

CLIENT ALERT

DoD Issues Proposed Rules Governing Organizational Conflicts of Interest

Apr.28.2010

On April 22, 2010, the Department of Defense issued proposed amendments [insert link: <http://edocket.access.gpo.gov/2010/pdf/2010-9210.pdf>] to the Defense Federal Acquisition Regulation Supplement ("DFARS") implementing section 207 of the Weapons Systems Acquisition Reform Act of 2009 ("WSARA"), which requires DoD to provide "uniform guidance and tighten" existing regulations governing organizational conflicts of interest ("OCI"). The deadline for submission of comments is June 21, 2010.

DoD is proposing to use these new rules for all DoD procurements. Instead of being located in Part 9 (relating to contractor qualifications, responsibility, and eligibility), where the current OCI rules can be found, these new rules would be located in Part 3 (relating to improper business practices and other integrity issues).

The drafters of the proposed rules have attempted to capture core concepts established by decisional law from the U.S. Government Accountability Office ("GAO") and the U.S. Court of Federal Claims ("CFC"). The basic policy reflected in these proposed rules mirrors FAR 9.5 and decades of GAO and CFC law: organizational conflicts of interest call into question the integrity and fairness of the competitive procurement process, and the Government seeks to acquire unbiased advice and/or goods and services from contractors that are free from, or have mitigated, such conflicts. In addition, the proposed rules mandate significant disclosures from contractors, to assist the agency in analyzing actual and potential OCIs and proposed mitigation measures. Importantly, the proposed rules provide a stated preference for mitigation, as opposed to exclusion of an otherwise successful offeror, as the favored method of resolving OCIs. What follows are the highlights of the proposed rules:

- **Applicability.** The proposed rules would apply to all DoD acquisitions, except those for commercially available off-the-shelf ("COTS") items. The rules apply to task or delivery orders, modifications, and profit and nonprofit organizations ("including nonprofit organizations created largely or wholly with Government funds."). In the preamble to the proposed rules, DoD discusses its coordination with the FAR Council, the Office of Government Ethics, and the Office of Federal Procurement Policy ("OFPP"). Last week, the Director of OFPP stated publicly that the proposed Government-wide FAR OCI rules would be consistent with these DFARS proposed rules and that he expected the FAR proposal would be published soon.
- **Types of OCI.** Tracking the guidance from the seminal OCI case, *Aetna Gov't Health Plans, Inc.*, B-254397.15, July 27, 1995, 95-5 CPD ¶ 129, the proposed rules set forth three types of conflicts: impaired objectivity, unfair access to non-public information, and biased ground rules. Unlike FAR 9.5, which is basically organized by type of task, the proposed rules are organized by type of conflict.
 - *Impaired objectivity.* An impaired objectivity OCI exists if a contractor's judgment and objectivity in performing a task for the Government might be impaired because the substance of the contractor's performance has the potential to affect other of its activities and interests (not just performance of other Government contracts), or *vice versa*. Classic examples include situations in which (i) the contractor is required to evaluate its products or services, or those of a competitor, and (ii) the contractor will provide the Government technical or policy advice

that could affect its other business interests, to include interests beyond those related to Government acquisitions.

