

Audit



Report

OFFICE OF THE INSPECTOR GENERAL

**ORGANIZATIONAL AND CONSULTANT
CONFLICTS OF INTEREST**

Report No. 94-174

August 10, 1994

Department of Defense

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Acronyms

| | |
|------|--------------------------------------|
| DCAA | Defense Contract Audit Agency |
| FAR | Federal Acquisition Regulation |
| OFPP | Office of Federal Procurement Policy |



**INSPECTOR GENERAL
DEPARTMENT OF DEFENSE
400 ARMY NAVY DRIVE
ARLINGTON, VIRGINIA 22202-2884**

August 10, 1994

**MEMORANDUM FOR DIRECTOR, DEFENSE PROCUREMENT
ASSISTANT SECRETARY OF THE NAVY (FINANCIAL
MANAGEMENT)
ASSISTANT SECRETARY OF THE AIR FORCE
(FINANCIAL MANAGEMENT AND COMPTROLLER)
DIRECTOR, ADVANCED RESEARCH PROJECTS
AGENCY
DIRECTOR, DEFENSE LOGISTICS AGENCY
DIRECTOR, DEFENSE NUCLEAR AGENCY
AUDITOR GENERAL, DEPARTMENT OF THE ARMY**

**SUBJECT: Audit Report on Organizational and Consultant Conflicts of Interest
(Report No. 94-174)**

We are providing this report for your review and comments. The audit was requested by the Executive Associate Director, Office of Management and Budget, through the President's Council on Integrity and Efficiency. The report discusses DoD compliance with Federal Acquisition Regulation policies and procedures on organizational and consultant conflicts of interest. Management comments on a draft of this report were considered in preparing the final report.

As a result of management comments, we redirected two recommendations, revised three recommendations, and added a recommendation. DoD Directive 7650.3 requires that all recommendations be resolved promptly. Therefore, all addressees are requested to provide comments on the material internal control weaknesses identified and the unresolved recommendations by October 11, 1994. See the chart at the end of each finding for the unresolved recommendations and the specific requirements for your comments.

We appreciate the cooperation and courtesies extended to the audit staff. If you have any questions on this audit, please contact Mr. Garold E. Stephenson, Audit Program Director, at (703) 604-9332 (DSN 664-9332) or Mr. Eugene E. Kissner, Audit Project Manager, at (703) 604-9213 (DSN 664-9213). Copies of the final report will be distributed to the organizations and individuals listed in Appendix J. The audit team members are listed inside the back cover.

David K. Steensma

David K. Steensma
Deputy Assistant Inspector General
for Auditing

Office of the Inspector General, DoD

Report No. 94-174
(Project No. 3CH-5012)

August 10, 1994

ORGANIZATIONAL AND CONSULTANT CONFLICTS OF INTEREST

EXECUTIVE SUMMARY

Introduction. On December 8, 1989, the Office of Federal Procurement Policy issued Policy Letter 89-1, "Conflict of Interest Policies Applicable to Consultants," to provide guidance on conflict of interest standards for persons providing consultant services to the Government and to provide procedures to promote compliance with the standards. The guidance in the policy letter was incorporated into the Federal Acquisition Regulation subpart 9.5, "Organizational and Consultant Conflicts of Interest," by Federal Acquisition Circular 90-1, "Interim Rule for Consultants and Conflicts of Interest," October 22, 1990. We performed this audit in response to a request from the Executive Associate Director, Office of Management and Budget, that the Federal Inspectors General examine implementation of Federal Acquisition Regulation subpart 9.5 within their departments or agencies.

Objectives. The primary purpose of this audit was to determine whether DoD contracting officers had effectively implemented Federal Acquisition Regulation conflict of interest policies and procedures when planning procurements and awarding contracts and whether DoD contracting officers effectively identified and prevented potential conflicts of interest. We also reviewed the effectiveness of internal controls and management's implementation of the DoD Internal Management Control Program.

Audit Results. DoD contracting officers have not effectively implemented Federal Acquisition Regulation conflict of interest policies and procedures.

- o DoD contracting officers did not include one or both of the conflict of interest provisions in 33 of 77 contract solicitations in our judgmental sample that should have included the provisions. Further, DoD contracting officers did not follow up with apparent successful offerers to obtain required certifications for 44 contract solicitations that had provisions but lacked certificates. Consequently, information concerning potential conflicts of interest was not available for contracting officer consideration before contract award (Finding A).

- o DoD contracting officers did not include a clause restricting the future activities of the contractors in eight contracts that involved potential conflicts of interest. As a result, the contractors may have an unfair competitive advantage when bidding for subsequent contracts or subcontracts because of work performed on the contracts (Finding B).

Internal Controls. The lack of adherence by DoD contracting officers to the policies and procedures in Federal Acquisition Regulation subpart 9.5 represents material internal control weaknesses that could result in conflicts of interest in contract awards. The DoD Internal Management Control Program did not identify the weaknesses because management did not include organizational conflicts of interest as an assessable unit. See Part I for a summary of internal controls reviewed and Part II for the details of the weaknesses.

Potential Benefits of Audit. We did not identify any potential monetary benefits during the audit; however, we did identify opportunities to improve compliance with regulations and prevent organizational conflicts of interest. See Appendix H for a summary of potential benefits resulting from the audit.

Summary of Recommendations. We recommend revisions to the Federal Acquisition Regulation to require offerers to submit organizational conflict of interest certificates and to disallow marketing consultant costs when contractors fail to report the use of marketing consultants. We recommend that guidance be issued requiring contracting officers to obtain organizational conflict of interest certificates for applicable contracts and to refer to agency heads for resolution instances in which contractors refuse to submit the certificates. We recommend that internal controls be established to ensure contractor compliance with organizational and consultant conflict of interest certification requirements. We also recommend that eight contracts be modified to include clauses that restrict the contractors from bidding on certain future contracts and subcontracts and that information be provided on implementation of Director, Defense Procurement, guidance on including organizational and consultant conflict of interest requirements in procurement management reviews.

Management Comments. The Director, Defense Procurement, did not agree with the recommendation to revise the Federal Acquisition Regulation. The Director did issue a memorandum that requires the Military Departments and the Defense agencies to include Federal Acquisition Regulation organizational and consultant conflict of interest requirements in procurement management reviews. The Army and the Navy suggested alternatives to terminating contracts if a contractor fails to submit a certification after the contracting officer requested the certification. The Army also suggested changes to two other recommendations, and the Navy noted a discrepancy between Office of Federal Procurement Policy and Federal Acquisition Regulation guidance. The Army and the Navy did not comment on one recommendation, the Air Force incorrectly stated that two recommendations were not directed to it, and the Defense Nuclear Agency did not comment on four recommendations. The Army, the Navy, and the Defense Nuclear Agency generally concurred and are either fully or partially implementing the other recommendations directed to them. The Advanced Research Projects Agency concurred and is implementing all recommendations directed to it. See Part II for a full discussion of management's responsiveness and Part IV for the complete text of the comments.

Audit Response. We redirected to the Service Acquisition Executives and the Directors of the Advanced Research Projects Agency and the Defense Nuclear Agency the recommendation to establish specific management controls to improve compliance with organizational and consultant conflict of interest requirements. We also added a recommendation for the Service Acquisition Executives and the Director, Defense Logistics Agency, to provide information on when and how they will implement Director, Defense Procurement, guidance on including conflict of interest requirements in procurement management reviews. We revised the recommendation on changes to the Federal Acquisition Regulation to include a requirement for contracting officers to obtain from contractors who do not file certificates written statements giving reasons why the certifications cannot be made. We revised the recommendation on terminating contracts to require contracting officers to refer instances in which contractors refuse to provide certificates to the head of contracting for resolution. We also revised the recommendation on modifying contracts to allow contracting officers to take other appropriate action if contract modifications are not obtainable. We request that the Director, Defense Procurement; the Army; the Navy; the Air Force; and the Directors of the Advanced Research Projects Agency and the Defense Nuclear Agency provide final comments on the report by October 11, 1994.

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This report was prepared by the Contract Management Directorate, Office of the Assistant Inspector General for Auditing, Department of Defense.

Part I - Introduction

Background

Organizational Conflict of Interest Policy Required. As a result of an investigation of DoD procurement fraud ("Operation Ill Wind"), Public Law 100-463, "Department of Defense Appropriation Act, 1989," section 8141, requires the Administrator, Office of Federal Procurement Policy (OFPP), to issue policy guidance on conflict of interest standards for consultants. Section 8141 further requires issuance of Government-wide regulations to implement consultant conflict of interest policies. Section 8141 is codified in title 41, United States Code, section 405b, "Conflicts of Interest Standards for Individuals Providing Consulting Services."

OFPP Policy Issued. On December 8, 1989, the Administrator, OFPP, issued Policy Letter 89-1, "Conflict of Interest Policies Applicable to Consultants" (Appendix A). The policy letter contains guidance on conflict of interest standards for persons providing consulting services to the Government and to its contractors and establishes procedures to promote compliance with those standards.

Federal Acquisition Regulation Policy Issued. On October 22, 1990, the Federal Acquisition Regulation (FAR) Secretariat, General Services Administration, published Federal Acquisition Circular 90-1, "Interim Rule for Consultants and Conflicts of Interest," in the *Federal Register*. Federal Acquisition Circular 90-1 amends FAR subpart 9.5, "Organizational and Consultant Conflicts of Interest," to implement OFPP Policy Letter 89-1, and provides guidance on responsibilities, general rules, and procedures for identifying, evaluating, and resolving organizational conflicts of interest. The final rule was published on October 25, 1991, in Federal Acquisition Circular 90-8 item IV, "Consultants-Conflict of Interest."

Defining Organizational Conflicts of Interest. FAR 9.501, "Definitions," states that an organizational conflict of interest results when, because of other activities or relationships with other persons, a person is unable or potentially unable to render impartial assistance or advice to the Government, the person's objectivity in performing the contract work is or might be otherwise impaired, or a person has an unfair competitive advantage. FAR 9.502, "Applicability," states that organizational conflicts of interest may occur on any kind of acquisition, but are more likely to occur in contracts involving:

- o management support services,
- o consultant or other professional services,
- o contractor performance of or assistance in technical evaluations, or
- o systems engineering or technical direction work performed by a contractor who does not have overall contractual responsibility for development or production.

Contracting Officer's Role in Identifying Organizational Conflicts of Interest. FAR 9.505, "General Rules," provides general rules for the contracting officer to apply to identify and to avoid organizational conflicts of interest. Contracting officers are instructed to analyze planned acquisitions and to avoid, neutralize, or mitigate any potential conflicts of interest before contract award.

Provision and Clause To Restrict Bidding on Future Contracts. If the contracting officer decides that a particular acquisition involves a significant potential organizational conflict of interest, the contracting officer usually places a provision in the contract solicitation that will restrict the winning contractor from bidding on certain future contracts. The provision is normally incorporated as a clause into the final contract.

Provision To Disclose Use of Marketing Consultants in Contract Solicitations Expected To Be More Than \$200,000. In solicitations for contracts greater than \$200,000, contracting officers must include a provision that requires the apparent successful offerers to disclose the use of marketing consultants and either to certify that no organizational conflicts of interest exist or to disclose any potential conflict of interest that exists. The DoD Contract Action Reporting System showed that DoD awarded 14,141 contracts greater than \$200,000 during FY 1992. Obligations on the 14,141 contracts amounted to about \$36 billion during FY 1992.

Provision To Disclose Performance of Related Services in Contract Solicitations for Advisory and Assistance Services Expected To Be More Than \$25,000. A provision must be included in solicitations for advisory and assistance services contracts greater than \$25,000. The provision requires apparent successful offerers to submit a certificate disclosing services concerning the subject matter of the solicitation that were provided to the Government or other clients during the 12 months preceding the date of the certification. The DoD Contract Action Reporting System showed that DoD awarded 272 contracts for advisory and assistance services during FY 1992. The 272 contracts had obligations of about \$1.8 billion. However, DoD also reported that obligations on contracts for consulting services amounted to about \$3 billion during FY 1992. Consulting services include management and professional support services; studies, analyses, and evaluations; and engineering and technical services.

Results of Failure to Provide Correct Certification. Failure by the offerer to provide a required certification may result in the offerer being determined ineligible for award, and false certifications may result in the assessment of penalties. The complete text of the applicable FAR subpart and provisions is in Appendix B.

Objectives

The primary purpose of this audit was to determine whether DoD contracting officers had effectively implemented FAR conflict of interest policies and

Introduction

procedures when planning procurements and awarding contracts, and whether DoD contracting officers effectively identified and prevented potential conflicts of interest. The specific objectives were to determine whether DoD contracting officers adhered to the applicable FAR conflict of interest policies and procedures when planning procurements and awarding contracts, and whether their actions were effective to identify and to prevent potential conflicts of interest. We also reviewed the effectiveness of internal controls and management's implementation of the DoD Internal Management Control Program.

Scope and Methodology

Universe and Sample. From the DoD Contract Action Reporting System, we identified 123 DoD contracting activities that awarded services contracts greater than \$200,000 during FY 1992. We judgmentally selected 46 of the DoD contracting activities and sent each of the 46 a questionnaire on conflicts of interest and the implementation of FAR subpart 9.5. We selected for review 101 contracts awarded by 9 of the 46 contracting activities that responded to the questionnaire. We examined contract actions awarded from January 1, 1991, through December 31, 1992. The contracting activities and contracts selected for review are shown in Appendix C. The total value of the 101 contracts was \$1.4 billion. Factors considered in selecting contracting activities and contracts included the types of services contracted, whether the contracting activity also awarded production contracts, and whether the contracting activity's response to the questionnaire contained information that indicated that a restrictive clause was included in a contract to prevent a conflict of interest on a future contract.

Methodology. All 46 contracting activities responded to the questionnaire with information on activity implementation of FAR subpart 9.5. We verified questionnaire responses at 15 contracting activities by reviewing contract files and interviewing responsible contracting officials. We also analyzed contract files and interviewed contracting officials responsible for 101 selected contracts at 9 of the 15 contracting activities. Additionally, for 16 sample services contracts, we examined subsequent contracts awarded by the contracting activity to the same contractor or known subcontractors to determine whether award of the subsequent contract had any connection to the sample services contract and would have created a conflict of interest. We did not use statistical sampling procedures to conduct this audit.

Use of Computer-Processed Data. We relied on computer-processed data from the DoD Contract Action Reporting System to determine which contracting activities would receive questionnaires and to determine audit sample selection. Although we did not perform a formal reliability assessment of the computer-processed data, we determined that contract numbers, award dates, contractors, and Federal supply codes on the contracts reviewed generally agreed with the information in the computer-processed data. We did not find errors that would preclude use of the computer-processed data to meet the objectives of the audit or that would change the conclusions in this report.

Audit Period, Locations, and Standards. We performed this program audit from February 1993 through November 1993 in accordance with the auditing standards issued by the Comptroller General of the United States, as implemented by the Inspector General, DoD. Accordingly, we included tests of internal controls considered necessary. Appendix I lists the organizations visited or contacted during the audit.

Internal Controls

Internal Controls Reviewed. The audit evaluated internal controls over organizational and consultant conflicts of interest. Specifically, we evaluated procedures at the 15 DoD contracting activities for including in applicable solicitations and contracts a clause restricting the contractor from bidding on certain future contracts. We also evaluated procedures at the 15 contracting activities for obtaining from successful offerers certifications required by the FAR concerning use of marketing consultants and potential conflicts of interest.

Internal Control Weaknesses Identified. The audit identified material internal control weaknesses as defined by DoD Directive 5010.38, "Internal Management Control Program," April 14, 1987. Internal controls were not established or effective to ensure that FAR provisions and clauses, required to identify and prevent potential conflicts of interest in current and future contract awards, were incorporated in applicable contract solicitations and contracts. The weaknesses are discussed in Findings A and B.

The DoD Internal Management Control Program failed to prevent or detect the weaknesses because management did not identify organizational conflicts of interest as an assessable unit. The Advanced Research Projects Agency, the only activity that identified conflicts of interest as an assessable unit, identified personal but not organizational conflicts of interest.

Potential Benefits. Implementation of recommendations A.1., A.3., A.4., B.1.a., B.1.b., and B.2 will correct the weaknesses. No monetary benefits are associated with correcting the weaknesses. See Appendix H for the potential benefits resulting from the audit. A copy of the report will be provided to the senior officials in charge of internal controls for the Military Departments, the Advanced Research Projects Agency, and the Defense Nuclear Agency.

Prior Audits and Other Reviews

No prior audits have addressed the implementation of the amended FAR subpart 9.5 in DoD. However, the General Accounting Office and the Inspector General, DoD, issued several reports that discussed organizational conflicts of interest. Also, in October 1993, the General Accounting Office began a Government-wide audit on organizational conflicts of interest that includes the implementation of the amended FAR subpart 9.5 by several Navy

Introduction

contracting activities. In April 1993, the President's Council on Integrity and Efficiency Project Subcommittee issued a survey report, "Survey of the Implementation of FAR Provisions Pertaining to Conflicts of Interest," that discusses the implementation of the amended FAR subpart 9.5 by 19 Federal agencies other than DoD. The report states that actual improvement in the effectiveness of Federal agencies in detecting organizational conflicts of interest was questionable, given the general lack of compliance with the certificate filing requirements of FAR subpart 9.5. The report concludes that Federal agencies had not effectively implemented the amended FAR subpart 9.5 and that the Office of Management and Budget and FAR guidance needed improvement. The report recommended that OFPP and the General Services Administration work jointly to revise the guidance. Appendix D summarizes nine prior reports and other reviews concerning DoD organizations.

Other Matters of Interest

We were requested by the Office of Management and Budget to obtain the answers to seven questions regarding the implementation of FAR subpart 9.5 by DoD. We included the questions in the questionnaire sent to 46 DoD contracting activities. See Appendix E for the questions and a summary of the responses.

Part II - Findings and Recommendations

Finding A. Organizational Conflicts of Interest Certificates

DoD contracting officers did not obtain all organizational and consultant conflicts of interest certificates required by the FAR for 77 of the 101 contracts reviewed. The other 24 contracts did not require certificates. The certificates were not obtained for 33 of the 77 contracts because contracting officers did not include in the contract solicitations 1 or both FAR provisions that require apparent successful offerers to submit the certificates. Certificates were not obtained from the contractors for the remaining 44 contracts even though the contract solicitations contained the required FAR provisions. As a result of omitting the FAR provisions and of not notifying apparent successful offerers, DoD contracting officers obtained only four certificates. Information concerning actual or potential conflicts of interest that may have been contained in certificates was not available for use by contracting officers before awarding the contracts, and may have resulted in contract awards when a conflict of interest or an unfair competitive advantage existed.

Background

Certification Requirements. FAR 9.507, "Solicitation Provisions and Contract Clause," requires contracting officers to include up to two provisions that require contractors to submit certifications on marketing consultants used and on advisory and assistance services contracts. A contract solicitation may require either provision, both provisions, or no provision.

Marketing Consultant Certifications. DoD contracting officers should include the provision FAR 52.209-7, "Organizational Conflicts of Interest Certificate - Marketing Consultants," in solicitations for contracts expected to exceed \$200,000. The provision states that a contractor who uses marketing consultants and is the apparent successful offerer for a contract shall submit a certificate giving information about each marketing consultant and the services provided by the marketing consultant. FAR 9.501 defines a marketing consultant as any independent contractor who furnishes advice, information, direction, or assistance to an offerer or any other contractor in support of the preparation or submission of an offer for a Government contract by that offerer. The apparent successful offerer must also provide a certificate signed by each marketing consultant stating that the marketing consultant was informed of FAR subpart 9.5 and that the marketing consultant either has not provided an unfair competitive advantage to the offerer or has disclosed any competitive advantage that may exist to the offerer.

Advisory and Assistance Services Certifications. Contracting officers should include the provision FAR 52.209-8, "Organizational Conflicts of Interest

Finding A. Organizational Conflicts of Interest Certificates

Certificate - Advisory and Assistance Services," in solicitations for advisory and assistance services contracts expected to exceed \$25,000. The provision states that a contractor who is the apparent successful offerer for a contract exceeding \$25,000 shall submit a certificate that contains information on any services provided to the Government concerning the subject matter of the contract solicitation during the past 12 months (may be extended to 36 months by the head of the contracting organization). The certificate should also contain a statement either that no actual or potential conflict of interest or unfair competitive advantage exists or that any actual or potential conflict of interest or unfair competitive advantage that does or may exist was communicated in writing to the contracting officer.

Use of FAR Provisions

Contracting Activities' Responses to Questionnaire on Organizational Conflicts of Interest. We requested 46 DoD contracting activities to respond to a questionnaire that included questions concerning the use of the FAR organizational conflicts of interest provisions in contract solicitations issued from October 1990 through December 1992. The responses from the 46 contracting activities showed that:

- o 13 contracting activities included FAR provision 52.209-7 but not FAR provision 52.209-8 in their contract solicitation,
- o 8 activities did not include either FAR provision, and
- o 20 activities included both FAR provisions.

Five contracting activities did not answer the questions concerning inclusion of the FAR provisions in contract solicitations.

Of the 21 contracting activities that had not used 1 or both FAR provisions, 9 activities stated they did not contract for advisory and assistance services or items or services covered by FAR subpart 9.5. Two contracting activities stated that the FAR provisions were omitted in error and that corrective action would be taken. The other 10 contracting activities did not state why the FAR provisions were excluded from their contract solicitations.

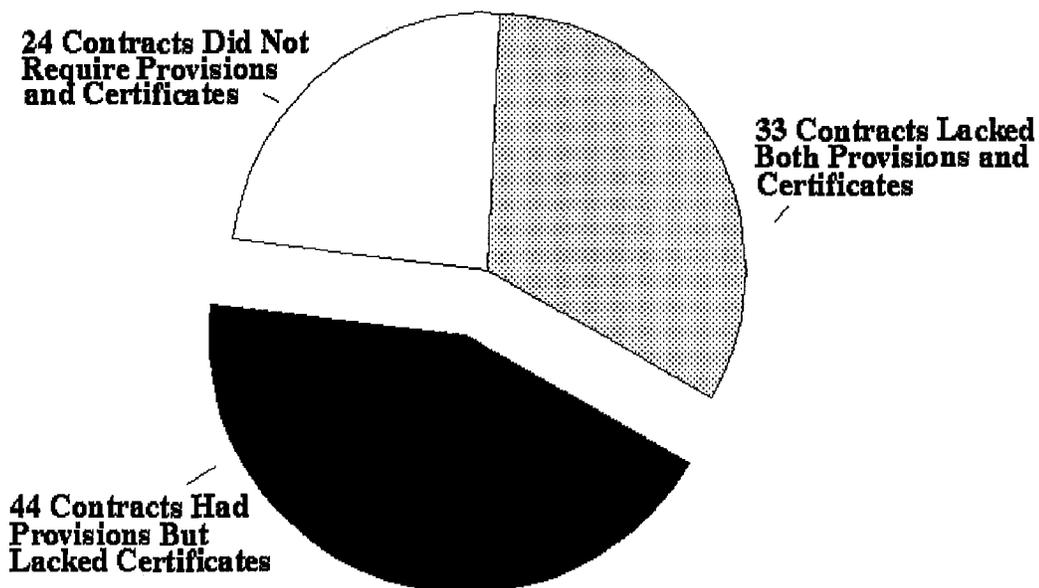
Sample Contracts With and Without FAR Provisions. At 9 of the 46 contracting activities, we reviewed 101 contracts to determine whether the FAR provisions were included and whether certificates were received. We determined the following about the 101 contracts.

