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July 21, 2010

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

Submitted via: <http://www.regulations.gov>

Subject: Defense Federal Acquisition Regulation Supplement (DFARS); Organizational Conflicts of Interest in Major Defense Acquisition Programs (DFARS Case 2009-D015)

CODSIA Case No. 9-10

Dear Ms. Williams:

The undersigned members of the Council of Defense and Space Industry Associations (CODSIA)¹ appreciate the opportunity to comment on the April 22, 2010 proposed rule entitled “Organizational Conflicts of Interest in Major Defense Acquisition Programs” (DFARS Case 2009-D015). The proposed DFARS rule is intended to implement section 207 of the Weapons System Acquisition Reform Act of 2009 (WSARA). As explained in the Federal Register announcement on the proposed rule, 75 Fed. Reg. 20954 (April 22, 2010):

Section 207 requires DoD to revise the DFARS to provide uniform guidance and tighten existing requirements for organizational conflicts of interest (OCIs) by contractors in major defense acquisition programs. The law sets out situations that must be addressed and allows DoD to establish such limited exceptions as are necessary to ensure that DoD has continued access to advice on systems architecture and systems engineering matters from highly qualified

¹ CODSIA was formed in 1964 by industry associations with common interests in federal procurement policy issues, at the suggestion of the Department of Defense. CODSIA consists of seven associations – the Aerospace Industries Association (AIA), the American Shipbuilding Association (ASA), the National Defense Industrial Association (NDIA), the Professional Services Council (PSC), the American Council of Engineering Companies (ACEC), TechAmerica, and the U.S. Chamber of Commerce. CODSIA’s member associations represent thousands of government contractors nationwide. The Council acts as an institutional focal point for coordination of its members’ positions regarding policies, regulations, directives, and procedures that affect them. A decision by any member association to abstain from participation in a particular case is not necessarily an indication of dissent.

contractors, while ensuring that such advice comes from sources that are objective and unbiased.

As the attached comments detail, the proposal fails to adhere to statutory direction or meet the department's or industry's goals. For example, the rule goes far beyond the statutory direction to cover Major Defense Acquisition Programs (MDAPs) to cover all DoD acquisitions. In addition, despite DoD's declared intent to make OCI mitigation the preferred means to resolve OCIs, the draft will, in fact, largely enshrine the "choose your major" initiative that several contracting offices have recently undertaken. We do not believe this will be good for the department's industrial base and it will certainly put the industry through several years of needless turmoil.

It is also important to place this coverage in DFARS Part 209 rather than Part 203. The existence of a conflict of interest is not an improper business practice.

As we demonstrate in the attached detailed comments, this restructuring of the industry is not required to protect DoD from OCIs. Rather, we believe the rule is premised on several mistaken assumptions that, once corrected, will allow DoD to adopt much less disruptive measures to protect its interests. We do not believe this policy should be driven by mere appearances or assumptions about corporate behavior in the defense sector that are at odds with our experience.

Given the significant comments we provide here and that we anticipate will be received from others on this proposed rule, and the critical impact any such rule could have on the defense industrial base, we urge DoD to publish a revised proposed rule for further public comment after addressing all public comments.

Thank you for your consideration of these comments. If you have any questions or need any additional information, please contact the CODSIA project officer, Alan Chvotkin, Executive Vice President and Counsel of the Professional Services Council, at chvotkin@pscouncil.org or (703) 875-8059 or Bettie McCarthy, the CODSIA Administrative Officer, at 703-875-8059.

Sincerely,



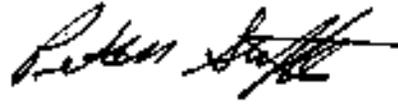
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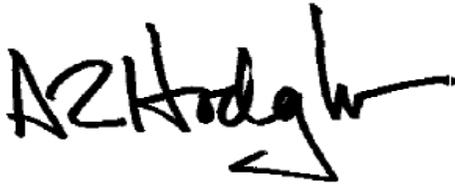
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Attachment

CODSIA Comments on Defense Federal Acquisition Regulation Supplement (DFARS)

Organizational Conflicts of Interest in Major Defense Acquisition Programs

(DFARS Case 2009-D015)

1. Background

The background statement accompanying the proposed rule states that the proposed regulation implements WSARA section 207 but the rule goes far beyond that by prescribing new organizational conflict of interest (OCI) rules for all DoD procurements.

Furthermore, the background statement fails to discuss any of the comments received in response to the Advance Notice of Proposed Rulemaking (ANPR) of a related Federal Acquisition Regulation, FAR Case 2007-018, Organizational Conflicts of Interest, 73 Fed. Reg. 15962 (March 26, 2008). Yet this ANPR is mentioned three times in this rule; once to say the FAR Councils are still working on a proposed OCI FAR rule; again when comments are cited to support consolidating contracting officers' responsibilities regarding OCIs; and finally responding to a comment requesting more coverage on the treatment of conflict resolution. In addition, using a "one-size-fits-all" rule on OCI fails to take into account the significant differences that exist between different sectors of the defense industrial base. While we are not arguing for a sector-by-sector policy, the department's analysis of situations and approaches to solutions properly should vary depending on the composition of the marketplace and factors such as the competitive nature of the department's past procurements and future spending opportunities.

A colloquial term used for options under this rule is "choose your major," meaning a company and all its affiliates would be permitted to support the government only through (a) support contracts prior to production or system development and deployment, (b) contracts that focus on production and system development and deployment, or (c) contracts that focus on support activities. Applying such an approach must balance potential increases in competition with government access to technical expertise.

In addition, DoD acknowledges that if and when the FAR is revised to incorporate broader OCI coverage, DoD will follow the FAR and will revise the DFARS to address only those aspects of OCI that relate specifically to MDAPs, particularly since MDAP coverage is all that is addressed in Section 207.

Finally, it is important for the rule to acknowledge that an organizational conflict of interest does not create a personal conflict of interest for employees and, conversely, any personal conflict of interest that may arise does not alone create an organizational conflict of interest.

2. Preference for Mitigation

We strongly support the proposal's preference for mitigation emphasized in the background and stated in the first sentence of 203.1203(c) and restated in 203.1205-1(c)(1) as:

Except as may be otherwise prohibited within this regulation, it is DoD policy that, generally, the preferred method to resolve an organizational conflict of interest is mitigation (see 203.1205-1).

Unfortunately, as detailed below, the exceptions within the regulation, the resolution methods referenced in 203.1205-1(a), and the further caveats in 203.1203(c), dramatically undercut the department's stated policy preferring mitigation.

The policy should allow effective mitigation such that qualified businesses could compete if the mitigation adopted assured the government that a contractor would not render biased advice to the government and would not benefit from an unfair competitive advantage.

