

Attendee List  
December 8, 2009

| Name       |             | Company                                      |
|------------|-------------|--|
| Michael    | Alvarez     | Venturi, Inc.                                |
| Vincent    | Antonacci   | General Dynamics Information Technology      |
| Vic        | Avetissian  | Avetissian & Associates, LLC                 |
| Marcia     | Bachman     | Air Force                                    |
| Glenn      | Baer        | ARINC  |
| Thomas     | Baldwin     | General Dynamics C4 Systems                  |
| Alexis     | Bernstein   | Air Force                                    |
| David      | Berteau     | Center for Strategic & International Studies |
| Jeffrey    | Bialos      | Sutherland, Asbill & Brennan                 |
| Antonie    | Boessenkool | Defense News                                 |
| Michael    | Botan       | Engility Corp                                |
| Chris      | Braddock    | US Chamber                                   |
| Michele    | Brown       | SAIC   |
| Howard     | Byrd        | NRO  |
| Carrie     | Campbell    | DPAP/CPIC                                    |
| Katharine  | Carney      | OASN (RD&A)                                  |
| Michael    | Carney      | Engility Corp                                |
| William    | Carroll     | American University College of Law           |
| Charles D. | Chadwick    | BAE Systems                                  |
| Amy        | Childers    | SAIC   |
| Alan       | Chvotkin    | Professional Services Council                |
| Mary       | Clarke      | HQ-GC  |
| Frank D.   | Colaw       | Boeing                                       |
| Bill       | Colwell     | Boeing                                       |
| Mark       | Davis       | General Dynamics Information Technology      |
| Michael    | Del-Colle   | Accenture                                    |
| Anne       | Donohue     | SRA International, Inc.                      |
| Dave       | Drabkin     | GSA  |
| Tom        | Elridge     | SAIC   |
| Geoff      | Emery       | BNA  |
| Jonathan   | Etherton    | Etherton and Associates, Inc.                |
| Peter      | Eyre        | Crowell & Morning                            |
| Uldric     | Fiore, Jr.  | Army   |
| Christine  | Fisher      | Public                                       |
| David      | Franke      | Army Test and Evaluation Command             |
| G. Drew    | Fuller      | Battelle Memorial Institute                  |
| Russell    | Geoffrey    | DCMA   |
| Stephanie  | Giese       | Reed Smith, LLP                              |
| William    | Graham      | Lockheed Martin                              |
| Dean       | Grayson     | ATK Space Systems, Inc.                      |
| Kathryn    | Green       | Davidson Technologies, Inc.                  |
| Lawrence   | Greenwood   | Teledyne Solutions, Inc.                     |
| Mary Pat   | Gregory     | Smith Pachter McWhorter PLC                  |

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|-------------|-------------|--|--|
| Karin       | Harper      | NRO  |  |
| Matthew     | Haws        | Smith Pachter McWhorter PLC                  |  |
| David       | Hersh       | Boeing                                       |  |
| Kathleen    | Hines       | BAE Systems                                  |  |
| Wayne       | Hodges      | Thales USA Defense & Security, Inc.          |  |
| Joachim     | Hofbauer    | Center for Strategic & International Studies |  |
| Mike        | Hokenson    | Army Test and Evaluation Command             |  |
| Ty          | Hughes      | Air Force                                    |  |
| Steven      | Hull        | Industrial Policy                            |  |
| Barry       | Hurewitz    | WilmerHale                                   |  |
| Lester      | Journet     | ACCESS Systems, Inc.                         |  |
| James       | Kennell     | SAIC   |  |
| Greg        | Kiley       | Center for Strategic & International Studies |  |
| Carolyn     | Kirby       | GAO  |  |
| Marina      | Kozmycz     | Air Force                                    |  |
| Stephen     | Kuffner     | Teledyne Solutions, Inc.                     |  |
| Brett       | Lambert     | Industrial Policy                            |  |
| Douglas     | Larsen      | WilmerHale                                   |  |
| Deidre      | Lee         | Professional Services Council                |  |
| Roy         | Levi        | Center for Strategic & International Studies |  |
| Michael K.  | Love        | CSC  |  |
| Marcia      | Madsen      | Mayer Brown                                  |  |
| Jeremy      | Madson      | Professional Services Council                |  |
| Charles     | Maggio      | L-3 Communications                           |  |
| Edward      | Maguire     | NGI  |  |
| Thomas      | Miller      | L-3 Communications                           |  |
| Karlos      | Morgan      | GSA  |  |
| James       | Morgan      | TEAM Integrated Engineering                  |  |
| Stephen     | Moss        | IBM  |  |
| Lt Col Luis | Munoz       | Spanish Embassy                              |  |
| Meredith    | Murphy      | DPAP/DARS                                    |  |
| Jon         | Neasham     | Cubic Applications Inc.                      |  |
| Joanne      | Newman      | L-3 Communications                           |  |
| Linda       | Neilson     | DPAP/DARS                                    |  |
| Dan         | Nielsen     | ODNI   |  |
| Paul        | Normand     | General Dynamics                             |  |
| Marc        | Numedahl    | Industrial Policy                            |  |
| Jeffrey     | O'Connell   | Battelle Memorial Institute                  |  |
| Whitdurst   | Owen        | Gibson, Dunn & Crutcher                      |  |
| Oliver      | Ozment      | Dynetics, Inc.                               |  |
| Katrina     | Perzchowski | DPAP/CPIC                                    |  |
| Florence    | Phillips    | Babcock & Wilcox Nuclear Operations Group    |  |
| Lee         | Phillips    | CSC  |  |
| Leigh       | Pompunio    | NASA   |  |

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| Om          | Prakash    | Industrial Policy                       |  |
| Terry       | Raney      | CACI International                      |  |
| Nicholas    | Retson     | HQ-GC                                   |  |
| Ron         | Reusch     | System Studies and Simulation, Inc.     |  |
| William     | Roark      | Torch Technologies                      |  |
| Sandra      | Ross       | DPAP/CPIC                               |  |
| Kim         | Rupert     | SAIC                                    |  |
| Terry       | Ryan       | ManTech                                 |  |
| Anne        | Sauer      | Lockheed Martin                         |  |
| Robert      | Schaefer   | Teledyne Solutions, Inc.                |  |
| Joseph      | Schlueter  | SRI International                       |  |
| Elizabeth   | Scott      | L-3 Communications                      |  |
| James       | Sheaffer   | CSC                                     |  |
| Michael     | Sipple     | Lockheed Martin                         |  |
| John        | Sleight    | Engility Corp                           |  |
| Eleanor     | Spector    | Lockheed Martin                         |  |
| Don         | Steele     | CAS, Inc.                               |  |
| Todd        | Steggerda  | WilmerHale                              |  |
| Cord        | Sterling   | Aerospace Industries Association        |  |
| Storme      | Street     | BAE Systems                             |  |
| Judith      | Sung       | SAIC                                    |  |
| Donald      | Taylor     | TEAM Integrated Engineering             |  |
| Grant       | Thorpe     | SAIC                                    |  |
| Robert      | Toth       | General Dynamics Information Technology |  |
| Christopher | Veith      | Boeing                                  |  |
| Paul        | Warring    | Air Force                               |  |
| Daniel      | Watson     | Air Force                               |  |
| Owen        | Whitehurst | Gibson, Dunn & Crutcher                 |  |
| Amy         | Williams   | DPAP/DARS                               |  |
| Debbie      | Williams   | SRI International                       |  |
| Peggy       | Wiser      | CACI International                      |  |
| Joan L.     | Wolfle     | Booz Allen Hamilton, Inc.               |  |
| Mark        | Wriggle    | Assurance Technology Group              |  |
| Matrice     | Wright     | Public                                  |  |

STATEMENT REGARDING SECTION 207 OF THE WEAPON SYSTEMS ACQUISITION  
REFORM ACT WITH RESPECT TO ORGANIZATIONAL CONFLICTS OF INTEREST

SUBMITTED BY

MARCIA G. MADSEN

JAMES A. ("TY") HUGHES

December 8, 2009

**STATEMENT REGARDING SECTION 207 OF THE WEAPON SYSTEMS  
ACQUISITION REFORM ACT**

**Submitted on behalf of Marcia G. Madsen and James A. ("Ty") Hughes**

The current Federal Acquisition Regulations ("FAR") require an agency to engage in an analytical process to determine whether a potential or actual Organizational Conflict of Interest ("OCI") exists and to determine whether it is in the agency's interest to avoid, neutralize, mitigate, or waive an OCI. The longstanding regulatory provisions do not dictate a particular outcome when an agency is confronted with an OCI. Instead, the regulations provide a framework for the agency to exercise its discretion. The FAR defines an OCI as "a person [that] is unable or potentially unable to render impartial assistance or advice to the Government, or the person's objectivity in performing the contract work is or might be otherwise impaired, or a person has an unfair competitive advantage" because of that person's other activities or relationships. FAR 2.101. FAR Part 9.5 requires contracting officers to "[i]dentify and evaluate potential organizational conflicts of interest as early in the acquisition process as possible," and to "avoid, neutralize, or mitigate significant potential conflicts of interest." FAR 9.504(a)(1)-(2). FAR 9.503 also allows an agency head or his or her designee to waive an OCI if otherwise avoiding, neutralizing, or mitigating it would not be in the interest of the agency.