- o For 77 of the 101 contract solicitations, 1 or both FAR provisions should have been included.
- o For 44 contracts, 1 or both provisions were properly included in the solicitations.

Finding A. Organizational Conflicts of Interest Certificates

o For 33 contract solicitations, valued at \$497 million, 1 or both provisions were omitted (26 solicitations did not include FAR provision 52.209-7, 2 did not include FAR provision 52.209-8, and 5 did not include both FAR provisions).

The following figure shows that marketing consultant and advisory and assistance services certificates were not obtained when the applicable FAR provisions were not included in the solicitations for 33 contracts, and that 1 or both of the certificates were not obtained even when the FAR provisions were included in the solicitations for 44 contracts. In no applicable case were all required certificates obtained, even when required solicitation provisions were included. Appendix C lists the 101 contracts reviewed at the 9 activities.



Compliance With Certification Requirements for 101 Contracts Reviewed

Contracting Officer Awareness of FAR Provisions. We interviewed the contracting officials for 31 of the 33 contracts when 1 or both FAR provisions were not included in the solicitations.

o Contracting officers who awarded 14 of the 33 contracts were unaware of the FAR requirement to include the provisions.

o Contracting officers who awarded 17 of the contracts stated the FAR provisions were overlooked when the contract solicitations were prepared.

o Contracting officers for the other two contracts were not available to discuss the contract solicitation.

Contractor Certifications Received

Number of Conflicts of Interest Certificates Received. DoD does not have a data base that identifies the contract solicitations that include the provisions and the contractor certifications that are received. In the questionnaire to the 46 contracting activities, we requested information on the certificates received for contracts awarded as a result of solicitations issued from October 1990 through December 1992 that included either or both FAR provisions. Only 9 of the 46 contracting activities reported the number of certificates received. The 9 contracting activities received a total of 31 certificates, 12 required by FAR provision 52.209-7 and 19 required by FAR provision 52.209-8. However, because we sent the questionnaire only to the 46 DoD contracting activities in our audit sample, the actual number of certificates received may be higher. Also, one of the 46 DoD contracting activities that did receive a questionnaire stated that certificates were received, but did not provide the number of certificates received.

Contractor Certifications Received on Sample Contracts. Of the 77 contracts reviewed that required 1 or both FAR organizational conflicts of interest provisions, the solicitations for 49 contracts (including 5 solicitations that needed both provisions but only included 1 provision) contained 1 or both provisions. However, only four certificates were received on four of the contracts, and none of the four certificates fully satisfied the FAR certification requirements for the contracts. This noncompliance occurred because the contracting officer included one, rather than both, FAR provisions in the contract solicitations, or the contracting officer included both provisions but only obtained the certificate applicable to one provision.

Reasons for Few Contractor Certificates Received. Contracting officers at 16 of the 46 contracting activities stated that the certificates required by FAR provision 52.209-7 were not submitted because the contractors did not employ marketing consultants. Contracting officers at five contracting activities stated that contractors probably ignored FAR provision 52.209-8 when it was included in the contract solicitations. However, when FAR provision 52.209-8 is included in contract solicitations, all contractors, when notified that they are apparent successful offerers, are required to submit the certificate.

We believe that contractors did not submit certificates because most contracting officers did not request the certificates or did not require the certificates before contract award. Also, contractors had no incentive to submit the certificates.

Improving Internal Management Controls

At the 15 contracting activities visited, internal management controls had not been established to ensure that FAR provisions 52.209-7 and 52.209-8 were included in applicable contract solicitations and that organizational conflicts of interest certificates were obtained from contractors. We believe that this

Finding A. Organizational Conflicts of Interest Certificates

internal control weakness is widespread at DoD contracting activities and that greater senior management attention and direction is required. Accordingly, the Director, Defense Procurement, should request the Service Acquisition Executives and the Directors of Defense agencies to give particular attention to organizational conflicts of interest certification requirements. Additionally, the Service Acquisition Executives and the Directors of the Defense agencies should require their contracting activities to establish management controls to ensure that the FAR requirements are met.

Adequacy of Current Guidance

Post-Selection Versus Initial Proposal Submission of Certificates. DoD contracting officials expressed concern that obtaining the organizational conflicts of interest certificates required by the FAR after all other award factors have been evaluated could lead to a change in the award decision and could significantly delay contract award. Submission of the certificates required by FAR provisions 52.209-7 and 52.209-8 by all offerers with their initial proposals would avoid this potential problem. Early submission would also eliminate the requirement for contracting officers to notify apparent successful offerers to submit the certificates and would avoid the confusion on whether the successful offerer, in the absence of any other notification, should submit certificates when tendered the contract. Additionally, any actual or potential conflict of interest or unfair competitive advantage identified in the certificates could be eliminated or resolved during proposal evaluation without delaying contract award.

Enforcement of Filing Requirements for Certificates. The FAR provides that persons who are required to certify but who willfully fail to do so may be determined to be nonresponsive and, therefore, may not be awarded a contract. The FAR also provides that those who willfully misrepresent any fact in any certificate may be subject to penalties associated with false certifications or such other provisions provided for by law or regulation. The DoD contracting activities contacted did not report taking any action against a contractor for failing to submit a required certification or for filing a false certification.

The Defense Contract Audit Agency (DCAA) performs audits of contractor proposals, overhead rates, and consultant service costs. The audits examine the reasonableness, allocability, and allowability of the consultant costs charged to Government contracts. Past audits by DCAA have determined that major Defense contractors use sales and marketing consultants to complement in-house marketing activities. DCAA audits can be a control mechanism to verify that contractors file marketing consultant certifications. As of March 1994, DCAA audit guidance relative to audits of professional and consultant service costs does not include steps for assessing compliance with FAR organizational conflict of interest certification requirements. We believe that, when requested, DCAA could review contractor compliance as part of its audits of consultant service costs and could provide information needed by the contracting officer on contractor compliance. We also believe that FAR 31.205-33, "Professional and

Finding A. Organizational Conflicts of Interest Certificates

Consultant Service Costs," should be revised to require that marketing consultant costs allocated to Government contracts be disallowed if the contractors and the marketing consultants fail to submit the certifications required by the FAR.

Discrepancy Between OFPP and FAR Guidance. A discrepancy exists between the guidance concerning submission of certificates contained in OFPP Policy Letter 89-1 and the FAR. The OFPP guidance requires contractors to either file certificates or to provide a written statement to the contracting officer giving the reasons why no such certification can be made. However, FAR subpart 9.5 and FAR provisions 52.209-7 and 52.209-8 do not require contractors to provide reasons for not submitting the certifications to the contracting officer. The FAR should be revised to conform with the guidance contained in OFPP Policy Letter 89-1.

Director, Defense Procurement, Position on FAR Changes. We discussed with the Director, Defense Procurement, the need for changes to the FAR. The Director disagreed with changing the FAR to require all offerers to submit with their proposals the certificates required by FAR provisions 52.209-7 and 52.209-8, and to disallow marketing consultant costs if the contractor and the marketing consultant failed to submit the certificates required by FAR provision 52.209-7. The Director stated that requiring all offerers to submit the conflict of interest certificates imposed an unreasonable burden on offerers who may not otherwise be eligible for contract award. The Director also disagreed with asking offerers to examine every possible conflict of interest situation before contract award when subcontractors have yet to be selected. With regard to disallowing marketing consultant costs, the Director said that cost principles are designed for preaward pricing of contracts and the postaward determination of cost allowability. To use a cost principle as a punitive measure against contractors who fail to submit conflicts of interest certificates is not appropriate.

Inspector General, DoD, Comments on Director, Defense Procurement, Position. We do not agree with the Director's position. We believe that requiring offerers to submit applicable certifications with their proposals is not an unreasonable requirement in light of the burden that would be placed on the apparent successful offerer, the contracting activity, and the requiring activity should a certificate submitted under the current FAR guidance cause a change in the award decision or otherwise significantly increase the lead time required to award the contract.

Additionally, we do not believe that the certification process is burdensome. The information required to complete the certificates required by FAR provisions 52.209-7 and 52.209-8 should be readily available to all offerers. FAR provision 52.209-7 requires offerers responding to solicitations expected to exceed \$200,000 who employ marketing consultants in connection with a contract to submit a certificate giving information about the marketing consultant and the services provided by the marketing consultant. The offerer must also submit a certificate signed by the marketing consultant stating the marketing consultant's awareness of FAR subpart 9.5 and whether the marketing consultant has provided an unfair competitive advantage to the

Finding A. Organizational Conflicts of Interest Certificates

offerer. FAR provision 52.209-8 requires offerers responding to solicitations for advisory and assistance services contracts expected to exceed \$25,000 to submit a certificate that contains information on services provided to the Government during the previous 12 months that concerned the subject matter of the contract solicitation and whether an actual or potential conflict of interest or unfair competitive advantage exists.

We do not understand the Director's objection to asking offerers to examine possible conflict of interest situations before contract award. The existing FAR guidance already requires the apparent successful offerer to submit certificates before contract award; our position merely extends the existing requirement to all offerers.

Regarding marketing consultant costs, we agree with the Director, Defense Procurement, that one of the uses of cost principles is the postaward determination of cost allowability. The purpose of our recommended FAR change is to include in the cost principles as an unallowable cost the services of marketing consultants in preparation or submission of an offer for a Government contract when the contractor did not submit the organizational conflicts of interest certificates required by FAR provision 52.209-7. Nonsubmission of the certificates indicates that the contractor did not use the services of marketing consultants. Clearly, if the contractor does not submit the certificates, any related marketing consultant costs claimed by the contractor should not be allowed.

DCAA Position on Reviewing Compliance with the Filing Requirements of FAR Provision 52.209-7. We discussed with the Assistant Director for Policy and Plans, DCAA, the need for a change to FAR 31.205-33 to make marketing consultant costs unallowable when the certificates required by FAR provision 52.209-7 are not submitted, and the additional control DCAA could provide by verifying contractor compliance with the certification requirements. The Assistant Director stated that until FAR 31.205-33 is revised, verifying compliance with the certification requirements of FAR provision 52.209-7 is outside the DCAA mission because, as written, the FAR has no bearing on contract costs. The Assistant Director suggested that contracting officers not request DCAA to verify compliance with the certification requirements of FAR provision 52.209-7 until FAR 31.205-33 is revised to make marketing consultant costs unallowable when the required certificates are not submitted.

Inspector General, DoD, Comments on DCAA Position. We agree with the position of the Assistant Director for Policy and Plans, DCAA, and have written the corresponding recommendation accordingly. DCAA should be requested to verify compliance by contractors with the certification requirements of FAR provision 52.209-7 after FAR 31.205-33 is revised to make marketing consultant costs unallowable when the required certificates are not submitted.

Conclusion

The guidance in OFPP Policy Letter 89-1 and the amended FAR subpart 9.5 have not been effectively implemented to prevent award of contracts when an organizational conflict of interest may exist. Contracting officers not including FAR provisions 52.209-7 or 52.209-8 or both in applicable contract solicitations allowed the apparent successful offerers to avoid the certification requirement. Although the audit did not find any conflicts of interest, the failure to include the FAR provisions, obtain the conflicts of interest certifications, or both, may have resulted in contract awards in which a conflict of interest or an unfair competitive advantage existed.

Recommendations, Management Comments, and Audit Response

Revised, Renumbered, Redirected, and Added Recommendations. As a result of management comments, we revised draft Recommendation A.1.a. to include a proposed FAR change that requires contracting officers to obtain from contractors who do not file certificates a written statement giving reasons why the certifications cannot be made. We also revised Recommendation A.2.b. to require contracting officers to refer to the head of contracting for resolution instances in which a contractor refuses to provide required certificates. Additionally, we renumbered draft Recommendations A.1.b.(2) and A.1.b.(3) as Recommendations A.2.c and A.2.d. and redirected the recommendations to the Service Acquisition Executives; the Director, Advanced Research Projects Agency; and the Director, Defense Nuclear Agency. We also added Recommendation A.3. for the Service Acquisition Executives and the Director, Defense Logistics Agency, to provide information on how and when they will implement Director, Defense Procurement, guidance on including the requirements of FAR subpart 9.5 in their procurement management reviews.

1. We recommend that the Director, Defense Procurement:

a. Propose a change to:

(1) Federal Acquisition Regulation subpart 9.5, "Organizational and Consultant Conflicts of Interest," and to Federal Acquisition Regulation provisions 52.209-7, "Organizational Conflicts of Interest Certificate-Marketing Consultants," and 52.209-8, "Organizational Conflicts of Interest Certificate-Advisory and Assistance Services," to require all offerers responding to applicable contract solicitations to submit to contracting officers with their proposals either the appropriate organizational conflicts of interest certificates or a written statement giving reasons why the certifications cannot be made. We have included language in Appendix F to change the Federal Acquisition Regulation.

(2) Federal Acquisition Regulation part 31, "Contracts With Commercial Organizations," to require that marketing consultant costs not be allowed if the contractor failed to submit the certificates required by

Finding A. Organizational Conflicts of Interest Certificates

Federal Acquisition Regulation provision 52.209-7, "Organizational Conflicts of Interest Certificate - Marketing Consultants." We have included language in Appendix F to change the Federal Acquisition Regulation.

b. Issue a policy memorandum to the Service Acquisition Executives and Directors of the Defense agencies that requires contracting activities to establish management controls to verify that Federal Acquisition Regulation provisions 52.209-7, "Organizational Conflicts of Interest Certificate - Marketing Consultants," and Federal Acquisition Regulation 52.209-8, "Organizational Conflicts of Interest Certificate - Advisory and Assistance Services," are included in applicable contract solicitations.

Management Comments. The Director, Defense Procurement, nonconcurred, stating that the recommendations were the same as those contained in an earlier working draft report that she commented on in March 1994. The Director further stated she did not agree with the need for FAR revisions for the reasons stated in her March 1994 comments to the working draft report. The Director issued a policy memorandum on July 1, 1994, that alerts the Military Departments and Defense agencies to the problems identified in the audit report and requires that implementation of FAR subpart 9.5, "Organizational and Consultant Conflicts of Interest," be included in future procurement management reviews.

Audit Response. The comments provided by the Director, Defense Procurement, are partially responsive to the recommendations. In her March 1994 response to the working draft report, the Director, Defense Procurement, did not concur with the proposed FAR changes, stating that obtaining conflict of interest certificates from all offerers created an unnecessary burden on the offerers and that the use of a cost principle as a punitive measure is not appropriate. We summarized the Director's comments in the draft audit report and stated our reasons why we continued to believe that the FAR revisions were necessary to improve DoD compliance and DoD contractor compliance with organizational and consultant conflicts of interest requirements. In responding to the draft audit report, the Director, Defense Procurement, did not comment on our rebuttal to her March 1994 comments and did not provide any new information that would cause us to change our conclusion that the recommended FAR revisions are needed. We request that the Director, Defense Procurement, reconsider her position and provide comments on the revised Recommendation 1.a. in response to the final report.

We consider the policy memorandum the Director issued to be responsive to Recommendation A.1.b. and to be appropriate action at the Office of the Secretary of Defense level. Accordingly, we directed Recommendations A.2.c. and A.2.d. to the Service Acquisition Executives, the Director, Advanced Research Projects Agency, and the Director, Defense Nuclear Agency to establish specific internal management controls to improve DoD compliance and DoD contractor compliance with the organizational and consultant conflicts of interest requirements of the FAR.

Finding A. Organizational Conflicts of Interest Certificates

2. We recommend that the Service Acquisition Executives and the Directors of the Advanced Research Projects Agency and the Defense Nuclear Agency direct contracting officers to:

a. Notify contractors to submit applicable certificates for contracts identified in Appendix C that are still open.

Army Comments. The Army generally agreed with the intent of the recommendation and suggested that the recommendation be revised to request certificates only for the contracts that included the clause in FAR provisions 52.209-7, 52.209-8, or both, in the solicitation. The Army stated that it had no basis to request a certificate if the solicitation did not contain the FAR provision.

Audit Response. The Army comments are partially responsive to the recommendation. However, we do not agree with the Army that the recommendation should be revised. The Government does not forfeit its right to require the contractor to submit certificates by failing to include the required provisions in the contract solicitation. These FAR provisions implement Statute and OFPP Policy Letter 89-1. They were in effect at the time of the execution of the contracts, and should be deemed to be incorporated into those contracts. Accordingly, the contracting officer can ask the contractor to submit the required certificates at any time that the contract is in effect. We request that the Army reconsider its position on the recommendation and provide comments in response to the final report.

Navy Comments. The Navy concurred and stated that on June 10, 1994, the Deputy Assistant Secretary of the Navy for Acquisition Policy, Integrity, and Accountability issued a memorandum reemphasizing to contracting officers the importance of complying with conflicts of interest policies. The memorandum requires contracting officers for contracts requiring certificates for which no certificates were received to request the certificates from the contractors. The Navy also pointed out that a discrepancy exists between OFPP Policy Letter 89-1 and FAR guidance concerning submission of certificates. The OFPP guidance requires contractors to file certificates or to provide a written statement to the contracting officer giving reasons why no such certification can be made. However, the FAR guidance does not require contractors to provide reasons for not submitting the certifications.

Audit Response. The Navy comments are fully responsive to the recommendation. As a result of the Navy comments, we revised Recommendation A.1.a. for the Director, Defense Procurement, to include a proposed change to the FAR that corrects the discrepancy between OFPP Policy Letter 89-1 and FAR guidance concerning submission of certificates.

Air Force Comments. The Air Force stated that, although the corrective actions were not directed to the Air Force, the Air Force has recognized the potential for problems in the subject area. To prevent problems, the Air Force issued a policy letter in July 1993 that stresses the importance of compliance by procurement personnel and contracting officers with requirements concerning conflict of interest policy and certifications.

Finding A. Organizational Conflicts of Interest Certificates

Audit Response. The Air Force comments are not responsive to the recommendation. The Air Force incorrectly stated that corrective actions were not directed to the Air Force. Recommendations A.2.a. and A.2.b. are directed to the Air Force Acquisition Executive. The Air Force policy letter issued on July 26, 1993, should improve compliance by contracting officers with the FAR requirements concerning organizational and consultant conflicts of interest. Because our visits to the two Air Force activities occurred in July and August 1993, the results of our audit may not show the full impact of the policy letter. We request that the Air Force provide comments on the recommendation in response to the final report.

Advanced Research Projects Agency Comments. The Advanced Research Projects Agency concurred and stated that contractors will be notified by July 31, 1994, to submit applicable certificates for Advanced Research Projects Agency contracts identified in Appendix C that are still open.

Defense Nuclear Agency Comments. The Defense Nuclear Agency concurred, stating that contracting officers would be directed to notify contractors who failed to provide the certificates for Defense Nuclear Agency contracts listed in Appendix C by September 30, 1994. The Defense Nuclear Agency also stated that it will conduct a vulnerability assessment and further improve its contracting procedures as necessary.

b. Refer to the head of contracting for resolution all instances in which the contractor refuses to submit the certificate required by Federal Acquisition Regulation provision 52.209-8, "Organizational Conflicts of Interest Certificate - Advisory and Assistance Services." The referral should be in writing and should, at a minimum, include the circumstances of the contractor's refusal and detailed information on any known actual or potential conflict of interest or unfair competitive advantage that may exist.

Army Comments. The Army nonconcurred and suggested that the recommendation be revised to require contracting officers to "initiate appropriate action," rather than "initiate contract termination," if contractors fail to provide certificates after being notified to submit certificates. The Army stated that termination of the contract may not be in the Government's best interest, and that FAR 9.506, "Procedures," identified alternate procedures to identify potential conflicts of interest when certificates may not have been submitted.

Audit Response. The Army comments are partially responsive. However, we do not agree with the Army that the contracting officer should "initiate appropriate action" when contractors refuse to provide the required certification. As a result of the Army and the Navy comments, we revised the recommendation to require contracting officers to refer contractor refusals to the head of contracting for resolution. We request that the Army comment on the revised recommendation in response to the final report.

Navy Comments. The Navy did not concur that contract termination should be initiated when a contractor refuses to provide the certification required by FAR provision 52.209-8 and suggested that the matter be referred to the head of

Finding A. Organizational Conflicts of Interest Certificates

the contracting activity for resolution. The Navy stated that if the certificates are not obtained within a reasonable time for the Navy contracts identified in the report, the issue will be referred to the head of the contracting activity for resolution.

Audit Response. The Navy comments are responsive. However, the Navy did not provide a completion date for its planned action. We request that the Navy provide a completion date for its planned action in response to the final report.

Advanced Research Projects Agency Comments. The Advanced Research Projects Agency concurred, stating that it would initiate contract termination on the applicable contract if the required certificate is not received by July 31, 1994.

Air Force and Defense Nuclear Agency Comments. The Air Force and the Defense Nuclear Agency did not comment on the recommendation.

c. Withhold the award of contracts to contractors who have not submitted organizational conflicts of interest certificates.

d. When the Federal Acquisition Regulation change in recommendation A.1.a.(2) is implemented, request the Defense Contract Audit Agency to review compliance by contractors during Defense Contract Audit Agency audits of contractor consultant costs.

Audit Response. We request that the Air Force and the Defense Nuclear Agency provide comments on recommendation A.2.b. in response to the final report, and we request Army, Navy, Air Force, Advanced Research Projects Agency, and Defense Nuclear Agency to provide comments on Recommendations A.2.c. and A.2.d.

3. We recommend that, for audit follow-up purposes, the Service Acquisition Executives and the Director, Defense Logistics Agency, in a response to the final report, provide information on how and when they will implement the guidance contained in Director, Defense Procurement, memorandum, "Conflicts of Interest Requirements," July 1, 1994, on including the requirements of Federal Acquisition Regulation subpart 9.5, "Organizational and Consultant Conflicts of Interest," in procurement management reviews.

Audit Response. We request the Army, the Navy, the Air Force, and the Defense Logistics Agency to provide comments on Recommendation A.3. in response to the final report.

