



Proposed OCI Rules

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May 20, 2010

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Webinar Agenda

- Background
- Proposed DFARS rules
- Potential impact on business strategy
- Potential impact on bid protests
- Questions

Background

- Weapons System Acquisition Reform Act of 2009 (“WSARA”)
- Panel on Contracting Integrity
- Duncan Hunter National Defense Authorization Act for FY2009
- FAR Case 2007-018

WSARA

- Senators McCain and Levin introduced bill
 - “many of the systems engineering firms which previously provided independent assessment [of major defense acquisition programs] have been acquired by the large prime contractors”
 - “different business units of the same firm can end up with both the service and product side in the same program or market area”
 - “This structural conflict of interest may result in ‘bias [and] impaired objectivity,’ which cannot be resolved through firewalls or other traditional mitigation mechanisms”

WSARA

- Signed by President Obama on May 22, 2009
- DoD must revise DFARS
 - Provide uniform guidance and tighten existing requirements for organizational conflicts of interest by contractors in major defense acquisition programs
 - What is an MDAP?
 - ✓ Designated by USD(AT&L), or
 - ✓ Total program spend in excess of \$2.19B

WSARA

- The revised regulations must
 - Prohibit SETA contractors from participating as prime or major sub in development or construction of a weapon system under the program
 - Ensure that prime contractors with production responsibilities for major defense acquisition programs cannot be the exclusive source of advice on systems architecture and systems engineering matters with respect to those programs
 - Establish limited exceptions as may be necessary

Proposed Rules

- Issued on April 22, 2010
- Deadline for comments is June 21, 2010
- DoD proposes to use new rules for all Defense acquisitions
- After FAR is revised, DoD will follow FAR and revise the DFARS to address OCIs specifically relating to major defense acquisition program

Proposed Rules

- Preamble mentions five guiding principles
 - Incorporate guidance reflected in GAO and COFC decisions from last 15 years
 - Focus on type of conflict, not task and type of work
 - Relocate to Part 3 (improper business practices)
 - Standard provisions and clauses are beneficial
 - Need to specifically address task and delivery orders

Proposed Rules

- Statement of DoD Policy
 - OCIs can impair the government's ability to acquire supplies and services that are the best value
 - OCIs can impair the public trust because the government must avoid the appearance of impropriety
 - OCIs must be identified and resolved or waived before award
 - OCIs must be identified and resolved during contract performance
 - Mitigation is the preferred resolution

Proposed Rules

- Applicability (§ 203.1202)
 - All DoD acquisitions, except those for COTS items
 - Modifications
 - Task or delivery orders
 - Profit and nonprofit organizations

Proposed Rules

- Types of OCIs (§ 203.1204)
 - Tracks *Aetna Gov't Health Plans, Inc.*, B-254397, *et al.*, July 27, 1995, 95-2 CPD ¶ 129
 - Three types of conflicts
 - ✓ Impaired objectivity
 - ✓ Unfair access to non-public information
 - ✓ Biased ground rules

Proposed Rules

- Identification of OCIs (§ 203.1205-2)
 - CO must consider potential OCIs at two points
 - Preparation of solicitation
 - ✓ Seek assistance from Program office and counsel
 - ✓ Program office must identify contractors that worked on SOW or other requirements documents, including cost or budget estimates
 - During evaluation of offers
 - ✓ Examine information from offerors
 - ✓ Examine information from other sources

Proposed Rules

- CO must consider entire “contractor organization, including not only the business unit or segment” that is seeking a contract, but also “all subsidiaries and affiliates”
 - Broad definition consistent with GAO and COFC decisions
- Definition of OCI requires CO (as well as offeror) to examine proposed subcontractors’ activities

Proposed Rules

- Resolution (§ 203.1205-3)
 - Avoidance
 - Limitation on future contracting (neutralization)
 - Mitigation

Proposed Rules

- Avoidance
 - Structuring requirements so that contractors can perform work without access to non-public information
 - Drafting SOW narrowly to exclude tasks that require contractors to utilize subjective judgment
 - Excluding one or more offerors from proposing to perform if participation would create a conflict for contract at issue or for a future contract
 - ✓ Disfavored because it would reduce competition
 - ✓ Can only be used if CO has determined that there is not a less restrictive alternative

Proposed Rules

- Limitation on future contracting
 - Allows contractor to perform on one contract but precludes the offeror from submitting offers for future contracts
 - Any limitation must be restricted to a fixed duration sufficient to neutralize the OCI

