

Project On Government Oversight

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July 27, 2011

General Services Administration
Office of Governmentwide Acquisition Policy
Attn: Melissa Gary
1800 F Street NW Room 4032
Washington, DC 20405-0002

Subject: FAR Case 2011-001

Dear Ms. Gary:

The Project On Government Oversight (POGO) provides the following public comment to FAR Case 2011-001, Federal Acquisition Regulation; Organizational Conflicts of Interests (76 Fed. Reg. 23236, April 26, 2011). The proposed rule issued by the General Services Administration (GSA), the Department of Defense (DoD), and the National Aeronautics and Space Administration (NASA) seeks comments on its proposal to amend the Federal Acquisition Regulation (FAR). Those agencies believe the proposed rule will provide revised regulatory coverage on organizational conflicts of interest (OCIs), provide additional coverage regarding contractor access to nonpublic information, and add related provisions and clauses. As an independent nonprofit organization committed to achieving a more accountable federal government, POGO supports the implementation of various new standards and procedures to better detect and avoid actual or potential organizational conflicts of interest and to increase public confidence in government contracting.

OCIs and Contract Integrity

Organizational conflicts of interest present one type of ethics risk to the government that must be identified and avoided through full disclosure by contractors and careful oversight by the government. In the past, 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 contractors' objectivity. OCIs are more likely to occur in contracts involving certain services, such as management support services and consultant or other professional services. The proposed rule will assist the government in creating competition by minimizing OCIs, and should reduce the number of bid protests and legal challenges that currently bog down the contracting system.

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OCIs have increased in frequency because mergers and acquisitions have caused a sharp reduction in the number of defense contractors, and those contractors have expanded their capabilities to provide a wider range of goods and services. Additionally, the government's reliance on contractors has increased and, as a result, so have concerns with OCIs.

As the Acquisition Advisory Panel (the Panel) noted in its report on this issue:

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.¹

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 contractors to identify their own potential OCIs, 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)² 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.

Proposed Rule

We especially agree with how the proposed regulations move the location of OCI regulations from Part 9 of the FAR to Part 3 and Part 4. This shift would allow for OCI regulations to be considered matters to impede improper business practices as well as matters for records retentions. However, we did find some problems with the proposed regulations.

Under the new regulations, contracting officers would have to judge whether an OCI would be deemed "acceptable" when the potential harm to government interests are outweighed by

¹ Acquisition Advisory Panel, *Report of the Acquisition Advisory Panel to the Office of Federal Procurement Policy and the United States Congress*, January 2007, p. 405. https://www.acquisition.gov/comp/aap/24102_GSA.pdf (Downloaded July 27, 2011)

² 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* (RS22631), October 8, 2010. <http://www.fas.org/sgp/crs/natsec/RS22631.pdf> (Downloaded July 27, 2011)

having a conflicted contractor perform the contract. Furthermore, contract officers would be able to propose acceptance only when the potential danger is to government business interests as opposed to the integrity of the acquisition process. To mitigate this problem, we suggest that the regulation require contracting officers to report to the public and to competing contractors what OCIs they have deemed acceptable.

Furthermore, we found that parts of the proposed rule contain vague terminology. Our recommendations contain proposals to alleviate this problem.

POGO's Recommendations

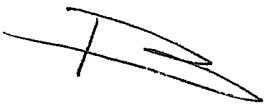
To help restore public faith in government and ensure that contract awards are not based on biased advice, divided loyalties, insider dealings, or unfair competitive advantages, the GSA, DoD, and NASA should:

1. Insert a set of standard OCI clauses into all contracts and subcontracts. These clauses should clearly define restrictions on the contractor, including a restriction on use and disclosure of proprietary information from the government or other contractors for as long as that information remains proprietary.
2. Require all contractor employees to sign, under penalty of civil or criminal punishment, agreements not to disclose nonpublic proprietary information, including but not limited to proprietary data, cost or pricing data, and bid or proposal data, to other contractors for as long as that information remains proprietary.
3. Require contracting officers to provide written reports explaining adherence to OCI regulations throughout all stages of contract award and performance. Contracting officers should be required to provide reports upon award of the contract, annually during the duration of the contract, and upon conclusion of the contract.
4. Require government agencies to review all lead systems integrator contract and subcontract awards to identify and eliminate OCIs.
5. Make any OCI waivers and supporting documentation freely available to the public and to competitors for integrity purposes.
6. Publicly disclose any participation by a contractor or contractors in the acquisition or procurement process.
7. Require contractors to include in bids, offers, or proposals written OCI identification, including a list of any conflicting companies, employees, divisions, affiliates, subsidiaries, partners, mentors, protégés, subcontractors, suppliers, or joint ventures, and mitigation plans which should be disclosed to other providers and the public.

8. Require contractors that have been awarded contracts to seek written approval from government officials for any subsequent change in business operation or relations that might create an actual or apparent OCI.
9. Prescribe remedies, including fines, withholding of payments, and suspension or debarment for failure to disclose an OCI, in FAR Subpart 3.1203 and the subsequent proposed FAR clauses.
10. Expand bid protest authority for all task or delivery orders in excess of \$100,000.
11. Define contractors in FAR Subpart 2.101, and that definition should include the contractor's parent companies, employees, divisions, affiliates, subsidiaries, partners, mentors, protégés, subcontractors, suppliers, and joint ventures.
12. Clarify the definition of OCIs in FAR Subpart 2.101 to state that "own interests" includes the interest of a contractor, as well as its parent companies, employees, divisions, affiliates, subsidiaries, partners, mentors, protégés, subcontractors, suppliers, and joint ventures.
13. In the definition of organizational conflict of interests in FAR Subpart 2.101, mention that the contractor or its affiliates have financial or other interests at stake in the matter *at the time of offer, contract award, and entire term of the contract*.
14. In FAR Subpart 3.12, prescribe policies and procedures for contractors *reporting* OCIs, in addition to contract officers identifying, analyzing, and addressing them.
15. Formulate a FAR Subpart 3.1208 that requires contractors to publicly report all initial and subsequent OCIs for all contracts.
16. Include language in FAR Subparts 2.101 and 3.1203 requiring that OCIs be reevaluated throughout the term of the contract as well as when offers are submitted.

Thank you for your consideration of this comment. If you have any questions, you may contact me at (202) 347-1122.

Sincerely,



Rohail Premjee
Researcher