



Report to the Committee on Armed
Services, U. S. Senate

March 2008

DEFENSE
CONTRACTING

Additional Personal
Conflict of Interest
Safeguards Needed for
Certain DOD
Contractor Employees



G A O

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Report Documentation Page				Form Approved OMB No. 0704-0188	
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1. REPORT DATE MAR 2008		2. REPORT TYPE		3. DATES COVERED 00-00-2008 to 00-00-2008	
4. TITLE AND SUBTITLE Defense Contracting: Additional Personal Conflict of Interest Safeguards Needed for Certain DOD Contractor Employees				5a. CONTRACT NUMBER	
				5b. GRANT NUMBER	
				5c. PROGRAM ELEMENT NUMBER	
6. AUTHOR(S)				5d. PROJECT NUMBER	
				5e. TASK NUMBER	
				5f. WORK UNIT NUMBER	
7. PERFORMING ORGANIZATION NAME(S) AND ADDRESS(ES) United States Government Accountability Office, 441 G St NW, Washington, DC, 20548				8. PERFORMING ORGANIZATION REPORT NUMBER	
9. SPONSORING/MONITORING AGENCY NAME(S) AND ADDRESS(ES)				10. SPONSOR/MONITOR'S ACRONYM(S)	
				11. SPONSOR/MONITOR'S REPORT NUMBER(S)	
12. DISTRIBUTION/AVAILABILITY STATEMENT Approved for public release; distribution unlimited					
13. SUPPLEMENTARY NOTES					
14. ABSTRACT					
15. SUBJECT TERMS					
16. SECURITY CLASSIFICATION OF:			17. LIMITATION OF ABSTRACT Same as Report (SAR)	18. NUMBER OF PAGES 57	19a. NAME OF RESPONSIBLE PERSON
a. REPORT unclassified	b. ABSTRACT unclassified	c. THIS PAGE unclassified			



Highlights of [GAO-08-169](#), a report to the Committee on Armed Services, U.S. Senate

Why GAO Did This Study

Many defense contractor employees work side-by-side with federal employees in Department of Defense (DOD) facilities performing substantially the same tasks affecting billions in DOD spending. Given concerns with protecting the integrity of DOD operations, GAO was asked to assess (1) how many contractor employees work in DOD offices and what type of mission-critical contracted services they perform, (2) what safeguards there are to prevent personal conflicts of interest for contractor employees when performing DOD's tasks, and (3) whether government and defense contractor officials believe additional safeguards are necessary.

GAO reviewed conflicts of interest laws and policies and interviewed ethics officials and senior leaders regarding applicability to DOD federal and contractor employees. GAO judgmentally selected and interviewed officials at 21 DOD offices with large contractor workforces, and 23 of their contractors.

What GAO Recommends

GAO recommends that DOD develop personal conflict of interest safeguards for contractor employees similar to those required of DOD's federal employees, which may require defense contractors to screen financial disclosures from certain employees. DOD commented it has established a contracting integrity subcommittee to review the recommendations.

To view the full product, including the scope and methodology, click on [GAO-08-169](#). For more information, contact Cristina T. Chaplain at (202) 512-4841 or chaplainc@gao.gov.

DEFENSE CONTRACTING

Additional Personal Conflict of Interest Safeguards Needed for Certain DOD Contractor Employees

What GAO Found

Indications are that significant numbers of defense contractor employees work alongside DOD employees in the 21 DOD offices GAO reviewed. At 15 offices, contractor employees outnumbered DOD employees and comprised up to 88 percent of the workforce. Contractor employees perform key tasks, including developing contract requirements and advising on award fees for other contractors.

In contrast to federal employees, few government ethics laws and DOD-wide policies are in place to prevent personal conflicts of interest for defense contractor employees. Several laws and regulations address personal conflicts of interest, but just one applies to both federal and contractor employees.

Selected Laws and Regulations That Address Personal Conflicts of Interest

Prohibition, restriction, or requirement	Applicable to federal employees?	Applicable to DOD contractor employees?
Bribery, kickback, other graft	Yes	Yes
Participating in matter affecting personal financial interest	Yes	No ^a
Avoiding appearance of partiality when performing duties	Yes	No ^a
Disclosing financial interests	Yes	No ^a
Accepting travel and gifts	Yes	No ^a
Using nonpublic information for personal gain	Yes	No ^a
Future employment contact	Yes	No ^a
Misusing position to provide preferential treatment to a private interest	Yes	No ^a

Source: GAO analysis of selected laws and regulations.

^aThere may be other laws and regulations that may apply to DOD contractor employees depending on the facts and circumstances of a particular case.

Some DOD offices and defense contractor companies are voluntarily adopting safeguards. For example, realizing the risk from personal conflicts of interest for particularly sensitive areas, the 19 DOD offices GAO reviewed that used contractor employees in the source selection process all use safeguards such as contract clauses that prohibit contractor employees' participation in a DOD procurement affecting a personal financial interest. In certain other tasks, only 3 of the 23 defense contractors GAO reviewed had safeguards requiring employees to identify potential conflicts of interest so they can be mitigated.

In general, government officials believed that current requirements are inadequate to prevent conflicts from arising for certain contractor employees influencing DOD decisions, especially financial conflicts of interest and impaired impartiality. Some program managers and defense contractor officials expressed concern that adding new safeguards will increase costs. But ethics officials and senior leaders countered that, given the risk associated with personal conflicts of interest and the expanding roles that contractor employees play, such safeguards are necessary.

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Abbreviations

DFARS	Defense Federal Acquisition Regulation Supplement
DOD	Department of Defense
DPAP	Defense Procurement and Acquisition Policy
FAR	Federal Acquisition Regulation
FFRDC	federally funded research and development center
GAO	Government Accountability Office
OFPP	Office of Federal Procurement Policy
OGE	Office of Government Ethics

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United States Government Accountability Office
Washington, DC 20548

March 7, 2008

The Honorable Carl Levin
Chairman
The Honorable John McCain
Ranking Member
The Honorable John Warner
Committee on Armed Services
United States Senate

Contractors have long played an integral role in the development of equipment and systems that fit the Department of Defense's (DOD) unique needs and in the delivery of certain support services, such as building maintenance, food service, and information technology services. Increasingly, however, contractors are also being hired to perform tasks affecting billions of dollars in DOD spending to oversee and execute high-risk programs, such as the acquisition of major weapon systems, and to assist in some of DOD's most sensitive and restricted operations. In DOD facilities, certain contractor employees work side-by-side with federal employees on substantially the same mission-critical tasks.

Given concerns with protecting the integrity of DOD's operations and federal spending, you asked us to review existing safeguards intended to prevent contractor employees from having personal conflicts of interest when performing tasks for DOD. In response, because DOD does not maintain departmentwide data on the numbers of contractor employees working side-by-side with federal employees, this report assesses (1) the roles being played by certain contractor employees by identifying how many of them are working at the DOD offices we reviewed as well as what responsibilities they have. This report also assesses (2) what safeguards there are to prevent conflict of interests for contractor employees and (3) whether government and defense contractor officials believe additional safeguards are necessary.

To address our objectives, we reviewed the conflicts of interest and ethics laws and regulations applicable to DOD government employees and defense contractor employees and DOD and federal policies on contracting. To assess the mission-critical roles being played by certain employees across a representative cross-section of DOD, we obtained information from five major organizations judgmentally selected for having large DOD contractor workforces: Air Force, Army, Navy, Missile Defense Agency, Tricare Management Activity, and DOD organizational sponsors for four federally funded research and development centers

(FFRDC), which are nonprofit organizations established under long-term contracts with the federal government to meet some special long-term research or development need. To describe the types of mission-critical services that certain defense contractor employees are providing to those five DOD organizations, we judgmentally selected 21 DOD offices for review which were identified by DOD officials as having large contractor workforce and representing a cross-section of DOD organizations.¹ We obtained information from these offices to document how many DOD and contractor employees worked there and the types of mission-critical contracted services performed by contractor employees and interviewed program managers, ethics and contracting officials about personal conflict of interest safeguards. We obtained information about ethics programs from 23 contractor and 4 FFRDC organizations judgmentally selected because their employees are performing contracted services at the 21 DOD offices we reviewed. We also interviewed officials from those contractor and FFRDC organizations to obtain information on conflict of interest safeguards and met with the Office of Government Ethics (OGE) to obtain views and information about conflict of interest safeguards appropriate for contractor employees. We conducted this performance audit from November 2006 through March 2008 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient and appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives. Appendix I provides additional details of our scope and methodology.

This report focuses specifically on individual, or *personal*, conflicts of interest among DOD contractor employees as opposed to *organizational* conflicts of interest. For this report, we defined a “personal conflict of interest” as a situation where an individual is employed by an FFRDC or a defense contractor company and is in a position to materially influence DOD’s recommendations and/or decisions and, because of his/her personal activities, relationships, or financial interests, may lack or appear to lack objectivity or appear to be unduly influenced by personal financial interest. By contrast, an organizational conflict of interest occurs when a defense contractor has present or currently planned interests that either directly or indirectly (including business or relationships with other

¹ By “contractor employee in the workforce,” we mean nongovernment employees in various DOD offices, including FFRDC employees and subcontractors to DOD contractors.

contractors) relate to the work to be performed under a DOD contract and (1) may diminish its capacity to give impartial, technically sound, objective assistance or advice, or (2) may result in it having an unfair competitive advantage.

Results in Brief

Indications are that a significant number of defense contractor employees are working side-by-side with government employees in DOD. DOD has not compiled departmentwide data. However, at 15 of the 21 offices we reviewed, contractor employees outnumbered DOD employees and comprised as much as 88 percent of the workforce. At the other offices, contractors comprised between 19 and 46 percent of the workforce. Contractor employees are responsible for carrying out a range of tasks, including studying alternative ways to acquire desired capabilities, developing contract requirements, and advising or assisting on source selection, budget planning, and award-fee determinations.

Defense contractor employees are not subject to the same laws and regulations that are designed to prevent personal conflicts of interests among federal employees. While the Department of Defense FAR Supplement (DFARS) and the Federal Acquisition Regulation (FAR) require that the companies that provide contractor employees to DOD have written ethics policies, no departmentwide or FAR policy obliges DOD offices using contractor employees to require that they be free from personal conflicts of interest. There are some safeguards being adopted voluntarily at the program office level, however. For example, realizing the risk from personal conflicts of interest for particularly sensitive areas, 19 offices we reviewed that used contractor employees in the source selection process all use safeguards such as contract clauses to prevent personal conflicts of interest. In addition, most of the contractor firms have policies requiring their employees to avoid a range of potential interests—such as owning stock in competitors—that conflict with the *firms'* interests. However, only three of those contractors' policies directly require their employees to disclose potential personal conflicts of interest with respect to their work at DOD so they can be screened and mitigated by the firms.

In discussions with program managers on whether safeguards are needed, many agreed, citing this was the reason why they put in safeguards at their offices for the contractor employees involved in the source selection process and sometimes for contractor employees involved in other advisory and assistance tasks. In addition, DOD oversight officials as well as OGE officials believed that current requirements are inadequate to

prevent certain conflicts from arising, especially financial conflicts of interest, impaired impartiality, and misuse of information and authority. These concerns have grown as contractor employees have more influence on government operations and spending decisions. An expert panel charged with examining ways to improve acquisitions in government recently expressed similar concerns. At the same time, however, a number of program managers and defense contractor company officials expressed concern that adding safeguards will increase costs and may be unnecessary since government officials—not contractor employees—are the ones ultimately making the decisions. But ethics officials, senior leaders, and panel experts countered that, given the risk associated with personal conflicts of interest and the expanding role that contractor employees play, such safeguards are necessary.

Given the magnitude of DOD's contractor employee use, our analyses of the range of key roles that contractor employees have across DOD, and the need to ensure the integrity of federal spending, we believe that DOD needs departmentwide personal conflict of interest safeguards for certain contractor employees who are providing the type of services affecting governmental decisions, similar to those required of DOD's federal employees. As such, this report makes recommendations to DOD to strengthen its personal conflict of interest policies for such contractor employees.

We provided a draft of this report to DOD and OGE for comment. In its written comments, DOD partially concurred with the recommendations, stating it agreed with their intent and has tasked a contracting integrity subcommittee to carefully review each recommendation. In its written comments, OGE offered information that should help DOD as it begins its efforts to address how best to implement our recommendations. See appendixes II and III for DOD's and OGE's comments in their entirety.

