



July 21, 2010

4805 Stonecroft Blvd.
Chantilly, Virginia 20151

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

Re: **DFARS Case 2009-D015**

Dear Ms. Williams:

TASC, Inc. ("TASC") is pleased to submit comments on the above-referenced Proposed Rule concerning Organizational Conflicts of Interest ("OCIs"), as published on April 22, 2010 (75 C.F.R. 20954). TASC, formerly a unit of Northrop Grumman Corp., is a premier, non-conflicted provider of advanced systems engineering, integration and decision-support services across the Intelligence Community, Department of Defense ("DoD") and civilian agencies of the federal government. In particular, we are a leader in providing Systems Engineering and Technical Assistance ("SETA") services. For more than 40 years, TASC has partnered with our customers toward one goal: the success of their missions. Our broad portfolio of services includes system and policy analysis; program, financial and acquisition management; enterprise engineering and integration; advanced concept and technology development; and test and evaluation. TASC has nearly 5,000 employees.

EXECUTIVE SUMMARY

Section 207 of the Weapon Systems Acquisition Reform Act of 2009 ("WSARA"), Pub. L. No. 111-23, required the Secretary of Defense to issue new regulations "to provide uniform guidance and tighten existing requirements" on OCIs. Section 207(a) (emphasis added). Those new regulations were required to ensure that DoD receives systems advice from FFRDCs or other sources "independent of the prime contractor." Section 207(b)(2) (emphasis added). Further, albeit subject to limited exceptions, the regulations were required to ensure the implementation of contract provisions "prohibiting" a SETA contractor and any corporate affiliate from also serving as the prime contractor or a major subcontractor for the development or construction of the system. Section 207(b)(3) (emphasis added).

When President Obama signed WSARA into law, he proclaimed that it would "end conflicts of interest in the weapons acquisition process." Remarks by the President at the Signing of the Weapons Systems Acquisition Reform Act (May 22, 2009) (emphasis added).

From our perspective, the overarching question to be addressed here is whether the Proposed Rule embodies the legislative intent and directive of Section 207 -- with its references to "tighten[ing]" the OCI rules, "prohibiting" dual roles and responsibilities, and "end[ing]" OCIs. TASC believes the Proposed Rule has many merits, but falls short.

To begin, we endorse the Proposed Rule's approach of extending the new rule's OCI coverage beyond Major Defense Acquisition Programs ("MDAPs") to a broader realm of defense procurement. The same OCI policy concerns that Congress addressed in connection with MDAPs apply across the board. Certainly, the GAO bid protest case law that the Proposed Rule quite correctly cites with approval applies to all procurements, not only MDAPs. In practice, the potential problems of impaired objectivity arising from OCIs apply not only in the MDAP context but across the full procurement spectrum. In our view, it would be very difficult to make a policy case for tolerating a set of OCIs in the broader context that would be impermissible in the MDAP context.

In terms of room for improvement, we question the Proposed Rule's stated policy preference for mitigation over other methods of OCI resolution. Based on the WSARA legislation, we would have expected a stated policy preference for avoidance of OCIs. In that connection, we note the Senate Armed Services Committee's recent reiteration of WSARA's "statutory presumption that SETA contractors may be permitted to participate in development and production only in exceptional cases." Senate Report No. 111-201, National Defense Authorization Act for Fiscal Year 2011, at 172. In our view, a DFARS policy preference for OCI avoidance is necessary to restore and maintain the public's trust in the defense procurement process. We urge removal of the bureaucratic approval requirements that the Proposed Rule would impose upon the contracting officer who seeks to avoid an OCI, rather than mitigate it.

We also believe that it is essential to weigh the costs of mitigation. Extensive resources are expended by otherwise conflicted contractors in collecting data, analyzing and organizing that data, preparing rounds of draft OCI-mitigation plans, seeking approvals, and then monitoring compliance -- and occasionally even reporting and remedying violations of OCI mitigation. A parallel set of resource demands exists on the government side, where resources are even more tightly constrained. In an environment of ever increasing fiscal pressures, we question whether such costs are acceptable. Who pays for them, if not the taxpayer? In our view, an overall policy of OCI avoidance -- with only occasional mitigation in truly exceptional circumstances, supported by clear implementing procedures -- would be best and most efficient approach.