The current regulations recognize that an absolute proscription against conflicts of interest is not in the best interest of the Government as the purchaser of services. An analysis of an actual or potential OCI, the possible means of avoidance, neutralization,

or mitigation of the OCI, or a waiver are necessarily fact-based. Thus, the agency and acquisition personnel are best situated, with the greatest knowledge of the Government's requirements, to analyze the risks posed by an OCI and should have the discretion to consider the facts before them and address an OCI in the manner best suited to the agency's interests.

However, as recognized by the Acquisition Advisory Panel ("Panel") in its 2007 Report, the existing regulations have not kept up with the dramatic expansion of services contracting, the consolidation in the defense industry, and the development of case law in the bid protest area. As demonstrated by the Government Accountability Office ("GAO") and judicial decisions sustaining protests challenging an agency's evaluation, or lack thereof, of OCIs and recently enacted legislation that mandates a review of Department of Defense ("DoD") acquisition regulations, the acquisition community needs more guidance in the analysis and resolution of OCIs. Consequently, the Panel recommended additional guidance for the acquisition community, including understanding and identifying OCIs, assessing appropriate responses for addressing OCIs, determining mitigation measures, balancing the relative risks and benefits to the Government, and providing clarity to industry.

In many situations, it is in the Government's best interest to mitigate or waive an OCI rather than eliminate the contractor and decrease competition. Recent legislation, however, would limit the Government's discretion to address OCIs on a case-by-case basis and apply tailored approaches to deal with them. The Weapon Systems

Acquisition Reform Act of 2009 (“WSARA”) requires DoD to develop new regulations to “tighten” OCI rules in certain areas.<sup>1</sup> WSARA requires DoD to revise and “tighten” its acquisition regulations to address potential OCIs stemming from the interplay of contracts for a Lead System Integrator (“LSI”) and any follow-on contracts, especially production contracts.<sup>2</sup> DoD also must address potential OCIs created by an entity pursuing a prime contract or supplier contract when its affiliate or related business has provided Systems Engineering and Technical Assistance (“SETA”) work on the program and OCIs resulting from the award of a subcontract to a prime contractor’s affiliate or related business, particularly in the context of software integration or development.<sup>3</sup> These provisions reflect the need for further guidance in the OCI regulations to provide a framework so that acquisition personnel have tools, and know how, to analyze an OCI and the possible mitigation or waiver of an OCI. While these provisions address some areas of interest to DoD, they are not the only areas where guidance is necessary; other areas involve decided cases, which are addressed further below.

In addition to requiring further attention to the regulations, Section 207(b)(3) of WSARA also imposes a prohibition on OCIs involving SETA work that would restrict a contractor or its affiliate from performing as a prime contractor or major subcontractor on a weapon system if the contractor provides SETA effort on the same program. This

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<sup>1</sup> Pub. L. 111-23, § 207, 123 Stat. 1704, 1728-30.

<sup>2</sup> *Id.* § 207(a) & (b).

<sup>3</sup> *Id.*

provision removes discretion from DoD's acquisition personnel to examine the facts regarding a perceived OCI and to determine and balance the risks with potential mitigation options that may be available to best meet the Government's needs.

WSARA provides for exceptions, however, that should permit DoD to meet the WSARA's objectives and provide improved, and much needed, guidance to assist agencies in determining whether an OCI exists, whether it is material, and how it should be addressed given each agency's needs. Section 207(b)(4) of WSARA allows for exceptions "as may be necessary to ensure that the Department of Defense has continued access to advice on systems architecture and systems engineering matters from highly-qualified contractors." With the delay in responding to the Panel's recommendations and the enactment of WSARA, we strongly encourage the creation of additional guidance and analysis tools to assist agencies and their contracting personnel in appropriately identifying and evaluating potential and actual OCIs. Such guidance also will be of benefit to industry in clarifying the Government's expectations and approach and to provide some degree of consistency in the Government's approach to these complex issues.

### **History of OCI Regulations and Recent Developments**

Regulatory provisions addressing OCIs did not exist until the 1960s, when OCI regulations were incorporated into agency-specific regulations.<sup>4</sup> For example, in 1963 the Department of Defense published Appendix G of the Armed Services Procurement

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<sup>4</sup> James Taylor and B. Alan Dickson, *Organizational Conflicts of Interest Under the Federal Acquisition Regulation*, 15 Pub. Con. L. J. 107 (1984).

Regulations (“ASPR”) to address OCIs and to establish certain rules in the attempt to avoid creating OCIs when awarding contracts. FAR Part 9.5, as originally promulgated, was similar to ASPR Appendix G, although the FAR provisions were more broadly applicable to civilian agencies as well as to DoD and provided more guidance to the contracting officer.

The original FAR provisions also were very similar to the current version of the FAR – Part 9.5 has not changed significantly since 1984. From the beginning, as it does now, FAR 9.5 has focused on protecting the competitive process. It sought, and still seeks, to prevent unfair competitive advantage and impaired objectivity post-award.<sup>5</sup> The FAR also has directed contracting officers to evaluate possible OCIs as early in the procurement process as possible, and it strongly recommended that contracting officers obtain the advice of legal counsel and technical specialists (as necessary), and submit any mitigation plans addressing a “significant potential OCI” to the head of the contracting authority for approval.<sup>6</sup> The FAR also has permitted agencies to waive OCIs if doing so would best serve the needs of the Government.<sup>7</sup> Over the years, the FAR has been amended, however, to, among other things: address the possibility of future OCIs based on the nature of the work to be performed under the contract at issue;<sup>8</sup> to instruct the contracting officer to award a contract to the successful offeror

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<sup>5</sup> FAR 9.501 (1984); FAR 9.505 (2009).

<sup>6</sup> FAR 9.504 (1984); FAR 9.507 (1984).

<sup>7</sup> FAR 9.503 (1984).

<sup>8</sup> FAR 9.502(c).

unless the agency determines an award to that contractor would result in an OCI that cannot be mitigated;<sup>9</sup> and to more fully explain the circumstances under which a contractor may possess an unfair competitive advantage.<sup>10</sup>

Like the original FAR provision, the current FAR 9.5 does not provide specific guidance regarding what analysis satisfies the agency's obligation to consider actual or potential OCIs during a procurement. Nor does it state what mitigating measures would be appropriate. The acquisition community has relied upon procedures it has developed over the years, as well as precedent provided by the Government Accountability Office and courts for guidance on what constitutes an OCI. This precedent categorized OCIs as one of three types:

- "Biased ground rules," in which a company advising the government under a contract helps set the ground rules for another government procurement in which it (or companies with which it is associated) will compete;
- "Unequal access to information," in which a company has access to nonpublic information that provides it an unfair advantage in the competition for a later contract; or
- "Impaired objectivity," where a company's performance of one Government contract could require it to evaluate its own performance or that of a competitor under a Government contract or through evaluations of proposals.<sup>11</sup>

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<sup>9</sup> FAR 9.504(e).

<sup>10</sup> FAR 9.505(b).

