VIA REGULATORY PORTAL, ELECTRONIC MAIL
And U.S. MAIL

Ms. Amy Williams
OUSD (AT&L) DPAP (DARS)
3060 Defense Pentagon Room 3B855
Washington, D.C. 20301-3060


Dear Ms. Williams:

On behalf of the Section of Public Contract Law of the American Bar Association ("the Section"), I am submitting comments on the above-referenced rulemaking regarding Organizational Conflicts of Interest – Implementation of Section 207 the Weapons System Acquisition Reform Act of 2009, 75 Fed. Reg. 20954 (Apr. 22, 2010) ("Proposed Rule"). The Section consists of attorneys and associated professionals in private practice, industry, and Government service.¹ The Section’s governing Council and substantive committees have members representing these three segments to ensure that all points of view are considered. The Section seeks to improve the process of public contracting for needed supplies, services, and public works.²

The Section is authorized to submit comments on acquisition regulations under special authority granted by the Association’s Board of Governors. The

¹ The Honorable Thomas C. Wheeler, a member of the Section’s Council, did not participate in the Section’s consideration of these comments and abstained from the voting to approve and send this letter.

² This letter is available in pdf format at: http://www.abanet.org/contract/regscomm/home.html under the topic “Compliance and Conflicts of Interest.”
views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, therefore, should not be construed as representing the policy of the American Bar Association.

I. INTRODUCTION

The Section appreciates the opportunity to comment on the Proposed Rule. The Proposed Rule provides a potentially more centralized and streamlined approach to address organizational conflicts of interest ("OCIs"), compared to the current rule at FAR 9.5, which is unclear in several respects, including outdated examples, and places contracting officers in the difficult position of attempting to winnow out relevant principles from years of Government Accountability Office ("GAO") and Court of Federal Claims ("COFC") bid protest decisions. Contractors and agencies alike are frustrated with the lack of predictability under the current rule and case law.

The Section agrees that the rule addressing OCIs has an important role to help protect the overall integrity of the public procurement process. The Section has a number of concerns about aspects of the Proposed Rule that are unclear, leave too much room for decisions based on mere perceptions, and lack adequately defined standards and meaningful boundaries. We have tried to provide concrete suggestions (including draft regulatory language) for improvement of the proposal in several areas.

Chief among our concerns about the Proposed Rule are the following:

- Despite professing a general preference for mitigation, it appears to emphasize avoidance or neutralization over mitigation. This is a function of the structure of the Proposed Rule and the lack of meaningful guidance regarding use of mitigation techniques. This will have unintended consequences, including restriction of competition.

- It requires disclosure of large amounts of data that appear to be irrelevant to determination of potential OCIs; will be extremely burdensome to both industry and the Government; and may well increase protests based on the Government’s failure to properly analyze all of the data in its decision-making process. Additionally, an alleged failure to identify an OCI may involve the OIG in the agency deliberations regarding potential mitigation (if the contractor views it as a reportable event under the Mandatory Disclosure Rule).
It unduly emphasizes “appearance of a conflict” based upon the bare fact of corporate affiliation without regard to an assessment of the risk of a conflict and the availability of mitigation, and appears to have the effect of creating a separate category of OCI – an “appearance of corporate affiliation” OCI. The Section is concerned that this may cause contracting officers to take a per se approach to identifying OCIs where affiliate relationships are involved.

It implicitly assumes that a corporation and all of its employees act with a unitary financial interest in a particular contract award, and ignores that corporations have many different business goals, including a reputation for ethical conduct.

It presumes that structural barriers and internal controls are insufficient to protect the Government’s interest, even though the Government recognizes and relies on such mechanisms in many different contexts.

It does not indicate the basis on which DoD determined that commercial items, other than COTS items, pose a potential risk of OCI.

It is inadequate with respect to the definition of “systems engineering” and “technical assistance” for purposes of implementing Section 207 of the Weapon Systems Acquisition Reform Act.

It reduces the Government’s discretion to waive OCIs and is unclear regarding the circumstances under which a residual OCI may be waived by the contracting officer.

The Section is also concerned that the Proposed Rule relies on GAO opinions interpreting the current FAR 9.5 to the exclusion of guidance and assistance that may be found in other areas of the law. In crafting a new regulation, we urge the DAR Council to take a broader view of potentially valuable concepts in a variety of areas.

II. BACKGROUND

December 8, 2010. The FAR Council has been working on a proposed rule since 2007 – FAR Case 2007-018, which was opened in response to the recommendations of the Acquisition Advisory Panel. That rule has not yet been published. In addition to WSARA Section 207, DoD is subject to further direction regarding the treatment of OCIs. For example, DoD has been directed to consider the recommendations presented by the Panel on Contracting Integrity. Additionally, Section 841 of the FY 2009 National Defense Authorization Act (“NDAA”) mandated a review of OCI coverage by the Office of Federal Procurement Policy (“OFPP”) in consultation with the Office of Government Ethics. Recommendations resulting from this review have not yet been published.

The Proposed Rule is intended to be used by DoD in lieu of FAR 9.5 until the FAR OCI revision is completed, at which point DoD will follow the FAR subject to any DoD-unique requirements. Thus, the Proposed Rule will replace FAR coverage for DoD contracts – it is broader than implementation of the WSARA provisions for Major Defense Acquisition Programs (“MDAP”).

III. COMMENTS

As a general matter, the Section is concerned that the Proposed Rule reflects a view that DoD is bound in developing new policy and regulation by current opinions of the GAO and COFC interpreting and applying the existing regulation. In formulating a new approach to OCIs, we recommend that the Council take into account other concepts as well, such as those found in corporate and securities law, as well as measures such as non-disclosure agreements (“NDA”) and other approaches used in transactions among private parties to protect sensitive information and activities. In this regard, we note that the Proposed Rule is too narrow in its focus on a company’s financial interest in a specific procurement or program and fails to take into account that corporations have substantial interests in their reputation for quality work and ethical conduct, as well as an obvious interest in the long term viability of the corporation to succeed in the government market.

A. Restriction on Competition

While the Proposed Rule professes a general preference for mitigation, which can facilitate competition, it fundamentally reflects a restriction on competition that is inconsistent with the Competition in Contracting Act and current policy emphasizing the need for more competition in the government marketplace. See, e.g. Memorandum for Acquisition Professionals, dated June 28, 2010, Under Secretary of Defense for Acquisition, Technology & Logistics; Memorandum for the Heads of Executive Departments and Agencies on
Government Contracting, dated March 4, 2009, 74 Fed. Reg. 9755 (Mar. 9, 2009). The Proposed Rule creates a restriction on competition based merely upon the “appearance” of a conflict as a result of corporate affiliation. The policy statement at Section 203.1203(a)(2), which provides that the Government must avoid the “appearance of impropriety” without regard to whether a conflict exists, sweeps too broadly because, among other things, it equates a potential conflict to an “impropriety” and it fails to recognize that an “appearance” is not the same thing as an actual impropriety. In this regard, and in light of subsequent GAO opinions regarding OCIs, the Proposed Rule goes too far in attempting to apply dicta from the GAO’s opinion in Aetna Gov’t Health Plans, Inc.; Foundation Health Servs., Inc., B-254397, July 17, 1995, 95-2 CPD ¶ 129, that there is no need to distinguish between a firm and its affiliates where concerns about potentially biased ground rules and impaired objectivity exist. 75 Fed. Reg. at 29955. As a result, in addition to addressing potential conflicts of interest resulting from unfair access to non-public information, biased ground rules, and impaired objectivity, the Proposed Rule appears to establish another category of OCI, an “appearance of impropriety based upon corporate affiliation” OCI.

Because of this overgeneralization (which assumes that every person working in a corporation has the identical interest to favor every element of the entire organization), the Section is concerned that the Proposed Rule is too rigid in its approach both to identifying and resolving OCIs. The emphasis on a highly subjective “appearance” standard, without regard to facts regarding the actual risk posed by a company’s structure and activities, will result in uneven application of the policy and have the unintended consequence of unnecessarily limiting competition. Furthermore, the Proposed Rule provides only three methods of resolving OCIs: “avoidance,” “limitation on future contracting (neutralization),” and “mitigation.” As structured, the Proposed Rule emphasizes avoidance and neutralization over mitigation, despite the general statement of a preference for mitigation, because there is no meaningful guidance regarding when and how mitigation should be used, as discussed further below. 75 Fed. Reg. at 20955. The perception that OCIs are an improper practice to be avoided, rather than mitigated, is reinforced by the reorganization of OCI coverage which includes OCIs in DFARS Part 203 (parallel to FAR Part 3) “Improper Business Practices and

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3 Avoidance of the “appearance” of a conflict is a standard normally applied to government employees and judges, not to contractors providing goods or performing services. See 5 C.F.R. § 2635.502 (consideration of the appearance of a conflict of interest in a government employee’s personal and business relationships) and Model Code of Judicial Conduct, Canon 2 (a judge shall avoid impropriety and the appearance of impropriety in all of the judge’s activities).
Personal Conflicts of Interest” (which includes improper conduct, such as gratuities, kickbacks, and violations of the Procurement Integrity Act), rather than Part 209 “Contractor Qualifications.” This suggests that OCIs and potential OCIs are akin to improper business practices, which seems contrary to the notion in the Proposed Rule that the preferred method of addressing OCIs is mitigation. To avoid this perception, the Section recommends placing the new rules in DFARS Part 209.

