

STATEMENT REGARDING SECTION 207 OF THE WEAPON SYSTEMS ACQUISITION  
REFORM ACT WITH RESPECT TO ORGANIZATIONAL CONFLICTS OF INTEREST

SUBMITTED BY

MARCIA G. MADSEN

JAMES A. ("TY") HUGHES

December 8, 2009

**STATEMENT REGARDING SECTION 207 OF THE WEAPON SYSTEMS  
ACQUISITION REFORM ACT**

**Submitted on behalf of Marcia G. Madsen and James A. ("Ty") Hughes**

The current Federal Acquisition Regulations ("FAR") require an agency to engage in an analytical process to determine whether a potential or actual Organizational Conflict of Interest ("OCI") exists and to determine whether it is in the agency's interest to avoid, neutralize, mitigate, or waive an OCI. The longstanding regulatory provisions do not dictate a particular outcome when an agency is confronted with an OCI. Instead, the regulations provide a framework for the agency to exercise its discretion. The FAR defines an OCI as "a person [that] is unable or potentially unable to render impartial assistance or advice to the Government, or the person's objectivity in performing the contract work is or might be otherwise impaired, or a person has an unfair competitive advantage" because of that person's other activities or relationships. FAR 2.101. FAR Part 9.5 requires contracting officers to "[i]dentify and evaluate potential organizational conflicts of interest as early in the acquisition process as possible," and to "avoid, neutralize, or mitigate significant potential conflicts of interest." FAR 9.504(a)(1)-(2). FAR 9.503 also allows an agency head or his or her designee to waive an OCI if otherwise avoiding, neutralizing, or mitigating it would not be in the interest of the agency.

The current regulations recognize that an absolute proscription against conflicts of interest is not in the best interest of the Government as the purchaser of services. An analysis of an actual or potential OCI, the possible means of avoidance, neutralization,

or mitigation of the OCI, or a waiver are necessarily fact-based. Thus, the agency and acquisition personnel are best situated, with the greatest knowledge of the Government's requirements, to analyze the risks posed by an OCI and should have the discretion to consider the facts before them and address an OCI in the manner best suited to the agency's interests.

However, as recognized by the Acquisition Advisory Panel ("Panel") in its 2007 Report, the existing regulations have not kept up with the dramatic expansion of services contracting, the consolidation in the defense industry, and the development of case law in the bid protest area. As demonstrated by the Government Accountability Office ("GAO") and judicial decisions sustaining protests challenging an agency's evaluation, or lack thereof, of OCIs and recently enacted legislation that mandates a review of Department of Defense ("DoD") acquisition regulations, the acquisition community needs more guidance in the analysis and resolution of OCIs. Consequently, the Panel recommended additional guidance for the acquisition community, including understanding and identifying OCIs, assessing appropriate responses for addressing OCIs, determining mitigation measures, balancing the relative risks and benefits to the Government, and providing clarity to industry.

In many situations, it is in the Government's best interest to mitigate or waive an OCI rather than eliminate the contractor and decrease competition. Recent legislation, however, would limit the Government's discretion to address OCIs on a case-by-case basis and apply tailored approaches to deal with them. The Weapon Systems

Acquisition Reform Act of 2009 (“WSARA”) requires DoD to develop new regulations to “tighten” OCI rules in certain areas.<sup>1</sup> WSARA requires DoD to revise and “tighten” its acquisition regulations to address potential OCIs stemming from the interplay of contracts for a Lead System Integrator (“LSI”) and any follow-on contracts, especially production contracts.<sup>2</sup> DoD also must address potential OCIs created by an entity pursuing a prime contract or supplier contract when its affiliate or related business has provided Systems Engineering and Technical Assistance (“SETA”) work on the program and OCIs resulting from the award of a subcontract to a prime contractor’s affiliate or related business, particularly in the context of software integration or development.<sup>3</sup> These provisions reflect the need for further guidance in the OCI regulations to provide a framework so that acquisition personnel have tools, and know how, to analyze an OCI and the possible mitigation or waiver of an OCI. While these provisions address some areas of interest to DoD, they are not the only areas where guidance is necessary; other areas involve decided cases, which are addressed further below.

