 50—EXTRAORDINARY CONTRACTUAL ACTIONS AND THE SAFETY ACT**

**50.205-1 [Amended]**

30. Amend section 50.205-1 by removing from paragraph (b) "7.105(b)(20)(v)" and adding "7.105(b)(21)(v)" in its place.

**PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES**

31. Add sections 52.203-XX, 52.203-DD, 52.203-LL, 52.203-MM, and 52.203-AA to read as follows:

**52.203-XX Potential Organizational Conflict of Interest—Disclosure and Representation.**

As prescribed in 3.1208(a), insert a provision substantially the same as the following:

POTENTIAL ORGANIZATIONAL CONFLICT OF INTEREST—DISCLOSURE AND  
REPRESENTATION (DATE)

(a) *Definition.* “Organizational conflict of interest,” as used in this provision, is defined in Federal Acquisition Regulation (FAR) clause 52.203-DD, Postaward Disclosure of Organizational Conflict of Interest.

(b) *Notice.* (1) The Contracting Officer has determined that the nature of the work to be performed under the contract resulting from this solicitation is such that it may result in organizational conflicts of interest (see FAR section 3.1204, Examples).

(2) The following entities are disqualified from competing as a prime contractor or a subcontractor, due to an applicable preexisting limitation on future contracting (see FAR 3.1205-2):

*[Contracting Officer shall insert entity name(s), if applicable.]*

(3) The following entities do not have an applicable preexisting limitation on future contracting. However, they participated in the preparation of the statement of

work or other requirements documents, including cost or budget estimates, or otherwise participated in development of the solicitation. These prior activities result in an organizational conflict of interest due to an unfair competitive advantage. As a result, the Contracting Officer has determined the following entities are disqualified from competing as a prime contractor or a subcontractor:

*[Contracting Officer shall insert entity name(s), if applicable.]*

(c) *Proposal requirements—(1) Disclosure.* The Offeror shall—

(i) Describe any relevant limitations on future contracting, the term of which has not yet expired, to which the Offeror or potential subcontractor(s) agreed;

(ii) Disclose all relevant information of which the Offeror is aware regarding past (within the past twelve months), present, or currently planned financial or other interests that could result in an organizational conflict of interest, including information about affiliates, clients, and potential subcontracts, except where such disclosure would constitute a violation of law (e.g., the Securities Exchange Act of 1934, 15 U.S.C. 78a et seq.). At a minimum, such disclosure must include—

(A) The name of the client(s) and a description of the services rendered or planned to be rendered;

(B) Specific client and industry relationships, if identified by the Contracting Officer, that may present a conflict with the work to be performed:

*[Contracting Officer shall insert entity name(s) and relationship(s), if applicable]; and*

(C) The nature and extent of the financial or other interest and any entity or entities involved in the relationship;

(iii) Disclose information withheld pursuant to paragraph (c)(1)(ii) of this provision as soon as the law no longer prohibits disclosure; and

(iv) Describe any professional standards to which the Offeror is subject, or any procedures the Offeror has in place, to prevent organizational conflicts of interest.

(2) *Representation.* The Offeror represents, by submission of its offer, that to the best of its knowledge and belief it has disclosed all relevant information of which the Offeror is aware regarding any organizational conflicts of interest as required in paragraph (c)(1) of this provision.

(3) To the extent that either the Offeror or the Government identifies any financial or other interests that could result in an organizational conflict of interest on the contract resulting from this solicitation, the Offeror shall explain the actions it intends to take to address such organizational conflicts of interest, e.g., by

submitting a mitigation plan and/or accepting a limitation on future contracting. The Offeror shall include information on planned flowdown to subcontracts of clauses 52.203-MM, Mitigation of Organizational Conflicts of Interest, or 52.203-LL, Limitation on Future Contracting.

(4) The Contracting Officer will determine whether an organizational conflict of interest exists and whether the organizational conflict of interest has been adequately addressed. The Contracting Officer may withhold award if an organizational conflict of interest cannot be adequately addressed.

(d) *Disclosure update.* The Offeror shall make a full disclosure in writing to the Contracting Officer within 5 days, if the Offeror identifies, after receipt of proposals but before contract award—

(1) Financial or other interests that could result in an organizational conflict of interest that was not previously disclosed in its proposal in accordance with paragraph (c) of this provision; or

(2) A change to any relevant facts relating to a previously disclosed organizational conflict of interest.

(e) *Resulting contract.* (1) If the Offeror submits a mitigation plan, the Contracting Officer will include the Government-approved mitigation plan and a clause substantially the same as 52.203-MM, Mitigation of

Organizational Conflicts of Interest, in the contract resulting from this solicitation.