B. Types of OCIs

We recognize the Department’s effort to organize OCIs into three general categories (in § 203.1204) follows guidance that GAO has outlined in the Aetna case and used in subsequent decisional law. In broad strokes, the Proposed Rule is consistent with GAO’s and the COFC’s jurisprudence and relies on concepts that are familiar to the government contracting and legal community. In this respect, the effort to integrate the OCI framework that has emerged over the last 15 years into the Proposed Rule does not present novel concepts or departures from the OCI constructs in FAR 9.5 or those that have emerged in various GAO and COFC decisions, and can (and should) be read in concert with the guidance provided in those decisions. It is clear that the GAO decisions, in particular, provided a framework for the Proposed Rule, thereby ensuring continuity with the existing regulations. As discussed elsewhere in these comments, the FAR Council is not bound in constructing a new regulation by GAO decisions construing the existing rule. Although it may be convenient to use the three “baskets” nevertheless, the Proposed Rule presents an opportunity to provide further clarification on issues related to the three “types” of OCIs, including the analytical constructs that a contracting officer should use to assess and evaluate whether a set of facts give rise to an OCI or how an OCI may be mitigated. The Proposed Rule, however, largely avoids any helpful detail in this regard. These comments attempt to provide assistance in structuring the further guidance that is necessary.

C. Identification of OCIs

Section 203.1205-2 offers some helpful guidance on identification of OCIs, but it could go further to involve the requirements community. In particular, it is helpful to be specific that the contracting officer should consider OCIs early –

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4 We note that the description of the three types of OCIs, as well as the definition included in Section 202.101, do not include broader language, such as that in FAR 9.505 that suggests OCIs “may arise in situations not expressly covered in this section . . . .” Although typically OCIs fall into one of the three designated “types” outlined in the Proposed Rule, the omission of general “catch-all” language similar to that used in FAR 9.505 could potentially limit a contracting officer’s OCI analysis or overlook an OCI that does not fall neatly within the three generic types.
in advance of and during preparation of the solicitation. Having the program office and requiring activity involved early is critical to analysis of the true potential for OCIs. We believe the Proposed Rule would benefit from greater emphasis on the importance of requirements definition.

In particular, proposed solicitation provision 252.203-70XX, Notice of Potential Organizational Conflict of Interest, and proposed clause 252.203-70ZZ, Disclosure of Organizational Conflict of Interest After Contract Award, are of substantial concern to the Section in at least four respects.

First, proposed solicitation provision 252.203-70XX, Notice of Potential Organizational Conflict of Interest, among other things, requires an offeror, at the time of proposal submission, to “disclose all relevant information regarding any [OCIs], or to “represent, to the best of its information and belief, that there will be no [OCI].” Furthermore, regardless of whether the offeror discloses the existence of an OCI, it must “describe any other work performed on contracts, subcontracts, grants, cooperative agreements, or other transactions within the past five years that is associated with the offer it plans to submit.” Finally, this proposed provision indicates that failure to disclose to the contracting officer an OCI of which a successful offeror “was aware or should have been aware” before contract award could result in termination for default of any resulting contract.

Proposed Clause 252.203-70ZZ, Disclosure of Organizational Conflict of Interest After Contract Award, recognizes that OCIs may arise for the first time during performance of the contract. Among other things, it requires the contractor to “make a prompt and full disclosure in writing to the Contracting Officer” of any OCIs “that arise during the performance of the contract, as well as any newly discovered conflicts that existed before contract award.” The new clause states that “[a]ny nondisclosure or misrepresentation of any relevant facts regarding [OCIs] will constitute a breach of contract and may result in (1) [termination of [the] contract for default; or (2) [e]xercise of other remedies as may be available under law or regulation.” Proposed Clause 252.203-70ZZ(d).

1. The Disclosure Requirement is Unclear and Burdensome to Both Government and Contractors

The requirement for a contractor to describe all work under any “contracts, subcontracts, grants, cooperative agreements, or other transactions within the past five years that is associated with the offer it plans to submit” is vague, overly broad, and will impose substantial burdens on both the contractors who are required to collect and disclose such information, as well upon the contracting officer who will be required to review all of it in reaching a decision with respect to whether an
OCI exists and how it should be treated. The Proposed Rule does not indicate what standard applies to this analysis – is it the FAR rule, just the DFARS rule, or will the specific rule contained in the actual (and proposed) contract, grant or cooperative agreement or other transaction agreement govern? Because the OCI rules for contracts, grants and cooperative agreements may contain varying provisions or deviations of existing provisions to define what is and is not considered a conflict of interest, this poses questions and concerns about the clarity and predictability of what is an OCI subject to this provision for both Government and industry. Further, the term “associated with” is not defined and the nature of the required nexus to be “associated with” is not clear. For example, in a procurement for maintenance of a particular kind of aircraft, would the manufacturer really be required to disclose every other government contract it had been awarded over the past five years relating to manufacture, upgrade or maintenance of that aircraft? The disclosure requirement could be limited to identifying prior work used in development of the new requirement (i.e., identifying a “biased ground rules” conflict) and identifying any ongoing work that might create a conflict of interest during the source selection evaluation process (i.e., identifying an “impaired objectivity” conflict).

2. Burdensome New Procedures Will Be Required To Deal with Data of Questionable Relevance

In order to comply with the identification and disclosure requirements of the new -70XX clause, contractors of all sizes will have to develop internal procedures to collect and maintain records. The five-year “look back” becomes an immediate concern, both for government agencies, and for large companies with multiple locations, as well as for companies that have acquired or merged with other companies. Without limiting the type of information sought and without focusing specifically on potential conflicts of interest, the disclosure requirements will have significant unintended consequences. For agencies, the Proposed Rule does not balance the burden of reviewing and analyzing huge volumes of information with the potential relevance of that information to a current OCI analysis. For their part, contractors are understandably wary of any representation that requires the collection and review of a great deal of data over a long period in order to ensure the accuracy of the representation. As noted above, a better standard and definition for “associated with” are needed. The potential reach of the disclosure requirement could be extremely broad in large companies, and include team arrangements and joint ventures, as well as merger and acquisition activity. In fact, it possibly could include arrangements and transactions that were not consummated, but where due diligence review of data or discussions has taken place.
3. Data Submission Requirements Will Increase the Burden on Government and May Increase Bid Protests

The Proposed Rule seeks to recognize the guidance from protest decisions. The GAO decisions indicate that the collection of information alone does not satisfy the requirement to identify and address OCI situations. Instead, the clear requirement is to have the agency consider and analyze the information. If there is a dispute over the OCI determination, the agency will need to show that it examined and analyzed all of the relevant material for the winning competitor. The material and the agency’s analysis will be part of the record for a bid protest and the Proposed Rule clearly indicates that this information is viewed as “relevant” to the OCI determination. See Proposed Clause 252.203-70XX(e)(i)(A). The Section recommends that the Council review the balance between burden and relevance in regard to the proposed five-year look-back.

4. The Mandatory Disclosure Rule May Well Interject the OIG into the OCI Decision Process

The Proposed Rule and its new DFARS provisions and clauses require an offeror “to disclose facts bearing on the possible existence of [OCIs] both prior to contract award and on a continuing basis during contract performance.” Proposed Rule 203.1203(b)(1) (Policy). The new requirements raise the question of whether an inaccurate or incomplete OCI representation would trigger the mandatory disclosure obligations under FAR 52.203-13. If so, the Proposed Rule would add another circumstance for mandatory disclosure to an agency Office of Inspector General (OIG), and could expose a contractor to legal liability for a faulty OCI representation, even beyond the sanction of default termination expressly set forth in the new rule.

