

title IV–D, IV–A, IV–B, and IV–E programs.

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(d) * * *

(1) The parent's, putative father's or non-parent relative's name; * * *

(3) The non-parent relative's SSN, if known.

(4) Any other information prescribed by the Office.

(e) The director of the IV–D agency or his or her designee shall attest annually to the following:

(1)(i) The IV–D agency will only obtain information to facilitate the location of any individual in accordance with section 453(a)(2) of the Act for the purpose of establishing parentage, establishing, setting the amount of, modifying, or enforcing child support obligations, or for determining who has or may have parental rights with respect to a child, or in accordance with section 453(a)(3) of the Act for enforcing a State law with respect to the unlawful taking or restraint of a child, or for making or enforcing a child custody or visitation determination as defined in section 463(d)(1) of the Act, or in accordance with section 453(j)(3) of the Act for the purpose of assisting State agencies to carry out their responsibilities under title IV–D, IV–A, IV–B, and IV–E programs.

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(2) In the case of a submittal made on behalf of a resident parent, legal guardian, attorney or agent of a child not receiving assistance under title IV–A, the IV–D agency must verify that the requesting individual has complied with the provisions of § 302.35 of this chapter.

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PART 307—COMPUTERIZED SUPPORT ENFORCEMENT SYSTEMS IN OPERATION AFTER OCTOBER 1, 1997

■ 10. The authority citation for part 307 continues to read as follows:

Authority: 42 U.S.C. 652 through 658, 664, 666 through 669A, and 1302.

■ 11. Amend § 307.13 by revising paragraphs (a)(3), (4)(iii), and (iv) to read as follows:

§ 307.13 Security and confidentiality for computerized support enforcement systems in operation after October 1, 1997.

* * * * *

(a) * * *

(3) Permit disclosure of information to State agencies administering programs under titles IV (including Tribal programs under title IV), XIX, and XXI of the Act, and SNAP, to the extent

necessary to assist them to carry out their responsibilities under such programs in accordance with section 454A(f)(3) of the Act, to the extent that it does not interfere with the IV–D program meeting its own obligations and subject to such requirements as prescribed by the Office.

(4) * * *

(iii) NDNH and FCR information may be disclosed without independent verification to IV–B and IV–E agencies to locate parents and putative fathers for the purpose of establishing parentage or establishing parental rights with respect to a child; and

(iv) NDNH and FCR information may be disclosed without independent verification to title IV–D, IV–A, IV–B and IV–E agencies for the purpose of assisting States to carry out their responsibilities to administer title IV–D, IV–A, IV–B and IV–E programs.

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[FR Doc. 2010–32424 Filed 12–28–10; 8:45 am]

BILLING CODE P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 209 and 252

[DFARS Case 2009–D015]

RIN 0750–AG63

Defense Federal Acquisition Regulation Supplement; Organizational Conflicts of Interest in Major Defense Acquisition Programs

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD is issuing a final rule to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to implement section 207 of the Weapon Systems Acquisition Reform Act of 2009. Section 207 addresses organizational conflicts of interest in major defense acquisition programs.

DATES: *Effective Date:* December 29, 2010.

FOR FURTHER INFORMATION CONTACT: Ms. Amy Williams, Defense Acquisition Regulations System, OUSD(AT&L)(DPAP)(DARS), Room 3B855, 3062 Defense Pentagon, Washington, DC 20301–3060. Telephone 703–602–0328; facsimile 703–602–7887. Please cite DFARS Case 2009–D015.

SUPPLEMENTARY INFORMATION:

I. Background

DoD is issuing a final rule to amend the DFARS to implement section 207 of the Weapon Systems Acquisition Reform Act of 2009 (WSARA) (Pub. L. 111–23). Section 207 requires DoD to revise the DFARS to provide uniform guidance and tighten existing requirements relating to organizational conflicts of interest (OCIs) of contractors in major defense acquisition programs (MDAPs). The law sets out situations that must be addressed and allows DoD to establish such limited exceptions as are necessary to ensure that DoD has continued access to advice on systems architecture and systems engineering matters from highly qualified contractors, while also ensuring that such advice comes from sources that are objective and unbiased.