- *Unfair access to non-public information.* An unfair access to non-public information OCI exists if a contractor has access to non-public information as part of its performance of a Government contract, grant, cooperative agreement, or other transaction and that non-public information may provide the contractor an unfair competitive edge in a later competition for a Government contract.
- The proposed rules regarding unfair access to non-public information provide that "not all competitive advantage is unfair," and - to that end - the rules incorporate the long-standing principle that incumbent contractors (or an offeror that has performed similar requirements in the past) may have a competitive edge over others, but that advantage by itself does not constitute an unfair competitive advantage. Second, the rules acknowledge that development contractors have an inherent advantage when it comes to competing for follow-on production contracts, but explicitly state that this "is an unavoidable advantage that is not considered unfair; hence, agencies should not prohibit development contractors from receiving award of follow-on production contracts merely because they have a competitive advantage."
- *Biased ground rules.* A biased ground rules OCI exists if a contractor, in performing under one Government contract, grant, cooperative agreement, or other transaction, is in a position to set the ground rules for another Government acquisition. Classic examples include participating in preparation of the statement of work or specifications, or establishing source selection criteria.
- **Identification of OCIs.** The proposed rules make clear that contracting officers *must* consider potential OCIs at two distinct points during a procurement - during preparation of the solicitation and during evaluation of offers. In identifying potential conflicts, the contracting officer must consider the entire "contractor organization, including not only the business unit or segment" that is seeking a contract, but also "all subsidiaries and affiliates." This definition, while broad, is consistent with current GAO and CFC decisions.
 - *Preparation of solicitation.* The contracting officer must examine the nature of work to be performed and determine whether an OCI could result. In making this determination, the contracting officer is encouraged to obtain assistance from the program office, technical specialists, and legal counsel. In addition, the contracting officer must require the program office or requiring activity to identify all contractors that participated in preparation of the statement of work or other requirements documents, including cost or budget estimates.

If the contracting officer finds that there is no potential OCI, the contracting officer must document this determination in the contract file. If the contracting officer finds that the contemplated work has the potential to create an OCI, then the contracting officer must include a solicitation provision, which requires offerors to make certain representations and/or provide detailed disclosures about their Government work.

- *Evaluation of offers.* The contracting officer must use the information provided by offerors to identify OCIs, and the rules direct the contracting officer to examine other sources of information including cognizant contract administration, finance and audit activities, and non-Government sources, including websites and trade journals.
- **Resolution of OCIs.** The contracting officer must ensure that OCIs are resolved through avoidance, limitation of future contracting, mitigation, or some combination of these resolution methods.
 - *Avoidance.* Avoidance consists of Government action on one acquisition that is intended to prevent OCIs from arising in future acquisitions. Methods of avoidance include (i) structuring contract requirements so that contractors can perform work without access to non-public information, (ii) drafting the statement of work

narrowly to exclude tasks that require contractors to utilize subjective judgment, and (iii) excluding a class of offerors from proposing to perform the work if their participation would create a conflict on a future contract. The rules provide that this last strategy is disfavored because it would reduce competition. Therefore, it can only be used if the contracting officer has determined that there is not a less restrictive alternative available.

- *Limitation on future contracting.* A limitation on future contracting allows a contractor to perform on one contract but precludes the offeror from submitting offers for future contracts if the contractor could obtain an unfair advantage in competing for award. Any limitations must be restricted to a fixed duration that is sufficient to neutralize the organizational conflict of interest.
- *Mitigation.* Mitigation is a generic term for any action that minimizes an OCI to an acceptable level - e.g., a firewall. The rule provides that a firewall within an offeror's organization, without more, is appropriate to resolve only unfair access to non-public information OCIs, not impaired objectivity or biased ground rules OCIs. This is consistent with recent GAO and CFC cases.

However, the rules provide that a firewalled subcontractor is viewed as an acceptable mitigation technique. Although the rules are silent as to the type of conflict addressed by a firewalled subcontractor, both GAO and CFC have found that this technique can lead to avoidance of an impaired objectivity OCI. Once the Government has approved a mitigation plan, that plan must be incorporated into the final contract.

- **Waiver.** The head of an agency may waive the requirement to resolve an OCI in a particular acquisition only if the agency had determined that resolution is not feasible or not in the best interest of the Government. This waiver authority can only be used to resolve any residual conflict(s), once an agency has resolved the balance of the conflict to the extent feasible. This authority can be delegated, but not below the head of contracting activity.

Any waiver must (i) be in writing, (ii) be applicable to one contract action, (iii) describe the extent of the conflict, and (iv) explain why it is not feasible or not in the best interest the Government to resolve the OCI. In competitive acquisitions, waivers can only be used if the solicitation specifically informs offerors that the Government reserves the right to waive the requirement to resolve an OCI.

