DOD'S PROPOSED RULES GOVERNING ORGANIZATIONAL CONFLICTS OF INTEREST

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I. Statutory Background: Weapons Systems Acquisition Reform Act Of 2009

A. On May 22, 2009, President Obama signed the Weapons Systems Acquisition Reform Act of 2009 ("WSARA"),[1] which contains a provision that directs DOD to revise the DFARS to provide uniform guidance and tighten existing requirements for organizational conflicts of interest ("OCI") in major defense acquisition programs.

B. The statute mandates that the revised regulations prohibit systems engineering and technical assistance ("SETA") contractors from participating as prime contractors or major subcontractors in the development or construction of a weapons systems that is part of the same major program.

C. Pursuant to WSARA, the revised regulations must also ensure that DOD receives advice on systems architecture and systems engineering matters with respect to major defense acquisition programs from federally funded research and development centers or other sources independent of the prime contractor for the program.

D. The statute directs DOD to establish limited exceptions to these above-referenced requirements to the extent necessary to ensure that DOD has continued access to advice on systems engineering and systems architecture matters from highly qualified contractors with domain experience and expertise, while ensuring that such advice comes from sources that are objective and unbiased.

II. Proposed Rules

A. Introduction And Guiding Principles

1. On April 22, 2010, DOD issued these proposed rules as amendments to the DFARS.[2] The deadline for submission of comments is June 21, 2010.

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1 *See* Attachment A.

2 *See* Attachment B.

2. 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).

3. In addition to implementing the language in WSARA relating to OCIs, 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 ("COFC").

4. The proposed rules provide that OCIs must be identified and resolved or waived before award. To the extent an OCI arises during contract performance, it must be identified and resolved. DOD has expressed a policy that mitigation is the preferred resolution of OCIs.

B. **Applicability**

1. The proposed rules (other than those specifically relating to major defense acquisition programs only) would apply to all DoD acquisitions, except those for commercially available off-the-shelf ("COTS") items.

2. The proposed rules would apply to task or delivery orders, modifications, and profit and nonprofit organizations ("including nonprofit organizations created largely or wholly with Government funds.").

C. **Types Of OCI**

1. Tracking the guidance from the seminal OCI case, *Aetna Gov't Health Plans, Inc.*, B-254397.15, July 27, 1995, 95-2 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 Subpart 9.5, which is basically organized by type of task, the proposed rules are organized by type of conflict.

2. 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

(a) the contractor is required to evaluate its products or services, or those of a competitor, and (b) 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.

3. 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.

a) 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.

b) 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."

4. 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.

D. **Identification Of OCIs**

1. 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 COFC decisions. The proposed rules also direct offerors to consider the activities of subcontractors, because those activities could give rise to an OCI.

2. Preparation Of Solicitation. The contracting officer must examine the nature of work to be performed and determine whether an OCI could result.

a) In making this determination, the contracting officer is encouraged to obtain assistance from the program office, technical specialists, and legal counsel.

b) The contracting officer must also 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.

c) If the contracting officer finds that there is no potential OCI, the contracting officer must document this determination in the contract file.

d) 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.

3. 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.

E. **Resolution Of OCIs**

1. The contracting officer must ensure that OCIs are resolved through avoidance, limitation of future contracting, mitigation, or some combination of these resolution methods.

2. Avoidance. Avoidance consists of government action on one acquisition that is intended to prevent OCIs from arising in future acquisitions. Methods of avoidance include:

a) Structuring contract requirements so that contractors can perform work without access to non-public information;

b) Drafting the statement of work narrowly to exclude tasks that require contractors to utilize subjective judgment; and

c) Excluding a class of offerors from proposing to perform the work if their participation would create a conflict on a future contract. The proposed 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.

3. 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.

4. Mitigation. Mitigation is a generic term for any action that minimizes an OCI to an "acceptable level" – *e.g.,* a firewall or release of previously non-public information. Once the government has approved a mitigation plan, that plan must be incorporated into the final contract.

a) The rules provide 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 COFC cases.

b) 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 COFC have found that this technique can lead to avoidance of an impaired objectivity OCI.

F. **Waiver**

1. According to the proposed rules, the head of an agency may waive the requirement to resolve an OCI in a particular acquisition only if the agency has 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.

2. Any waiver must (a) be in writing, (b) be applicable to only one contract action, (c) describe the extent of the conflict, and (d) explain why it is not feasible or not in the best interest of 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.

3. The proposed rules provide 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.

G. **Award Decisions**

1. Before a contracting officer can withhold award from the apparent successful offeror because of OCI considerations, the contracting officer must (a) notify the contractor in writing, (b) provide the reasons for the determination, and (c) allow the contractor a reasonable opportunity to respond.

2. The proposed rules 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).

H. **Task or Delivery Orders**

1. 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 contracting officer must include a resolution plan in a basic contract.

2. 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.

3. 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.

I. **Pre-Award Disclosure Requirements**

1. 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:

a) 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.

b) 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."

c) 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."

2. If the government or offeror identifies any OCIs, the offeror shall set forth its proposed mitigation strategy.

3. 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."

J. **Post-Award Disclosure Requirements**

1. 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.

2. 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.

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

4. 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."

5. 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.

K. **Systems Engineering And Technical Assistance In A Major Defense Acquisition Program**

1. 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 (a) design and development contractors and (b) highly qualified contractors with domain experience and expertise if the conflict can be adequately resolved.

2. 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."

PL 111-23 (S 454)
May 22, 2009
WEAPON SYSTEMS ACQUISITION REFORM ACT OF 2009

SEC. 207. ORGANIZATIONAL CONFLICTS OF INTEREST IN MAJOR DEFENSE ACQUISITION PROGRAMS.

(a) REVISED REGULATIONS REQUIRED.--Not later than 270 days after the date of the enactment of this Act, the Secretary of Defense shall revise the Defense Supplement to the Federal Acquisition Regulation to provide uniform guidance and tighten existing requirements for organizational conflicts of interest by contractors in major defense acquisition programs.

(b) ELEMENTS.--The revised regulations required by subsection (a) shall, at a minimum--

(1) address organizational conflicts of interest that could arise as a result of--

(A) lead system integrator contracts on major defense acquisition programs and contracts that follow lead system integrator contracts on such programs, particularly contracts for production;

(B) the ownership of business units performing systems engineering and technical assistance functions, professional services, or management support services in relation to major defense acquisition programs by contractors who simultaneously own business units competing to perform as either the prime contractor or the supplier of a major subsystem or component for such programs;

(C) the award of major subsystem contracts by a prime contractor for a major defense acquisition program to business units or other affiliates of the same parent corporate entity, and particularly the award of subcontracts for software integration or the development of a proprietary software system architecture; or

(D) the performance by, or assistance of, contractors in technical evaluations on major defense acquisition programs;

(2) ensure that the Department of Defense receives advice on systems architecture and systems engineering matters with respect to major defense acquisition programs from federally funded research and development centers or other sources independent of the prime contractor;

(3) require that a contract for the performance of systems engineering and technical assistance functions for a major defense acquisition program contains a provision prohibiting the contractor or any affiliate of the contractor from participating as a prime contractor or a major subcontractor in the development or construction of a weapon system under the program; and

(4) establish such limited exceptions to the requirement in paragraphs (2) and (3) as may be necessary to ensure that the Department of Defense has continued access to advice on systems architecture and systems engineering matters from highly-qualified contractors with domain experience and expertise, while ensuring that such advice comes from sources that are objective and unbiased.

(c) CONSULTATION IN REVISION OF REGULATIONS.--

(1) RECOMMENDATIONS OF PANEL ON CONTRACTING INTEGRITY.--Not later than 90 days after the date of the enactment of this Act, the Panel on Contracting Integrity established pursuant to section 813 of the John War-

ner National Defense Authorization Act for Fiscal Year 2007 (Public Law 109-364; 120 Stat. 2320) shall present recommendations to the Secretary of Defense on measures to eliminate or mitigate organizational conflicts of interest in major defense acquisition programs.

(2) CONSIDERATION OF RECOMMENDATIONS.--In developing the revised regulations required by subsection (a), the Secretary shall consider the following:

(A) The recommendations presented by the Panel on Contracting Integrity pursuant to paragraph (1).

(B) Any findings and recommendations of the Administrator for Federal Procurement Policy and the Director of the Office of Government Ethics pursuant to section 841(b) of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (Public Law 110-417; 122 Stat. 4539).

(d) EXTENSION OF PANEL ON CONTRACTING INTEGRITY.--Subsection (e) of section 813 of the John Warner National Defense Authorization Act for Fiscal Year 2007 is amended to read as follows:

"(e) TERMINATION.--

"(1) IN GENERAL.--Subject to paragraph (2), the panel shall continue to serve until the date that is 18 months after the date on which the Secretary of Defense notifies the congressional defense committees of an intention to terminate the panel based on a determination that the activities of the panel no longer justify its continuation and that concerns about contracting integrity have been mitigated.

"(2) MINIMUM CONTINUING SERVICE.--The panel shall continue to serve at least until December 31, 2011.".