In developing regulatory language, section 207 directed DoD to consider the recommendation presented by the Panel on Contracting Integrity and further directed DoD to consider any findings and recommendations of the Administrator of the Office of Federal Procurement Policy (OFPP) and the Director of the Office of Government Ethics (OGE) pursuant to section 841(b) of the Duncan Hunter National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2009 (Pub. L. 110–417). Section 841(b) of the NDAA for FY 2009 required review by OFPP, in consultation with OGE, of FAR coverage of OCIs. Neither OFPP nor OGE has issued recommendations to date pursuant to section 841(b), but both have worked with the FAR Acquisition Law Team, which includes representatives from DoD and the civilian agencies, to draft a proposed rule on OCIs under FAR Case 2007–018. As part of this process, OFPP, OGE, and the FAR Acquisition Law Team reviewed comments received in response to an Advance Notice of Proposed Rulemaking, published in the **Federal Register** at 73 FR 15962 on March 26, 2008, and are also considering pertinent comments that were submitted in response to this DFARS Case 2009–D015 in formulation of the proposed FAR rule.

A public meeting was held on December 8, 2009 (*see* 74 FR 57666) to provide opportunity for dialogue on the possible impact on DoD contracting of the section 207 requirements relating to OCIs.

DoD published a proposed rule in the **Federal Register** on April 22, 2010 (75 FR 20954). The comment period was initially scheduled to close on June 21, 2010. On June 15, 2010, the comment

period was extended to July 21, 2010 (75 FR 33752).

II. Discussion and Analysis

DoD received comments from 21 respondents in response to the proposed rule. Some respondents expressed general support for the rulemaking. Others expressed concern that the rule did not achieve the overall objectives of section 207, either because the proposed coverage was too stringent or not sufficiently strong. Based on public comments, changes were made to the proposed rule, including the following:

- Removing from the DFARS final rule the proposed changes that would have provided general regulatory coverage on OCIs to temporarily replace that in FAR subpart 9.5.
- Locating the core of the final rule in subpart 209.5 and 252.209.
- Making clear that this final rule takes precedence over FAR subpart 9.5, to the extent that there are inconsistencies.
- Adding to the policy an explanation of the basic goals to promote competition and preserve DoD access to the expertise of qualified contractors.
- Tightening the exception for “domain experience and expertise” to require a head of the contracting activity determination that DoD needs access to the domain experience and expertise of the apparently successful offeror; and that, based on the agreed-to resolution strategy, the apparently successful offeror will be able to provide objective and unbiased advice.
- Refining the definition of “major subcontractor” to include upper and lower limits on application of the percentage factor test for determining if the value of the subcontract in relation to the prime contract warrants classifying the subcontract as major; specifically—

- A subcontract less than the cost or pricing data threshold would not be considered a major subcontract; and
- A subcontract equal to or exceeding \$50 million would automatically be considered a major subcontract.
- Addressing pre-MDAP as well as MDAP programs.

The following is a discussion of the comments and the changes included in this final rule as a result of those comments. Comments on aspects of the proposed rule that would have provided general coverage on OCIs outside the context of major defense acquisition programs are being considered in the formulation of the FAR rule.

A. General

1. Incorporation in DFARS of OCI Regulations Beyond WSARA Requirements

Comment: A number of respondents took exception to coverage in the proposed rule that would have extended beyond MDAP to cover all DoD procurements, noting that the broader OCI changes should be considered for inclusion in the FAR rather than the DFARS for the following reasons:

- Congress did not mandate, or even suggest, that DoD adopt new regulations to completely rewrite the OCI rules applicable to all DoD procurements.
- The manner in which DoD is proceeding in relation to the FAR rule is an inversion of the way we normally proceed, is inefficient, and will be confusing and disruptive to DoD and industry.

