On October 15, 1996, the Section submitted comments to the U.S. Department of Energy ("DOE") regarding its proposed amendments to its rules on organizational conflicts of interest ("OCI"). The DOE proposed to add two new contract clauses that implement and supplement the FAR OCI coverage.

The Section recommended that the proposed amendments not be adopted or that they be significantly modified. Of specific concern is the extension of the disclosure requirement, not only to the apparent awardee, but also to consultants and subcontractors. The Section argued that this was an excessive burden on the contractors. Also, the Section expressed concern that extension of the disclosure requirement to affiliates was not only burdensome but also difficult to define.

The Section suggested that the government include in the solicitation and contract the OCI information required to be identified in accordance with the FAR. The Section also recommended that the language of the rules be replaced with more flexible language that allows the contracting officer to tailor the OCI restrictions of a particular procurement to the actual risks associated with that procurement.

October 15, 1996

Mr. Robert M. Webb
U.S. Department of Energy
Office of Procurement and Assistance Management, Office of Policy, HR-51
Room 8H-023
1000 Independence Ave., S.W.
Washington, D.C. 20585

Re: Proposed Rule on Organizational Conflicts of Interest;

Dear Mr. Webb:

On behalf of the Section of Public Contract Law of the American Bar Association ("the Section"), I am submitting comments on the above-referenced matter. The Public Contract Law Section consists of attorneys and associated professionals in private practice, industry and Government service. The Section's governing Council and substantive committees contain a balance of members representing these three segments, to ensure that all points of view are considered. In this manner, the Section seeks to improve
the process of public contracting for needed supplies, services and public works.

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

The Proposed Rule

On August 6, 1996, the Department of Energy ("DOE") issued proposed amendments to the organizational conflict of interest ("OCI") rules applicable to DOE procurements. 61 Fed. Reg. 40775. The proposed changes were prompted by the repeal of 15 USC § 789 and 42 USC § 5918, which had provided a unique statutory basis for DOE's OCI regulations. In the absence of this statutory authority, DOE has recognized that its OCI control authority must flow from the existing coverage of the Federal Acquisition Regulation ("FAR"). DOE therefore has proposed replacing the current regulatory language in Part 9 of the DOE Acquisition Regulation ("DEAR"), primarily by adding two new contract clauses that implement and supplement the FAR coverage.

The Section believes that DOE's approach too closely follows its prior statute-based system and may not be sufficiently flexible to fully carry out the intent of the FAR OCI policies, and therefore offers the following comments. In addition, it appears that the proposal at times conflicts with, or is inconsistent with, the FAR Subpart 9.5 OCI rules. Such departures are not permitted, under FAR § 1.302 (agency acquisition regulations are limited to those which implement or supplement the FAR) and § 1.304 (agency acquisition regulations shall not conflict or be inconsistent with the FAR).

Scope of OCI Coverage

The FAR currently requires the apparent awardee of a contract for advisory and assistance services to provide a limited OCI disclosure at contract award. FAR § 52.209-8. See also FAR § 52.209-7 (OCI disclosures for marketing consultants). DOE proposed to adopt this provision, with revisions, in the DEAR. DOE, however, goes beyond this basic FAR requirement to mandate use of broader solicitation and contract clauses to impose continuing OCI protection obligations. Most notably, the proposed DOE OCI disclosure requirement extends not only to the apparent awardee, but also to its consultants and subcontractors. Proposed DEAR § 952.209-8. In addition, DOE intends to impose OCI restrictions not only on each contractor but also on each subcontractor at any tier, and all affiliates. Proposed DEAR § 952.209-72. The proposed rule, with its expansive unilateral obligations, imposes a significant burden on contractors and will not provide any apparent benefit to DOE beyond that already available in FAR Part 9.5. The Section therefore recommends that DOE not adopt, or should at least modify, the proposed clauses. A number of reasons may be cited.

First, the approach of the existing FAR rule is intended to address only one type of OCI. When this rule was promulgated in the FAR in 1990, the Section commented that it was narrow and did not appear to address the government's actual OCI needs (which can arise in a variety of contracts), and at the same time it added substantial burdens to the contracting community. Prior to adoption of this clause, contracting officers were required to consider, and adopt in their discretion, whatever clause might be appropriate to the OCI risks of a particular procurement. The FAR clause effectively dictated the result of the analysis for advisory and assistance contracts. Although this is not the appropriate forum to argue whether the FAR provision needs modification, the proposed rule at § 952.209-72 unnecessarily perpetuates the singling out of advisory and assistance contracts for more burdensome and inflexible OCI obligations than are required of other contracts, going beyond the already problematic FAR rules.