If the contractor discovers an inaccurate or incomplete OCI representation provided pursuant to either 252.203-70XX before contract award or 252.203-70ZZ during contract performance, the contractor would have to determine whether a mandatory disclosure to the OIG (and contracting officer) is warranted under FAR 52.203-13, in addition to any disclosure to the contracting officer required by the new rule. Most relevant here, the contractor would have to decide whether the faulty OCI representation constituted credible evidence of fraud or a civil False Claims Act violation. See FAR 52.203-13(b)(3)(i).

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5 See, e.g., Alion Science & Tech. Corp., B-297022.3, Jan. 9, 2006, 2006 CPD ¶ 2 (Alion I) (agency conducted a study, but GAO found that the agency’s assessment of the OCI was not adequately supported by the record); Purvis Systems, Inc., B-293807.3, B-293807.4, Aug. 16, 2004, 2004 CPD ¶ 177 (Purvis I) (agency failed to analyze conflict of interest that existed); Informatics Corp. v. United States, 40 Fed.Cl. 508 (1998) (agency failed to consider contractor’s mitigation plan).
The new rule has the potential to result in a significant increase in mandatory disclosures to the various agency OIGs. First, OCIs are often difficult to identify, so flawed representations will predictably occur. As discussed above, moreover, a contractor’s obligation to disclose is not limited to OCIs, but also includes certain work within the past five years “that is associated with the offer” a contractor submits. Second, the new rule indicates that the Government could impose liability for nondisclosures of OCIs even beyond default termination of the contract. See Proposed Clause 252.203-70ZZ(d)(2) (“exercise of other remedies as may be available under law or regulation”). This aspect of the new rule could mean that the Government (or a qui tam relator) might assert that a faulty OCI representation constitutes a False Claims Act violation. Finally, the mandatory disclosure regulation imposes its own stiff sanctions for noncompliance, so contractors likely will err on the side of making a disclosure. Such disclosures to the OIG may result in disruption and delay to the award process.

It appears sensible, therefore, for DoD to consider the impact of the mandatory disclosure obligations when preparing the final rule. Any contractor disclosure to the OIG would complicate the contracting officer’s assessment of whether an OCI exists; and, if so, whether it could be mitigated, and whether any prior contractor nondisclosure should result in default termination. Most fundamentally, it is unclear what role the OIG should play in the agency’s OCI analyses and determinations. Accordingly, at a minimum, the final rule should address the OIG’s role, if any, for purposes of clarity (and if a role is envisioned, impose time requirements for the OIG’s input to minimize procurement delays).

5. The Proposed Rule Should Address Conflicts Involving Government Entities

The Section has another concern as well. The Proposed Rule does not address OCIs involving government entities. Increasingly, efforts by entities such as Air Force depots to maintain organic core capabilities and to comply with the 50 percent limitation in 10 U.S.C. § 2466 on contracting out depot and maintenance work often result in teaming-type relationships with private companies, such as public-private partnerships. The rule should address how those entities should be treated when they are involved in subsequent procurements for similar work. There is an inherent conflict of interest when the Government acts as both customer and as a subcontractor in the depot setting.

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6 See DoDI 4151.27 “Public-Private Partnerships for Depot-Level Maintenance” (which provides no guidance on how to address potential conflicts of interest for current or future work).
D. **Corporate Affiliation**

The Section is concerned that the breadth of the definition of “contractor” in the Proposed Rule has the potential to result in excessive categorization of OCIs. Section 203.1201 of the Proposed Rule defines “contractor” to encompass “the total contractor organization, including not only the business unit or segment that signs the contract. It also includes all subsidiaries and affiliates.” The Proposed Rule does not define “affiliate”; however, the FAR does contain a definition.\(^7\)

In establishing a new OCI rule, it may not be necessary or desirable to adopt the broad and potentially burdensome view of corporations contained in the Proposed Rule. The Section suggests that the Council clarify whether “affiliate” carries the definition at FAR 2.101.

In the section entitled “Supplementary Information” under subpart B, DoD states that “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.” The Section is concerned that this statement is inaccurate and may well have the effect of encouraging contracting officers to take a *per se* approach to identifying OCIs where affiliate relationships are concerned. The Proposed Rule thus assumes that all aspects of a corporation (and all personnel employed by the organization) act with a unitary interest (the Proposed Rule focuses only on the financial interest in a particular contract award) and thus will seek to favor affiliates in performing government contracts. The Proposed Rule implicitly assumes that impaired objectivity and biased ground rules conflicts of interest cannot be mitigated within a single entity, regardless of how large or how decentralized that entity might be. This view incorrectly assumes that every part of an organization and every person employed by an organization know what every other part is doing and how to benefit other parts. This view also ignores the fact that corporations have other goals, including a vested interest in ethical conduct, as well as business goals that may be different and completely unrelated in different parts of the organization.

The Section recommends that the Council include an explicit statement in the final rule alerting contracting officers that the mere existence of an affiliate relationship is not conclusive evidence of the existence of a significant OCI

\(^7\) FAR 2.101 defines “Affiliates” to mean: [A]ssociated 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.
requiring resolution. The final rule should indicate to contracting officers that a case-by-case evaluation is required in order to determine reasonably whether the affiliate relationship in a particular circumstance creates an OCI and if so, whether it would have the power to bias the performance of an affiliate’s contract. If an OCI exists, then the contracting officer should consider the contractor’s proposal to determine whether the OCI can be mitigated adequately to protect the Government’s interest.

For example, the National Aeronautics and Space Administration’s Guide on Organizational Conflicts of Interest (March 2010) (“NASA Guide on OCIs”)

provides that although business relationships must be scrutinized for potential OCIs, “some interests (financial, business, or otherwise) may simply be too speculative or too remote to establish a significant OCI in need of resolution.” NASA Guide on OCIs at 10. As discussed above, the Section believes that the Proposed Rule misapplies the language from GAO’s decision in Aetna. The final rule should reflect the fact that GAO has tempered and contoured this position in more recent case law. See RMG Systems, Ltd., B-281006, Dec. 18, 1998, 98-2 CPD ¶ 153 (finding that affiliate relationship at issue created “no more than a remote, theoretical possibility of risk that the awardee would perform with impaired objectivity”); Int’l Mgmt. & Communications Corp., B-272456, Oct. 23, 1996, 96-2 CPD ¶ 156 (finding that affiliate relationship at issue was “too indirect” to give rise to an impaired objectivity OCI).

Additionally, rather than applying a per se affiliation rule, the Proposed Rule should reflect the need for a contracting officer and the agency involved to perform an analysis of the facts in reaching a conclusion that a corporate relationship necessarily results in a significant OCI (and as discussed further below, the same type of analysis is necessary to determine appropriate mitigation). The specific points of such an analysis include, but are not limited to:

- An assessment of the substantive facts regarding the potentially conflicted work, including the potential flow of information.
- Identification of the location in the company structure where the work will be performed.
- Identification and analysis of the corporate and business relationship between the business segment with the work that may be the source of the potential conflict (the current requirement) and the segment with the potentially conflicted opportunity. Such an analysis would include, (but not be limited to) the following questions:

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-- Whether the work at issue is performed by separate business segments?
-- If the work is in separate business segments, what is the degree of separation, *i.e.*, do those segments have different or overlapping management?
-- Are the business segments controlled by corporate headquarters, or do either of them have autonomy to make independent decisions in the area of concern?
-- Are there other internal barriers, such as corporate resolutions or management agreements that restrict the business or management of one or both segments?
-- Are the business segments in separate legal entities?
-- In the case of a joint venture, what is the level of ownership? Is ownership dispositive of control, or are there other mechanisms that affect control (*e.g.*, existence of management agreements)?
-- Does the contractor have only an investment interest(s) without management or control?
-- Are other potential restrictions relevant, such as Sarbanes-Oxley, or SEC rules?

In performing this analysis, the contracting officer may require the assistance of counsel well-versed in corporate and securities law. Additional training regarding corporate and SEC requirements may be necessary. DoD may want to consider having certain contracting officers who are expert in dealing with OCI issues or direct the creation of multi-disciplined OCI review panels within each acquisition organization to assure the appropriate multi-disciplinary expertise is involved in the analysis of OCI issues.9

E. **Resolution of OCIs**

The Section agrees with and supports the statement of policy in 203.1203(c) and in 203.1205(c)(1) that the preferred method to resolve an OCI is mitigation. Resolving an OCI by mitigation allows the DoD to further its interests in promoting competition in its acquisition programs, preserving access to the expertise and experience of highly-qualified contractors, and fostering transparency in government contracting. Nevertheless, the Proposed Rule, as currently worded, provides insufficient means for mitigation.10 As a result, there is a significant risk

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9 An example would be the Air Force Electronic Systems Center OCI Review Panel, which was created in 2005 and consists of GS-15 personnel from Contracting, Acquisition Planning, and Legal staff. See http://herb.b.hanscom.af.mil/OCI-IDB2008.ppt.