We understand that there will be some special cases where mitigation and/or waiver of OCIs will be appropriate. Yet we share the SASC's concern that the "exception provided by the proposed DFARS rule appears to be broader in scope than the exception authorized by the statute." Senate Report No. 111-201, at 172. In this connection, we find a major incongruity in how the Proposed Rule appears to accept the existence of OCIs. In the coverage specific to MDAPs (Proposed DFARS § 203.1270-6), the Proposed

Rule states that the same contractor may be selected to serve as both the SETA contractor and the development contractor -- if it is "highly qualified with domain experience and expertise" and if the OCI is otherwise "adequately resolved in accordance with 203.1205-3." Upon close examination of that cross-referenced section, however, the only real way for the OCI to be mitigated would be for the otherwise conflicted SETA contractor to subcontract the affected work to a conflict-free subcontractor. See Proposed DFARS § 203.1205-3(c)(1) (firewall alone inadequate to mitigate an "impaired objectivity" OCI) & 203-1205-3(c)(3) (permitting mitigation via subcontracting of "conflicted portion of the work" to an unconflicted subcontractor). But what is the value of the prime contractor's supposed "domain experience and expertise," if the SETA work will not be performed by that company but instead by a subcontractor? How can the conflicted prime contractor select and pay the SETA subcontractor, without that very process presenting serious OCI concerns? With such questions left hanging, there appears to us to be an unresolved problem in the Proposed Rule's approach to OCI mitigation. To reiterate, we believe that OCI resolution through mitigation should be the exception and not the rule.

As a company with deep roots in the SETA and advisory services business, we are aware that some in industry will use "competition" as an argument in favor of a more lenient approach to OCIs. In our view, that argument is misplaced. There is more than ample competition among OCI-free SETA contractors -- not to mention competition from FFRDCs, which also have an appropriate role to play. One year ago, TASC was part of a much larger aerospace and defense company, and we and they were handling our OCIs through a myriad of mitigation plans. See WSARA § 207(b)(1)(B). Since that time, through a corporate divestiture, we have joined the swelling ranks of conflict-free SETA contractors. That outcome is proving to be a "win/win/win" -- for us, for our former corporate parent, and most importantly for our customers. Similar divestiture processes have occurred and are now under way. With this changing competitive landscape, the government simply does not need to endure the widespread persistence of OCIs in order to find high-quality, trusted advice at a reasonable cost.

SPECIFIC COMMENTS

Strengths

TASC believes the Proposed Rule has many positive aspects that will help restore and maintain public trust in the acquisition process. The Proposed Rule provides uniform guidance and tightens existing requirements to ensure that the Government receives objective advice. The proposal provides criteria for evaluating the existence of an actual OCI during the solicitation evaluation phase based on the financial interests of the offeror. Proposed DFARS § 203.1205-2. Current FAR coverage does not contain a clear standard for evaluating the nature of an OCI. By specifically defining the standard, the Proposed Rule provides a uniform and appropriate way for the Contracting Officer to determine the existence of an OCI.

The Proposed Rule establishes that "the total contractor organization," including all subsidiaries and affiliates, and not just the business unit or segment that signs the contract, is subject to evaluation for

an OCI. Proposed DFARS § 203.1201. Evaluating the entire contractor organization for OCIs is appropriate as it is the entire organization that can receive the financial benefit, the measure of an OCI.

We agree with the policy decision, contained in the Proposed Rule, to extend the statutory coverage beyond MDAP programs to all types of contracts except those for commercially available off-the-shelf items. Proposed DFARS § 203.1202(a). Application of the new OCI coverage to this broad spectrum of contracts is prudent as it provides a greater level of consistency across procurements and mandates resolution of all OCIs in procurements where the Government could receive less than objective advice from the contractor. Public trust in the acquisition process should be preserved for all contracts, not just MDAP program contracts.

The Proposed Rule organizes OCIs by type of OCI, rather than defining OCIs by type of task. Proposed DFARS § 203.1204. This will improve the understanding of OCIs by Contracting Officers and will enhance their ability to resolve OCIs effectively.

The five-year look-back period for disclosure of potential OCI issues pre-award is appropriate due to the length of the budgeting and acquisition cycle for a procurement, which often covers that period of time, thus potentially creating an OCI issue on the current contract from prior actions. Proposed DFARS § 252.203-70XX(e)(1)(ii). Additionally, the typical SETA contract lasts for five years, including options. Consequently, disclosure over such a five-year period of time is warranted.

The specific requirement for full disclosure post-award of additional OCI situations (Proposed DFARS § 252.203-70ZZ), both newly discovered and those that arise during contract performance, is appropriate. With such ongoing disclosures, the Contracting Officer can continue to make informed decisions regarding OCIs, and so ensure unbiased advice through a resolution technique. Full disclosure post-award is consistent with GAO case law precedent.

The Proposed Rule specifically states that a number of resolution techniques are to be used in combination in order to protect the government interest -- not just mitigation with firewalls. Proposed DFARS § 203.1205-3. This too is consistent with GAO case law precedent.

Areas of Weakness

There is a need to tighten the existing OCI requirements further in order to implement the WSARA requirements and to restore and preserve public trust in the acquisition process.

In our view, the Proposed Rule does not implement all the requirements of WSARA. We agree with the Senate's recent statement that "taken in conjunction with the rule's overall preference for mitigation over avoidance, the rule may be read to reverse the presumption that SETA contractors may be permitted to participate in development and production only in exceptional cases." Senate Report No. 111-201, National Defense Authorization Act for Fiscal Year 2011, at 172.