(3) Communications in which the station licensee or control operator has a pecuniary interest, including communications on behalf of an employer, with the following exceptions:

(i) A control station operator may participate on behalf of an employer in a government-sponsored emergency preparedness or disaster readiness test or drill, limited to the duration and scope of such test or drill, and operational testing immediately prior to such test or drill.

(ii) An amateur operator may notify other amateur operators of the availability for sale or trade of apparatus normally used in an amateur station, provided that such activity is not conducted on a regular basis.

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[FR Doc. 2010–9092 Filed 4–21–10; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 202, 203, 212, and 252

RIN 0750–AG63

Defense Federal Acquisition Regulation Supplement; Organizational Conflicts of Interest in Major Defense Acquisition Programs (DFARS Case 2009–D015)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Proposed rule with request for comments.

SUMMARY: DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to implement section 207 of the Weapons System Acquisition Reform Act of 2009.

DATES: Comments on the proposed rule should be submitted in writing to the address shown below on or before June 21, 2010, to be considered in the formation of the final rule.

ADDRESSES: You may submit comments, identified by DFARS Case 2009–D015, using any of the following methods:

Federal eRulemaking Portal: http://www.regulations.gov. Follow the instructions for submitting comments.

E-mail: dfars@osd.mil. Include DFARS Case 2009–D015 in the subject line of the message.

Fax: 703–602–0350.

Mail: Defense Acquisition Regulations System, Attn: Ms. Amy Williams, OUSD (AT&L) DPAP (DARS), 3060 Defense Pentagon, Room 3B855, Washington, DC 20301–3060.

Comments received generally will be posted without change to *http://www.regulations.gov,* including any personal information provided.

FOR FURTHER INFORMATION CONTACT: Ms. Amy Williams, 703–602–0328.

SUPPLEMENTARY INFORMATION:

A. Background

DoD is proposing to amend the DFARS to implement section 207 of the Weapons System Acquisition Reform Act of 2009 (WSARA) (Pub. L. 111–23). Section 207 requires DoD to revise the DFARS to provide uniform guidance and tighten existing requirements for organizational conflicts of interest (OCIs) by contractors in major defense acquisition programs. The law sets out situations that must be addressed and allows DoD to establish such limited exceptions as are necessary to ensure that DoD has continued access to advice on systems architecture and systems engineering matters from highly qualified contractors, while ensuring that such advice comes from sources that are objective and unbiased.

In developing regulatory language, DoD is directed to consider the recommendation presented by the Panel on Contracting Integrity. DoD has reviewed the provisional recommendations of the Panel in the formation of this proposed rule and will consider the final recommendations of the Panel in the formation of the final rule. DoD must also consider any findings and recommendations of the Administrator of the Office of Federal Procurement Policy (OFPP) and the Director of the Office of Government Ethics (OGE) pursuant to section 841(b) of the Duncan Hunter National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2009 (Pub. L. 110–417). Section 841(b) of the NDAA for FY 2009 required review by OFPP, in consultation with OGE, of FAR coverage of OCIs. Neither OFPP nor OGE has issued recommendations to date pursuant to section 841, but are working with the FAR Acquisition Law Team, which includes representatives from DoD and the civilian agencies, to draft a proposed rule under FAR Case 2007–018. As part of this process, OFPP, OGE, and the Team are reviewing comments received in response to an Advance Notice of Proposed Rulemaking, published in the **Federal Register** at 73 FR 15962 on March 26, 2008.

A public meeting was held on December 8, 2009 (*see* 74 FR 57666) to provide opportunity for dialogue on the possible impact on DoD contracting of the section 207 requirements relating to OCIs. In the formation of this proposed rule, DoD considered the comments provided at the public meeting, as well as other unsolicited comments received from the public. Various presenters at the public meeting (1) Expressed a desire for policy and regulation to emphasize the importance of using mitigation strategies to address OCIs, (2) sought a more consistent approach within the Government to resolve OCIs, and (3) voiced a strong interest in ensuring any rule is published for comment prior to taking effect.

To implement section 207 and its call for the tightening of existing OCI requirements effectively, DoD felt it was necessary to review the FAR's coverage on OCIs in subpart 9.5 carefully. FAR subpart 9.5 is intended to provide the foundational principles and processes for identifying and addressing OCIs. At the same time, FAR subpart 9.5 is essentially unchanged from the days when the coverage was located in an appendix to the Defense Acquisition Regulation (DAR). The existing FAR coverage relies primarily upon examples to describe OCI; some in the contracting community incorrectly thought the examples in FAR 9.505 contained the universe of conflicts. Further, the existing FAR coverage does not provide any standard provisions or clauses addressing OCIs, and the requirements of FAR subpart 9.5 were often overlooked by the contracting community.

DoD has concluded from its review that—

- The many decisions issued in the past 15 years by the Government Accountability Office (GAO) and the Court of Federal Claims (CoFC) on OCIs should be reflected in any updated coverage;
- The coverage of OCIs should be better organized and relocated to a new subpart 203.12 to be addressed along with improper business practices and personal conflicts of interest;
- Standard provisions and clauses will be beneficial, as long as there is opportunity for contracting officers to tailor the provisions and clauses for particular circumstances, as appropriate; and
- Expanding coverage to address unique issues associated with task and delivery order (indefinite-delivery/indefinite-quantity) contracts is also useful.

DoD proposes to use DFARS subpart 203.12 in lieu of the present FAR subpart 9.5. However, when the FAR is revised, pursuant to the section 841(b) review, to incorporate broader OCI changes, DoD will follow the FAR and

revise the DFARS to address only those aspects of OCIs that relate specifically to major defense acquisition programs.

B. Details of Proposed Revised Coverage on OCIs.

202.101 Definition: Adding a new definition of "organizational conflict of interest" refers to the types of conflicts first defined in *Aetna Government Health Plans* (B–254397, July 27, 1995). Further details necessary to identify conflicts are contained in section 203.1204, entitled *Types of organizational conflicts of interest.* DoD believes it would be more useful to the contracting community if these details are in subpart 203.12 instead of in the part 202 definition.

203.1200 Scope. This section is comparable to the scope statement at FAR 9.500(a); however, there are meaningful differences between the proposed and current coverage. The proposed coverage adopts principles from case law to define conflicts rather than relying primarily on examples. This proposed section continues to implement section 8141 of the National Defense Appropriations Act for Fiscal Year 1989 (Pub. L. 100–463), which was codified as 41 U.S.C. 405b.

203.1201 Definitions.

The proposed new coverage includes the following definitions:

- *Contractor,* clarifying that the entire contractor organization is included when protecting against OCIs. GAO stated in its decision on *Aetna Government Health Plans, supra,* that there is no basis to distinguish between a firm and its affiliates, at least where concerns about potentially biased ground rules and impaired objectivity are at issue. (*See ICF Inc.,* B–241372, February 6, 1991.)
- *Firewall,* one of the techniques to mitigate an OCI.
- *Resolve,* explaining that there are ways to acquire needed goods and services and also address OCIs.

Unlike current FAR subpart 9.5., the proposed DFARS coverage does not include a definition of "marketing consultant" because the coverage is expanded beyond contracts only for marketing consultants.

203.1202 Applicability. DoD proposes that this rule should continue to apply to contracts with both profit and nonprofit organizations (current FAR 9.502(a)).

DoD addresses the applicability of part 12, proposing that, except for commercially available off-the-shelf (COTS) items, the rule should also apply to acquisitions of commercial items. DoD made this determination, in part, based on the belief that the acquisition of commercial services might not be free from OCI concerns.

203.1203 Policy. DoD proposes including a policy statement that reflects the harm that can be caused by OCIs. It is, therefore, the policy of DoD to protect its interests by identifying and resolving OCIs. It is also DoD policy that mitigation is generally the preferred method of resolution.

203.1204 Types of organizational conflicts of interest. This section explains the three types of OCIs as recognized by the GAO and the Court of Federal Claims—

- Impaired objectivity;
- Unfair access to non-public information; and
- Biased ground rules.

Subsequent case law has amplified and refined the principles first articulated in the *Aetna* decision. This section reflects these further amplifications when they would help contracting officers identify conflicts of interest.

The section organizes OCIs by type of conflict of interest, rather than type of task. However, an example taken from section 9.505 of the FAR is provided for each type of OCI. DoD believes that the expanded explanation reflecting the tenets from case law will improve contracting officers' understanding of OCIs and their ability to both identify them and to work with contractors to address them. This approach should also help to address the criticism made by some that contracting officers believe no OCI exists when a contract differs from the examples listed in FAR subpart 9.5.

"Unfair access to non-public information" is one of the three types of conflicts discussed in section 203.1204. Different sources sometimes refer to "unfair access to data." DoD selected the term "information" because it is (a) broader than "data," which is defined in the FAR clause at 52.227–14, Rights in Data—General, to mean recorded information, and (b) used most frequently in case law. The section also includes a statement that natural competitive advantages are not conflicts which contracting officers are required to resolve.

203.1205 Contracting officer responsibilities. This section addresses comments from several respondents to the Advance Notice of Proposed Rulemaking that the section on contracting officer responsibilities in current FAR subpart 9.5 does not encompass all the contracting officer responsibilities with regard to OCIs. Rather, these responsibilities are spread throughout the current subpart. One respondent requested that the coverage provide better direction to contracting officers to ensure more predictable results, and to ensure that the contracting officer roles and responsibilities are identified and fulfilled.