Background

DOD hires contractors to provide a wide range of services that may include basic services (custodial and landscaping); administrative types of services (travel and management support); and complex professional and management (i.e., advisory and assistance) services that closely support inherently governmental functions, decisions, and spending, (acquisition support, budget preparation, developing or interpreting regulations,

engineering and technical services, and policy development).² Contractor employees often work inside DOD facilities, alongside DOD employees, to provide these services.

DOD's increased spending on services in recent years indicates there are a large number of contractor employees working side-by-side with federal employees. In fiscal year 2006, DOD obligated more than \$151 billion on services contracts, a 78 percent real increase since fiscal year 1996. Overall, according to DOD, the amount obligated on services contracts in fiscal year 2005 exceeded the amount the department spent on supplies and equipment, including major weapon systems. Some categories of spending on services have grown significantly in recent years. For example, obligations for professional, management, and administrative support has grown about 161 percent from 1996 to 2005; obligations for medical services grew by more than 400 percent during the same time period.

Several reasons are behind DOD's increased reliance on contractors for services. In addition to the belief that it is more cost-effective to hire contractor employees instead of government employees, reasons include the need for skills and expertise not currently found in DOD; the flexibility and the relative ease in obtaining necessary support from contractor employees instead of hiring more government employees; and ceilings on the authorized number of government employees.

² A function is inherently governmental if it is "so intimately related to the public interest as to mandate performance by government employees" either because the function involves the discretionary exercise of government authority or monetary transactions and entitlements. Federal Acquisition Regulation (FAR) 2.101. Consistent with the types of services described above, FAR 2.101 describes a broad range of advisory and assistance services that can be provided under contract to support and affect government decision-making, for example, program management support, systems engineering, technical assistance, contract and acquisition support, budgeting, and direct support of a weapon system that is essential to the research, development, production, operation, or maintenance of the system.

Contractor Employees Outnumber DOD Employees at Many Offices That GAO Reviewed

DOD has not compiled departmentwide data on the numbers of contractor employees working at its facilities. Indications are, however, that significant numbers of contractor employees are working side-by-side with government employees in certain segments of the department, based in part on information we obtained from 21 DOD offices we reviewed. As shown in table 1, at 15 of these offices, contractor employees outnumber DOD employees and the percentage of contractor employees in the remaining offices ranges from 19 to 46 percent.

Table 1: Number and Percent of Defense Contractor versus DOD Employees in DOD Offices That GAO Reviewed

	DOD employees	Defense contractor employees	Total number of personnel	Percent comprising contractor employees
Army				
Army Materiel Command (Communications Electronics Command)				
• Acquisition Business Process Systems, Enhancements and Industrial Analyses Sector	12	14	26	54%
• Logistics and Readiness Center	41	35	76	46%
• Project Management Office, Tactical Radio Communications Systems	101	345	446	77%
Office of the Deputy Under Secretary of the Army for Business Transformation				
• HR (Human Resources) Solutions Program Office	3	15	18	83%
Army Contracting Agency				
• Contracting Center of Excellence	106	25	131	19%
Air Force				
Air Force Space Command				
• Deterrence and Strike Division (A5MF)	14	24	38	63%
• Surveillance, Reconnaissance and Spacelift Division (A5F)	21	39	60	65%
Air Force Materiel Command				
• Aeronautical Systems Center (303rd Air Wing)	500	400	900	44%
• Aeronautical Systems Center (516th Air Wing)	332	202	534	38%
• Electronic Systems Center	2,891	1,691	4,582	37%
Navy				
Naval Sea Systems Command				
• Program Executive Office for Aircraft Carriers	67	102	169	60%
• Program Executive Office for Integrated Warfare Systems	36	80	116	69%
Missile Defense Agency				
• Ground-Based Midcourse Defense Program Office	282	464	746	62%
• Terminal High Altitude Area Defense Program Office	222	191	413	46%
• Agency Operations Office ^a	200	1,089	1,289	84%
• Aegis Ballistic Missile Defense Program Office	82	201	283	71%
• Engineering	41	246	287	86%
• Sensors	21	90	111	81%
Tricare Management Activity				
• Acquisition Management and Support Office	43	57	100	57%
• Clinical Information Technology Program Office	24	112	136	82%
• Resources Information Technology Program Office	14	100	114	88%

Sources: DOD (data); GAO (analysis and presentation).

^aThe number of DOD and contractor employees identified represent three out of the five directorates that comprise the Agency Operations Office. The three directorates include Business Operation; Infrastructure and Environment; and Security/Intelligence Operations.

For the offices we reviewed, contractors are supporting key mission-critical tasks that have the potential to influence DOD decisions. Some of these tasks are similar to functions performed by federal employees. For example, at the front end of the acquisition process, contractor employees who work in various DOD program offices study alternative ways to acquire desired capabilities, help develop requirements, and help design and evaluate requests for proposals as well as responses to those proposals and provide advice on the past performance of external contractors competing for that work. In the course of an acquisition, contractor employees recommend actions to program offices to correct other contractors' performance problems, they analyze other contractors' cost, schedule and performance data, and they assist in award-fee determinations for other contractors. In addition, contractor employees help DOD program offices develop long-range financial plans as well as yearly budgets. They also assist in administrative tasks to support program offices by tracking travel budgets and researching and reconciling payment discrepancies.

Although we view the types of roles being played by contractor employees as closely supporting inherently governmental functions, some DOD officials had a different perspective. That is, when discussing contractor employees' roles in the decision-making process, program managers we spoke with characterize contractor employee involvement as "technical" input into the decision-making process versus direct involvement in the decisions themselves. It should be noted, the Federal Acquisition Regulation (FAR) defines contractor participation in the evaluation of contract proposals as one of those functions that may approach being in the inherently governmental function category.³

Appendix IV provides more details on the key services contractor employees are performing in the DOD offices we reviewed.

³ FAR 7.503 (d)(8).

Few Laws or DOD-Wide Policies Address Personal Conflicts of Interests among Contractor Employees

Contractor employees are not subject to the same laws and regulations that are designed to prevent conflicts of interests among federal employees.⁴ While the DFARS and the FAR require that the companies that provide contractor employees to DOD have written ethics policies, no departmentwide or FAR policy obliges DOD offices using contractor employees to require that they be free from personal conflicts of interest. On the other hand, some program managers, realizing the risk from potential personal conflicts of interest, have established their own safeguards for particularly sensitive areas where contractor employees provide support to decision processes. For example, all DOD offices we reviewed that used contractor employees in the source selection process use additional safeguard controls such as contract clauses designed to prevent personal conflicts of interests. The same offices, however, assessed risk differently when it came to other types of activities that contractors perform—with only 6 of 21 offices using similar conflict of interest contract clauses for activities such as requirements development, cost estimating, and test and evaluation.

Most of the firms we visited have ethics policies that address personal conflicts of interests, but only three directly require their employees to identify potential personal conflicts of interest with respect to their work at DOD so they can be screened and mitigated by the firms. Lastly, because of recent public scrutiny regarding a conflict of interest issue with a high-level FFRDC official, in January 2007 DOD revised its policy for employees of FFRDCs.

Most Laws and Regulations Designed to Prevent Conflicts for Federal Employees Do Not Apply to Contractor Employees

Several laws and regulations exist that address situations where individuals performing service to the government are, or might appear to be, unduly influenced by a personal financial interest. These include prohibition on bribery and kickbacks; bans on participating in matters affecting personal financial interest; and requirements relating to private employment contacts between certain procurement officials and potential bidders on government contracts. For federal employees, misconduct in some of these areas also violates criminal statutes with potentially serious consequences, including dismissal, prosecution, fines, and incarceration. As shown in table 2, there are very limited prohibitions—relating to public

⁴ Both federal employees and contractor employees involved in source selection and related activities supporting award of government contracts are subject to laws and regulations to prevent release of protected procurement-related information. 41 U.S.C. 423(a) and FAR 3.104-4.

corruption involving criminal bribery activity—that apply to both DOD and defense contractor employees.

Table 2: Selected Laws and Regulations That Apply to Personal Conflict of Interest Situations

Law or regulation ^a	Applies to federal employees	Applies to defense contractor employees ^b
Public corruption		
Prohibition on bribery, kickback, or other graft (18 U.S.C. § 201)	✓	✓
Financial conflicts of interest		
Prohibition on participation in a particular matter affecting personal financial interests (18 U.S.C. § 208 and 5 C.F.R. § 2635, subpart D)	✓	
Requirement to be and appear to be impartial in performing official duties (5 C.F.R. §§ 2635.101(b)(8) and 2635.501-503)	✓	
Requirements for certain federal employees to disclose financial interests (Title I of the Ethics in Government Act, 5 U.S.C. app. §§ 101-107)	✓	
Prohibition on using nonpublic information for personal gain and engaging in a financial transaction using nonpublic information (5 C.F.R. § 2635.703)	✓	
Seeking other employment conflicts of interest		
Prohibition on discussing future employment with a prospective bidder or competing contractor while participating in the source selection/procurement process (41 U.S.C. § 423 and FAR 3.104; 18 U.S.C. 208 and 5 C.F.R. § 2635.601-606)	✓	
Gifts and travel		
Limitations on accepting gifts, including travel, from outside, non-federal sources (5 U.S.C. § 7353 and 5 C.F.R. §§ 2635.201 and 2635.202 ^c)	✓	
Misuse of position/endorsement		
Prohibition on misuse of position for private gain (5 C.F.R. §§ 2635.101(b)(7) and 2635.702)	✓	

Source: GAO analysis of federal personal conflicts of interest laws and regulations.

^aThis table represents a selection of the federal personal conflict of interest laws and regulations that are generally applicable to a conflict of interest situation. It should be noted, that there may be other laws and regulations that may apply depending on the facts and circumstances of a particular situation.

^bIncludes FFRDC contractor employees.

^cThe Standards of Ethical Conduct for Executive Branch Employees at 5 C.F.R. part 2635 provide that an employee may not solicit or accept any gift that is given because of the employee's official position or that is given by a prohibited source. As defined in the standards of conduct, a gift is almost anything of monetary value, such as cash, meals, trips, or services. 5 C.F.R. §§ 2635.202 and 2635.203(b).



The type of public corruption addressed by laws for both federal and contractor employees concern bribes, kickbacks, or other forms of graft. The anti-bribery law seeks to prevent the type of “quid pro quo” where an official action was taken in return for money, favors, travel, gifts, or other

things of value.⁵ Examples of this law being applied to bribery cases involving contractor employees working on government contracting matters are as follows:

- A Navy contractor employee at the Space and Naval Warfare Systems Center pled guilty in 2006 to accepting bribes from a freight forwarding company. In exchange for awarding freight transportation contracts to the company, this contractor employee received items valued at more than \$10,000, including extravagant dinners, concert and NASCAR tickets, weekends at a bed-and-breakfast inn, jewelry, and “spa days” at a department store. Investigators discovered that coincidentally, the freight company’s business was virtually nonexistent before this contractor employee began awarding the company contracts that eventually totaled over \$700,000. The contractor employee was sentenced to a year in prison and ordered to help repay the government \$84,000.
- An Army contractor employee working for the Coalition Provisional Authority in Iraq was put in charge of over \$82 million in funding for an area south of Baghdad. The contractor employee quickly began accepting bribes in the form of cash, cars, jewelry, and sexual favors provided by a U.S. citizen who owned and operated several companies in Iraq and Romania in exchange for steering lucrative contracts in the business owner’s direction. Investigators recovered incriminating e-mail traffic, including one e-mail from the contractor employee to the business owner exclaiming, “I love to give you money!” The contractor employee pled guilty in 2006 to bribery, conspiracy, and money-laundering and was sentenced to 9 years in prison, 3 years of supervised release, and ordered to forfeit \$3.6 million.

⁵ 18 U.S.C. § 201.

DOD Lacks a Departmentwide Policy Requiring Safeguards for Personal Conflicts of Interest with Contractor Employees

DOD lacks a departmentwide policy requiring safeguards against personal conflicts of interest for contractor employees. For example, although DOD contracting policy in DFARS encourages companies providing contractor employees to DOD to have written ethics policies,⁶ it fails to require that contractor employees be free from conflicts of interest or to deploy other safeguards to help assure that the advice and assistance received from contractor employees is not tainted by personal conflicts of interest. This policy also fails to address procurement integrity-related issues involving contractor employees contacting prospective bidders to DOD contracts about future employment.