3. Location of Coverage in DFARS Subpart 203

We believe the coverage for identifying and resolving conflicts of interest throughout the acquisition process is best treated as matter of "contractor responsibility," as the current FAR rule does in Part 9, rather than as an "Improper Business Practice" as this proposed DFARS Subpart 203 does. The FAR rule on OCI is properly located in FAR Part 9, titled "Contractor Responsibility," while this proposed DFARS rule would move coverage into DFARS Part 203 and rename the section "Improper Business Practices and Personal Conflicts of Interest." Not only does this proposed rule violate the FAR drafting conventions, it sends a chilling message to the entire acquisition workforce that conflicts of interest – regardless of their characterization or any government action at resolution – are improper behaviors that justify penalties rather than situations that can be mitigated.

We also believe that a contracting officer's determination of whether to accept or reject a mitigation plan has the same weight as a determination of affirmative responsibility. Like an affirmative responsibility determination, the contracting officer will have to live with the determination after award. In our view, contracting officers perceive that such decisions are being second guessed by higher level management or reviews, as well as numerous external reviews and oversight of their actions. This perception is prompting contracting officers (and even some entire organizations) to adopt more stringent approaches to avoidance, such as limitations on future contracting, rather than using authorized alternative approaches. Thus, if DoD does not want contracting officers to set industrial base policy through their decisions on OCI matters, the final rule should provide further assurance that it is acceptable for contracting officers to accept reasonably specific mitigation plans.

4. Definitions in Section 203.101 and 252.203-70YY

The proposed definition of “organizational conflict of interest” combines the coverage of three different types of conflict of interest – actual, potential, and apparent – resulting in considerable ambiguity. To resolve this, we propose the following definitions:

- An “actual conflict of interest” exists when current circumstances provide no protection to the government from acting on biased advice.²
- A “potential conflict of interest” exists when circumstances could arise in the future causing an actual conflict of interest. If the likelihood of a potential conflict of interest becoming an actual conflict of interest is sufficiently remote, then the Government should be able to proceed with the instant award despite the potential conflict, while taking steps to address the circumstances that might arise in the future.
- An “apparent conflict of interest” exists when circumstances appear to allow a contractor’s biased judgment to materially influence the government. For an apparent conflict of interest to require further mitigation or other steps to resolve it, *all* the material and relevant facts must be viewed from the perspective of a reasonable person who concludes that the contractor will be unable to render impartial and unbiased advice or judgments in accordance with its contractual commitments, and the government cannot take adequate steps to ensure it is not unduly influenced by such advice.³

Any OCI rule should recognize that agencies exercise independent judgment and are capable of counterbalancing information and advice. Furthermore, appearances, if not supported by material facts, should not require resolution.

FAR Subpart 9.5 and the proposed DFARS rule also treat as a conflict of interest access to non-public information that could give a company whose employees have access to that information a competitive advantage. Under the proposed DFARS rule, only this “unfair access” OCI, addressed at proposed DFARS 203.1204(b), can be mitigated using a firewall (see 203.1205-3(c)(1)). The rule would be more clear and implementable by treating access to information only as a matter of controlling information use and disclosure, rather than as a conflict of interest.

The definition of OCI covers both the “offeror” and “subcontractors.” We recommend that the prime contractor be required to address only their first tier subcontractors.

² An important means to protect the government’s interest in this situation is to get advice from more than one source. This technique is expressly endorsed in FAR 9.505-2(b)(1)(iii). WSARA section 207(b)(2) requires regulations to provide that “the Department of Defense receives advice on systems architecture and systems engineering matters with respect to major defense acquisition programs from federally funded research and development centers or other sources independent of the prime contractor.”

³ We believe these definitions also cover the biased ground rules OCI as defined in 203.1204(c) since the contractor there has the power to set ground rules in its favor violating its contractual obligation to provide its best advice on what the ground rules should be.

The following discussion will use the organizational conflict of interest definition proposed in DFARS 202.101 except where noted.

5. **Unique Definitions in 203.1201**

A. The proposed rule defines “**contractor**” too broadly and ambiguously by including the phrase “the total contractor organization,” which includes “all subsidiaries and affiliates.” While FAR 2.101 contains a standard definition of affiliate,⁴ the FAR and the proposed DFARS rule leave undefined the key terms of “total contractor organization” and “subsidiary.” While the intent may be to include the legal entity holding the contract and all of its affiliates, meaning those business entities that can affect how the entity holding the contract performs, the addition of the phrase “total contractor organization” and the word “subsidiary” suggests that phrases must cover more than the FAR definition. Likewise, the term “affiliate” and the definition in FAR 2.101 include third party control, thus expanding the term too broadly. As a result, joint ventures, minority holdings, other non-controlling ownership interests and even teaming arrangements may be covered by the proposed definition. If such an unusually broad definition is intended, that should be made clear and be justified. In our view, the only concern covered by this rule should be the contractor and those affiliates who have direct control over the contractor’s performance on the contract in question. We suggest the following change:

*“Contractor means a party to a government contract other than the government and includes ~~the total contractor organization, including not only the business unit or segment~~ **the entity** that signs⁵ the contract. ~~It also includes and all subsidiaries and of~~ **its** affiliates who control its performance.”*

Even this more limited definition may be excessively broad for OCI purposes. In the definition or elsewhere in the regulation, when contracting officers are evaluating an OCI situation and a contractor resolution plan, they should be expressly cautioned to not assume that an organization consisting of many business units and affiliates with differing interests will react as if the organization were a single entity.

B. The term “**firewall**” is defined once in 203.1201 and is elaborated on in 203.1205-3(c)(1)(ii):

Proposed 203.1201 states:

“Firewall means a combination of procedures and physical security arrangements intended to restrict the flow of information either within an organization or between organizations.”

Proposed 203.1205-3(c)(1)(ii) states:

“A firewall—

⁴ Affiliates means associated business concerns or individuals if, directly or indirectly,

(1) Either one controls or can control the other; or (2) A third party controls or can control both.

⁵ We suggest that instead of “signs” the regulation should say “that is bound to the contract” since signing is not the only way a contractor can become bound to perform. This suggestion, however, does not concern OCIs.

- (A) May include an agreement to limit reassignment of contractor employees who have access to non-public information; and
- (B) May also apply to the reporting chain within a company to ensure that an employee's supervisor is not in a position to exercise inappropriate influence on another acquisition."

However, because 203.1205-3(c)(i) provides that a firewall can *only* be used to mitigate "unfair access to non-public information," we are concerned that, by defining a firewall so broadly that it goes well beyond just limiting information flow, any procedure – whether physical separation, limits on employee transfers, or management independence – will be inappropriately precluded from being considered as a resolution technique when addressing either the "impaired objectivity" or the "biased ground rule" OCI.

Congress directed DoD to consider such steps beyond simply restricting information flow as potentially effective mitigation measures. The WSARA conference report,⁶ at page 93, states:

In developing the regulations ... for cases in which mitigation is determined to be appropriate, the conferees expect the Secretary to give consideration to strengthened measures of organizational separation of the type included in the Senate bill.