10 Further guidance also could be offered regarding “neutralization.” For example, novation of an existing contract would be another means of neutralization.
that the stated preference will not be achieved in practice. Even if there are acceptable mitigation techniques, COs may err on the side of avoiding even the appearance of an OCI and reject workable OCI mitigation plans, to the collective detriment of the DoD, the public, and the contractor community. The Proposed Rule is unclear about whether a contracting officer may decline to resolve an OCI by mitigation to safeguard against the appearance of an OCI. The rule should more clearly convey the extent to which a contracting officer must accept mitigation when a contractor proffers a mitigation plan that adequately protects the Government’s interest. The mere appearance of an OCI should not be sufficient to allow a contracting officer to reject a mitigation plan. The contracting officer should be required to identify a material risk that is unacceptable to the Government that a contractor will breach its mitigation plan (which would become part of its contract) in lieu of eliminating an entity because there is an appearance question.

Accordingly, the Section believes that the Proposed Rule should be revised as follows to make clear that a contracting officer will resolve OCIs by mitigation whenever possible.

1. Definitions are important with respect to mitigation. All three of the definitions contained in section 203.1201 (“Contractor”, “Firewall”, and “Resolve”) affect the approach to mitigation. Significantly, the term “mitigation” is not defined in section 203.1201. The Section recommends that such a definition be included. As discussed below, the purpose of a “Firewall” in the Proposed Rule is too narrow and fails to encompass measures that should be acceptable for mitigating impaired objectivity and biased ground rule OCIs. The definition of “Firewall” should be deleted in favor of a menu of possible structural barriers and internal control mechanisms as set forth below.

2. The Section suggests that the Council add a statement explaining the benefits associated with mitigating OCIs in section 203.1203(c) of the Proposed Rule. Further, either OCI provisions should be retained in section 209.5 or, at a minimum, an explanation should be provided that DoD is not equating OCI to actions such as gratuities and kickbacks, which are unethical and illegal. Additionally, the order of resolution techniques in section 203.1205-3 should be

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11 The definition of the term “Firewall” addresses only the flow of information within or between organizations and does not recognize that barriers also can effectively reduce or even eliminate management control or influence. In another sense, the definition is overly broad because it states that both physical security measures and procedures are necessary to have an effective firewall for purposes of restricting information.
reversed or, at a minimum, language should be added explaining that mitigation is preferred over the other two techniques.

3. We note that the preference for mitigation in section 203.1203(c) is prefaced with the statement “except as may be otherwise prohibited within this regulation[.]” The Section recommends that the Council provide specific citation to the section(s) prohibiting the use of mitigation so that contractors will not have to guess at whether they have identified any or all such exceptions.

4. The Proposed Rule provides insufficient guidance to contracting officers with respect to resolution of impaired objectivity and biased ground rule OCIs. There is a view in some quarters that GAO’s Aetna decision precludes mitigation of impaired objectivity OCIs, while others disagree. GAO has held that a contracting officer’s acceptance of a mitigation plan for an impaired objectivity OCI was unreasonable.\textsuperscript{12} GAO also has indicated that use of direct subcontractors has been an acceptable method of mitigating impaired objectivity.\textsuperscript{13} Given the mixed case law on this complex issue and the Council’s message that it is crafting these rules to conform to the case law, there is a consequent risk that a contracting officer could reject the possibility of mitigation, or decline to meaningfully evaluate an offeror’s mitigation plan for an impaired objectivity OCI when there are viable methods available.

a. The Section recommends that the Proposed Rule address the level of detail that is required in an acceptable mitigation plan. In this regard, the rule should inform contracting officers that, particularly in the context of a significant acquisition, mitigating an OCI is preferable to approaches that limit competition (i.e., avoidance or limitations on future contracting). The rule should inform contracting officers more explicitly that an OCI analysis is necessarily fact-intensive, such that a mitigation technique and plan that are appropriate in one acquisition may need to be revised or tailored to address particular OCI concerns in another acquisition.

b. Under section 203.1205-1(c)(2), the contracting officer may determine that a successful offeror is “unable to mitigate” an OCI “effectively” and “taking into account both the instant contract and longer term Government needs, shall use another approach to resolve the [OCI] . . ., select another offeror, or request a waiver.” Further guidance should be provided as to what circumstances


would justify a finding that an offeror is “unable to mitigate” “effectively” and what “terms” in the contract and “longer term Government needs” would warrant seeking a waiver versus selecting another approach. Although section 203.1205-3(c) provides discretion to the contracting officer to “minimize OCI to an acceptable level,” the contractor cannot know whether its mitigation plan is likely to be considered effective by the contracting officer, or if the contracting officer will pass it by and select another offeror for award, or seek a waiver. The rule should provide examples of situations in which “mitigation is not likely to be effective and the conflict of interest cannot be resolved,” when the contracting officer “shall select another offeror,” and when he/she may “request a waiver.” We would suggest that the danger of an OCI is that the contractor will misuse data or breach its obligation to provide its best judgment to the Government because of other interests it, or an affiliate, may have. Acceptable mitigation materially reduces the risk of this occurring inadvertently and also reduces the risk that those involved will breach such an obligation intentionally – mitigation thus reduces the Government’s risk to an acceptable level.

c. Section 203.1205-3(c) addresses mitigation as an action to reduce OCIs to an “acceptable level.” The Proposed Rule states that a “combination of resolution methods may be appropriate.” The Section believes it is helpful that the rule explicitly does not require elimination of OCIs, but rather looks to the relative risk that can be managed. But, the Proposed Rule does not indicate what is acceptable. In the Section’s view, it is critical that the Proposed Rule provide additional guidance regarding the appropriate use of techniques to reduce OCIs to acceptable levels. The Proposed Rule mentions three techniques (firewalls, information dissemination, and/or requiring a subcontractor or team member that is conflict free and subject to a firewall to perform the conflicted portion), but treats them inappropriately and offers no explanation for that treatment. For example, in the view of some, the use of a non-conflicted subcontractor that also must be firewalled could be more properly characterized as neutralization – not mitigation. The Proposed Rule is unnecessarily restrictive and insufficient regarding the use of various types of structural barriers. There also is only a very limited mention of reliance on other types of internal corporate controls to address OCIs.

The Proposed Rule fails to recognize and take into account that in a variety of contexts that do or may involve government contracts or contractors, Government and industry rely on internal barriers, corporate internal controls, or safeguards that depend for their efficacy on the basic proposition that an organization’s personnel will not act with a single, unitary interest to benefit the organization’s potentially narrow and immediate financial interests. For example:
FOCI: The Under Secretary of Defense – Intelligence and the Defense Security Service ("DSS") rely upon the use of particular corporate formalities, and in some cases, independent directors, to address Foreign Ownership, Control, or Influence ("FOCI") of United States companies performing even the most sensitive classified projects. These mechanisms, which range from formal board resolutions to voting trusts, are considered sufficient not only to protect against the unauthorized release of information, but also against the possibility of inappropriate influence over classified matters.

Security Clearance: Even apart from the FOCI context, the Government routinely relies on contractors to handle classified and highly sensitive information and to limit access and use thereof. The limitations do not merely concern access to information, but also preclude personnel that obtain access from using information for a company’s financial benefit in connection with other classified projects or opportunities.

Non-Disclosure Agreements ("NDAs") and acquisitions: It is typical with contemplated acquisitions for a potential acquiring company and the target company, including government contractors, to enter into an NDA in which only certain – typically senior personnel charged with making competitive business decisions – at the acquiring company can access information about the target and agree (and are trusted) not to use such information to further the acquiring company’s competitive interests.

Non-Disclosure Agreements in support of government acquisition activity: The Government itself commonly uses NDAs with both contractors and individuals involved in support of government activities where they will have access to information belonging to other companies – some of whom may well be competitors. In relying on such NDAs, the Government does not assume that parties who are given access will act in the unitary interest of their company or employer to misuse proprietary and confidential information.

Compliance and Mandatory Disclosure: The compliance regime contemplated by FAR 52.203-13 assumes that a government contractor can implement a system whereby company personnel can serve as hotline or investigative personnel, or both, to address potential violations of statutes or regulations in connection with the
company's government contracts. These personnel are trusted - including by the Government - to act in a manner that is not aligned with the company's potential interest in concealing suspected fraud or misconduct, but rather to investigate and potentially reveal information that may be detrimental to the company and its specific financial interests.