Finding A. Organizational Conflicts of Interest Certificates

Response Requirements Per Recommendation

Response to the final report is required from the addressee shown for the items indicated with an "X" in the chart below.

| <u>Number</u> | <u>Addressee</u> | <u>Response Should Cover</u> | | |
|----------------------|------------------|------------------------------|----------------------------|----------------------------|
| | | <u>Concur/ Nonconcur</u> | <u>Proposed Action</u> | <u>Completion Date</u> |
| A.1.a. | DDP | X | X | X |
| A.2.a. | Army | X | X | X |
| | Air Force | X | X | X |
| A.2.b. | Army | X | X | X |
| | Navy | | | X |
| | Air Force | X | X | X |
| A.2.c. and A.2.d. | DNA | X | X | X |
| | Army | X | X | X |
| A.3. | Navy | X | X | X |
| | Air Force | X | X | X |
| | ARPA | X | X | X |
| | DNA | X | X | X |
| | DLA | X | X | X |

| | |
|------|-----------------------------------|
| DDP | Director, Defense Procurement |
| ARPA | Advanced Research Projects Agency |
| DLA | Defense Logistics Agency |
| DNA | Defense Nuclear Agency |

Management Comments and Audit Response on Appendix C

Air Force Comments. The Air Force stated that contract F33657-91-D-2236, listed in Appendix C as requiring FAR provision 52.209-7, does not require the provision because the contract is in direct support of the National Air Intelligence Center.

Audit Response. We agree with the Air Force that the contract meets the exception to the certification requirement of FAR provision 52.209-7 for contracts involving intelligence activities. At the time we examined the contract files, the application of the exception was not shown in contract documents and the contracting officer was not able to explain why the provision was not included in the contract solicitation. As a result of the Air Force comments, we changed Appendix C to show that FAR provision 52.209-7 was not required for contract F33657-91-D-2236. Additional comments on Appendix C are not required from the Air Force.

Finding A. Organizational Conflicts of Interest Certificates

Advanced Research Projects Agency Comments. The Advanced Research Projects Agency disagreed that FAR provision 52.209-7 was required in 6 of the 10 Advanced Research Projects Agency contracts listed in Appendix C because request for proposal type contract solicitations were not used. The Advanced Research Projects Agency stated that five contracts (MDA972-91-C-0030, MDA972-91-C-0053, MDA972-92-C-0008, MDA972-92-C-0020, and MDA972-92-C-0048) resulted from broad agency announcements. The Advanced Research Projects Agency further stated that the FAR 15.407, "Solicitation Provisions," includes only requests for proposals and requests for quotations, not broad agency announcements, in the definition of contract solicitations. The sixth contract (MDA972-91-C-0013) was an urgent action for which no contract solicitation was issued.

Audit Response. We agree with the Advanced Research Projects Agency that we were technically incorrect to state that FAR provision 52.209-7 was required in the solicitation when broad agency announcements were used to solicit proposals or when a contract resulted from an unsolicited proposal. However, for the purpose of preparing Appendix C, we grouped actions that should have been taken before contract award to obtain the certifications required by FAR provision 52.209-7 under the heading "required in solicitation." FAR 9.502(b) states that organizational conflicts of interest requirements are not limited to any particular type of acquisition and FAR 9.507-1(b) requires that FAR provision 52.209-7 be included in all solicitations, other than sealed bids, if the contract amount is expected to exceed \$200,000. Clearly, the FAR intends that the certificates required by FAR provision 52.209-7 be obtained. Because broad agency announcements do not include standard solicitation provisions, we believe that the Advanced Research Projects Agency should have included FAR provision 52.209-7 either in a separate letter or in the representations and certifications package sent to prospective contractors following the publication of the broad agency announcements and before the contracts were awarded. On contract MDA972-91-C-0013, which resulted from an unsolicited proposal, the Advanced Research Projects Agency should have informed the contractor of FAR provision 52.209-7 during discussions held before the unsolicited proposal was submitted as encouraged by FAR 15.504, "Advance Guidance." The Advanced Research Projects Agency also could have provided the applicable provision to the contractor by letter or in a representations and certifications package. The Advanced Research Projects Agency concurred with Recommendation 1.a. to obtain the required certifications for contracts identified in Appendix C that are still open. Additional comments on Appendix C are not required from the Advanced Research Projects Agency.

Finding B. Clause Restricting Future Contracting

DoD contracting officers did not include in 8 contracts, valued at \$131 million, of 38 applicable contracts, valued at \$393 million, the clause required by FAR 9.507-2, "Contract Clause," that restricts the contractor's eligibility for future prime contract or subcontract awards because of potential organizational conflicts of interest. The restrictive clause was not included because contractors requested that the clause not be included in two contracts, and contracting officers either were advised not to include the clause or were unaware the other six contracts contained a potential conflict of interest. As a result of omitting the required clause, the contractors are not restricted from bidding on subsequent contracts and subcontracts that may result in actual conflicts of interest, and their judgment on the contracts could be biased. Additionally, deficiencies in the standard restrictive clause used by some contracting activities decrease the effectiveness of the standard restrictive clause in preventing potential organizational conflicts of interest.

Background

FAR Requirement for Restrictive Clause. FAR 9.504, "Contracting Officer Responsibilities," requires contracting officers, as early in the acquisition process as possible, to evaluate planned acquisitions and initiate action before contract award to avoid, neutralize, or mitigate any significant potential organizational conflicts of interest identified. This action usually involves preparing a contract solicitation provision and a contract clause (restrictive clause) that restricts the contractor from bidding on certain future contracts and subcontracts.

Evaluating Potential Organizational Conflicts of Interest. FAR 9.504 states that contracting officers should obtain the advice of legal counsel and the assistance of appropriate technical specialists to evaluate potential organizational conflicts of interest and to develop any necessary contract solicitation provisions and contract clauses for resolving the potential conflicts. Each individual contracting situation should be examined on the basis of its particular facts and the nature of the proposed contract. The two underlying principles for the examination are the prevention of conflicting roles that might bias a contractor's judgment and the prevention of an unfair competitive advantage. A contractor's judgment may be biased when a contract requires the drafting of specifications, work statements, or other requirements for future acquisitions, if the contractor expects to compete for the future acquisitions. An unfair competitive advantage may exist:

- o when a contract requires the contractor to give advice that could favor its own products or capabilities,

Finding B. Clause Restricting Future Contracting

o when the work performed on a contract allows the contractor access to information concerning future acquisition requirements not available to competitors, and

o when a contractor competing for a contract possesses proprietary information or source selection information that is not available to all competitors.

Approval of Contracting Officer's Recommended Action. If the contracting officer decides that a significant potential organizational conflict of interest exists, the contracting officer should submit a written analysis for approval by the head of contracting. The written analysis should include recommended action for avoiding, neutralizing, or mitigating the potential conflict; a draft solicitation provision; and, if appropriate, a proposed contract clause.

Including Restrictive Clauses

Number of Incomplete Contracts. Of the 101 contracts reviewed, 38 contracts needed an organizational conflict of interest clause to avoid, neutralize, or mitigate potential organizational conflicts of interest; 30 contracts contained a restrictive clause; and 8 did not contain a restrictive clause.

Contracts Without Restrictive Clauses. Of the eight contracts that did not contain a restrictive clause, four had a restrictive provision in the contract solicitation. Had the restrictive provision been incorporated as a clause in each of the contracts, the contractors would have been ineligible for subsequent contracts resulting from work performed on the four contracts. Further, the contractors would have been required to protect any proprietary information they obtained under the contracts.

Contract DAAB07-91-D-F005, awarded by the Army Communications-Electronics Command, and contract DNA001-92-C-0029, awarded by the Defense Nuclear Agency, did not include the restrictive clause because the contractors requested that the clause not be included in the contracts. Contract DNA001-92-C-0148 did not include the restrictive clause because the Deputy General Counsel, Defense Nuclear Agency, believed that little or no likelihood of an organizational conflict of interest existed and advised the contracting officer not to include the clause. Contracting officials for contracts DAAB07-91-D-F005, DNA001-92-C-0029, and DNA001-92-C-0148 stated that a restrictive clause was not needed. A contract specialist failed to recommend to the contracting officer that the restrictive clause be placed in contract N00123-92-D-5491, awarded by the Navy Regional Contracting Center, San Diego.

Contracts Without Restrictive Provisions and Clauses. Of the eight contracts that did not contain a restrictive clause, four contracts did not include a restrictive provision in the contract solicitations. Contract DAAA09-91-C-0341, awarded by the Army Armament, Munitions,

Finding B. Clause Restricting Future Contracting

and Chemical Command, did not contain a restrictive provision and clause because the contracting officer believed no potential conflict of interest existed. Contracting officials for contract DAAB07-91-C-J522, awarded by the Army Communications-Electronics Command, and contracts MDA903-91-D-0030 and MDA903-92-D-0108, awarded by the Defense Supply Service-Washington, had no explanation for why restrictive provisions and clauses were not included, and the contract files contained no documentation on the omissions. Contracting officials at the Army Armament, Munitions, and Chemical Command; the Army Communications-Electronics Command; and the Defense Supply Service-Washington agreed that a restrictive clause should have been included in the four contracts.

Need for Restrictive Clause. The eight contracts required a restrictive clause because the contracts contained potential organizational conflicts of interest. The potential conflicts existed because the work required by the contracts placed the contractors in a position to either influence what products or capabilities the Government would purchase on subsequent contracts or to gain knowledge concerning the Government's contracting requirements that would not be available to competitors. For synopses of the eight contracts, see Appendix G.

Documentation Requirements. FAR 9.504 requires that a contracting officer's judgment be documented only when a substantive issue concerning a potential organizational conflict of interest exists. The contracting officers did not document their reasons for not including a restrictive clause in the contracts for the four contracts for which a restrictive provision was included in the contract solicitations. We believe that contracting officers should document their reasons for not using a restrictive clause in all cases in which a restrictive provision was in the contract solicitation but not included in the contract. Documenting the reasons would prevent restrictive clauses from being inadvertently or incorrectly omitted from contracts.

Effectiveness of Standard Restrictive Clauses

Three contracting activities inserted standard restrictive clauses that need changes in the following areas.

Specifying Restrictive Time Periods. The clauses used by the Naval Air Systems Command, the Advanced Research Projects Agency, and the Defense Nuclear Agency did not address the time period of the restrictions. This deficiency could cause the contractor not to compete on future contracts for a longer period than necessary. FAR 9.507-2 states that "the restraint imposed by a clause shall be limited to a fixed term of reasonable duration." In every case, the restriction shall specify termination by a specific date or upon the occurrence of an identified event.

Providing Copies of Proprietary Data Agreements. The clauses used by the Advanced Research Projects Agency and the Defense Nuclear Agency did not require the contractor to provide the contracting officer with a copy of

Finding B. Clause Restricting Future Contracting

agreements between the contractor and other companies concerning the contractor's commitment to protect the proprietary data of the other companies. The clause used by the Naval Air Systems Command required the contractor to submit copies of the agreements only when requested by the contracting officer. The absence of the requirement could result in contractors not executing the agreements and inadvertent disclosure or misuse of proprietary information. FAR 9.505-4 requires contracting officers to obtain copies of all agreements between contractors and other companies on proprietary information.

Granting Waivers of Restrictions. The clauses used by the Advanced Research Projects Agency and the Defense Nuclear Agency stated that the contracting officer could grant a waiver of the restrictions when it is in the Government's best interest. FAR 9.503, "Waiver," states that agency heads have the authority to waive the restrictions and that this authority cannot be delegated below the level of head of a contracting activity. In a November 1990 procurement management review report, the Director, Defense Procurement, identified the improper delegation of waiver authority contained in the Advanced Research Projects Agency standard restrictive clause. However, the Advanced Research Projects Agency had not corrected the deficiency as of our visit in August 1993. Advanced Research Projects Agency contracting officials stated that the standard restrictive clause would be revised to correct the deficiency.

Recommendations, Management Comments, and Audit Response

Revised Recommendation. As a result of management comments, we revised Recommendation B.1.c. to require contracting officers to attempt to modify contracts to inform the contractors of the restrictions imposed on the contractors' future activities to prevent organizational conflicts of interest. If contract modification is not possible, the contracting officer should, at a minimum, note in appropriate contract and program management records that a determination whether an organizational conflict of interest exists is required before the contractor is awarded a subsequent contract.

1. We recommend that the Army and the Navy Acquisition Executives and the Director, Defense Nuclear Agency, direct contracting officers to:

a. Include a clause that restricts the contractor's eligibility for certain future prime contracts and subcontracts when potential organizational conflicts of interest exist.

Army and Navy Comments. The Army and the Navy concurred. In a July 28, 1994, memorandum, the Army advised contracting officers of the audit findings and the need to adhere to FAR organizational and consultant conflict of interest requirements. The Army memorandum also stated that compliance with FAR organizational and consultant conflict of interest requirements will be included as a special interest item in future procurement management reviews as

Finding B. Clause Restricting Future Contracting

requested by the Director, Defense Procurement. In a June 10, 1994, memorandum, the Navy reemphasized the need for contracting officers to comply with FAR organizational and consultant conflict of interest requirements.

Defense Nuclear Agency Comments. The Defense Nuclear Agency did not comment on Recommendation B.1.a.

Audit Response. We request that the Defense Nuclear Agency provide comments on the recommendation in response to the final report.

b. Document reasons for not including a restrictive clause in contracts that had a restrictive provision in the contract solicitation.

Army, Navy, and Defense Nuclear Agency Comments. The Army, the Navy, and the Defense Nuclear Agency did not comment on Recommendation B.1.b.

Audit Response. We request that the Army, the Navy, and the Defense Nuclear Agency provide comments on the recommendation in response to the final report.

c. Attempt to modify the eight contracts from which a restrictive clause was omitted. The modifications should inform the contractors of the potential organizational conflicts of interest and the restrictions imposed on the contractors' future activities to prevent the conflicts. If the contracts cannot be modified, other appropriate actions should be taken. At a minimum, the contracting officers should note in contract and program management records that a determination is required before the contractor is awarded a subsequent contract. The determination should indicate whether an organizational conflict of interest or an unfair competitive advantage exists because of work performed on the contract.

Army Comments. The Army generally concurred with the intent of the recommendation and suggested that the recommendation be revised to require contracting officers to attempt to modify the eight contracts from which a restrictive clause was omitted and take other appropriate action if contract modification is not possible. The Army stated that including a restrictive clause after contract award may be cost prohibitive or may not otherwise be in the Government's best interest. The Army also stated that it is reviewing contracts DAAB07-91-D-F005, DAAA09-91-C-0341, DAAB07-91-C-J522, MDA903-91-D-0030, and MDA903-92-D-0108 to determine whether potential conflicts of interest exist and, if so, the actions required to neutralize, avoid, or otherwise mitigate the conflicts.

Audit Response. As a result of the Army comments, we changed the recommendation to require contracting officers, when contract modification is not possible, to, as a minimum, note in contract and program management records the need to determine whether an organizational conflict of interest

Finding B. Clause Restricting Future Contracting

exists before the contractor is awarded a subsequent contract. We request that the Army provide a completion date for its planned action in response to the final report.

Navy Comments. The Navy concurred, stating that the Navy Regional Contracting Center, San Diego, entered into discussion to insert a restrictive clause in contract N00123-92-D-5491.

Audit Response. The Navy comments are responsive to the recommendation. However, the Navy did not provide a completion date for inserting a restrictive clause in the contract. We request that the Navy provide a completion date for its planned action in response to the final report.

Defense Nuclear Agency Comments. The Defense Nuclear Agency partially concurred with the recommendation. On contract DNA001-92-C-0029, the Defense Nuclear Agency stated that the contracting officer will issue a modification to cancel tasks 6.1.5., 6.8., and 6.8.1. from the contract statement of work because the tasks do not properly characterize the work being done but could, if performed as stated, result in potential for future conflicts of interest. On contract DNA001-92-C-0148, the Defense Nuclear Agency did not agree that the contractor would have an unfair competitive advantage when bidding on subsequent contracts because of work performed under the contract. The Defense Nuclear Agency stated that the statement of work for contract DNA001-92-C-0148 calls for research and analysis on very broad strategic topic areas, and the contractor would not access program and planning documents to gain an unfair competitive advantage. The Defense Nuclear Agency reported that the project manager had confirmed the contractor had not been given program-specific planning, source-selection, or proprietary information. The Defense Nuclear Agency concluded that no compelling reason existed to judge improper the contracting officer's decision not to include a restrictive clause in contract DNA001-92-C-0148.

Audit Response. The Defense Nuclear Agency plan to cancel tasks 6.1.5., 6.8., and 6.8.1. from the contract DNA001-92-C-0029 statement of work is responsive to the recommendation. However, the Defense Nuclear Agency did not provide an estimated completion date for the planned action. We request that the Defense Nuclear Agency provide an estimated completion date for the planned modification to contract DNA001-92-C-0029 in response to the final report.

We do not agree that contract DNA001-92-C-0148 has no potential to provide the contractor an unfair competitive advantage on subsequent contracts for the reasons stated in Appendix G. The Defense Nuclear Agency statement that the contractor has not been given program-specific planning information, source-selection information, or access to proprietary information does not ensure that the contractor will not be exposed to such information during the remainder of contract performance. Task 3.6. of the contract statement of work requires the contractor to provide support for the transition of topics identified during the execution of other contract tasks to new research contracts. This task clearly places the contractor in a position to gain information and provide advice concerning the award of future contracts that could benefit the contractor or the

Finding B. Clause Restricting Future Contracting

contractor's other clients. This recommendation is intended to preclude future potential conflicts of interest and not just correct what has occurred in the past. We request that the Defense Nuclear Agency reconsider its position on contract DNA001-92-C-0148 and provide additional comments in response to the final report.

2. We recommend that the Navy Acquisition Executive and the Directors of the Advanced Research Projects Agency and the Defense Nuclear Agency advise contracting officers to use restrictive clauses that comply with the Federal Acquisition Regulation subpart 9.5. The restrictive clauses should identify the nature of the potential conflict of interest, the nature and specific duration of the restrictions on future contractor activities, the requirement for contractors to submit copies of agreements between contractors and other companies on proprietary information, and the correct waiver approval authority.

Management Comments. The Navy and the Advanced Research Projects Agency concurred. The Defense Nuclear Agency did not comment on the recommendation. On June 10, 1994, the Navy reemphasized to contracting officers the need to comply with the FAR subpart 9.5. On August 3, 1994, the Director of the Contract Management Office, Advanced Research Projects Agency, issued a policy memorandum that provides Advanced Research Projects Agency contracting officers a standard restrictive clause that complies with FAR subpart 9.5.

Audit Response. We request that the Defense Nuclear Agency provide comments on the recommendation in response to the final report.

Response Requirements Per Recommendation

Response to the final report is required from the addressee shown for the items indicated with an "X" in the chart below.

| <u>Number</u> | <u>Addressee</u> | <u>Response Should Cover</u> | | |
|---------------|------------------|------------------------------|----------------------------|----------------------------|
| | | <u>Concur/ Nonconcur</u> | <u>Proposed Action</u> | <u>Completion Date</u> |
| B.1.a. | DNA | X | X | X |
| B.1.b. | Army | X | X | X |
| | Navy | X | X | X |
| | DNA | X | X | X |
| B.1.c. | Army | X | X | X |
| | Navy | | | X |
| | DNA | X | X | X |
| B.2. | DNA | X | X | X |

Part III - Additional Information

Appendix A. Office of Federal Procurement Policy Letter 89-1



EXECUTIVE OFFICE OF THE PRESIDENT OFFICE OF MANAGEMENT AND BUDGET

WASHINGTON, D.C. 20503

OFFICE OF FEDERAL
PROCUREMENT POLICY

Policy Letter 89-1

December 8, 1989

TO THE HEADS OF EXECUTIVE DEPARTMENTS AND ESTABLISHMENTS

SUBJECT: Conflict of Interest Policies Applicable to Consultants

1. **Purpose.** The purpose of this Policy Letter is (a) to establish policy relating to conflict of interest standards for persons who provide consulting services to the government and to its contractors and (b) to provide procedures to promote compliance with those standards.
2. **Authority.** This Policy Letter is issued pursuant to section 8141 of the 1989 Department of Defense Appropriation Act, Pub. L. 100-463, 102 Stat. 2770-47 (1988) (hereinafter referred to as "the Act") and section 6 of the Office of Federal Procurement Policy (OFPP) Act, codified at 41 U.S.C. section 404.

3. **Background.** This Policy Letter is intended to implement section 8141 of the Act. This section provides, in part, as follows:

- (9) Not later than 90 days after the date of enactment of this Act, the Administrator of the Office of Federal Procurement Policy shall issue a policy, and not later than 180 days thereafter promulgate rules regulations shall be issued under the Office of Federal Procurement Policy Act which set forth:
 - (1) conflict of interest standards for persons who provide consulting services described in subsection (9); and
 - (2) procedures, including such registration, certification, and endorsement requirements as may be appropriate, to promote compliance with such standards.
- (10) The regulations required by subsection (9) shall apply to the following types of consulting services:
 - (1) advisory and assistance services provided to the government to the extent necessary to identify and evaluate the potential for conflicts of interest that could be prejudicial to the interests of the United States;
 - (2) services related to support of the preparation or submission of bids and proposals for Federal contracts to the extent that inclusion of such services in such regulations is necessary to identify and evaluate the potential for conflicts of interest that could be prejudicial to the interests of the United States; and
 - (3) such other services related to Federal contracts as may be specified in the regulations prescribed under subsection (9) to the extent necessary to identify and evaluate the potential for conflicts of interest that could be prejudicial to the interests of the United States.

4. Definitions.

- (a) "Advisory and assistance services" means advisory and assistance services as defined in OMB Circular No. A-129, "Guidelines for the Use of Advisory and Assistance Services," dated January 4, 1988, and any amendments thereto. Only those compensated services provided pursuant to nonpersonal service contracts are covered by this Policy Letter.

(1) Such services include -

- (i) services provided by individual experts and consultants;
- (ii) management and professional support services;
- (iii) the conduct and preparation of studies, analyses, and evaluations; and
- (iv) engineering and technical services.

(2) *Exclusions.* In addition to the exclusions in OMB Circular A-120, the following services are excluded from the coverage of this Policy Letter:

- (i) routine engineering and technical services (such as installation, operation, or maintenance of systems, equipment, software, components, or facilities);
- (ii) routine legal, actuarial, auditing, and accounting services; and
- (iii) training services.

(b) "Agency" means an executive department specified in section 101 of title 5, United States Code; a military department specified in section 102 of such title; an independent establishment as defined in section 104(1) of such title; and a wholly owned government corporation fully subject to the provisions of chapter 91 of title 31, United States Code.

(c) "Conflict of interest" means that condition or circumstance wherein a person is unable or is potentially unable to render impartial assistance or advice to the government because of other activities or relationships with other persons, or wherein a person has an unfair competitive advantage.

The critical element in this definition is the existence of a relationship or potential relationship that might cause an offeror, if awarded a contract, to make recommendations or interpretations that, at the expense of the government, favor the interests of the offeror directly, or those of persons or entities presently or potentially able to confer a benefit on the offeror.