203.1205–1 General. This subsection uses the principles in the current FAR 9.504 to set forth the overarching responsibilities of contracting officers, which are to identify and evaluate OCIs prior to contract award, using common sense and good judgment, and the DoD preference for mitigation.

203.1205–2 Identification of OCIs. This new subsection provides specific guidance on the identification of OCIs and introduces the differences between a potential OCI and an actual OCI. The subsection segregates the solicitation phase of acquisitions from the evaluation phase.

In the solicitation phase of the process, contracting officers must examine the nature of the work to determine whether it may create a conflict, applying the principles in the new section 203.1204. Subsection 203.1205–2 requires that a statement be placed in the file documenting a finding of no conflicts. This subsection also provides that contracting officers should obtain the assistance of the program office, appropriate technical specialists, and legal counsel to identify potential conflicts of interest.

During the evaluation phase, contracting officers are required to examine the financial interests of the offerors to determine whether there is a conflict of interest. However, contracting officers are cautioned not to rely solely on information provided by the offeror in making this determination. Other sources of information are identified in this subsection.

Overlook Systems Technologies, B–298099.4, B–298099.5, November 28, 2006, held that communications regarding OCI do not constitute discussions. Implementation of *Overlook* means that, even in a sealed bidding situation, it is possible to converse about an OCI mitigation plan to arrive at an acceptable solution without such conversation being considered to be "discussions." It should be noted that *Overlook's* holding on communications only applies when OCI is an eligibility factor, which is accomplished by the provision at 252.203–70XX, Notice of Potential Organizational Conflicts of Interest.

203.1205–3 Resolution of organizational conflicts of interest. This section covers the three methods of resolution: avoidance, limitation on future contracting (neutralization), and mitigation. It addresses a response to the

Advance Notice of Proposed Rulemaking that requested more coverage regarding resolution. The new coverage replaces the phrase "neutralization" with the phrase "limitation on future contracting" for purposes of clarity.

To assist the contracting officer in fashioning an appropriate resolution, subsection 203.1205–3 describes the methods of resolution and provides illustrative examples (many of which are taken from case law) of each method. These examples are not intended to be all-inclusive lists. The subsection also makes it clear that a combination of resolution methods may be appropriate in some circumstances.

It is not uncommon for a company to have both advisory and production (or implementation) capabilities, and for such dual capabilities to raise potential conflict of interest concerns. The rule requires that such conflicts be addressed adequately to protect the Government's interest, but also provides that careful consideration be given to the manner in which conflicts are resolved. In particular, the rule restricts use of the avoidance method to exclude a class of contractors unless no less restrictive approach will protect the interests of the Government adequately.

203.1205–4 Waiver. The proposed DFARS 203.1205–4 addresses the use of waivers. The coverage in current FAR subpart 9.5 is carried over. The proposed rule also makes it clear that waivers should be for residual conflicts that exist after all the techniques of resolution have been attempted to lessen a conflict.

The proposed rule provides that waivers cannot be used in a competitive situation unless the solicitation specifically informed offerors that the Government reserves the right to waive the requirement to resolve an OCI. The reservation of the right to waive these requirements is incorporated in paragraph (i) of the provision at 252.203–70XX, Notice of Potential Organizational Conflict of Interest, and implements a fundamental tenet that awards must be made using the evaluation factors stated in a solicitation.

203.1205–5 Award. The proposed rule establishes that—

(1) The contracting officer shall award the contract to the apparent successful offeror only if all organizational conflicts of interest are resolved (with limited exceptions);

(2) Establishes what specific actions shall be taken if a contracting officer determines that award should be withheld from the apparent successful offeror based on conflict of interest considerations; and

(3) If an organizational conflict of interest is identified at the time of task or delivery order contract award, the contracting officer shall include a resolution plan (mitigation plan, or limitation on future contracting) in the basic contract.

DoD proposes to address in this subsection the unique OCI concerns created by task and delivery order contracts. The confluence of OCI concerns and task or delivery order contracting principles affects single-award and multiple-award task and delivery order contracts differently, resulting in a different balance between the need to resolve OCIs at time of award and timing of knowing the actual requirement.

For multiple-award task or delivery order contracts (against which other agencies may place orders and for GSA Schedules), the contracting officer for the ordering agency may determine that an organizational conflict of interest precludes award of an order unless a Government-approved resolution plan (mitigation plan or limitation on future contracting) is incorporated into the order. The contracting officer placing the order is responsible for administering the plan.

203.1206 Solicitation provision and contract clauses. DoD used the requirements currently in FAR 9.506 and 9.507 as the basis for the new provision and clauses on OCI. DoD determined that it was preferable to have a provision and clauses that can be tailored rather than providing no provision or clauses. Recognizing the variability among OCIs, DoD recommends the provision and clauses be prescribed "substantially the same as" so that contracting officers can tailor them, as appropriate. Further, the provision contains specific fill-ins that the contracting officer is required to complete, and the actual OCI mitigation plan is referenced in 252.203–70YY, Resolution of Organizational Conflicts of Interest.

Section 203.1270 specifically implements section 207 of WSARA. It cites the definition of "lead system integrator" in the clause at 252.209–7007, cites the definitions of "major defense acquisition program" in 10 U.S.C. 2430, cites the definition of "major subcontractor" in the new proposed clause at 252.203–70WW, Organizational Conflict of Interest—Major Defense Acquisition Program, and bases the definitions of "systems engineering" and "technical assistance" on the discussion of systems engineering and technical direction at FAR 9.505–1.

The policy section at 203.1270–3 is based on sections 207(b)(4) and (b)(2) of WSARA.

Limitations on lead system integrators as required by 207(b)(1)(A) of WSARA are already incorporated in the DFARS at 209.570, and the associated clauses in 252.209.

Section 203.1270–5 on identification of OCIs provides considerations of situations in which OCIs must be addressed, as specified in section 207(b)(1)(B) through (D) of WSARA.

Section 203.1270–6(a) sets forth the restrictions on systems engineering and technical assistance contracts that are required by section 207(b)(3) of WSARA. With some exceptions, a contract for systems engineering and technical assistance for a major systems defense acquisition program shall 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.

Exceptions are proposed in paragraph 203.1270–6(b), as authorized in paragraph (b)(4) of WSARA. The first exception is based on the exception for design and development work in accordance with FAR 9.505–2(a)(3), FAR 9.505–2(b)(3), or preparation of work statements in accordance with FAR 9.505–2(b)(1)(ii).

The other exception is an exception for a contractor that is highly qualified with domain experience and expertise, if the OCI can be adequately resolved in accordance with the new proposed coverage at 203.1205–3.

Although authorized by section 207(b)(4) of WSARA, this rule does not propose any exceptions to the requirement of 207(b)(2) that a contractor for the performance of systems engineering and technical assistance functions for a major defense acquisition program receive advice from a federally funded research and development center or other sources independent of the prime contractor (implemented in the policy section 203.1270–3).

Section 203.1270–7 proposes an additional solicitation provision and contract clause for use in solicitations and contracts for systems engineering and technical assistance for major defense acquisition programs. This solicitation provision and clause are used in conjunction with the other appropriate OCI provisions and clauses prescribed at 203.1206.

• *252.203–70VV, Notice of Prohibition Relating to Organizational Conflict of Interest—Major Defense*

Acquisition Program. This provision notifies the offerors that this solicitation is for the performance of systems engineering and technical assistance for a major defense acquisition program. It states the prohibition as required by paragraph (b)(3) of section 207, but provides the opportunity for offerors to request an exception.

- *252.203–70WW, Organizational Conflict of Interest—Major Defense Acquisition Program.* This clause defines "major subcontractor" and repeats the prohibition from section 207(b)(3) of WSARA, which is in effect unless an approved OCI mitigation plan has been submitted and incorporated into the contract. Compliance with the OCI mitigation plan is a material requirement of the contract.
- *252.203–70XX, Notice of Potential Organizational Conflict of Interest.* This provision—
  - Provides a definition of "organizational conflict of interest;"
  - Places offerors on notice that the contracting officer has identified a potential OCI and makes resolution of an OCI (or waiver) an eligibility requirement for award;
  - Requires the contracting officer to describe the nature of the potential conflict of interest and any steps the Government has taken to lessen the conflict;
  - Requires an offeror to disclose all relevant information regarding an OCI, or to represent, to the best of its knowledge and belief, that there is no OCI.
  - Regardless of whether the offeror discloses the existence of an OCI, the offeror must describe any other work performed on contracts and subcontracts within the past five years that is associated with the offer it plans to submit.
  - Requires an offeror to explain the actions it intends to use to resolve any OCI, *e.g.,* submit an acceptable mitigation plan if an actual OCI exists or agree to a limitation on future contracting;
  - Indicates the clauses that may be included in the resultant contract depending upon the type of resolution;
  - Indicates that failure to disclose facts regarding an OCI could result in a termination for default of any resulting contract; and
  - Reserves the right to waive the requirement to resolve an OCI.
- *252.203–70YY, Resolution of Organizational Conflicts of Interest.* This clause is to be used generally when the contract may involve an OCI that can be resolved by an acceptable contractor-submitted mitigation plan prior to contract award. The clause—
  - Provides definitions of "contractor" and "organizational conflict of interest;"
  - Incorporates the mitigation plan in the contract;
  - Addresses changes to the mitigation plan;
  - Addresses violations of the mitigation plan;
  - Addresses breach of the provisions of the clause; and
  - Requires flowdown of the clause.
- *252.203–70YZ, Limitation of Future Contracting.* This clause will be used when the contracting officer decides to resolve a potential conflict of interest through a limitation on future contracting. The contracting officer must fill in the nature of the limitation on future contractor activities. Although the clause contains a default time period of three years, this time period may be modified as long as the duration is sufficient to avoid unfair competitive advantage or potential bias.
- *252.203–70ZZ, Disclosure of Organizational Conflict of Interest After Contract Award.* DoD recognizes that events may occur during the performance of a contract that give rise to a new conflict. Examples of such events could be a novation or the acquisition of a business interest. This clause, which is included in solicitations and contracts when the solicitation includes the provision 252.203–70XX, Notice of Potential Organizational Conflicts of Interest, requires the contractor to make a prompt and full disclosure of any newly discovered OCI.