Administrative agreements: In addressing suspension and debarment matters and present responsibility, the Government often relies on the contractor and its compliance mechanisms to oversee responsibility matters. In such circumstances, the Government trusts the company to abide by the agreement and conduct its business ethically and responsibly, even though it may have engaged in conduct that was previously determined to be less than acceptable from a corporate integrity standpoint, such as failure to comply with the law or regulations.

The Procurement Integrity Act Post-employment Restrictions: The Procurement Integrity Act prohibits former government employees from receiving compensation “from a contractor as an employee, officer, director, or consultant of the contractor” for a period of one-year after the individual served in certain specified capacities with regard to contract actions over $10 million. 41 U.S.C. § 423(d)(1). The Act provides that this restriction does not prohibit the former official from “accepting compensation from any division or affiliate of a contractor that does not produce the same or similar products or services as the entity of the contractor that is responsible for the contract” over which the former official served in one of the specified capacities. 41 U.S.C. § 423(d)(2). The Act thus recognizes the distinct nature of corporate divisions and affiliates, and treats them as if they were different entities.

The Proposed Rule could be read as being dismissive of the effectiveness of barrier mechanisms, or internal corporate controls to mitigate OCIs, including particularly impaired objectivity OCIs. In formulating a new rule, the Council is not constrained by decisions interpreting prior regulations that did not address the basis for permitting mitigation based on barriers and internal control mechanisms. As is evident from the discussion above, the Council is not required to assume that every part of a corporation and every employee has a unitary interest to promote a particular financial interest over other important corporate concerns.
The Section believes that the Proposed Rule should provide practical guidance to contracting officers with respect to mitigating impaired objectivity OCIs in order to enable them to conduct procurements consistent with the stated preference for mitigation. The following is a suggested approach that would modify section 203.1205-3(c).

[Insert the following language in lieu of the last sentence of (c) and in lieu of (c)(1)]

The Government may use various techniques involving structural barriers, internal controls, or both, to reduce an impaired objectivity OCI to an acceptable level. The choice of a mitigation approach should be based on an analysis of the individual facts and circumstances of each case. Examples of such techniques include, but are not limited to:

(i) An agreement that the contractor's board of directors will adopt a binding resolution prohibiting certain directors, officers or employees, or parts of the company from any involvement with contract performance.

(ii) A requirement for a non-disclosure agreement between the business segment performing the contract and the parent corporation and sister corporations. The audit committee of the board of directors could be charged with oversight of the non-disclosure agreement.

(iii) Delegation of corporate responsibility for all performance aspects of a particular contract to a particular business unit or segment of the contractor rather than have that segment report to a supervisory level (or to corporate headquarters).

(iv) Creation of a separate business segment of the contractor to perform the work that has independent management.

(v) Creation of a separate subsidiary – a separate legal entity with its own board of directors and management – to perform the conflicted work.

(vi) In addition to the creation of a separate subsidiary, as referenced in (v), require that the board of directors of the subsidiary include one independent director who has no prior relationship with the contractor.
(vii) Creation of a separate subsidiary, as in (v) above, but require that the board of the subsidiary include at least five directors, three of whom have no prior relationship with the company.

(viii) Subcontract the conflicted portion of work to a separate and unaffiliated company.

(ix) In appropriate circumstances, creation of a corporate OCI compliance official to oversee implementation of the OCI mitigation plan.

These techniques and others that are used both in Government and in the private sector to separate specific information or activities can be effective, consistent with the facts and needs of a particular situation. Although some GAO decisions have held otherwise with respect to the current rule, the Council is not required to follow such holdings in crafting a new rule, but can look to additional sources and practices.

Once the contracting officer has made the decision that an OCI mitigation can reduce the risk of an OCI to an acceptable level, a waiver of any residual OCI by the contracting officer should be permitted. We recommend that the Council consider adding the following language:

If the contracting office makes a written determination that: (i) implementation of an agreed mitigation plan will reduce the potential risk of an organizational conflict of interest to an acceptable level; and (ii) proceeding is in the Government’s best interest, a waiver under Section [ ] of this subpart shall not be required. Failure to implement an agreed mitigation after contract award shall be deemed to be a material breach of the contract and may be deemed by the contracting officer as a basis for termination for default.

F. **Commercial Items**

The Proposed Rule applies to commercial items, but exempts commercially available off-the-shelf (“COTS”) items. COTS, as currently defined in FAR 2.101, covers “any item or supply (including construction material),” that is a commercial item “[s]old in substantial quantities in the commercial marketplace,” but does not extend to services. Therefore, services that are commercial items and will be subject to the Proposed Rule include “[i]nstallation services, maintenance services, repair services, training services, and other services” in support of COTS or commercial items or “[s]ervices of a type offered and sold competitively in
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substantial quantities in the commercial marketplace based on established catalog or market prices for specific tasks performed or specific outcomes to be achieved and under standard commercial terms and conditions.” See FAR 2.101 (definition of “commercial item.”).

The application of the Proposed Rule to commercial items, including services in support of COTS items, will limit DoD’s ability to take advantage of the efficiencies and innovations in the commercial marketplace for commercial items and to obtain commercial prices for those commercial items and services. Such OCI restrictions are not customary in the commercial marketplace. The Proposed Rule requires contractors to have a coordinated vision of what items and services they provide and will provide DoD, both at the time of offer and during performance. Contractors with healthy commercial sales, especially those with hundreds of thousands or millions of transactions, might not have systems in place to predict, track, identify, and mitigate OCIs.

Contractors whose systems do not track sales of commercial items, including services, to ensure compliance with such a rule have two options: (1) revise their systems to add such controls at potentially significant cost or (2) refuse to do business with DoD. Because changing systems to allow for the necessary tracking and oversight is costly, especially for contractors with significant numbers of transactions, contractors who choose the first option will need to flow the costs across their goods and services to commercial customers, thereby reducing profit and making themselves less competitive on price. DoD business is not significant enough to cause commercial contractors to reshape their business to fit DoD’s desires, nor should DoD expect commercial prices where DoD imposes requirements that are fundamentally inconsistent with commercial terms and conditions.

The Proposed Rule does not reveal that DoD has conducted the necessary market research or made the necessary determinations to subject services that are commercial items to the OCI rule. FAR 12.302(c) requires such market research and a waiver to add clauses other than those established FAR Part 12 in procuring commercial items. Specifically, it states:

(c) Tailoring inconsistent with customary commercial practice. The contracting officer shall not tailor any clause or otherwise include any additional terms or conditions in a solicitation or contract for commercial items in a manner that is inconsistent with customary commercial practice for the item being acquired unless a waiver is approved in accordance with agency procedures. The request for waiver must describe the customary commercial practice found in
the marketplace, support the need to include a term or condition that is inconsistent with that practice and include a determination that use of the customary commercial practice is inconsistent with the needs of the Government. A waiver may be requested for an individual or class of contracts for that specific item.

It is not clear from the Proposed Rule that DoD has considered the customary commercial practice found in the marketplace or the negative impact that this rule might have on its ability to procure commercial items, including commercial services, at commercial prices. Moreover, because the Proposed Rule appears to be inconsistent with commercial industry practice, it adds yet another landmine for commercial item contractors and COTS contractors who provide services to discover.

One commentator already has suggested that there was no basis on which to distinguish the risk of OCIs in the procurement of COTS from commercial items and concluded that even COTS should be subject to OCI rules. Such an application would significantly limit DoD’s ability to procure COTS items. It appears that DoD believed that it could not justify overturning the congressionally-mandated preference for procurement of COTS items under commercial terms and conditions, subject only to a limited set of applicable laws. See 41 U.S.C. § 431. We agree with DoD’s exception of COTS items and see no basis on which to extend the OCI rule to COTS items.

The DoD should consider one of the following options to ensure that it has continued access to the commercial marketplace for the procurement of commercial items and commercial services, especially those commercial services that support COTS items—

- Exempt commercial items from the Proposed Rule;
- Exempt commercial items from the Proposed Rule, unless the contracting officer determines in writing that it is necessary to impose OCI restrictions on the procurement of commercial items; or
- Exempt “installation services, maintenance services, repair services, training services, and other services” in support of COTS items from the Proposed Rule.