Since December 2007, the FAR has required certain contractors to set and follow written codes of business ethics and conduct.⁷ However as shown in table 3, this new FAR requirement for contractors' ethics programs—which were modeled on some of the DFARS requirements—will be insufficient in addressing DOD's lack of a departmentwide policy requiring safeguards for personal conflicts of interest with contractor employees. This is because, like DOD's policy, the new FAR requirements also lack specific provisions to prohibit conflicts of interest or employ other safeguards to assure that the advice and assistance received from contractor employees is not tainted by personal conflicts of interest.

⁶ DFARS § 203.70—Contractor Standards of Conduct.

⁷ Contractors receiving awards worth more than \$5,000,000 and involving work in excess of 120 days are required to have a written code of business ethics and conduct. The rule allows for flexibility and where appropriate, contractor discretion, by providing certain exemptions for small businesses. In addition, it does not apply to contracts for commercial items or to contracts performed outside the U.S. FAR Subpart 3.10.

Table 3: FAR Procedures Modeled on DFARS Requirements for Contractor Ethics Program

1. Written code of business ethics and conduct and an ethics training program for all employees
2. Periodic reviews of company business practices, procedures, policies, and internal controls for compliance with standards of conduct and the special requirements of government contracting
3. Mechanism, such as a hot line, for employees to report suspected instances of improper conduct and instructions that encourage employees to make such reports
4. Internal and/or external audits
5. Disciplinary action for improper conduct

Sources: FAR Subpart 3.10 and DFARS § 203.7001 (information); GAO (analysis and presentation).

Note: The new FAR procedures (FAR Subpart 3.10) exempt small businesses from suggested DFARS contractor ethics program procedures for a formal training program and an internal control system. In addition, although DFARS procedures for contractor ethics program included (1) timely reporting to appropriate government officials of any suspected or possible violation of law in connection with government contracts or any other irregularities in connection with such contracts and (2) full cooperation with any government agencies responsible for either investigation of corrective actions, mandatory disclosure and full cooperation are now being considered under a separate FAR proposal. 72 Fed. Reg. 64019-23 (Nov. 14, 2007).

Some DOD Offices Have Safeguards Addressing Contractor Employees' Conflict of Interest in Particularly Sensitive Areas

While DOD does not have a policy regarding contractor employee conflicts of interest, many DOD offices believe there is a risk of personal conflicts of interest when contractor employees participate in source selection activities. All of the 19 DOD offices we reviewed had established safeguard procedures such as contract clauses or self-certifications to prevent conflict of interests for contractor employees for the source selection process, as shown in table 4. By contrast, program offices assessed risk differently when it came to other types of contractor employees' participation in decision making. Only 6 of the 21 offices had personal conflict of interest safeguards, such as contract clauses for other types of contractor employee services that involve advice and assistance on governmental decisions—which, for example, could include services related to requirements development, test and evaluation, and cost estimation.

Table 4: DOD Offices Reviewed That Have Conflict of Interest Safeguards for Contractor Employees

Personal conflict of interest safeguards by task category		
	Source selection support	Other advisory & assistance services
Army		
Army Materiel Command (Communications Electronics Command)		
• Acquisition Business Process Systems, Enhancement and Industrial Analyses Sector	✓	✓ ^a
• Logistics and Readiness Center	✓	✓ ^a
• Project Management Office, Tactical Radio Communications Systems	✓	✓ ^a
Office of the Deputy Under Secretary of the Army for Business Transformation		
• HR Solutions Program Office	✓	✓
Army Contracting Agency		
• Contracting Center of Excellence	✓	✓
Air Force		
Air Force Space Command		
• Deterrence and Strike Division (A5MF)	✓	
• Surveillance, Reconnaissance and Spacelift Division (A5F)	✓	
Air Force Materiel Command		
• Aeronautical Systems Center (303rd Air Wing)	✓	
• Aeronautical Systems Center (516th Air Wing)	✓	
• Electronic Systems Center	✓	✓
Navy		
Naval Sea Systems Command		
• Program Executive Office for Aircraft Carriers	^b	
• Program Executive Office for Integrated Warfare Systems	^b	
Missile Defense Agency		
• Ground-Based Midcourse Defense Program Office	✓	^c
• Terminal High Altitude Area Defense Program Office	✓	^c
• Agency Operations Office	✓	^c
• Aegis Ballistic Missile Defense Program Office	✓	^c
• Engineering	✓	^c
• Sensors	✓	^c

Personal conflict of interest safeguards by task category		
	Source selection support	Other advisory & assistance services
Tricare Management Activity		
• Acquisition Management and Support Office	✓	
• Clinical Information Technology Program Office	✓	
• Resources Information Technology Program Office	✓	

Sources: DOD offices (information); GAO (analysis and presentation).

^aPolicy revised in August 2007 and, as of September 2007, has yet to be used in any solicitation.

^bCommand policy is to not use contractor employees to support source selection tasks. However in excepted cases where contractor employees are being used, Naval Sea Systems Command requires each individual to sign agreement to not disclose procurement-related information.

^cIn a number of situations involving other advisory and assistance services support, Missile Defense Agency policy may require each individual to sign an agreement to not disclose any government information and also to refrain from activities that would create an actual or apparent conflict of interest during the course of their work on a task and to promptly notify their employer and the contract officer representative should this agreement be violated. For example, under this policy, contractor employees involved in acquisition planning or who have access to procurement sensitive, proprietary, or source selection information may be required to sign the agreement. In addition, the agency requires all contractor employees supporting budget planning to individually sign a non-disclosure agreement that forbids them from divulging budget data to outside parties.

The Air Force's Electronic Systems Center uses a contract clause as a safeguard to prevent conflicts of interest for contractors involved in source selection and other activities critical to mission-support and government decision making.⁸ According to an Air Force contracting official, this contract clause, highlighted in greater detail in table 5, affects 38 prime contractor companies, with an estimated value of \$280,000,000 in task orders in 2007. An Air Force official told us that this clause has been used for at least 10 years in recognition of the close relationship between decision makers and federal employee advisors—who are both required to identify and avoid financial conflicts—and contractor employees directly advising them in these roles. Thus, the clause provides a mechanism to address potential and actual contractor financial conflicts that could affect the integrity of the procurement system.

⁸ Under Electronic Systems Center policy, this clause is to be used for a full range of advisory and assistance services that include providing essential technical and business advice that may be highly influential in government employees's decision making. These advisory and assistance services include preparation of specifications, contractor performance monitoring, analysis and evaluation of technical performance issues, etc.

Also, the Army's Communications Electronics Lifecycle Management Command developed a personal conflict of interest policy and contractual procedural safeguards for its contractor employees after our June 2007 visit to three of its offices where Army officials told us they had not previously considered the need to do so.⁹ According to a policy alert sent out in August 2007 to the command's contracting activities, an underlying principle behind the policy is preventing the existence of conflicting roles that might bias a contractor employee's judgment. According to the new policy, conflicts of interest are more likely to occur in support services contracts, such as management support; consultants; preparing statements of work; and performance of technical evaluations. Table 5 also highlights the command's new safeguards in greater detail.

⁹ Under the command's policy, its clause is to be used for all support services for program management support services, budgetary or accounting services, or advisory and assistance services including consultant services.

Table 5: Highlights of Selected Air Force and Army Contract Clauses Addressing Personal Conflict of Interest Safeguards

DOD offices using contract clauses	Highlights of contract clauses
Air Force Electronic Systems Center	Defines financial interest as any interest in, or affiliation with, a prime contractor, a subcontractor to a prime contractor, any offeror, or any prospective subcontractor to any offeror for the program, contract, or other matter for which the employee is performing the support task under a contract. According to an Air Force program official, the financial conflict of interest contract clause has been included in all advisory and assistance services contracts for at least 10 years. The clause does the following: - Prohibits the prime contractor from assigning or allowing one of their employees or subcontractors to perform any task under the contract if that employee or employee's spouse, minor child, or household member has a financial interest that poses a conflict. - Directs the prime contractor to obtain and maintain a financial disclosure statement from each employee assigned to perform support tasks for the government when an employee is initially assigned to a support task under the contract and to update the disclosure statement at least on an annual basis. - Directs the prime contractor, upon written request by the government contracting officer, and at no increase in contract price, to make financial disclosure statement available to the government for inspection and review. - Directs the prime contractor to obtain a written waiver from the government contracting officer if the prime contractor wishes to assign an employee to perform a task for which the employee has a financial interest and conflict exists.
Army Communications Electronics Lifecycle Management Command	Defines financial interest as compensation for employment in the form of wages, salaries, commissions, professional fees, or fees for business referrals, or any financial investments in another contractor in the form of direct stocks or bond ownership, or partnership interest (excluding non-directed retirement or other mutual fund investments). The clause establishes the following requirements: - At the government contracting officer's discretion, contractor employees are required to sign a "Contractor-Employee Personal Financial Interest/Protection of Sensitive Information" agreement with the command regarding personal financial interest. - In this agreement, the contractor employee certifies that they have a continuing obligation to inform their employer if their assigned duties could affect the interests of a company or business entity in which the employee, or spouse, minor children, or immediate family member has a personal financial interest and thus could result in a conflict of interest. - The contractor employees are required to be trained and informed of this contract provision.

Sources: Air Force and Army (information); GAO (analysis and presentation).

Appendix V includes the full text of both contract clauses.

We obtained information from one defense contractor about how this company—a large business—has implemented the clause required under the company's subcontract with an Electronic Systems Center prime contractor. According to the contractor's senior vice president, the company developed policy and procedure for annual financial conflict of interest employee certifications. According to the senior vice president,

this conflict of interest safeguard applies to every employee working on this subcontract. The company's safeguard is similar to the financial disclosure process used for DOD employees covered by federal conflict of interest safeguards. For example, the company's instructions to employees state that the annual financial disclosure and certification process is done to assure that each employee is "free from any actual, potential, or apparent financial conflicts of interest with work he or she may perform on this [sub]contract."

In 2006, a conflict of interest for one of this company's employees was disclosed on the annual certification. According to the company's senior vice president, after the employee disclosed that his wife had taken a job with one of the center's prime contractors, the company removed him from performing service under the subcontract. That was because the company's annual review revealed not only that the employee might have a financial conflict of interest that could not reasonably be mitigated with the subcontracted work he was performing at the Electronic Systems Center,¹⁰ but he had not complied with the company's ongoing requirement for employees to avoid prohibited financial interests and to immediately notify the company when financial interests change from what was certified in an employee's last disclosure.

Firms Policies and Practices Vary

We analyzed the ethics program documents available for 22 of the 23 contractors we reviewed and found that 18 have written policies and procedures that address avoidance of personal conflicts of interest by their employees.¹¹ However, the policies require their employees to avoid a range of interests—such as owning substantial stock in competitors or suppliers—that conflict with the *firms'* interests. Except in three cases, the policies did not require written disclosure forms identifying potential conflicts of interest with the employees' work at DOD.

¹⁰ According to the company, the employee's 2006 conflict of interest certification disclosed through the company's process that his wife had started working 7 months earlier as a product line manager for a prime contractor that is one of the firms whose work was reviewed by this employee under the subcontract. Upon further investigation, the contractor determined that 85 percent of this employee's tasks consisted of review of data from the company where his wife now worked. After the company offered to reassign him to another contract to avoid the conflict of interest, the employee resigned rather than have a longer commute.

¹¹ One firm did not respond to our request for documentation of their ethics policy, nor did they indicate to us that they have any such policy.

More specifically, our review of the documents showed that:

- policies for 4 of the contractor firms did not address avoidance of personal conflicts of interests at all;
- policies for 18 of the firms did address avoidance of personal conflicts of interest, but just 3 specifically required written disclosures identifying potential conflicts of interest with respect to their work for customers, including DOD, so they can be screened and mitigated by the firms; and
- 16 of the firms extended their conflicts policies to the employees' family members.

Our analysis of contractors' ethics documents found variation in how the contractors' policy and procedural safeguards address how employees' financial interests that could conflict or create the appearance of a conflict in the work they do for clients such as DOD. For example, several companies have conflict of interest policies addressing business ethics and standards of conduct requiring all employees to avoid having a range of financial or personal interests that would interfere in any way with their work for the company and could make others question the company's integrity, or give the appearance of impropriety. These contractors' conflicts of interest policies generally describe a range of potential activities that include employees' financial or other interests, arrangements, and outside business interests and personal relationships that could pose an actual or the appearance of a conflict to be avoided.