(2) If a limitation on future contracting is used, the Contracting Officer will include a clause substantially the same as 52.203-LL, Limitation on Future Contracting in the resultant contract.

(End of provision)

**52.203-DD Postaward Disclosure of Organizational Conflict of Interest.**

As prescribed in 3.1208(b), insert the following clause:

POSTAWARD DISCLOSURE OF ORGANIZATIONAL CONFLICT OF INTEREST (DATE)

(a) *Definition.* "Organizational conflict of interest," as used in this clause, means that an entity or its affiliate(s) has impaired objectivity or an unfair competitive advantage as a result of other activities or relationships with other entities or their affiliates, including with public, private, domestic, and foreign entities. An entity or its affiliate may have an unfair competitive advantage as a result of biased ground rules or through unequal access to information. As used in this definition—

(1) "Biased ground rules" means a situation in which an entity or its affiliate, as part of its performance of a Government contract, has or may have materially influenced the development of the requirement, evaluation criteria, or

other source selection procedures for another Government contract. The primary concern is that the entity could skew the future competition, whether intentionally or not, in favor of itself;

(2) "Entity" means an individual, corporation, or other organization;

(3) "Impaired objectivity" means a situation in which an entity or its affiliate has or may have financial or other interests or an incentive to provide other than impartial advice to the Government, or the entity or its affiliate's objectivity in performing the contract work is or might be otherwise impaired; and

(4) "Unequal access to information" means a situation in which an entity or its affiliate has or may have an unfair competitive advantage because—

(i) Access to the information was provided to the entity or its affiliate by the Government. Such information may include proprietary and source selection information, e.g., proposals, financial information;

(ii) The information is not available to all potential offerors; and

(iii) Having access to the information would assist the entity in obtaining the contract.

(b) *Disclosures.* (1) Except as provided in paragraph (b)(3) of this clause, the Contractor shall

provide the Contracting Officer a full disclosure in writing within 5 days if the Contractor identifies—

(i) Financial or other interests that could result in an organizational conflict of interest that was not previously addressed and for which a waiver has not been granted;

(ii) A change to any relevant facts relating to a previously identified organizational conflict of interest; or

(iii) Specific client and industry relationships, if identified by the Contracting Officer, that may present a conflict with the work to be performed:

*[Contracting Officer shall insert entity name(s), if applicable].*

(2) The Contractor shall disclose organizational conflicts of interest identified during performance of the contract, as well as newly discovered organizational conflicts of interest that existed before contract award. This disclosure shall include a description of—

(i) The organizational conflict(s) of interest in sufficient detail for agency evaluation; and

(ii) Actions to address the organizational conflict(s) of interest that—

(A) The Contractor has taken or proposes to take; or

(B) The Contractor recommends that the Government take.

(3) Where such disclosure would constitute a violation of law (e.g., the Securities Exchange Act of 1934, 15 U.S.C. 78a *et seq.*), the Contractor shall withhold information only until the law no longer prohibits disclosure.

(c) *Termination.* If, in compliance with this clause, the Contractor reports financial or other interests that the Contracting Officer identifies as an organizational conflict of interest that cannot be addressed in a manner acceptable to the Government, the Contracting Officer may terminate the contract, one or more orders, the blanket purchase agreement, or the basic ordering agreement.

(d) *Subcontracts.* The Contractor shall include the substance of this clause, including this paragraph (d), in subcontracts exceeding the simplified acquisition threshold where the work includes or may include tasks that may result in an organizational conflict of interest, other than subcontracts for commercial products, commercial services, and commercially available off-the-shelf items. The Contractor shall modify the terms "Contractor" and "Contracting Officer" appropriately to reflect the change in parties.

(End of clause)

**52.203-MM Mitigation of Organizational Conflicts of Interest.**

As prescribed in 3.1208(c), insert a clause substantially the same as the following:

MITIGATION OF ORGANIZATIONAL CONFLICTS OF INTEREST (DATE)

(a) *Definition.* "Organizational conflict of interest," as used in this clause, is defined in the clause 52.203-DD, Postaward Disclosure of Organizational Conflict of Interest.

(b) *Mitigation plan.* The Government-approved organizational conflict of interest mitigation plan (mitigation plan) and its obligations are hereby incorporated as an attachment to the contract. While implementation of a mitigation plan is the Contractor's responsibility, the Government retains the right to review implementation of the plan.

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

(2) The Contractor shall propose an update to the mitigation plan within 30 days of—

(i) Any changes to the legal construct of its organization, any subcontractor changes, or any significant management or ownership changes that impact the mitigation plan; or

(ii) A change to the contract requirements that impacts the mitigation plan.