One respondent said the rule goes beyond agency-specific acquisition regulations as contemplated and authorized by FAR 1.301 *et seq.*, both in form and in substance.

Two respondents endorsed the proposed rule’s approach of extending the OCI coverage beyond MDAPs, with one respondent noting that the same OCI policy concerns that Congress addressed in connection with MDAPs apply across the board. This respondent also pointed out that the General Accountability Office bid protest case law that the proposed rule cites applies to all procurements, not only MDAPs. Also, the respondent said, application of the new OCI coverage to this broad spectrum of contracts provides a greater level of consistency across procurements.

Response: DoD does not agree that the proposed rule violated FAR subpart 1.3 by addressing OCI issues that go beyond those that are specifically applicable in the context of MDAPs, but has decided to remove coverage from the rule that is not required to comply with section 207 of WSARA. DoD’s intent was to provide coverage that would improve all aspects of OCI policy affecting the covered contract types, not just those aspects unique to MDAPs and systems engineering and technical assistance (SETA) contracting, since some OCI issues involved are no different from those raised on any other procurement. In doing so, DoD also sought to temporarily apply those provisions that are common to both those contracts covered by section 207 and other contracts, so that all would benefit from the improved coverage until the FAR is modified. However, coordinating and reconciling the many comments received on the proposed general

coverage with the team developing FAR coverage would delay the finalization of this rulemaking and could create unnecessary confusion. Therefore, DoD has concluded that the final DRAFS rule will address only MDAP and SETA OCI coverage as required by section 207. As noted above, comments related to the general coverage have been provided to the team developing changes to FAR coverage on OCIs.

Comment: Another respondent suggested that DoD and the FAR Council could use the WSARA-mandated changes as a pilot program and evaluate the results of the changes when developing the DoD-wide and Government-wide regulations. This respondent further stated that a powerful reason to restrict application of this rule to MDAP procurements as a pilot program is that OCI policy could drive significant changes to the industrial base.

Response: This comment is now moot, since DoD decided to remove the comprehensive coverage from the DFARS rule.

Comment: Another respondent stated that, by extending the scope of this rule beyond MDAPs, it appeared that DoD might have been trying to address the difficult issue of what rules to follow for programs and technology development efforts that start as a non-MDAP and then transition to an MDAP. If so, the respondent stated, this rule could have addressed that issue by limiting its applicability to MDAPs and then requiring that all potential OCI in non-MDAP programs be exempted or be “required to be easily mitigated” once they cross into the MDAP threshold.

Response: The issue of addressing programs that may become MDAP programs has been resolved by revising the final rule to cover both pre-MDAP and MDAP programs. SETA contracts are often required in the early pre-MDAP phase of a program.

2. Move From Subpart 9.5 to Subpart 3.12

Comment: Various respondents recommended that the rule on OCIs should remain in DFARS part 209 for the following reasons:

- Four respondents stated their opinions that the OCI rules should not be moved to DFARS part 203 to avoid the perception that OCI is in the same category as improper business practices, which pertains to conduct that is criminal in nature. Two of these respondents stated that putting OCI coverage in part 209 is inconsistent with the notion that mitigation is the preferred method of addressing OCI. One respondent said it was

unreasonable even to imply that an OCI inherently constitutes misconduct, since OCIs are routine in typical business settings and a byproduct of defense industry consolidation.

- On the positive side, one respondent said that the OCI rules should remain in DFARS part 209 because of their relationship to a company's responsibility. Another respondent stated the opinion that a contracting officer's determination of whether to accept or reject a mitigation plan has the same weight as a determination of affirmative responsibility.

- One respondent pointed out that while the Government has the discretion under both FAR 9.503 and the proposed rule to waive OCIs, it cannot waive improper business practices, such as unlawful gratuities and kickbacks.