In three cases, however, the policies required written disclosure forms identifying potential conflicts of interest related to work carried out for DOD. That is, three contractor firms we reviewed require their employees to disclose potential conflicts related to their work at DOD and have employees working at the Air Force, Navy, and Army advising and assisting on engineering development and operation of aircraft and missile programs and acquisition management support on a communications program. For example as presented below, two firms have measures for ensuring that their employees do not have personal interests that would conflict with their work at DOD. According to the firms' ethics documentation, these measures are part of the corporate mission and values statements so that all levels of their employees are aware that their services to clients as well as individual and company decisions are based on core business values such as honesty and the highest standards of ethics and integrity. For example:

-
- One small business contractor has employees who work on a range of aeronautical systems programs of the Air Force Materiel Command. Their responsibilities for one of the offices we visited in the area of acquisition management include tasks in various phases of the acquisition cycle, such as development, award, management, and contract closeout.¹² The company has a 3-page Financial Conflict of Interest Reporting Form—and according to company officials, it is modeled on the federal financial disclosure form—that each of its professional employees must submit when initially hired and annually thereafter. The contractor's reporting form asks each employee if there are any personal or household financial interests in the matters dealt with under the Air Force contract, such as stock ownership in any of the contractors who are involved in the aeronautical systems programs that the employee works on as part of his or her tasks. The company's vice-president stated that, as the employee's supervisor, he evaluates reported interests on the financial conflict of interest form and reviews the circumstances in light of present and prospective duties of the individual to ensure that both actual and apparent conflicts of interest are avoided. According to the vice-president, he also decides on how any conflict or apparent conflict will be resolved, such as reassignment, divestiture, or disqualification.
 - A large business defense contractor has employees who work on missile programs under the Naval Sea Systems Command. Their responsibilities for the Navy include systems engineering and program office support, including contract management input for award fee deliberations and contract modifications. The company has a 1-page Certificate on Conflict of Interest, Relationships with Suppliers, and Standards of Business Conduct that, according to contractor officials, employees are required to submit annually by e-mail, fax, or on-line. The certification form requires yes or no answers to seven questions that serve to prompt each employee to disclose certain interests in the company's suppliers or prospective suppliers, such as whether they or a member of their family has a substantial financial interest. The form also asks each employee if they or their family members have any other interest or agreement which may violate the Standards of Business Conduct or may otherwise result in an actual or perceived

¹² For example, this contractor has employees who assist the Air Force in preparing source selection material, development of evaluation criteria, assist source selection teams in the evaluation of proposals, and provide support to past performance and cost evaluation teams.

conflict of interest. According to the company's ethics and Navy contracting managers, the annual conflict-of-interest certification process receives a fair amount of supervisory review and screening by corporate business ethics offices in order to prevent or mitigate actual or even the appearance of an employee being in a position with a personal conflict of interest.

Stricter Conflict of Interest Safeguards Recently Developed for DOD FFRDC Employees

DOD's FFRDCs are private nonprofit organizations established to meet specialized or long-term research or development needs that cannot be met by existing government or contractor resources.¹³ For example, employees from FFRDCs may provide design and systems engineering expertise to major space or weapon acquisition programs, and even work along side DOD employees. They may be involved with conducting independent assessments of technical risk, management, cost, and schedule for particular programs or in broader research on international security and defense strategy, acquisition and technology policy, force management, and logistics.

In 2006, prompted by the aftermath of public and congressional scrutiny regarding a conflict of interest with the president of one DOD-sponsored FFRDC,¹⁴ DOD's Deputy General Counsel (Acquisition and Logistics) reviewed the conflict of interest policies and procedures in place at each of DOD's 10 FFRDCs. DOD's review addressed FFRDC sponsoring agreements, contracts, and internal policies and procedures. DOD concluded that some of these documents failed to meet minimum FAR

¹³ DOD agencies fund FFRDCs that are operated by universities or nonprofit organizations under long-term contracts. Provisions of the Competition in Contracting Act authorize agencies to award these contracts noncompetitively. 10 U.S.C. §§ 2304(b)(1)(C) and (c)(3)(B).

¹⁴ In September 2006, the president and trustee of the Institute for Defense Analyses resigned before it was determined by DOD's Inspector General that his position on two defense subcontractors' corporate boards violated the FFRDC's conflicts of interest policy. In July of that year, his dual roles as FFRDC president and as a member of one of the defense subcontractor's board of directors drew public and congressional scrutiny regarding a business case for the Air Force on the multi-year procurement of the F-22 Raptor aircraft. Because this subcontractor manufactures a missile launcher for the F-22 aircraft's prime contractor, conflict of interest concerns were raised that the FFRDC president stood to financially profit from a favorable multi-year procurement decision for the F-22.

requirements and others needed revision to better protect DOD from conflicts of interest by FFRDC employees.¹⁵

As a result, in January 2007, the Undersecretary of Defense (Acquisition, Technology, and Logistics) revised DOD's policy adding stricter contracting safeguards for FFRDC contractors requiring them to have procedures that address personal conflicts of interest for FFRDC employees. DOD revised the policy to ensure that FFRDC employees operate in the public interest with objectivity and independence. DOD's revised policy requires in part that each administrator of its FFRDCs do the following:

- maintain written, corporatewide conflict of interest policies for their employees; report any personal conflicts of interest to contracting officers or their representatives; provide annual compilations of personal conflicts of interest and their dispositions; maintain audit programs to verify compliance;
- establish policies for their employees that address all major areas of personal conflicts of interest including, but not necessarily limited to gifts, outside activities, and financial interest;
- set procedures to screen for potential conflicts of interest for all employees in a position to make or materially influence research findings and/or recommendations to DOD;
- provide initial and annual training to address ethics and conflicts of interest for affected employees; and
- designate an office responsible for ethics compliance and training.

All four FFRDC administrators that we contacted for this report had written corporatewide ethics policies and training for their employees prior to DOD's new policy. According to FFRDC administrator officials, three of the FFRDCs have updated their ethics compliance program and policies, which include their training programs, and are in compliance with the new requirements. As of October 2007, a fourth FFRDC we contacted has yet to reach agreement with its Air Force sponsor

¹⁵ The FAR requires an FFRDC to conduct its business in a manner befitting its special relationship with the government, to operate in the public interest with objectivity and independence, to be free from organizational conflicts of interest, and to have full disclosure of its affairs to the sponsoring agency. FAR 35.017.

organization on whether additional safeguards are necessary.¹⁶ Of the three FFRDCs that have already changed practices to implement the revised DOD-wide policy, there were some differences in how they changed their procedures to screen for potential conflicts of interest for all employees in a position to make or materially influence research findings and/or recommendations to DOD. For example, according to FFRDC administrator officials:

- New requirements are being implemented by two of the FFRDCs for their employees to complete an on-line personal conflict-of-interest screening questionnaire as part of their initial assignment to a DOD-sponsored task. The on-line screening tool will prompt these FFRDC employees, on a task-by-task basis, to disclose and list any financial interests they, their spouse, or family members have in specific DOD prime and subcontractors pre-loaded in the FFRDC database for each defense weapon system or DOD program being researched or advised on under the FFRDC project. According to ethics officials for these two FFRDCs, any disclosure of financial interests from the on-line tool is reviewed by the employee's project manager or supervisor as well as the ethics office to identify actual or potential conflicts of interest, which would then be mitigated in ways similar to practices for federal employees.¹⁷
- Instead of task-by-task screening, a third FFRDC's procedures require all employees (except project directors) working on DOD tasks to submit annual disclosures identifying personal and family financial interests for review by supervisors and ethics offices to screen for actual or potential conflicts of interest in the employees' tasks for DOD. Project directors are now required to submit financial disclosures task-by-task.

¹⁶ According to a senior vice president and general counsel with this FFRDC, the company had submitted documentation on its robust and long-time collection of ethics and conflicts of interest practices and programs to demonstrate its commitment to objectivity and freedom from conflicts of interest and in its opinion, it has an effective program in place and does not need to implement the additional requirements set forth in DOD's new FFRDC policy. As of October 2007, the official told us that this FFRDC is awaiting a response from its DOD sponsor to its February 2007 questions including how best to report potential conflicts even if the company determines that the conflict does not exist.

¹⁷ When review of a disclosure reveals the existence of an actual or potential conflict, FFRDC ethics officials told us that their ethics procedure provides such mitigations as disqualification from being assigned to the DOD task, reassignment, or divestiture.

Range of Views Indicate Additional Conflict of Interest Safeguards Are Necessary for Contractor Employees

A majority of government officials we spoke with indicated support for changes in contracting policy to address risks from contractor employees having personal conflicts of interest when participating in matters affecting DOD's decisions. Those closest to the situation—DOD program managers—all agreed that safeguards are needed for contractor employees participating in the source selection process. Moreover, some of these managers had also put in safeguards for contractor employees involved in other types of advisory and assistance tasks. However, a number of program managers as well as defense contractor company officials expressed concern that adding new safeguards will increase costs for the government and are unnecessary since government officials—not contractors—are the ones ultimately making the decisions. DOD oversight officials as well as OGE officials, however, believed additional safeguards are necessary to maintain public confidence, particularly since contractors are increasingly being involved in spending decisions, though this could be achieved through changes in policy and practice and changes in regulations rather than changes in the law. A congressionally mandated Acquisition Advisory Panel recently concluded that there is a need to assure that the increase in contractor employees' involvement in agency activities does not undermine the integrity of the government's decision-making process and that changes in the FAR should be considered to establish additional conflict of interest safeguards across agencies through contract clauses.

Program Managers' Viewpoints

All of the 19 offices we reviewed established safeguard procedures such as contract clause or self-certifications to prevent conflict of interest for contractor employees when involved in the source selection process. At the same time, six offices had safeguards for contractors performing other types of advisory and assistance tasks. For example, the Army's Communications Electronics Lifecycle Management Command and the Air Force's Electronics Systems Center have recognized the need to prevent the existence of conflicting interests that might bias a contractor employee's judgment and have developed contract clauses for other types of contractor employees who directly advise and assist federal decision-makers in those organizations. In addition, some of DOD's program managers said they should require certain contractor employees to file financial disclosures with their companies so that they can screen for potential personal conflicts of interest in the work they do at DOD.

However, when it comes to using contractor employees to perform tasks other than source selection, some program managers believed that additional safeguards are unnecessary. In fact, some believed it could create a cost and oversight burden. For example, these managers also

stressed that government officials are ultimately responsible for decision-making, not contractor employees. When we asked DOD officials to tell us about cases of improper conduct involving contractor employees, some officials also pointed out that very few cases of actual conflicts of interest or other ethics problems involving contractor employees have been publicly identified and in most of these cases, the situations were handled informally. They were also concerned that requiring contractor employees to abide by certain safeguards, such as submitting financial disclosure forms for government or contractor ethics review processes, could chase away qualified contractors from federal work.

Contractor Officials' Viewpoints

We spoke to various company representatives responsible for managing their companies contracting business and/or employee ethics matters at the 21 DOD offices where we conducted our review. Some of the contractor company officials told us that they believed additional safeguards are not needed because their employees were aware that personal conflicts of interest are prohibited under their corporate ethics programs. Moreover, they pointed out that their employees would know to advise their supervisors of any potential conflicts, consistent with the companies' ethics program procedures. Contractor officials also contended that the creation of new safeguards could drive up costs for the government because of contractor administrative costs for collecting and maintaining employee financial conflict of interest paperwork.

Company officials cited other reasons for not establishing additional conflict of interest safeguards for contractor employees, but we found evidence that contradicted these positions. For example, one reason was that defense contractor companies' business ethics and standards of conduct for their employees are already consistent with the government's ethics requirements for federal employees. Our review of 22 contractors' ethics program documents found that they did not address the same issues that the government ethics programs are required to address.¹⁸ Also, in some cases, they were designed to protect the contractor's interests, not the government's.

Another reason was that the risk of conflicts of interest for contractor employees was low because it would be obvious if these employees tried to steer decision making to favor a personal interest or bias. Some

¹⁸ One contractor firm did not respond to our request for documentation of its ethics policy.

contractor officials also stressed that the role that their employees were playing in decisions was minimal. Some government officials we spoke with, however, indicated that these types of inputs into decisions are not trivial and that it may not always be obvious when employees are providing biased information.