<sup>11</sup> Acquisition Advisory Panel, *Report of the Acquisition Advisory Panel to the Office of Federal Procurement Policy and the United States Congress* 406 (2007) (citing *Aetna Gov't Health Plans, Inc.*, B-254397, July 27, 1995, 95-2 CPD ¶ 129, at 12-13; *Vantage Associates, Inc. v. United States*, 59 Fed. Cl. 1, 10 (2003)).

Agencies and acquisition personnel often are unsure about what type of analysis is sufficiently robust to satisfy the requirements of FAR Part 9.5. GAO's recent decision in *L-3 Services, Inc.* demonstrates how an agency's analysis of actual or potential OCIs and any mitigation plans can be inadequate. GAO found that the agency's evaluation of potential "biased ground rules" OCI was based on an "illusory" characterization of the ability of a contractor to exert influence on different phases of the contract and that "the record lack[ed] a thorough agency inquiry" into a potential "unequal access to information" OCI.<sup>12</sup>

Within the past two years the regulatory community, including the Panel, has recognized the need for greater guidance regarding OCIs. In its 2007 report, the Panel called for an examination of the guidance on OCIs provided by the FAR.<sup>13</sup> Subsequently, there have been several FAR and DFAR Cases opened to address perceived problems with FAR Part 9.5. These include FAR Case 2007-018, which considered whether the FAR's current guidance on OCIs serves the need of the Federal Government and acquisition community as raised by the Panel. The notice of proposed rulemaking seeking comments related to this FAR case was published on March 26, 2008, and is just now wending its way to issuance - presumably as a proposed revision to the rule. However, prior to the completion of this FAR case, Congress passed WSARA, necessitating DFAR Case 2009-D015, which would implement the

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<sup>12</sup> *L-3 Servs., Inc.*, B-400134.11, 2009 CPD ¶ 171 (Sept. 3, 2009).

<sup>13</sup> Acquisition Advisory Panel, *Report of the Acquisition Advisory Panel to the Office of Federal Procurement Policy and the United States Congress* 407.

requirements of WSARA Section 207. It is important that the proposed FAR amendment and the WSARA rule (which only applies to DoD) are consistent in their approach to the greatest degree possible so that both agencies and contractors understand how the Government is analyzing and addressing OCIs.

### **Process, Not Outcome**

As previously noted, the current version of the FAR recognizes that agencies must be able to exercise “common sense, good judgment, and sound discretion” when determining whether an OCI exists and whether the OCI may be mitigated.<sup>14</sup> Accordingly, the FAR requires that agencies and contracting personnel engage in an analytical process, rather than dictating a particular outcome. Such flexibility allows the procuring agency to determine whether the contractor’s prior obligations or relationships creates a risk to the Government, and whether this risk can and should be mitigated.

The current regulatory structure allows the agency and the contracting personnel with the greatest knowledge and understanding of the Government’s particular needs the discretion to fulfill these needs in the most appropriate manner. As the Federal Circuit Court recently has recognized, “identification of OCIs and the evaluation of mitigation proposals are fact-specific inquiries that require the exercise of considerable discretion.”<sup>15</sup> Whether an OCI may be mitigated depends on the breadth and severity

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<sup>14</sup> FAR 9.505.

<sup>15</sup> *Axiom Res. Mgmt., Inc. v. United States*, 564 F.3d 1374, 1382 (2009).

of the conflict.<sup>16</sup> Agencies and their contracting personnel may determine what expertise and services the agency requires, the acceptable level of risk posed by an OCI and, if necessary, whether this risk can be mitigated properly. The current rule allows agencies analyzing OCIs to consider actual facts and circumstances, rather than requiring contracting personnel to speculate about OCIs that might arise from subsequent awards.

However, GAO has determined that there are certain instances when a contractor cannot mitigate an OCI. For example, in *Aetna Government Health Plan, Inc.*, GAO found, after a consideration of the facts before the agency, that the OCI could not be mitigated due to the “very substantial dollar value” of the potential sub-contract to an affiliate of the consultant assisting the agency evaluate proposals, the consultant’s role in the procurement process, and “the largely subjective nature of the evaluation of probable health care costs in this procurement, where probable cost calculations turn on whether the [consultant] evaluators have been persuaded that an offeror will succeed in managing health care as proposed.”<sup>17</sup> GAO appears to have stepped back from this rather harsh result, however. In *Overlook Systems Technology, Inc.*, GAO denied a protest challenging the sufficiency of the agency’s analysis of a potential OCI and its possible mitigation after the agency took corrective action.<sup>18</sup> GAO noted that, in its re-evaluation, the agency considered substantial amounts of additional information and

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<sup>16</sup> *DZS/Baker LLC*, B-281224, 99-1 CPD ¶ 19 (Jan. 12, 1999).

<sup>17</sup> *Aetna Gov’t Health Plan, Inc.*, B-254397, 95-2 CPD ¶ 129 (July 27, 1995).

<sup>18</sup> *Overlook Sys. Tech., Inc.*, B-298099.4, 2006 CPD ¶ 185 (Nov. 28, 2006).

that the re-evaluation was reasonable. GAO also denied a protest challenging the agency's re-evaluation of an OCI in *Alion Science and Technology Corp.*<sup>19</sup> after sustaining a previous protest raising the same allegations vis-à-vis the agency's initial OCI analysis. In the first protest, GAO found that the agency's OCI evaluation was "devoid of any meaningful analysis."<sup>20</sup> After the agency's re-evaluation, GAO determined that "[o]nce an agency has given meaningful consideration to potential conflicts of interest, our Office will not sustain a protest challenging a determination in this area unless the determination is unreasonable or unsupported by the record."<sup>21</sup>

There also are many instances when an agency appropriately and effectively can mitigate actual or potential OCIs, or instances in which the policy supporting restrictions on OCIs does not apply. One such exception is for a contractor that performs development and design work. As the FAR recognizes, often a contractor performing this work is one of the, if not the, most advanced in the field. Because of its work on a system design and development, this contractor is able to begin production earlier and more knowledgably than contractors that have not participated in the development phase. These advantages are unavoidable but not unfair and rightly are not prohibited.<sup>22</sup> In addition, agencies may, after an analysis of actual or potential OCIs, determine that a waiver is in the best interest of the Government.

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<sup>19</sup> *Alion Science & Tech. Corp.*, B-297022.4, 2006 CPD ¶ 146 (Sept. 26, 2006).

<sup>20</sup> *Alion Science & Tech. Corp.*, B-297022.3, 2006 CPD ¶ 2, (Jan. 9, 2006).

<sup>21</sup> *Alion Science & Tech. Corp.*, *supra* note 18.

<sup>22</sup> FAR 9.505-2(a)(3).

## Lack of Guidance

While FAR Part 9.5 confers upon the agency the necessary discretion to analyze OCIs, it fails to provide much of the detail the contracting community requires to help it identify OCIs, to properly analyze actual and potential OCIs, and to how to adequately avoid, neutralize, or mitigate OCIs, if necessary. Similarly, it provides no guidance on where an OCI waiver would be appropriate. It would be impossible for the FAR to provide an exhaustive list of circumstances giving rise to actual or potential OCIs, as well as impossible to provide an exhaustive list of possible remedies. As the Panel recommended in its report, however, regulations should be updated to reflect the explosive growth in the blended workforce and to provide guidance to contracting officers and acquisition personnel about how to identify, analyze, and properly mitigate OCIs.

Acquisition personnel have particular difficulty addressing OCIs in the context of "impaired objectivity." The FAR defines "impaired objectivity" as being "unable or potentially unable to render impartial assistance or advice to the Government, or the person's objectivity in performing the contract work is or might be otherwise impaired."<sup>23</sup> Nevertheless, agencies must rely on GAO and judicial precedent for instruction in the absence of detailed guidance from the applicable regulations. As a result, agencies sometimes receive conflicting guidance. A prime example of such conflicting advice are two cases decided by GAO. In *Overlook Systems Technology, Inc.*,

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<sup>23</sup> FAR 2.101.