G. **WSARA Implementation – Major Defense Acquisition Programs**

Section 203.1270 of the Proposed Rule implements section 207 of WSARA with respect to OCIs in major defense acquisition programs. In addition to the concerns expressed above, the Section is specifically concerned about the proposed
implementation of the prohibition with respect to systems engineering and technical assistance ("SETA") contracts addressed in the Proposed Rule in section 203.1270-6 and clauses 252.203-70VV and 252.203-70WW.

The Proposed Rule states that with limited exceptions:

[A] contract for the performance of systems engineering and technical assistance for a major defense acquisition program shall prohibit the contractor or any affiliate of the contractor from participating as a contractor or major subcontractor in the development or construction of a weapon system under such program.

First, the Proposed Rule is vague with respect to the definition of Systems Engineering and Technical Assistance that is provided in proposed section 203.1270-1. The Proposed Rule adopts the same language currently found in FAR 9.505-1(b). The Section recommends that DoD clarify this definition by adding to the end of both the definition of "Systems engineering" and the definition of "Technical assistance" the following language: "to support requirements definition, source selection, or evaluation of contractor performance in a Major Defense Acquisition Program." The Section believes that this additional language squares more closely with the language of WSARA section 207.

Further, the definition requires additional guidance because it does not reflect technology development since the original promulgation of FAR 9.5.14 It is unclear with respect the meaning of "determining specifications." For example, is a decision to use commonly available commercial information technology that requires no development a "specification" within the meaning of the Proposed Rule? What is meant by "determining interface requirements"? Would that phrase encompass routine IT interfaces? The references to test requirements and test data are similarly unclear. Current IT systems are equipped with a host of self-diagnostics and test programs – are these prohibited activities if such technology ends up in an MDAP? Further, if a company has an affiliate that normally provides commercial consulting services with respect to commercial IT systems, is that work transformed into a prohibition by virtue of its association with an MDAP? Are

14 Interestingly, DoD Directive 5500.10, issued on June 1, 1963, contained virtually the same elements as the current FAR 9.505-1(b) and provided that the term "systems engineering" meant a combination of substantially all of the following activities: determination of specifications, identification and solution of interfaces between parts of the system, development of test requirements, or plans and evaluation of test data," and that the term "technical direction” meant “a combination of substantially all of the following activities: preparation of work statements for contractors, determination of parameters, direction of contractors’ operations, and resolution of technical controversies."
references in a SOW to use of standard automated tests going to lead to a solicitation being “off-limits” to certain affiliates of contractors that participate in the manufacture of major weapons systems?

As discussed above, requirements that are unclear may result in substantial overuse of this prohibition. The Section strongly recommends that DoD clarify and update the definition of “systems engineering” and provide specific guidance regarding the meaning and application of this terminology in the Proposed Rule.

In addition to the notice called for in clauses 252.203.70VY and -70WW that the contract is for SETA work on an MDAP, the Section also strongly recommends that each DoD solicitation (whether or not for an MDAP) state expressly that the work either is or is not SETA work so that language contained in a solicitation’s SOW or requirements document that inadvertently resembles the SETA definition is not construed inappropriately to trigger the prohibition. Clarity here will enable prospective offerors to determine in advance whether there is a risk that the SETA prohibition may be invoked by the contracting officer. Otherwise, unclear requirements or SOWs may result in companies avoiding competitions that were not intended to fall within the prohibition or unnecessarily divesting businesses were not in the ambit of the prohibition.

Second, the Proposed Rule does not use mitigation approaches for SETA work specifically referred to in the legislative history of section 207. The WSARA Conference Report expressly mentions the use of structural barriers and that such approaches, i.e., FOCI-type mitigation measures, will be considered in developing the regulations under section 207 as a permissible approach to mitigation of SETA OCI concerns. H.R. Rep. No. 111-124 at 37-38 (2009). The Section recommends that the Council revise the Proposed Rule to provide for the use of such mechanisms as anticipated by Congress. The Proposed Rule also is unclear whether a SETA prohibition may arise after award, and thus require draconian measures such as contract termination or divestiture.

Further, with regard to the SETA prohibition, there is an arbitrary distinction made as to what would be a “major subcontractor” for purposes of coverage. Specifically, the clause provides that a major subcontractor is one “awarded subcontracts totaling more than 10 percent of the value of the contract under which the subcontracts are awarded.” Proposed Clause 252.203-70WW(a). Given the size of potential major defense acquisition programs, this could mean that subcontractors with millions of dollars in subcontracts would not be covered, but others with less than $1 million would be covered. Knowing whether one would or would not be considered a major subcontractor subject to the clause could
become a critical issue for a potential teaming partner or subcontractor and some clarity ought be provided.

II. Waiver

The Proposed Rule specifically addresses the use of waiver authority and sets forth an approach for employing that authority. The Section agrees that waivers are an important tool in addressing OCIs and that further clarity and guidance regarding the use of waivers is necessary. Nevertheless, the Section is concerned that the Proposed Rule needlessly reduces the discretion of the contracting officer to waive OCIs.

The current waiver provision in FAR 9.503 is extremely broad, providing the Government virtually unlimited discretion to waive “any general rule or procedure” expressed in the FAR’s OCI provisions:

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. Any request for waiver must be in writing, shall set forth the extent of the conflict, and requires approval by the agency head or a designee. Agency heads shall not delegate waiver authority below the level of head of a contracting activity.

FAR 9.503.

Despite agencies’ broad discretion to waive OCIs under FAR 9.503 and the recognition by the COFC and GAO that waiver is an acceptable practice, agencies virtually never use waivers to address actual or apparent OCIs. We urge the DAR Council to encourage waivers when in the Government’s best interests. We also encourage the Council to allow waivers to be approved at levels below the head of contracting activity. The approval levels and dollar thresholds for the value of the awarded contract that are used for other than full and open competition could be adopted. Alternatively, the Council could allow a contracting officer to make a written determination that (i) implementation of an agreed mitigation plan will reduce the potential risk of an organizational contract of interest to an acceptable level, and (ii) assumption of such risk is in the best interest of the Government, and not require a waiver under this section for any residual OCI.

Both the COFC and GAO have repeatedly noted that waiver is an appropriate method of addressing actual or apparent OCIs. See, e.g., Filtration Dev. Co. LLC v. United States, 63 Fed. Cl. 418, 422 (2005) (“In appropriate circumstances, the head of the contracting agency is empowered to waive an OCI..."
when it is in the best interest of the United States to do so"). In most GAO cases
addressing the subject, the discussion of the possibility of waiver is dicta, as the
agency decision before it did not involve a waiver of a perceived OCI. In the only
GAO decision reviewing an agency’s decision to waive an OCI, GAO upheld the
agency’s broad discretion to waive an OCI. See Knights’ Piping, Inc., B-280398.2,

In addition to the FAR waiver authority, the Federal Aviation
Administration (“FAA”) also has been granted OCI waiver authority that is even
broader than that in the FAR. The FAA Management System (AMS) provides:
“When necessary to further the interests of the agency, an actual or potential
conflict may be waived or mitigated at the FAA’s discretion.” AMS § 3.1.7.
Unlike FAR 9.503, which requires the agency head or his/her designee to approve
the waiver, FAA contracting officers have the authority to waive OCIs if they
determine that “it is in the best interest of the FAA” to do so:

The Contracting Officer should award the contract to the apparent
successful offeror unless a conflict of interest is determined to exist which
cannot be neutralized, avoided, or mitigated. Before determining to
withhold award based on conflict of interest considerations, the Contracting
Officer should notify the contractor, provide the applicable reasons, and
allow the contractor a reasonable opportunity to respond. If after
consultation with legal counsel and team members, the Contracting Officer
determines that it is in the best interest of the FAA to award the contract
notwithstanding a conflict of interest, the Contracting Officer should
document that determination.

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15 See also Filtration Dev. Co. LLC v. United States, 60 Fed. Cl. 371, 388 (2004) (“[T]he FAR
permits the CO, after finding that it is in the best interest of the United States to do so, to award
the contract despite the OCI upon obtaining a waiver from the head of the agency or a designee. Given
that the court can envision a situation where such an option could be exercised, a permanent
injunction excluding AFS from the re-instituted trade study and from future competition is
inappropriate.”); L-3 Servs., Inc., B-400134.11, B-400134.12 Sep. 3, 2009, 2009 CPD ¶ 171
(sustaining protest based on finding that awardee had biased ground rules and unequal access to
information OCIs, but noting that the agency could allow the awardee to remain in the competition
by executing a waiver under FAR 9.503); Dep’t of the Navy—Reconsideration, B-286194.7, May
29, 2002, 2002 CPD ¶ 76 (“[W]e see no reason why agencies may not, consistent with the
provisions of FAR 9.503 . . . , execute conflict of interest waivers with regard to MEO teams or
consultants assisting them. As with any such determination applicable to private-sector competitors,
we would expect waivers to be consistent with, and reasonably supported by, the record.”); see also
Nortel Gov’t Solutions, Inc., B-299522.5, B-299522.6, Dec. 30, 2008, 2009 CPD ¶ 10; Alion Sci. &
AMS Guidance T3.1.7 Organizational Conflict of Interest (Rev. 4, April 2006) - 6: Procedures, a. The decision of the contracting officer is subject to review and final determination by the FAA Administrator through the Office of Dispute Resolution for Acquisition (“ODRA”), which issues Findings and Recommendations. There are no reported ODRA decisions in which an FAA contracting officer has attempted to waive an OCI.