As passed by the Senate, the exceptions in Subsection 205(b)(3) of S. 454 required the regulation writers to consider⁷ steps beyond the mere control of information as having the potential to mitigate otherwise prohibited contracting relations. The bill requires DoD to:

- (3) provide for an exception to the requirement in paragraph (2) for an affiliate that is separated from the contractor by structural mechanisms, approved by the Secretary of Defense, that are similar to those required for special security agreements under rules governing foreign ownership, control, or influence over United States companies that have access to classified information, including, at a minimum—
 - (A) establishment of the affiliate as a separate business entity, geographically separated from related entities, with its own employees and management and restrictions on transfers for personnel;
 - (B) a governing board for the affiliate that has organizational separation from related entities and governance procedures that require the board to act solely in the interest of the affiliate, without regard to the interests of related entities, except in specified circumstances;
 - (C) complete informational separation, including the execution of non-disclosure agreements;
 - (D) initial and recurring training on organizational conflicts of interest and protections against organizational conflicts of interest; and

⁶ House Report 111-124, Joint Explanatory Statement of the Committee of Conference.

⁷ Subsection 205(b)(4) of S. 454, as passed the Senate, provided that the regulation writers were not bound to accept the exceptions specified in 205(b)(3) if they were inadequate to protect DoD's interests.

(E) annual compliance audits in which Department of Defense personnel are authorized to participate;”.

WSARA Section 207(b) as enacted directs that the regulations shall, at a minimum:

(2) ensure that the Department of Defense receives advice on systems architecture and systems engineering matters with respect to major defense acquisition programs from federally funded research and development centers or other sources independent of the prime contractor;

(3) require that a contract for the performance of systems engineering and technical assistance functions for a major defense acquisition program contains a provision prohibiting the contractor or any affiliate of the contractor from participating as a prime contractor or a major subcontractor in the development or construction of a weapon system under the program; and

(4) establish such limited exceptions to the requirement in paragraphs (2) and (3) 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 experience and expertise, while ensuring that such advice comes from sources that are objective and unbiased.

The elements of these exceptions in the Senate bill track closely to the National Industrial Security Program Operating Manual (NISPOM) requirements for allowing affiliates of foreign owned companies to have access to classified information.⁸ Several presentations at the December 2009 DoD-conducted public meeting also asserted that the NISPOM or independent affiliate approach should, at a minimum, suffice to mitigate both impaired objectivity and biased ground rule OCIs. The department’s failure to address this issue is a serious shortcoming in the rule. Any final rule should follow the congressional direction and, with appropriate controls similar to those granting domestic units of foreign companies’ access to DoD classified information, permit the use of an “independent” affiliate as an additional technique to mitigate all potential OCI issues. Similarly, the proposed rule fails to adequately address WSARA Section 207(b)(2) and (4) regarding independent systems architecture and systems engineering advice and the establishment of limited exceptions to ensure the availability of such advice from private contractors as needed.

Applicability in 203.1202

A. Task Order/Delivery Order Contracts. We agree that OCI rules should generally apply to task and delivery order contracts but, as discussed further below, some significant and material implications are not addressed in the rule and may not have been fully considered. For example, some IDIQ contracts require all contract holders to compete for all task orders issued or for all orders that include certain CLINs. The regulation should specifically provide that, if by submitting a bid a contract holder would create a conflict of interest, the contract holder may

⁸ See National Industrial Security Program Operating Manual (NISPOM) §2-303.

notify the contracting officer that it will not bid because such action could create the potential for a conflict of interest and such action would not breach an existing contract. At a minimum, the DFARS should provide that contracts must not be used to force contractors into OCI situations.

In addition, we are concerned with the significant challenges created by imposing these same rules on task and delivery order contracts. Simply, the typical timeframe provided by agencies for most task order responses – ranging from as little as three business days to up to fourteen business days – does not provide sufficient time for contract holders or the government to assess the requirements, conduct due diligence about the impact on every other contractor activity, evaluate resolution strategies and submit such information to the contracting officer in time to meet the timeframes for task order responses. Nor would that application give contracting officers meaningful time to evaluate any proposed resolution technique while also supervising the evaluation of the underlying task order responses. Here again, the net effect of the application of the rule to task orders could be a further restriction on competition since firms will be unable to meet the requirements of the rule in a timely manner in order to submit a proposal or agencies will have to significantly extend the time for the submission of offers.

Similarly, the rigorous due diligence and risk mitigation required by the rule should not be required for simple contract modifications that, for example, make additional funds available. We strongly recommend that the OCI provisions be applicable only to contract modifications that enhance the scope of work under the contract.

B. Commercial Items. We strongly support the exemption for commercial-off-the-shelf items in proposed 203.1202(a)(2) but do not understand why other types of commercial items are similarly not exempt. In our view, absent specific statutory coverage requiring application to commercial item procurements, 41 U.S.C. 430 exempts all contracts and subcontracts for commercial items.

C. Coverage. The special caution in proposed 203.1202(b) is unnecessary and misleading. We oppose singling out for special treatment three specific examples of services contracts and one situation that the rule already defines as a conflict of interest. The four areas mentioned in the rule as more prone to risk of an OCI are: “(1) pre-solicitation acquisition support services; (2) other support services; (3) advisory and assistance services; or (4) contractor access to non-public information.” With regard to the first three examples of services contracts, contracting officers could improperly assume that all actions in these three covered areas have a particular risk for OCI such that resolution is limited to avoidance techniques. Additionally, these examples may cause contracting officers to improperly assume that other types of services contracts are not as susceptible to OCI concerns such that the solicitation clause in the proposed rule does not need to be included. We recommend that this list be dropped and the regulations rely on the succeeding provisions.

D. Other. The department has unilaterally exceeded the statutory requirement to apply OCI coverage only to major defense systems. That decision creates another gap in how DoD should, or could, apply the rule's requirements to DoD funded orders placed against contracts awarded by other agencies, such as any government-wide acquisition contracts, GSA Federal Supply Schedules contracts, or Economy Act purchases. In our view, these acquisitions should continue to be governed only by FAR 9.5.