GAO stated that “while walling off employees using a firewall arrangement may resolve other types of conflicts of interest (such as those involving unfair access to information), it does not resolve an OCI involving potentially impaired objectivity.”<sup>24</sup> Less than one year later, however, GAO took the opposite position, finding that in “impaired objectivity” OCI situations, that subcontracting or transferring work to a separate entity, and establishing a firewall around the impaired entity, can reasonably mitigate these types of OCIs.”<sup>25</sup>

Furthermore, agencies must remember that “potential impaired-objectivity OCIs are not limited to acquisition-related activities; rather, impaired-objectivity OCIs are created any time the performance of a contract requirement involves the contractor's exercise of judgment that could affect other contractor-related interests.”<sup>26</sup> One focus of the agency's inquiry should be whether there is “some indication that there is a direct financial benefit to the firm alleged to have the organizational conflict of interest.”<sup>27</sup> In addition, impaired objectivity OCIs are not limited to contractor employees or representatives. Agency personnel can be the subject of impaired objectivity, such as when agency evaluators are tasked with evaluating technical proposals as part of an A-76 cost comparison that the agency evaluators currently perform.<sup>28</sup>

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<sup>24</sup> *Overlook Sys. Tech., Inc.*, B- 298099.4 fn. 9.

<sup>25</sup> *Cf. Bus. Consulting Assocs., LLC*, B- 299758.2, 2007 CPD ¶ 134 (Aug. 1, 2007).

<sup>26</sup> *Alion Science & Tech. Corp.*, B-297022.3, 2006 CPD ¶ 2 (Jan. 9, 2006).

<sup>27</sup> *L-3 Servs., Inc.*, B- 400134.11, 2009 CPD ¶ P 171 (Sept. 3, 2009).

<sup>28</sup> *DZS/Baker LLC.*, B-281224, 99-1 CPD ¶ 19 (Jan. 12, 1999).

In rulings applicable to all three types of OCIs described in *Aetna Government Health Plans*, GAO has instructed agencies that they must conduct themselves according to certain standards when analyzing OCIs. Understandably, any analysis must be reasonable and meaningful.<sup>29</sup> An agency cannot rely solely on the contractor's determination of the existence of an OCI, or lack thereof, and the reasonableness of the mitigation plan, nor can the agency replace a pre-award analysis with an ad hoc mitigation plan to be considered on a piecemeal basis after award.<sup>30</sup> Agencies also cannot rely on unsupported conclusions.<sup>31</sup>

### Conclusion

That GAO has had to provide so much instruction to agencies regarding proper, or improper, analysis of an actual or potential OCI demonstrates the need for additional guidance in regulations, in accordance with the Panel's original recommendation. WSARA reflects this need, directing DoD to include, at a minimum, certain additional information in its acquisition regulations. WSARA's prohibition against any "impaired objectivity" SETA OCIs, however, is unnecessary. It purports to remove DoD's ability to judge what risks, and mitigation plans or potential waivers, DoD can accept to meet its needs. The Government, and DoD specifically, can benefit from a contractor's technical and management expertise, skills and knowledge, especially in the context of

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<sup>29</sup> *Alion Science & Tech. Corp.*, B-297022.3, 2006 CPD ¶ 2 (Jan. 9, 2006); *Ktech Corp.* B-285330, 2002 CPD ¶ 77 (Aug. 17, 2000). See also, *Overlook Sys. Tech.*, B-298099.4, 2006 CPD ¶ 185.

<sup>30</sup> *Johnson World Servs., Inc.*, B-286714.2, 2001 CPD ¶ 20 (Feb. 13, 2001).

<sup>31</sup> *Alion Science & Tech. Corp.*, B-297022.3.

major weapons systems. This benefit increases when the agency lacks the personnel resources to manage these complex programs on its own. If contractors are forced to choose between providing technical assistance to an agency and participating in the development of a weapons system, the agency may unnecessarily lose access to valuable (and essential) support.

The regulatory structure, either government-wide or agency-specific, should not prohibit actual or apparent OCIs without *considering the facts at hand* or the possibility of effective mitigation plans. An OCI determination is by its nature fact-specific. As demonstrated by the cases, agencies have difficulty conducting an adequate factual analysis and applying the appropriate legal standards. The simple fact is that neither a conclusory assertion that an OCI does not exist nor a failure to address a meaningful response will withstand review – whether the outcome is to permit mitigation or not permit mitigation.

The WSARA prohibition regarding SETA work removes this factual analysis from the Contracting Officer. Instead, a considered analysis of actual or potential OCIs involving SETA work and their possible mitigation will be the exception rather than the rule. Such a change will limit DoD's ability to obtain the expertise that it needs.

This provision aside, however, the acquisition community still requires greater guidance than it currently receives from the FAR and agency-specific regulations about how to appropriately analyze OCIs. Therefore, the regulatory community should

carefully consider the guidance agency and contracting personnel need in order to engage appropriately in the analytical process for which the regulations currently call.

Testimony to the Department of Defense  
Public Hearing on Implementation of Section 207, Weapon Systems  
Acquisition Reform Act of 2009 – Organizational Conflict of Interest

My name is Cord Sterling and I am the Vice President at the Aerospace Industries Association. Our Association has more than 275 member companies across the aerospace and defense sector, employing more than 630,000 high skilled personnel.

I appreciate the opportunity to speak today and provide input regarding the implementation of section 207 of the Weapon Systems Acquisition Reform Act of 2009 which requires the Secretary of Defense to revise the Defense Federal Acquisition Regulation Supplement to provide uniform guidance and tighten existing requirements for organizational conflict of interest in major defense acquisition programs. While Section 207 as written is limited to these major programs, it is easy to envision that any new guidance on OCI established by the Department of Defense will eventually be considered across the Federal government and for all types of contracts. Therefore, we believe that establishing a set of principles in the

DFARS will have wide-ranging implications for the future and the greatest care should be taken in establishing those principles.

Understanding the reasons for any increase in OCI's is an important first step. We believe it started with the reduction in defense programs in the 90s, and the resulting consolidation of companies within the defense industry so that there are now fewer companies with the technical expertise needed by Government. A second factor is the actions that were taken by the government to downsize its acquisition workforce, which in turn led to a loss of its "in-house" technical expertise and experience. This required the supplementation of the Government workforce through contracting for needed skills and knowledge. The third factor is the increasing complexity of modern systems that combine weapons, information technology, and command and control in a "system of systems" requires equally complex integration capability.

The private sector defense industry possess' significant technical expertise and technological advantages that the Government needs and to which the Government should have access, if such access can be accomplished in a manner that does not provide these contractors with an

unfair future competitive advantage and that results in unbiased and impartial technical support of the Government.

Current DFARS rules essentially delegate the determinations of OCI issues, OCI mitigation, and contractor's eligibility to compete for potentially OCI-sensitive work to the individual contacting officer. In the absence of clear policy direction, several agencies and departments within DoD and other Government agencies have developed organization-wide policies that restrict competition and require disqualification of a contractor from competing for work that in the past could be mitigated. Other organizations have continued to allow for OCI mitigation while awaiting the outcome of a final rule from DoD. These widely differing policies are creating significant uncertainty in the private sector and leading to business decisions that could negatively impact DoD's ability to obtain needed support in the future.

To provide clarity and consistency to the rules that govern the system, AIA welcomes this hearing and urges swift adoption of a final rule.

In order to strengthen OCI requirements while still allowing DoD access to needed skills, any final OCI rule must be flexible, must be

narrowly construed to address the problem, and must be consistently applied across Government.

The first principle that we believe should be incorporated in the final rule is flexibility. The problem of mitigating OCI is comparable to controlling the flow of classified and other controlled information – information must be managed so that it is only available to those with the right level of clearance and a need to know. Just as Defense contractors have many decades of experience complying with security laws—restricting information to only those with a need and excluding those who do not, we have the same ability to restrict program information to mitigate OCI. We also have the demonstrated ability to isolate elements of a company to enhance mitigation. Therefore, the Government should consider a range of policies for OCI that can be used to mitigate any perceived bias. This approach would give the contracting officer flexibility in matching the right mitigation strategy to the risk.

Divestiture is, of course, one possible approach to resolving an OCI. However, Government direction to create new organizational structures to isolate a portion of a business for OCI purposes or to divest a portion of a

business should be a last resort and, because of the industrial base implications of such a decision, should be approved by the Senior Procurement Executive based on a business case which demonstrates why mitigation is not possible and how the forces that are causing increased OCIs (workforce skills and complexity) will be addressed.