In addition to requiring further attention to the regulations, Section 207(b)(3) of WSARA also imposes a prohibition on OCIs involving SETA work that would restrict a contractor or its affiliate from performing as a prime contractor or major subcontractor on a weapon system if the contractor provides SETA effort on the same program. This

---

<sup>1</sup> Pub. L. 111-23, § 207, 123 Stat. 1704, 1728-30.

<sup>2</sup> *Id.* § 207(a) & (b).

<sup>3</sup> *Id.*

provision removes discretion from DoD's acquisition personnel to examine the facts regarding a perceived OCI and to determine and balance the risks with potential mitigation options that may be available to best meet the Government's needs.

WSARA provides for exceptions, however, that should permit DoD to meet the WSARA's objectives and provide improved, and much needed, guidance to assist agencies in determining whether an OCI exists, whether it is material, and how it should be addressed given each agency's needs. Section 207(b)(4) of WSARA allows for exceptions "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 the delay in responding to the Panel's recommendations and the enactment of WSARA, we strongly encourage the creation of additional guidance and analysis tools to assist agencies and their contracting personnel in appropriately identifying and evaluating potential and actual OCIs. Such guidance also will be of benefit to industry in clarifying the Government's expectations and approach and to provide some degree of consistency in the Government's approach to these complex issues.

### **History of OCI Regulations and Recent Developments**

Regulatory provisions addressing OCIs did not exist until the 1960s, when OCI regulations were incorporated into agency-specific regulations.<sup>4</sup> For example, in 1963 the Department of Defense published Appendix G of the Armed Services Procurement

---

<sup>4</sup> James Taylor and B. Alan Dickson, *Organizational Conflicts of Interest Under the Federal Acquisition Regulation*, 15 Pub. Con. L. J. 107 (1984).

Regulations (“ASPR”) to address OCIs and to establish certain rules in the attempt to avoid creating OCIs when awarding contracts. FAR Part 9.5, as originally promulgated, was similar to ASPR Appendix G, although the FAR provisions were more broadly applicable to civilian agencies as well as to DoD and provided more guidance to the contracting officer.

The original FAR provisions also were very similar to the current version of the FAR – Part 9.5 has not changed significantly since 1984. From the beginning, as it does now, FAR 9.5 has focused on protecting the competitive process. It sought, and still seeks, to prevent unfair competitive advantage and impaired objectivity post-award.<sup>5</sup> The FAR also has directed contracting officers to evaluate possible OCIs as early in the procurement process as possible, and it strongly recommended that contracting officers obtain the advice of legal counsel and technical specialists (as necessary), and submit any mitigation plans addressing a “significant potential OCI” to the head of the contracting authority for approval.<sup>6</sup> The FAR also has permitted agencies to waive OCIs if doing so would best serve the needs of the Government.<sup>7</sup> Over the years, the FAR has been amended, however, to, among other things: address the possibility of future OCIs based on the nature of the work to be performed under the contract at issue;<sup>8</sup> to instruct the contracting officer to award a contract to the successful offeror

---

<sup>5</sup> FAR 9.501 (1984); FAR 9.505 (2009).

<sup>6</sup> FAR 9.504 (1984); FAR 9.507 (1984).

<sup>7</sup> FAR 9.503 (1984).

<sup>8</sup> FAR 9.502(c).

unless the agency determines an award to that contractor would result in an OCI that cannot be mitigated;<sup>9</sup> and to more fully explain the circumstances under which a contractor may possess an unfair competitive advantage.<sup>10</sup>

Like the original FAR provision, the current FAR 9.5 does not provide specific guidance regarding what analysis satisfies the agency's obligation to consider actual or potential OCIs during a procurement. Nor does it state what mitigating measures would be appropriate. The acquisition community has relied upon procedures it has developed over the years, as well as precedent provided by the Government Accountability Office and courts for guidance on what constitutes an OCI. This precedent categorized OCIs as one of three types:

- "Biased ground rules," in which a company advising the government under a contract helps set the ground rules for another government procurement in which it (or companies with which it is associated) will compete;
- "Unequal access to information," in which a company has access to nonpublic information that provides it an unfair advantage in the competition for a later contract; or
- "Impaired objectivity," where a company's performance of one Government contract could require it to evaluate its own performance or that of a competitor under a Government contract or through evaluations of proposals.<sup>11</sup>

---

<sup>9</sup> FAR 9.504(e).

<sup>10</sup> FAR 9.505(b).