Policy in 203.1203

A. Policy Statements. The policy statements in subsection 203.1203(a)(1) appear to be based on the unstated and inaccurate assumption that DoD is helpless to recognize and then counter bias. The rule also falsely assumes that contractors will breach their contracts under any circumstance when such action would benefit them. We recommend the following as a better expression of policy that should guide the government in addressing OCIs:

- (a) Organizational conflict of interest can impair—
 - (1) The government's ability to acquire supplies and services that are the best value to the government. For example—
 - (i) A contractor **providing judgment to the government as part of its work under a contract, or one of its affiliates, has interests that** ~~an organizational conflict of interest~~ may **induce the contractor to attempt to** influence the Government to pursue an acquisition outcome that is more compatible with the contractor's interests than with the government's interests. **In such instances, the contractor and the government should address the circumstances to assure that the government's interests are not materially impaired.**
 - (ii) A contractor that properly had access to non-public information **that would be materially advantageous if the contractor used it for its own purposes** while performing under a government contract, grant, cooperative agreement, or other transaction ~~may be able unfairly to use the~~ **may be able to use the** non-public information unfairly to its advantage to win award of a ~~future~~ contract **(e.g., use "procurement information" as defined in FAR 3.104).**

B. Public Trust. Keeping the public trust is one of many differences between public and private sector contracting. The proposed regulation is right to note this explicitly. However, proposed 203.1203(a)(2) goes well beyond noting this caution and instead creates a new type of OCI – appearance – that is not covered in the law nor elsewhere in the regulations, and should not be treated as a type of organizational conflict. Section 203.1203(a)(2) provides:

The Government *must* avoid the appearance of impropriety which taints the public view of the acquisition system. Organizational conflicts of interest, *by their mere appearance*, call into question the integrity and fairness of the competitive procurement process. This concern exists *regardless* of whether any individual contractor employee or

contractor organization ever actually renders biased advice or benefits from an unfair competitive advantage. (Italics added.)

We strongly recommend this quoted text be deleted. As written, many will improperly interpret this provision to mean that if an appearance of an OCI exists, the procurement must not proceed. Other elements of the proposed rule support our position. For example, in defining an organizational conflict of interest, 252.203-70XX(a)(ii) specifically and properly recognizes that appearances must be judged “from the perspective of a reasonable person with knowledge of the relevant facts.” Thus, if 203.1203(a)(2) is to be retained, we recommend it be rewritten as follows:

The appearance of impropriety should be avoided where possible to avoid public misperceptions of the fairness of the acquisition system. It is the contracting officer’s responsibility to obtain the material facts and evaluate them objectively so as to effectuate DoD’s policy in favor of mitigating organizational conflicts of interest. The contracting officer may determine a mitigation and implementation plan ensures that the contractor and its employees will not render biased advice, receive benefits from an unfair competitive advantage, or not materially affect the government’s actions.

In our view, an “appearance” creates an obligation to thoroughly investigate and document the circumstances and not imply that an “appearance” alone imposes a need for mitigation. If the investigation determines that a conflict exists, the provisions of this rule would apply and special mitigation language for “appearances” would not be necessary. We believe this approach comports with the intent of the proposed rule addressed elsewhere, with the intent of Congress, with the government’s ability to protect itself and with the reality that contractors are not seeking ways to breach their contracts through biased advice provided to the government.

C. Notice, Disclosure and Resolution Policy. We acknowledge the need for the “notice, disclosure, and resolution policy” enunciated in 203.1203(b). This is a shared responsibility between the government and the contractor. Contractors have an obligation to avoid an OCI and the procuring activity has an affirmative obligation to screen for an OCI among existing support contractors.

However, if the DAR Council elects to treat unequal access to information as a conflict of interest, we recommend that this subsection advise the contracting officer that any procurement “may give rise to one or more organizational conflicts of interest” unless exempt, or if the contracting officer determines the procurement will not give rise to an organizational conflict of interest. As drafted, the only procurement that could not give rise to a conflict of interest is one where the entire procurement was supported exclusively by government employees. However, as an example, some unfair access OCIs can be resolved through support contractor employees signing non-disclosure agreements that provide enforcement rights both

to the government and to the owners of the accessed data.⁹ We advocate giving the owners of the data such rights because they are the real parties in interest. Nonetheless, if implemented as proposed, we would expect almost all procurements would **routinely** require an OCI analysis.

However, the rule has omitted the first essential step in that analysis, namely the government's identification in each solicitation of every support contractor involved in the procurement, including noting whether the contractor provided advice or merely had access to non-public information and the disclosure of "the total [support] contractor organization, including not only the business unit or segment that signs the contract. It also includes all subsidiaries and affiliates."¹⁰ The government also needs to identify every contractor that it knows or anticipates will evaluate or test proposed products or services or deliverables under the contract since 203.1204(a)(2)(i) states that such activities also can give rise to an "impaired objectivity" OCI. In addition, subsection 203.1205-2(b), regarding the contracting officer's responsibilities during preparation of a solicitation, should be amended to conform. Prospective prime contractors and their team members will need this information as early in the acquisition process as possible to avoid or propose a mitigation plan for such potential OCI. Without the names of the government's support contractors and all their affiliates, prime contractors cannot be expected to know which potential team members, much less the affiliates of such team members, raise OCI issues before they may be deemed to be tainted by working with them. The nature of the work being performed also directly impacts whether and how OCIs can be mitigated.

D. Limitations on Mitigation. Subsection 203.1203(c) states that while mitigation is "generally, the preferred method to resolve an organizational conflict of interest ... mitigation may not be advisable in every instance." As more fully discussed below under 203.1205-3, the proposed rule seems to reject all but one very limited form of mitigation for all OCIs except unfair access to information. Thus, if the rule does not de jure lead contracting activities to require contractors to "choose their major," the proposed rule provides a de facto policy of such approach or at least no meaningful disincentive from doing so. At a minimum, the next iteration of this rule must do more to identify when "mitigation" is not advisable.

6. Impaired Objectivity of OCIs in 203.1204(a)

Section 203.1204(a) of the proposed rule defines "impaired objectivity" as:

when a contractor's judgment and objectivity in performing tasks for the government might be impaired because the substance of the contractor's performance has the potential to affect other of its activities and interests.

This may accurately describe circumstances when the parties should investigate whether an actual OCI exists but, without further analysis, these circumstances do not mean the best

⁹ Section 821 of the FY 2010 NDAA, Pub. Law No. 111-84, authorizes support contractors to be provided access to technical data if the support contractor provides a nondisclosure agreement. As of this date, DoD has not yet implemented this requirement in the DFARS.

¹⁰ As recommended above, we believe the definition of "contractor" should be more limited than proposed.

interests of the government will be harmed. Section 203.1204(a)(1) identifies only two elements that create impaired objectivity:

- (i) The contractor is performing tasks that involve the use of subjective judgment or giving advice; and
- (ii) The contractor has a financial or economic interest that could be affected by the outcome of its performance.

Again, these “elements” are more properly viewed as signals requiring further contractor and government investigation but do not alone establish an actual OCI.

If the contracts are being performed by a single person, these other inquiries need not be made because an individual will know what is being done on both contracts and has the power to affect performance of both. That does *not* mean, however, the individual will perform either improperly. But organizations are different from individuals and getting components to work together, even for the best of purposes, can be difficult.¹¹ The existence of risk factors should not be an automatic disqualification but should require further investigation and analysis to determine whether there is an actual conflict of interest.