On the other hand, many company officials told us that if the federal government were to require contractor employees to submit financial conflict of interest certifications or disclosures, then the companies would comply in the interest of maintaining the public's confidence in the integrity of government operations supported by contractor employees. In addition, a manager of one small business defense contractor said that the company's personal conflicts of interest and ethical conduct policy already requires all employees to submit annual financial conflict of interest reporting forms when assigned to perform government work. He added that most support contractor employees are retired military and have been accustomed to abiding by government rules for 30 years.

Viewpoints of Ethics Officials and Senior Leaders

Senior officials within DOD responsible for ensuring integrity in employee conduct and in the contracting function as well as the OGE told us that they believed that there are risks associated with personal conflicts of interests not just in program offices that involve contractors in source selection, but those that use contractors in other ways to support spending decisions. In fact, during our review, DOD undertook steps to begin assessing the need for departmentwide policies for preventing personal conflicts of interests for its contractor employees.

OGE: OGE, which promulgates ethics guidance for the executive branch, has expressed concerns that current federal requirements and policies are inadequate to prevent certain kinds of ethical violations on the part of contractor employees. The office is specifically concerned with potential financial conflicts of interest, impaired impartiality, and misuse of information and authority. As such, additional conflict of interest safeguards should be targeted at contractor employees engaged in the types of services that influence governmental spending, contracting, and mission delivery decisions and concern the type of processes and operations upon which considerations of management and delegation must turn. OGE has also observed that federal and contractor employees work so closely on a day-to-day basis, it is difficult to distinguish whether employees are government or contracted and they see greater risks to the integrity of decisions given the growing influence that contractors appear to be having on government operations and expenditure of funds.

OGE has advocated policy changes to apply conflicts of interest requirements to contractors. In considering additional contract-based safeguards to ensure that the government's interests are not compromised by contractor employees' conflicts of interest, OGE's acting director has expressed concerns in several areas, such as:

- advisory and assistance services support,¹⁹ especially those where contractor personnel regularly perform in the government workplace and participate in deliberative and decision-making processes along with government employees;
- management and operations contracts involving large research facilities and laboratories, military bases, and other major programs; and
- large indefinite delivery or umbrella contracts that involve decentralized ordering and delivery of services at multiple agencies or offices.

DOD ethics and general counsel officials: Defense ethics and other general counsel officials we spoke to from several DOD offices responsible for DOD-wide standards of conduct and ethics compliance had generally the same concerns raised by OGE. For example, according to the director of DOD's Standards of Conduct Office in 2006,²⁰ as DOD increases its integration of contractor employees into the actual administration of its organizations and offices, the larger the gap between employees in its blended workforce in terms of the conflict of interest requirements that apply only to federal employees, and the more difficult it becomes to ensure the integrity of government decision making. DOD ethics and general counsel officials also expressed concerns about risks associated with reliance on contractor employees, particularly when they perform many of the same advisory and management functions as federal employees. An Army general counsel official observed that contractor employees are exerting greater influence over Army operations given that the Army has lost expertise and leadership over the years.

¹⁹ The Federal Acquisition and Streamlining Act of 1994 defines advisory and assistance services as management and professional support services; studies, analyses, and evaluations; and engineering and technical services. As defined in the FAR, these types of contract services are to support or improve agency functions, such as program management, decision making, and administration. FAR 2.101.

²⁰ On behalf of DOD's General Counsel, the Standards of Conduct Office, which is part of the Defense Legal Services Agency, is responsible for overseeing the ethics and standards of conduct programs throughout DOD, including providing guidance to the Army, Navy, Air Force, and defense agencies.

Further, DOD ethics and general counsel officials stated that those contractor employees participating in and supporting the government's decision-making processes should be subject to stricter conflict of interest rules so that agencies can better judge the objectivity of their advice to the government. An Air Force ethics official said his office has come across situations in which contractor employees would have been in violation of the government ethics rules had they been government employees. An Army general counsel official told us that not requiring financial disclosure statements from contractor employees poses the greatest risk to the integrity and impartiality of the work they perform under contract for the government. Unlike for federal employees who are prohibited under conflict of interest law from participating in a particular matter involving specific parties in which they have a financial interest, there is no way to know whether contractor employees are doing so.

In 2006, an approach to apply conflict of interest laws to contractor employees was identified by DOD's Standards of Conduct Office director, who offered his personal views at one public policy discussion on the issue of contractor ethics that the FAR Council²¹ should consider some model language, or instruction to government agencies to include conflict of interest provisions within contracts.

DOD's Directorate of Defense Procurement and Acquisition Policy (DPAP): The DPAP director concurred with the views of ethics officials across the department and recently directed a DOD panel examining various aspects of contracting integrity to specifically examine the need for departmentwide policies to prevent conflicts of interest with its contractor employees. The Panel on Contracting Integrity is comprised of senior leaders representing a cross section of DOD.²² The director told us that existing policy may be inadequate given the growing reliance on contractor employees across DOD

²¹ The FAR Council was established to assist in the direction and coordination of governmentwide procurement policy and regulatory activities in the federal government. The Council manages, coordinates, controls, and monitors the maintenance and issuance of changes in the FAR.

²² In February 2007, the Under Secretary of Defense (Acquisition, Technology, and Logistics) established the Panel on Contracting Integrity, as required by section 813 of the fiscal year 2007 defense authorization act (Pub. Law No. 109-364). The panel's executive director is the Director, Defense Procurement and Acquisition Policy, and includes more than 20 senior-level procurement executives, inspector general, and other representatives from across DOD as members. As required by the act, the first annual report to Congress was issued in December 2007 on the panel's findings and recommendations to foster and monitor contracting integrity across the department.

program offices. He was specifically concerned with contractors who are involved in source selection and contract management.

Acquisition Advisory Panel: This panel, comprised of recognized experts in government acquisition law and policy, was established by a congressional mandate to examine and report on ways to improve federal acquisition practices.²³ According to the panel, the trend toward more reliance on contractors in the federal workplace raises the possibility that the government's decision making could be undermined as a result of personal conflicts of interest on the part of contractor employees. The panel concluded that, in view of the tremendous amount of federal contracting for services, and particularly in the context of the blended workforce, additional safeguards to protect against personal conflicts of interest by contractor employees are needed. The panel believed that conflict of interest safeguards are more critical for certain types of contracts (primarily services contracts) and that further study was needed to identify those types of contracts where the potential for contractor employee conflicts of interest raises a concern.

The panel believed that achieving greater governmentwide consistency in safeguarding against contractor employees conflicts of interest would be beneficial, in that it would allow agencies to implement best practices and it would also help to assure that all bidders on federal contracts—whether successful or not—are aware of their responsibilities and that they structure their operations knowing what was expected of them. The panel concluded that it was not necessary to adopt any new federal statutes to impose additional conflict of interest safeguards on contractors or their employees. Rather, the additional safeguard requirements should be imposed—where appropriate—through contract clauses.²⁴

As a result, the panel recommended to the Office of Federal Procurement Policy (OFPP) that the FAR Council should determine when contractor employee personal conflicts of interest need to be addressed, and whether greater disclosures, specific prohibitions, or reliance on specified

²³ *Report of the Acquisition Advisory Panel to the Office of Federal Procurement Policy and the United States Congress* (Washington, D.C.: January 2007).

²⁴ According to the panel's report, such clauses would not necessarily impose specific prohibitions on contractors and or their employees. Rather, it might be possible to achieve an appropriate level of integrity on the part of contractors and their employees by developing general ethical guidelines and principles and/or by requiring disclosure of potential conflicts of interest.

principles are needed to maintain public confidence in the integrity of government operations reliant on contractors. The panel recommended that the FAR Council's efforts should consider whether development of a standard ethics clause or a set of standard clauses that establish the contractor's responsibility to perform the contract with a high level of integrity needs to be included in solicitations and contracts.

According to OFPP officials, the FAR council was asked to initiate a case review process to consider changes to the FAR to include new conflict of interest safeguards for contractor employees. This anticipated action would be separate from the November 2007 amendment to the FAR requiring certain contractors to have written codes of ethics and business conduct, employee ethics and compliance training programs, and internal control systems to guard against violation of these codes.²⁵ The final rule does not speak to development of a standard ethics clause concerning when contractor employee personal conflicts of interest need to be addressed.

Conclusions

The environment in which DOD makes its most significant spending decisions is changing. As programs grow more complex and costly, DOD has increasingly become reliant on technical, business, and procurement expertise supplied by contractors—sometimes to a point where the foundation on which decisions are based may be largely crafted by individuals who are not employed by the government, who are not bound by the same rules governing their conduct, and who are not required to disclose whether they have financial or other personal interests that conflict with the responsibilities they have performing contract tasks for DOD. To its credit, DOD has recognized that this condition and its risks needs to be studied and addressed by adding personal conflicts of interest among contractor employees as a tasking for its Panel on Contracting Integrity and adopting stricter safeguards for FFRDC employees early in 2007. Such attention is important.

While few cases of improper conduct have been publicly identified, there are also few safeguards in place to identify whether personal conflicts of

²⁵ A separate proposed rule was recently published at the request of the Justice Department to amend the FAR to require that companies holding certain types of contracts disclose suspected violations of federal criminal law in connection with the award or performance of contracts, or face suspension or debarment. Public comments were due in January 2008. 72 Fed. Reg. 64019-23 (Nov. 14, 2007).

interest even exist. The new FAR requirements making it mandatory for certain contractors to set and follow written codes of business ethics and conduct will not assure that the advice and assistance received from contractor employees is not tainted by personal conflicts of interest. The officials in most offices we reviewed that operate within this environment believe that the risk to the government is considerable enough to warrant safeguards when contractors are involved in source selection; at least some believe that risk extends to contractors that are involved in other activities that feed into spending decisions. Arguments that no change is needed focus on costs, which may be calculable. Yet, costs of contractor employees constructing options for their personal gain—an outcome increasingly likely based on sheer numbers—would likely never be known, let alone calculable as long as there is no transparency. Changes to current policy and practices that are targeted, tailored and implemented at the lowest practicable level are a way to minimize the cost of addressing personal conflicts of interest among contractor employees and to maximize the value of any additional safeguards. Several program offices have already demonstrated this is possible through the use of contract clauses and processes to identify potential conflicts and at least one small company has adopted similar safeguards on its own.

Recommendations

We recommend that the Secretary of Defense direct the Under Secretary of Defense (Acquisitions, Technology, and Logistics), to develop and implement policy that requires personal conflict of interest contract clause safeguards for defense contractor employees that are similar to those required of DOD's federal employees. In developing its policy, DOD should include requirements for contractor companies to identify and prevent personal conflicts of interest for certain of their contractor employees who are performing contracted services that provide inputs to DOD's decision-making in such mission-critical areas as the development, award, and administration of government contracts and other advisory and assistance functions.

In developing its policy, DOD should include the following requirements for defense contractor companies:

- require a written code of business ethics and conduct applicable to contractor personnel working on certain DOD mission-critical advisory and assistance type services to:
 - prohibit contractor personnel from participating in a government contract in which they have a personal conflict of interest;

-
- require contractor personnel to avoid the appearance of loss of impartiality in performing contracted duties for DOD;
 - require contractor personnel to disclose personal conflicts of interest to their employer prior to beginning work on these contracts;
 - require the contractor to review and address any personal conflicts of interest its employees might have before assigning them to deliver contracted services;
 - prohibit contractor personnel from using non-public government information obtained while performing work under the contract for personal gain;
 - prohibit contractor employees providing procurement support services from having future employment contact involving a bidder in an ongoing procurement;
 - impose limits on the ability of contractors and their employees on accepting gifts (defined as almost anything of monetary value, such as cash, meals, trips, or services) in connection with contracted duties; and
 - prohibit misuse of DOD contract duties to provide preferential treatment to a private interest.

In developing its policy, DOD should include requirements for contractor companies to:

- Report any contractor personnel conflict of interest violations to the applicable contracting officer or contracting officer's representative as soon they are identified.
- Maintain effective oversight to verify compliance with personal conflict of interest safeguards, and have procedures in place to screen for potential conflicts of interest for all employees in a position to make or materially influence findings, recommendations, and decisions regarding DOD contracts and other advisory and assistance functions. This screening can be done on a task-by-task basis or on an annual basis, such as a financial disclosure statement.

