# CLIENT ALERT

## DoD Issues Final OCI Rule For Major Programs

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On December 29, 2010, the Department of Defense ("DoD") issued a final amendment to the Defense Federal Acquisition Regulation Supplement ("DFARS") implementing section 207 of the Weapons Systems Acquisition Reform Act of 2009 ("WSARA"), which required DoD to provide "uniform guidance and tighten" existing regulations governing organizational conflicts of interest ("OCI"). What follows are the highlights of the rule, which is immediately effective and placed in part 209 of the DFARS:

- **Applicability**. The rule only applies to Major Defense Acquisition Programs ("MDAP") and pre-MDAPS.

  A Major Defense Acquisition Program, which is defined in 10 U.S.C. 2430, means a DoD acquisition program that is not a highly sensitive classified program (as determined by the Secretary of Defense) and (i) is designated by the Secretary of Defense as a major defense acquisition program, or (ii) is estimated by the Secretary of Defense to require an eventual total expenditure for research, development, test, and evaluation of more than $300,000,000 (based on fiscal year 1990 constant dollars) or an eventual total expenditure for procurement, including all planned increments or spirals, of more than $1,800,000,000 (based on fiscal year 1990 constant dollars).

  A Pre-Major Defense Acquisition Program means a program that is in the Materiel Solution Analysis or Technology Development Phases preceding Milestone B of the Defense Acquisition System and has been identified to have the potential to become a Major Defense Acquisition Program.

- **Policy**. The rule sets forth two overarching DoD policy positions. First, the defense agencies must obtain advice on MDAPs and pre-MDAPS from sources that are objective and unbiased. Second, contracting officers generally should seek to resolve OCIs in a manner that will promote competition and preserve DoD access to the expertise and experience of qualified contractors.

- **Systems Engineering and Technical Assistance**. The rule, implementing a specific WSARA mandate, provides that a contract for the performance of Systems Engineering and Technical Assistance ("SETA") for a MDAP must prohibit the contractor, or any affiliate of the contractor, from participating as a contractor or Major Subcontractor in the development or construction of a weapon system under such program. (It appears that non-weapon system MDAPS may be covered by FAR 9.5).

  The rule defines "Systems Engineering" as "an interdisciplinary technical effort to evolve and verify an integrated and total life cycle balanced set of system, people, and process solutions that satisfy customer needs." The rule defines "Technical Assistance" as "the acquisition support, program management support, analyses, and other activities involved in the management and execution of an acquisition program." The rule defines "Systems Engineering and Technical Assistance" as a "combination of activities related to the development of technical information to support

various acquisition processes."

The rule defines "Major Subcontractor" as a subcontractor that is awarded a subcontract that equals or exceeds (i) both the cost or pricing data threshold and 10 percent of the value of the contract under which the subcontracts are awarded, or (ii) $50 million.

The rule expressly recognizes that the prohibition on future work as a production or supply contractor does not apply if the head of contracting activity determines that (i) an exception is necessary because DoD needs the domain experience and expertise of the highly qualified, apparently successful offeror, and (ii) based on an agreed-to resolution strategy, the apparently successful offeror will be able to provide objective and unbiased advice, without a limitation on future participation in development and production.

Under this rule, it appears that the prohibition only applies to new SETA contracts. However query whether holders of SETA contracts pre-dating December 29, 2010 would be barred from obtaining new production or construction contracts in the same MDAP under FAR 9.5 and existing case law.

- **Identification of OCIs**. When evaluating OCIs in the context of MDAPS or pre-MDAPS, contracting officers must consider (i) the ownership of business units performing systems engineering and technical assistance, professional services, or management support services to a MDAP or pre-MDAP by a contractor who simultaneously owns a business unit competing (or potentially competing) to perform as the prime contractor for the same MDAP or as the supplier of a major subsystem or component for the same MDAP; (ii) the proposed award of a major subsystem by a prime contractor to business units or other affiliates of the same parent corporate entity, particularly the award of a subcontract for software integration or the development of a proprietary software system architecture; and (iii) the performance by, or assistance of, contractors in technical evaluation.

- **Mitigation.** The rule defines "Mitigation" as "any action taken to minimize an organizational conflict of interest," and requires that an OCI mitigation plan, if required under the circumstances, must be incorporated into the contract.

  If the contracting officer determines, after consultation with agency legal counsel, that the otherwise successful offeror is unable to effectively mitigate an organizational conflict of interest, then the contracting officer must use another approach to resolve the OCI, select another offeror, or request a waiver in accordance with FAR 9.503.

  For any acquisition that exceeds $1 billion, the contracting officer shall brief the senior procurement executive before determining that an offeror's mitigation plan is unacceptable.

The final rule, which is described above, is significantly narrower than the approach that DoD had outlined in April, 2010, when it issued a proposed rule. The proposed rule set forth a comprehensive approach, which would have been applicable to virtually all DoD procurements. DoD, noting that finalizing the comprehensive approach in the proposed rule would have caused delay and possible confusion, decided to limit that final rule to the WSARA-mandated changes. Nonetheless, the proposed rule raised some important issues that have been left open to be dealt with in a proposed OCI rule to be issued by the FAR Council that will be effective government-wide and is expected to be issued soon. The proposed DFARS rule on these issues did not change the substantive OCI law, simply codifying the law as developed by the Government Accountability Office and the Court of Federal

Claims. However, that proposed rule would have significantly formalized the required procedures for contracting officers to investigate, analyze, and potentially mitigate OCIs and would have imposed substantial obligations on potential offerors to provide information to assist the contracting officer. All the public comments on the proposed DFARS rule have been provided to the FAR Council and will be considered in promulgation of the proposed FAR rule. Examples of these issues include:

- Definition of OCIs
- Types of OCIs
- Required Timing of OCI analysis
- Disclosure of information from offerors to assist contracting offerors in identifying OCIs
- Guidance about specific mitigation techniques
- Waiver

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