We propose to combine, rewrite and add these key elements of 203.1204(a) to define an actual impaired objectivity OCI as follows:

A contractor is (1) providing subjective judgments or advice in evaluating a proposal, a product or service, or technical or policy advice; (2) that could materially affect government action; (3) the contractor or an affiliate has a substantial economic or financial interest that could be affected by such government action; and (4) relevant material facts show that government acts or contractor steps do not assure that the conflicting interest will have no material effect on the government’s action or the contractor’s advice or judgment. If a conflicting interest exists, the contracting officer should examine whether that conflicting interest is sufficient to bias the contractor’s performance and if so, whether (1) the government will have other sources of advice to balance that of the contractor, (2) whether the contractor’s affiliate has the information needed for the contractor’s affiliate to know it could benefit from specific acts or omissions of the contractor, and (3) whether the contractor’s affiliate that would benefit has the necessary control to affect the contractor’s act or omission to benefit its own interests.

While the above is not necessarily the best way to define an “actual impaired objectivity” OCI, it includes the key elements missing from the proposed regulation. We also note that these information and control elements could be addressed as part of the resolution section.

¹¹ It took an Act of Congress, the Goldwater-Nichols Act, to make the military services coordinate their war fighting efforts.

6. Unfair Access to Non-public Information in 203.1204(b)

This type of organizational conflict of interest has been treated as such for decades. However, we recommend that the concept would be better understood and clarified if it were labeled “misuse of non-public information.” The problematic aspect is the contractor’s temptation to use the information improperly. There is no advantage afforded a contractor if the contractor does not misuse the information. Once again, there is a huge difference between one employee being given information that may, if known to other employees in the organization, be used unfairly in a concurrent or future competition and the situation where a single person both receives the information and is also involved in that future or concurrent competition. The simple point is that two or more individuals cannot coordinate unless they both have the information to do so. Requiring contractors to have executive management oversight to ensure no undue influence is a proven practice and better addresses this concern.

We therefore recommend that 203.1204(b)(1) and (2) be rewritten as follows:

Misuse of non-public information” organizational conflict of interest may arise when a contractor’s employees must have access to, or it is in the government’s interest to provide contractor employees access to non-public information during the contractor’s performance of a government contract, grant, cooperative agreement, or other transaction that may provide the contractor a material competitive advantage in a procurement. There is no competitive advantage if substantially equivalent information will be made available in the procurement or access to the information provides no, or an immaterial, competitive advantage.

Subsection 203.1204(b)(3)(i) provides two examples of competitive advantages that do not create an unfair relationship. It is well understood, and a long-standing legal interpretation, that incumbents have advantages that are not considered unfair. But often, to assure a reasonably fair competition, it is in the government’s best interest, and it is sometimes required, to make available to the public information held by an incumbent. Our concern is that this provision could be read as relieving the government of any duty to provide bidders with such information under any circumstances.

We have several concerns with subsection 203.1204(b)(3)(ii) even though it tracks closely with existing FAR 9.505-2(a)(3). First, the placement of this exception/explanation in the unfair access OCI subsection infers that it only applies to excuse unfair access OCIs. Thus a firm or government contracting officer could argue that if a development contractor provided the government with opinions on what the production requirements should look like, the development contractor would not have an unfair access to non-public OCI (under this exemption), but still could have an impaired objectivity OCI that would prevent it from competing on the production contract. In contrast, the structure and wording of FAR 9.505-2(a)(3) prevents this ambiguity from arising by recognizing that development work performed

under certain contracts does not create an unfair competitive advantage with regard to the follow-on production effort.

In the first sentence, the provision refers to the contractor designing the product as well as developing the product. The remainder of the paragraph does not mention design, thus creating another ambiguity. Is the rule seeking to allow design contractors to compete for development work? If so, this would be a departure from current practice but would, arguably, move DoD's acquisition practices closer to those in some sectors of private industry. In addition, it is important to distinguish design work from research and development because DoD's practice properly allows a contractor that has performed research and development work to compete for the production work.

We recommend that this section be rewritten to clarify both whether development contractors will be subject to being barred from competing because advice provided the government during development might favor their own approaches and whether this exception is being expanded to include design as well as development contracts.

7. **Biased Ground Rules in 203.1204(c)**

We question whether this type of OCI needs to be treated separately and thus potentially differently from impaired objectivity OCIs. In both cases the contractor faces a potential OCI because it can influence the government to act in the contractor's favor by biasing the contractor's advice to the government. So it is difficult to see why establishing this category aids in an OCI analysis of what would otherwise be an impaired objectivity OCI.

As with impaired objectivity OCI, the rule should (a) reflect that DoD has available to it and uses various mechanisms to protect itself from materially biased advice and (b) explicitly mention the effective mitigation option of getting input from multiple sources.

8. **Contracting Officer Responsibilities in 203.1205-1**

We strongly support the process provided in 203.1205-1(c) making mitigation of an OCI the first item to consider when determining how to resolve an OCI. However, as we note in our comments on 203.1205-3, the rule does not give contracting officers and competitors any real opportunity to mitigate impaired objectivity and biased ground rules OCIs.

As drafted, 203.1205-1(a) only requires resolution of conflicts prior to award. It does, however, require contracting officers to strive to structure RFP provisions to avoid or resolve OCIs. It is important that contracting officers give potential offerors DoD's position on the existence of, and acceptable mitigation approaches to, OCIs as early in the procurement as possible, to save interested competitors the time and effort needed to pursue opportunities they cannot win. We also recognize that contracting officers will be hard pressed to justify expending resources on a detailed analysis of mitigation plans submitted by competitors who may not win. To better balance the guidance, we recommend revising 203.1205-1(a) to provide: "shall then resolve as

promptly as practical, but no later than prior to contract award, any organizational conflict of interest identified.”

9. Government Identification of Support Contractors in 203.1205-2(b)(2)

The proposed rule requires the government “to identify any contractor(s) that participated in preparation of the statement of work or other requirements documents, including cost or budget estimates.” This information needs to be released publicly so that competitors and subcontractors can use it to identify potential OCIs. If the definitions of contractor and the three types of OCIs are not changed dramatically, however, this is not enough information. For each contractor named, the government must describe the type of work it did and whether the contractor used or had access to non-public information that could provide that contractor or any of its affiliates an unfair competitive advantage so that companies can determine if they or teammates have OCIs and the type of OCI. It must also name all the contractor’s affiliates.¹²

If the government or the named contractors have a government approved mitigation plan in place that should also be released along with any restrictions the named contractor and/or its affiliates may have on participating in the upcoming competition.

However, we recommend that the list of supporting contractors exclude any contractor whose work did not involve access to data sensitive to the upcoming competition, provided no advice and set no ground rules, or otherwise cannot be the source of an OCI (e.g. development contractors who only had access to nonpublic information).

Finally, if the contracting officer determines that contractor performance of the contemplated work has the potential to create an OCI, before the contracting officer includes the provision and clause required by 203.1206, the contracting officer should notify the contractor and provide an opportunity to discuss the OCI.