Part 212—Acquisition of Commercial Items. The proposed rule requires use of the provisions and clauses in contracts for the acquisition of commercial items (other than COTS items). The rule also notes that the representation in 252.203–70XX, Notice of Potential Organizational Conflicts of Interest, is not in the ORCA database. The proposed rule exempts acquisitions for COTS items (as defined at FAR 2.101) from applicability of subpart 203.12 because the revised coverage is not based in statute (*see* section IV.C. discussion entitled "203.1200, Scope") and COTS items are, by definition, sold in substantial quantities in the commercial marketplace and offered to the Government without modification, in the same form in which they are sold in the commercial marketplace. The requirements of the COTS definition render COTS items not susceptible to organizational conflicts of interest.

This is a significant regulatory action and therefore is subject to Office of Management and Budget review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

C. Regulatory Flexibility Act

DoD believes that the proposed changes will not result in a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.,* because the requirements of subpart 203.12 do not differ from the burden currently imposed on offerors and contractors by FAR subpart 9.5.

Further, the proposed rule does not include a certification requirement and allows for avoidance, neutralization, or mitigation of organizational conflicts of interest or, under exceptional circumstances, waiver of the requirement for resolution.

An Initial Regulatory Flexibility Analysis has, therefore, not been performed. DoD invites comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (DFARS Case 2009–D015) in correspondence.

D. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. Chapter 35) applies because the proposed rule contains information collection requirements. DoD invites comments on the following aspects of the proposed rule: (a) Whether the collection of information is necessary for the proper performance of the functions of DoD, including whether the information will have practical utility; (b) the accuracy of the estimate of the burden of the information collection; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the information collection on respondents, including the use of automated collection techniques or other forms of information technology. The following is a summary of the information collection requirement.

Title: Defense Federal Acquisition Regulation Supplement (DFARS); Organizational Conflicts of Interest in Major Defense Acquisition Programs.

Type of Request: New collection.

Number of Respondents: 8,690.

Responses per Respondent: Approximately 1.

Annual Responses: 9,255.

Average Burden per Response: Approximately 26.75 hours.

Annual Burden Hours: 247,560.

Needs and Uses: DoD needs the information required by 252.203–70XX, 252.203–YY, and 252.203–ZZ to identify and resolve organizational conflicts of interest, as required by section 207 of the Weapons System Acquisition Reform Act of 2009.

Affected Public: Businesses or other for-profit institutions.

Respondent's Obligation: Required to obtain or retain benefits.

Frequency: On occasion.

These estimates are based on—

- 252.203–70XX (e)(1)(i)(A) and (2)—5,650 responses providing information on OCIs and mitigation plans, average of 40 burden hours per plan;
- 252.203–70XX(e)(1)(ii)—2, 930 responses providing information from offerors that do not submit a mitigation plan, average of 2 burden hours per response.
- 252.203–70YY(b)(2)—565 updates to mitigation plan, average of 20 hours per update.
- 252.203–70ZZ—110 disclosures of OCIs after contract award, average of 40 hours per response.

Written comments and recommendations on the proposed information collection should be sent to Ms. Jasmeet Seehra at the Office of Management and Budget, Desk Officer for DoD, Room 10236, New Executive Office Building, Washington, DC 20503, with a copy to the Defense Acquisition Regulations System, Attn: Ms. Amy Williams, OUSD(AT&L)DPAP(DARS), 3060 Defense Pentagon, Room 3B855, Washington, DC 20301–3060. Comments can be received from 30 to 60 days after the date of this notice, but comments to OMB will be most useful if received by OMB within 30 days after the date of this notice.

To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to the Defense Acquisition Regulations System, Attn: Ms. Amy Williams, OUSD(AT&L)DPAP(DARS), 3060 Defense Pentagon, Room 3B855, Washington, DC 20301–3060.

List of Subjects in 48 CFR Parts 202, 203, 212, and 252

Government procurement.

Ynette R. Shelkin,

Editor, Defense Acquisition Regulations System.

Therefore, DoD proposes to amend 48 CFR parts 202, 203, 212, and 252 as follows:

1. The authority citation for 48 CFR parts 202, 203, 212, and 252 continues to read as follows:

Authority: 41 U.S.C. 421 and 48 CFR chapter 1.

PART 202—DEFINITIONS OF WORDS AND TERMS

2. Section 202.101 is amended by adding the definition for "organizational conflict of interest" to read as follows:

202.101 Definitions.

* * * * *

Organizational conflict of interest means a situation in which, with reference to a particular acquisition—

(1) An offeror, or any of its prospective subcontractors, by virtue of its past or present performance of another Government contract, grant, cooperative agreement, or other transaction—

(i) Had access to non-public information that may provide it an unfair advantage in competing for some or all of the proposed effort; or

(ii) Was in a position to set the ground rules, and thereby affect the competition, for the proposed acquisition; or

(2) The contract awardee or any of its subcontractors—

(i) Will have access to non-public information that may provide it an unfair competitive advantage in a later competition for a Government contract;

(ii) May, from the perspective of a reasonable person with knowledge of the relevant facts, be unable to render impartial advice or judgments to the Government; or

(iii) Will be in a position to influence a future competition, whether intentionally or not, in its own favor.

* * * * *

PART 203—IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST

3. Section 203.000 is added to read as follows:

203.000 Scope of part.

This part prescribes policies and procedures for avoiding improper business practices and conflicts of interest and for dealing with their occurrence. It implements 41 U.S.C. 405b.

4. Subpart 203.12 is added to read as follows:

Subpart 203.12—Organizational Conflicts of Interest

Sec.

Subpart 203.12—Organizational Conflicts of Interest

203.1200 Scope of subpart.

This subpart—

(a) Prescribes general rules and procedures for identifying, evaluating, and resolving organizational conflicts of interest (as defined in 202.101); and

(b) Implements section 207 of the Weapons System Acquisition Reform Act of 2009 (Pub. L. 111–23).

203.1201 Definitions.

As used in this subpart—

Contractor means a party to a Government contract other than the Government and includes the total contractor organization, including not only the business unit or segment that signs the contract. It also includes all subsidiaries and affiliates.

Firewall means a combination of procedures and physical security arrangements intended to restrict the flow of information either within an organization or between organizations.

Resolve means to implement an acquisition approach that will enable the Government to acquire the required goods or services while adequately addressing any organizational conflict of interest.

203.1202 Applicability.

(a) This subpart—

(1) Applies to contracts (including task or delivery orders) and modifications to contracts with both profit and nonprofit organizations, including nonprofit organizations created largely or wholly with Government funds;

(2) Does not apply to the acquisition of commercially available off-the-shelf items, but does apply to acquisitions of other commercial items (*see* 212.301(f)(xiv));

(b) Although this subpart applies to every type of acquisition, organizational conflicts of interest are more likely to arise in contracts involving—

(1) Pre-solicitation acquisition support services;

(2) Other support services;

(3) Advisory and assistance services; or

(4) Contractor access to non-public information.

203.1203 Policy.

(a) Organizational conflicts of interest can impair—

(1) The Government's ability to acquire supplies and services that are the best value to the Government. For example—

(i) A contractor with an organizational conflict of interest may influence the Government to pursue an acquisition outcome that is more compatible with the contractor's interests than with the Government's interests.

(ii) A contractor that properly had access to non-public information while performing under a Government contract, grant, cooperative agreement, or other transaction may be able unfairly to use the non-public information to its advantage to win award of a future contract.

(2) The public trust. The Government must avoid the appearance of impropriety which taints the public view of the acquisition system. Organizational conflicts of interest, by their mere appearance, call into question the integrity and fairness of the competitive procurement process. This concern exists regardless of whether any individual contractor employee or contractor organization ever actually renders biased advice or benefits from an unfair competitive advantage.