- One respondent thought that the regulations should remain within DFARS part 9 simply for continuity.

Response: DoD does not agree that placing the OCI rules in part 203 vs. part 209 lends credence to the perception that OCI is in the same category as conduct that is criminal in nature. We note that part 209 also covers criminal activity by way of its association with suspension and debarment. Furthermore, the scope of part 203 has been evolving over time, an example being the recent FAR rule proposing inclusion of a new FAR subpart 3.11 to include policy addressing personal conflicts of interest by contractor employees performing acquisition functions closely associated with inherently governmental functions—see FAR Case 2008–025. And while acceptance or rejection of a mitigation plan might affect a contractor's responsibility, it is not, in and of itself, a determination relating to responsibility.

However, because the FAR proposed rule has not yet been published, and because the decision has been made to limit this rule to implementation of OCIs in MDAPs (see section II.A.1.), this final rule has been located primarily in subpart 209.5, until such time as the FAR coverage on OCIs may be relocated.

B. MDAP Definitions

1. Major Subcontractor

Comment: Two respondents expressed concerns that the definition of “major subcontractor” was arbitrary. The proposed clause at 252.203–70WW (now 252.209–7009) defined a major subcontractor as a subcontractor awardee with a subcontract totaling 10 percent or more of the value of the

contract. One of the respondents was concerned that a subcontractor with millions of dollars in subcontracts may not be covered, but others with less than \$1 million would be covered.

Response: As the clause relates to subcontractors for major defense acquisition programs which, generally, are programs that exceed \$1.8 billion (Fiscal Year 1990 constant dollars) in eventual total expenditure (10 U.S.C. 2430), a prime contract would not likely be issued with a value of only \$10 million, which would be the prime contract threshold for a \$1 million subcontract to meet the 10 percent subcontract threshold to be a major subcontract. However, DoD agrees with the need to enhance the definition. The final rule contains—

- A lower end exclusion of any subcontract that is less than the cost or pricing data threshold; and
- An upper bound, such that any subcontract that equals or exceeds \$50 million will be considered a major subcontract, regardless of whether it meets the 10 percent criterion.

This is modeled after—

- 15.404–3(c)(1), which specifies thresholds for requiring cost or pricing data on subcontracts; and
- DODI 5000.02 Table 4, which addresses major contracts and subcontracts.

2. Systems Engineering and Technical Assistance

Comment: Two respondents observed that there is no definition of “Systems Engineering and Technical Assistance” in statute or regulation and noted that the FAR defines “systems engineering” and “technical direction,” which may not necessarily be exactly the same as “systems engineering and technical assistance.”

One of the respondents expressed concerns that the definition of “Systems Engineering and Technical Assistance” is vague and that the rule should add “to support requirements definition, source selection, or evaluation of contractor performance in a Major Defense Acquisition Program.”

Several respondents proposed that the “systems engineering and technical assistance” definition be restricted to activities and functions that relate to supporting source selection and testing activities that might trigger bias and impaired objectivity OCIs. According to these respondents, all other support should be classified as engineering or program support; and the related OCIs should be addressed through standard mitigation techniques. “Systems Engineering and Technical Assistance” needs to be better defined and only

address those circumstances when the contractor has “authority” and is in a position to unduly influence a program, event, or outcome.

Response: DoD decided to provide a unified definition for “systems engineering and technical assistance” as a single term, as well as the individual definitions of “systems engineering” and “technical assistance”, because “systems engineering and technical assistance” is the statutory term and is the recognized term for a particular type of contract. DoD sought advice from systems engineering and technical assistance subject matter experts within DoD to arrive at a more comprehensive definition of the term. In response to public comments, DoD changed the requirement from “substantially all” to “any” and clarified that “directing other contractors’ operations” does not apply to the operations of subcontractors. It is not necessary to include in the definition of SETA that it is only for MDAPs. SETA contracts could be for other types of programs as well. The limitation to MDAPs is accomplished through the policy statements and the clause prescriptions.