Second, where the FAR already shifts much of the burden of compliance onto the contractor with its clause, the DOE proposal increases this burden substantially. Initially, the proposed rule requires the offeror/awardee to identify all possible conflicts of interest for disclosure purposes (prime and subcontractor, past, present and currently planned). Proposed DEAR § 952.209-8. Thereafter, the contractor has the burden of passing along, to subcontractors at all tiers and to all affiliates, OCI restrictions on work related to the initial contract. In many cases, agency personnel are aware of the issues and
activities that would impair the objectivity of their actual or potential contractors or that would impact the fairness of a procurement. In fact, the FAR requires contracting officers to identify and evaluate potential OCIs as early in the acquisition process as possible (FAR § 9.504(a)(1)) and, if they decide that the acquisition involves a significant potential OCI, they must prepare a written analysis, a draft solicitation provision and, if appropriate, a proposed contract clause, prior to issuance of the solicitation. FAR § 9.506(b). The DEAR proposed rule would appear to shift the default approach to one of contractor disclosure rather than contracting officer analysis and preparation.

While contractors should not be free to ignore actual or potential OCIs when competing for government work, it is inequitable to leave the entire burden of identification and disclosure on the contractor. Rather than mandate that only contractors should prepare lengthy disclosures, the Section believes the government should share this burden by including in the solicitation and contract the information that should be identified in accordance with the FAR. The DEAR cannot relax those FAR requirements. (We recognize that the proposed rule at DEAR § 909.507-2 allows contracting officers to make "appropriate modifications where necessary to address the potential for organizational conflicts of interest," but suggest, based upon the experience of some of our members with DOE and with other agency contracts, that such permissive language is inadequate to ensure that helpful modifications are made to the OCI clause for any particular procurement. Without affirmative direction to undertake at least a "best efforts" attempt to specify anticipated conflicts of interest that may flow from a particular contract, we believe that such modifications of the clause will not be made.)

Third, the decision to automatically impose OCI restrictions on all affiliates and subcontractors for advisory and assistance services contracts is burdensome and inequitable. While proposed DEAR § 952.209-8 warns offerors that they must make an OCI disclosure at the time of award for itself and its "identified consultants or subcontractors," it does not warn that the award document, with DEAR § 952.209-72, will restrict not only their own future activities but also those of subcontractors at all tiers, and all affiliates, not to mention successors in interest. DOE will surprise many contractors who respond to the solicitation based upon a clause that only warns only about disclosure of contractor/subcontractor OCIs. There is no rational basis for automatic imposition of OCI restrictions upon all subcontractors and affiliates, regardless of their role or relationship to the contractor or to the work being performed. A good example is that of a DOE prime or subcontractor on a particular task (company A), that has an affiliate (an entirely different division of the company) that performs outsourced data processing services. These services have nothing specific to do with the advisory and assistance services provided to DOE by company A and are controlled by the affiliate's customer(s) (company B). If DOE then awards another contract based upon the work of company A, and bars company A (and its subcontractors and affiliates) from competing for the contract, the affiliate, under the proposed rule, will have an OCI and be barred from performing its data processing services for company B on the new DOE contract, although in reality only company A has a true OCI. Likewise, some of A's subcontractors, if they performed tasks unrelated to the new contract, do not have OCIs and should not be excluded from competition for the second contract. The proposed rule removes the flexibility needed to avoid such results.

Furthermore, as anyone who has argued affiliation issues before the Small Business Administration can attest, the question of what constitutes an affiliate is not an easy one. Contractors will find it difficult to guess what business relationships may be considered "affiliations" under the proposed rule, and may simply disclose nothing but the most obvious conflicts or expend substantial effort trying to answer for all actual or possible affiliates. On the other side of this problem is the reality that those "affiliates" may be significantly disadvantaged (restricted from future work) by a contract award over which they had no control, depending upon whose definition of "affiliate" may prevail. This can be especially true of large contractors with diverse operations, but even smaller contractors may find the clauses burdensome and difficult to comply with.