(b) The vast preponderance of contracting done within DoD is done free of actual or potential conflict of interest. However, there are circumstances under which potential or actual conflict of interest could exist. In those instances, it is the Government's policy to protect its interests by identifying and resolving organizational conflicts of interest. To that end, in every acquisition in which the contracting officer determines that contractor performance of the contemplated work may give rise to one or more organizational conflicts of interest, the contracting activity shall ensure that—

(1) Offerors are required to disclose facts bearing on the possible existence of organizational conflicts of interest both prior to contract award and on a continuing basis during contract performance;

(2) All identified organizational conflicts of interest are either resolved or waived prior to the award of a contract (including individual task or delivery orders); and

(3) The contract establishes a process by which the parties will resolve any organizational conflicts of interest that arise during contract performance.

(c) Except as may be otherwise prohibited within this regulation, it is DoD policy that, generally, the preferred method to resolve an organizational conflict of interest is mitigation (*see* 203.1205–1). It is recognized, however, that mitigation may not be advisable in every instance. In accordance with 203.1205–1(c), in those cases where the contracting officer determines that mitigation is not likely to be effective and the conflict of interest cannot otherwise be resolved, the contracting officer shall select another offeror or request a waiver in accordance with 203.1205–4.

(d) *See* 203.1270 for additional requirements that apply to major defense acquisition programs.

203.1204 Types of organizational conflicts of interest.

There are three types of organizational conflicts of interest.

(a) "Impaired objectivity" organizational conflicts of interest exist when a contractor's judgment and objectivity in performing tasks 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.

(1) Such conflicts generally involve two elements–

(i) The contractor is performing tasks that involve the use of subjective judgment or giving advice; and

(ii) The contractor has a financial or economic interest that could be affected by the outcome of its performance.

(2) Examples of an organizational conflict of interest of this type may arise when—

(i) The contractor (or one of its subcontractors) is required to evaluate products or services it or its affiliates provide or to evaluate the products or services of a competitor or a competitor of an affiliate; or

(ii) A contractor will provide the Government technical or policy advice that could affect its other business interests, to include its interests beyond those related to Government acquisitions.

(b) "Unfair access to non-public information" organizational conflicts of interest arise when 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 advantage in a later competition for a Government contract.

(1) Examples of an organizational conflict of interest of this type may arise when a support contractor in a program office has access to proprietary information or non-public source selection information which could provide the contractor with an unfair competitive advantage in future competitions.

(2) The test for determining whether a contractor's access to non-public information requires resolution is—

(i) Whether the non-public information will be available to potential offerors;

(ii) Whether the non-public information would be competitively useful in responding to a solicitation; and

(iii) Whether the advantage afforded to the contractor by its access to the non-public information is unfair.

(3) Not all competitive advantage is unfair.

(i) The natural competitive advantage of an incumbent contractor or an offeror that has performed similar requirements in the past, does not by itself constitute an unfair competitive advantage.

(ii) When a contractor develops or designs a product, that contractor frequently is in a position to produce the product more quickly, efficiently, and knowledgeably than firms that did not participate in its development. In many instances, the Government may have contracted for and financed the development. Because timeliness, efficiency, quality, and continuity are all important to the Government when it comes to the production process, development contractors have an inherent advantage when it comes to competing for follow-on production contracts. However, while the development contractor has a competitive advantage, it 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.

(c) "Biased ground rules" organizational conflicts of interest may arise when 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. For example, this type of conflict may arise when, as part of its

performance of a Government contract, an offeror will participate in preparing the statement of work or specifications, establishing source selection criteria, or otherwise influencing the ground rules of a future acquisition for which the contractor may compete.

203.1205 Contracting officer responsibilities.

203.1205–1 General.

(a) The contracting officer shall assess early in the acquisition process whether contractor performance of the contemplated work is likely to create any organizational conflicts of interest (*see* 203.1205–2) and shall then resolve, prior to contract award, any organizational conflicts of interest identified (*see* 203.1205–3).

(b) The contracting officer shall exercise common sense, good judgment, and sound discretion—

(1) In deciding whether an acquisition will give rise to any organizational conflicts of interest; and

(2) In developing an appropriate means for resolving any such conflicts.

(c)(1) The contracting officer shall give preference to the use of mitigation to resolve an organizational conflict of interest.

(2) If the contracting officer determines, after consultation with agency legal counsel, that the otherwise successful offeror is unable to mitigate an organizational conflict of interest effectively, then the contracting officer, taking into account both the instant contract and longer term Government needs, shall use another approach to resolve the organizational conflict of interest, select another offeror, or request a waiver.

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

203.1205–2 Identification of organizational conflicts of interest.

(a) The nature of the work to be performed determines whether a potential for a conflict of interest exists; the financial interests and other activities of the offeror/contractor determine whether an actual conflict requiring resolution exists. Therefore, the contracting officer shall particularly consider organizational conflicts of interest during preparation of the solicitation and evaluation of the offers.

(b) *Solicitation.* The contracting officer shall review the nature of the work to be performed to determine whether performance by a contractor could result in an organizational conflict of interest (*see* 203.1202(b)).

(1) The contracting officer should obtain the assistance of the program office, appropriate technical specialists, and legal counsel in identifying potential for organizational conflicts of interest.

(2) In addition, the contracting officer shall require the program office or the requiring activity to identify any contractor(s) that participated in preparation of the statement of work or other requirements documents, including cost or budget estimates.

(3) If the contracting officer determines that contractor performance of the contemplated work does not have the potential to create any organizational conflicts of interest, the contracting officer shall document in the contract file the rationale supporting the decision.

(4) If the contracting officer determines that contractor performance of the contemplated work has the potential to create an organizational conflict of interest, then the contracting officer shall include a provision and clause as prescribed in 203.1206.

(c) *Evaluation of offers.*

(1) Information from offerors. The contracting officer shall use information provided by the offerors (*see* 252.203–70XX, Notice of Potential Organizational Conflict of Interest) to identify organizational conflicts of interest. However, the contracting officer should not rely solely on this contractor-provided information when determining whether an actual organizational conflict of interest will exist upon award.

(2) *Other sources of information.* The contracting officer should seek readily available information about the financial interests of the offerors from within the Government or from other sources to determine whether an organizational conflict of interest will exist upon award.

(i) *Government sources.* Government sources include the files and the knowledge of personnel within—

(A) The contracting office;

(B) Other contracting offices; and

(C) The cognizant contract administration, finance, and audit activities.

(ii) *Non-Government sources.* Non-Government sources include—

(A) Offeror's Web site;

(B) Credit rating services;

(C) Trade and financial journals; and

(D) Business directories and registers.

(3) In competitive acquisitions, whether by sealed bid or negotiation, the contracting officer shall communicate to an offeror any issues or concerns raised by the offeror's proposed organizational conflict of interest resolution plan and provide the offeror an opportunity to craft an acceptable solution. If resolution of an organizational conflict of interest is an evaluation criterion, the evaluation methodology shall be on an acceptable/non-acceptable basis.

203.1205–3 Resolution of organizational conflicts of interest.

Organizational conflicts of interest may be resolved by avoidance, limitation on future contracting, or mitigation. In some circumstances, a combination of resolution methods may be appropriate.

(a) *Avoidance.* Avoidance consists of Government action on one acquisition that is intended to prevent organizational conflicts of interest from arising in future acquisitions. Use of this technique is appropriate when, because of the nature of the work contemplated in the initial acquisition, the contractor for the initial acquisition would have access to non-public information or would be in a position to influence the ground rules for a future acquisition. In order to remain eligible for the future acquisition, a contractor will avoid, or be prohibited from, submitting an offer for the initial acquisition. In order to successfully implement an avoidance strategy, the contracting officer should work with the program office or requiring activity early in the acquisition process. Methods of avoiding future organizational conflicts of interest include, but are not limited to, the following examples:

(1) Excluding an offeror or class of offerors from proposing to perform the work that could create an organizational conflict of interest on a future contract (*e.g.,* excluding offerors that have a production capability for the future contract from being eligible to develop the specifications or statement of work). The use of an avoidance approach that prohibits a class of contractors or a list of specific contractors from participating in an acquisition has the potential to substantially reduce competition and reduce the Government's potential to consider sources that may offer a best-value solution. Therefore, this approach should be used only if the contracting officer has determined that no less restrictive forms of resolution will adequately protect the Government's interest. This determination must be documented in the contract file.