The definition should not restrict the meaning to select activities based on the presumption of the likelihood of the occurrence of an OCI. While potential OCIs can be significant concerns in source selection and testing activities, potential OCIs can exist in other activities, with harmful repercussions to DoD. The determination of the existence of potential for an OCI is situational and based on the facts and conditions. It is up to the contracting officer to determine the potential for an OCI. The definition should not be based on the presumption that an OCI will occur for SETA contracts and will not occur in the range of other activities.

Comment: One respondent made several comments about the definitions of a number of activities cited within the definition of “systems engineering” and “technical assistance” and suggested further definitional clarity of the activities. The respondent asked what “determining specifications” means and what “determining interface requirements” means. The respondent cited a number of specific actions a contractor may be asked to perform and asked if the work would fall under the DFARS definition of SETA.

Response: Further definition of the activity elements is not required. These terms are in common use. It is up to the contracting officer, exercising common sense, good judgment, sound discretion, and the advice of technical experts to determine if the activities in a

solicitation would be covered by the definition of SETA.

Comment: One respondent recommended that the SETA definition should include a statement that the contractor performs the services, but will not be delivering the system. The respondent cites Section 203.1270–6 (now 209.571–7) as the basis for this change.

Response: The consequence of being a SETA contractor is outside of, and unnecessary for, inclusion within the definition of what a SETA contractor is. While 209.571–7 prohibits a SETA contractor from participating as a contractor or major subcontractor on the related program, there are certain instances listed in 209.571–7 where the paragraph does not apply. Changing the definition of SETA is unnecessary and could lead to erroneous application of the rule.

C. MDAP OCI Policy

1. Mitigation Preference Is Not Appropriate

Comments: A number of respondents objected to the rule's designation of mitigation as the "preferred method" for resolving OCIs.

Two respondents suggested that a preference for mitigation would reduce, rather than increase, competition for Government contracts. Specifically, they suggested that the preference appears to favor industry interests in the sense that it chiefly will benefit large, integrated businesses which, but for the application of a preference for mitigation, might otherwise be precluded from competing for certain requirements.

Several respondents expressed concern that the preference for mitigation would impinge upon the contracting officer's duty and discretion to consider all appropriate factors, such as the potential costs associated with monitoring mitigation plans, when determining which method for resolving a particular OCI would best serve the Government's interest.

One respondent stated that establishing an outright preference for mitigation would create a potential ground for bid protests by unsuccessful offerors. The respondent opined that DoD agencies may find themselves defending against claims that contracting officers did not take adequate affirmative steps to comply with the preference by finding ways to mitigate potential OCIs.

Response: DoD carefully considered the comments on both sides of this issue. While finding that the policy rationale supporting the proposed

preference for mitigation is sound, DoD agrees that establishing a formal preference may have the unintended effect of encouraging contracting officers to make OCI resolution decisions without considering all appropriate facts and information. Therefore, in order to make it clear that decisions about how best to resolve OCIs arising in particular procurements remain a matter within the "common sense, good judgment, and sound discretion" of DoD contracting officers, DoD has removed the rule's stated preference for mitigation.

However, DoD replaced the rule's explicit mitigation preference with a more general statement of DoD policy interests in this area. Specifically, the rule now provides that it is DoD policy to promote competition and, to the extent possible, preserve DoD access to the expertise and experience of highly-qualified contractors. To this end, the rule now emphasizes the importance of employing OCI resolution strategies that do not unnecessarily restrict the pool of potential offerors and do not impose per se restrictions on the use of particular resolution methods, except as may be required under part 209.571–7.