Proposed Rules

- Mitigation
 - Preferred method
 - Generic term for any action that minimizes OCI to an “acceptable level”
 - Plan must be incorporated into the final contract
 - Examples
 - ✓ Firewall
 - A firewall within an offeror’s organization, without more, is appropriate to resolve only unfair access to non-public information OCIs
 - ✓ Dissemination of previously non-public information
 - ✓ Firewallled subcontractor

Proposed Rules

- Waiver (§ 203.1205-4)
 - Head of agency may waive the requirement to resolve an OCI in a particular acquisition
 - ✓ Agency must determine that resolution is not feasible or not in the best interest of the government
 - Can only be used to resolve residual conflict(s), once an agency has resolved the balance of the conflict to the extent feasible
 - Authority can be delegated, but not below head of contracting activity

Proposed Rules

- Waiver (§ 203.1205-4)
 - Any waiver must
 - ✓ Be in writing
 - ✓ Be applicable to only one contract action
 - ✓ Describe extent of the conflict
 - ✓ 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 solicitation informs offerors that the government reserves the right to waive

Proposed Rules

- Waiver (§ 203.1205-4)
 - Two examples in proposed rules
 - ✓ Limited waiver to allow a contractor to divest itself of the conflicting business or contract if contractor agrees to stringent mitigation measures in the interim
 - ✓ Waiver may be appropriate in order for the agency to obtain a particular expertise

Proposed Rules

- Award decision (§ 203.1205-5)
 - CO shall award the contract to apparent successful offeror “only if all organizational conflicts of interest are resolved”
 - Before CO can withhold award from apparent successful offeror because of OCI considerations, CO must
 - ✓ Notify contractor in writing
 - ✓ Provide reasons for determination
 - ✓ Allow contractor an opportunity to respond

Proposed Rules

- Task or delivery orders (§ 203.1205-5)
 - If OCI can be identified when basic contract awarded, CO must include resolution plan in basic contract
 - CO 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
 - For multiple-award task or delivery order contracts against which other agencies may place orders, CO for ordering agency is responsible for administering a mitigation plan and/or determining that an OCI precludes award of an order

Proposed Rules

- Contractor disclosure requirements
 - Pre-Award
 - Post-Award

Proposed Rules

- Pre-Award disclosures (§ 252.203-70XX)
 - If CO determines an OCI may exist, must insert solicitation provision that requires
 - ✓ If offeror finds there is an OCI, it must inform CO “before preparing its offer”
 - ✓ When it submits proposal, 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”
 - ✓ 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”

Proposed Rules

- Post-Award disclosures (§ 252.203-70ZZ)
 - Contractor has ongoing obligation to make “a prompt and full disclosure” to CO of any OCIs that arise during performance
 - Contractor must also disclose newly discovered conflicts that existed before contract award
 - Contractor must update mitigation plan within 30 days regarding any changes to its organization, subcontractor changes, or significant management or ownership changes
 - Contractor must report to CO any noncompliance with a mitigation plan

Proposed Rules

- Mandatory flow-down of disclosure requirements to subcontractors
 - Must include requirement in subcontracts “where the work includes or may include tasks related to the organizational conflict of interest”
 - ✓ How to make that determination?
 - Practical consideration relating to sharing proprietary information

Proposed Rules

- Possible consequence for failure to comply with disclosure requirements
 - Termination for default
 - False Statements
 - False Claims Act
 - Mandatory Disclosure

Proposed Rules

- SETA contractors for MDAPs (§ 203.1270)
 - WSARA implementation
 - Contract for SETA functions on major defense 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
 - Exceptions
 - ✓ Design and development contractors
 - ✓ Highly qualified contractors with domain experience and expertise if the conflict can be adequately resolved

Proposed Rules

- SETA contractors for MDAPs (§ 203.1270)
 - WSARA implementation
 - 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”
 - Although authorized by WSARA, proposed rules contain no exceptions to the above requirement

Potential Impact on Business Strategy

- Divestitures of business units
 - Recent Northrup Grumman spin off of TASC
 - Due diligence
 - Beware of *McCarthy/Hunt*
 - ✓ OCIs can arise during confidential M&A negotiations
 - ✓ Normal confidentiality rules used in connection with such M&A discussions found inadequate
 - ✓ Need to involve CO early in process
- Divestitures of contracts

Potential Impact on Bid Protests

- Will continue to be hot area at GAO and COFC
 - High sustain rate
 - Once finalized, will rules reduce protests?
- New issues
 - What is “acceptable level”
 - Disclosures by offerors
 - Documentation requirements
 - Failure by CO to consider information
 - Waivers
 - Exceptions
 - Exclusions versus preferred status of mitigation
 - Timeliness questions

Questions?

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Reminder: The slides and a link to a recording of the webinar will be distributed to attendees after the event.