(2) Drafting the statement of work to exclude tasks that require contractors to utilize subjective judgment. Tasks requiring subjective judgment, which involves the exercise of independent judgment, include—

(i) Making recommendations;
(ii) Providing analysis, evaluation, planning, or studies; and
(iii) Preparing statements of work or other requirements and solicitation documents.
(3) Structuring the contract requirements so that contractors can perform the work without access to non-public information to the extent feasible.
(b) *Limitation on future contracting (neutralization).*
(1) A limitation on future contracting allows a contractor to perform on the instant contract but precludes the contractor from submitting offers for future contracts where the contractor could obtain an unfair advantage in competing for award. The limitation on future contracting effectively neutralizes the organizational conflict of interest.
(2) Limitations on future contracting shall be restricted to a fixed term of reasonable duration that is sufficient to neutralize the organizational conflict of interest. The restriction shall end on a specific date or upon the occurrence of an identifiable event.
(c) *Mitigation.* Mitigation is any action taken to minimize an organizational conflict of interest to an acceptable level. Mitigation may require Government action, contractor action, or a combination of both. A Government-approved mitigation plan, reflecting the actions a contractor has agreed to take to mitigate a conflict, shall be incorporated into the contract. Ways of acceptably mitigating organizational conflicts of interest include, but are not limited to, the following:
(1) *Using a firewall.* (i) A firewall by itself, without any additional mitigation actions, is appropriate to resolve only "unfair access to non-public information" organizational conflicts of interest (but *see* paragraph (c)(3) of this subsection).
(ii) A firewall—
(A) May include an agreement to limit reassignment of contractor employees who have access to non-public information; and
(B) May also apply to the reporting chain within a company to ensure that an employee's supervisor is not in a position to exercise inappropriate influence on another acquisition.
(2) Disseminating previously non-public information to all offerors. This technique involves the Government disclosing to all offerors the competitively useful, non-public information previously accessed by the conflicted contractor in order to remove the unfair competitive advantage. This technique is appropriate only to resolve "unfair access to non-public information" conflicts and should be used only after the contracting officer has carefully investigated and reasonably determined the extent and type of non-public information to which the conflicted contractor had access.
(3) Requiring a subcontractor or team member that is conflict free to perform the conflicted portion of the work on the instant contract. This technique will not be effective unless it is utilized in conjunction with a firewall around the contractor or conflicted team member. This technique may be used to resolve any types of organizational conflict of interest.

203.1205–4 Waiver.

(a) *Authority.* (1) The agency head may waive the requirement to resolve an organizational conflict of interest in a particular acquisition only if the agency head determines that resolution of the organizational conflict of interest is either not feasible or is not in the best interest of the Government.
(2) The agency head shall not delegate this waiver authority below the head of a contracting activity.
(b) Any waiver shall–
(1) Be in writing;
(2) Cover just one contract action;
(3) Describe the extent of the conflict;
(4) Explain why it is not feasible or not in the best interest of the Government to resolve the organizational conflict of interest; and
(5) Be approved by the appropriate official.
(c) *Use of waivers.*
(1) Agencies shall resolve conflicts to the extent feasible before granting a waiver for any remaining conflicts.
(2) Circumstances when waivers are appropriate include, but are not limited to, the following examples:
(i) A limited-time waiver is necessary to allow a contractor time to divest itself of conflicting businesses or contracts and the contractor agrees to stringent mitigation measures in the interim.
(ii) A waiver is necessary in order for the agency to obtain a particular expertise.
(3) Waivers shall not be used in competitive acquisitions unless the solicitation specifically informs offerors that the Government reserves the right to waive the requirement to resolve organizational conflicts of interest (*see* 252.203–70XX(h)).
(4) The contracting officer shall include the waiver request and decision in the contract file.

203.1205–5 Award.

(a) Before withholding award from the apparent successful offeror based on conflict of interest considerations, the contracting officer shall—
(1) Notify the contractor in writing;
(2) Provide the reasons therefor; and
(3) Allow the contractor a reasonable opportunity to respond.
(b) Except as provided in paragraphs (c) and (d), the contracting officer shall award the contract to the apparent successful offeror only if all organizational conflicts of interest are resolved.
(c) If the contracting officer finds that it is in the best interest of the United States to award the contract notwithstanding a conflict of interest, a request for waiver shall be submitted in accordance with 203.1205–4.
(d)(1) For task or delivery order contracts, it may not be possible for the contracting officer to identify all organizational conflict of interest issues at the time of award of the task or delivery order contract. To the extent an organizational conflict of interest can be identified at the time of task or delivery order contract award, the contracting officer shall include a resolution plan (mitigation plan or limitation on future contracting) in the basic contract.
(2) The contracting officer shall consider organizational conflicts of interest at the time of issuance of each order. If a resolution plan is in the basic task or delivery order contract at the time of its award, the contracting officer may need to appropriately tailor the resolution when issuing an order. For example, appropriate tailoring could include—
(i) Establishment of a reasonable time limitation on future contracting;
(ii) Description of the arrangement where a team member without the conflict performs the effort;
(iii) Description of the nature of the limitation on reassignments of a firewall; or
(iv) Identification of the resolution method most appropriate for the order;
(3) For multiple-award task or delivery order contracts against which other agencies may place orders and for GSA Schedules, the contracting officer for the ordering agency may determine that an organizational conflict of interest precludes award of an order unless a Government-approved mitigation plan is incorporated into the order. The contracting officer placing the order is responsible for administering the plan.

203.1206 Solicitation provision and contract clauses.

(a) The contracting officer shall include a solicitation provision substantially the same as 252.203–70XX, Notice of Potential Organizational Conflict of Interest, upon determining that contractor performance of the work may give rise to organizational conflicts of interest.

(1) The contracting officer should fill in paragraph (c) of the provision when the Government has taken action prior to release of the solicitation to address or resolve potential organizational conflicts of interest.

(2) If the contracting officer has decided on an approach for resolving organizational conflicts of interest prior to release of the solicitation, the contracting officer may include information regarding the type of resolution the contracting officer believes will be necessary to resolve the conflict. For example, the contracting officer may determine in advance that a limitation on future contracting is the most appropriate method for resolving the conflicts.

(3) The representation in this provision is not in the Online Representations and Certifications Application (ORCA) database.

(b)(1) The contracting officer shall include in solicitations and contracts a clause substantially the same as 252.203–70YY, Resolution of Organizational Conflicts of Interest, when the contract may involve an organizational conflict of interest that can be resolved by an acceptable contractor-submitted mitigation plan prior to contract award.

(2) The contracting officer shall consider whether the mitigation plan should include a limitation on reassignments of personnel with unfair access to non-public information. The contracting officer and the contractor shall agree upon a reasonable period of time for the restriction on reassignments. In the case of access to non-public pre-solicitation information, a reasonable period of time is after contract award and expiration of the protest period.

(c) The contracting officer shall include in solicitations and contracts a clause substantially the same as 252.203–70YZ, Limitation on Future Contracting, when the resolution of the organizational conflict of interest will involve a limitation on future contracting.

(1) The contracting officer shall fill in the nature of the limitation on future contractor activities in paragraph (b) of the clause.

(2) The contracting officer may modify the duration of the limitation, but the duration shall be sufficient to neutralize any unfair competitive advantage or potential bias.

(d) The contracting officer shall include in solicitations and contracts a clause substantially the same as 252.203–70ZZ, Disclosure of Organizational Conflict of Interest after Contract Award, when the solicitation includes the provision 252.203–70XX, Notice of Potential Organizational Conflict of Interest.

203.1270 Implementation of section 207 of the Weapons System Acquisition Reform Act of 2009 (Pub. L. 111–23).

203.1270–1 Definitions.

As used in this section—

Lead system integrator is defined in the clause at 252.209–7007, Prohibited Financial Interests for Lead System Integrators.

Major defense acquisition program is defined in 10 U.S.C. 2430.

Major subcontractor is defined in the clause at 52.203–70WW, Organizational Conflict of Interest—Major Defense Acquisition Program.

Systems engineering means a combination of substantially all of the following activities:

(1) Determining specifications.

(2) Identifying and resolving interface problems.

(3) Developing test requirements.

(4) Evaluating test data.

(5) Supervising design.

Technical assistance means a combination of substantially all of the following activities:

(1) Developing work statements.

(2) Determining parameters.

(3) Directing other contractors' operations.

(4) Resolving technical controversies.

203.1270–2 Applicability.

This section applies to major defense acquisition programs.

203.1270–3 Policy.

(a) The Department of Defense must ensure that it obtains advice on major defense acquisition programs from sources that are objective and unbiased.

(b) Agencies shall obtain advice on systems architecture and systems engineering matters with respect to major defense acquisition programs from Federally Funded Research and Development Centers or other sources independent of the major defense acquisition program contractor.

203.1270–4 Lead system integrators.

For limitations on contractors acting as lead systems integrators, *see* 209.570.

203.1270–5 Identification of organizational conflicts of interest.

(a) When evaluating organizational conflicts of interest for major defense acquisition programs, contracting officers shall consider—

(1) The ownership of business units performing systems engineering and technical assistance, professional services, or management support services to a major defense acquisition program by a contractor who simultaneously owns a business unit competing to perform as—

(i) The prime contractor for the same major defense acquisition program; or

(ii) The supplier of a major subsystem or component for the same major defense acquisition program;

(2) 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

(3) The performance by, or assistance of, contractors in technical evaluation.

(b) *See* PGI 203.1270–5 for examples of organizational conflicts of interest that can arise in contracts for lead system integrators and the other specific areas of concern identified in paragraph (a) of this section.

203.1270–6 Systems engineering and technical assistance contracts.

(a) Except as provided in paragraph (b) of this subsection, a contract for the performance of systems engineering and technical assistance for a major defense acquisition program shall 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.

(b) Paragraph (a) of this subsection does not apply if the contracting officer determines that—

(1) The performance is design and development work in accordance with FAR 9.505–2(a)(3), FAR 9.505–2(b)(3), or preparation of work statements in accordance with FAR 9.505–2(b)(1)(ii); or

(2) The contractor is highly qualified with domain experience and expertise and the organizational conflict of interest will be adequately resolved in accordance with 203.1205–3.