<sup>11</sup> Acquisition Advisory Panel, *Report of the Acquisition Advisory Panel to the Office of Federal Procurement Policy and the United States Congress* 406 (2007) (citing *Aetna Gov't Health Plans, Inc.*, B-254397, July 27, 1995, 95-2 CPD ¶ 129, at 12-13; *Vantage Associates, Inc. v. United States*, 59 Fed. Cl. 1, 10 (2003)).

Agencies and acquisition personnel often are unsure about what type of analysis is sufficiently robust to satisfy the requirements of FAR Part 9.5. GAO's recent decision in *L-3 Services, Inc.* demonstrates how an agency's analysis of actual or potential OCIs and any mitigation plans can be inadequate. GAO found that the agency's evaluation of potential "biased ground rules" OCI was based on an "illusory" characterization of the ability of a contractor to exert influence on different phases of the contract and that "the record lack[ed] a thorough agency inquiry" into a potential "unequal access to information" OCI.<sup>12</sup>

Within the past two years the regulatory community, including the Panel, has recognized the need for greater guidance regarding OCIs. In its 2007 report, the Panel called for an examination of the guidance on OCIs provided by the FAR.<sup>13</sup> Subsequently, there have been several FAR and DFAR Cases opened to address perceived problems with FAR Part 9.5. These include FAR Case 2007-018, which considered whether the FAR's current guidance on OCIs serves the need of the Federal Government and acquisition community as raised by the Panel. The notice of proposed rulemaking seeking comments related to this FAR case was published on March 26, 2008, and is just now wending its way to issuance – presumably as a proposed revision to the rule. However, prior to the completion of this FAR case, Congress passed WSARA, necessitating DFAR Case 2009-D015, which would implement the

---

<sup>12</sup> *L-3 Servs., Inc.*, B-400134.11, 2009 CPD ¶ 171 (Sept. 3, 2009).

<sup>13</sup> Acquisition Advisory Panel, *Report of the Acquisition Advisory Panel to the Office of Federal Procurement Policy and the United States Congress* 407.

requirements of WSARA Section 207. It is important that the proposed FAR amendment and the WSARA rule (which only applies to DoD) are consistent in their approach to the greatest degree possible so that both agencies and contractors understand how the Government is analyzing and addressing OCIs.

### **Process, Not Outcome**

As previously noted, the current version of the FAR recognizes that agencies must be able to exercise “common sense, good judgment, and sound discretion” when determining whether an OCI exists and whether the OCI may be mitigated.<sup>14</sup> Accordingly, the FAR requires that agencies and contracting personnel engage in an analytical process, rather than dictating a particular outcome. Such flexibility allows the procuring agency to determine whether the contractor’s prior obligations or relationships creates a risk to the Government, and whether this risk can and should be mitigated.

The current regulatory structure allows the agency and the contracting personnel with the greatest knowledge and understanding of the Government’s particular needs the discretion to fulfill these needs in the most appropriate manner. As the Federal Circuit Court recently has recognized, “identification of OCIs and the evaluation of mitigation proposals are fact-specific inquiries that require the exercise of considerable discretion.”<sup>15</sup> Whether an OCI may be mitigated depends on the breadth and severity

---

<sup>14</sup> FAR 9.505.

<sup>15</sup> *Axiom Res. Mgmt., Inc. v. United States*, 564 F.3d 1374, 1382 (2009).

of the conflict.<sup>16</sup> Agencies and their contracting personnel may determine what expertise and services the agency requires, the acceptable level of risk posed by an OCI and, if necessary, whether this risk can be mitigated properly. The current rule allows agencies analyzing OCIs to consider actual facts and circumstances, rather than requiring contracting personnel to speculate about OCIs that might arise from subsequent awards.

However, GAO has determined that there are certain instances when a contractor cannot mitigate an OCI. For example, in *Aetna Government Health Plan, Inc.*, GAO found, after a consideration of the facts before the agency, that the OCI could not be mitigated due to the “very substantial dollar value” of the potential sub-contract to an affiliate of the consultant assisting the agency evaluate proposals, the consultant’s role in the procurement process, and “the largely subjective nature of the evaluation of probable health care costs in this procurement, where probable cost calculations turn on whether the [consultant] evaluators have been persuaded that an offeror will succeed in managing health care as proposed.”<sup>17</sup> GAO appears to have stepped back from this rather harsh result, however. In *Overlook Systems Technology, Inc.*, GAO denied a protest challenging the sufficiency of the agency’s analysis of a potential OCI and its possible mitigation after the agency took corrective action.<sup>18</sup> GAO noted that, in its re-evaluation, the agency considered substantial amounts of additional information and

---

<sup>16</sup> *DZS/Baker LLC*, B-281224, 99-1 CPD ¶ 19 (Jan. 12, 1999).