Types of potential conflicts include, but are not limited to, the following:

(1) evaluating a contractor's, or potential contractor's products or services, where the evaluator is or was substantially involved in the development or marketing of those products or services;

(2) serving as a consultant to a contractor seeking the award of a contract (or seeking to be awarded the contract directly) after preparing or assisting substantially in the preparation of specifications, or other significant contract provisions or requirements, to be used in the same acquisition;

(3) serving as a consultant to a contractor seeking the award of a contract (or seeking to be awarded the contract directly) after having access to source selection or proprietary information not available to other persons competing for the contract; and

(4) providing advice and assistance to an agency where such advice and assistance could benefit the contractor's other clients.

(d) An "unfair competitive advantage" exists, in addition to the situations addressed in FAR Subpart 9.5, where a contractor competing for award of any federal contract possesses

Appendix A. Office of Federal Procurement Policy Letter 89-1

(1) proprietary information that was obtained from a government official without proper authorization, or

(2) source selection information that is relevant to the contract but is not available to all competitors, and

such information would assist that contractor in obtaining the contract.

(e) "Marketing Consultant" means any independent contractor who furnishes advice, information, direction, or assistance to any other contractor in support of the preparation or submission of a bid or proposal for a government contract by such contractor. An independent contractor is not a marketing consultant if he or she would be rendering advisory and assistance services pursuant to any of the exclusions in paragraph 4(a)(2), above.

5. Exemptions. The following may be exempted from the application of policies and regulations issued under this Policy Letter:

(a) *Intelligence activities.* Services rendered in connection with intelligence activities as defined in section 3.4(e) of Executive Order 12333 or a comparable definitional section in any successor order, or in connection with special access programs; and

(b) *Public interest considerations.* Specific contract actions where the head of an agency grants a waiver on the basis of the public interest.

6. Policy. Agencies must comply with the following policies:

(a) Responsibility for identifying and preventing potential conflicts of interest in government contracts is shared among the government contracting officer, the requester of the service, and other government officials with access to applicable information. The responsibility for deciding whether to award a particular contract, however, rests with the government contracting officer;

(b) Prior to contract award, contracting officers shall take appropriate steps to identify and evaluate the potential for conflicts of interest that could be prejudicial to the interests of the United States with regard to persons who provide advisory and assistance services to the government, and to take steps to avoid or mitigate any conflicts believed to exist; similar actions will be taken with regard to any unfair competitive advantage that marketing consultants provide to contractors;

(c) Federal contracting officers shall require, for contracts covered by this Policy Letter, that the apparent successful offeror provide certified information describing the nature and extent of any conflicts of interest that may exist with respect to the proposed award. Marketing consultants shall also be required to certify that they have provided no information to the contractor employing them that would give the contractor an unfair competitive advantage;

(d) Federal procurement officials shall encourage contractors to consider carefully the potential for conflicts of interest in all of their activities associated with federal procurement, and shall be sensitive to the appearance of conflicts of interest in any contracting actions; and

(e) Federal procurement regulations that implement this policy and address conflicts of interest shall take into account the need to (1) encourage participation of highly qualified persons and firms in federal procurement programs; (2) enhance and safeguard the Nation's industrial base; (3) promote full and open competition in the award of government contracts; and (4) improve the overall effectiveness and efficiency of the government's procurement programs.

7. Responsibilities of the Defense Acquisition Regulatory Council and Civilian Agency Acquisition Council. The Councils shall promulgate the government-wide regulations specified in

section 8141 of the Act within 180 days of the effective date of this Policy Letter. Such regulations shall conform to the policies established herein. Only solicitations issued after the effective date of the regulations are affected by these policies.

8. Responsibilities of prime contractors employing marketing consultants. An individual or firm that employs, retains, or engages one or more marketing consultants in connection with a federal acquisition must submit to the contracting officer, with respect to each marketing consultant, the certificates described below, if the individual or firm is notified that it is the apparent successful offeror.

(a) *Certificate required.* No certificates are required for contracts of \$200,000 or less. For contracts over \$200,000, the contractor must file the certificate described below with respect to each marketing consultant, or provide a written statement to the contracting officer giving the reasons why no such certification can be made. The reasons given must be satisfactory to the contracting officer as to why such certificate cannot be made.

(b) *Contents of certificate.* The certificate to be submitted must contain the following:

- (1) the name of the agency and the number of the solicitation in question,
- (2) the name, address, telephone number, and federal taxpayer identification number of the marketing consultant;
- (3) the name, address, and telephone number of a responsible officer or employee of the marketing consultant who has personal knowledge of the marketing consultant's involvement in the contract;
- (4) a description of the nature of the services rendered by or to be rendered by each marketing consultant;
- (5) based on information provided to the contractor by the marketing consultant, if any marketing consultant is rendering or, in the 12 months preceding the date of the certificate, has rendered services respecting the same subject matter of the instant solicitation, or directly relating to such subject matter, to the government or any other client (including any foreign government or person), the name, address, and telephone number of the client or clients, and the name of a responsible officer or employee of the marketing consultant who is knowledgeable about the services provided to such client(s), and a description of the nature of the services rendered to such client(s);
- (6) a statement that the person who signs the certificate for the prime contractor has informed the marketing consultant of the existence of this Policy Letter and associated regulations; and
- (7) the signature, name, title, employer's name, address, and telephone number of the persons who signed the certificates for both the prime contractor and the marketing consultant.

(c) *Marketing consultant certificate.* In addition, the prime contractor will forward to the contracting officer a certificate addressed to the government and signed by the marketing consultant that (i) such marketing consultant has been told of the existence of the regulations implementing this Policy Letter and (ii) such marketing consultant has made inquiry, and to the best of his or her knowledge and belief, he or she has provided no unfair competitive advantage to the prime contractor with respect to the services rendered or to be rendered in connection with the solicitation, or that any unfair competitive advantage that, to the best of his or her knowledge and belief, does or may exist, has been disclosed to the prime contractor. Prime contractors may request such a certificate from a marketing consultant, or make inquiries of any marketing consultant, at any time they negotiate for the marketing consultant's services, or

afterwards, until an award is made, to satisfy themselves that the marketing consultant has provided no unfair competitive advantage.

9. Responsibilities of contractors providing advisory and assistance services. Those individuals or firms providing advisory and assistance services to the government must submit to the contracting officer the certificate or certificates described below if the individual or firm is notified that it is the apparent successful offeror.

(a) *Certificate required.* No certificates are required for contracts of \$25,000 or less. For contracts over \$25,000, the certificate described in (b), below, must be filed or a written statement provided to the contracting officer giving the reasons that no such certification can be made. The reasons given must be satisfactory to the contracting officer as to why such certificate cannot be made.

(b) *Contents of the certificate.* The certificate must contain the following:

- (1) name of the agency and the number of the solicitation in question;
- (2) the name, address, telephone number, and federal taxpayer identification number of the apparent successful offeror,
- (3) a description of the nature of the services rendered by or to be rendered on the instant contract;
- (4) if, in the 12 months preceding the date of the certification, services were rendered to the government or any other client (including a foreign government or person) respecting the same subject matter of the instant solicitation, or directly relating to such subject matter, the name, address, telephone number of the client or client(s), a description of the services rendered to the previous client(s), and the name of a responsible officer or employee of the offeror who is knowledgeable about the services rendered to each client. The agency and contract number under which the services were rendered must also be included, if applicable;
- (5) a statement that the person who signs the certificate has made inquiry and that, to the best of his or her knowledge and belief, (a) no actual or potential conflict of interest or unfair competitive advantage exists with respect to the advisory and assistance services to be provided in connection with the instant contract, or (b) that any actual or potential conflict of interest or unfair competitive advantage that does or may exist with respect to the contract in question has been communicated in writing to the contracting officer or his or her representative; and
- (6) the signature, name, employer's name, address, and telephone number of the person who signed the certificate.

10. Responsibilities of Executive Branch Agencies.

(a) *Maintenance of data files.* Each agency must maintain the certificates described by this Policy Letter in the contract file. Agencies may extract and categorize such information from these files and consolidate them in a central registry, as appropriate, subject only to the requirement to safeguard information (1) as requested by the submitter of the certificate as confidential, sensitive, privileged, proprietary, or otherwise not releasable, or (2) based on independent agency determinations not to release the information pursuant to the Freedom of Information Act, or other authority.

(b) *Availability of data.* Certificates must be made available to department or agency contracting officers and their superiors, advisors, or their designees, as well as to inspectors general and government audit officials.

(c) *Nondisclosure of information.* Agencies and departments must protect, to the fullest extent permitted by law, all sensitive business and other information submitted pursuant to any policy devised or regulation promulgated pursuant to the Act. Contractors and consultants must take care to identify what information is not releasable. Opportunity to so mark such information shall be afforded to the submitter of the information at any time.

(d) *Prenward conflict of interest analysis; special contract provisions.* Agency officials must, before an award of a contract is made, determine whether a conflict of interest exists with regard to those providing advisory and assistance services to the government, or whether an unfair competitive advantage exists with respect to services provided by a marketing consultant in connection with a particular contract action. In performing this function, they may use (a) information from any certificates or statements previously submitted or submitted with the bid or offer in question and (b) any other substantive information available to them. The contracting officer shall award the contract to the apparent successful offeror unless a conflict of interest or unfair competitive advantage is believed to exist that cannot be avoided or mitigated. Finally, before the contracting officer decides not to award a contract based on conflict of interest considerations, he or she shall notify the prime contractor, or the contractor rendering advisory and assistance services, and provide a reasonable opportunity to respond. Where the contracting officer finds that it is in the best interest of the United States to award the contract notwithstanding such conflict or unfair competitive advantage, the contract file should be documented to reflect the basis for that finding.

(e) *Other information.* This Policy Letter does not prohibit contracting officers from requesting other information relevant to the goals of this Policy Letter. In addition, in special cases, and if approved by the head of the contracting activity, the contracting officer may request that the certificates described above, be made with respect to a period as long as, but no longer than, 36 months preceding the date of the certificate.

11. *Responsibilities of the Federal Acquisition Regulatory Council.* All government-wide regulations to be issued pursuant to section 8141 of the Act will be provided to the Federal Acquisition Regulatory Council for review not less than thirty days prior to publication in the *Federal Register* for public comment.

12. *Remedies.* Persons required to certify in accordance with this Policy Letter's associated regulations but who fail to do so may be determined to be ineligible for award of a contract. Misrepresentation of any fact may result in suspension or debarment, as well as penalties associated with false certifications or such other provisions provided for by law or regulation.

13. *Information contact.* For information regarding this Policy Letter please contact Richard A. Ong, Deputy Associate Administrator, the Office of Federal Procurement Policy, 725 17th Street, N.W., Washington, DC 20503. Telephone (202)395-6810.

14. *Effective date.* The effective date of this Policy Letter is 30 days from the date of issuance on the first page.

15. *Sunset review date.* This Policy Letter will be reviewed three years from the date of issuance and every three years thereafter to ensure accuracy and relevancy. This review must include a reexamination of the threshold amounts in the light of any changes made in the small purchase amount provided for in FAR Part 13.



ALLAN V. BURMAN
Administrator Designate

Appendix B. Applicable Federal Acquisition Regulation Subpart and Provisions

SUBPART 9.5—ORGANIZATIONAL AND CONSULTANT CONFLICTS OF INTEREST

9.500 Scope of subpart.

This subpart—

(a) Prescribes responsibilities, general rules, and procedures for identifying, evaluating, and resolving organizational conflicts of interest;

(b) Provides examples to assist contracting officers in applying these rules and procedures to individual contracting situations; and

(c) Implements section 8141 of the 1989 Department of Defense Appropriation Act, Pub. L. 100-463, 102 Stat. 2270-47 (1988) and Office of Federal Procurement Policy (OFPP) Letter 89-1, Conflict of Interest Policies Applicable to Consultants.

9.501 Definitions.

"Marketing consultant" means any independent contractor who furnishes advice, information, direction, or assistance to an offeror or any other contractor in support of the preparation or submission of an offer for a Government contract by that offeror. An independent contractor is not a marketing consultant when rendering—

(a) Services excluded in Subpart 37.2;

(b) Routine engineering and technical services (such as installation, operation, or maintenance of systems, equipment, software, components, or facilities);

(c) Routine legal, actuarial, auditing, and accounting services; and

(d) Training services.

"Organizational conflict of interest" means that because of other activities or relationships with other persons, a person is unable or potentially unable to render impartial assistance or advice to the Government, or the person's objectivity in performing the contract work is or might be otherwise impaired, or a person has an unfair competitive advantage.

9.502 Applicability.

(a) This subpart applies to contracts with either profit or nonprofit organizations, including nonprofit organizations created largely or wholly with Government funds.

(b) The applicability of this subpart is not limited to any particular kind of acquisition. However, organizational conflicts of interest are more likely to occur in contracts involving—

(1) Management support services;

(2) Consultant or other professional services;

(3) Contractor performance of or assistance in technical evaluations; or

(4) Systems engineering and technical direction work performed by a contractor that does not have overall contractual responsibility for development or production.

(c) An organizational conflict of interest may result when factors create an actual or potential conflict of interest on an instant contract, or when the nature of the work to be performed on the instant contract creates an actual or potential conflict of interest on a future acquisition. In the latter case, some restrictions on future activities of the contractor may be required.

(d) Acquisitions subject to unique agency organizational conflict of interest statutes are excluded from the requirements of this subpart.

9.503 Waiver.

The agency head or a designee may waive any general rule or procedure of this subpart by determining that its application in a particular situation would not be in the Government's interest. Any request for waiver must be in writing, shall set forth the extent of the conflict, and requires approval by the agency head or a designee. Agency heads shall not delegate waiver authority below the level of head of a contracting activity.

9.504 Contracting officer responsibilities.

(a) Using the general rules, procedures, and examples in this subpart, contracting officers shall analyze planned acquisitions in order to—

(1) Identify and evaluate potential organizational conflicts of interest as early in the acquisition process as possible; and

(2) Avoid, neutralize, or mitigate significant potential conflicts before contract award.

(b) Contracting officers should obtain the advice of counsel and the assistance of appropriate technical specialists in evaluating potential conflicts and in developing any necessary solicitation provisions and contract clauses (see 9.506).

(c) Before issuing a solicitation for a contract that may involve a significant potential conflict, the contracting officer shall recommend to the head of the contracting activity a course of action for resolving the conflict (see 9.506).

(d) In fulfilling their responsibilities for identifying and resolving potential conflicts, contracting officers should avoid creating unnecessary delays, burdensome information requirements, and excessive documentation. The contracting officer's judgment need be formally documented only when a substantive issue concerning potential organizational conflict of interest exists.

(e) The contracting officer shall award the contract to the apparent successful offeror unless a conflict of interest is determined to exist that cannot be avoided or mitigated.

Appendix B. Applicable Federal Acquisition Regulation Subpart and Provisions

Before determining to withhold award based on conflict of interest considerations, the contracting officer shall notify the contractor, provide the reasons therefor, and allow the contractor a reasonable opportunity to respond. If the contracting officer finds that it is in the best interest of the United States to award the contract notwithstanding a conflict of interest, a request for waiver shall be submitted in accordance with 9.503. The waiver request and decision shall be included in the contract file.

9.505 General rules.

The general rules in 9.505-1 through 9.505-4 prescribe limitations on contracting as the means of avoiding, neutralizing, or mitigating organizational conflicts of interest

that might otherwise exist in the stated situations. Some illustrative examples are provided in 9.508. Conflicts may arise in situations not expressly covered in this section 9.505 or in the examples in 9.508. Each individual contracting situation should be examined on the basis of its particular facts and the nature of the proposed contract. The exercise of common sense, good judgment, and sound discretion is required in both the decision on whether a significant potential conflict exists and, if it does, the development of an appropriate means for resolving it. The two underlying principles are—

(a) Preventing the existence of conflicting roles that might bias a contractor's judgment; and

(b) Preventing unfair competitive advantage. In addition to the other situations described in this subpart, an unfair competitive advantage exists where a contractor competing for award of any Federal contract possesses—

(1) Proprietary information (as defined in 3.104-4(j)) that was obtained from a Government official without proper authorization; or

(2) Source selection information (as defined in 3.104-4(k)) that is relevant to the contract but is not available to all competitors, and such information would assist that contractor in obtaining the contract.

9.505-1 Providing systems engineering and technical direction.

(a) A contractor that provides systems engineering and technical direction for a system but does not have overall contractual responsibility for its development, its integration, assembly, and checkout, or its production shall not (1) be awarded a contract to supply the system or any of its major components or (2) be a subcontractor or consultant to a supplier of the system or any of its major components.

(b) Systems engineering includes a combination of substantially all of the following activities: determining specifications, identifying and resolving interface problems, developing test requirements, evaluating test data, and supervising design. Technical direction includes a combination of substantially all of the following activities: developing work statements, determining parameters, directing other contractors' operations, and resolving technical controversies. In performing these activities, a contractor occupies a highly influential and responsible position in determining a system's basic concepts and supervising their exe-

cution by other contractors. Therefore this contractor should not be in a position to make decisions favoring its own products or capabilities.

9.505-2 Preparing specifications or work statements.

(a)(1) If a contractor prepares and furnishes complete specifications covering nondevelopmental items, to be used in a competitive acquisition, that contractor shall not be allowed to furnish these items, either as a prime contractor

or as a subcontractor, for a reasonable period of time including, at least, the duration of the initial production contract. This rule shall not apply to—

(i) Contractors that furnish at Government request specifications or data regarding a product they provide, even though the specifications or data may have been paid for separately or in the price of the product; or

(ii) Situations in which contractors, acting as industry representatives, help Government agencies prepare, refine, or coordinate specifications, regardless of source, provided this assistance is supervised and controlled by Government representatives.

(2) If a single contractor drafts complete specifications for nondevelopmental equipment, it should be eliminated for a reasonable time from competition for production based on the specifications. This should be done in order to avoid a situation in which the contractor could draft specifications favoring its own products or capabilities. In this way the Government can be assured of getting unbiased advice as to the content of the specifications and can avoid allegations of favoritism in the award of production contracts.

(3) In development work, it is normal to select firms that have done the most advanced work in the field. These firms can be expected to design and develop around their own prior knowledge. Development contractors can frequently start production earlier and more knowledgeably than firms that did not participate in the development, and this can affect the time and quality of production, both of which are important to the Government. In many instances the Government may have financed the development. Thus, while the development contractor has a competitive advantage, it is an unavoidable one that is not considered unfair; hence no prohibition should be imposed.

(b)(1) If a contractor prepares, or assists in preparing, a work statement to be used in competitively acquiring a system or services—or provides material leading directly, predictably, and without delay to such a work statement—that contractor may not supply the system, major components of the system, or the services unless—

(i) It is the sole source;

(ii) It has participated in the development and design work; or

(iii) More than one contractor has been involved in preparing the work statement.

(2) Agencies should normally prepare their own work statements. When contractor assistance is necessary, the contractor might often be in a position to favor

Appendix B. Applicable Federal Acquisition Regulation Subpart and Provisions

its own products or capabilities. To overcome the possibility of bias, contractors are prohibited from supplying a system or services acquired on the basis of work statements growing out of their services, unless excepted in subparagraph (b)(1) of this section.

(3) For the reasons given in 9.505-2(a)(3), no prohibitions are imposed on development and design contractors.

9.505-3 Providing technical evaluation or advisory and assistance services.

Contracts involving (a) technical evaluations of other contractors' offers or products or (b) advisory and assistance services (see 37.201) shall not generally be awarded to a contractor that would evaluate, or advise the Government concerning, its own products or activities, or those of a competitor, without proper safeguards to ensure objectivity and protect the Government's interests. In this connection, consult OMB Circular No. A-120, Guidelines for the Use of Advisory and Assistance Services, OFPP Policy Letter 89-1, Conflict of Interest Policies Applicable to Consultants, and implementing agency regulations.

9.505-4 Obtaining access to proprietary information.

(a) When a contractor requires proprietary information from others to perform a Government contract and can use the leverage of the contract to obtain it, the contractor may gain an unfair competitive advantage unless restrictions are imposed. These restrictions protect the information and encourage companies to provide it when necessary for contract performance. They are not intended to protect information (1) furnished voluntarily without limitations on its use or (2) available to the Government or contractor from other sources without restriction.

(b) A contractor that gains access to proprietary information of other companies in performing advisory and assistance services for the Government must agree with the other companies to protect their information from unauthorized use or disclosure for as long as it remains proprietary and refrain from using the information for any purpose other than that for which it was furnished. The contracting officer shall obtain copies of these agreements and ensure that they are properly executed.

(c) Contractors also obtain proprietary and source selection information by acquiring the services of marketing consultants which, if used in connection with an acquisition, may give the contractor an unfair competitive advantage. Contractors should make inquiries of marketing consultants to ensure that the marketing consultant has provided no unfair competitive advantage. See the certification required for contractors and marketing consultants in the provision at 52.209-7.

9.506 Procedures.

(a) If information concerning prospective contractors is necessary to identify and evaluate potential organizational conflicts of interest or to develop recommended actions, and no organizational conflicts of interest certificates have been filed contracting officers should first seek the information from within the Government or from other readily available sources. Government sources include the files

and the knowledge of personnel within the contracting office, other contracting offices, the cognizant contract administration and audit activities and offices concerned with contract financing. Non-Government sources include publications and commercial services, such as credit rating services, trade and financial journals, and business directories and registers.

(b) If the contracting officer decides that a particular acquisition involves a significant potential organizational conflict of interest, the contracting officer shall, before issuing the solicitation, submit for approval to the chief of the contracting office (unless a higher level official is designated by the agency)—

(1) A written analysis, including a recommended course of action for avoiding, neutralizing, or mitigating the conflict, based on the general rules in 9.505 or on another basis not expressly stated in that section;

(2) A draft solicitation provision (see 9.507-1); and

(3) If appropriate, a proposed contract clause (see 9.507-2).

(c) The approving official shall—

(1) Review the contracting officer's analysis and recommended course of action, including the draft provision and any proposed clause;

(2) Consider the benefits and detriments to the Government and prospective contractors; and

(3) Approve, modify, or reject the recommendations in writing.

(d) The contracting officer shall—

(1) Include the approved provision(s) and any approved clause(s) in the solicitation or the contract, or both;

(2) Consider additional information provided by prospective contractors in response to the solicitation or during negotiations;

(3) Before awarding the contract, resolve the conflict or the potential conflict in a manner consistent with the approval or other direction by the head of the contracting activity; and

(4) Retain all certificates submitted in accordance with the provisions at 52.209-7 and 52.209-8 in the contract file.

(e) If, during the effective period of any restriction (see 9.507), a contracting office transfers acquisition responsibility for the item or system involved, it shall notify the successor contracting office of the restriction, and send a copy of the contract under which the restriction was imposed.

9.507 Solicitation provisions and contract clause.

9.507-1 Solicitation provisions.