The second principle is that the rule should be narrowly construed so that it concentrates on the problem – contractors doing inherently governmental functions. It must also allow for some exemptions. Section 207 specifies that a systems engineering and technical assistance (SETA) contractor for an MDAP is prohibited from participating as a contractor or major subcontractor in the development or construction of a weapon system. However, recognizing that there is a limited pool of the highly qualified personnel, with the appropriate levels of clearance, necessary to make a program successful the Congress made an allowance *“to ensure that the Department of Defense has continued access to advice on systems architecture and systems engineering matters from highly-qualified contractors with domain experience and expertise, while ensuring that such advice comes from sources that are objective and unbiased.”*

The final OCI rule needs to recognize three exemptions for SETA contractors that may apply in a limited set of circumstances. First, a development contractor may possess a competitive advantage. However, if the competitive advantage is an unavoidable one, it is not necessarily unfair. Part 9.505-2 of the Federal Acquisition Regulations states *“In development work, it is normal to select firms that have done the most advanced work in the field. These firms can be expected to design and develop around their own prior knowledge. Development contractors can frequently start production earlier and more knowledgeably than firms that did not participate in the development, and this can affect the time and quality of production, both of which are important to the Government. In many instances the Government may have financed the development. Thus, while the development contractor has a competitive advantage, it is an unavoidable one that is not considered unfair; hence no prohibition should be imposed.”* Second, if the contractor’s OCI can be mitigated adequately, there is no need to disqualify a highly-qualified SETA contractor with domain experience and expertise. Finally, the rule should make clear that mere minority ownership interest in a company should not invoke OCI concerns.

The third and final principle is that once a strategy is adopted, it should be consistent across all Government agencies. For example, if there is a program where more than one military service, or even more than one federal agency, may one day purchase a system once it is developed, the mitigation strategy that was approved by the contracting officer responsible for the development contract, should be accepted by all agencies who subsequently participate in the procurement of the system. Furthermore, once that contracting officer has developed a mitigation strategy for any particular program, it should remain in place and applicable throughout the life of the program—the rules by which the contract is governed should not change every time there is a change in government personnel.

AIA recommends that the rule implementing section 207 include the following:

1. A “menu” of acceptable OCI mitigation processes and procedures that are recognized, in whole or in part, as achieving an appropriate OCI mitigation plan for any program. The most invasive mitigation options, isolating a portion of a business or divesting a

portion of the business must be approved by the Senior Procurement Executive based on a business case.

2. Recognition that there are some exemptions to the requirement that SETA contractors are prohibited from participating as a development contractor or subcontractor that can be applied in a limited set of circumstances.
3. Require that if an acceptable OCI mitigation has been identified and agreed to by one contracting officer, all other contracting officers must be bound by that agreement and not arbitrarily disqualify or penalize a contractor for agreeing to such an OCI mitigation.

## CONCLUSION

AIA believes that DoD should develop and implement a clear, organization-wide policy that reflects the desirability and necessity of utilizing the vast amount of technical and systems engineering expertise of its government contractors while ensuring strict mitigation of OCIs. We believe that, with a clear policy and regulatory guidance, the Federal Government can take advantage of the significant technical expertise that

many defense contractors have to offer – expertise that has been developed over many years of highly sophisticated, state-of-the-art technical work generated at a cost of billions of dollars to the Government.



Statement of James W. Sheaffer, President of CSC's North American Public Sector (NPS):  
Consistency and Recognition of Adequate Mitigation Measures Are Needed

I am Jim Sheaffer, President of CSC's North American Public Sector (NPS). Thank you for sponsoring this meeting on one of the most important issues confronting DoD, its industrial base and all stakeholders in the federal acquisition system. Thanks too for allowing me the opportunity to take part in today's dialog.

This year CSC celebrates its 50<sup>th</sup> anniversary providing both commercial and governmental customers cutting edge Information Technology solutions across the globe. Our specialty is providing IT solutions to complex, mission-critical challenges.

CSC's global revenues exceed \$16 Billion. NPS performs nearly all of CSC's federal contracting with annual revenues of \$6 Billion. Washington Technology's most recent ranking listed CSC as the ninth largest federal contractor.

Over CSC's 50 year history, we have developed expertise by performing a variety of roles serving many industries. Some clients look to CSC to provide solutions. Others look to us to analyze the client's problems and recommend effective solutions based on our intimate knowledge of the IT markets in which CSC participates.

By providing IT, integrated IT technology solutions, and pure IT advisory services, CSC has developed deep IT market knowledge that a pure IT service provider or consulting services company can lack. This knowledge and experience allows us to better serve all our clients. This desirable combination is not unique to CSC. Of course, I do believe CSC is the best at what it does. Many in the IT industry, as well as other industries, similarly serve their clients in multiple roles for any number of valid business reasons. This diversity of experience clearly benefits DoD.

Today we are discussing Organizational Conflicts of Interest (OCIs), the implementation of section 207 of the Weapon Systems Acquisition Reform Act (WSARA)<sup>i</sup> and related congressional mandates. In my prepared remarks I will first show why mitigation should be more widely accepted in accordance with existing regulatory guidance. Then I will review our understanding of the current rules pertaining to OCIs. I will urge that DoD regulations define characteristics of a mitigation approach that should always be acceptable. DoD recognizes that similar techniques can be successfully used to prevent disclosure, misuse, or control of classified aspects of national defense programs by foreign corporate owners. The Senate also recognized the efficacy of limiting control and restricting information flow to mitigate OCIs in the bill it sent to conference<sup>ii</sup> (Senate S. 454) in the process of passing WSARA.

Permit me to note something important for the purposes of this meeting. In all the acquisitions, teaming agreements and business deals I have been involved in or know of, I have yet to hear of one designed to give an unfair advantage to an affiliate in a current or future opportunity. This goes to the essence of the topic of the day, effective mitigation of OCIs.



As our new OFPP Administrator, Daniel Gordon, several years ago noted in his “OCI Paper,” a conflict of interest is “a situation where a person is torn between duties (or loyalty) to two or more different parties.”<sup>iii</sup>

Non-disclosure agreements between businesses that at times compete often cause a conflict of interest. The company receiving the information likely could use it to better position itself or an affiliate in a related future competition if the company or an employee disregarded the non-disclosure obligations. The receiving company and its employees who have the information are both duty bound to strive to best serve the corporate family’s competitive interests and also to honor their nondisclosure obligations to the disclosing company. The duty to protect the information consistently overrides the broader corporate family interests. Without a fundamental belief that non-disclosure obligations will be honored, teaming, joint ventures and traditional prime-subcontractor relationships could not occur.

This normal behavior of industry to honor non-disclosure obligations contradicts any presumption that agreements to mitigate OCIs through information control, such as firewalls, can not be effective.<sup>iv</sup>

As CSC has previously argued to the Senate Armed Services Committee before it amended and then reported out S. 454,<sup>v</sup> GAO’s analyses of “impaired objectivity OCIs” suffers from some flawed premises about corporate conduct. One premise seems to be that an organization acts the same as an individual person, particularly regarding impaired objectivity.<sup>vi</sup> “Impaired objectivity” is when a company is asked to perform tasks that require objectivity, but another role the company plays casts doubt on the company’s ability to be truly objective (for example, where a company is to give the government an assessment of the performance of firms, where one of those firms is an affiliate of the company giving the assessment).<sup>vii</sup> CSC believes an analysis of pertinent circumstances in such cases is appropriate to determine if the “doubt” about a company’s objectivity was justified. In making such a determination, important factors that must be considered include:

1. Whether the same individuals are to perform as part of both roles,
2. Whether a single organization is performing both roles,
3. What efforts will be undertaken to keep information about the two roles controlled within the broader organization,
4. Whether managers will have requisite independence, and
5. What other mitigation efforts will help ensure that each organization will perform its different role in accordance with their individual contractual commitments; that is, in the clients’ best interests as defined in the relevant contracts.

One of the principal differences between personal and organizational conflicts of interest is that in addition to relying on the integrity of each individual, an organization can provide processes, management and oversight to ensure the potential conflict does not adversely affect performance. Thus mitigation strategies can be more effective for OCIs than personal conflicts of interests.