The proposed rules provides two circumstances as examples when waivers may be appropriate. First, a limited time waiver may be appropriate to allow a contractor to divest itself of the conflicting business or contract if the contractor agrees to stringent mitigation measures in the interim. Second, a waiver may be appropriate in order for the agency to obtain a particular expertise.

- **Award Decisions.** Before a contracting officer can withhold award from the apparent successful offeror because of OCI considerations, the contracting officer must (i) notify the contractor in writing, (ii) provide the reasons for the determination, and (iii) allow the contractor a reasonable opportunity to respond. The proposed rules explicitly provide that a contracting officer shall award the contract to the apparent successful offeror "only if all organizational conflicts of interest are resolved" (by avoidance, limitation on future contracting, mitigation, or waiver).
- **Task or Delivery Orders.** The proposed rules give special attention to the complexity of OCIs in the context of task or delivery orders. If an OCI can be identified at the time of the task or delivery order contract award, the CO must include a resolution plan in a basic contract. The contracting officer must reconsider OCIs at the time of issuance of each task or delivery order and, if necessary, include a resolution plan in the task order or revise the plan incorporated into the basic award. In the case of multiple-award task or delivery order contracts against which other agencies may place orders, the

contracting officer for the ordering agency is responsible for administering a mitigation plan and/or determining that an OCI precludes award of an order.

- **Systems Engineering and Technical Assistance in a Major Defense Acquisition Program.** Subject to a few exceptions, the proposed rules, implementing a specific WSARA mandate, provide that a contract for the performance of systems engineering and technical assistance for a major acquisition program 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. The proposed rules expressly recognize that an exception is appropriate for (i) design and development contractors and (ii) highly qualified contractors with domain experience and expertise if the conflict can be adequately resolved.

Conversely, the proposed rules provide that DoD must ensure that it obtains advice on major defense acquisition programs from sources that are "objective and unbiased" and that such advice should come from Federally Funded Research and Development Centers or other sources "independent of the major defense acquisition program contractor."

- **Pre-Award Disclosure Requirements.** If a contracting officer determines that performance of the contemplated work has the potential to create an organizational conflict of interest, the contracting officer must insert a solicitation provision, which includes very broad disclosure and certification requirements, including:
 - If the offeror finds there is an OCI associated with the offer it plans to submit, it must - "before preparing its offer" - inform the contracting officer of any potential conflicts of interest, including those involving contracts, grants, cooperative agreements, or other transactions with other Government organizations, so that the Government may assess whether the conflicts will require resolution.
 - When it submits its proposal, an offeror must disclose "*all relevant information* regarding any organizational conflicts of interest" or "represent, *to the best of its knowledge and belief*, that there will be no organizational conflict of interest."
 - In addition, the offeror must describe "any other work performed on contracts, subcontracts, grants, cooperative agreements, or other transactions within the past five years *that is associated with the offer* it plans to submit."
 - If the Government or offeror identifies any OCIs, the offeror shall set forth its proposed mitigation strategy.

The relevant solicitation provision states that if "the successful offeror was aware, *or should have been aware*, of an organizational conflict of interest before award of this contract and did not fully disclose that conflict to the Contracting Officer, the Government may terminate the contract for default."

- **Post-Award Disclosure Requirements.** After award, under a required clause, the contractor will have an ongoing obligation to make "a prompt and full disclosure" to the contracting officer of any OCIs that arise during performance the contract as well as newly discovered conflicts that existed before contract award.

The contractor must also update its mitigation plan within 30 days of any changes to the legal construct of the organization, subcontractor changes, or significant management or ownership changes.

The rules also require that contractors report to the contracting officer any noncompliance with a mitigation plan.

As with the pre-award disclosure requirements, any nondisclosure or misrepresentation regarding OCIs could have severe consequences, including termination of the contract for default or "exercise of other remedies as may be available under law or contract."

The new rules require flow down of the post-award disclosure requirements to subcontractors if the work includes, or may include, tasks related to the OCI, or if the subcontracted work may create the potential for an OCI.

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