

Department of Defense Issues Limited Final OCI Rules

The government contracting community has awaited the release of the Department of Defense (DOD)'s final rules governing organizational conflicts of interest (OCI) with significant attention. The proposed rules suggested that DOD was planning to take the lead in this controversial and contested area by issuing far-reaching and specific regulations in response to developments in the decisional law. Instead, DOD declined this leadership role, and broke little new ground with its final rule, which is closely limited and makes no dramatic changes in current OCI practice.

Section 207 of the Weapons Systems Acquisition Reform Act of 2009 (WSARA) instructed DOD to "tighten existing requirements for OCI by contractors in major defense acquisition programs [MDAPs]."¹ The law specifically required stricter limits in the Defense Federal Acquisition Regulations Supplement (DFARS) on lead system integrator (LSI) contracts² and systems engineering and technical assistance (SETA) contracts, balanced by "limited exceptions" to permit DOD to receive needed advice from qualified contractors.³

DOD initially went beyond the strict terms of WSARA, and proposed rules in April 2010 that engaged the evolving doctrine of OCI law emanating from protest decisions at the Government Accountability Office (GAO) and the Court of Federal Claims (COFC).⁴ The proposed rule sought to remove uncertainty and formalize the decisional law. For example, while WSARA did not require a new definition for OCIs, the proposed rule incorporated the well-known OCI taxonomy derived from the GAO case of *Aetna Government Health Plans, Inc.; Foundation Health Federal Services, Inc.*, B-254397 et al., July 27, 1995, 95-2 CPD ¶ 129: impaired objectivity, biased ground rules, and unequal access to information.⁵ DOD received extensive comments on the proposed rules.

¹ Pub. L. No. 111-23, 123 Stat. 1704

² DOD proposed new limits on lead systems integrator (LSI) contracting in January of 2008, but those limits were not in force at the time WSARA was enacted. See 73 FR 1824. The subsequently promulgated strict LSI rules amend DFARS 209.570 to prohibit any LSI for a "major" DOD system "from having any direct financial interest in the development or construction of any individual system or element of any system of systems." *Id.* (DFARS 209.570-2(a)). DOD has stated that these rules meet the requirements of WSARA. See 75 FR 20956.

³ Pub. L. No. 111-23, 123 Stat. 1704, 1728-29.

⁴ See 75 FR 20954.

⁵ See *id.* at 20958 (proposed DFARS 202.101). The COFC has cited and adopted the *Aetna* categories. See, e.g., *Vantage Assocs., Inc. v. United States*, 59 Fed. Cl. 1, 10 (2003).

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DOD's final rule, published December 29, 2010, changed direction by limiting its impact to MDAPs, per the terms of WSARA, and did not seek to incorporate the OCI analysis from *Aetna* or any other decision.⁶ The DOD stated that many commenters had observed that it was not necessary, and possibly confusing, to develop broad new OCI rules for the DFARS, when there was already a team developing new rules for the FAR itself. Such a rule would apply to DOD as well, and DOD did not want its own rulemaking to complicate or delay the government-wide rule.⁷ DOD has forwarded the comment file from the proposed rule to the FAR Council team for its use in drafting the new FAR OCI rule.⁸

Like other DFARS provisions, the final rule operates in conjunction with the existing FAR rules, supplanting them only where they conflict. The DOD's final OCI rule does not replace the general OCI framework set forth in FAR 9.5, but it does impose heightened restrictions, which will control over their FAR counterparts in the event of an inconsistency.⁹ The rule sets forth specific restrictions over future contracting by DOD SETA contractors, and provides new guidelines for review of OCIs under MDAPs generally.

Applicability:

The final rule amends DFARS 209 and adds new clauses to DFARS 252. The rule applies to MDAPs, as well as certain "pre-MDAP" programs that have the potential to grow into MDAPs.