Comment: One respondent stated that the rule's stated policy preference for mitigation should be replaced with a preference for avoidance in order to comply with the "statutory intent" of WSARA. The respondent expressed concern that various aspects of the rule significantly impair the ability of contracting officers to employ avoidance strategies. Finally, the respondent commented that the rule should reflect that mitigation is the resolution method of last resort.

Response: As discussed in the response to the preceding comment, DoD replaced the rule's explicit preference for mitigation with language more generally emphasizing that contracting officers should seek to employ OCI resolution strategies that promote competition and do not unnecessarily restrict the pool of potential offerors. DoD does not agree that WSARA requires an across-the-board preference for avoidance. Such a preference would give rise to the same issues and concerns voiced by other respondents relating to contracting officer discretion, potential bid protests, and the like. To the extent that WSARA creates a requirement or preference for avoidance, that preference is limited to SETA contracts and is appropriately addressed at 209.571–7.

2. Mitigation Preference Is Appropriate and Should Even Be Strengthened

Comments: A number of respondents expressed support for the rule's stated preference for using mitigation to resolve OCIs. Generally, these respondents stated that the preference for mitigation would promote competition, preserve Government access to the broadest range of experienced contractors, and promote transparency.

Several respondents expressed concern that the rule does not do enough to encourage contracting officers to use mitigation and that some aspects of the rule may, in fact, discourage the use of mitigation.

One respondent suggested that, despite its stated preference for mitigation, the rule as a whole appears actually to favor avoidance and neutralization, principally because it provides "no meaningful guidance regarding when and how mitigation should be used."

Another respondent stated that the preference for mitigation would be more compelling if the rule included more examples of acceptable mitigation methods.

A third respondent made several specific recommendations for bolstering the preference for mitigation. The respondent suggested that DoD: (1) Add a statement "summarizing the potential benefits of mitigation" and (2) add language requiring contracting officers to "consider the status of the industrial base and the number of potential sources" before determining that mitigation was inappropriate.

Response: As discussed in responses to preceding comments, DoD decided to replace the rule's express preference for mitigation with language indicating that it is DoD policy that contracting officers should seek to employ OCI resolution strategies that promote competition and do not unnecessarily restrict the pool of potential offerors. DoD appreciates the general concern voiced by these respondents that some agencies and contracting officers may already be either implicitly or explicitly favoring avoidance-based resolution strategies. DoD recognizes that an explicit preference for mitigation may serve a useful purpose in cases where agencies or contracting officers are unnecessarily foreclosing competitive opportunities by favoring avoidance over mitigation. Therefore, although DoD has removed the rule's express preference for mitigation, the rule's revised policy language will have the appropriate effect of encouraging contracting officers to consider all potential OCI resolution

strategies, to pursue resolution outcomes that promote competition whenever feasible, and to implement strategies that are consistent with the Government's best interests, broadly speaking.

A more detailed analysis of the methods and benefits of mitigation is outside the scope of the present rule and may be addressed in the FAR rule on OCIs.

D. Identification of MDAP OCIs

Comment: One respondent requested a clarification in 203.1270–5(a)(2) (now 209.571–6(a)(2)) of the proposed rule to provide that there should not be a second OCI evaluation after award when the contractor establishes a team arrangement and its accepted proposal explains the work the prime will do and what other team members will do. The respondent was concerned that the proposed rule implies that there will be a reevaluation, although WSARA does not require a second evaluation. The respondent recommended adding before the semicolon in subparagraph (a)(2) the following: “either as part of the initial award determination or, if the prime contractor makes this disclosure after award, then before beginning the relevant work”.

Response: There is nothing in the statement in the proposed rule that implies that the timing of the evaluation would be after award. In the proposed rule, the policy in 203.703 made clear that OCIs are to be resolved early in the acquisition process. Since this rule is limited strictly to MDAP, the requirement in current FAR 9.504(a) still applies, *i.e.*, the contracting officer is required to analyze planned acquisitions in order to identify and evaluate potential OCIs as early in the acquisition process as possible, and to avoid, neutralize, or mitigate significant potential conflicts before contract award. Further details about early resolution of OCIs will be addressed in the FAR OCI rule.