Agency Comments

We provided a draft of this report to DOD and OGE for comment. The DPAP director wrote that DOD partially concurred with the recommendations. Specifically, he wrote that he agrees with their intent and that each of our recommendations will be carefully reviewed by the Panel on Contracting Integrity's subcommittee, Contractor Employee Conflicts of Interest. According to the DPAP director, this subcommittee was established in order to respond to the concerns and recommendations

voiced in the exit conference for our work. DOD's comments are reproduced in appendix II.

In providing comments, OGE's Director commended the draft report for breaking important new ground by providing data regarding the ethical implications of contractors in the federal workplace. OGE offered a few comments on our recommendations that should help DOD as it begins its efforts to address how best to implement them. Also, OGE offered its expertise to assist DOD in developing its policy in response to our recommendations regarding the scope of personal conflicts of interest and other ethics requirements that would be appropriate for contractor employees in comparison to federal employees. OGE's comments are reproduced in appendix III.

We are sending copies of this report to the Secretary of Defense, the Director of the Office of Management and Budget, the Director of the OGE, and other interested parties. We will make this report available to the public on the GAO Web site at <http://www.gao.gov>.

If you have any questions about this report or need additional information, please contact me at (202) 512-4841 or chaplainc@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this report. Key contributors to this report were Carolyn Kirby, Assistant Director; Russ Reiter; Martene Bryan; Lily Chin; John Krump; Meredith Moore; Lillian Slodkowski; and Suzanne Sterling.

A handwritten signature in black ink, appearing to read 'Cristina T. Chaplain', with a stylized, cursive script.

Cristina T. Chaplain
Director, Acquisition and Sourcing Management

Appendix I: Scope and Methodology

Our overall objective was to review existing safeguards to prevent contractor employees from having personal conflicts of interest that could affect the integrity of their service while performing tasks to their employer under contract with DOD. Because DOD does not maintain departmentwide data on the numbers of contractor employees working side-by-side with federal employees, a specific objective was to (1) assess the roles being played by certain contractor employees by identifying how many of them were working at DOD offices included in this review as well as what responsibilities they were undertaking. Other specific objectives were to assess (2) what safeguards there are to prevent conflict of interests for contractor employees and (3) whether government and contractor officials believe additional safeguards are necessary.

We reviewed federal statutes and government ethics and federal acquisition regulations concerning personal conflicts of interest to assess their scope and applicability, focusing our analysis on conflict of interest laws and regulations that safeguard or promote the integrity of the government's decisions, approvals, disapprovals, and recommendations. In addition, we reviewed information on personal conflict of interest requirements for federal employees versus contractor employees and interviewed officials from the Office of Government Ethics (OGE); several offices that administer the defense ethics program including the Standards of Conduct Office in DOD's General Counsel (Office of the Secretary of Defense) and the Army, Navy, and Air Force general counsels for ethics.

To determine what conflict of interest safeguards for contractor employees that DOD has of its own for contractor employees, we reviewed DOD offices who used contractor employees to perform the type of tasks closely associated with inherently governmental functions and that influence government decision making. To obtain an understanding on the scope of DOD-wide safeguards, we reviewed the Defense Federal Acquisition Regulation Supplement (DFARS) to identify relevant contracting policies or contract clauses restricting contractor employees participation in DOD matters regarding personal conflicts of interest. To gain an understanding of the extent to which DOD offices use any DFARS policies or have augmented DFARS to establish local conflict of interest safeguards for contractor employees supporting their mission and operations, we visited and/or obtained information from 21 DOD offices in the Air Force, Army, Navy, Missile Defense Agency, and Tricare Management Activity. We judgmentally selected these DOD organizations and offices for review because they were cited by various DOD officials as having large contractor workforces and representing a cross-section of

DOD organizations growing trend of reliance on support contractors. Table 6 lists the specific DOD offices selected for our review.

Table 6: DOD Offices Selected for GAO's Review

Army	Navy
Army Materiel Command (Communications Electronics Lifecycle Management Command)	Naval Sea Systems Command
Acquisition Business Process Systems, Enhancements and Industrial Analyses Sector	Program Executive Office for Aircraft Carriers
Logistics and Readiness Center	Program Executive Office for Integrated Warfare Systems
Project Management Office: Tactical Radio Communications Systems	Missile Defense Agency
Office of the Deputy Under Secretary of the Army for Business Transformation	Ground-Based Midcourse Defense Program Office
HR Solutions Program Office	Terminal High-Altitude Area Defense Program Office
Army Contracting Agency	Agency Operations Office
Contracting Center of Excellence	Aegis Ballistic Missile Defense Program Office
Air Force	Engineering
Air Force Space Command	Sensors
Deterrence and Strike Division (A5MF)	Tricare Management Activity
Surveillance, Reconnaissance and Spacelift Division (A5F)	Acquisition Management Support Office
Air Force Materiel Command	Joint Medical Information Systems Office
Aeronautical Systems Center (303rd Air Wing)	Resources Information Technology Program Office
Aeronautical Systems Center (516th Air Wing)	
Electronic Systems Center	Clinical Information Technology Program Office

Within these DOD organizations and 21 offices, we obtained information from and interviewed contracting officials, program managers, and other management officials. We also met with officials from DOD sponsoring organizations for federally funded research and development centers (FFRDC) within the office of the Undersecretary of Defense (Acquisition, Technology, and Logistics), Army, Air Force, and Navy. To obtain similar information from each of the 21 DOD offices, we interviewed these

officials to obtain their views and supporting documentation using a structured set of questions covering several topics including (1) the types of services being provided by contractor employees, (2) their concerns about the integrity of the information and advice being provided by the contractor employees with regard to personal conflicts of interest, and (3) what safeguards such as contract clauses the offices are using to ensure that the assistance and advice provided is not impaired due to contractor employees conflicts of interest. (See table 7, which summarizes the structured topics discussed with the DOD offices selected for this review.)

Table 7: Information on Contractor Employees and Conflicts of Interest Safeguards Obtained from Selected DOD Offices

• Number of military and civilian employee positions required to disclose their financial interests and outside activities under government ethics financial disclosure laws • Specific assets and income in which the employees (or spouse and dependent child) are prohibited from having an interest in while working in this office • Office reliance on contractor employees—which contractors and/or FFRDCs support the office, the number of contractor employees and examples of their responsibilities, advice, or assistance • How the office would become aware if a contractor employee had a personal conflict of interest • Examples of a contractor employee with an apparent conflict of interest that would have been prohibited if they were a federal employee • Safeguard mechanisms used by office (i.e., contract clauses requiring non-conflict of interest certifications, financial disclosures, mitigation plans, etc) to address contractor employees personal conflicts of interest • Awareness if contractor ethics programs include standards to avoid personal conflicts of interest • Risks to DOD in not applying personal conflict of interest requirements to contractor employees who perform the same types of tasks as federal employees • Views on whether contractor employees performing tasks closely associated with inherently government functions should be required to follow the same conflict of interest standards that federal employees are required to follow (i.e., financial, employment, or outside activities conflicts of interest, financial disclosure, gifts and travel, etc.)

In that regard we also obtained and reviewed available contract clauses or other documented safeguards to prevent, identify, and mitigate contractor employees' personal conflicts problems. We also interviewed defense procurement and acquisition policy and general counsel and contractor oversight officials from the Office of the Undersecretary of Defense (Acquisitions, Technology, and Logistics), Army, Navy, Air Force, and Missile Defense Agency, DOD Procurement Fraud Working Group, Defense Contract Management Agency, and Defense Contract Audit Agency to obtain information and views on their oversight and monitoring

of defense contractor ethics programs and contractor employees conflict of interest issues.

To identify safeguards that DOD contractors have implemented for their employees to avoid conflicts of interest, we met with and obtained documentation on ethics programs from 23 defense contractors and four FFRDC administrator organizations. We judgmentally selected these contractors and FFRDCs for review because they were cited by program managers in the 21 DOD offices we reviewed as having contractor employees who are performing contracted services for them. According to fiscal year 2006 contract award data, DOD obligated \$8.0 billion for professional, administrative, and management support services contracts with the 23 contractors, which accounted for 25 percent of total dollars obligated that year for this category of services contracts. The contractors and FFRDCs we selected for review are listed in table 8.

Table 8: Defense Contractors and FFRDCs Selected for GAO's Review

• Aerospace FFRDC	• Institute for Defense Analyses Studies and Analyses Center FFRDC
• Alion Sciences and Technology Corporation	• Irving Burton Associates, Inc.
• Axiom Resources Management, Inc.	• Jacer International, Inc.
• BAE Systems, Inc.	• Kennell and Associates, Inc.
• Booz Allen Hamilton, Inc.	• L-3 Communications Corporation
• CACI, Inc.	• Lockheed Martin Corporation
• Center for Naval Analyses FFRDC	• Logtec
• Computer Sciences Corporation	• Northrop Grumman Corporation
• EG&G Technical Services, Inc.	• P E Systems, Inc.
• Engineering and Professional Services, Inc.	• Arroyo Center FFRDC
• General Dynamics Corporation	• The Ravens Group, Inc.
• Global Solutions Network, Inc.	• Sensor Technologies, Inc.
• HMR Tech LLC	• Tecolote Research, Inc.
	• Viatch, Inc.

We reviewed examples of the contractors' statements of work or other documentation to identify the types of advice and assistance services being provided by their employees to the 21 DOD offices reviewed. To obtain similar information for each of the contractors and FFRDCs, we interviewed their officials to obtain their views and supporting documentation using a structured set of questions covering several topics including (1) DOD's reliance on contractor employees in terms of their numbers and responsibilities, (2) steps the contractors take to identify and

mitigate their employees' conflicts of interest, and (3) views or concerns about the need for additional safeguards to ensure that the assistance and advice provided is not impaired by contractor employees conflicts of interest. (See table 9, which summarizes the structured topics discussed with the contractors and FFRDCs selected for this review.) We also discussed and obtained documentation from the FFRDC administrators on changes in their ethics policies and procedures to address safeguards for employee conflict of interest problems in response to DOD's January 2007 revised policy for FFRDCs.

Table 9: Information on Contractor Employees and Conflicts of Interest Safeguards Generally Requested and Obtained from Selected Defense Contractors and FFRDCs

- Number of employees at company providing services to the DOD program office(s) included in our review.
- Employees' duties and responsibilities for DOD.
- Examples of areas of advice or recommendations that the contractor employees provide to this DOD program office.
- Steps taken by contractors to identify and mitigate potential or actual problems with contractor employees' ethics and personal conflicts of interest, e.g., require employees to report or disclose their financial interests and/or outside business activities.
- Any specific assets and income that the employees (or spouse and dependent child) are prohibited from having an interest in while working in this company.
- Examples of a company employee having an actual or potential personal conflict of interest and/or engaging in conduct that would have been considered unethical and thus prohibited if they were a government employee.
- Documentation of company's ethics program, policy, or guidance.
- Views on what gaps pose the greatest vulnerability—i.e., of the range of ethics rules applicable to government employees but not to contractor employees.
- Views on whether contractor employees, i.e., those performing functions closely associated with inherently governmental functions should be required to follow the same ethical standards that the government employees are required to follow.

To determine if government and contractor officials believe additional safeguards are necessary for contractor employees, we used the results of the above discussions with officials from DOD organizations, including program managers and ethics and contracting officials. In addition, we used the results from the above discussions with officials at the 23 defense contractors and four FFRDCs included in our review. We also reviewed the report of the Acquisition Advisory Panel and met with OGE and OFPP officials to obtain information on actions being considered in response to Panel recommendations related to personal conflict of interest safeguards for contractor employees. We also met with representatives of industry and other groups, including the Defense Industry Initiative on Business Ethics and Conduct, Professional Service Council, Ethics Resource

Center, and members of the American Bar Association's Public Contract Law Section on Professional Responsibility and Contracting Ethics.

We conducted this performance audit from November 2006 through March 2008 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient and appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives

Appendix II: Comments from the Department of Defense



OFFICE OF THE UNDER SECRETARY OF DEFENSE
3000 DEFENSE PENTAGON
WASHINGTON, DC 20301-3000

FEB 28 2008

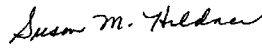
Ms. Christina T. Chaplain
Director, Acquisition and Sourcing Management
U.S. Government Accountability Office
441 G Street, N.W.
Washington, DC 20548

Dear Ms. Chaplain:

This is the Department of Defense (DoD) response to the GAO Draft Report, GAO-08-169, "DEFENSE CONTRACTING: Additional Personal Conflict of Interest Safeguards Needed for Certain DoD Contractor Employees," dated January 23, 2008 (GAO Code 120592).