Section 205 of S. 454 as passed initially by the Senate required mitigation to *eliminate appearances* of a conflict, which the Conference Committee wisely dropped. Like the Conference Committee, we cannot agree “[T]hat the essence of an OCI is always a matter of appearance.”<sup>viii</sup> As the Conference Committee reported, OCI and mitigation guidance should “ensure that advice provided by contractors is objective and unbiased.”<sup>ix</sup> Thus the essence of a conflict is the inability of the government to be assured contractual obligations will be met. The fact that an individual or an organization might be challenged to achieve objectivity and fairness does raise an OCI issue. Mitigation means the challenges that have given root to an OCI have been made manageable. No mitigation can eliminate an appearance of conflict in all instances.

A final important point: There is a continuing trend toward finding impaired objectivity OCIs. Some view impaired objectivity as extremely difficult or impossible to mitigate. Thus contracting offices have increasingly required companies to divest business units or be deemed ineligible for contract awards. This has already forced several divestitures, including one CSC has agreed to and Northrop-Grumman’s recent divestiture of TASC.<sup>x</sup> Moreover, the wide perception that GAO is second guessing contracting officers and requiring burdensome evaluation and justification of acceptance of mitigation plans, also favors the simple, expedient action (for contracting offices) of simply requiring divestiture. To assure against second guessing and because evaluating OCI mitigation is part of determining a contractor’s ability to perform, approval of mitigation plans should be given the same deference as affirmative responsibility determinations.

Unless we change these circumstances, the defense industry faces wholesale divestiture and restructuring despite the fact that DoD OCI and industrial base policy has *not* changed. If this continues, only two distinct types of firms will remain - those that provide services and those that provide products. Over time, the services only firms will be divided further into those who can provide professional and technical expertise to the government and those that deliver services using their own expertise to produce the deliverables that other service firms will help evaluate. In this future state, much cross fertilization within corporate families will be lost to everyone’s detriment.

Such broad based restructuring of the industrial base, which DoD helped shape, should not be allowed to occur as a second order effect or unintended consequence of contracting office OCI decisions.

We believe DoD should eliminate or severely restrict a contracting officer’s discretion to demand divestiture. When a contractor offers to create legally separate and independently managed organizations with limited flow of information between them, “independent” affiliates, that should suffice to mitigate an OCI because without information and lacking control, undue influence will not occur. An “independent” affiliate is where an affiliated but legally distinct organization, like an LLC, has a majority of board members from outside both businesses who would also would serve as an OCI review committee, no employees are shared, no investment option in parent company stock is provided through any benefits plan or otherwise, information systems are separate, and employees have no automatic right of transfer between the two organizations. Section 205 of Senate passed S. 454 recognizes such OCI mitigation efforts would be adequate.<sup>xi</sup> Moreover, DoD’s Defense Security Service



recognizes that similar controls adequately protect classified information from foreign owners of federal contractors and their governments in the NISPOM,<sup>xii</sup> which applies not only to DoD but 23 other federal agencies.

### **Conclusion**

To address the need for consistency in the treatment of OCIs, recognize adequate mitigation efforts and minimize unintended industrial base restructuring, CSC respectfully urges DoD to use the opportunity presented by section 207 of WSARA to take control by amending the DFARS to:

1. Supplement the definition of organizational conflict of interest in the FAR<sup>xiii</sup> to instruct DoD contracting offices to recognize organizations as distinct from an individual person and to take those inherent differences into consideration in determining whether an OCI exists and the efficacy of proposed remediation plans.
2. State that (a) effective control is required over related organizations before they may be considered affiliates for OCI purposes, and (b) among other factors, contractor agreements to control information sharing, including firewalls, should be presumed effective unless circumstances known to the contracting officer overcome this presumption.
3. State a mere appearance of an OCI is not sufficient to reject an otherwise qualified competitor or contractor, particularly when mitigation efforts make the likelihood of impaired contract performance small.
4. State that if an allegedly conflicted business itself or its affiliate causing the OCI have (a) controls in place to restrict critical information flow between them, and (b) management and oversight mechanisms to police the effectiveness of these controls to ensure both organizations will perform independently and only considering their individual contractual obligations, then such mitigation shall be found adequate for the alleged OCI.
5. Provide for DoD Office of Industrial Policy review before telling an otherwise qualified competitor or contractor that it cannot compete or be awarded a contract unless it creates an "independent" affiliate or it completely cuts its ties with a related organization, that is divests. The affected contractor or competitor must also have an opportunity to comment on the contracting officer's recommendation to the DOD Office of Industrial Policy.
6. Note that a Contracting Officer's evaluation and acceptance of a mitigation plan is part of an affirmative responsibility determination and that forums reviewing such determinations should apply equivalent deference.
7. Provide that one Contracting Officer's determination that an OCI mitigation plan allowing a contractor to compete on a future competition shall be binding upon subsequent contracting officers absent a showing the assumed circumstances considered by the first contracting officer



are materially different than the circumstances actually confronting a subsequent contracting officer.

Again thank you for this opportunity. I hope to explore these issues further through a continuing dialog.

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<sup>i</sup> Pub. Law 111- 23. [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111\\_cong\\_public\\_laws&docid=f:publ023.111](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_public_laws&docid=f:publ023.111) . Section 207 is also found in 10 U.S.C. §2430 note.

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

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

<sup>iii</sup> Daniel I. Gordon, *Organizational Conflicts of Interest: A Growing Integrity Challenge*, page 2, download at <http://ssrn.com/abstract=665274> (“OCI Paper”). A slightly different version is available in 35 Pub. Cont. L.J. 25 (2005). All cites here are to the web-version on ssrn.com.

The OCI Paper, while not purporting to be GAO policy, accurately summarized GAO bid protests decision up to that time and proved to be a reasonably accurate prediction of where those decisions have gone thus far. Thus, for convenience, this discussion will use the OCI Paper as organizational, but reasonably accurate device, to represent of a long and continuing series of GAO decisions.

<sup>iv</sup> OCI Paper, *supra* n. 1, page 4, citing ICF, Inc., B-241372, Feb. 6, 1991, 91-1 CPD ¶ 124 at 1, which explicitly notes the decision was based the contracting officers examination of all pertinent facts and should not be cited for “approval of the blanket exclusion of a class of potential contractors on other EPA contracts without a comprehensive consideration of the particular work to be performed.”

<sup>v</sup> CSC White Paper dated March 27, 2009 submitted for consideration during Senate Armed Services Committee deliberations on S. 454, Weapon Systems Acquisition Reform Act of 2009, introduced by Senator Levin and Senator McCain. Attachment A.

<sup>vi</sup> OCI Paper, *supra* n. 1, page 6.

<sup>vii</sup> OCI Paper, *supra* n. 1, page 7.



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viii OCI Paper, *supra* n. 1, page 14.

ix Conference Report no. 111–124, Pages 37-38 < <http://thomas.loc.gov/cgi-bin/cpquery/T?&report=hr124&dbname=111&>>.

x *Nextgov*, Northrop's sale of business unit signals start of a divestiture trend, Nov. 9, 2009 < [http://www.nextgov.com/nextgov/ng\\_20091109\\_8678.php](http://www.nextgov.com/nextgov/ng_20091109_8678.php)>

xi This version of the Bill also required these steps to eliminate the appearance of an OCI, which, as discussed before, effectively precludes any mitigation approach.

xii Chapter 2, section 3 of the National Industrial Security Program Operating Manual (NISPOM).

xiii FAR 2.101



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**CSC White Paper**

CSC respectfully submits this white paper for consideration during deliberations on S. 454, Weapon Systems Acquisition Reform Act of 2009, introduced by Senator Levin and Senator McCain. The CSC point of contact for this White Paper is Michael K. Love, Assistant General Counsel, 703-641 2232; email [mlove9@csc.com](mailto:mlove9@csc.com)

**THE PROPOSED LEGISLATION PRESENTS ACRITICALLY FLAWED ORGANIZATIONAL CONFLICT OF INTEREST (OCI) POLICY**

***S. 454, Section 205 (b)(1) and (2) provide:***

*(b) ELEMENTS.—The revised regulations required by subsection (a) shall, at a minimum—*

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

*(2) require that a contract for the performance of systems engineering and technical assistance (SETA) functions with regard to a major weapon system contains a provision prohibiting the contractor or any affiliate of the contractor from having a direct financial interest in the development or construction of the weapon system or any component thereof;*

**DISCUSSION:**

As proposed, these two provisions would substantially change existing law and significantly restrict the access by Department of Defense components to a mature pool of highly skilled analysts. The proposed provisions allow no mitigation of organizational conflicts of interest. If enacted, businesses will be forced to sever financial relations with affiliates and teammates to eliminate even the appearance of a conflict of interest. Some might argue, as discussed below, if an OCI creates “impaired objectivity” existing Government Accountability Office (“GAO”) bid



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protest decisions hold that such OCIs are not mitigable. However, other forms of OCIs covered by these provisions can be mitigated under existing law; namely, unequal access to information and biased ground rules. The proposed OCI provisions also require no showing that a financial interest in the development or construction of a weapon system does or could impair performance of, or prejudice the systems engineering and technical assistance (“SETA”) contractor’s work. They also fail to consider that the nature of the work performed by a SETA type contractor may present no opportunity for the financial interest to adversely influence the services the government receives. Rather than allow a reasoned judgment to be made after determining the material facts and circumstances, under section 205 as introduced, mere appearances requires a company to dismember its corporate family.