10. Resolution of OCIs in 203.1205-3

A. When addressing the resolution of organizational conflicts of interest, 203.1205-3 provides three means of resolving conflicts that appear to be virtually exclusive but in reality are not. The explicitly preferred resolution technique under the rule, mitigation, is actually listed last. In 203.1205-3(a), the technique of avoidance is described as an appropriate method to use for two kinds of OCIs: (i) obtaining non-public information and (ii) influencing ground rules¹³ “in order to remain eligible for the future acquisition, a contractor will avoid, or be prohibited from, submitting an offer for the initial acquisition.” This sentence effectively expresses the “choose your major” approach – a company must choose to support the early acquisition program

¹² If the definition of contractor is not changed, the government should identify the total organization of its support contractors and all subsidiaries.

¹³ There is no reason given as to why the “impaired objectivity” OCI is not included in the types of OCIs that can be avoided. Logically, it seems impaired OCIs should be resolvable through avoidance. We support making such appropriate changes to the section on avoidance.

phases or limit itself to competing for the larger production opportunities. This remedy is elaborated upon in 203.1205(a)(1) and is declared in the rule to be a last resort.

However, the only alternative identified in 203.1205(a)(2) is “to exclude tasks that require contractors to utilize subjective judgment [or]... involve the exercise of independent judgment.” In other words, the rule seems to direct the department to not tap any expertise a contractor may have due to its past or planned future work in production or other phases and precludes any company with such expertise from providing it to the government. This seems extreme and would unlikely be used much except when the government has all the in-house expertise needed and that in-house expertise is available.

B. The next resolution technique, neutralization or limitation on future contracting, is listed in section 203.1205-3(b). Section 203.1205-3(b)(1) suggests prohibiting an early phase contractor from competing for later phases, which is another formulation of the “choose your major” option. The only mitigation available here is that the restriction must have a definitive end point.

C. The last resolution technique, and the rule’s identified preferred solution, is mitigation addressed in 203.1205(c). The section lists only three mitigation techniques and explicitly disclaims an intention to make the list exclusive. Our concern is that few contracting officers will accept a mitigation technique that is not specifically listed in the rule. We urge DoD to add to the rule other acceptable techniques, particularly as they apply to impaired objectivity and biased ground rule OCIs, and to broaden the definition of “firewall.”

The first endorsed mitigation technique is using a firewall. The term “firewall” in the definitions section at 203.1201 means “a combination of procedures and physical security arrangements intended to restrict the flow of information either within an organization or between organizations.” However, pursuant to 203.1205-3(c)(1)(i), a firewall alone is only appropriate to resolve an OCI caused by unfair access to information but then 203.1205-3 (c)(1)(ii) creates an ambiguity. After restricting the use of a firewall “by itself,” 203.1205(c)(1)(ii) states in full:

“(ii) A firewall—

(A) May include an agreement to limit reassignment of contractor employees who have access to non-public information; and

(B) May also apply to the reporting chain within a company to ensure that an employee’s supervisor is not in a position to exercise inappropriate influence on another acquisition.”

Adding either or both of these two steps would make the option of “firewall” stronger and a more useable technique. One reading of this provision is that these additional steps, taken in conjunction with the normal restrictions on information flow, either separately or together, could allow the use of such a strengthened firewall to resolve other OCIs; however, this

interpretation ignores the fact that, even with these enhancements, the mitigation technique is still called a “firewall” and under the proposed rule firewalls are only effective for “unfair access to information” OCIs and not properly available for impaired objectivity or biased ground rules.

The second listed OCI mitigation technique, like a firewall, is limited to OCIs caused by unfair access to information. Section 203.1205-3(c)(2) provides that this mitigation technique is implemented by releasing to all bidders the non-public information to which the contractor had access. The subsection goes on to caution that the contracting officer must carefully investigate and reasonably determine “the extent and type of nonpublic information to which the conflicted contractor had access.” We recognize the important balance that the contracting officer must weigh and recommend that the rule encourage contracting officers to make as much information available as possible to further the purposes of the rule while protecting appropriate government non-public information. Contracting officers have been effectively using these techniques for years.

The final listed mitigation technique, available to resolve *any* OCI, is addressed in 203.1205-3(c)(3) and authorizes “a subcontractor or team member that is conflict free to perform the conflicted portion of the work on the instant contract.” Although this is another form of “choose your major” for the contractor, this option would only be acceptable if “it is utilized in conjunction with a firewall around the contractor or conflicted team member.” However, the rule offers no explanation of what a “firewall around the contractor or conflicted team member” entails but it does say that the information restriction is on the conflicted party. In essence, it appears that the non-conflicted team member would be on its own and might be precluded from performing other work for a conflicted prime contractor because the information flow and control could breach the firewall directed to be placed around the conflicted contractor.

In addition, the rule should add to the endorsed mitigation technique for “impaired objectivity” OCI the use of a walled-off, conflict free, subcontractor. An added risk to this technique is that the prime contractor will have no control over this walled off subcontractor but will retain responsibility for its work. We also note that the requirement to wall off this subcontractor seems to arise from an unwarranted concern that two companies that have no relation other than a subcontract will agree that the subcontractor will bias its work in favor of the prime contractor. We reject this assumption.

At least one mitigation technique currently recognized but not addressed in the proposed rule is for the government to get advice from more than one contractor. FAR 9.505-2(a)(1)(ii) states that a conflict is not created in “situations in which contractors, acting as industry representatives, help government agencies prepare, refine, or coordinate specifications, regardless of source, provided this assistance is supervised and controlled by government representatives.” Likewise FAR 9.505-2(b) states:

- (1) If a contractor prepares, or assists in preparing, a work statement to be used in competitively acquiring a system or services—or provides material leading directly,

predictably, and without delay to such a work statement—that contractor may not supply the system, major components of the system, or the services unless—

- (i) It is the sole source;
- (ii) It has participated in the development and design work; or
- (iii) More than one contractor has been involved in preparing the work statement.

This FAR provision also leaves room for contractors to compete even where they are providing material, provided such performance does not lead directly, predictably and without delay to the work statement but the FAR provides no further guidance. The proposed rule should give guidance and endorse this as a mitigation technique or recognize that no apparent, potential or actual OCI is raised by this circumstance or regrettably, the proposed rule is silent on the point.

Interestingly, Congress and DoD have both been presented with arguments that a NISPOM-type¹⁴ mitigation approach, also known as an independent affiliate, should be an acceptable technique to mitigate any type of OCI. In fact, Congress specifically asked DoD to address this option in the conference report accompanying WSARA,¹⁵ but the rule fails to do so. While the regulation does not explicitly preclude the NISPOM/independent affiliate solution, it does not endorse it, despite congressional direction. So while the regulation purports to identify “mitigation” as the preferred alternative over the other two resolution techniques listed, two of these techniques are only useful for mitigating access to non-public information and the other essentially requires the prime contractor to contract out the work without any meaningful way to manage that part of its contracted-for performance while remaining accountable under the contract for it.