203.1270–7 Solicitation provision and contract clause.

In addition to the provisions and clause required by 203.1206—

(a) Use the provision at 252.203–70VV, Notification of Prohibition Relating to Organizational Conflict of Interest—Major Defense Acquisition Program, if the solicitation includes the clause 252.203–70WW, Organizational Conflict of Interest—Major Defense Acquisition Program; and

(b) Use the clause at 252.203–70WW, Organizational Conflict of Interest—Major Defense Acquisition Program, in solicitations and contracts for systems

engineering and technical assistance for major defense acquisition programs, unless the contracting officer has determined that an exception at 203.1270–6(b) applies that does not require an Organizational Conflict of Interest Mitigation Plan.

PART 212—ACQUISITION OF COMMERCIAL ITEMS

5. Section 212.301 is amended by adding paragraph (f)(xiv) to read as follows:

212.301 Solicitation provisions and contract clauses for the acquisition of commercial items.

* * * * *

(f) * * *

(xiv) Except when acquiring commercially available off-the-shelf items, the contracting officer shall use the provision and clauses relating to Organizational Conflicts of Interest as prescribed at 203.1206 and 203.1270–7, when applicable. The representation in this provision is not in the Online Representations and Certifications Application (ORCA) database.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

6. Sections 252.203–70VV through 252.203–70ZZ are added to read as follows:

252.203–70VV Notice of Prohibition Relating to Organizational Conflict of Interest—Major Defense Acquisition Program.

As prescribed in 203.1270–7(a), use the following provision:

Notice of Prohibition Relating to Organizational Conflict of Interest—Major Defense Acquisition Program (DATE)

(a) *Definitions. Major subcontractor* is defined in the clause at 52.201–WW, Organizational Conflict of Interest—Major Defense Acquisition Program.

(b) This solicitation is for the performance of systems engineering and technical assistance for a major defense acquisition program.

(c) *Prohibition.* As required by paragraph (b)(3) of section 207 of the Weapons System Acquisition Reform Act of 2009 (Pub. L. 111–23), if awarded the contract, the contractor or any affiliate of the contractor is prohibited from participating as a prime contractor or a major subcontractor in the development or construction of a weapon system under the major defense acquisition program, unless the offeror submits, and the Government approves, an Organizational Conflict of Interest Mitigation Plan.

(d) *Request for an exception.* If the offeror requests an exception to the prohibition of paragraph (c) of this provision, then the offeror shall submit an Organizational Conflict of Interest Mitigation Plan with its offer for evaluation. If the plan is acceptable, it will be incorporated into the resultant contract and paragraph (d) of the clause at 252.203–70WW will become applicable.

(End of provision)

252.203–70WW Organizational Conflict of Interest—Major Defense Acquisition Program.

As prescribed in 203.1270–7(b), use the following clause:

Organizational Conflict of Interest—Major Defense Acquisition Program (DATE)

(a) *Definition. Major subcontractor,* as used in this clause, means a subcontractor that is awarded subcontracts totaling more than 10 percent of the value of the contract under which the subcontracts are awarded.

(b) This contract is for the performance of systems engineering and technical assistance for a major defense acquisition program.

(c) *Prohibition.* Except as provided in paragraph (d) of this clause, as required by paragraph (b)(3) of section 207 of the Weapons System Acquisition Reform Act of 2009 (Pub. L. 111–23), the Contractor or any affiliate of the Contractor is prohibited from participating as a prime contractor or major subcontractor in the development or construction of a weapon system under the major defense acquisition program.

(d) *Organizational Conflict of Interest Mitigation Plan.* If the Contractor submitted an acceptable Organizational Conflict of Interest Mitigation Plan that has been incorporated into this contract, then paragraph (c) of this clause does not apply. The Contractor shall comply with the Organizational Conflict of Interest Mitigation Plan. Compliance with the Organizational Conflict of Interest Mitigation Plan is a material requirement of the contract. Failure to comply may result in the Contractor or any affiliate of the Contractor being prohibited from participating as a contractor or major subcontractor in the development or construction of a weapon system under the program, in addition to any other remedies available to the Government for non-compliance with a material requirement of a contract.

(End of clause)

252.203–70XX Notice of Potential Organizational Conflict of Interest.

As prescribed in 203.1206(a), insert a provision substantially the same as the following:

Notice of Potential Organizational Conflict of Interest (DATE)

(a) *Definitions.* As used in this provision—

Organizational conflict of interest means a situation in which, with reference to a particular acquisition—

(1) An offeror, or any of its prospective subcontractors, by virtue of its past or present performance of another Government contract, grant, cooperative agreement, or other transaction—

(i) Had access to non-public information that may provide it an unfair advantage in competing for some or all of the proposed effort; or

(ii) Was in a position to set the ground rules, and thereby affect the competition, for the proposed acquisition; or

(2) The contract awardee or any of its subcontractors—

(i) Will have access to non-public information that may provide it an unfair competitive advantage in a later competition for a Government contract;

(ii) May, from the perspective of a reasonable person with knowledge of the relevant facts, be unable to render impartial advice or judgments to the Government; or

(iii) Will be in a position to influence a future competition, whether intentionally or not, in its own favor.

Resolve means to implement an acquisition approach that will enable the Government to acquire the required goods or services while adequately addressing any organizational conflict of interest.

(b) *Notice.* The Contracting Officer has determined that the nature of the work to be performed in the contract resulting from this solicitation is such that it may give rise to organizational conflicts of interest (*see* subpart 203.12, Organizational Conflicts of Interest).

(c) *Action already taken by Government to resolve organizational conflict of interest.* _____ [*Contracting Officer to describe the steps the Government has taken to resolve the conflict(s) of interest, if any.*]

(d) *Pre-proposal requirement.* Applying the principles of FAR subpart 203.12, the offeror shall assess whether there is an organizational conflict of interest associated with the offer it plans to submit. Before preparing its offer, the offeror should inform the Contracting Officer of any potential conflicts of interest, including those involving contracts, grants, cooperative agreements, or other transactions with other Government organizations, in order that the Government may assess whether the conflicts will require resolution.

(e) *Proposal requirements.* (1) The offeror shall—

(i)(A) Disclose all relevant information regarding any organizational conflicts of interest; or

(B) Represent, to the best of its knowledge and belief, that there will be no organizational conflict of interest; and

(ii) 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.

(2) To the extent that either the offeror or the Government identifies any organizational conflicts of interest, the offeror shall explain the actions it intends to use to resolve such conflicts, *e.g.,* by submitting a mitigation plan and/or accepting a limitation on future contracting.

(3) If the offeror's proposed action to resolve an organizational conflict of interest is not acceptable, the Contracting Officer will

notify the offeror in writing, providing the reasons why the proposed resolution is not considered acceptable and allowing the offeror a reasonable opportunity to respond before making a final decision on the organizational conflict of interest.

(4) The Contracting Officer has the sole authority to determine whether an organizational conflict of interest exists and to determine whether the organizational conflict of interest has been adequately resolved.

(f) *Resultant contract.* (1) If the offeror submits an organizational conflict of interest mitigation plan that the Contracting Officer approves, the resultant contract will include the Government-approved Mitigation Plan and a clause substantially the same as 252.203–70YY, Resolution of Organizational Conflicts of Interest.

(2) If the resolution of the organizational conflict of interest involves a limitation on future contracting, the resultant contract will include a clause substantially the same as 252.203–70YZ, Limitation on Future Contracting.

(g) *Termination for default.* 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.

(h) *Waiver.* The agency reserves the right to waive the requirement to resolve any organizational conflict of interest.

(End of provision)

252.203–70YY Resolution of Organizational Conflicts of Interest.

As prescribed in 203.1206(b)(1), insert a clause substantially the same as the following:

Resolution of Organizational Conflicts of Interest (DATE)

(a) *Definitions.* As used in this clause—

Contractor means a party to a Government contract other than the Government and includes the total contractor organization, including not only the business unit or segment that signs the contract. It also includes all subsidiaries and affiliates.

Organizational conflict of interest means a situation in which, with reference to a particular acquisition—

(1) An offeror, or any of its prospective subcontractors, by virtue of its past or present performance of another Government contract, grant, cooperative agreement, or other transaction—

(i) Had access to non-public information that may provide it an unfair advantage in competing for some or all of the proposed effort; or

(ii) Was in a position to set the ground rules, and thereby affect the competition, for the proposed acquisition; or

(2) The contract awardee or any of its subcontractors—

(i) Will have access to non-public information that may provide it an unfair competitive advantage in a later competition for a Government contract;

(ii) May, from the perspective of a reasonable person with knowledge of the relevant facts, be unable to render impartial advice or judgments to the Government; or

(iii) Will be in a position to influence a future competition, whether intentionally or not, in its own favor.

(b) *Mitigation plan.* (1) The Government-approved Organizational Conflict of Interest Mitigation Plan (Mitigation Plan) and its obligations are hereby incorporated in the contract by reference.

