

Testimony to the Department of Defense

Public Hearing on Implementation of Section 207, Weapon Systems  
Acquisition Reform Act of 2009 – Organizational Conflict of Interest

My name is Cord Sterling and I am the Vice President at the Aerospace Industries Association. Our Association has more than 275 member companies across the aerospace and defense sector, employing more than 630,000 high skilled personnel.

I appreciate the opportunity to speak today and provide input regarding the implementation of section 207 of the Weapon Systems Acquisition Reform Act of 2009 which requires the Secretary of Defense to revise the Defense Federal Acquisition Regulation Supplement to provide uniform guidance and tighten existing requirements for organizational conflict of interest in major defense acquisition programs. While Section 207 as written is limited to these major programs, it is easy to envision that any new guidance on OCI established by the Department of Defense will eventually be considered across the Federal government and for all types of contracts. Therefore, we believe that establishing a set of principles in the

DFARS will have wide-ranging implications for the future and the greatest care should be taken in establishing those principles.

Understanding the reasons for any increase in OCI's is an important first step. We believe it started with the reduction in defense programs in the 90s, and the resulting consolidation of companies within the defense industry so that there are now fewer companies with the technical expertise needed by Government. A second factor is the actions that were taken by the government to downsize its acquisition workforce, which in turn led to a loss of its "in-house" technical expertise and experience. This required the supplementation of the Government workforce through contracting for needed skills and knowledge. The third factor is the increasing complexity of modern systems that combine weapons, information technology, and command and control in a "system of systems" requires equally complex integration capability.

The private sector defense industry possess' significant technical expertise and technological advantages that the Government needs and to which the Government should have access, if such access can be accomplished in a manner that does not provide these contractors with an

unfair future competitive advantage and that results in unbiased and impartial technical support of the Government.

Current DFARS rules essentially delegate the determinations of OCI issues, OCI mitigation, and contractor's eligibility to compete for potentially OCI-sensitive work to the individual contacting officer. In the absence of clear policy direction, several agencies and departments within DoD and other Government agencies have developed organization-wide policies that restrict competition and require disqualification of a contractor from competing for work that in the past could be mitigated. Other organizations have continued to allow for OCI mitigation while awaiting the outcome of a final rule from DoD. These widely differing policies are creating significant uncertainty in the private sector and leading to business decisions that could negatively impact DoD's ability to obtain needed support in the future.

To provide clarity and consistency to the rules that govern the system, AIA welcomes this hearing and urges swift adoption of a final rule.

In order to strengthen OCI requirements while still allowing DoD access to needed skills, any final OCI rule must be flexible, must be

narrowly construed to address the problem, and must be consistently applied across Government.

The first principle that we believe should be incorporated in the final rule is flexibility. The problem of mitigating OCI is comparable to controlling the flow of classified and other controlled information – information must be managed so that it is only available to those with the right level of clearance and a need to know. Just as Defense contractors have many decades of experience complying with security laws—restricting information to only those with a need and excluding those who do not, we have the same ability to restrict program information to mitigate OCI. We also have the demonstrated ability to isolate elements of a company to enhance mitigation. Therefore, the Government should consider a range of policies for OCI that can be used to mitigate any perceived bias. This approach would give the contracting officer flexibility in matching the right mitigation strategy to the risk.

Divestiture is, of course, one possible approach to resolving an OCI. However, Government direction to create new organizational structures to isolate a portion of a business for OCI purposes or to divest a portion of a

business should be a last resort and, because of the industrial base implications of such a decision, should be approved by the Senior Procurement Executive based on a business case which demonstrates why mitigation is not possible and how the forces that are causing increased OCIs (workforce skills and complexity) will be addressed.

The second principle is that the rule should be narrowly construed so that it concentrates on the problem – contractors doing inherently governmental functions. It must also allow for some exemptions. Section 207 specifies that a systems engineering and technical assistance (SETA) contractor for an MDAP is prohibited from participating as a contractor or major subcontractor in the development or construction of a weapon system. However, recognizing that there is a limited pool of the highly qualified personnel, with the appropriate levels of clearance, necessary to make a program successful the Congress made an allowance *“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.”*

The final OCI rule needs to recognize three exemptions for SETA contractors that may apply in a limited set of circumstances. First, a development contractor may possess a competitive advantage. However, if the competitive advantage is an unavoidable one, it is not necessarily unfair. Part 9.505-2 of the Federal Acquisition Regulations states *“In development work, it is normal to select firms that have done the most advanced work in the field. These firms can be expected to design and develop around their own prior knowledge. Development contractors can frequently start production earlier and more knowledgeably than firms that did not participate in the development, and this can affect the time and quality of production, both of which are important to the Government. In many instances the Government may have financed the development. Thus, while the development contractor has a competitive advantage, it is an unavoidable one that is not considered unfair; hence no prohibition should be imposed.”* Second, if the contractor’s OCI can be mitigated adequately, there is no need to disqualify a highly-qualified SETA contractor with domain experience and expertise. Finally, the rule should make clear that mere minority ownership interest in a company should not invoke OCI concerns.

The third and final principle is that once a strategy is adopted, it should be consistent across all Government agencies. For example, if there is a program where more than one military service, or even more than one federal agency, may one day purchase a system once it is developed, the mitigation strategy that was approved by the contracting officer responsible for the development contract, should be accepted by all agencies who subsequently participate in the procurement of the system. Furthermore, once that contracting officer has developed a mitigation strategy for any particular program, it should remain in place and applicable throughout the life of the program—the rules by which the contract is governed should not change every time there is a change in government personnel.

AIA recommends that the rule implementing section 207 include the following:

1. A “menu” of acceptable OCI mitigation processes and procedures that are recognized, in whole or in part, as achieving an appropriate OCI mitigation plan for any program. The most invasive mitigation options, isolating a portion of a business or divesting a

portion of the business must be approved by the Senior Procurement Executive based on a business case.

2. Recognition that there are some exemptions to the requirement that SETA contractors are prohibited from participating as a development contractor or subcontractor that can be applied in a limited set of circumstances.
3. Require that if an acceptable OCI mitigation has been identified and agreed to by one contracting officer, all other contracting officers must be bound by that agreement and not arbitrarily disqualify or penalize a contractor for agreeing to such an OCI mitigation.

## CONCLUSION

AIA believes that DoD should develop and implement a clear, organization-wide policy that reflects the desirability and necessity of utilizing the vast amount of technical and systems engineering expertise of its government contractors while ensuring strict mitigation of OCIs. We believe that, with a clear policy and regulatory guidance, the Federal Government can take advantage of the significant technical expertise that

many defense contractors have to offer – expertise that has been developed over many years of highly sophisticated, state-of-the-art technical work generated at a cost of billions of dollars to the Government.