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

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

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

(e) *Subcontracts.* (1) The Contractor shall include the substance of this clause, including this paragraph (e), in subcontracts exceeding the simplified acquisition threshold where the subcontract work is addressed in the mitigation plan, other than subcontracts for commercial products, commercial services, and commercially available off-the-shelf items.

(2) The Contractor shall modify the terms "Contractor" and "Contracting Officer" appropriately to reflect the change in parties.

(3) The Contractor shall provide the Contracting Officer with information on the flowdown of this clause upon request.

(End of clause)

**52.203-LL Limitation on Future Contracting.**

As prescribed in 3.1208(d), insert a clause substantially the same as the following:

LIMITATION ON FUTURE CONTRACTING (DATE)

(a) *Limitation.* The Contractor and any of its affiliates shall be disqualified from performing \_\_\_\_\_ *[Before contract award, Contracting Officer to describe the work that the Contractor will be disqualified from performing]* as a contractor or as a subcontractor. The disqualification will last until \_\_\_\_\_. *[Before contract award, Contracting Officer to determine appropriate length of prohibition or identify the appropriate ending event for the limitation on future contracting.]*

(b) *Subcontracts.* (1) The Contractor shall include the substance of this clause, including this paragraph (b), in subcontracts exceeding the simplified acquisition threshold where the work includes tasks that are encompassed by the description of work provided in paragraph (a) of this clause, other than subcontracts for commercial products, commercial services, and commercially available off-the-shelf items. The Contractor shall modify

the terms "Contractor" and "Contracting Officer" appropriately to reflect the change in parties.

(2) Upon request, the Contractor shall provide information to the Contracting Officer with regard to flowdown of this clause.

(End of clause)

**52.203-AA Unequal Access to Information-Representation.**

As prescribed in 3.1208(e), insert a provision substantially the same as the following:

UNEQUAL ACCESS TO INFORMATION-REPRESENTATION (DATE)

(a) *Preproposal requirements.* The Offeror shall determine, to the best of its knowledge and belief, whether it or any of its affiliates had unequal access to any information that could provide an unfair competitive advantage as described in Federal Acquisition Regulation (FAR) 3.1204(b)(2). If so, the Offeror shall inform the Contracting Officer of such access prior to the submission of its offer. The Offeror shall also advise the Contracting Officer of any actions that the Offeror proposes to take to address the situation pursuant to FAR 3.1207-4(d).

(b) *Representation.* (1) By submission of its offer, the Offeror represents, to the best of its knowledge and belief, that-

(i) No firewall was necessary because the Offeror did not have an unfair competitive advantage due to unequal access to information; or

(ii) If a firewall was planned to mitigate the impact of an unfair competitive advantage due to unequal access to information, the firewall was implemented and was not breached during the preparation of this offer; or

(2) By checking this box ☐, the Offeror represents, to the best of its knowledge and belief, that the planned firewall was not implemented or was breached, and additional explanatory information is attached.

(End of provision)

32. Amend section 52.212-3 by—

a. Revising the date of the provision; and

b. Removing from paragraph (t) introductory text “12.301(d) (1)” and adding “12.301(d) (3)” in its place.

The revision reads as follows:

**52.212-3 Offeror Representations and Certifications—  
Commercial Products and Commercial Services.**

\* \* \* \* \*

OFFEROR REPRESENTATIONS AND CERTIFICATIONS—COMMERCIAL PRODUCTS AND

COMMERCIAL SERVICES (DATE)

\* \* \* \* \*

33. Amend section 52.212-5 by—

a. Revising the date of the clause;

b. Redesignating paragraphs (c)(1) through (10) as paragraphs (c)(4) through (13); and

c. Adding new paragraphs (c)(1) through (3).

The revision and additions read as follows:

**52.212-5 Contract Terms and Conditions Required To  
Implement Statutes or Executive Orders—Commercial Products  
and Commercial Services.**

\* \* \* \* \*

CONTRACT TERMS AND CONDITIONS REQUIRED TO IMPLEMENT STATUTES OR EXECUTIVE

ORDERS—COMMERCIAL PRODUCTS AND COMMERCIAL SERVICES (DATE)

\* \* \* \* \*

(c) \* \* \*

\_\_\_(1) 52.203-DD, Postaward Disclosure of  
Organizational Conflict of Interest (Pub. L. 117-324) (41  
U.S.C. 2303 note).

\_\_\_(2) 52.203-MM, Mitigation of Organizational  
Conflicts of Interest (Pub. L. 117-324) (41 U.S.C. 2303  
note).

\_\_\_(3) 52.203-LL, Limitation on Future Contracting  
(Pub. L. 117-324) (41 U.S.C. 2303 note).

\* \* \* \* \*

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