The Proposed Rule, while attempting to clarify waiver authority, appears to reduce the contracting officer’s discretion to waive OCIs. The preamble to the Proposed Rule states that “[t]he coverage in current FAR subpart 9.5 is carried over.” 75 Fed. Reg. at 20956. However, several aspects of the Proposed Rule would constitute significant departures from FAR 9.503 and would have the effect of reducing the discretion agencies have to waive OCIs.

First, it is unnecessary to require that the Government explicitly reserve its right to waive OCIs in each solicitation, which will further reduce use of an already underutilized mechanism. Section 203.1205-4(c)(3) of the Proposed Rule provides that “[w]aivers shall not be used in competitive acquisitions unless the solicitation specifically informs offerors that the Government reserves the right to waive the requirement to resolve organizational conflicts of interest.” 75 Fed. Reg. at 20961. This requirement is not in FAR 9.503, and this procedural hurdle is unnecessary. Because the FAR expressly provides that agencies are permitted to waive OCIs, all contractors should be aware that there is the potential for the Government to issue an OCI waiver in connection with any solicitation or contract. Moreover, because agencies have rarely issued waivers, it is highly unlikely that disappointed bidders or offerors have complained that they would not have competed for a particular opportunity had they known that the agency might waive an OCI. Thus, this requirement does not appear to be addressing an existing problem, and it may well create a trap for contracting officers who inadvertently fail to include the clause in a solicitation.

Although it is not entirely clear, the preamble to the Proposed Rule suggests that this requirement was included because it “implements a fundamental tenet that awards must be made using the evaluation factors stated in a solicitation.” 75 Fed. Reg. at 20956. In situations where OCI considerations are included under the evaluation factors, then agencies obviously must make awards based on those announced factors. On the other hand, in the majority of instances, where the evaluation criteria do not explicitly include consideration of OCIs, the FAR already places contractors on notice that agencies can waive OCIs. Because it unnecessarily reduces the discretion agencies have to issue waivers under FAR 9.503, we recommend that section 203.1205-4(c)(3) be removed from the final rule.
Second, the Section is concerned that the examples of waiver in the Proposed Rule, while offering some helpful guidance, are not comprehensive and imply a preference for divestiture. As discussed above, despite the broad waiver authority currently in FAR 9.503, agencies have been reluctant to exercise their waiver rights, notwithstanding GAO’s suggestion in multiple sustained OCI protests (albeit in dicta) that waiver is an appropriate alternative for agencies to consider. One of the only examples of waiver that has recently been exercised involves the NRO’s “limited-time waiver” to allow a contractor to divest itself of an entity creating a potential conflict. The Section believes that the new OCI rules should offer guidance that while resolution of conflicts is required if possible, where it is not feasible, waiver can be a legitimate means of addressing OCIs. The two waiver examples the Proposed Rule currently offers, however, do not convey that message.

Proposed section 203.1205-4(c)(2) provides as follows:

(2) Circumstances when waivers are appropriate include, but are not limited to, the following examples:
(i) A limited time waiver is necessary to allow a contractor to divest itself of conflicting businesses or contracts and the contractor agrees to stringent mitigation measures in the interim.
(ii) A waiver is necessary in order for the agency to obtain a particular expertise.

By including the “limited-time waiver” as the first of only two enumerated possible reasons for waiver, the rule can be read to imply that waivers generally should not be granted unless contractors agree to reorganize themselves to eliminate any potential conflict. In other words, the example would appear to describe the status quo, rather than offer meaningful guidance as to other situations where a waiver may be appropriate. Moreover, the example potentially places government agencies in the position of requiring reorganizations of private corporations, not an issue government contracting personnel are likely to be equipped to address. The second example, where the agency needs a particular expertise, suggests that waivers may be appropriate where a contractor with a potential OCI is a sole source of a particular expertise. Neither of these examples conveys the breadth of what should be acceptable bases for an OCI waiver.\(^1\)

Accordingly, the Section would suggest adding as the first example:

\(^1\) In other contexts, such as seeking representation of counsel, it is commonplace for a client to consent to a potential conflict of interest so long as certain safeguards are in place. For example, ABA Model Rule of Professional Conduct 1.7(b) provides: "Notwithstanding the existence of a concurrent conflict of interest . . . , a lawyer may represent a client if:
Circumstances where the agency determines that the potential OCI, while not entirely mitigated, is attenuated enough that the agency is willing to accept the risk in order to take advantage of the value of including the contractor in the competition.

Third, the Proposed Rule leaves some doubt as to whether waivers are permitted once contract performance has begun. Proposed section 203.1203(b)(3) provides that, in circumstances under which a potential or actual conflict of interest could exist, the contracting activity shall ensure that “[t]he contract establishes a process by which the parties will resolve any organizational conflicts of interest that arise during contract performance.” 75 Fed. Reg. at 20959 (emphasis added). Section 203.1203(b)(2) provides, however, that “[a]ll identified organizational conflicts of interest [must be] either resolved or waived prior to the award of a contract (including individual task or delivery orders).” Id. (emphasis added). Thus, it is unclear from the Proposed Rule whether waivers are permissible once contract performance has begun. The Section believes that if an OCI arises during contract performance, the Government should have the ability to waive the OCI to the extent that it cannot be completely mitigated if doing so is in the best interest of the Government. The current FAR 9.503 so provides, and there is no reason to dilute the Government’s authority in these circumstances.

Fourth, proposed section 203.1205-4 provides that the agency head may waive the requirement to resolve an OCI in a particular acquisition upon a determination that resolution of the OCI is either: (1) not feasible; or (2) not in the best interest of the Government. The current rule in FAR 9.503 permits the agency head to waive any general rule or procedure in FAR subpart 9.5 upon a determination that its application would not be in the Government’s interest. The new rule should clarify that the agency head “or designee” may grant such a waiver. In addition, if resolution of an OCI is “not feasible” there should still be a determination that proceeding in spite of the OCI is in the Government’s interest.

Finally, as discussed above (at III.E.4.(c)), the Section believes that a waiver should

1. the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

2. the representation is not prohibited by law;

3. the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

4. each affected client gives informed consent, confirmed in writing.

(Emphasis added).
not be required if the contracting officer has reduced the risk of OCI to an acceptable level through mitigation and has determined proceeding with the procurement is in the Government’s interest despite any residual OCI.

I. **Relationship Between OCI Proposed Rule and Inherently Governmental Guidance**

1. Functions Addressed In Proposed Policy Letter

On March 31, 2010, OFPP issued a proposed Policy Letter that would provide guidance to Executive Departments and agencies on circumstances when work must be reserved for performance by federal government employees, as well as circumstances where preference should be given to federal government employees. 75 Fed. Reg. 16188 (the “Proposed Policy Letter”). To that end, the Proposed Policy Letter sets forth three classes of functions that either must be performed by federal employees or where “special consideration” should be given to performance by federal employees:

**Inherently Governmental Functions.** The Proposed Policy Letter adopts the definition of “inherently governmental function” set forth in the Federal Activities Inventory Reform Act of 1998 (“FAIR Act”), which defines an “inherently governmental function” as those “function[s] that [are] so intimately related to the public interest as to require performance by Federal Government employees.” Included under this umbrella are “activities that require either the exercise of discretion in applying Federal Government authority or the making of value judgments in making decisions for the Federal Government.” See FAIR Act § 5(2). Inherently governmental functions must be performed by the Government.

