

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.¹ 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.² 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.³ 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

¹ Pub. L. 111-23, § 207, 123 Stat. 1704, 1728-30.

² *Id.* § 207(a) & (b).

³ *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.⁴ For example, in 1963 the Department of Defense published Appendix G of the Armed Services Procurement

⁴ 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.⁵ 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.⁶ The FAR also has permitted agencies to waive OCIs if doing so would best serve the needs of the Government.⁷ 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;⁸ to instruct the contracting officer to award a contract to the successful offeror

⁵ FAR 9.501 (1984); FAR 9.505 (2009).

⁶ FAR 9.504 (1984); FAR 9.507 (1984).

⁷ FAR 9.503 (1984).

⁸ FAR 9.502(c).

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

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.¹¹

⁹ FAR 9.504(e).

¹⁰ FAR 9.505(b).

¹¹ 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.¹²

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.¹³ 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

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

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