<sup>17</sup> *Aetna Gov’t Health Plan, Inc.*, B-254397, 95-2 CPD ¶ 129 (July 27, 1995).

<sup>18</sup> *Overlook Sys. Tech., Inc.*, B-298099.4, 2006 CPD ¶ 185 (Nov. 28, 2006).

that the re-evaluation was reasonable. GAO also denied a protest challenging the agency's re-evaluation of an OCI in *Alion Science and Technology Corp.*<sup>19</sup> after sustaining a previous protest raising the same allegations vis-à-vis the agency's initial OCI analysis. In the first protest, GAO found that the agency's OCI evaluation was "devoid of any meaningful analysis."<sup>20</sup> After the agency's re-evaluation, GAO determined that "[o]nce an agency has given meaningful consideration to potential conflicts of interest, our Office will not sustain a protest challenging a determination in this area unless the determination is unreasonable or unsupported by the record."<sup>21</sup>

There also are many instances when an agency appropriately and effectively can mitigate actual or potential OCIs, or instances in which the policy supporting restrictions on OCIs does not apply. One such exception is for a contractor that performs development and design work. As the FAR recognizes, often a contractor performing this work is one of the, if not the, most advanced in the field. Because of its work on a system design and development, this contractor is able to begin production earlier and more knowledgeably than contractors that have not participated in the development phase. These advantages are unavoidable but not unfair and rightly are not prohibited.<sup>22</sup> In addition, agencies may, after an analysis of actual or potential OCIs, determine that a waiver is in the best interest of the Government.

---

<sup>19</sup> *Alion Science & Tech. Corp.*, B-297022.4, 2006 CPD ¶ 146 (Sept. 26, 2006).

<sup>20</sup> *Alion Science & Tech. Corp.*, B-297022.3, 2006 CPD ¶ 2, (Jan. 9, 2006).

<sup>21</sup> *Alion Science & Tech. Corp.*, *supra* note 18.

<sup>22</sup> FAR 9.505-2(a)(3).

## Lack of Guidance

While FAR Part 9.5 confers upon the agency the necessary discretion to analyze OCIs, it fails to provide much of the detail the contracting community requires to help it identify OCIs, to properly analyze actual and potential OCIs, and to how to adequately avoid, neutralize, or mitigate OCIs, if necessary. Similarly, it provides no guidance on where an OCI waiver would be appropriate. It would be impossible for the FAR to provide an exhaustive list of circumstances giving rise to actual or potential OCIs, as well as impossible to provide an exhaustive list of possible remedies. As the Panel recommended in its report, however, regulations should be updated to reflect the explosive growth in the blended workforce and to provide guidance to contracting officers and acquisition personnel about how to identify, analyze, and properly mitigate OCIs.

Acquisition personnel have particular difficulty addressing OCIs in the context of "impaired objectivity." The FAR defines "impaired objectivity" as being "unable or potentially unable to render impartial assistance or advice to the Government, or the person's objectivity in performing the contract work is or might be otherwise impaired."<sup>23</sup> Nevertheless, agencies must rely on GAO and judicial precedent for instruction in the absence of detailed guidance from the applicable regulations. As a result, agencies sometimes receive conflicting guidance. A prime example of such conflicting advice are two cases decided by GAO. In *Overlook Systems Technology, Inc.*,

---

<sup>23</sup> FAR 2.101.