(a) As indicated in the general rules in 9.505, significant potential organizational conflicts of interest are normally resolved by imposing some restraint, appropriate to the nature of the conflict, upon the contractor's eligibility for future contracts or subcontracts. Therefore, affected solicitations shall contain a provision that—

(1) Invites offerors' attention to this subpart;

(2) States the nature of the potential conflict as seen by the contracting officer;

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(3) States the nature of the proposed restraint upon future contractor activities; and

(4) Depending on the nature of the acquisition, states whether or not the terms of any proposed clause and the application of this subpart to the contract are subject to negotiation.

(b) The contracting officer shall insert the provision at 52.209-7, Organizational Conflicts of Interest Certificate—Marketing Consultants, in solicitations, other than sealed bids, if the contract amount is expected to exceed \$200,000.

(c) The contracting officer shall insert the provision at 52.209-8, Organizational Conflicts of Interest Certificate—Advisory and Assistance Services, in solicitations for advisory and assistance services if the contract amount is expected to exceed \$25,000.

(d) The provisions required by paragraphs (b) and (c) of this subsection shall not be used in solicitations for—

(1) Services excluded in section 37.204;

(2) Routine engineering and technical services (such as installation, operation or maintenance of systems, equipment, software components, or facilities);

(3) Routine legal, actuarial, auditing and accounting services;

(4) Training services; and

(5) Services rendered in connection with intelligence activities defined in section 3.4(e) of Executive Order 12333 or a comparable definitional section in any successor order, or in connection with special access programs.

9.507-2 Contract clause.

(a) If, as a condition of award, the contractor's eligibility for future prime contract or subcontract awards will be restricted or the contractor must agree to some other restraint, the solicitation shall contain a proposed clause that specifies both the nature and duration of the proposed restraint. The contracting officer shall include the clause in the contract, first negotiating the clause's final terms with the successful offeror, if it is appropriate to do so (see 9.506(d) of this subsection).

(b) The restraint imposed by a clause shall be limited to a fixed term of reasonable duration, sufficient to avoid the circumstance of unfair competitive advantage or potential bias. This period varies. It might end, for example, when the first production contract using the contractor's specifications or work statement is awarded, or it might extend through the entire life of a system for which the contractor has performed systems engineering and technical direction. In every case, the restriction shall specify termination by a specific date or upon the occurrence of an identifiable event.

9.508 Examples.

The examples in paragraphs (a) through (i) following illustrate situations in which questions concerning organizational conflicts of interest may arise. They are not all inclusive, but are intended to help the contracting officer apply the general rules in 9.505 to individual contract situations.

(a) Company A agrees to provide systems engineering and technical direction for the Navy on the powerplant for

a group of submarines (i.e., turbines, drive shafts, propellers, etc.). Company A should not be allowed to supply any powerplant components. Company A can, however, supply components of the submarine unrelated to the powerplant (e.g., fire control, navigation, etc.). In this example, the system is the powerplant, not the submarine, and the ban on supplying components is limited to those for the system only.

(b) Company A is the systems engineering and technical direction contractor for system X. After some progress, but before completion, the system is canceled. Later, system Y is developed to achieve the same purposes as system X, but in a fundamentally different fashion. Company B is the systems engineering and technical direction contractor for system Y. Company A may supply system Y or its components.

(c) Company A develops new electronic equipment and, as a result of this development, prepares specifications. Company A may supply the equipment.

(d) XYZ Tool Company and PQR Machinery Company, representing the American Tool Institute, work under Government supervision and control to refine specifications or to clarify the requirements of a specific acquisition. These companies may supply the item.

(e) Before an ADP equipment acquisition is conducted, Company A is awarded a contract to prepare data system specifications and equipment performance criteria to be used as the basis for the equipment competition. Since the specifications are the basis for selection of commercial hardware, a potential conflict of interest exists. Company A should be excluded from the initial follow-on ADP hardware acquisition.

(f) Company A receives a contract to define the detailed performance characteristics an agency will require for purchasing rocket fuels. Company A has not developed the particular fuels. When the definition contract is awarded, it is clear to both parties that the agency will use the performance characteristics arrived at to choose competitively a contractor to develop or produce the fuels. Company A may not be awarded this follow-on contract.

(g) Company A receives a contract to prepare a detailed plan for scientific and technical training of an agency's personnel. It suggests a curriculum that the agency endorses and incorporates in its request for proposals to institutions to establish and conduct the training. Company A may not be awarded a contract to conduct the training.

(h) Company A is selected to study the use of lasers in communications. The agency intends to ask that firms doing research in the field make proprietary information available to Company A. The contract must require Company A to (1) enter into agreements with these firms to protect any proprietary information they provide and (2) refrain from using the information in supplying lasers to the Government or for any purpose other than that for which it was intended.

(i) An agency that regulates an industry wishes to develop a system for evaluating and processing license applications. Contractor X helps develop the system and process the applications. Contractor X should be prohibited from acting as a consultant to any of the applicants during its period of performance and for a reasonable period thereafter.

Appendix B. Applicable Federal Acquisition Regulation Subpart and Provisions

52.209-7 Organizational Conflicts of Interest Certificate—Marketing Consultants.

As prescribed in 9.507-1(b), insert the following provision:

ORGANIZATIONAL CONFLICTS OF INTEREST CERTIFICATE—MARKETING CONSULTANTS (NOV 1991)

(a) Definitions.

(1) "Marketing consultant" means any independent contractor who furnishes advice, information, direction, or assistance to an offeror or any other contractor in support of the preparation or submission of an offer for a Government contract by that offeror. An independent Contractor is not a marketing consultant when rendering—

- (i) Services excluded in FAR 37.204;
- (ii) Routine engineering and technical services (such as installation, operation, or maintenance of systems, equipment, software, components, or facilities);
- (iii) Routine legal, actuarial, auditing, and accounting services; or
- (iv) Training services.

(2) Organizational conflict of interest means that because of other activities or relationships with other persons, a person is unable or potentially unable to render impartial assistance or advice to the Government, or the person's objectivity in performing the contract work is or might be otherwise impaired, or a person has an unfair competitive advantage.

(b) An individual or firm that employs, retains, or engages contractually one or more marketing consultants in connection with a contract, shall submit to the contracting officer, with respect to each marketing consultant, the certificates described below, if the individual or firm is notified that it is the apparent successful offeror.

(c) The certificate* must contain the following:

- (1) The name of the agency and the number of the solicitation in question.
- (2) The name, address, telephone number, and federal taxpayer identification number of the marketing consultant.
- (3) The name, address, and telephone number of a responsible officer or employee of the marketing consultant who has personal knowledge of the marketing consultants involvement in the contract.
- (4) A description of the nature of the services rendered by or to be rendered by the marketing consultant.
- (5) The name, address, and telephone number of the client or clients, and the name of a responsible officer or employee of the marketing consultant who is knowledgeable about the services provided to such client(s), and a description of the nature of the services rendered to such client(s), if, based on information provided to the Contractor by the marketing consultant, any marketing consultant is rendering or, in the 12* months preceding the date of the certificate, has rendered services

respecting the same subject matter of the instant solicitation, or directly relating to such subject matter, to the Government or any other client (including any foreign government or person).

(6) A statement that the person who signs the certificate for the prime Contractor has informed the marketing consultant of the existence of Subpart 9.5 and Office

of Federal Procurement Policy Letter 89-1.

(7) The signature, name, title, employer's name, address, and telephone number of the persons who signed the certificates for both the apparent successful offeror and the marketing consultant.

(d) In addition, the apparent successful offeror shall forward to the Contracting Officer a certificate signed by the marketing consultant that the marketing consultant has been told of the existence of Subpart 9.5 and Office of Federal Procurement Policy Letter 89-1, and the marketing consultant has made inquiry, and to the best of the consultant's knowledge and belief, the consultant has provided no unfair competitive advantage to the prime Contractor with respect to the services rendered or to be rendered in connection with the solicitation, or that any unfair competitive advantage that, to the best of the consultant's knowledge and belief, does or may exist, has been disclosed to the offeror.

(e) Failure of the offeror to provide the certifications may result in the offeror being determined ineligible for award. Misrepresentation of any fact may result in the assessment of penalties associated with false certifications or such other provisions provided for by law or regulation.

(End of provision)

52.209-8 Organizational Conflicts of Interest Certificate—Advisory and Assistance Services.

As prescribed in 9.507-1(c), insert the following provision:

ORGANIZATIONAL CONFLICTS OF INTEREST CERTIFICATE—ADVISORY AND ASSISTANCE SERVICES (NOV 1991)

(a) "Organizational conflict of interest" means that because of other activities or relationships with other persons, a person is unable or potentially unable to render impartial assistance or advice to the Government, or the person's objectivity in performing the contract work is or might be otherwise impaired, or a person has an unfair competitive advantage.

(b) An offeror notified that it is the apparent successful offeror shall provide the certificate described in paragraph (c) of this provision.

(c) The certificate must contain the following:

- (1) Name of the agency and the number of the solicitation in question.
- (2) The name, address, telephone number, and federal taxpayer identification number of the apparent successful offeror.
- (3) A description of the nature of the services rendered by or to be rendered on the instant contract.

* If approved by the head of the contracting activity, this period may be increased up to 36 months.

Appendix B. Applicable Federal Acquisition Regulation Subpart and Provisions

(4) The name, address, telephone number of the client or client(s), a description of the services rendered to the previous client(s), and the name of a responsible officer or employee of the offeror who is knowledgeable about the services rendered to each client. If, in the 12^o months preceding the date of the certification, services were rendered to the Government or any other client (including a foreign government or person) respecting the same subject matter of the instant solicitation, or directly relating to such subject matter. The agency and contract number under which the services were rendered must also be included, if applicable.

* If approved by the head of the contracting activity, this period may be increased up to 36 months.

(5) A statement that the person who signs the certificate has made inquiry and that, to the best of his or her knowledge and belief, no actual or potential conflict of interest or unfair competitive advantage exists with respect to the advisory and assistance services to be provided in connection with the instant contract, or that any actual or potential conflict of interest or unfair competitive advantage that does or may exist with respect to the contract in question has been communicated in writing to the Contracting Officer or his or her representatives.

(6) The signature, name, employer's name, address, and telephone number of the person who signed the certificate.

(d) Failure of the offeror to provide the certification may result in the offeror being determined ineligible for award. Misrepresentation of any fact may result in the assessment of penalties associated with false certifications or such other provisions provided for by law or regulation.

(End of provision)

Appendix C. Contracts Reviewed

| Contracting Activity | Contract | FAR 52.209-7 | | | FAR 52.209-8 | | | Amount |
|--|-------------------|--------------------------|----------|------------------------|--------------------------|------------------|------------------------|------------|
| | | Required in Solicitation | Included | Certification Obtained | Required in Solicitation | Included | Certification Obtained | |
| | | | | | | | | (millions) |
| Army Armament, Munitions, and Chemical Command | DAAA09-91-C-03411 | No | No | No | No | No | No | \$ 0.89 |
| | DAAA09-91-C-04861 | Yes | Yes | No | Yes | Yes | Yes | 0.34 |
| | DAAA09-91-C-07362 | No | No | No | No | No | No | 0.25 |
| | DAAA09-92-C-03301 | Yes | Yes | No | Yes | Yes | No | 0.94 |
| | DAAA09-92-C-03591 | Yes | Yes | No | No | No | No | 0.66 |
| | DAAA09-92-C-06931 | Yes | Yes | No | No | Yes ³ | No | 0.06 |
| | DAAA09-92-D-00021 | Yes | Yes | No | No | No | No | 2.72 |
| | DAAA09-92-G-00012 | Yes | Yes | No | Yes | Yes | No | 6.79 |
| | DAAA09-92-G-00031 | Yes | Yes | No | No | Yes ³ | No | 2.75 |
| | DAAA09-93-C-00431 | Yes | Yes | No | No | No | No | 1.35 |
| Army Communications- Electronics Command | DAAB07-91-C-J2592 | No | No | No | No | No | No | 0.48 |
| | DAAB07-91-C-J5224 | No | No | No | No | No | No | 0.40 |
| | DAAB07-91-C-L0061 | Yes | No | No | No | No | No | 9.25 |
| | DAAB07-91-D-F0051 | No | No | No | No | No | No | 115.00 |
| | DAAB07-91-D-L2511 | No | No | No | No | No | No | 0.75 |
| | DAAB07-92-C-K5055 | Yes | No | No | No | No | No | 0.67 |
| | DAAB07-92-D-B2641 | Yes | No | No | Yes | No | No | 0.25 |
| | DAAB07-92-D-C7551 | Yes | No | No | Yes | No | No | 0.20 |
| | DAAB07-93-D-B7551 | Yes | Yes | No | Yes | No | No | 1.09 |
| | DAAB07-93-D-U0121 | Yes | Yes | No | No | No | No | 90.00 |
| Defense Supply Service- Washington | MDA903-91-C-00202 | Yes | No | No | No | No | No | 0.39 |
| | MDA903-91-C-00882 | Yes | No | No | No | No | No | 0.10 |
| | MDA903-91-C-01782 | Yes | No | No | No | No | No | 0.35 |
| | MDA903-91-C-01791 | Yes | No | No | No | No | No | 4.50 |
| | MDA903-91-D-00206 | Yes | No | No | No | No | No | 0.26 |
| | MDA903-91-D-00266 | Yes | No | No | No | No | No | 11.74 |
| | MDA903-91-D-00304 | Yes | Yes | No | No | No | No | 1.56 |
| | MDA903-92-C-01711 | Yes | No | No | No | No | No | 0.53 |
| | MDA903-92-D-00116 | Yes | No | No | No | No | No | 5.40 |
| | MDA903-92-D-01084 | Yes | Yes | No | Yes | Yes | No | 3.59 |

See footnotes at end of appendix.

| Contracting Activity | Contract | FAR 52.209-7 | | | FAR 52.209-8 | | | Amount |
|----------------------|-------------------|--------------------------|----------|------------------------|--------------------------|----------|------------------------|------------|
| | | Required in Solicitation | Included | Certification Obtained | Required in Solicitation | Included | Certification Obtained | |
| | | | | | | | | (millions) |
| Naval Air Systems | N00019-91-C-00031 | Yes | No | No | No | No | No | \$272.94 |
| Command | N00019-91-C-00685 | Yes | No | No | No | No | No | 29.57 |
| | N00019-91-C-01251 | Yes | Yes | No | Yes | Yes | No | 11.08 |
| | N00019-91-C-01455 | Yes | Yes | No | Yes | Yes | No | 4.35 |
| | N00019-91-C-01602 | No | No | No | No | No | No | 4.86 |
| | N00019-91-C-01901 | No | No | No | No | No | No | 206.29 |
| | N00019-91-C-01965 | Yes | No | No | No | No | No | 61.72 |
| | N00019-91-C-02075 | Yes | No | No | No | No | No | 43.90 |
| | N00019-91-C-02241 | Yes | No | No | No | No | No | 0.68 |
| | N00019-91-C-02351 | Yes | Yes | No | Yes | Yes | No | 1.73 |
| | N00019-91-C-02471 | No | No | No | No | No | No | 66.45 |
| | N00019-91-C-02622 | Yes | Yes | No | No | No | No | 7.42 |
| | N00019-91-C-02771 | Yes | Yes | No | Yes | Yes | No | 0.53 |
| | N00019-91-D-02601 | Yes | Yes | No | Yes | Yes | No | 9.61 |
| | N00019-91-G-02641 | Yes | No | No | No | No | No | 7.09 |
| | N00019-92-C-00481 | Yes | No | No | No | No | No | 0.89 |
| | N00019-92-C-01601 | Yes | Yes | No | Yes | Yes | No | 1.52 |
| | N00019-92-C-01752 | Yes | Yes | No | Yes | Yes | No | 7.33 |
| | N00019-92-D-00094 | Yes | No | No | Yes | Yes | Yes | 6.07 |
| | N00019-93-C-00101 | Yes | Yes | No | No | No | No | 2.97 |
| | N00019-93-D-00092 | Yes | Yes | No | Yes | Yes | Yes | 0.38 |
| Naval Air Systems | N00123-91-C-51421 | No | No | No | No | No | No | 0.72 |
| Contracting Center, | N00123-91-D-50871 | No | No | No | No | No | No | 3.19 |
| San Diego | N00123-91-D-51182 | No | No | No | No | No | No | 3.00 |
| | N00123-91-D-51251 | No | No | No | No | No | No | 1.17 |
| | N00123-91-D-51742 | No | No | No | No | No | No | 1.20 |
| | N00123-92-D-50571 | No | No | No | No | No | No | 3.30 |
| | N00123-92-D-50941 | Yes | No | No | Yes | No | No | 1.02 |
| | N00123-92-D-52071 | Yes | No | No | Yes | No | No | 6.31 |
| | N00123-92-D-54911 | Yes | No | No | No | No | No | 2.28 |
| | N00123-93-D-51541 | Yes | No | No | Yes | Yes | No | 7.12 |

See footnotes at end of appendix.

| Contracting Activity | Contract | FAR 52.209-7 | | | FAR 52.209-8 | | | Amount |
|---------------------------------------|-------------------------------|--------------------------|----------|------------------------|--------------------------|------------------|------------------------|------------|
| | | Required in Solicitation | Included | Certification Obtained | Required in Solicitation | Included | Certification Obtained | |
| | | | | | | | | (millions) |
| Air Force Aeronautical Systems Center | F33600-91-C-0110 ² | No | No | No | No | No | No | \$ 0.79 |
| | F33600-91-D-0276 ¹ | No | No | No | No | No | No | 2.90 |
| | F33600-92-C-0087 ¹ | No | No | No | No | No | No | 1.69 |
| | F33615-91-C-1711 ² | Yes | Yes | No | No | No | No | 2.40 |
| | F33615-91-C-1801 ⁴ | Yes | Yes | No | No | No | No | 3.83 |
| | F33657-91-D-0057 ⁴ | Yes | Yes | No | No | No | No | 14.50 |
| | F33657-91-D-2164 ⁴ | Yes | Yes | No | Yes | Yes | No | 24.00 |
| | F33657-91-D-2236 ⁴ | No | No | No | No | No | No | 4.50 |
| | F33657-92-D-2171 ¹ | Yes | Yes | No | No | No | No | 2.20 |
| | F33657-93-D-2035 ² | Yes | Yes | No | No | No | No | 16.46 |
| Air Force Electronic Systems Center | F19628-88-D-0016 ¹ | No | No | No | No | No | No | 20.77 |
| | F19628-90-D-0001 ¹ | No | No | No | No | No | No | 17.73 |
| | F19628-90-D-0007 ¹ | No | No | No | No | No | No | 0.78 |
| | F19628-91-C-0077 ² | Yes | Yes | No | Yes | Yes | No | 14.86 |
| | F19628-91-C-0088 ² | No | No | No | No | No | No | 69.90 |
| | F19628-91-C-0092 ⁵ | Yes | Yes | No | Yes | Yes | No | 1.56 |
| | F19628-92-C-0006 ² | Yes | Yes | No | No | No | No | 6.37 |
| | F19628-92-D-0009 ⁶ | Yes | Yes | No | Yes | Yes | No | 2.49 |
| | F19628-93-C-0036 ² | Yes | Yes | No | No | No | No | 34.02 |
| | F19628-93-D-0025 ¹ | Yes | Yes | Yes | No | Yes ³ | No | 19.04 |
| Advanced Research Projects Agency | MDA972-90-C-0067 ⁴ | No | No | No | No | No | No | 4.18 |
| | MDA972-91-C-0013 ⁵ | Yes | No | No | No | No | No | 0.90 |
| | MDA972-91-C-0030 ⁵ | Yes | No | No | No | No | No | 1.32 |
| | MDA972-91-C-0053 ² | Yes | Yes | No | No | No | No | 1.45 |
| | MDA972-92-C-0008 ⁵ | Yes | No | No | No | No | No | 6.21 |
| | MDA972-92-C-0020 ² | Yes | No | No | No | No | No | 0.60 |
| | MDA972-92-C-0029 ⁵ | Yes | Yes | No | No | No | No | 2.09 |
| | MDA972-92-C-0042 ¹ | Yes | Yes | No | No | No | No | 0.15 |
| | MDA972-92-C-0048 ⁵ | Yes | Yes | No | No | No | No | 0.32 |
| | MDA972-93-C-0003 ² | Yes | Yes | No | Yes | Yes | No | 7.62 |

See footnotes at end of appendix.

| Contracting Activity | Contract | FAR 52.209-7 | | | FAR 52.209-8 | | | Amount |
|------------------------|-------------------------------|--------------------------|----------|------------------------|--------------------------|------------------|------------------------|------------|
| | | Required in Solicitation | Included | Certification Obtained | Required in Solicitation | Included | Certification Obtained | |
| | | | | | | | | (millions) |
| Defense Nuclear Agency | DNA001-91-C-0132 ² | Yes | Yes | No | No | No | No | \$ 1.00 |
| | DNA001-91-C-0136 ⁵ | Yes | Yes | No | No | No | No | 2.48 |
| | DNA001-92-C-0029 ² | Yes | No | No | No | No | No | 6.52 |
| | DNA001-92-C-0033 ² | Yes | Yes | No | No | No | No | 6.59 |
| | DNA001-92-C-0088 ⁴ | Yes | No | No | Yes | No | No | 1.19 |
| | DNA001-92-C-0148 ¹ | Yes | No | No | Yes | Yes | No | 1.10 |
| | DNA001-92-C-0175 ⁵ | Yes | Yes | No | Yes | Yes | No | 1.19 |
| | DNA001-93-C-0016 ⁵ | Yes | Yes | No | Yes | No | No | 4.49 |
| | DNA001-93-C-0050 ¹ | Yes | Yes | No | No | Yes ³ | No | 10.32 |
| | DNA001-93-C-0103 ² | Yes | Yes | No | No | No | No | 1.48 |

¹Contract for services other than automated data processing or information resources management, although either may be involved. Total of 47 contracts valued at \$914.85 million.

²Contract for information resources management services. Total of 26 contracts valued at \$202.61 million.

³Provision included but not required because contract was not for consulting services.

⁴Contract for studies and analysis. Total of 10 contracts valued at \$63.82 million.

⁵Contract for research and development. Total of 14 contracts valued at \$160.77 million.

⁶Contract for automated data processing services. Total of 4 contracts valued at \$19.89 million.

Appendix D. Summary of Prior Audits and Other Reviews

General Accounting Office

On October 20, 1993, the General Accounting Office announced Project No. 966588, a survey to determine what Federal agencies are doing to avoid potential conflicts of interest by their consulting services contractors, and whether sufficient information exists to determine where potential conflicts exist. Within DoD, the General Accounting Office reviewed consulting service contracts awarded by the Naval Command, Control, and Ocean Surveillance Center, San Diego, California; the Naval Air Warfare Center, Weapons Division, China Lake, California; and the Navy Regional Contracting Center, San Diego. As of July 21, 1994, the review is in progress at Naval Sea Systems Command, Arlington, Virginia; Naval Air Systems Command, Arlington; Office of the Chief of Naval Research, Arlington; Navy Regional Contracting Center, Washington, D.C.; and Military Sealift Command, Washington, D.C. The Chairman, Subcommittee on Federal Services, Post Office, and Civil Service, Senate Committee on Governmental Affairs, requested the audit.