The philosophy underlying section 205 is akin to the flawed OCI policy the GAO, through its bid protest decisions, has developed concerning impaired objectivity OCIs. Practically, GAO’s policy requires restructuring of the industrial base because virtually the only means by which an agency can be assured of satisfactory resolution of impaired objectivity, short of surviving a bid protest, is through requiring divestments of parts of the affected company. GAO’s theory rests on several flawed assumptions including: a) companies, no matter how large, diverse or decentralized act as monoliths, and b) as long as there remains an appearance of impaired objectivity, the OCI has not been adequately mitigated without regard to the reality of the individuals’ conduct and their fairness. See Daniel I. Gordon, *Organizational Conflicts of Interest: A Growing Integrity Challenge*<sup>1</sup> download at <http://ssrn.com/abstract=665274>.

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<sup>1</sup> Mr. Gordon’s discussion, while not purporting to be GAO policy, accurately summarized GAO bid protests decision up to that time and proved to be a reasonably accurate prediction of where it would go. Thus, for convenience, this discussion will use the paper as an easy but reasonably accurate representation of the policy developed by GAO through a long and continuing series of



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GAO assumes, conclusively, that each affiliate totally controls all other affiliates. Mitigation of impaired objectivity is impracticable, “Where an “impaired objectivity” OCI is at issue, it is difficult to see how a firewall within the conflicted organization would mitigate the OCI, in light of the **assumption** in these OCIs that all employees of the organization will work to further the organization’s interest.” (Emphasis added). Gordon at n. 48. “Impaired objectivity comes into play when a company is asked to perform [advisory type] tasks that require objectivity, but another role the company plays casts doubt on the company’s ability to be truly objective (for example, where a company is to give the government an assessment of the performance of firms, where one of those firms is an affiliate of the company giving the assessment).” Gordon at n. 23. While GAO recognizes that companies have many goals, it nonetheless concludes “all the people and bodies associated with an organization -- whether they are agents, officers, employees, officials, or representatives-- will treat the organization’s interests as, in some sense, their own and want to further them.”<sup>2</sup> Gordon at n. 13. When an organization<sup>3</sup> has many interests, the employee and various affiliates prioritize them in accordance with the affiliate’s interests, which does not support GAO’s conclusion that the interest most detrimental to the government will prevail, that is that the performing affiliate and the employees actually performing the work will bias their work – even though

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decisions. Mr. Gordon also participated in *Aetna Government Health Plans, Inc.; Foundation Health Federal Services, Inc.*, B-254397 *et al.*, July 27, 1995, 95-2 CPD ¶ 129, a seminal GAO decision on organizational conflicts of interest.

<sup>2</sup> The clear assumption is that a company is a monolith, all parts acting jointly in each of its endeavors without regard to the differing missions and business models that may well exist for different affiliates. In fact, the need for different business models and missions may have prompted the creation or maintenance of separate business units.

<sup>3</sup> GAO also erred fundamentally in assuming a corporation composed of many individuals, and often different affiliates, acts like a single person. Because the FAR OCI definition does not distinguish between a living person and a legal entity, GAO *assumes* a corporations act with the same unity of purpose as a single person. Gordon at n. 19 & 20



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doing so breaches contractual obligations and may subvert the performing affiliate's own interests in serving its immediate clients dutifully. GAO has addressed such arguments and erroneously rejected them in *Aetna Government Health Plans, Inc.; Foundation Health Federal Services, Inc., B-254397 et al.*, July 27, 1995:

*[The awardee]... contends that FAR subpart 9.5 does not apply to "apparent" conflicts of interest, and that a standard based on the appearance of impropriety "has no place in determining whether agencies have met their responsibilities under FAR Subpart 9.5." In our view, the organizational conflict of interest at issue in these protests was not merely an apparent conflict. [The awardee's] dual roles placed it in an actual organizational conflict of interest because of the **prospect** that it would be unable to render impartial advice to OCHAMPUS. FAR § 9.501. Furthermore, we view it as **axiomatic** that a key purpose of FAR subpart 9.5 is to avoid the **appearance** of impropriety in government procurements. [Emphasis added]*

We respectfully submit that GAO erred not only in assuming monolithic organizational action, but in conflating a "prospect" with an "axiomatic" key that used an "appearance" to derive "an actual organizational conflict of interest." Congress should refrain from enshrining GAO's errors in S. 454.

Based on these errors, GAO has rejected traditional mitigation strategies such as individual non-disclosure agreements – which prevent the flow of information often vital to allowing manipulation of work product; and firewalls between corporate business units –which help ensure independence of action. Separate business entities with governing boards comprised of a majority of independent directors and restricted information access would also likely be rejected notwithstanding the U.S. Government's well established policy and practice of permitting analogous



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independent entities to effectively prevent foreign owners from exercising undue control over their U.S. subsidiaries handling classified information.<sup>4</sup>

Requiring divestiture is an easy “solution.” No judgment, no analysis of the facts and no regard for the consequences make such a rule easy to implement.

Government workforce limitations strongly favor simple solutions such as the corporate divestitures that would be required under section 205.

Such a flawed policy will result in the government receiving sub-optimal support from both development and SETA support contractors. As companies are forced to choose between development and SETA contractor roles, the most valuable personnel currently supporting the government in one of those efforts may be moved to other roles within the company rather than becoming part of a divested unit depriving the government of access to their proven competence and experience. The required divestitures will also cause a long period of turmoil in the industry.

Sound industrial base policy, acquisition policy and OCI policy should require evaluation of OCIs based upon a realistic assessment of real, not apparent, conflicts of interest and reasonable mitigation plans rather than a blanket ban on **any** financial connection between a prime product developer and companies looking to provide SETA support to the government on that program.

Nonetheless, we respectfully submit that if Congress concludes that agencies have been and will be unable to spend the time to find the qualified resources to perform and document such assessments, a reasonable compromise is that a SETA

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<sup>4</sup> National Industrial Security Program Operating Manual (NISPOM) §2-303.



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contractor should be precluded from having an affiliate that it controls, or that is commonly controlled, which will compete for a material part of the development program on which the SETA contractor is providing the Government with material advice. Thus, if the SETA contractor is providing material advice and its affiliate will be competing for or is performing a material part of the program, the SETA contractor and the affiliate must be independently controlled; in other words, a structural change is required. This means either divestiture or the establishment of a separate business entity with separate employees and officers and a board of directors or its equivalent with a majority of independent members. However, this compromise position should include a provision that permits the head of the procuring activity to waive this requirement if that officer signs a waiver showing it is in the best interests of the government to do so.

**RECOMMENDATION:**

Ideally, Congress should explicitly allow mitigation of impaired objectivity, expressly provide that Contracting Officers will consider the circumstances of an affiliate's independence, access to information and the affiliates' own incentives in judging the adequacy of mitigation efforts, *i.e.*, Contracting Officers will not consider all affiliates as acting as a monolith. In this ideal world, the Government Accountability Office would also defer to Contracting Officer's judgments of adequacy of mitigation plans unless it found the judgment to be arbitrary; much as GAO gives deference to the contracting officer's exercise of discretion in affirmative responsibility determinations.