GAO stated that “while walling off employees using a firewall arrangement may resolve other types of conflicts of interest (such as those involving unfair access to information), it does not resolve an OCI involving potentially impaired objectivity.”<sup>24</sup> Less than one year later, however, GAO took the opposite position, finding that in “impaired objectivity” OCI situations, that subcontracting or transferring work to a separate entity, and establishing a firewall around the impaired entity, can reasonably mitigate these types of OCIs.”<sup>25</sup>

Furthermore, agencies must remember that “potential impaired-objectivity OCIs are not limited to acquisition-related activities; rather, impaired-objectivity OCIs are created any time the performance of a contract requirement involves the contractor's exercise of judgment that could affect other contractor-related interests.”<sup>26</sup> One focus of the agency's inquiry should be whether there is “some indication that there is a direct financial benefit to the firm alleged to have the organizational conflict of interest.”<sup>27</sup> In addition, impaired objectivity OCIs are not limited to contractor employees or representatives. Agency personnel can be the subject of impaired objectivity, such as when agency evaluators are tasked with evaluating technical proposals as part of an A-76 cost comparison that the agency evaluators currently perform.<sup>28</sup>

---

<sup>24</sup> *Overlook Sys. Tech., Inc.*, B- 298099.4 fn. 9.

<sup>25</sup> *Cf. Bus. Consulting Assocs., LLC*, B- 299758.2, 2007 CPD ¶ 134 (Aug. 1, 2007).

<sup>26</sup> *Alion Science & Tech. Corp.*, B-297022.3, 2006 CPD ¶ 2 (Jan. 9, 2006).

<sup>27</sup> *L-3 Seros., Inc.*, B- 400134.11, 2009 CPD ¶ P 171 (Sept. 3, 2009).

<sup>28</sup> *DZS/Baker LLC.*, B-281224, 99-1 CPD ¶ 19 (Jan. 12, 1999).

In rulings applicable to all three types of OCIs described in *Aetna Government Health Plans*, GAO has instructed agencies that they must conduct themselves according to certain standards when analyzing OCIs. Understandably, any analysis must be reasonable and meaningful.<sup>29</sup> An agency cannot rely solely on the contractor's determination of the existence of an OCI, or lack thereof, and the reasonableness of the mitigation plan, nor can the agency replace a pre-award analysis with an ad hoc mitigation plan to be considered on a piecemeal basis after award.<sup>30</sup> Agencies also cannot rely on unsupported conclusions.<sup>31</sup>

### Conclusion

That GAO has had to provide so much instruction to agencies regarding proper, or improper, analysis of an actual or potential OCI demonstrates the need for additional guidance in regulations, in accordance with the Panel's original recommendation. WSARA reflects this need, directing DoD to include, at a minimum, certain additional information in its acquisition regulations. WSARA's prohibition against any "impaired objectivity" SETA OCIs, however, is unnecessary. It purports to remove DoD's ability to judge what risks, and mitigation plans or potential waivers, DoD can accept to meet its needs. The Government, and DoD specifically, can benefit from a contractor's technical and management expertise, skills and knowledge, especially in the context of

---

<sup>29</sup> *Alion Science & Tech. Corp.*, B-297022.3, 2006 CPD ¶ 2 (Jan. 9, 2006); *Ktech Corp.* B-285330, 2002 CPD ¶ 77 (Aug. 17, 2000). See also, *Overlook Sys. Tech.*, B-298099.4, 2006 CPD ¶ 185.

<sup>30</sup> *Johnson World Servs., Inc.*, B-286714.2, 2001 CPD ¶ 20 (Feb. 13, 2001).

<sup>31</sup> *Alion Science & Tech. Corp.*, B-297022.3.

major weapons systems. This benefit increases when the agency lacks the personnel resources to manage these complex programs on its own. If contractors are forced to choose between providing technical assistance to an agency and participating in the development of a weapons system, the agency may unnecessarily lose access to valuable (and essential) support.

The regulatory structure, either government-wide or agency-specific, should not prohibit actual or apparent OCIs without *considering the facts at hand* or the possibility of effective mitigation plans. An OCI determination is by its nature fact-specific. As demonstrated by the cases, agencies have difficulty conducting an adequate factual analysis and applying the appropriate legal standards. The simple fact is that neither a conclusory assertion that an OCI does not exist nor a failure to address a meaningful response will withstand review – whether the outcome is to permit mitigation or not permit mitigation.

The WSARA prohibition regarding SETA work removes this factual analysis from the Contracting Officer. Instead, a considered analysis of actual or potential OCIs involving SETA work and their possible mitigation will be the exception rather than the rule. Such a change will limit DoD's ability to obtain the expertise that it needs.

This provision aside, however, the acquisition community still requires greater guidance than it currently receives from the FAR and agency-specific regulations about how to appropriately analyze OCIs. Therefore, the regulatory community should

carefully consider the guidance agency and contracting personnel need in order to engage appropriately in the analytical process for which the regulations currently call.