Report No. GAO/NSIAD 91-60 (OSD Case No. 8382), "Test and Evaluation - The Director, Operational Test and Evaluation's Controls Over Contractors," December 1990. The report states that the Institute for Defense Analysis, a federally funded research and development center, used contractors who had worked on programs to perform operational test and evaluation of those programs. The report also questions the objectivity of the Institute for Defense Analysis because of its work for DoD organizations responsible for system acquisition and development testing. The report recommended that the Director, Operational Test and Evaluation, DoD, require the Institute for Defense Analysis to disclose possible conflicts of interest. The Director concurred, and stated that in November 1990, the Institute for Defense Analysis implemented procedures to provide to the Director, Operational Test and Evaluation, DoD, information on any consultant working on operational test and evaluation projects for which any appearance of conflict of interest could exist.

Report No. GAO/NSIAD 90-119 (OSD Case No. 8026-A), "Consulting Services - Role and Use in Acquiring Three Weapons Systems," August 1990. The General Accounting Office evaluated DoD use of consulting services in acquiring the Army's fiber optic guided missile, the Navy's V-22 tiltrotor aircraft, and the Air Force's Peacekeeper Rail Garrison missile basing system. The report does not identify conflicts of interest, but stresses the need for Government awareness of consultant employment relationships to make informed judgments about potential conflicts; the need to evaluate conflicts of

Appendix D. Summary of Prior Audits and Other Reviews

interest on a case-by-case basis; and the use of appropriate contract clauses to avoid or mitigate identified conflicts. The report does not contain any recommendations to DoD concerning organizational conflicts of interest.

Inspector General, DoD

Report No. 92-OIG-01, "Independent Cost Estimating for Major Defense Acquisition Programs," February 5, 1992. The report states that two principal support contractors for Air Force programs prepared the cost estimates for those programs. This practice was not conducive to the preparation of an estimate free from influence by program advocates. The report recommended that the Assistant Secretary of Defense (Program Analysis and Evaluation) revise DoD Directive 5000.4 to require that the Cost Analysis Improvement Group review and approve the use of all contractors in preparation of independent cost estimates to preclude conflicts of interest. The recommendation was implemented in a revised directive that became effective November 24, 1992.

Report No. 91-115, "Consulting Services Contracts for Operational Test and Evaluation," August 22, 1991. The report states that the Military Department operational test agencies frequently used the same services contractors to support operational tests for major Defense acquisition systems that participated in the development of the systems. As a result, operational tests may not attain the desired impartiality and independence, test assessments may be biased, and systems may be produced and deployed with unknown performance limitations. The report states this situation fits the general description of an organizational conflict of interest even though it is not one of the specific examples mentioned in FAR subpart 9.5. The report recommended that the Director, Operational Test and Evaluation, DoD, revise DoD Directive 5000.2 to require program managers to maintain a list of all advisory and assistance services contractors and subcontractors that participated in the development, production, or testing for major Defense acquisition systems. As of July 28, 1994, the revision was not issued because numerous additional changes to the directive are required as a result of recent legislation.

Report No. 91-042, "Software Engineering Support Contracts for Intercontinental Ballistic Missiles," February 6, 1991. The report states that a potential for organizational conflicts of interest existed because a contractor assisted the Peacekeeper Rail Garrison Program Office in determining work requirements and resources and later performed the work. The report made no recommendations.

Report No. 90-092, "Quick-Reaction Report on the Audit of the Procurement of Contract Reconciliation Services by the Defense Logistics Agency," July 2, 1990. The report states that Defense Logistics Agency had contracted with a large public accounting firm to reconcile DoD contracts. Some of the contractors could have been clients for whom the accounting firm provided audit or management consulting services. In such cases, the accounting firm could have a conflict of interest. The report recommended modifying the contract to

Appendix D. Summary of Prior Audits and Other Reviews

prohibit the accounting firm from reconciling DoD contracts with clients of the accounting firm. On August 10, 1990, the Deputy Comptroller, Defense Logistics Agency, gave written notice of the prohibition to the contractor and directed the contracting officer's technical representative to enforce it.

Report No. 89-104, "Acquisition of the MK-50 Torpedo Program," August 29, 1989. The report recommended that Naval Ocean Systems Center include restrictive conflict of interest clauses in contracts for support services. The Naval Ocean Systems Center implemented the recommendation.

Report No. INS 88-002, "Inspection of Defense Supply Service-Washington," February 22, 1988. The report states no formal means ensured that follow-on contracts for related work are not awarded to contractors restricted from bidding because of conflict of interest clauses in previous contracts. The report recommended that the Defense Supply Service-Washington publish a list of contractors that were restricted from bidding. Management agreed to implement the recommendation.

Appendix E. Summary of Questionnaire Responses

The Inspector General, DoD, was requested to obtain answers to seven questions during the audit. We included the questions in a questionnaire to 46 DoD contracting activities. The questions and the responses received are summarized below.

Question 1, Number of Filed Conflicts of Interest Certificates

How many organizational conflict of interest certificates have contractors filed with your activity since the requirement became effective on October 22, 1990?

Response Summary. Of the 46 contracting activities responding to the questionnaire, 9 contracting activities reported receiving a total of 31 certificates from October 22, 1990, through December 31, 1992. One contracting activity stated it obtained certificates but did not provide the number received, and 7 contracting activities did not answer the question. The other 29 contracting activities reported receiving no certificates.

Audit Comment. DoD does not have a data base identifying the numbers of certificates filed, and this information was not readily available at most of the DoD contracting activities. The DoD contracting activities should have obtained more certificates than were reported as received. Certificates were not received because contracting officers did not always include in contract solicitations the FAR provisions that required the certificates, contracting officers did not notify apparent successful offerers to submit the certificates when the FAR provisions were in the contract solicitations, and successful offerers did not file the certificates when tendered the contracts. See Finding A.

Question 2, Reports of Conflict or Unfair Advantage

Were there any instances where an apparent successful offerer reported an actual or potential conflict situation or unfair competitive advantage that they identified as significant?

Response Summary. Of the 46 contracting activities, 4 reported that in 5 instances the contractors reported a potential or actual conflict of interest that was considered significant.

Question 3, Making Information Available

Do contracting officers at your activity and program officials supported by your activity believe that making more conflict of interest information available to the Government and placing increased emphasis on a preaward review for the presence of conflicts of interest have increased the likelihood that the Government will receive unbiased advice from its consultants?

Response Summary.

| | |
|------------|----|
| Yes | 26 |
| No | 12 |
| No opinion | 8 |

The 12 contracting activities, which did not believe that making more information available and emphasizing preaward reviews were useful, stated that locally prepared guidance and the FAR guidance on procurement integrity and conflicts of interest that existed before OFPP Policy Letter 89-1 were sufficient.

Question 4, Lessening the Likelihood of Unfair Advantage

Do contracting officers at your activity and program officials supported by your activity believe that the requirements in FAR subpart 9.5 have lessened the likelihood that consultants or marketing consultants will attempt to obtain an unfair competitive advantage?

Response Summary.

| | |
|------------|----|
| Yes | 20 |
| No | 11 |
| No opinion | 15 |

Contracting activities that did not believe that the amended FAR subpart 9.5 was helpful in preventing contractors from gaining an unfair competitive advantage offered the following reasons: the FAR guidance is vague and difficult to understand, and the revised guidance added no additional benefits over previous guidance.

Question 5, Sufficient Means Existed to Obtain Unbiased Performance

Do contracting officers at your activity and program officials supported by your activity believe that sufficient means existed before OFPP Policy Letter 89-1 for obtaining unbiased contract performance and discouraging the obtaining or exploitation of unfair competitive advantage?

Response Summary.

| | |
|------------|----|
| Yes | 13 |
| No | 20 |
| No opinion | 13 |

The contracting activities providing positive responses generally stated that sufficient conflict of interest requirements were already in the FAR and in locally prepared provisions and guidance.

Question 6, FAR Procedures Understandable

Do contracting officers at your activity and program officials supported by your activity believe that the procedures in FAR subpart 9.5 are understandable and easy to implement without great expense to the Government or contractors?

Response Summary.

| | |
|------------|----|
| Yes | 34 |
| No | 9 |
| No opinion | 3 |

Audit Comment. Although the majority of the contracting activities provided positive responses, interviews with individual contracting officers showed that many contracting officers did not have a good understanding of the certification requirements. See Finding A.

Question 7, Changes to the FAR

Do contracting officers at your activity and program officials supported by your activity believe that any changes should be made to FAR subpart 9.5?

Appendix E. Summary of Questionnaire Responses

Response Summary.

| | |
|------------|----|
| Yes | 13 |
| No | 30 |
| No opinion | 3 |

Changes recommended by the contracting activities included:

- o Rewrite in language that can be readily understood by nonlawyers, and provide additional details about the procedures to follow.

- o Delete the exemption for the services excluded from the definition of advisory and assistance services by FAR 37.204 because conflicts of interest can occur on any type of acquisition. [FAR 9.507-1(d) pertains.]

- o Include a standard provision so that every time a provision is required approval does not have to be obtained. [FAR 9.506 pertains.]

- o Address conflicts of interest avoidance plans as a tool to identify and avoid potential conflicts of interest.

- o OFPP should review the need for standard clauses relating to organizational and consultant conflicts of interest for those contracting efforts that consist of research and development but involve significant contractor engineering support. OFPP should offer guidance on when to use those clauses, especially in the event the contracting officer determines that the use of such clauses will significantly and negatively affect competition.

Appendix F. Proposed Federal Acquisition Regulation Changes

9.507-1, "Solicitation Provisions"

Add (e) as follows:

(e) The contracting officer shall obtain the certificates required by the provisions at 52.209-7 and 52.209-8 or a written statement giving reasons why the certifications cannot be made from all offerors with initial proposals, and evaluate any information therein which might indicate the existence of an organizational conflict of interest. If the contracting officer determines an organizational conflict of interest exists which might preclude award to any otherwise eligible offeror, the contracting officer shall provide written notice to such offeror as prescribed in 9.504(e). If the contracting officer determines that an offeror with a potential organizational conflict of interest should remain in competition and that award to such offeror is in the best interest of the United States, the contracting officer shall request a waiver in accordance with 9.503.

31.205-33, "Professional and Consultant Service Costs"

Add (c)(5) as follows:

(c)(5) Services by marketing consultants in support of the preparation or submission of an offer for a Government contract when the contractor and marketing consultants did not submit the organizational conflicts of interest certificates required by FAR 52.209-7.

52.209-7, "Organizational Conflicts of Interest Certificate - Marketing Consultants"

Change (b) as follows (underlined text to be added):

(b) An individual or firm that employs, retains, or engages contractually one or more marketing consultants in connection with a contract shall, with its offer, submit to the contracting officer, with respect to each marketing consultant, the certificates described below in paragraph (c) of this provision. ~~if the individual or firm is notified that it is the apparent successful offeror~~. Offerors who are unable to provide the certificates shall provide a written statement giving reasons why the certifications cannot be made.

Appendix F. Proposed Federal Acquisition Regulation Changes

Change (e) as follows (underlined text to be added):

(e) Failure of the offeror to provide the certifications may result in the offeror being determined ineligible for award. Misrepresentation of any fact may result in the assessment of penalties associated with false certifications or such other provisions provided for by law or regulation, including disallowance of marketing consultant costs.

52.209-8, "Organizational Conflicts of Interest Certificate - Advisory and Assistance Services"

Change (b) as follows (underlined text to be added):

~~(b) An offeror notified that it is the apparent successful offeror~~ All offerors shall, with their offers, provide submit to the contracting officer the certificate described in paragraph (c) of this provision. Offerors who are unable to provide the certificate shall provide to the contracting officer a written statement giving the reasons why the certification cannot be made.

Appendix G. Summaries of Contracts Requiring a Restrictive Clause

DoD contracting officers did not include in eight contracts a restrictive clause that was required because potential organizational conflicts of interest existed. Information on the work statement, the potential conflict of interest, and the omission of the clause is summarized below for each contract.

Contract DAAB07-91-D-F005

| | |
|-----------------------|---|
| Contracting Activity: | Army Communications-Electronics Command |
| Competitive: | Yes |
| Award Amount: | \$115,000,000 (basic plus 4 option years) |
| Contractor: | GTE Government Systems Corporation (GTE) |

Statement of Work. Provide program management and control and performance of software quality assurance management and configuration management functions for the AN/TTC-39 and AN/TYC-39 circuit and message switches; provide AN/TTC-39 and AN/TYC-39 system engineering, equipment design modifications, logistic support, and field assistance technical services.

Evaluation. GTE developed the AN/TTC-39 and AN/TYC-39 switches in the early 1980s and has been the sole producer of the switches. However, the Government purchased the technical data package under the initial production contract. According to the contracting officer's market survey, 11 other contractors showed interest in performing the statement of work. However, none of the 11 contractors bid, citing reasons such as limited personnel, no teaming partners, services not within scope of company abilities, and other contract commitments.

The contract requires the contractor to provide engineering support and to develop design modifications/enhancements (upgrades) to the AN/TTC-39 and AN/TYC-39 circuit and message switches. Development of design modifications will give GTE an unfair competitive advantage when bidding on future contracts to supply or install modified or upgraded items. The contract should have contained an organizational conflict of interest clause restricting GTE from bidding as a prime contractor or subcontractor to supply hardware or perform modifications for the AN/TTC and AN/TYC circuit and message switches. The contracting officer obtained approval from legal counsel and the Principal Assistant Responsible for Contracting, Army Communications-Electronics Command, to insert a restrictive clause in the contract solicitation. During negotiations, the contracting officer agreed to a request from GTE to

Appendix G. Summaries of Contracts Requiring a Restrictive Clause

omit the organizational conflict of interest clause from the contract. The contracting officer did not obtain written approval from the Principal Assistant Responsible for Contracting to exclude the restrictive clause from the contract.

Discussion with Contracting Activity Officials. The contracting officer stated that a restrictive provision was included in the contract solicitation because the procurement was competitive. The contracting officer stated that a restrictive clause was not included in the contract because GTE was the only offerer.

Conclusion. A restrictive clause should be in the contract, or the contracting officer should have obtained written approval from the head of the contracting activity to waive the restrictive clause. GTE will gain an unfair competitive advantage on any follow-on production contracts by virtue of the work performed on contract DAAB07-91-D-F005. Additionally, without a restrictive clause, GTE is placed in a position that could impair its objectivity and result in GTE recommending procurement of its own products or services.

Contract DNA001-92-C-0029

| | |
|-----------------------|---------------------------------|
| Contracting Activity: | Defense Nuclear Agency |
| Competitive: | No |
| Award Amount: | \$6,523,425 |
| Contractor: | Northrop Corporation (Northrop) |

Statement of Work. Adapt the existing ORION effectiveness model, which was proprietary to Northrop, to perform the quantitative and comparative analyses of operational concepts and system configuration options relevant to the Open Skies Treaty negotiations. This contract was for the third phase of an effort to develop an aerial inspection and modeling system. The May 18, 1992, statement of work included the following statements:

- o Additional sensor, media, and aircraft types shall be added and adapted to enable the evaluation of candidate treaty equipment (section 6.1.5).

- o Continue support on Open Skies systems acquisition planning. As specified in phase 2, task 5.6, the contractor shall continue to assist the Defense Nuclear Agency in conducting feasibility and utility studies leading to the development and procurement of an integrated Open Skies system, sensors and aircraft, to turn over to the Air Force as the agency responsible for the Open Skies program (section 6.8).

- o The contractor shall conduct an extensive trade-off evaluation of the various candidate aircraft, the planned sensors, and the supporting avionics equipment. Several different approaches may be developed by the Government, and the contractor may be asked to assist in documenting and technically assessing these approaches to enable the Government to reach a decision (section 6.8.1).

Appendix G. Summaries of Contracts Requiring a Restrictive Clause

Evaluation. The contract permits Northrop to recommend what sensor systems, avionics equipment, and aircraft will be purchased to support the Open Skies program. The Defense Nuclear Agency included a restrictive clause in the proposed letter contract in accordance with FAR subpart 9.5, which requires adding restrictions when a contract may give the contractor a competitive advantage. Northrop, in a May 20, 1992, letter, stated that acceptance of the letter contract was contingent on removal of the organizational conflict of interest clause and incorporation of a revised statement of work dated May 18, 1992. The revisions to the statement of work involved sections 6.8.1 and 6.8.3, which originally required Northrop to develop specifications. The revised statement of work does not require Northrop to develop specifications, but does require Northrop to perform studies and trade-off evaluations and provide the Government advice on the procurement of aircraft, sensors, and supporting avionics equipment for the Open Skies program.

Discussion with Contracting Activity Officials. The contracting officer did not remember any organizational conflict of interest issue involving the contract, but said that based on the Northrop letter, a change must have been made to the statement of work.

The Deputy General Counsel, Defense Nuclear Agency, believed that a restrictive clause was not necessary because the quantities of equipment to be acquired according to advice given on this contract were insignificant, and the equipment acquired would be very simple.

An Open Skies program official, who recalled attending a meeting with the contracting officer and Northrop personnel, stated that Northrop wanted the clause deleted because the clause would prohibit Northrop from selling any sensors to the Government in the future. The official further stated he assumed the contracting officer made the decision to drop the restrictive clause.

Conclusion. A restrictive clause should be in the contract. The removal of the requirement to prepare specifications from the statement of work did not eliminate the potential for an organizational conflict of interest on this contract. The work to be performed places Northrop in a position to provide advice that will influence procurements, possibly favoring its own products or capabilities. The quantity and simplicity of future equipment to be acquired are not relevant in the evaluation of potential organizational conflicts of interest. Also, inclusion of a restrictive clause would not prohibit Northrop from selling sensors to the Government for the indefinite future. The restrictive clause will include a definite time limit and, even during the restricted time period, Northrop could compete for contracts to supply sensors for programs other than the Open Skies program.

Contract DNA001-92-C-0148

| | |
|-----------------------|--|
| Contracting Activity: | Defense Nuclear Agency |
| Competitive: | Yes |
| Award Amount: | \$1,097,053 |
| Contractor: | Strategic Planning International, Inc. |

Statement of Work. Plan, develop, manage, and report on the conduct of two or three conferences per year which provide for open, frank, and substantive discussion among senior Government officials, senior industry executives, foreign government representatives, and accomplished members of academia addressing matters concerning nuclear weapons and nuclear weapon acquisitions; perform topical research and analysis, as well as analysis of academic multi-discipline strategic interest topic areas for the conferences; independently evaluate and comment on reports developed under the contract; provide briefings and briefing support for senior Government officials on reports, conference findings, and other assessments; review and assess academic studies and research reports and other reports; and perform additional topic development and analyses.

Evaluation. Strategic Planning International, Inc., could provide advice and assistance to Defense Nuclear Agency and exercise discretion that would benefit Strategic Planning International, Inc., and clients. The contract may also allow Strategic Planning International, Inc., access to program and planning documents involving the Department of Energy and other DoD Components that could give Strategic Planning International, Inc., a competitive advantage on future contracts. The contract should contain a restrictive clause prohibiting Strategic Planning International, Inc., from bidding on subsequent contracts involving programs or topics developed or evaluated under this contract, and from being a marketing consultant or subcontractor to other contractors bidding on the contracts. The contract solicitation properly included a restrictive provision.

Discussion with Contracting Activity Officials. The Deputy General Counsel, Defense Nuclear Agency, and the contracting officer believed that little potential for conflict of interest existed and that a restrictive clause was not needed in the contract. The contracting officer stated that the restrictive provision was inserted in the contract solicitation by error.

Conclusion. A restrictive clause should be in the contract. We do not agree that little potential for a conflict of interest existed or that little potential for a conflict of interest is a valid reason for not including a restrictive clause in the contract. The potential for an organizational conflict of interest is significant because the contract places Strategic Planning International, Inc., in a position to provide advice to the Government concerning the programs and topics developed or evaluated under the contract and could give Strategic Planning International, Inc., and its clients an unfair competitive advantage when bidding for subsequent contracts involving those programs or topics.

Contract N00123-92-D-5491

| | |
|-----------------------|--|
| Contracting Activity: | Navy Regional Contracting Center, San Diego |
| Competitive: | Yes |
| Award Amount: | \$2,282,767 |
| Contractor: | Engineering Visions, Inc. |

Statement of Work. Provide engineering and technical services including the writing of equipment test and repair specifications.

Evaluation. The contract requires Engineering Visions, Inc., to develop equipment test and repair specifications and equipment specifications for DoD contracts. A conflict of interest will occur if Engineering Visions, Inc., is awarded a follow-on contract to test or repair equipment using the specifications it developed under the contract, performs such test and repair work as a subcontractor to another contractor, or recommends test and repair procedures that would give a company with which it has a marketing consulting arrangement an advantage. The contract should have contained an organizational conflict of interest clause restricting the contractor from bidding on future contracts that are related to the test and repair and bid specifications developed under the contract, and from performing the work as a subcontractor. A restrictive provision was placed in the contract solicitation. The contract file did not document why the restrictive clause was not included in the contract.

Discussion with Contracting Activity Officials. The contract specialist for the contract agreed that an organizational conflict of interest could occur, and stated that he probably should have recommended to the contracting officer that the contract include an organizational conflict of interest restrictive clause.

Conclusion. A restrictive clause should be in the contract.

Contract DAAA09-91-C-0341

| | |
|-----------------------|---|
| Contracting Activity: | Army Armament, Munitions, and Chemical Command |
| Competitive: | No |
| Award Amount: | \$886,920 |
| Contractor: | Nomura Enterprises, Inc. |

Statement of Work. Maintain control over engineering documentation to the degree necessary to define the technical data for the M1/M1A1 tank fire control system in accordance with military specification MIL-STD-482A. The

Appendix G. Summaries of Contracts Requiring a Restrictive Clause

objective of the contract was for a single contractor to provide consolidated storage and maintenance of original documents for all line replaceable units in the tank fire control system.

Evaluation. Nomura Enterprises, Inc., will control technical data that could benefit it and other contractors in bidding for contracts on tank fire control system components. We examined two additional contracts awarded by the Army Armament, Munitions, and Chemical Command to Nomura Enterprises, Inc., that were manufacturing contracts, although not for the M1/M1A1 program.

Discussion with Contracting Activity Officials. The contracting officer said the work was routine and no potential existed for the contractor to influence requirements. The contracting officer's technical representative agreed with the contracting officer's assessment. Both the contracting officer and the technical representative stated no danger of an organizational conflict of interest existed because Nomura Enterprises, Inc., was not a manufacturer. The contracting officer's supervisor at the Army Armament, Munitions, and Chemical Command agreed that the contract should have contained a restrictive clause because Nomura Enterprises, Inc., is a manufacturer.