The WSARA OCI provisions had their origin in a 2008 Defense Science Board (DSB) study, *Creating an Effective National Security Industrial Base for the 21st Century*, Defense Science Board (July 2008). That

DSB study concluded that in the desirable 21st century industrial structure, “[s]trong, independent systems architecture/engineering firms would advise the Government on systems-of-systems solutions,” and that “[s]tructural separation beyond firewalls should occur between SETA service providers and hardware/software providers, with significant work in the same business area, to avoid COI [conflicts of interest].” DSB Report at 26 (emphasis in original). In discussing mergers and acquisitions (“M&A”), the DSB Report recommended that DOD should announce a yellow light warning for “[v]ertical acquisition by a systems prime of critical, discriminating capabilities in areas where there are few competitors and/or where the service/SETA acquisition would present potential future conflicts,” and that DOD should also closely examine proposed mergers between each service and system integrator and/or product provider for OCI issues during anti-trust reviews.” DSB Report at 28. Thus, the DSB was concerned about both current OCI situations and future OCI situations that could result from M&A processes.

Senator Levin, in his remarks when he introduced what would become the WSARA coverage of OCIs, quoted the DSB study stating that “many of the systems engineering firms which previously provided independent assessment [of major defense acquisition programs] have been acquired by the large prime contractors.” Further, he stated that as a result, the DSB Task Force reported that “different business units of the same firm can end up with both the service and product side in the same program or market area.” Senator Levin continued: “This structural conflict of interest may result in ‘bias [and] impaired objectivity,’ which cannot be resolved through firewalls or other traditional mitigation mechanisms.” The proposed OCI legislation would address this problem, said Senator Levin, “as recommended by the Task Force, by: (1) prohibiting systems engineering contractors from participating in the development or construction of the major weapon systems on which they are advising the Department of Defense; and (2) requiring tightened oversight of organizational conflicts of interests by contractors in the acquisition of major weapon systems.” Congressional Record, 111th Congress (2009-2010), S2366 (Feb. 23, 2009). Ultimately, when President Obama signed WSARA into law, he proclaimed that WSARA would “end conflicts of interest in the weapons acquisition process.” Remarks by the President at the signing of the Weapons Systems Acquisition Reform Act (May 22, 2009).

The Proposed Rule has a strong preference for mitigation of OCI rather than avoidance, in particular in DFARS § 203.1203(c). Indeed, the Proposed Rule states that the avoidance approach of restricting an offeror or class of offerors is the least preferred method of OCI resolution unless there is no less restrictive form of resolution that will adequately protect the Government’s interest. Proposed DFARS § 203.1205-3(a)(1). This is inconsistent with the statutory intent of Section 207 of WSARA. Additionally, under the Proposed Rule, before withholding award for OCI reasons the Contracting Officer must notify the offeror in writing of the reasons for the potential award withhold and allow the offeror a reasonable time to respond. Proposed DFARS § 203.1205-5(a). Finally, the Contracting Officer must brief the Agency Senior Procurement Executive before determining whether an offeror’s mitigation plan is unacceptable on any acquisition that exceeds \$1 billion. Proposed DFARS § 203.1205-1(c)(3). Cumulatively, these requirements create significant obstacles for a Contracting Officer to avoid an OCI, even when he or she believes it is the right thing to do.

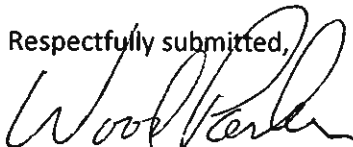
With respect to MDAPs, the Proposed Rule at § 203.1270-6(a) states that "Except as provided in paragraph (b) of this subsection, a contract for the performance of systems engineering and technical assistance functions for a major defense acquisition program shall prohibit the contractor or any affiliate of the contractor from participating as a contractor or major subcontractor in the development or construction of a weapon system under such program." Paragraph (b) (2) states that the preceding paragraph does not apply "if the contracting officer determines that . . . [t]he 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." We believe this is contrary to the statutory intent. Sec. 207(b)(4) of WSARA states that the regulations shall carve out "such limited exceptions" to the rule 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 expertise and experience, while ensuring that such advice comes from sources that are objective and unbiased."

Accordingly, in order to carry out the statutory direction, we recommend that Section 203.1270-6(b)(2) be rewritten to make it clear that avoidance is the preferred approach to deal with OCIs and that mitigation is the resolution method of last resort. We urge that the DFARS Rule include a requirement that before approving OCI mitigation, the Contracting Officer must determine, with the approval by the Head of Contracting Activity, that (a) the contractor is highly qualified with domain experience and expertise, (b) the organizational conflict of interest will be adequately resolved through mitigation, and (c) there is no other source with the requisite domain experience and expertise.

CONCLUSION

Once again, we at TASC appreciate the opportunity to submit our comments on this Proposed Rule concerning the proper resolution of OCIs, a topic we regard to be of prime importance to our national security and the public trust.

Respectfully submitted,



Wood Parker

President & Chief Executive Officer