July 21, 2010

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

Subject: DFARS Case 2009–D015—Organizational Conflicts of Interest in Major Defense Acquisition Programs

Dear Ms. Williams:

The Project On Government Oversight (POGO) provides the following public comment to DFARS Case 2009-D015, “Organizational Conflicts of Interest in Major Defense Acquisition Programs” (75 Fed. Reg. 20954, April 22, 2010). The proposed rule issued by the Department of Defense (DoD) seeks comments on additional requirements for organizational conflicts of interest (OCI). As an independent nonprofit organization committed to achieving a more accountable federal government, POGO supports the implementation of new standards and procedures to better detect and avoid actual or potential organizational conflicts of interest and thereby increase public confidence in defense contracting.

DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to clarify OCI regulations and implement Section 207 of the “Weapons System Acquisition Reform Act of 2009.” Pub. L. 111–23. Accordingly, DoD has issued a proposed rule “to provide uniform guidance and tighten existing requirements for organizational conflicts of interest by contractors in major defense acquisition programs.” Additionally, it requires DoD to address OCIs that could arise from lead system integrator contracts, contracts where a service contractor (or subsidiary) might simultaneously work as a prime contractor or supplier of a major subsystem or component, and when contractors provide technical evaluations on major defense acquisition programs.1 The proposed rule also requires DoD to receive advice from independent, unbiased sources and states that limited exceptions to the requirements are permitted when “necessary.”2

These ethics restrictions are vitally important. Mergers and acquisition have caused a severe reduction in the number of defense contractors, and those contractors have expanded their capabilities to include a vast range of goods and services, including

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1 Pub. L. 111–23, Sec. 207(b)(1).
management, engineering, technical, and information technology functions, which increases the likelihood of conflicts.

**OCIs and Contract Integrity**

Organizational conflicts present one type of ethics risk to the government that must be identified and avoided through full disclosure by contractors and careful government oversight. OCIs are often grouped into three general categories based on the problems they create: unequal access to information, impaired objectivity, and biased ground rules. Contracting officials are to avoid, neutralize, or mitigate potentially significant conflicts of interest so as to prevent an unfair competitive advantage or the existence of conflicting roles that might impair a contractor’s objectivity. Organizational conflicts are more likely to occur in contracts involving certain services, such as management support services and consultant or other professional services. The rule will assist the government in creating competition by minimizing conflicts, and should reduce the amount of bid protests and legal challenges that now bog down the contracting system.

As the Acquisition Advisory Panel (the Panel) noted in its final report:

> Over the last two decades, a number of factors have led to an increasing probability of—and [an] increasing need to protect against—OCIs. Three industry trends appear to be responsible for the increase in OCIs. First, the government is buying more services that involve the exercise of judgment, such as evaluating technical platforms or assessing the goods or services provided by contractors. Second, industry consolidation has resulted in fewer and larger firms, which results in more opportunities for conflicts. Third, use of contract vehicles such as indefinite-delivery, indefinite-quantity (“IDIQ”) umbrella contracts result in awards of tasks to a limited pool of contractors.\(^3\)

In theory, the contracting agency is responsible for determining whether an actual or apparent OCI is present and to what extent it should impact the contract award. In practice, however, the government often relies on contractor employees to identify potential organizational conflicts of interest, which can create problems when they are assigned to a procurement on which their company or one of its employees, divisions, affiliates, subsidiaries, or subcontractors is bidding.

The government’s use of lead systems integrators (LSIs)\(^4\) also increases the risk for OCIs. For example, an LSI might favor its own or a subsidiary’s proposals over those of other contractors. Further, if the LSI stands to benefit from the continuation of a program into production, it has a financial stake in the outcome that could compromise its decisions. As demonstrated by the troubled Future Combat Systems program, the government’s ability to oversee and act independently from the LSIs has weakened as experienced government managers have retired and dependence on the LSIs has increased.

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\(^4\) A lead systems integrator is a contractor, or team of contractors, hired by the federal government to execute a large, complex, defense-related acquisition program, particularly a so-called system-of-systems (SOS) acquisition program.” Congressional Research Service, “Defense Acquisition: Use of Lead System Integrators (LSIs) — Background, Oversight Issues, and Options for Congress,” Updated June 6, 2008. http://www.fas.org/sgp/crs/natsec/RS22631.pdf
DoD’s Proposed Rule

Generally, POGO supports the intent of the proposed rule. After numerous cases in the Court of Appeals for the Federal Circuit, the Court of Federal Claims, and the Government Accountability Office, the subject deserved increased scrutiny and clarification.