Conclusion. The contract should have included an organizational conflict of interest restrictive clause prohibiting Nomura Enterprises, Inc., from subsequent contracts supporting the M1/M1A1 tank fire control system or from being a marketing consultant or subcontractor to any contractor supporting the M1/M1A1 tank fire control system. A potential organizational conflict of interest exists because Nomura Enterprises, Inc., will have access to technical data that could give it an unfair competitive advantage when bidding on subsequent contracts to manufacture or upgrade tank fire control system components.

Contract DAAB07-91-C-J522

| | |
|-----------------------|---|
| Contracting Activity: | Army Communications-Electronics Command |
| Competitive: | Yes |
| Award Amount: | \$397,915 |
| Contractor: | Lockheed Sanders, Inc. |

Statement of Work. Perform a study to establish the important trends in imaging seeker development that impact countermeasure requirements, confirm or deny the professed immunity of imaging seekers to existing countermeasures, and postulate deceptive techniques and associated hardware requirements for future countermeasures that are effective against imaging seekers. Task 6, "Develop CM Requirements," states that the contractor shall recommend a set of requirements for a countermeasure system, or systems, for defeating imaging seekers.

Appendix G. Summaries of Contracts Requiring a Restrictive Clause

Evaluation. Lockheed Sanders, Inc., is a subsidiary of Lockheed Corporation. Performance of the study could give Lockheed Corporation a competitive advantage over Ford Aerospace and Raytheon, which were two imaging seeker developers identified by contracting personnel.

Discussion with Contracting Activity Officials. An Army Communications-Electronics Command contracting officer agreed that a potential conflict may exist.

Conclusion. The contract should have included an organizational conflict of interest restrictive clause that prohibited Lockheed Sanders, Inc., and any other subsidiaries of Lockheed Corporation from receiving contracts or subcontracts relating to the development and production of future countermeasure systems and components.

Contract MDA903-91-D-0030

| | |
|-----------------------|--|
| Contracting Activity: | Defense Supply Service-Washington |
| Competitive: | Yes |
| Award Amount: | \$1,561,160 |
| Contractor: | Science Applications International Corporation |

Statement of Work. Provide quick-turn-around, analytic support services to carry out systems and operational analyses and force design and structure tradeoffs related to strategy, doctrine, combat development, and systems acquisition by the Army. Develop, update, and evaluate simulation models, including war games and data supporting models. The contractor will perform specific tasks as directed by the contracting officer. The tasks are in the following four general areas:

- o the Army's strategic roles and missions in support of the national military strategy;
- o force structure, force design, weapon or other systems, including performance and cost effectiveness analyses, resource allocation, and priority determination;
- o the design and operation of systems and policies concerning personnel management and the human element in combat; and
- o analysis models in all Army functional areas.

Evaluation. Science Applications International Corporation will influence Army decisions on Defense program requirements, weapon system requirement analysis methodology, and equipment modernization options. The advice that Science Applications International Corporation provides the Army on tasking

Appendix G. Summaries of Contracts Requiring a Restrictive Clause

under this contract could influence the contractor's independence and objectivity on follow-on contracts for test and evaluation of Army weapon systems and provide it with a competitive advantage in bidding on other Army contracts or performing work as a subcontractor. The contract should have included an organizational conflict of interest clause prohibiting Science Applications International Corporation from bidding on subsequent equipment modernization contracts or other contracts for which it developed requirements. The restrictive clause should also prohibit Science Applications International Corporation from being a marketing consultant or subcontractor to any contractor bidding on the contracts.

Discussion with Contracting Activity Officials. The contracting officer neither agreed nor disagreed that an organizational conflict of interest clause should have been included in the contract. The contracting officer recommended the matter be discussed with the contract specialist for the contract. The specialist agreed that some tasks could have a potential for conflicts of interest and that an assessment should have been done. The specialist stated that Defense Supply Service-Washington did not want to prohibit the contractor from performing any future work.

Conclusion. A restrictive clause should be in the contract. The FAR guidance does not allow the contracting activity to omit a restrictive clause simply because the contracting activity prefers not to prohibit the contractor from performing future work. The contracting officer should have included a restrictive clause or obtained a head-of-agency waiver in accordance with FAR 9.503.

Contract MDA903-92-D-0108

| | |
|-----------------------|-----------------------------------|
| Contracting Activity: | Defense Supply Service-Washington |
| Competitive: | Yes |
| Award Amount: | \$3,594,652 |
| Contractor: | Digital Systems Research, Inc. |

Statement of Work. Provide technical, analytical and management assistance to the Software and Intelligent Systems Technology Office, Advanced Research Projects Agency.

Evaluation. The statement of work required the contractor to investigate proposed and ongoing research issues, and to provide the necessary technical and analytical assistance to enhance the selection and performance of selected research in all areas of interest to the Software and Intelligent Systems Technology Office. Work performed under the contract may enable the contractor to influence the direction of research by the Software and Intelligent Systems Technology Office. The investigative and assistance work performed by Digital Systems Research, Inc., will influence research projects funded by the Software and Intelligent Systems Technology Office and perhaps which

Appendix G. Summaries of Contracts Requiring a Restrictive Clause

contractors perform the research. The work on the contract could result in Digital Systems Research, Inc., recommending research projects in areas in which the contractor or its other clients have an interest. The knowledge that Digital Systems Research, Inc., will gain concerning the selection of future research projects will provide the contractor with an unfair competitive advantage over competitors who are not made aware of the projects until contract solicitations are issued. Digital Systems Research, Inc., should be restricted from bidding on subsequent research contracts awarded by any DoD Component that relate to the research responsibilities of the Software and Intelligent Systems Technology Office, and from being a marketing consultant or subcontractor to other contractors bidding on such contracts.

Discussion with Contracting Activity Officials. The contracting officer and contract specialist responsible for the contract agreed that a potential conflict of interest could occur and that the contract should have had a restrictive clause.

Conclusion. A restrictive clause should be in the contract.

Appendix H. Summary of Potential Benefits Resulting From Audit

| Recommendation Reference | Description of Benefit | Amount and/or Type of Benefit |
|---|--|-------------------------------|
| A.1.a. | Internal Controls. Increases the likelihood of preventing organizational conflicts of interest by permitting timely evaluation of contractor certifications disclosing potential organizational conflicts of interest. | Nonmonetary. |
| A.1.b., A.1.c., A.1.d., A.3, B.1.a., B.1.b, B.2. | Internal Controls. Increases likelihood of preventing organizational conflicts of interest by establishing controls to verify contracting officer and contractor compliance with FAR organizational conflict of interest provisions. | Nonmonetary. |
| A.2., B.1.c. | Program Results. Requires compliance with FAR organizational conflict of interest provisions on existing contracts. | Nonmonetary. |

Appendix I. Organizations Visited or Contacted

Department of Defense

Director, Defense Procurement, Washington, DC

Department of the Army

Inspector General, Department of the Army, Washington, DC
Army Armament Munitions and Chemical Command, Rock Island, IL¹
Army Aviation and Troop Command, St. Louis, MO²
Army Communications-Electronics Command, Fort Monmouth, NJ¹
Army Communications-Electronics Activity, Vint Hill Farm Station,
Warrenton, VA²
Army Information Systems Command, Fort Huachuca, AZ
Army Missile Command, Redstone Arsenal, AL²
Army Space and Strategic Defense Command, Huntsville, AL²
Army Tank-Automotive Command, Warren, MI²
Seventh Signal Command, Fort Ritchie, MD³
Army Research, Development, and Engineering Center, Picatinny Arsenal, NJ²
Belvoir Research, Development, and Engineering Center, Fort Belvoir, VA²
Army Research Office, Research Triangle Park, NC²
Army Contracting Support Agency, Falls Church, VA
Defense Supply Service-Washington, Washington, DC¹

Department of the Navy

Assistant Secretary of the Navy (Research, Development, and Acquisition),
Washington, DC
Chief of Naval Research, Arlington, VA²
Naval Air Systems Command, Arlington, VA¹
Naval Sea Systems Command, Arlington, VA²
Naval Supply Systems Command, Arlington, VA
Space and Naval Warfare System Command, Arlington, VA²
Aircraft Division, Naval Air Warfare Center, Indianapolis, IN²
Aircraft Division, Naval Air Warfare Center, Patuxent River, MD²
Weapons Division, Naval Air Warfare Center, China Lake, CA³
Crane Division, Naval Surface Warfare Center, Crane, IN²
Dahlgren Division, Naval Surface Warfare Center, Dahlgren, VA²
Naval Undersea Warfare Center, Newport, RI²
Naval Command, Control, and Ocean Surveillance Center, San Diego, CA³
Fleet and Industrial Supply Center Charleston, SC²

See footnotes at end of appendix.

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Appendix I. Organizations Visited or Contacted

Department of the Navy (cont'd)

Fleet and Industrial Supply Center Norfolk, VA²
Navy Regional Contracting Center Philadelphia, PA²
Navy Regional Contracting Center San Diego, CA¹
Navy Regional Contracting Center Washington, DC²

Department of the Air Force

Assistance Secretary of the Air Force (Acquisition), Washington, DC
Aeronautical Systems Center, Wright-Patterson AFB, OH¹
Electronic Systems Center, Hanscom AFB, MA¹
Ogden Air Logistics Center, Hill AFB, UT²
Oklahoma City Air Logistics Center, Tinker AFB, OK²
Sacramento Air Logistics Center, McClellan AFB, CA²
San Antonio Air Logistics Center, Kelly AFB, TX²
Warner-Robins Air Logistics Center, Robins AFB, GA²
Air Force Space Command, Peterson AFB, CO²
Ballistic Missile Organization, Norton AFB, CA³
Space and Missile Systems Center, Los Angeles AFB, CA³
30th Space Wing, Vandenberg AFB, CA³
Air Force Development Test Center, Eglin AFB, FL²
Phillips Laboratory, Kirtland AFB, NM²

Defense Organizations

Advanced Research Projects Agency, Arlington, VA¹
Defense Contract Audit Agency, Alexandria, VA
Defense Logistics Agency, Alexandria, VA
 Defense Construction Supply Center, Columbus, OH²
 Defense Electronics Supply Center, Dayton, OH²
 Defense Fuel Supply Center, Alexandria, VA²
Defense Nuclear Agency, Alexandria, VA¹

Non-Defense Federal Organizations

General Accounting Office, Washington, DC
Office of Federal Procurement Policy, Washington, DC
President's Council on Integrity and Efficiency, Washington, DC

¹Audit visit to site to verify questionnaire response and to review contracts.

²Questionnaire only; no audit visit to site.

³Audit visit to site to verify questionnaire response.

Appendix J. Report Distribution

Office of the Secretary of Defense

Director, Defense Research and Engineering
Principal Deputy Under Secretary of Defense for Acquisition and Technology
Director, Defense Procurement
Comptroller of the Department of Defense
Assistant to the Secretary of Defense (Atomic Energy)
Assistant to the Secretary of Defense (Public Affairs)
Director, Defense Acquisition Regulations Council

Department of the Army

Secretary of the Army
Assistant Secretary of the Army (Research, Development, and Acquisition)
Commander, Army Armament, Munitions, and Chemical Command
Commander, Army Communications-Electronics Command
Commander, Seventh Signal Command
Director, Defense Supply Service-Washington
Auditor General, Department of the Army

Department of the Navy

Secretary of the Navy
Assistant Secretary of the Navy (Financial Management)
Assistant Secretary of the Navy (Research, Development, and Acquisition)
Commander, Naval Air Systems Command
Commander, Weapons Division, Naval Air Warfare Center
Commanding Officer, Naval Command, Control, and Ocean Surveillance Center
Commanding Officer, Navy Regional Contracting Center, San Diego
Auditor General, Department of the Navy

Department of the Air Force

Secretary of the Air Force
Assistant Secretary of the Air Force (Acquisition)
Assistant Secretary of the Air Force (Financial Management and Comptroller)
Commander, Aeronautical Systems Center
Commander, Electronic Systems Center
Commander, Space and Missile Systems Center
Commander, 30th Space Wing
Commander, Ballistic Missile Organization
Auditor General, Department of the Air Force

Appendix J. Report Distribution

Defense Organizations

Director, Advanced Research Projects Agency
Director, Defense Commissary Agency
Director, Defense Contract Audit Agency
Director, Defense Information Systems Agency
Director, Defense Intelligence Agency
Director, Defense Logistics Agency
Director, Defense Mapping Agency
Director, Defense Nuclear Agency
Director, National Security Agency
Director, On-Site Inspection Agency
Inspector General, Central Imagery Office
Inspector General, Defense Intelligence Agency
Inspector General, National Security Agency
Director, Defense Logistics Studies Information Exchange

Non-Defense Federal Organizations

Administrator, Office of Federal Procurement Policy
Office of Management and Budget
Technical Information Center, National Security and International Affairs Division,
General Accounting Office
Chairman, President's Council on Integrity and Efficiency Project Subcommittee

Chairman and Ranking Minority Member of Each of the Following Congressional
Committees and Subcommittees:

Senate Committee on Appropriations
Senate Subcommittee on Defense, Committee on Appropriations
Senate Committee on Armed Services
Senate Committee on Governmental Affairs
House Committee on Appropriations
House Subcommittee on Defense, Committee on Appropriations
House Committee on Armed Services
House Committee on Government Operations
House Subcommittee on Legislation and National Security, Committee on
Government Operations

Senator David Pryor, United States Senate

Part IV - Management Comments

Director, Defense Procurement, Comments



ACQUISITION AND
TECHNOLOGY

OFFICE OF THE UNDER SECRETARY OF DEFENSE

3000 DEFENSE PENTAGON
WASHINGTON DC 20301-3000



DP (DAR)

APR 17 1994

MEMORANDUM FOR DIRECTOR, CONTRACT MANAGEMENT DIRECTORATE,
OFFICE OF THE ASSISTANT INSPECTOR GENERAL FOR
AUDITING, DOD

THROUGH: CHIEF, CONGRESSIONAL ACTIONS AND INTERNAL REPORTS

SUBJECT: Organizational and Consultant Conflicts of Interest
(Project No. 3CH-5012)

This responds to your April 13, 1994, memorandum requesting comments on recommendations 1a and 1b in the draft audit report. These recommendations are identical to those contained in an earlier working draft report for which we provided comments in March 1994.

We do not agree with the need for any FAR revisions for the reasons that we previously indicated. However, I will agree to issue a policy memorandum to alert the military departments and defense agencies to the problems identified in your audit report.

Eleanor R. Spector

Eleanor R. Spector
Director, Defense Procurement



Department of the Army Comments

Final Report
Reference



DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY
U S ARMY CONTRACTING SUPPORT AGENCY
8109 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041-3201



REPLY TO
ATTENTION OF

SFRD-KP

10 JUN 1994

MEMORANDUM FOR INSPECTOR GENERAL (AUDITING), OFFICE OF
SECRETARY OF DEFENSE, 400 ARMY NAVY
DRIVE, ARLINGTON, VA 22202-2884

SUBJECT Audit Report on Organizational and Consultant Conflicts of Interest
(Project No 3CH-5012)

The Army has reviewed the subject draft report and concurs with the finding that, in the contracts selected for review, contracting officers generally failed to include the provisions at Federal Acquisition Regulation (FAR) 52.209-7, "Organizational Conflicts of Interest Certificate - Marketing Consultants," and 52.209-8, "Organizational Conflicts of Interest Certificate - Advisory and Assistance Services," when appropriate. Additionally, when the provisions were properly placed in the solicitation, either certificates were not requested or records were not documented when certificates were not applicable for the contractor.

Suggested changes to the draft audit recommendations are provided below.

It is suggested that recommendation A 2 a be revised to read: **Notify contractors to submit applicable certificates for contracts identified in Appendix C that are still open and included the clause[s] at FAR 52.209-7 and/or 8 in the solicitation.** If the solicitation did not contain the clause, we have no basis on which to request the contractor to submit a certificate.

It is suggested that recommendation A 2 b be revised to read: **Initiate appropriate actions if the certificates required by Federal Acquisition Regulation provision 52.209-8, "Organizational Conflicts of Interest Certificate - Advisory and Assistance Services," included in the solicitations are not submitted by the contractor within 30 days of notification.** If contractors refuse to provide certifications required in solicitations which contained the provision at FAR 52.209-8, it may not be in the Government's best interest to terminate the resultant contracts. FAR 9.506 identifies alternate procedures to identify potential conflicts of interest when certificates may not have been submitted.

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Final Report
Reference

SFRD-KP
SUBJECT Audit Report on Organizational and Consultant Conflicts of Interest
(Project No. 3CH-5012)

It is suggested that recommendation B 1 c be revised to read: **Attempt to modify contracts from which a restrictive clause was inappropriately omitted. The modifications should inform the contractors of the potential organizational conflicts of interest and the restrictions imposed on the contractor's future activities to prevent the conflicts. If the contracts cannot be modified, other appropriate actions should be taken.** Army contracts DAAB07-91-D-1-005, DAAA09-91-C-0341, DAAB07-91-C-1522, MDA903-91-D-0030, and MDA903-92-D-0108 are currently being reviewed to determine if significant potential conflicts of interest exist and, if so, the actions required to neutralize, avoid or otherwise mitigate the conflicts. Inclusion of a clause restricting the contractor from future work and profits, after contract award, may be cost prohibitive or may not otherwise be in the best interest of the Government. Alternative means are available to protect the Government if a conflict of interest is established on the contracts identified.

The Army will issue additional guidance to all contracting activities advising them of the findings of this audit and to assure adherence to the requirements of FAR subpart 9.5. The guidance will be forwarded to the field no later than July 15, 1994. Point of contact for this audit is Mr. Bruce E. Sullivan, SFRD-KP, (703) 756-2086.


J. Bruce King
Acting Director

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Department of the Navy Comments



THE ASSISTANT SECRETARY OF THE NAVY
(Research, Development and Acquisition)
WASHINGTON, D.C. 20350-1000

22 JUN 1994

MEMORANDUM FOR THE DEPARTMENT OF DEFENSE ASSISTANT INSPECTOR
GENERAL FOR AUDITING

Subj: DRAFT AUDIT REPORT ON ORGANIZATIONAL AND CONSULTANT
CONFLICTS OF INTEREST [PROJECT NUMBER 3CH-5012]

Ref: (a) DoDIG memo of 13 Apr 93

Encl: (1) DON Response to Draft Audit Report

I am responding to the draft audit report forwarded by reference (a) concerning compliance with the Federal Acquisition Regulation policies and procedures on organizational and consultant conflicts of interest.

The Department of the Navy response to recommendations under the purview of the Navy is provided at enclosure (1). We generally agree with these draft audit report recommendations. As outlined in enclosure (1), the Department has taken, or is planning to take, specific actions to ensure compliance with the Federal Acquisition Regulations policies and procedures.


Nora Slatkin

Copy to:
NAVINGEN
NAVCOMPT (NCB-53)

Department of the Navy Comments

Final Report
Reference

Revised
Pages
13, 15,
53, 54

Revised
Page 18

DEPARTMENT OF THE NAVY

RESPONSE TO DRAFT DODIG AUDIT REPORT ON ORGANIZATIONAL AND CONSULTANT CONFLICTS OF INTEREST Project Number 3CH-5012 dated April 13, 1994

GENERAL OBSERVATION:

There is a discrepancy between the guidance contained in Office of Federal Procurement Policy (OFPP) Letter 89-1 and the coverage contained in Federal Acquisition Regulation, subpart 9.5, concerning submission of certificates. OFPP Letter 89-1, paragraphs 8 and 9, requires contractors to file certificate or to provide a written statement to the contracting officer giving the reasons why no such certification can be made. However, the coverage in Federal Acquisition Regulation subpart 9.5 and the solicitation provisions at Federal Acquisition Regulation 52.209-7 and 52.209-8 do not require contractors to provide reasons for not submitting a certification to the contracting officer.

RECOMMENDATIONS FOR CORRECTIVE ACTION, FINDING A:

2. *We recommend that the Service Acquisition Executives and Directors of the Advanced Research Projects Agency and the Defense Nuclear Agency direct contracting officers to:*

a. Notify contractors to submit applicable certificates for contracts identified in Appendix C that are still open.

b. Initiate contract terminations if the certificates required by Federal Acquisition Regulation provision 52.208-8, "Organizational Conflicts of Interest Certificate - Advisory and Assistance Services," are not received within 30 days of notification.

DoN Position: Concur in part.

We have reemphasized to DoN contracting officers the importance of resolving potential conflicts of interest and obtaining requisite contractor certifications (Attachment (A)). Contracting officers have been requested to review the contracts identified in the audit as well as on-going acquisitions to ensure that appropriate certifications are obtained. We do not concur that contract termination action should be initiated. Alternatively, those contracts identified in the Draft Audit Report where certifications are determined to be required, but not obtained within a reasonable time, will be referred to the Head of the Contracting Activity for resolution.

**DoN Response to DoDIG Draft Audit Report:
Organizational and Consultant Conflicts of Interest
Project No. 3CII-5012 of April 13, 1994**

RECOMMENDATIONS FOR CORRECTIVE ACTION, FINDING B:

1. *We recommend that the Army and Navy Acquisition Executives and the Director Defense Nuclear Agency direct contracting officers to:*
 - a. *Include a clause that restricts the contractor's eligibility for certain future prime contracts and subcontracts when potential organizational conflicts of interest exist.*
 - b. *Document reasons for not including a restrictive clause in contracts that had a restrictive provision in the contract solicitation.*
 - c. *Issue modifications to the eight contracts from which a restrictive clause was omitted. The modification should inform the contractors of the potential organizational conflict of interest and the restrictions imposed on the contractor's future activities to prevent the conflicts.*

DoN Position: Concur.

The need to comply with Federal Acquisition Regulation subpart 9.5 has been reemphasized to DoN contracting officers. The Naval Regional Contracting Center, San Diego, has entered into discussions to incorporate an organizational conflict of interest clause under contract N000123-92-D-5491 which was identified in the Draft Audit Report as requiring, but not containing, such a clause.

2. *We recommend that the Army and Navy Acquisition Executives and the Directors of the Advanced Research Projects Agency and the Defense Nuclear Agency advise contracting officers to use restrictive clauses that comply with the Federal Acquisition Regulation subpart 9.5. The restrictive clauses should identify the nature of the potential conflict of interest, the nature and duration of the restrictions on future activities, the requirement for contractors to submit copies of agreements between contractors and other companies on proprietary information, and the correct waiver approval authority.*

DoN Position: Concur.

The need to comply with Federal Acquisition Regulation subpart 9.5 has been reemphasized to DoN contracting officers.



DEPARTMENT OF THE NAVY
OFFICE OF THE ASSISTANT SECRETARY
(Research, Development and Acquisition)
WASHINGTON, D.C. 20360-1000

JUN 10 1984

MEMORANDUM FOR DISTRIBUTION

Subj: ORGANIZATIONAL AND CONSULTANT CONFLICTS OF INTEREST

The Federal Acquisition Regulation (FAR), subpart 9.5, implements §8141 of Public Law 100-463 and Office of Federal Procurement Policy (OFPP) Letter 89-1, Conflict of Interest Policies Applicable to Consultants, and prescribes responsibilities, general rules, and procedures for identifying, evaluating, and resolving organizational conflicts of interest.