In the present circumstances, we propose that Subsections 205(b)(1) & (2) of S. 454 should be amended to explicitly allow mitigation through establishment of an



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independent affiliate. To implement this proposal, these subsections would be amended as follows:

- (1) ensure that the Department of Defense receives advice on systems architecture and systems engineering matters with respect to major weapon systems from federally funded research and development centers or other sources that act independently of the prime contractor for the development or construction of the weapon system or any major component;
- (2) require that a ~~contract for the performance of~~ systems engineering and technical assistance (SETA) ~~functions~~ contract with regard to provide material judgmental advice on a major weapon system contains a provision prohibiting the contractor or any affiliate of the contractor from having a direct financial interest in an affiliate providing the development or construction of the weapon system or any major component thereof unless that the affiliate who provides the development or construction of the weapon system or any major component is independent provided however, the head of the procuring activity may waive this provision through a written finding that doing so is in the government's best interest.
- (3) For these purposes an "independent affiliate" is:
  - (A) A separate business entity with its own employees and management;
  - (B) A governing Board that has a majority of members who are not affiliated with the business entity or that entity's affiliates;
  - (C) Governance procedures that direct the governing board to act solely in the interest of the entity and without regard to the interests of any affiliate except the parent corporation may take and must agree to the following acts:
    - (i) The sale, lease or other disposition of any of the property, assets or business of the business entity, or the purchase of any property or assets by the business entity that is other than in the ordinary course of business;
    - (ii) The merger, consolidation, reorganization, dissolution or liquidation of the business entity;



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- (iii) The filing or making of any petition under the Federal Bankruptcy Code or any applicable bankruptcy law or other acts of similar character; or
- (iv) The initiation of action to terminate the rights of the independent board members.

(D) An affiliate means associated business concerns or individuals if, directly or indirectly,

(i) Either one controls or can control the other; or

(ii) A third party controls or can control both.<sup>5</sup>

(E) A SETA contractor provides system engineering and technical direction for a major weapons system but does not have overall contractual responsibility for its development, its integration, assembly and checkout. *Systems engineering* includes a combination of substantially all of the following activities: determining specifications, identifying and resolving interface problems, developing test requirements, evaluating test data, and supervising design. *Technical direction* includes a combination of substantially all of the following activities: developing work statements, determining parameters, directing other contractors' operations, and resolving technical controversies.<sup>6</sup>

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<sup>5</sup> Adapted from FAR 2.101.

<sup>6</sup> Adapted from FAR 9.505-1.

**Lockheed Martin Comments and Recommendations**  
**Defense Acquisition Regulations System Public Meeting**  
**On Weapon Systems Acquisition Reform Act**  
**Organizational Conflicts of Interest Requirements**

**December 8, 2009**

Lockheed Martin is pleased to participate in this industry-Government dialogue. We commend DOD for seeking industry perspectives on the impact of the 2009 Weapon Systems Acquisition Reform Act (WSARA) on DOD contracting, in particular, Section 207 of that Act that directs the Department to review and tighten rules and regulations regarding organizational conflicts of interest (OCI).

In the November 9 Federal Register Notice announcing today's session, DOD invited industry to focus on three areas of potential impacts on DOD contracting relating to OCI. In our comments today, we will focus primarily on the second of those areas, providing recommendations for specific policies, practices, and structural solutions for effective mitigation of OCI concerns that may arise regarding ownership of business units that perform systems engineering and other support services on major defense acquisition programs (MDAPs) in relation to the business units that compete to perform as supplier for the program; we will also suggest certain activities in the Government acquisition process for which OCI mitigation may not be appropriate. Finally, we will comment briefly on the third area, regarding the award of major subsystem contracts by the prime contractor to affiliated business units on MDAPs, and providing technical evaluations on MDAPs.

**OCI Concerns regarding Business Unit Ownership Relationships**

Concern with OCI in Government contracting has increased in recent years primarily due to consolidation of companies within the defense industry resulting in fewer companies with the technical expertise needed by the Government; significant reductions in the Government workforce with required "in-house" technical expertise; and the increasing complexity of weapon systems, command and control systems, information systems, and other Government management and services systems that must interface seamlessly with each other to accomplish missions. These complex systems demand the highest degree of technical expertise for integration into systems of systems for maximum operational effectiveness. Not only is this essential to the warfighter, but it is also essential to the efficient use of taxpayer resources in procuring goods and services across the Government.

Government contractors, especially those with experience in MDAPs, possess significant technical expertise and technological capabilities and facilities. The Government should have access to this expertise, if the work can be accomplished in an unbiased and impartial manner and these contractors are not given an unfair competitive advantage. Part 9.5 of the Federal Acquisition Regulation (FAR) provides general parameters for the resolution of OCI issues. Recently, however, isolated OCI violations and inadequate OCI mitigation measures have cast some doubt on the ability of Government and industry to effectively mitigate OCI concerns.

The FAR gives the responsibility for resolving OCI and determining a contractor's eligibility to compete for OCI-sensitive work to the contracting officer. Several DOD components and other Government agencies have developed organization-wide policies that reject OCI mitigation and require disqualification of a contractor from competing for potentially OCI-sensitive work. In addition, in some instances, even when an OCI mitigation plan is approved by the contracting officer, the contractor is rated negatively in the evaluation process on OCI grounds. In other instances, later development work is

denied on the basis of its relationship to previous OCI-sensitive work, even if an OCI mitigation plan for that work was approved by the contracting officer and the contractor complied with the terms of that plan.

The potential unintended consequences of an overly cautious approach to OCI must be considered in formulating a DOD-wide or Government-wide policy. The people, processes, tools, infrastructure, and culture of development contractors combine to create technical expertise through cross-training of personnel between systems engineering and major development efforts over the life of an employee's career. If such development contractors are precluded from competing for certain contracts due to a blanket policy of OCI avoidance, a significant element of systems engineering and technical expertise will become unavailable to the Government, because large development contractors will opt to maintain eligibility for development work rather than choose to work only on the systems engineering foundation.

In addition, requiring development contractors to divest a portion of their business to resolve OCI concerns will not be effective in ensuring that expertise remains available to the Government. It is not just a matter of transferring people to non-conflicted companies, because many seasoned employees may choose not to leave the employ of the development contractor if that contractor offers broader career opportunities or other advantages. Further, it is difficult to transfer effectively to a new entity the processes, tools, infrastructure and culture that create the needed expertise. Segregating systems engineering from development engineering will also, over time, eliminate the benefits of broad cross-training, resulting in a dilution of expertise available to the Government to solve complex system of systems issues. Companies with a narrower technical focus do not offer the Government the same breadth of experience in solving complex problems. In short, failure to formulate a Government-wide policy that recognizes the feasibility and advisability of effective mitigation of OCI concerns would create a significant limitation on competition for Government systems engineering work and, more importantly, would put at risk the future success of complex development programs that may lack a highly sophisticated systems engineering foundation due to the unavailability of that expertise to the Government.

To ensure a rigorous and effective OCI mitigation process, we make several recommendations for development of a clear DOD-wide policy that reflects the desirability and necessity of utilizing the vast amount of technical and systems engineering and integration expertise of its Government contractors, while ensuring effective mitigation of OCI. With this updated policy guidance and revised regulations, the Government will be able to continue to take advantage of the significant technical expertise that major defense contractors have to offer -- expertise that has been developed over many years of highly sophisticated, state-of-the-art technical work.

Our recommendations address mitigation in two broad areas of potential organizational conflict: "unequal access to information" which might otherwise give a contractor an unfair competitive advantage, and possible perceptions of "biased ground rules and impaired objectivity".

#### Unequal Access to Information

Mitigation of OCI, in many cases, can be viewed most basically as a restriction in the flow of information to those to whom the Government does not want to disclose this information. It is very similar to controlling the flow of classified and other sensitive information, such as export-controlled information. Government contractors, particularly those dealing with DOD and the intelligence community, have decades of successful experience with effectively compartmentalizing information within their organizations and strictly complying with information security laws and regulations.

The GAO and Federal Courts have ruled on many "unequal access to information" OCI issues and consistently found that if the Government carefully considers the OCI, documents its findings, and