MDAPs:

MDAPs are defined by 10 U.S.C. 2430(a) as nonclassified DOD programs that are estimated to cost \$300 million or more for initial "research, development, test, and evaluation," or those that are estimated to cost a total of \$1.8 billion or more, "including all planned increments or spirals."¹⁰ The final rule provides new clauses for integration into MDAP solicitations and contracts.¹¹

Pre-MDAPs:

The final rule also recognizes, however, that SETA contractor expertise can be useful (and is commonly used) in early stages of programs that may (or may not) develop into full MDAPs. Thus, the rule is also applicable to programs identified by DOD as "pre-MDAP." A "pre-MDAP" is defined as any DOD program currently in the development and analysis phases prior to Milestone B of the Defense Acquisition System that has been "identified to have the potential to become a major defense acquisition program."¹² DOD designates a "pre-MDAP" program by including the new DFARS clause in the initial contract.¹³

Evaluating Potential OCIs under MDAPs:

In addition to the general FAR 9.504 obligation to review OCIs, the new rule requires that DOD contracting officers (COs) consider three specific areas of potential risk:¹⁴

- (a) Common ownership between (1) an entity performing SETA, professional services, or management support services to an MDAP or pre-MDAP; and (2) an entity competing (or potentially competing) to perform as a prime contractor or major supplier for that program;
- (b) Self-subcontracting, i.e., "[t]he proposed award of a major subsystem by a prime contractor to business units or other affiliates of the same parent corporate entity, particularly the award of a subcontract for software integration or the development of a proprietary software system architecture;" or
- (c) More generally, COs must review "[t]he performance by, or assistance of, contractors in technical evaluation."

This specific focus on the risks presented by private contractors providing SETA and evaluative services is consistent with the mandate in WSARA to "tighten" rules governing such relationships.

⁶ See 75 FR 81908-15.

⁷ *Id.* at 81909.

⁸ *Id.*

⁹ *Id.* at 81914 (DFARS 209.571-2(b)).

¹⁰ U.S.C. 2430(a); 75 FR 81913 (DFARS 209.571-1).

¹¹ See 75 FR 81915 (DFARS 252.209-7008, 7009).

¹² *Id.* at 81913 (DFARS 209.571-1).

¹³ *Id.* at 81915 (DFARS 252.209-7008, 2009).

¹⁴ *Id.* at 81914 (DFARS 209.571-6).

Mitigation:

One controversial provision in the April 2010 proposed rule was the requirement that contracting officers “shall give preference to the use of mitigation to resolve an organizational conflict of interest.”¹⁵ Commenters believed this requirement placed pressure on COs to make close calls in favor of allowing OCIs, thus risking the existence of, and increasing litigation over, conflicts. DOD removed the preference from the final rule, stating that such a preference “may have the unintended effect of encouraging contracting officers to make OCI resolution decisions without considering all appropriate facts and information.”¹⁶

In place of this preference, the final rule states that contracting officers should seek to “promote competition and preserve DOD access to the expertise and experience of qualified contractors,” and deal with OCIs using (unspecified) means that do not “unnecessarily restrict the pool of potential offerors in current or future acquisitions.”¹⁷ While this policy may achieve flexibility, it provides little “bright-line” or specific guidance to either contracting officers or contractors as to appropriate means to address OCIs. The policy does, at least, steer the contracting community away from any one-size-fits-all solutions, even as it appears to push the inevitable balancing of OCI considerations away from the “tightening” message of WSARA and toward preserving DOD access to contractor technical capabilities.

Review and Integration of Mitigation Plans:

Despite the removal of an express preference for mitigation, the final rule plainly anticipates that mitigation will play a significant role in how COs address OCIs on MDAPs and pre-MDAPs. Once a mitigation plan has been approved by the CO, the plan, “reflecting the actions a contractor has agreed to take to mitigate a conflict, shall be incorporated into the contract.”¹⁸ The new solicitation clauses require such integration as well.¹⁹

If a conflict cannot be mitigated, then COs are instructed to consult with agency legal counsel, and then use another (unspecified) approach to resolve the OCI and award to someone else, or request a waiver under FAR 9.503. Interestingly, when a CO contemplates rejecting a contractor’s mitigation plan for a large procurement, the CO is required to brief a party higher up the chain of command: “For any acquisition that exceeds \$1 billion, the contracting officer shall brief the senior procurement executive before determining that an offeror’s mitigation plan is unacceptable.”²⁰ Therefore, even if not explicitly, the rule reflects a continued preference for mitigation.

Limitation on Future Contracting for SETA Contractors:

The final rule requires that any SETA contract on an MDAP or pre-MDAP include a prohibition against the contractor and any contractor “affiliate” from “participating as a contractor or major subcontractor in the development or production of a weapon system under such program.”²¹ The rule provides specific clauses to be included in SETA solicitations and contracts.²²

This bar on future contracting, and the narrow exception described below, seems to contradict the discussion in the final rule of integrating mitigation plans into SETA contracts. The specific reference to “weapons systems” in the 209.571-7(b)(1) limitation, however, implies that subsequent participation by a SETA contractor on non-weapons systems MDAPs is not precluded per se, and may be possible if an acceptable mitigation plan can be incorporated into the contract per the new DFARS 209.571-4. It is unclear whether a mitigation plan can be effective to permit participation by a SETA contractor in a follow-on weapons systems procurement, but it seems unlikely (at least not without higher level approval, as discussed below).