In a recent audit conducted at the request of the Office of Management and Budget, the Department of Defense Inspector General found that DoD contracting officers have not effectively implemented FAR subpart 9.5 conflict of interest policies and procedures. While the audit did not disclose any conflicts of interest, there is concern that failure to comply with FAR subpart 9.5 may result in contract awards where a conflict of interest or an unfair competitive advantage might exist.

It is important to reemphasize to our contracting officers the importance of complying with the policies and procedures set forth in FAR subpart 9.5. On-going solicitations should be reviewed to ensure compliance and that appropriate organizational conflict of interest clauses are included in contracts and applicable certifications obtained. The file should be documented if it is determined that an organizational conflict of interest clause or certification is not required.

For contracts requiring certificates for which no certificates were obtained, the contracting officer should request the certificates from the contractor. If certificates are not obtained within a reasonable time, the matter should be forwarded to the Head of the Contracting Activity for resolution taking into consideration factors such as the stage of completion, need for continued support, potential impact of reopening the contracts, etc.

A handwritten signature in black ink, appearing to read "E. B. Harshbarger".

E. B. HARSHBARGER
RADM, SC, USN
Deputy for Acquisition Policy,
Integrity and Accountability

DISTRIBUTION:
See Page 2

Attachment (A)
to Enclosure (1)

Subj: ORGANIZATIONAL AND CONSULTANT CONFLICTS OF INTEREST

Distribution:

| | |
|-------------------|-------------|
| COMNAVAIRSYSCOM | (AIR 02) |
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| COMNAVSEASYSYSCOM | (SEA 02) |
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| CNR | (ONR 02) |
| COMSC | (N10) |
| DIRSSP | (SPN) |
| COMITAC | |

Department of the Air Force Comments

Final Report
Reference



DEPARTMENT OF THE AIR FORCE
WASHINGTON DC



11 JUN 1994

OFFICE OF THE ASSISTANT SECRETARY

MEMORANDUM FOR DEPARTMENT OF DEFENSE, INSPECTOR GENERAL

FROM: SAF/AQC
1060 AIR FORCE PENTAGON
WASHINGTON DC 20330-1060

SUBJECT: Draft Report - Audit of Organization and Consultant Conflicts of Interest (3CH-5012)

This is in response to a request for comments on the subject draft report and will confirm the 13 Jun 94 telecon between Mr. Bob Brown and Mr. Jerry Stephenson.

We have no significant objections to the finalization of the draft report. Although suggested corrective actions were not directed to the Air Force, the Air Force has recognized the potential for misunderstanding in this subject area. In an effort to forestall misunderstandings, SAF/AQC issued a policy letter (Atch 1) on 26 Jul 93. That letter stresses the importance of complying with applicable requirements concerning conflict of interest policy and certifications.

Although we have no significant objections to the report, we would like to bring to your attention one point of concern. As pointed out in the attached Aeronautical Systems Center (ASC) memorandum dated 13 Jun 94 (Atch 2), Appendix C, page 38 of the subject report indicated that Air Force Contract Number F33657-91-C-2236 required the submission of consultant certifications. ASC reports that that particular contract did not require the inclusion of Federal Acquisition Regulation (FAR) Provision 52.209.7 or the resultant certificates pursuant FAR 37.204 exception (C), (N), (O), and (P) (Atch 3) because the contract was in direct support of the National Air Intelligence Center.

If you should have any questions, our action officer is Mr. Bob Brown, SAF/AQCX, (703) 614-5359.

Attachments:

1. SAF/AQC Ltr, 26 Jul 93
2. ASC Memo, 13 Jun 94
3. FAR 37.204

COA Ltr
Distribution of COA Ltr to all
Component Offices
Distribution to all Component Offices

cc:
SAF/FMPE
SAF/AQCX

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304-5012



DEPARTMENT OF THE AIR FORCE
WASHINGTON DC



OFFICE OF THE ASSISTANT SECRETARY

26 JUL 1993

FROM: SAF/AQC
1060 Air Force Pentagon
Washington, DC 20330-1060

SUBJ: Conflict of Interest Policies Applicable to Consultants

TO: ALMAJCOM-FOA-DRU (Contracting)

1. A recent study on the implementation of the Federal Acquisition Regulation (FAR) provisions pertaining to consultants and conflict of interest has been completed by the President's Council on Integrity and Efficiency (PCIE). The results indicate that contracting personnel may not be fully familiar with the requirements of FAR 9.5 as they relate to consultant conflicts of interest. Based on these results, the Office of Federal Procurement Policy has asked executive agencies to ensure that employees are made thoroughly aware of the applicable requirements, and comply with them.

2. The PCIE study did not involve any Air Force contracts. For that reason no direct conclusions can be made as to our compliance in this area. Nonetheless, the results indicate that in many agencies noncompliance is widespread. Therefore, we should assure ourselves that we are properly implementing these conflict of interest procedures.

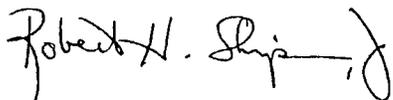
3. Federal Acquisition Circular (FAC) 90-1, dated October 22, 1990 amended FAR Subpart 9.5 implementing the policies contained in OFPP Policy Letter 89-1, "Conflict of Interest Policies Applicable to Consultants," dated December 18, 1989. FAC 90-1 implemented the policy relating to conflict of interest standards for persons or firms which provide consulting services to the government and its contractors, and procedures to promote compliance with those standards. These policies require an apparent successful offeror on solicitations over \$200,000 who employs marketing consultants, and all apparent successful offerors, or bidders, on any contract for advisory and assistance services over \$25,000, to submit a certificate to the contracting officer addressing any conflicts of interest or potentially unfair competitive advantages. The certificates (see FAR 52.209-7 and 52.209-8) must describe the nature and extent of any conflicts of interest that may exist with respect to the proposed award. Procedures for identifying and mitigating conflicts of interest are described at FAR 9.506.

ATCH 1

Department of the Air Force Comments

4. To assure the Air Force is properly implementing consultant conflict of interest procedures, we suggest that all buying personnel, and especially procuring contracting officers, thoroughly familiarize themselves with the requirements of FAR 9.5, in particular with the certification requirements previously discussed. Additionally, these requirements should be added to any contract review checklists, or any other similar tools you may be using to aid in procedural compliance. It is important to heighten our awareness of these requirements. They are likely to receive additional scrutiny in the future.

5. Should you have any questions or concerns regarding these matters, please refer them to Mr. Maglio, SAF/AQCX at DSN 224-5359.



ROBERT H. SHIPMAN, JR., Col, USAF
Assistant Deputy Assistant Secretary
(Contracting)
Assistant Secretary (Acquisition)

06/13/94

09:10

513 478 7483

ASC/PKM

002



DEPARTMENT OF THE AIR FORCE
HEADQUARTERS AIR FORCE MATERIEL COMMAND
WRIGHT-PATTERSON AIR FORCE BASE, OHIO

13 JUN 1994

MEMORANDUM FOR SAE/AQCX (Mr. Brown)
1060 Air Force Pentagon
Washington DC 20330-1060

FROM: ASC/PK BLDG 14
1865 Fourth Street Suite 6
Wright Patterson AFB, OH 45433-7120

SUBJECT: DoD Draft Report, 13 Apr 94, "Organizational and
Consultant Conflicts of Interest," DoD IG Project
Number 3CH-5012 - INFORMATION MEMORANDUM

1. This is in reply to your verbal request to ASC/IG to provide field comments in the subject report.
2. Finding A, page 8: Based upon review of contract F33657-91-D-2236 identified in Appendix C, page 38 of subject report, this contract does not require FAR provision 52.209.7 or resultant certificates pursuant to FAR 37.204 exceptions (c), (n), (o) and (p) as this contract is in direct support of National Air Intelligence Center.

KATHRYN L. THOMPSON, Technical Assistant
Contracting Directorate
Aeronautical Systems Center

cc: ASC/IG

ATCH 2

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37.204

rent knowledge or skill that may be combined with extensive operational experience. This enables them to provide information, opinions, advice, or recommendations to enhance understanding of complex issues or to improve the quality and timeliness of policy development or decision-making.

(b) *Studies, analyses, and evaluations.* Studies, analyses, and evaluations are organized, analytic assessments needed to provide the insights necessary for understanding complex issues or improving policy development or decision-making. These analytic efforts result in formal, structured documents containing data or leading to conclusions and/or recommendations. This summary description is operationally defined by the following criteria:

(1) *Objective.* To enhance understanding of complex issues or to improve the quality and timeliness of agency policy development or decision-making by providing new insights into, understanding of, alternative solutions to, or recommendations on agency policy and program issues, through the applications of fact finding, analysis, and evaluation.

(2) *Areas of application.* All subjects, issues, or problems involving policy development of decision-making in the agency. These may involve concepts, organization, programs and other systems, and the application of such systems.

(3) *Outputs.* Outputs are formal structured documents containing or leading to conclusions and/or recommendations. Data bases, models, methodologies, and related software created in support of a study, analysis, or evaluation are to be considered part of the overall study effort.

(c) *Management and professional support services.* Management and professional support services take the form of advice, training, or direct assistance for organizations to ensure more efficient or effective operations of managerial, administrative, or related systems. This summary description is operationally defined in terms of the following criteria:

(1) *Objective.* To ensure more efficient or effective operation of management support or related systems by providing advice, training, or direct assistance associated with the design or operation of such systems.

(2) *Areas of application.* Management support or related systems such as program management, project monitoring and reporting, data collection, logistics management, budgeting, accounting, auditing, personnel management, paperwork management, records management, space management, and public relations.

(3) *Outputs.* Services in the form of information, opinions, advice, training, or direct assistance that lead to the improved design or operation of managerial, administrative, or related systems. This does not include training which maintains skills necessary for normal operations. Written reports are normally incidental to the performance of the service.

37-4 (FAC 90-16)

FEDERAL ACQUISITION REGULATION (FAR)

(d) *Engineering and technical service.* Engineering and technical services (technical representatives) take the form of advice, training, or, under unusual circumstances, direct assistance to ensure more efficient or effective operation or maintenance of existing platforms, weapon systems, related systems, and associated software. All engineering and technical services provided prior to final Government acceptance of a complete hardware system are part of the normal development, production, and procurement processes and do not fall in this category. Engineering and technical services provided after final Government acceptance of a complete hardware system are in this category except where they are procured to increase the original design performance capabilities of existing or new systems or where they are integral to the operational support of a deployed system and have been formally reviewed and approved in the acquisition planning process.

37.204 Exclusions.

The following activities and programs are excluded or exempted from the definition of advisory or assistance services:

(a) Activities that are reviewed in accordance with the OMB Circular A-76, Policies for Acquiring Commercial or Industrial Products and Services Needed by the Government.

(b) Architectural and engineering services as defined in Part 36.

(c) ADP/Telecommunications functions and related services that are controlled in accordance with 41 CFR Part 201, the Federal Information Resources Management Regulation.

(d) Research on theoretical mathematics and basic medical, biological, physical, social, psychological, or other phenomena.

(e) Engineering studies related to specific physical or performance characteristics of existing or proposed systems.

(f) The day-to-day operation of facilities (e.g., the Johnson Space Center and related facilities) and functions (e.g., ADP operations and building maintenance).

(g) Government-owned, contractor-operated (GOCO) facilities. However, any contract for advisory and assistance services other than the basic contract for operation and management of a GOCO shall come under the definition of advisory or assistance services

(h) Clinical medicine.

(i) Those support services of a managerial or administrative nature performed as a simultaneous part of, and nonseparable from specific development, production, or operational support activities. In this context, nonseparable means that the managerial or administrative systems in question (e.g., subcontractor monitoring or configuration control) cannot reasonably be operated by anyone other than the designer or producer of the end-item hardware.

ATCH 3

PART 37—SERVICE CONTRACTING

37.303

(j) Contracts entered into in furtherance of statutorily mandated advisory committees.

(k) Initial training, training aids, and technical documentation acquired as an integral part of the lease or purchase of equipment.

(l) Routine maintenance of equipment, routine administrative services (e.g., mail, reproduction, telephone), printing services, and direct advertising (media) costs.

(m) Auctioneers, realty-brokers, appraisers, and surveyors.

(n) The National Foreign Intelligence Program (NFIP).

(o) The General Defense Intelligence Program (GDIP).

(p) Tactical Intelligence and Related Activities (TIARA).

(q) Foreign Military Sales.

(r) Engineering and technical services as set forth in 37.203(d).

37.205 Management controls.

OMB Circular A-120 requires each agency to establish procedures for a written evaluation at the conclusion of the contract to assess the utility of the deliverables to the agency and the performance of the contractor.

37.206 Requesting activity responsibilities.

Requests for advisory and assistance services shall include—

(a) A statement certifying that the requirement is for advisory and assistance services as defined in this subpart.

(b) Written justification of need and certification that such services do not unnecessarily duplicate any previously performed work or services.

(c) Written approval for such services by an official at a level above the requesting office. However, in the case of requirements received by the contracting officer during the fourth quarter of the fiscal year, for award during the same fiscal year, the approval at the second level, or higher level if required by agency procedures, above the requesting office shall accompany the request for contract action.

(d) Properly chargeable funds certified by the cognizant fiscal/budget office.

37.207 Contracting officer responsibilities.

The contracting officer is responsible for determining whether any requested contractual action, regardless of dollar value, constitutes advisory and assistance services as described in this subpart. The contracting officer's determination shall be final. Before processing any contractual action for advisory and assistance services, the contracting officer shall verify that—

(a) Action is taken to avoid conflicts of interest in accordance with Subpart 9.5;

(b) The applicable requirements of this subpart and 37.103 and 37.104 are met;

(c) The services being contracted for consist only of the types of services defined at 37.203;

(d) The request includes a statement of need and certification by the requesting official (see 37.206(a) and (b)); and

(e) Written approval for the requirement, including requests for contract modifications beyond the scope of the acquisition originally approved, has been obtained from the appropriate level(s) (see 37.206(c)).

SUBPART 37.3—DISMANTLING, DEMOLITION, OR REMOVAL OF IMPROVEMENTS**37.300 Scope of subpart.**

This subpart prescribes procedures for contracting for dismantling or demolition of buildings, ground improvements and other real property structures and for the removal of such structures or portions of them (hereafter referred to as "dismantling, demolition, or removal of improvements").

37.301 Labor standards.

Contracts for dismantling, demolition, or removal of improvements are subject to either the Service Contract Act (41 U.S.C. 351-358) or the Davis-Bacon Act (40 U.S.C. 276a-276a-7). If the contract is solely for dismantling, demolition, or removal of improvements, the Service Contract Act applies unless further work which will result in the construction, alteration, or repair of a public building or public work at that location is contemplated. If such further construction work is intended, even though by separate contract, then the Davis-Bacon Act applies to the contract for dismantling, demolition, or removal.

37.302 Bonds or other security.

When a contract is solely for dismantling, demolition, or removal of improvements, the Miller Act (40 U.S.C. 270a-270f) (see 28.102) does not apply. However, the contracting officer may require the contractor to furnish a performance bond or other security (see 28.103) in an amount that the contracting officer considers adequate to (a) ensure completion of the work, (b) protect property to be retained by the Government (c) protect property to be provided as compensation to the contractor, and (d) protect the Government against damage to adjoining property.

37.303 Payments.

(a) The contract may provide that the (1) Government pay the contractor for the dismantling or demolition of structures or (2) contractor pay the Government for the right to salvage and remove the materials resulting from the dismantling or demolition operation.

(FAC 90-3) 37-5

Advanced Research Projects Agency Comments

Final Report
Reference



ADVANCED RESEARCH PROJECTS AGENCY
3701 NORTH FAIRFAX DRIVE
ARLINGTON VA 22203-1714

JUN 10 1994



MEMORANDUM FOR DIRECTOR, CONTRACT MANAGEMENT DIRECTORATE,
OFFICE OF THE INSPECTOR GENERAL

SUBJECT: Audit Report on Organizational and Consultant Conflicts
of Interest (Project No. 3CH-5012)

This is in response to your memorandum of April 13, 1994,
same subject, requesting review and comment on the draft audit
report.

"Finding A. Organizational Conflicts of Interest Certificates

Recommendations for Corrective Action

2. We recommend that the Service Acquisition Executives and the
Directors of the Advanced Research Projects Agency and the Defense
Nuclear Agency direct contracting officers to:

a. Notify contractors to submit applicable certificates for
contracts identified in Appendix C that are still open."

ARPA Response. We concur. We will notify contractors to
submit applicable certificates for contracts identified in
Appendix C that are still open. The estimated date for
completion of this corrective action is July 31, 1994.

We wish to note for the record, however, that we dispute the
findings of the draft audit report on six of the ten ARPA
contracts listed in "Appendix C. Contracts Reviewed" on Page
38. Our specific dispute is with the finding that FAR
52.209-7 was required in the solicitation of nine of those
contracts, as signified by "Yes" in the first column. Our
rationale for disputing this point is that five of those
contracts (MDA972-91-C-0030, 91-C-0053, 92-C-0008, 92-C-0020,
and 92-C-0048) resulted from Broad Agency Announcements
(BAA's). NOTE: FAR 15.407 includes only requests for
proposals (RFP's) and requests for quotations (RFQ's) not
BAA's in the definition of solicitations. The BAA, a
legitimate competitive technique in our line of work, by
design does not include standard solicitation clauses. The
sixth disputed contract, MDA972-91-C-0013, was an urgent
action for "DESERT STORM," for which there was no
solicitation. We contend that on these six contracts, where
RFP-type solicitations were not used, it is improper to state
that FAR 52.209-7 was "required in the solicitation."

"b. Initiate contract terminations if the certificates required by Federal Acquisition Regulation provision 52.209-8, "Organizational Conflict of Interest Certificate - Advisory and Assistance Services," are not received within 30 days of notification."

ARPA Response. We concur. According to Appendix C, this Certificate only will be required on Contract MDA972-93-C-0003, the last contract on the list. The estimated date for completion of this corrective action is July 31, 1994.

"Finding B. Clause Restricting Future Contracting

Recommendations for Corrective Action

2. We recommend that the Army and Navy Acquisition Executives and the Directors of the Advanced Research Projects Agency and the Defense Nuclear Agency advise contracting officers to use restrictive clauses that comply with the Federal Acquisition Regulation subpart 9.5. The restrictive clauses should identify the nature of the potential conflict of interest, the nature and specific duration of the restrictions on future contractor activities, the requirement for contractors to submit copies of agreements between contractors and other companies on proprietary information, and the correct waiver approval authority."

ARPA Response. We concur. By July 31, 1994, the Director of the Contracts Management Office (CMO) at ARPA will issue the recommended advice to all CMO contracting officers via policy memorandum. The restrictive clauses will identify the nature of the potential conflict of interest, the nature and specific duration of the restrictions on future contractor activities, the requirement for contractors to submit copies of agreements between contractors and other companies on proprietary information, and the correct waiver approval authority.

Should additional information be required, please contact Mr. R. Timothy Arnold, Director, Contracts Management Office, at (703) 696-2381.


Ron H. Register
Deputy Director,
Management

Defense Nuclear Agency Comments



Defense Nuclear Agency
6801 Telegraph Road
Alexandria, Virginia 22310-3398

JUN 13 1994

MEMORANDUM FOR INSPECTOR GENERAL, DEPARTMENT OF DEFENSE

SUBJECT: Audit Report on Organizational and Consultant Conflict of Interest (Project No. 3CH-5012)

Reference is made to your Memorandum, same subject, dated 13 April 1994 which provided a copy of the draft report for Agency review and comments.

The Defense Nuclear Agency (DNA) has conducted its review of the draft report and this memorandum provides our response to the findings and recommendations of the report:

Finding A. Organizational Conflicts of Interest Certificates

RECOMMENDATION 2.a

DNA concurs with the findings that the certification requirements of FAR 9.507 were not followed in all cases. The recommendation for directing the Contracting Officers to notify those contractors who failed to provide the certificates for the DNA contracts listed in Appendix C will be implemented. We plan to complete this corrective action by 30 September 1994. The Agency is committed to making improvements and a vulnerability assessment will be conducted and further changes made as necessary.

Finding B. Clause Restricting Future Contracting

RECOMMENDATION 1.

The audit report states that two DNA contracts reviewed needed an organizational conflict of interest clause to avoid, neutralize, or mitigate potential organizational conflicts of interest. DNA partially concurs with the findings under contract DNA001-92-C-0029 and nonconcur with the findings under contract DNA001-92-C-0148. DNA's position on these findings are:

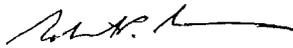
a. DNA001-92-C-0029: Partially Concur. The findings presented in the audit report state that the restrictive clause was not included because the contractor requested that the clause be removed and recommends that action be taken to issue a modification to the contract to inform the contractor that potential organizational conflicts of interest exist and that restrictions will be imposed on the contractors' future activities to prevent the conflicts. Our review of the finding showed that, during the contract negotiation stage which follows the issuance of any letter contract, the Contracting Officer gave

SUBJECT: Audit Report on Organizational and Consultant Conflict of Interest (Project No. 3CH-5012)

full consideration to the risk of an organizational conflict of interest and concurred with the contractor's request to remove the restrictive clause on the basis that the potential for conflict was moot. This was a contracting officer's decision and there is no reason to refute that decision based on information available to us. However, the wording of portions of the statement of work continued to create confusion as they do not properly characterize the work being done that could result in potential for future conflict of interest. Although the potential for future conflict of interest is remote, we have simply cancelled the task from the statement of work. The contracting officer will be issuing a modification to the contract to remove the areas in question (task 6.1.5; 6.8; and 6.8.1) DNA concurs with the audit recommendation for this contract even though we have not agreed with the language of the finding upon which it is based.

b. DNA001-92-C0148: The audit finding is that the contractor is in a position to provide advice to the Government concerning the programs and topics developed or evaluated under the contract and therefore would be in an unfair competitive advantage when bidding on subsequent contracts. We nonconcur with this finding and the recommendation for corrective action as well. Our position is that the contract calls for research and analysis on very broad strategic topic areas. It is not envisioned that the contractor will access program and planning documents of specific detail because the statement of work under the contract calls for the contractor to research broad strategic topic areas. Therefore, program specific information which would provide unfair advantage would go far beyond the contract statement of work. The DNA Project Manager has confirmed that the contractor has not been given program specific planning information, source selection information or access to proprietary information. In this particular case there is no compelling reason based on facts or other information that would prove the contracting officer decision to be improper.

The Defense Nuclear Agency appreciates the opportunity to review the draft report and expresses its gratitude to be able to provide its position and comments on the findings and recommendations concerning this activity.

for  *, C1, USAF*
KENNETH L. HAGEMANN *Chief of Staff*
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