The Department partially concurs with the recommendations. Detail comments on the report recommendations are enclosed.

Sincerely,


for Shay D. Assad
Director, Defense Procurement
and Acquisition Policy

Enclosure:
As stated

GAO Draft Report Dated January 23, 2008
GAO-08-169 (GAO CODE 120592)

**“DEFENSE CONTRACTING: ADDITIONAL PERSONAL
CONFLICT OF INTEREST SAFEGUARDS NEEDED FOR
CERTAIN DOD CONTRACTOR EMPLOYEES”**

**DEPARTMENT OF DEFENSE COMMENTS
TO THE GAO RECOMMENDATIONS**

RECOMMENDATION 1: The GAO recommends that the Secretary of Defense direct the Under Secretary of Defense (Acquisition, Technology and Logistics) to develop and implement policy that requires personal conflict of interest contract clause safeguards for Defense contractor employees that are similar to those required of DoD's Federal employees. In developing the policy, DoD should include requirements for contractor companies to identify and prevent personal conflicts of interest for certain of their contractor employees who are performing contracted services that provide inputs to DoD's decision-making in such mission-critical areas as the development, award, and administration of government contracts and other advisory and assistance functions. (p. 32/GAO Draft Report)

DOD RESPONSE: Partially Concur. The Department formed the Panel on Contracting Integrity in response to Section 813 of the John Warner National Defense Authorization Act of Fiscal Year 2007. The purpose is to conduct a Department-wide review to eliminate areas of vulnerability of the defense contracting system that allow fraud, waste, and abuse to occur. The Panel is required to recommend changes in law, regulations, and policy as determined necessary. The first annual report was submitted to Congress on December 31, 2007. A subcommittee, Contractor Employee Conflicts of Interest, was established in late December to respond to the concerns and recommendations voiced in the exit conference of the GAO-08-169 report. DoD agrees with the intent of the recommendations. The subcommittee will have the opportunity to carefully review each recommendation. A plan of action and milestones (PO&AM) has not been submitted. We will provide updated information regarding timelines. We will issue a policy to implement the subcommittee's recommendations upon acceptance by the Panel comprised of senior leaders representing a cross section of the Department.

RECOMMENDATION 2: The GAO recommends that in developing its policy, DoD should include the following requirements for defense contractor companies:

On pages 31 and 32 of this report.

Require a written code of business ethics and conduct applicable to contractor personnel working on certain DoD mission-critical advisory and assistance type services to:

- Prohibit contractor personnel from accepting illegal gratuities in connection with contracted duties;
- Prohibit contractor personnel from participating in a government contract in which they have a personal conflict of interest;
- Require contractor personnel to avoid the appearance of loss of impartiality in performing contracted duties for DoD;
- Require contractor personnel to disclose personal conflicts of interest to their employer prior to beginning work on these contracts;
- Require the contractor to review and address any personal conflicts of interest its employees might have before assigning them to deliver contracted services;
- Prohibit contractor personnel from using non-public government information obtained while performing work under the contract for personal gain;
- Prohibit contractor employees providing source selection support services from having future employment contact involving a bidder in an ongoing procurement;
- Impose limits on the ability of contractors and their employees on accepting gifts (defined as almost anything of monetary value, such as cash, meals, trips, or services) in connection with contracted duties; and
- Prohibit misuse of DoD contract duties to provide preferential treatment to a private interest. (p. 32/GAO Draft Report)

On page 32 of this report.

DOD RESPONSE: Partially Concur. See response to Recommendation 1 above.

RECOMMENDATION 3: The GAO recommends that in developing its policy, DoD should include requirements for contractor companies to report any contractor personnel conflict of interest violations to the applicable contracting officer or contracting officer's representative as soon as they are identified. (p. 33/GAO Draft Report)

On page 32 of this report.

DOD RESPONSE: Partially Concur. See response to Recommendation 1 above.

RECOMMENDATION 4: The GAO recommends that in developing its policy, DoD should include requirements for contractor companies to maintain effective oversight to verify compliance with personal conflict of interest safeguards, and have procedures in place to screen for potential conflicts of interest for all employees in a position to make or materially influence findings, recommendations, and decisions regarding DoD contracts and other advisory and assistance functions; this screening can be done on a task-by-task basis or on an annual basis, such as by financial disclosure statement. (p. 33/GAO Draft Report)

On pages 32 and 33 of this report.

DOD RESPONSE: Partially Concur. See response to Recommendation 1 above.

Appendix III: Comments from the Office of Government Ethics



United States
Office of Government Ethics
1201 New York Avenue, NW., Suite 500
Washington, DC 20005-3917

February 7, 2008

Cristina T. Chaplain
Director, Acquisition and Sourcing Management
U.S. Government Accountability Office
Washington, DC 20548

Dear Ms. Chaplain:

Thank you for the opportunity to review and comment on the Government Accountability Office's (GAO) draft report, Defense Contracting: Additional Personal Conflict of Interest Safeguards Needed for Certain DoD Contractor Employees (GAO-08-169).

The Office of Government Ethics (OGE) wishes to commend GAO for the work it has done on this project. As you know, and the report acknowledges, OGE has sought opportunities in recent years to raise awareness about the potential ethical concerns presented by contractor employee personal conflicts of interest. In OGE's view, the draft report breaks important new ground by providing data for the first time regarding the ethical implications of contractors in the federal workplace. In particular, the report catalogs the kinds of sensitive work contractors are performing for the Federal Government and underscores the Government's need for conflict of interest protections under those circumstances, just as certain safeguards are in place for federal employees.

While the Department of Defense (DoD) was the subject of GAO's inquiry, OGE notes that other agencies undoubtedly have issues similar to those described in this report. In addition, it is likely that contractor employees working outside the procurement area have personal conflicts of interest that could impair the integrity of their services to the Government. OGE is aware of at least one such instance that was documented recently by the Department of Education Inspector General. In its final audit report entitled, RMC Research Corporation's Administration of the Reading First Program Contracts (ED-OIG/A03F0022, March 2007) (ED-OIG report), the Education Inspector General's Office found that a Department contractor did not adequately screen those it hired to provide technical assistance under the Reading First program to ensure that those individuals were free of potential bias or impaired objectivity. According to the report, several of those hired by the contractor to perform work under the contract had significant personal conflicts of interest that may have contributed to criticisms of the Reading First program, including concerns that "some individuals were promoting or pushing reading products they were affiliated with and had exerted influence over the products being selected by" the state and local education agencies receiving technical assistance. ED-OIG report at 8.

OGE - 106
August 1992

Appendix IV: Contractor Employees Are Key in DOD Offices GAO Reviewed

Christina T. Chaplain
February 7, 2008
Page 2

OGE would like to offer a few comments on the recommendations contained in the draft report. First, the draft report recommends that DoD “develop and implement policy that requires personal conflict of interest contract clause safeguards for defense contractor employees.” While OGE does not have expertise in the area of procurement policy, OGE’s efforts to raise awareness about the potential problems with contractor employee personal conflicts of interest have suggested that contract clauses are only one possible solution in this area. Others could include legislation, and education and training by both the Government and contractors. However, OGE is aware of at least one case in which a contract clause on personal conflicts of interest was successfully enforced. In *United States v. President and Fellows of Harvard College*, 323 F.Supp.2d 151 (D. Mass. 2004), investments in Russia by individuals hired by Harvard College to assist Russia in developing capital markets and foreign investments under an agreement between USAID and Harvard College contravened the terms of the contract barring such business activity and resulted in a breach of the contract.

Second, GAO recommends that, as DoD develops its policy, it should include several requirements for contractor companies, such as to report any personal conflict of interest violations among their employees and to maintain effective oversight to verify compliance with personal conflict of interest safeguards. GAO may also wish to recommend that DoD establish a process to ensure that appropriate actions are taken by DoD and/or the contractor if personal conflict of interest violations are reported or otherwise come to light.

Finally, since GAO is recommending that DoD’s policy require personal conflict of interest safeguards that are “similar to those required of DoD’s federal employees,” OGE would be pleased to offer its expertise to assist DoD’s development of what the term “personal conflicts of interest” means in this context. OGE has often stated, in its comments on this issue, that not all of the conflict of interest and other ethics requirements that apply to federal employees would be appropriate for contractor employees.

Again, thank you for the opportunity to comment on this report. If you have any questions, please contact Marilyn Glynn, OGE’s General Counsel, at (202) 482-9292.

Sincerely,



Robert I. Cusick
Director

For the purposes of understanding how key defense contractor employees are used to perform mission-critical tasks that could influence DOD decisions similar to functions carried out by federal employees, we obtained information from 21 offices across the five DOD organizations we reviewed. We also reviewed examples of contracting documents including statements of work and task orders.¹

The contract documents described a range of services that closely support inherently governmental functions, such as developing briefings, preparing contracts, proposing award fee amounts for contractors, conducting systems engineering studies, analyzing technical issues, and providing financial management support. Most of the documents we reviewed described services requiring contractor employees to provide program management oversight duties and entailed providing these contractors with classified, business proprietary, and otherwise nonpublic information to perform duties closely associated with inherently governmental functions. Table 10 lists a range of professional and management services and support that contractor employees provided to different DOD organizations we reviewed.

¹Task orders are placed against a preexisting contract for services that does not procure or specify a firm quantity (other than a minimum or a maximum quantity) and that provides for the issuance of orders for the performance of tasks during the period of the contract. FAR 16.501-1.

**Appendix IV: Contractor Employees Are Key
in DOD Offices GAO Reviewed**

Table 10: Services and Support Tasks Provided by Contractor Employees Closely Supporting Inherently Governmental Functions in DOD Organizations Reviewed

DOD organization	Types of services provided by defense contractor employees
Air Force	Source selection: Assist in the evaluation of proposals and provide support to past performance and cost evaluation teams; assist in developing evaluation criteria, source selection plans, and track award fee plans. Cost estimates: Analyze contractor cost, schedule, and performance data; conduct financial management and assist in executing program funds; administer the Defense Travel System; track travel program funds; track budgets through congressional review and appropriation process. Support test and evaluations: Recommend, assess, and analyze test and evaluation strategies, requirement and objects. Provide assistance in recommending and assessing test data requirements necessary to meet program test objectives within program cost and schedule constraints. Security management support: Plan, design, review, analyze, and report on tailored security plans for the protection of systems during testing and evaluation and make recommendations for changes to security test procedures. Analyze adequacy of the weapon system prime contractor's and/or subcontractors' program protection planning/efforts and report on discrete areas of concern.
Army	Business functions: Responsible for managing, coordinating, tracking, and documenting support operations to include financial operations, administrative support, payments processing and customer relations support. Support controlling and maintaining budget forecasts, and travel funds. Research and support reconciliation of billing and payment discrepancies. Procurement support: Provides support from pre-procurement planning through solicitation, award, administration and closeout. Help with cost and pricing and preparation of performance work statement and specifications. Provide technical evaluation support to source selection panels. Contract management support: Provide support for closeout of contracts, delivery and task orders. Identify and support resolution of any uncompleted obligations or pending liabilities on the part of either the government or the contractor.
Missile Defense Agency	Technical and engineering support for a weapon system: Analyze system requirements, evaluates system engineering trade studies, participate in design reviews. Conduct independent analysis to substantiate requirements, and requirements traceability developed by the prime contractor and subcontractors. Test planning and execution: Plan, execute, and report on testing and evaluation events. Assist in the data collection, reviews, dissemination and analysis of data products from experiments. Recommendations to DOD management: Recommend solutions for resource shortfalls. Develop alternatives and provide recommendations to include timelines and benefits. Financial management: Support the development and review of program financial execution plans. Assist in drafting, reviewing, and coordinating funding modifications, and purchase requests.

**Appendix IV: Contractor Employees Are Key
in DOD Offices GAO Reviewed**

DOD organization	Types of services provided by defense contractor employees
Navy	Technical expertise: Perform studies to evaluate alternatives, propose design changes, and provide recommendations to address potential warfare systems upgrades and modifications. Develop input to ship and weapon systems specifications and contracts. Identify and provide recommendations to resolve weapon system test and evaluation, integration, and specification issues. Award fee evaluations: Act as moderator for award fee board meetings and provide recommendations with regard to evaluation proceedings. Determine award fee amount the contractor is eligible to earn. Program management: Evaluate issues and provide recommendations related to weapons system cost, schedule, performance, and contract modifications. Provide recommendations regarding programming, planning, and budget management. Analyze contractor proposals.
Tricare Management Activity	Technical and business proposals: Develop criteria to evaluate technical and business proposals submitted in response to government requests for proposals and prepare analysis of criteria for evaluation cost proposals submitted in response to proposals. Project management support: Conduct project planning, develop project plans and documentation, define and manage project resources, and provide general project support to government project officers. Cost certification: Perform independent analysis of the offerors who are awarded future health care and health care-related contracts. Develop options and recommendations governing the feasibility/advisability of revising current and future contracts.

