Government Contracts Advisory

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DOD Issues Long-Awaited OCI Rule

On December 29, 2010, DOD issued its long-awaited final rule on Organizational Conflicts of Interest (OCI) in Major Defense Acquisition Programs (MDAPs). The rule adds a subpart 209.571 to part 209 of the Defense Federal Acquisition Regulation Supplement (DFARS). 75 Fed. Reg. 81908, 81913 (Dec. 29, 2010), *adding* 48 C.F.R. subpart 209.571, **http://origin.www.gpo.gov/fdsys/pkg/FR-2010-12-29/pdf/2010-32713.pdf**. The rule includes a new solicitation provision and contract clause that prohibit a contractor from providing a weapon system after performing Systems Engineering and Technical Assistance (SETA) services on the major defense acquisition program for that system. *Id.* at 81914, *adding* 48 C.F.R. §§ 252.209-7008 and 7009.

As originally proposed in April 2010, the rule also would have provided general guidance on OCIs for all DOD procurements, not just MDAPs. That broad-based general coverage had been proposed in parallel with an ongoing FAR Case (No. 2007-018) that eventually will revamp subpart 9.5 of the Federal Acquisition Regulation (FAR). Issuance of the final version of the DFARS rule therefore had been eagerly awaited as an indicator of the approach that will likely be taken when a the new FAR OCI rule is proposed for public comment. A preamble to the new DFARS rule explains, however, that further coordination of parallel FAR and DFARS efforts to develop general coverage on OCIs would have delayed finalization of the MDAP aspect of the DFARS rule and created confusion, and thus the final rule addresses only the MDAP OCI provisions. Meanwhile, the proposed FAR rule has been drafted and is undergoing internal reviews prior to publication for public comment.

With respect to MDAPs, the final DFARS rule fully implements section 207 of the Weapon Systems Acquisition Reform Act of 2009 (WSARA), Pub. L. No. 111-23, 123 Stat 1729 (May 22, 2009). Section 207 required DOD to address OCIs arising in the context of (1) lead system integrator contracts; (2) companies having business units performing SETA services (or other professional or management support services) as well as business units competing to supply the system or major subsystems or components of the system; (3) a prime contractor's award of major subsystem contracts to its own affiliates; and (4) performance of technical evaluations. The statute also required DOD to prohibit SETA contractors in major defense acquisition programs from participating — either themselves or through affiliates — as a prime contractor or major subcontractor in the development or construction of a weapon system under the program (with limited exceptions).

The final DFARS rule implements each of these statutory requirements by providing general policy on OCIs in MDAPs, addressing the use of mitigation actions to resolve conflicts, and prescribing new solicitation provisions and contract clauses to effect the prohibition on competing for systems, subsystems, and

components after performing SETA work on a system.

In response to comments related to those parts of the proposed rule specifically directed to the WSARA requirements, the final DFARS rule:

- Locates the new coverage in DFARS part 209 (contractor qualifications) rather than DFARS part 203 (improper business practices and personal conflicts of interest);

- Replaces the proposed rule's preference for mitigation (as opposed to avoidance) of OCIs, adding language that more generally emphasizes contracting officer discretion to manage the dual objectives of employing OCI resolution strategies that do not unnecessarily restrict the pool of potential offerors, while ensuring that agencies obtain objective and unbiased advice on major defense programs;

- Tightens the exception to the SETA contracting prohibition on competing for future work to require that the exception be approved by the head of the contracting activity through a finding that the offeror in question will be able to provide objective and unbiased advice; and

- Refines the definition of "major subcontractors" (who are also subject to the SETA contracting prohibition) to include all subcontracts over $50 million, regardless of the percentage of value of the prime contract.

In another significant departure from the rule as originally proposed, the final rule's policy statement provides that agencies "shall not impose across-the-board restrictions or limitations on the use of particular [OCI] resolution methods," except as may be required to implement the SETA contracting prohibition or "as may be appropriate in particular acquisitions." 48 C.F.R. § 209.571-3(b). This change appears to be a reaction to industry and American Bar Association comments that had criticized the proposed rule for suggesting that contracting officers could never permit impaired objectivity conflicts to be mitigated through the use of organizational separation and information firewall techniques. Several commentators had observed that the rule as originally proposed would have unduly limited contracting officer discretion in that regard.