PROFESSIONAL SERVICES COUNCIL
The Unified Voice of the Government Services Industry

4401 Wilson Boulevard, Suite 1110, Arlington, Virginia 22203
P: 703-875-8059 F: 703-875-8922 www.pscouncil.org

REMARKS OF

ALAN CHVOTKIN, ESQ.
EXECUTIVE VICE PRESIDENT AND COUNSEL
PROFESSIONAL SERVICES COUNCIL

BEFORE THE

DEPARTMENT OF DEFENSE PUBLIC MEETING

REGARDING

ORGANIZATIONAL CONFLICTS OF INTEREST AND IMPLEMENTATION OF SECTION 207 OF THE WEAPON SYSTEMS ACQUISITION REFORM ACT OF 2009

DECEMBER 8, 2009

Introduction
Thank you to Deputy Secretary Lynn and Undersecretary Carter for their outreach. Thank you also for this session, and we hope to have the dialogue called for in the *Federal Register* notice. We want to ensure that our efforts are actually helping you as you shape policy.

The Professional Services Council (PSC) is the leading national trade association of the government professional and technical services industry. PSC's more than 330 member companies represent small, medium, and large businesses that provide federal agencies with services of all kinds, including information technology, engineering, logistics, facilities management, operations and maintenance, consulting, international development, scientific, social, environmental services, and more. Together, the association's members employ hundreds of thousands of Americans in all 50 states.

PSC has had a deep interest and been long involved in the legislative and regulatory issues regarding organizational conflicts of interest and was an active advocate during the congressional consideration of the Weapon Systems Acquisition Reform Act (WSARA).

It is important to approach the regulatory implementation of Section 207 of WSARA with a clear understanding of the characterization of the key segments of the weapons systems and services markets—one size will not fit all and one policy will not serve DoD or the industries well. There are different dynamics between SETA and technology solutions providers (such as the diversity of the market and the multiple markets served) and capabilities the often cross-over beyond major defense systems. These complex business issues are not readily solved with binary or linear regulatory approaches.

Regulations—and the application of any such regulations—have the potential to significantly affect the character and composition of discrete segments of the market. Any such actions should have the approval of senior leaders of the department because of the short-term effects on competition, the long-term implications for an industrial base to serve the department's needs, and the almost irreversible nature of company actions that comply with such actions. Your actions must present a balanced approach that recognizes the symbiotic partnership that must exist for success because DoD policies of the past have contributed significantly to the current environment. There must be rules of, and made by, both reason and fairness.

We certainly agree that more needs to be done on OCI but there is no need for DoD to over-regulate beyond section 207 to meet the elements of this law. Section 207 deals with the relationship between two sectors of the same entity – a major defense acquisition program and SETA work. But we also recognize that other laws and policies call for further action on OCI or even PCI, but that is not the stated purpose of this meeting.

OCI is not new and has a long track record of successful operation – and mitigation. While current concerns about certain business relationships between contractors providing certain types of engineering and technical assistance work in relation to weapons systems' development are legitimate, there is no indication that the existing OCI structure and approaches—if clarified and followed by both DoD and its contractors—cannot be effective. We have numerous examples where mitigation strategies, beyond mere firewalls, work. However, we are troubled by the November 3rd Air Force SAF/AQC preemption of the department's broader efforts; we are also troubled by Under Secretary

Carter's November 24th memorandum on Personal Conflicts of Interest (PCI) that dictates that, pending any further regulation, PCI issues should be treated as an OCI. In our view, a PCI does not create an OCI, nor does an OCI create a PCI.

Six Key Principles Regarding Regulations

We believe six key principles should guide the department's implementation of these regulations.

1. Transparency: The department's regulatory actions must be transparent—not just in terms of publishing rules but in terms of the concerns to be addressed and the proposed solutions that are available to DoD for implementation. This transparency must be carried over into the application of any regulation or policy to specific procurements, beginning with the acquisition strategy through contract administration.

2. Predictability: Any regulatory guidance and operational doctrine must provide predictability for the industry about the department's actions. These are market affecting actions.

3. Consistency: The department's actions must be able to be consistently applied—not only for the same contractor under similar conditions across a range of procurement opportunities but also among potential offerors within the same procurement. We understand that any actual OCI issues will vary within companies and, understandably, must be based on the nature of specific procurements. Consistency contributes to achieving predictability for government and industry.

4. Uniformity: The department's policies and implementing actions must be able to be uniformly applied across the wide range of weapons systems and by a wide range of contracting officials. Uniformity contributes to achieving predictability for government and industry.

5. Prospective application only: Whatever policy the department adopts, it must have prospective application for both the policy and its use on individual procurements. In addition, both the government and the industry need, and should have, a reasonable amount of time to adopt and implement any policy direction. It is unlikely that either government or industry can "turn on a dime" on these issues and we should be honest and up-front about the challenges of implementation. Even simple disclosure policies will take time to develop and implement.

6. Finally, protect the industrial base for systems architecture and systems engineering, particularly with domain experience. Take advantage of the exceptions in the statute and the FAR as well as retaining the flexibility to exercise a waiver based on existing FAR authorities.

Role of FFRDCs

We recognize that the statute provides for certain considerations in using Federally-funded Research and Development Centers (FFRDCs). While FFRDCs certainly have some specialized capabilities, they do not have the broad engineering and technical talent necessary to fill the gap that could be created by a draconian OCI policy. In addition, annual defense appropriations acts have appropriately required DoD-sponsored FFRDCs to have and enforce an organizational conflicts of interest policy. Under any section 207 policy, FFRDCs should be held to the same standard as any other non-government entity when evaluating skills and potential conflicts of interest.

Government Actions
To be successful, the procuring activities must clearly define the variables in a business relationship to be protected from conflicts of interest. The WSARA statute clearly and appropriately limited the scope of coverage to SETA support in the context of major defense systems programs.

After defining with specificity the area of concern, it is appropriate for the department to require contractors to disclose circumstances that may give rise to the "covered" conflict and to propose mitigation strategies to avoid that conflict. There are numerous strategies that have been applied – and others that could be applied—to fully protect the government's interest. And the government, not the contractor, gets to make that decision – a consistent lesson of the GAO bid protests in this area.

Once a mitigation strategy has been proposed, the government should be required to make a timely review and decision about whether the plan offers sufficient protection. The FAR already provides waiver authority for the agency for unique circumstances and that waiver authority should be retained for the government to invoke in special or unique circumstances. Furthermore, a decision of either "no conflict" or approval of a mitigation strategy must be binding on the department unless the contractor fails to comply with the approved mitigation plan or circumstances change that make that previously adopted strategy inapplicable.

PSC Prior Comments
On July 17, 2008, PSC submitted comments to the FAR Council in response to the advanced notice of proposed rulemaking. Those comments spelled out a series of procedural steps that could be taken. The full text of those comments is available on the PSC website[i]. While obviously not written with the requirements of WSARA in mind, those comments still reflect a fair and balanced implementation approach for some of the issues that are relevant in the implementation of this statute.

Further Dialogue is Essential
We again thank Dr. Carter for his commitment to a dialogue on this very important issue and for the opportunity provided us to present these comments. The department should take full advantage of the expertise and experience in the industry associations and companies in fashioning a fair, balanced and executable rule on OCI that fully complies with the statute but that takes into account the essential nature of executing major systems programs in support of the warfighter and the American people. PSC is ready to offer our assistance, and that of our members, in continuing this important discussion.

---

[i] http://www.pscouncil.org/AM/Template.cfm?Section=Policy_Issues&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=2511