(2) The Contractor shall update the mitigation plan within 30 days of any changes to the legal construct of the organization, subcontractor changes, or significant management or ownership changes.

(c) *Changes.* Either the Contractor or the Government may propose changes to the Mitigation Plan. Such changes are subject to the mutual agreement of the parties and will become effective only upon written approval of the revised Mitigation Plan by the Contracting Officer.

(d) *Noncompliance.* (1) The Contractor shall report to the Contracting Officer any noncompliance with this clause or with the Mitigation Plan, whether by its own personnel or those of the Government or other contractors.

(2) The report shall describe the noncompliance and the actions the Contractor has taken or proposes to take to mitigate and avoid repetition of the noncompliance.

(3) After conducting such further inquiries and discussions as may be necessary, the Contracting Officer and the Contractor shall agree on appropriate corrective action, if any, or the Contracting Officer will direct corrective action, subject to the terms of this contract.

(e) *Subcontracts.* The Contractor shall include the substance of this clause, including this paragraph (e), in subcontracts where the work includes or may include tasks related to the organizational conflict of interest. The terms "Contractor" and "Contracting Officer" shall be appropriately modified to reflect the change in parties and to preserve the Government's rights.

(End of clause.)

252.203–70YZ Limitation on Future Contracting.

As prescribed in 203.1206(c), insert a clause substantially the same as the following:

Limitation on Future Contracting (DATE)

(a) *Definitions.*

Contractor means a party to a Government contract other than the Government and includes the total contractor organization, including not only the business unit or segment that signs the contract. It also includes all subsidiaries and affiliates.

(b) *Limitation.* The Contractor shall be ineligible to perform _____ [*Contracting Officer to describe the work that the Contractor will be ineligible to perform*] for a period of three years.

(c) *Subcontracts.* The Contractor shall include the substance of this clause, including this paragraph (c), in subcontracts where the work includes tasks which result in an organizational conflict of interest. The terms "Contractor" and "Contracting Officer" shall be appropriately modified to reflect the change in parties and to preserve the Government's rights.

(End of clause.)

252.203–70ZZ Disclosure of Organizational Conflict of Interest after Contract Award.

As prescribed in 203.1206(d), insert the following clause:

Disclosure of Organizational Conflict of Interest After Contract Award (DATE)

(a) *Definitions.* As used in this clause—

Contractor means a party to a Government contract other than the Government and includes the total contractor organization, including not only the business unit or segment that signs the contract. It also includes all subsidiaries and affiliates.

Organizational conflict of interest means a situation in which, with reference to a particular acquisition—

(1) An offeror, or any of its prospective subcontractors, by virtue of its past or present performance of another Government contract, grant, cooperative agreement, or other transaction—

(i) Had access to non-public information that may provide an unfair advantage in competing for some or all of the proposed effort; or

(ii) Was in a position to set the ground rules, and thereby affect the competition, for the proposed acquisition; or

(2) The contract awardee or any of its subcontractors—

(i) Will have access to non-public information that may provide it an unfair competitive advantage in a later competition for a Government contract;

(ii) May, from the perspective of a reasonable person with knowledge of the relevant facts, be unable to render impartial advice or judgments to the Government; or

(iii) Will be in a position to influence a future competition, whether intentionally or not, in its own favor.

Resolve means to implement an acquisition approach that will enable the Government to acquire the required goods or services—while adequately addressing any organizational conflict of interest.

(b) If the Contractor identifies an organizational conflict of interest that has not already been adequately resolved and for which a waiver has not been granted, the Contractor shall make a prompt and full disclosure in writing to the Contracting Officer. Organizational conflicts of interest that arise during the performance of the contract, as well as newly discovered conflicts that existed before contract award, shall be disclosed. This disclosure shall include a description of—

(1) The organizational conflict of interest; and

(2) Actions to resolve the conflict that—

(i) The Contractor has taken or proposes to take, or

(ii) The Contractor recommends that the Government take.

(c) If, in compliance with this clause, the Contractor identifies and promptly reports an organizational conflict of interest that cannot be resolved in a manner acceptable to the Government, the Contracting Officer may terminate this contract for convenience of the Government.

(d) *Breach.* Any nondisclosure or misrepresentation of any relevant facts regarding organizational conflicts of interests will constitute a breach and may result in—

(1) Termination of this contract for default; or

(2) Exercise of other remedies as may be available under law or regulation.

(e) *Subcontracts.* The Contractor shall include the substance of this clause, including this paragraph (e), in subcontracts where the work includes or may include tasks that may create a potential for an organizational conflict of interest. The terms "Contractor" and "Contracting Officer" shall be appropriately modified to reflect the change in parties and to preserve the Government's rights.

(End of clause.)

[FR Doc. 2010–9210 Filed 4–21–10; 8:45 am]

BILLING CODE 5001–08–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

49 CFR Part 580

[Docket No. NHTSA–2010–0046; Notice 1]

Petition for Approval of Alternate Odometer Disclosure Requirements

AGENCY: National Highway Traffic Safety Administration (NHTSA), DOT.

ACTION: Initial determination.

SUMMARY: The State of Wisconsin has petitioned for approval of alternate odometer requirements to certain requirements under Federal odometer law. NHTSA has initially determined that Wisconsin's alternate requirements satisfy Federal odometer law, with limited exceptions. Accordingly, NHTSA has preliminarily decided to grant Wisconsin's petition on condition that before NHTSA makes a final determination, Wisconsin amends its program to meet all the requirements of Federal odometer law or demonstrates that it meets the requirements of Federal law. This document is not a final agency action.

DATES: Comments are due no later than May 24, 2010.

ADDRESSES: You may submit comments [identified by DOT Docket ID Number NHTSA–2010–0046] by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Mail:* Docket Management Facility: U.S. Department of Transportation, 1200 New Jersey Avenue SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery or Courier:* West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., between 9 a.m. and 5 p.m. ET, Monday through Friday, except Federal holidays.
- *Fax:* 202–493–2251.

Instructions: For detailed instructions on submitting comments and additional information on the rulemaking process, *see* the Public Participation heading of the Supplementary Information section of this document. Note that all comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided. Please *see* the Privacy Act heading below.

Privacy Act: Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, *etc.*). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78) or you may visit *http://DocketInfo.dot.gov .*

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov* or the street address listed above. Follow the online instructions for accessing the dockets.

FOR FURTHER INFORMATION CONTACT: Andrew DiMarsico, Office of the Chief Counsel, National Highway Traffic Safety Administration, 1200 New Jersey Avenue, SE., West Building W41–227, Washington, DC 20590 (Telephone: 202–366–5263) (Fax: 202–366–3820).

SUPPLEMENTARY INFORMATION:

I. Introduction

Federal odometer law, which is largely based on the Motor Vehicle Information and Cost Savings Act (Cost Savings Act) [1] and Truth in Mileage Act of 1986 [2], as amended (TIMA), contains a number of provisions to limit odometer fraud and assure that the purchaser of a motor vehicle knows the true mileage of the vehicle. The Cost Savings Act requires the Secretary of Transportation to promulgate regulations requiring the transferor (seller) of a motor vehicle to provide a written statement of the vehicle's mileage registered on the odometer to the transferee (buyer) in connection with the transfer of ownership. This written statement is generally referred to as the odometer disclosure statement. Further, under TIMA, vehicle titles themselves must have a space for the odometer disclosure statement and States are prohibited from licensing vehicles unless a valid odometer disclosure statement on the title is signed and dated by the transferor. Titles must also be printed by a secure printing process or other secure process. With respect to leased vehicles, TIMA provides that the regulations promulgated by the Secretary require written mileage disclosures be made by lessees to lessors upon the lessor's transfer of the ownership of the leased vehicle. Lessors must also provide written notice to lessees about odometer disclosure requirements and the penalties for not complying with them. Federal law also contains document retention requirements for odometer disclosure statements.

TIMA's motor vehicle mileage disclosure requirements apply in a State unless the State has alternate requirements approved by the Secretary. The Secretary has delegated administration of the odometer program to NHTSA. Therefore, a State may petition NHTSA for approval of such alternate odometer disclosure requirements.

Seeking to implement an electronic vehicle title transfer system, the State of Wisconsin has petitioned for approval of alternate odometer disclosure requirements. The Wisconsin Department of Transportation proposes a paperless odometer disclosure program. Last year, NHTSA reviewed certain requirements for alternative State programs and approved the Commonwealth of Virginia's alternate odometer disclosure program. 74 FR 643, 650 (January 7, 2009). Wisconsin's program is similar to Virginia's program in some respects and is broader in scope than Virginia's in others. Like Virginia's program, transactions involving an out-of-State party are not, in general, within the scope of Wisconsin's program. Wisconsin Pet. p. 2. Unlike Virginia's program, which did not apply to transactions for leased vehicles, Wisconsin's proposal implicates provisions of Federal odometer law related to these vehicles. Wisconsin Pet. p. 4.

As discussed below, NHTSA's initial assessment is that the Wisconsin program satisfies the requirements for approval under Federal odometer law, subject to resolution of certain concerns.

[1] Public Law 92–513, 86 Stat 947, 961 (1972).

[2] Public Law 99–579, 100 Stat. 3309 (1986).