¹⁴ [National Industrial Security Program Operating Manual](#) (NISPOM) §2-303.

¹⁵ Weapon Systems Acquisition Reform Act of 2009, S. 454, Sec. 205, available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:s454es.txt.pdf, as passed the Senate on May 7, 2009 (“Senate S. 454”). The WSARA Conference Report, House Report no. 111–124, pages 37-38, available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_reports&docid=f:hr124.111.pdf, emphasizes the need for more consistency through additional guidance to ensure objective and unbiased advice considering the guidance provided in section 205 of the Senate bill by stating:

“Existing Department of Defense regulations leave it up to individual elements of the Department to determine on a case-by-case basis whether or not organizational conflicts of interest can be mitigated, and if so, what mitigation measures are required. The conferees agree that additional guidance is required to tighten existing requirements, provide consistency throughout the Department, and ensure that advice provided by contractors is objective and unbiased. In developing the regulations required by this section for cases in which mitigation is determined to be appropriate, the conferees expect the Secretary to give consideration to strengthened measures of organizational separation of the type included in the Senate bill.”

a. Avoiding OCIs in 203.1205-3(a)

Even before the WSARA provision was enacted or the proposed rule published, several DoD contracting officers (and some DoD organizations) were already adopting policies requiring companies to “choose your major,” with no known analysis of the short-term or long-term effect such policy would have on the defense industrial base supporting that activity or other departmental activities.

Avoidance, the first listed resolution technique, is nothing more than a “choose your major” technique. Section 203.1205-3(a)(1) directs “excluding offerors that have a production capability for the future contract from being eligible to develop the specifications or statement of work.” Thus, offerors that choose to provide advice cannot compete for later phase production work. For those that do have such capability, 203.1205-4(c)(2)(1) provides that a contractor may apply for a temporary waiver to allow divestiture. However, the waiver must be approved by the head of the contracting activity. To its credit, DoD recognizes the adverse effect this approach has on competition and thus states it is to be used as a last resort and must be documented in the contract file.

b. Neutralization in 203.1205-3(b)

Neutralization is the obverse of avoidance and allows a contractor that could compete on future work to perform advisory work but only if it agrees not to compete for that future work. The restriction on future contract work, however, must be limited in time. The proposed rule gives no guidance on how long a restriction should last.

c. Mitigation in 203.1205-3(c)

The proposed rule specifically disclaims identifying every way the government and the contractor can “minimize an organizational conflict of interest to an acceptable level” but fails to provide contracting officers with any meaningful guidance to encourage contracting officers to use any other mitigation technique. As we noted above, we strongly recommend that the rule focus on (1) behavior among entities within a single organization or, if applicable, between controlling affiliates; (2) not assume that an organization will intentionally breach its contractual obligations, including nondisclosure agreements; (3) focus mitigation techniques on controlling information flow and incentives to encourage related organizations to put their immediate customers first; (4) always judge a proposed mitigation plan from the viewpoint of a reasonable person with full knowledge of all relevant, material facts; and (5) do not reject a mitigation plan because of a remote risk it might not work or because those without a full knowledge of the facts might think an appearance of a conflict remains. The next iteration of the rule must also revise the definition of “firewall” to be consistent with this flexibility. Without such guidance, contracting officers will have no reason to evaluate, let alone accept, any mitigation technique that is not specifically identified in the rule.

A significant element of our concerns arise because we cannot suggest additional mitigation techniques that would not be precluded by the broad definition of the term “firewall” and its express limitation on its use to only unfair access cases and to wall off subcontractors doing otherwise conflicted work. We strongly urge DoD to list other techniques for mitigation of impaired objectivity and biased ground rules even if it makes no change in the definition of the term “firewall.”

A “potential conflict of interest” exists when circumstances could arise in the future causing an actual conflict of interest or when there are mitigation steps or other circumstances that make it less likely that an actual conflict of interest will arise. If the likelihood of a potential conflict of interest becoming an actual conflict of interest is sufficiently remote, then the government should be able to proceed with the instant award despite the potential conflict, while taking steps to address the circumstances that might arise in the future.

d. Waivers in 203.1205-4

We are aware of only one waiver¹⁶ granted under the current FAR rules, despite the wide discretion for the head of the contracting activity to waive OCIs. The additional cautions and requirements in the proposed rule strongly suggest that DoD’s intent is that waivers are to be granted even less frequently. DoD should modify the rule to encourage waivers to enhance competition in addition to, or in place of, expanding acceptable mitigation techniques as we suggest above. However, our preference is to not rely on waivers but rather expand the recognition of OCI mitigation techniques because (1) they are effective for all the reasons stated above, (2) waivers have a stigma that something was wrong that the government chose to ignore, and (3) contracting officers have been reluctant to use waiver authority.

11. Award in 203.1205-5

In our view, the guidance on award is helpful. With respect to multiple award contracts, we recommend that the regulation explicitly provide that a holder of a multiple award contract who otherwise would be required to perform an order is excused from doing so if award of the order could give rise to an OCI. We also reiterate our earlier position that contracts for commercial items should be exempt from coverage.

12. Solicitation Provision and Contract Clause in 203.1205-6

Section 203.1205-6(a)(2) provides that if the contracting officer has determined a way to resolve OCIs prior to release of the solicitation, the solicitation may contain that information. Absent special circumstances, the rule should require the solicitation to contain both the determination and the resolution technique. If DoD knows of such circumstances warranting non-disclosure, it

¹⁶ *Knights’ Piping, Inc.*, Comp. Gen. Dec. B-280398.2 (Oct. 9, 1998)

should disclose as much of the information as possible and disclose any special circumstances that prevent further public disclosure.

13. Definition of SETA Contracts in 203.1270-1

The proposed rule defines “system engineering and technical assistance” (SETA) consistent with the current FAR definition. To avoid ambiguity, we recommend adding the following definition of the phrase “SETA contract” since that is the phrase that triggers application of 203.1270-6:

System engineering and technical assistance contract means the contractor provides both system engineering and technical services without taking responsibility for delivery of the system.

14. WSARA Policy in 203.1270-3

The statement of policy fails to focus on the key aspect of OCI mitigation. While it is best if all information the government receives is objective and unbiased, the key is to ensure that government action is not unduly affected by information that may not be objective or unbiased. The current FAR recognizes this principal, as evidenced by its endorsement of using multiple contractors to provide advice as a technique to mitigate or eliminate an OCI. In section 207(b)(2) of WSARA, Congress provided that DoD’s OCI regulations should:

ensure that the Department of Defense receives advice on systems architecture and systems engineering matters with respect to major defense acquisition programs from federally funded research and development centers or other sources independent of the prime contractor.