Finally, and most troublesome of all, the imposition of expansive disclosure obligations and performance limitations (all past, present and currently planned work of all subcontractors and all affiliates) virtually assures that errors will be made, to the substantial disadvantage of both DOE (which would receive less-than-useful information) and contractors (who may become vulnerable to charges of misrepresenting their affiliations despite good faith efforts to comply, and who cannot properly plan, as a company, for a known scope of OCI restrictions). The Section questions the wisdom of creating a rule that cannot be complied with.
The Section hopes that the clause at FAR 52.209-8 will be revised in the future as part of the government's continuing contract reform effort, to more fully align the government's interests in minimizing the impact of OCIs with the contractual requirements to achieve this end. Nonetheless, we recommend that DOE not help perpetuate this problem with the additional requirements in the proposed DOE rule.

**Limitations on Contracting Officer Discretion to Select Appropriate Protective Measures**

As suggested in the general analysis above, the Section believes that the proposed DEAR 52.209-72 is overly prescriptive, in that it limits the contracting officer's discretion, as provided in the FAR, to identify or develop OCI avoidance mechanism(s) appropriate to each procurement. FAR 9.507-2(b).

The FAR contemplates that each contracting officer will develop contract language to address OCI issues that could arise in the course of a procurement. Id. The contracting officer operating under the FAR has at his disposal a menu of options, beginning with the disclosures required by FAR 52.209-8; then notification in the RFP of specific disqualifying OCI's; and when the foregoing options are too limited the requirement of offeror disclosures (covering for example affiliates or subcontractors, or requesting development of an OCI avoidance plan). The options of implementing reporting requirements during performance and expressly stating restrictions on future contracting also are available.

Most of these FAR OCI avoidance tools are less intrusive, but effective, methods of protecting the government's interests, which the DOE proposed rule does not take full advantage of. Although the proposed DEAR 952.209-72 addresses some of these tools, it directs their usage and does not address all of the available options. While it may be argued that the contracting officer has the discretion, in appropriate cases, to seek expansive OCI disclosures, the proposed DEAR approach eliminates any exercise of discretion and simply assumes that an OCI must exist.

An example of the reduction in discretion may be found in the blanket 5 year prohibition on performing work stemming from the contractor's work on a DOE advisory and assistance services contract. The FAR sets no such mandatory limits. Thus, where an advisory and assistance services contractor has completed a contract or task for DOE, under the proposed rule it would have an OCI for related work for 5 years, even if other contractors successfully performed intervening work (obviating the risk of unfair competitive advantage and bias). The proposed rule offers no reasoned analysis in support of this mandatory period of restriction. Given the pace of technological change these days, in the majority of cases it is unlikely that the ability to introduce bias or to obtain an unfair competitive advantage would last as long as five years after any DOE contract. This mandate far exceeds the requirements of the FAR (which limits such bans to a reasonable period of time necessary to avoid the OCI), and dispenses with the exercise of judgment about the need for such a restriction in the each individual procurement required by the FAR. The DEAR thus deprives the contracting officer of his or her discretion to make a determination as to what time restriction is reasonable for a particular contract.

The DOE contracting officer should, as provided in the FAR, have the flexibility to determine a reasonable time limit for an OCI, in light of the specific product or service being procured. While the DOE contracting officers should retain the flexibility to choose the most appropriate measures to address OCI issues in particular procurements, the Section believes that the regulations should set a clear preference for use of a solicitation clause, prepared by the contracting officer for a particular procurement, which identifies specific OCIs that DOE believes are disqualifying. Contractor disclosure requirements beyond that required by the FAR, especially those extending to subcontractors and affiliates, should be used only when other OCI measures are insufficient. This preference should apply equally to OCIs present at the time of award and to those identified pursuant to a contractor's continuing OCI reporting obligations during contract performance.

Accordingly, the proposed DEAR clause should be revised to provide a mechanism to allow the contracting officer to 1) designate activities that the contracting officer believes create an OCI that would be disqualifying in the absence of avoidance or mitigation; 2) designate the period of time for which limitations on future contracting would apply; 3) request additional disclosures (pre and post-award) above those required under the FAR for advisory and assistance services contracts where the CO determines that no other mechanism is available to mitigate the impact of OCIs on the procurement; and 4) approve contractor avoidance or mitigation plans for OCIs identified through 1) or 3) above.
**Conclusion**

For the foregoing reasons, the Section believes that the proposed revisions to the OCI rules in part 9 of the DEAR should be replaced with more flexible language that allows the contracting officer to tailor the OCI restrictions of a particular procurement to the actual risks associated with that procurement.

The Section appreciates the opportunity to provide these comments and is available to provide additional information or assistance as you may require.

Sincerely,

John T. Kuelbs  
Chair, Section of Public Contract Law

cc: Marcia G. Madsen  
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