Sources: DOD organizations (information); GAO (analysis and presentation).

Appendix V: Contract Clauses Used by DOD Organizations to Address Contractor Employees Personal Conflicts of Interest

Under Air Force Electronic Systems Center and Army Communications Electronics Lifecycle Management Command policies affecting 4 of the 21 DOD offices we reviewed, we identified two examples of local contract clauses establishing conflict-of-interest safeguards for contractor employees performing advisory and assistance services tasks and other support services. To illustrate the scope and breadth of these local contract clauses for addressing contractor employees' personal conflicts of interest, the clauses are reproduced in their entirety.

Air Force Electronic Systems Center

With its annual budget of about \$3 billion, the mission of the Electronic Systems Center is to develop, acquire, modernize, and integrate command and control, intelligence, surveillance and reconnaissance capabilities, as well as combat support information technology systems. According to the center, advisory and assistance services contractor employees comprise a substantial portion of its workforce helping to execute this mission. And, according to the center's law division, although these contractor employees cannot perform inherently governmental functions, they do provide essential technical and business advice and expertise that may be highly influential in decision making by government employees.

Given the close relationship between Air Force decision-makers and federal employee advisors at the center—who are both required to identify and avoid financial conflicts—and contractor employees directly advising them in these roles, the clause (as shown in table 11), which has been used for advisory and assistance services contracts for at least 10 years, provides a mechanism to address potential and actual contractor financial conflicts that could affect the integrity of the procurement system. According to the center, the clause places an obligation on the part of the contractor to monitor for personal financial conflicts of interest and maintain its own disclosure records. The center does not routinely monitor or review these records, but relies on a self-certification model, consistent with its treatment of similar requirements in such contracts.

Table 11: Financial Conflict of Interest Clause Used by the Air Force's Electronic Systems Center for Advisory and Assistance Services Contracts

PART I—THE SCHEDULE
SECTION H—SPECIAL CONTRACT REQUIREMENTS
SECTION H FA8721-07-F-0103

ESC.H008: FINANCIAL CONFLICT OF INTEREST (APR 2007)

Except as provided for under subparagraph (d) hereof, the prime contractor shall not assign, nor allow any employee for whom it receives payment under this contract to perform any task under this contract concerning any program, prime contractor, contract, or other matter in which that employee, or that employee's spouse, minor child or household member has a financial interest. For each employee who performs a task in violation of this prohibition, the price of the contract line item number (CLIN) under which the prime contractor receives payment for that performance shall be reduced by the product of the hourly rate prescribed for that employee in the schedule (including wages, indirect costs, general and administrative expenses and profit), multiplied by the number of hours in which that employee was performing the task in violation of this prohibition, and the prime contractor shall forfeit any right to receive said payment. Direct and indirect costs allocable to the expended hours for which payment has been forfeited shall be accounted for as unallowable costs and shall not be charged to this or any other Government contract.

A financial interest consists of any interest in, or affiliation with, a prime contractor, a subcontractor to a prime contractor, any offerors, or any prospective subcontractor to any offeror for the program, contract, or other matter for which the employee is performing the support task under this contract. A financial interest does not consist of an interest in, or affiliation with, the prime contractor that is the party to this contract. The financial interest can take the form of any ownership interest (e.g. stock; ownership of bonds; a loan or other financial arrangement that is other than an arm's length transaction; employment, or an arrangement concerning prospective employment, including negotiations therefore, or, any non-arm's length loan, any gift from, or any other non-arm's length financial arrangement or interest with, any person who is directly communicating with the Government on behalf of any prime contractor, subcontractor holder thereto, or any prospective subcontractor or offeror as described above).

The prime contractor shall obtain and maintain, as part of its personnel records, a financial disclosure statement from each employee assigned to perform support tasks for the Government under any order resulting from this program. The financial disclosure statement shall: (1) list any financial interests described in subparagraph (b) hereof, (2) be obtained not later than each employee's initial assignment to a support task under this program, (3) be updated at least annually, and (4) be reviewed by the prime contractor with each employee on an annual basis during the term of the orders under this program.

Whenever the prime contractor wishes to assign an employee to perform a task on an order under this program concerning any program, contract, prime contractor, or other matter in which the employee has a financial interest as defined under subparagraph (b) hereof, the prime contractor shall, before making the assignment, obtain a written waiver from the primary contracting officer (PCO), by submitting to the PCO a written request for waiver including all relevant supporting information. The PCO shall have the sole discretion to grant or deny the waiver in whole or in part. The PCO's determination shall be discretionary, final and conclusive and not subject to appeal under the Disputes clause or the Contract Disputes Act of 1978.

The prime contractor shall, upon written request by the PCO, and at no increase in contract price, make such financial disclosure statement available to the Government for inspection and review.

Source: Electronic Systems Center.

**Army Communications
Electronics Lifecycle
Management Command**

In August 2007, the chief of the command's Acquisition Process Change Group distributed a policy applicable to all of the command's contracting activities to establish personal conflict of interest safeguards to be addressed for contractor employees as part of current contracting procedures for identifying, evaluating, and resolving organizational conflicts of interest. The underlying principles behind the revised policy are preventing the existence of conflicting roles that might bias a

contractor's judgment and unfair competitive advantage. According to the command's policy, conflicts of interest are more likely to occur in support services contracts involving:

- management support services;
- consultant or other professional services;
- contractor performance of or assistance in technical evaluations;
- preparing specifications or work statements; and
- systems engineering and technical direction work performed by a contractor that does not have overall contractual responsibility for development or production.

In the acquisition planning process for all support services, the contracting officer is required to use local clause HS6001, Organizational Conflict of Interest, in the solicitation and contract (see table 12). As a condition of award, the contractor is required to have its employees and subcontractors who will perform work on the task execute the Contractor-Employee Personal Financial Interest/Protection of Sensitive Information Agreement, to maintain copies of those agreements, and provide them to the contracting officer upon request.

Table 12: Organizational Conflict of Interest Clause Used by the Army's Communications Electronics Lifecycle Management Command for Support Services Contracts

PRESCRIPTION: (a) Insert in solicitations and contracts when (1) the contractor will provide support services (e.g., program management support services, budgeting or accounting services or advisory and assistance services including consultant services, and (2) the contracting officer has reason to believe the conditions of FAR 9.505 apply. It is only necessary for a potential conflict to exist. The Contracting Officer needs to consider input from the requiring activity, legal counsel, and even the contractor itself when considering the need for and nature of any potential organizational conflict of interest clause. Prior to insertion of this clause, the approval of the Chief of the Contracting Office (i.e., Director, CECOM LCMC Acquisition Center) must be obtained in accordance with FAR 9.506.

(b) The nature of any potential conflict of interest will vary. Therefore, the Contracting Officer may modify the language of paragraph (b), to specify the program or acquisition for which the organizational conflict of interest applies or may apply. Paragraph (c)(2) may also be modified as to the elements to be addressed in a mitigation plan to delete overly burdensome or complex elements for small businesses, or to add items for more complex programs (e.g., a plan addressing subcontractors with potential organizational conflict of interests.)

HS6001 ORGANIZATIONAL CONFLICT OF INTEREST (August 2007)

(a) Definition. Per FAR 2.101, an "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." It does not include the normal flow of benefits from incumbency.

(b) The Contracting Officer has determined that potentially significant organizational conflicts of interest may arise due to the nature of the work the Contractor will perform under this contract that may preclude the Contractor from being awarded future CECOM LCMC Acquisition Center contracts in a related area. Whereas the Contractor has agreed to undertake this contract to provide _____ [Contracting Officer insert the program or acquisition] , it is agreed that the Contractor shall be ineligible to act as a prime contractor, consultant, or subcontractor to any prime contractor or subcontractor at any tier who is to supply the services, system or major components thereof for any project where the Contractor has provided or is providing support as described in FAR 9.505-1 through 9.505-4.

(c) The Contracting Officer may make a determination to allow a Contractor to participate in an acquisition subject to the submission of an acceptable mitigation plan in accordance with paragraphs (1) and (2) below. This determination may not be appealed.

(1) If the Contracting Officer requests, and the Contractor submits an organizational conflict of interest mitigation plan that, after Government review is acceptable to the Government, the Contractor's parent corporation, subsidiaries, or other physically separate profit and loss centers may not be precluded from acting as a subcontractor or consultant on future CECOM LCMC Acquisition Center contracts. The Government's determination regarding the adequacy of the mitigation plan or the possibility of mitigation are unilateral decisions made solely at the discretion of the Government and are not subject to the Disputes clause of the contract. The Government may terminate the contract for default if the Contractor fails to implement and follow the procedures contained in any approved mitigation plan.

(2) Any mitigation plan shall include, at a minimum, non-disclosure agreements to be executed by the Contractor and the Contractor's employees supporting the Government per paragraph (c) above. Items for consideration in a mitigation plan include the following: identification of the organizational conflict(s) of interest; reporting and tracking system; an organizational conflict of interest compliance/enforcement plan, to include employee training and sanctions, in the event of unauthorized disclosure of sensitive information; a plan for organizational segregation (e.g., separate reporting chains); and data security measures.

(d) These restrictions outlined in paragraph (b) shall apply to _____ [Contracting Officer insert the company name upon award of the contract]. This clause shall remain in effect for _____ [Contracting Officer insert timeframe, which should normally be one year after completion of this contract. However, the contracting officer may insert a different timeframe, if another timeframe is justified.]

(e) The Contractor shall apply this clause to any subcontractors or consultants, who have access to information, participate in the development of data, or participate in any other activity related to this contract which is subject to terms of this clause at the prime contractor level, unless the Contractor includes an acceptable alternate subcontractor provision in its mitigation plan. For subcontractors or consultants under this contract, if an organizational conflict of interest mitigation plan is submitted and acceptable

**Appendix V: Contract Clauses Used by DOD
Organizations to Address Contractor
Employees Personal Conflicts of Interest**

to the Government, the subcontractor's parent corporation, subsidiaries, or other physically separate profit and loss centers may not be precluded from acting as a prime, subcontractor, or consultant on future CECOM LCMC Acquisition Center contracts.

(f) The Contractors employees shall be trained and informed of Subpart 9.5 of the FAR and this contract provision, and shall execute a "Contractor-Employee Personal Financial Interest/Protection of Sensitive Information" Agreement as appropriate.

(g) The Contractor agrees that it will use all reasonable diligence in protecting proprietary data received by it. The Contractor further agrees it will not willfully disclose proprietary data to unauthorized parties without the prior permission of the Government, and that proprietary data shall not be duplicated, used or disclosed, in whole or part, for any purpose other than to accomplish the contracted effort. This restriction does not limit the contractors right to use, duplicate or disclose such information if such information was lawfully obtained by the contractor from other sources.

(h) The Contractor agrees to enter into written agreements with all companies whose proprietary data it shall have access and to protect such data from unauthorized use or disclosure as long as it remains proprietary. The Contractor shall furnish to the Contracting Officer copies of these written agreements. The Contractor agrees to protect the proprietary data and rights of other organizations disclosed to the Contractor during performance of this contract with the same caution that a reasonably prudent Contractor would use to safeguard highly valuable property. The Contractor agrees to refrain from using proprietary information for any purpose other than that for which it was furnished.

(i) The Contractor shall not distribute reports, data or information of any nature arising from its performance under this contract, except as provided by this contract or as may be directed by the Contracting Officer.

(j) Government Representatives shall have access to the Contractors premises and the right to inspect all pertinent books and records in order to insure that the contractor is in compliance with FAR 9.5.

(k) The Contractor agrees that if after award it discovers a potential organizational conflict of interest, a prompt and full disclosure shall be made in writing to the Contracting Officer. This disclosure shall include a description of the actions the Contractor has taken or proposes to take, to avoid or mitigate such conflicts.

(l) The Government may waive application of this clause when it is determined to be in the best interest of the Government to do so.

Source: Communications Electronics Lifecycle Management Command.

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