DoD’s proposed OCI rule requires contracting officers to get this input, but says nothing about how these varied viewpoints may mitigate the effect of any OCI on government decision-making. We urge DoD to make clear that, when such advice is obtained, it mitigates any OCI related to that advice.¹⁷

15. Identification of OCIs for MDAPS in 203.1270-5

This section largely repeats language from Section 207 of WSARA. In at least one instance, however, we believe DoD should clarify in the rule a provision in the statute. 203.1270-5(a)(2) provides that:

(a) When evaluating organizational conflicts of interest for major defense acquisition programs, contracting officers shall consider—

* * *

¹⁷ We also suggest that this be recognized as an exception to paragraphs (2) and (3) of Section 207(b) based on the direction in paragraph 4 that DoD develop exceptions to these two paragraphs.

(2) The 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;”.

When a prime contractor establishes a team arrangement and its accepted proposal explains the work the prime will do and what other team members will do, WSARA does not require and we do not believe the rule should require a reevaluation of those determinations after award although we believe the proposed rule implies that such reevaluation be done. Therefore, we recommend adding before the semicolon in subparagraph (a)(2) the following:

, either as part of the initial award determination or, if the prime contractor makes this disclosure after award, then before beginning the relevant work.

The government’s acceptance of a proposed contracting team and its major components should include any necessary OCI evaluation so that another evaluation is not only unnecessary but does not adversely affect the underpinning of the contractor’s proposal. Likewise, the objective in selecting major subcontractors after award is to obtain the best value. Thus, the regulation should not be silent on how the contracting officer is to consider awards to affiliates.

We also believe it appropriate to refer contracting officers to the general OCI rules, which we hope will reflect our suggested changes, to guide resolution of the OCI matters raised elsewhere in 203.1270-5(a).

16. SETA Contracts in 203.1270-6

As proposed above, we urge DoD to make clear that if DoD gets advice on issues from others in addition to the advice it is receiving from an otherwise conflicted contractor, this should be considered adequate mitigation as 203.1270-2(b)(1) recognizes for SETA contracts.

We do not see the purpose of 203.1270-2(b)(2) since it only provides that if an OCI is resolved, then a “highly qualified [contractor] with domain experience and expertise” may be used. But if the OCI is resolved, then it is irrelevant whether the contractor is “highly qualified with domain experience and expertise.” The proposed rule does not otherwise implement the congressional direction to address the role of “highly qualified [contractors] with domain experience and expertise” as Congress intended.

17. Organizational Conflict of Interest – Major Defense Acquisition Program in 252.203-70WW

In 252.203-70WW(a), the citation to the term “major subcontractor” should be to “252.203-70WW” not “52.201-WW.”

18. Notice of Potential Organizational Conflict of Interest in 252.203-70XX

In 252.203-70XX(a)(1)(i), we recommend adding before the semicolon the phrase “under the proposed acquisition”.

In 252.203-70XX(b), contracting officers should be required to notify contractors of the potential OCI and provide the reasons supporting the assertion of a potential OCI. Contracts should be given the opportunity to discuss the potential OCI with the contracting officer prior to the contracting officer making a determination.

In 252.203-70XX(e)(4), the proposed rule gives the contracting officer sole authority to determine whether an OCI exists and to determine whether the OCI has been mitigated. If a contractor is to be precluded from award due to a potential OCI, as determined by the contracting officer, the contractor should have the flexibility to escalate this decision to the head of the contracting activity. In addition, there are numerous contracts to which multiple agencies are parties. In those cases, the proposed rule should make it clear that the mitigation strategy that was approved by the contracting officer for the original contract shall be accepted by all agencies who subsequently participate in the contract. Further, after the contracting officer has approved a mitigation strategy for a program that strategy must remain in place and be applicable throughout the life of the program – absent changed program circumstances – but not because of a change in contracting officers.

19. Resolution of Organizational Conflicts of Interest in 252.203-70YY

In 252.203-70YY(b)(2), we recognize the importance of keeping the approved mitigation plan current but recommend that the plan be required to be revised “if the change will have a material impact on the mitigation plan or create a new OCI.”

20. Limitation on Future Contracting in 252.203-70YZ

252.203-70YZ(c) requires the flowdown of this clause in certain contracts, and directs that the term “contractor” and “contracting officer” be appropriately modified to reflect the changes in parties and to “preserve the government’s rights.” Since this latter phrase is otherwise undefined in this new Part 203 or in any other FAR or DFARS provision, it is essential that this flow down provision be clarified to identify whether the federal contracting officer or the higher tier contractor is the official authorized to address and determine whether a conflict of interest at the subcontract level exists and whether and how it might be mitigated.

21. GAO Protest Decisions

The preamble discusses several GAO protest decisions and suggests that the proposal is merely codifying them. In our view, DoD should use the DFARS to set its own OCI policy, not adopt without question GAO decisions as the appropriate DoD policy. The preamble’s reliance on the interpretation of GAO protest decisions raises questions whether DoD considered the more

fundamental question of whether those protest decisions are appropriate prospective departmental OCI policy.

The FAR definition of organizational conflict of interest uses the term “person” throughout and does not use the term “organization” as in the proposed DFARS. Based on this, it may be that GAO has effectively determined that an organization consisting of affiliates is a single person for the purposes of analyzing the control and information flow.¹⁸ No policy should be based on an assumption that one affiliate will bias its judgment provided to DoD – in breach of its contract and endangering its own relations to DoD – to advance the interests of a company affiliate.

Thus, following the information flow is a key to exercising control. As discussed previously, the proposed rule follows GAO protest decisions that have found restrictions on information flow, (i.e., firewalls) ineffective for mitigating impaired objectivity and biased ground rules OCIs. But GAO’s decisions ignore the industry and government experience. The most obvious example is the extensive protections firms use to protect national security classified information from disclosure to those who are not authorized to have such access. In addition, industry relies extensively on nondisclosure agreements between companies who are teaming or partnering on the bidding for and performance of government opportunities to share a wide range of sensitive information, often without further assurances. Such information clearly could be used against the disclosing firm in other competitions if used contrary to the obligations of those non-disclosure agreements. Likewise agencies rely on their employees to not misuse confidential or source selection sensitive data they create or have access to, based on clear government policies against such improper disclosures. Even GAO uses protective orders that permit certain individuals representing a party in a protest access to the most sensitive data of their competitors. These examples strongly suggest that the proposed rule unnecessarily rejects demonstrably effective measures to control the flow of sensitive information. Regrettably, the proposed rule gives too little credit to the organization’s desire and ability to restrict improper attempts by one affiliate to control the actions of another.

* * * *

¹⁸ Proposed Policy, 75 Fed. Reg. 20955, “there is no basis to distinguish between a firm and its affiliates, at least where concerns about potentially biased ground rules and impaired objectivity are at issue,” citing *Aetna Government Health Plans* (GAO B-254397, July 27, 1995) & *ICF Inc.*, (GAO B-241372, February 6, 1991). Daniel I. Gordon, *Organizational Conflicts of Interest: A Growing Integrity Challenge*, text at n. 18- 21, available at <http://ssrn.com/abstract=665274>.