Definition of SETA:

In addition to defining “systems engineering” and “technical assistance” as individual terms, the rule provides a unified

¹⁵ See 75 FR 20960.

¹⁶ 75 FR 81911.

¹⁷ *Id.* at 81914 (DFARS 209.571–3(b)).

¹⁸ *Id.* (DFARS 209.571–4(b)).

¹⁹ See *id.* at 81915 (DFARS 252.209–7008, 2009).

²⁰ *Id.* at 81914 (DFARS 209.571–4(c)).

²¹ *Id.* at 81914 (DFARS 209.571–7(b)(1)).

²² *Id.* at 81915 (DFARS 252.209–7008, 7009).

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definition for SETA contracting, setting forth a list of specific, non-exclusive examples of contract activities that will be considered SETA work, including:²³

- Deriving requirements;
- Performing technology assessments;
- Developing acquisition strategies;
- Conducting risk assessments;
- Developing cost estimates;
- Determining specifications;
- Evaluating contractor performance and conducting independent verification and validation;
- Directing other contractors' (other than subcontractors) operations;
- Developing test requirements and evaluating test data; and
- Developing work statements.

The definition incorporates the exclusions found in the FAR for work by advanced development and design contractors, and the preparation of work statements by contractors acting as industry representatives.²⁴

Definition of "Major" Subcontractor:

The contract clause implementing the restriction on SETA contractors participating as prime contractors or major subcontractors defines a "major subcontractor" as "a subcontractor that is awarded a subcontract that equals or exceeds [b]oth the cost or pricing data threshold and 10 percent of the value of the contract under which the subcontracts are awarded; or \$50 million."²⁵

Exclusion for "Highly Qualified" Contractors:

The proposed rule included an exception to the SETA bar on future contracting in circumstances where the CO determined that the OCI could be mitigated, and the SETA

contractor was "highly qualified."²⁶ Upon reviewing this proposed exception, the Senate Armed Services Committee (and many commenters) concluded that the proposed exception was too broad, and allowed the CO too much discretion to skirt the new SETA restrictions.²⁷

The final rule responded to these comments by removing the CO's discretion, and stating that the prohibition against subsequent work by SETA contractors "cannot be waived."²⁸ However, the rule states an "exception" to this prohibition whereby the head of the contracting activity may determine that "[a]n exception is necessary because DOD needs the domain experience and expertise of the highly qualified, apparently successful offeror; and [b]ased on the agreed-to resolution strategy, the apparently successful offeror will be able to provide objective and unbiased advice... without a limitation on future participation in development and production."²⁹ Presumably, the "agreed-to resolution strategy" that might be the basis for authorizing this exception could be a mitigation plan of some sort. Despite the claim of non-waivability, this exception available with approval of higher authority is substantially similar to the standard FAR waiver provisions.³⁰

As noted by the DOD itself, the new DFARS requirements satisfy the requirements of WSARA, but do not seek to articulate and impose the OCI framework which has developed in the GAO and COFC. In fact, the regulations

²⁶ 75 FR 20962.

²⁷ See S. Rep. No. 111-201 at 171-72 (May 28, 2010) ("the exception... appears to be broader in scope than the exception authorized by the statute").

²⁸ 75 FR 81914 (DFARS 571-7(b)(2)).

²⁹ *Id.* (DFARS 571-7(c)).

³⁰ See FAR 9.503 ("The agency head or a designee may waive any general rule or procedure of this subpart by determining that its application in a particular situation would not be in the Government's interest.").

²³ *Id.* at 81913-14 (DFARS 209.571-1).

²⁴ *Id.* See FAR 9.505-2(a)(3), FAR 9.505-2(b)(3), and 9.505-2(b)(1)(ii).

²⁵ 75 FR 81915 (DFARS 252.209-7009).

provide some new specific definitions, but otherwise leave the existing FAR-based OCI procedure largely unchanged. It remains to be seen how much of the evolving judicial framework will be incorporated into subsequent FAR revisions, but DOD has made clear that it will not take the lead in formalizing this evolving area of law.

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