**Functions Closely Associated with Inherently Governmental Functions.** The Proposed Policy Letter also requires agencies to give special consideration to reserving the performance of “functions closely associated with government

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18 The Proposed Policy Letter provides a list of examples of inherently governmental functions that is consistent with the list currently set forth in FAR 7.503(c). OFPP also enunciated two tests for agencies to use in determining whether functions not included in the list qualify as “inherently governmental.” These include the “nature of the function” test, which focuses on whether the task to be performed involves the exercise of sovereign power, and the “discretion” test, derived from OMB Circular A-76, *Performance of Commercial Activities*, which asks agencies to evaluate whether the discretion exercised by the contractor in performing the function could commit the Government to a certain course of action without appropriate veto power by the federal agency.
functions” for federal employees. If an agency decides to outsource a closely associated function, the agency is required to set forth limitations on the contractor’s decision-making authority in the contract and provide for sufficient federal oversight of the contract, including addressing potential OCIs.

**Critical Functions.** The last category of activities address by the Proposed Policy Letter are those deemed to be “critical functions,” which are described generally as “function[s] that [are] necessary to the agency being able to effectively perform and maintain control of its mission and operations.” If an agency determines that it has sufficient internal capability to control its mission and operations, the function may be outsourced, provided outsourcing is more cost effective and performance and risk considerations do not outweigh the cost considerations.

2. **Overlap Between Proposed Rule and Proposed Inherently Governmental Guidance.**

There is fundamental overlap between DoD’s proposed OCI regulations and OMB’s Proposed Policy Letter’s mandate that agencies identify functions that should be reserved for government employees. On one hand, an agency decision to perform work “in house”—by definition—will eliminate the potential for contractor OCIs related to that work. For example, if an agency chooses to utilize its own employees to provide expertise that would otherwise be provided under an advisory and assistance contract, it has eliminated the potential for a contractor OCI. On the other hand, if an agency decides that a function can be performed by contractors, then it must apply the OCI regulations to address any OCIs or potential OCIs.

In fact, 10 U.S.C. § 2383 and DFARS 207.503 already specifically require that the contracting officer address any potential OCIs when contracting for acquisition functions closely associated with inherently governmental functions (as identified in FAR 7.503(d)). The Proposed Policy Letter would expand the requirement beyond acquisition support, requiring that an agency, after it makes a threshold decision that a “function closely associated with an inherently governmental function” can be performed by contractors, take affirmative steps to avoid or mitigate conflicts of interest, identifying the following examples:

(i) Conducting pre-award conflict of interest reviews, to ensure contract performance is in accordance with objective standards and contract

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19 Section 736 of Division D of the Omnibus Appropriations Act of 2009, Pub. L. No. 111-8, directs agencies to “give consideration” to using government employees to perform such functions.
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specifications, and developing a conflict of interest mitigation plan, if needed, that identifies the conflict and specific actions that will be taken to lessen the potential for conflict of interest or reduce the risk involved with a potential conflict of interest;

(ii) Physically separating contractor personnel from government personnel at the worksite;

(iii) Ensuring contractors are clearly identified as such in work product and on work support systems, such as in electronic mail systems and phone messaging systems, and on signature blocks, security and other identification badges, and office name plates;

(iv) Having contractor personnel work offsite, if cost-effective and without derogation to the work to be performed;

(v) Excluding contractors from subsequent competitions if conflicts cannot be avoided; or

(vi) Performing work with federal employees if (A) contractor conflicts cannot be satisfactorily resolved or (B) decision-making would be at risk of being transferred to the private sector because contractors have such influence and insight into government decision making or government officials would rely too heavily on contractor inputs (or rely almost exclusively on contractor fact finding or memory).


Despite this relationship, neither the Proposed Rule nor the accompanying commentary addresses how DoD intends for the proposed OCI regulations to be applied in light of the obligations in OMB’s Proposed Policy Letter (the Proposed Rule does not discuss “inherently governmental functions”). The Proposed Rule would require contracting officers to address the potential for OCIs prior to issuing a solicitation. Specifically, if the contracting officer determines that there is no potential for OCIs, then he or she must document that determination and include it in the contract file. See 75 Fed. Reg. at 20960 (Proposed section 203.1205-2(b)(3)). If the contracting officer determines that there is a potential for OCIs, he or she must include Proposed Clause 252.203-1206 in the solicitation. See id. (Proposed Clause 252.1205-2(b)(4)). These requirements overlap to some extent with the Proposed Policy Letter’s guidance and DFARS 207.503.

Accordingly, the Section recommends that DoD (potentially in consultation with OFPP) consider whether it is feasible or appropriate to clarify how the pre-
solicitation OCI requirements are intended to relate to the requirements in the Proposed Policy Letter and DFARS 207.503. We do not necessarily recommend that DoD make specific clarifications in the text of the proposed regulations, but DoD could acknowledge and comment on the Proposed Policy Letter and DFARS 207.503 in the Preamble to the Proposed Rule. For example, as noted previously, OFPP’s Proposed Policy Letter would expand DFARS 207.503 and require an agency, after making a decision that a function closely associated with an inherently governmental function can be performed by contractors, take affirmative steps to avoid or mitigate conflict of interest, and provides several specific examples for avoiding or mitigating such conflicts.

This type of requirement is directly relevant to DoD’s Proposed Rule, and agencies (and contracting officers) could benefit from coordination between DoD and OFPP with respect to specific OCI avoidance/mitigation guidance. See Proposed section 203.1205-1 (“The contracting officer shall assess early in the acquisition process whether contractor performance of the contemplated work is likely to create any [OCI] . . . and shall then resolve, prior to contract award, any [OCI] . . . “); see also Proposed section 203.1205-2 (“The nature of the work to be performed determines whether a potential for a conflict of interest exists . . . . The contracting officer shall review the nature of the work to be performed [which could include an analysis of whether the work is closely associated with an inherently governmental function] to determine whether performance by a contractor could result in an [OCI] . . . “). As part of the contracting officer’s pre-award assessment of potential OCIs and efforts to avoid/mitigate OCIs, adding guidance to the Proposed Rule consistent with guidance in OFPP’s Proposed Policy Letter and DFARS 207.503 would give contracting officers sharper, more uniform direction with respect to such assessments. See Report of the Acquisition Advisory Panel at 407 (“Although FAR 9.5 provides considerable leeway to contracting officers and agencies for considering avenues to address actual or potential OCIs, lack of guidance regarding identification and mitigation of conflicts . . . leads to variable results and inconsistent application of the regulations. Uniform regulations providing guidance to contracting officers and contracting agencies could help to reduce the frequency of failures to identify and mitigate OCIs.”).

Part of DoD’s consideration of how pre-solicitation OCI requirements are intended to relate to the requirements in the Proposed Policy Letter and DFARS 207.503 could include whether, and to what extent, the potential for OCIs should affect an agency’s threshold decision to reserve work for government employees. For example, should the potential that a function could create OCIs be a factor in (1) whether the function is “inherently governmental;” (2) whether a function is “closely associated with inherently governmental functions” or a “critical function;” or (3) whether the “closely associated with inherently governmental
function” or “critical function;” should be performed by government employees or contractor employees? At the very least, DoD should reference DFARS 207.503 in the OCI regulations to put agencies on notice of the heightened obligations that apply when contracting for acquisition functions closely associated with inherently governmental functions.

The Proposed Policy Letter suggests that OCIs are not part of the threshold sourcing decision, and instead, are to be addressed once an agency decides to rely on contractors to perform functions closely associated with inherently governmental functions. See Proposed Policy Letter 5-2a(c). The Section agrees with this approach. Unless all contractors would be conflicted based on the nature of the work (which likely would mean that the function is “inherently governmental” and cannot be performed by contractor employees), the potential that some sources might suffer from OCIs generally should not be a sufficient basis to foreclose the possibility of using contractor support. For that reason, we recommend that DoD and OMB clarify that while the issues of identifying functions to be performed by government personnel and identifying and addressing OCIs are related, agencies generally should address those issues separately. First, the agency should determine whether the needed services can and should be performed by contractor employees (i.e., it is not (1) an inherently governmental function, or (2) a position or activity performing a function closely associated with inherently governmental functions or a critical function the agency decides should be performed internally). Second, if the agency determines that contractors can and should perform all or some of the work, then the agency would conduct an acquisition and identify and address OCIs based on a consolidated set of OCI regulations.

IV. CONCLUSION

The Section appreciates the opportunity to provide these comments. The Section leadership and members of the OCI Working Group are available and would be pleased to meet with the Council to respond to questions concerning any aspect of these comments.

Respectfully submitted,

Karen L. Manos
Chair, Section of Public Contract Law
cc: Donald G. Featherstun
    Carol N. Park Conroy
    Mark D. Colley
    David G. Ehrhart
    Allan J. Joseph
    John S. Pachter
    Michael M. Mutek
    Patricia A. Meagher
    Council Members, Section of Public Contract Law
    Marcia G. Madsen
    Kara M. Sacilotto