Specifically, POGO approves of the rule’s application to all DoD acquisitions, including contracts and task or delivery orders, and not just those deemed to be major weapons systems. Sec. 203.1202.

POGO also supports the proposed rule’s definition of contractors to include “the total contractor organization, including not only the business unit or segment that signs the contract. It also includes all subsidiaries and affiliates.” Sec. 203.1201. POGO urges DoD to add subcontractors to that list to ensure that all OCIs are considered. To remain consistent, POGO urges DoD to define the term “organization” in Sec. 203.1201 so that all business units, segments, subsidiaries, affiliates, and subcontractors are governed by this proposed rule. Treating contractors as a single entity, including all subsidiaries and affiliates, and subcontractors, will help the government better identify and mitigate OCIs. The proposed rule will apply to both profit and non-profit organization, which is important especially given the award of many research contracts. Sec. 203.1202.

POGO does not oppose the proposal to place responsibility on contractors to identify OCIs (Sec. 203.1203(b), but that system needs government oversight, and to be integrated with certifications made when offers are submitted and a system requiring disclosure at anytime when an actual or apparent OCI is identified during the performance of a contract. The proposed rule guidance to examine financial interest to determine if there are conflicts is a great step in the right direction. POGO also supports the provision cautioning contracting officers again relying solely on information provided by the offeror in making the determination—other sources of information should also be sought by the contracting officer. Sec. 203.1205-2(c). We recommend that DoD make that a mandatory rather than discretionary action.

The proposed rule should also require the reporting of undisclosed OCIs as a mandatory disclosure under the rule that went into effect in 2008 which requires federal contractors to report to the government certain types of misconduct related to the award, performance, or closeout of a contract.

The proposed rule should also create clearly defined penalties for violating conflict of interest regulations, including termination of a contract, fines, withholding of payments, and suspension or debarment. A lack of a remedy clause will hamper DoD’s ability to hold contractors accountable for failing to disclose an actual or apparent OCI.

POGO also urges DoD to add transparency to the OCI process. Contractor disclosures as well as agency determinations and waivers should be made publicly available.

SETA Contracts

POGO supports the proposed rule’s prohibition on organizational conflicts of interest in systems engineering and technical assistance (SETA) contracts across the Department. As Dr. Ashton Carter, Under Secretary of Defense for Acquisition, Technology & Logistics, stated in an interview with the Council on Foreign Relations, “we have allowed the pendulum to swing too far in the direction of believing that we could outsource to industry much of the program management
functions, the systems engineering function."6 Preventing these conflicts of interest is the first essential management step to improving procurement outcomes.

In July 2008, the Defense Science Board Task Force on Defense Industrial Structure for Transformation reported that as many prime contractors acquire systems engineering firms, there are more opportunities for the same firm to serve in both service and production roles of the same program. Contractors have long insisted that they have sufficient firewalls in place to ensure independence, but the Task Force soundly refuted this. When this conflict occurs, they wrote, "the result creates more classic OCIs, based on bias, impaired objectivity, and informal anomalies...not inherently resolvable through firewalls or similar mitigations."7 Restoring the independence of this function, the Task Force wrote, would help the Pentagon "optimize" its capabilities.

POGO could not agree with you more when Dr. Carter stated that "we need to make sure the process by which we decide whether and what to buy is appropriately separated from the actual buy."8 Independent analysis is key to ensuring that DoD decision makers are given unbiased, accurate information upon which to base program decisions. We urge the Department to give taxpayers an optimized procurement system and include and enforce the OCI provision to preclude contractors from advising the DOD on weapons systems and then developing them.

**Conclusion**

To help restore public faith in government and ensure that contract awards are not based on biased advice, divided loyalties, insider dealings, or unfair competitive advantages, DoD must strengthen regulations and procedures for proactively detecting and avoiding OCIs. Thank you for your consideration of this comment. If you have any questions, you may contact me at (202) 347-1122.

Sincerely,

Scott H. Amey
General Counsel
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http://www.cfr.org/publication/20355/conversation_with_ashton_b_carter.html (Downloaded July 20, 2010)
