On January 27, 2009, the Department of Defense Inspector General (DOD IG) released a redacted version of its report on "contracted advisory and assistance services for the U.S. Army Future Combat Systems." The report concluded that the DOD's Director of Operational Test and Evaluation (DOT&E) had engaged SAIC as its "primary commercial contractor" supporting its testing needs, even though SAIC (along with Boeing) serves as the Future Combat Systems (FCS) Lead System Integrator for system design and development, and even though SAIC's contract with DOT&E "explicitly stated '… providers are excluded from this contract who have significant involvement in the development of DoD systems that are under, or will be under DOT&E oversight'."

Despite SAIC's argument that its role on the FCS contract was one of system integrator, not system developer, the DOD IG found that the FCS contract had received billions of dollars out of the Army's Research, Development, Test and Evaluation (RDT&E) appropriation—thus, SAIC was *de facto* a system developer. The **DOD IG Report**, blasted the entities involved for this situation, stating that "DOT&E and the Army did not exercise the good judgment and sound discretion needed to prevent the existence of conflicting roles that might bias a contractor's judgment or provide it an unfair competitive advantage." Ouch.

According to the DOD IG, after the situation was brought to the parties' attention, SAIC's advisory/assistance support contract to DOT&E was quickly modified to "delete the FCS-related tasks" after officially "concluding that SAIC had statutory OCIs regarding those tasks."

But what is an Organizational Conflict of Interest (OCI)? We've touched on this topic before, notably **in connection** with Northrop Grumman's sale of its TASC unit.
Essentially, the FAR states that an OCI exists when one of three situations exists—

1. An individual is actually (or potentially) unable to provide the government with "impartial assistance or advice"

2. A person's objectivity in performing contract work is or might be impaired

3. A person or entity has an unfair competitive advantage

An OCI can be created with respect to an existing contract or with respect to future work. The FAR (at 9.5) discusses “Organizational and Consultant Conflicts of Interest,” and (according to the DOD IG audit report) “places restrictions on contractors being placed in a position to make decisions that favor their own products or capabilities.” The DOD IG also noted that 10 U.S.C. § 2399 “places further restrictions on system developers supporting operational test and evaluation.”

The DOD IG report also noted that Army Contracting Officers had a responsibility to identify and, if possible, mitigate actual or potential OCIs. (See FAR 9.504.) Moreover, the FAR directs “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.”

Despite the FAR requirements regarding OCIs, the DOD IG concluded—

We were unable to determine if the contracting officer performed any evaluation beyond accepting statements made in SAIC's proposal to determine if potential issues existed that would hinder SAIC's ability to provide unbiased advisory and assistance services related to the overall contract or the specific scope of work SAIC performed under [the Delivery Order]. There was no documentation in the contracting file to show how the issue was addressed.

…

We found no evidence that anyone evaluated whether SAIC was significantly involved in the development of a DoD system that DOT&E was or would be overseeing prior to contract award. According to the contracting officer, DOT&E did not see a conflict with awarding the contract to SAIC because it had previously been fulfilling the requirements under a bridge contract that was entered into after the previous prime contractor was dropped after being acquired by Northrop Grumman, another FCS systems developer. Only after an inquiry was made was the issue of how the Government reached its conclusion that SAIC's participation in the development of the FCS did not violate the OCI clause contained in the solicitation examined.

In addition, the DOD IG found similar concerns with Northrop Grumman, CSC, General Dynamics
, and Lockheed Martin
. It reported—

We were unable to determine how the contracting officer concluded that the business isolation procedures that Northrop Grumman described in the proposal it submitted for the overall contract was consistent with the OCI provisions of 10 U.S.C. 2399 or the OCI clause contained in their overall contract. However, based on documentation contained in the contract files, it appears the contracting officer concluded that Northrop Grumman possessed no OCIs related to the requirements of either delivery order.

…

In their proposal, the Test and Experimentation Services Company [a JV that included CSC] informed the contracting officer that it possessed OCIs with respect to the work to be performed under the work authorization orders.

However, the company proposed that CSC's partner perform all the work under the contract. Thus, the Director of Contracts stated that based on that fact, the command concluded that awarding the scope of work to the Test and Experimentation Services Company did not violate Title 10's OCI restrictions because CSC would not share in any of the profit derived from the contract.

…

The OCI provisions prohibited FC Business Systems from satisfying requirements resulting from its work under the contract, and the task order issued to support the OTC Air Defense Artillery Test Directorate's mission requirements included additional restrictions to prevent FC Business Systems from operationally testing equipment it helped manufacture. However, the provisions did not require FC Business Systems to inform the Government of its acquisition by General Dynamics. As a result, the OTC and General Services Administration did not detect that General Dynamics, one of Boeing's major FCS development subcontractors (after acquiring the FC Business Systems) was helping the command plan, coordinate, collect, and reduce data used to evaluate the effectiveness and suitability of the FCS, a clear violation of the OCI provisions in 10 U.S.C. 2399.

The DOD IG made several recommendations designed to prevent similar situations from arising in the future. Among them, it recommended that the Director of Defense Procurement and Acquisition Policy, Mr. Shay Assad, develop a new DFARS clause that would preclude "contractors that are involved in the development, production, or testing of a system … from providing technical advice to the program office for that system or from participating activities impacting the operational test and evaluation of that system unless appropriate waivers are obtained." Importantly, the new clause would " m ake it incumbent on the proposing contractor to identify in their proposal any work that that they are or have performed either under prime contract or subcontract related to the development or supply of a DoD system."

The report noted that Mr. Assad agreed with the recommendation. "The Director also stated that he would issue a memorandum emphasizing the importance of complying with FAR OCI provisions after the FAR Acquisition Law Team issues its final rule for a related FAR case to ensure that he does not issue conflicting guidance."

We recommend that contractors supporting government test and evaluation

functions take note.