Comment: The same respondent also commented that the regulation should not be silent on how the contracting officer is to consider awards to affiliates.

Response: The policy section on identification of OCIs at 209.571–6(a)(2) states that the contracting officer “shall consider” the proposed award of a major subsystem by a prime contractor to business units or other affiliates of the same corporate entity. Since OCIs are very specific to individual situations, the regulation cannot provide a precise prescription for how the contracting officer should consider this, except to alert the contracting officer to potential conflicts in such situations.

E. SETA Contracts

Comment: Four respondents expressed concern that the rule's exception for all highly-qualified SETA contractors (where the OCI can be adequately resolved) is overly broad, beyond the limited exception contemplated by WSARA, and unnecessary in view of the numbers of conflict-free SETA contractors.

One respondent stated that there is clear congressional preference for a rule prohibiting any systems engineering firm from participating in the development or construction of a system in an MDAP. The respondent quoted various sources, including the references by the Senate Armed Services Committee during debate on SR 111–201.

One respondent recommended that the rule should include a requirement that the contracting officer also determine that there is no other source with the requisite domain experience and expertise before approving OCI mitigation.

However, another respondent expressed concern about whether the rule will adequately ensure DoD access to advice on systems architecture and engineering matters.

Response: WSARA permits the SETA exception contained in the proposed rule. A SETA exception is necessary to meet DoD needs and the proposed exception contained the requirement that the OCI must be adequately resolved. In the absence of an exception, many or all prospective SETA contractors may have OCIs and could be excluded. As a result, the best-qualified or best-priced contractors might be unavailable unless future restrictions are lifted. However, in response to concern that the exception was overly broad and would not meet the objective of WSARA to “tighten” application of OCI policy, DoD revised the exception to require a determination by the head of the contracting activity that “an exemption is necessary because DoD needs the domain experience and expertise of the highly qualified, apparently successful offeror.” The head of the contracting activity must further determine that, based on the agreed-to resolution strategy, the apparently successful offeror will be able to provide objective and unbiased advice.

Comment: Another respondent objected that the rule did not include an exception for performance of SETA functions by any affiliate of the contractor performing production or development work as a prime or major contractor, as was referenced in the statutory language and the

accompanying conference report. Further, the respondent objected that the only acceptable mitigation approach for impaired objectivity OCIs for MDAPS seemed to be splitting work away from a contractor and affiliates, as the waiver option is not authorized.

Response: The SETA exception is not unduly restrictive with regard to affiliates. It is not true that affiliates of the contractor performing the production contract could not qualify for performance of SETA functions.

Further, although the waiver option was deliberately omitted from the exception because the statute requires that the contractor must be able to provide objective and unbiased advice, the rule does not address what mitigation approaches would be acceptable.

F. Training and Implementation

Comment: One respondent stated that it is necessary for the rule to address training and implementation. The respondent stated that contracting officers should not be allowed to make decisions on OCIs until training is completed.

Response: This is not an entirely new requirement. The FAR already requires that OCIs be addressed, and there are existing training courses that cover OCIs. The Government will make changes to standard contracting course curriculum to implement these changes.

Comment: The same respondent requested more guidance on the use of particular data sources to inform their decisions, and any required processes to implement the rule effectively. For example, the respondent suggests that contracting officers should separate SETA-type work from design- and development-type work, and not include both types in the same task order or other contract vehicle.

Response: FAR 9.506 procedures provide current guidance on sources of information to identify and evaluate potential organizational conflicts of interest. DoD has also added to DFARS Procedures, Guidance, and Information the guidance about separating SETA-type work from other types of design- and development-type work.

G. Regulatory Flexibility Analysis

Comment: Three respondents commented on the potential impact of the regulation on small businesses. However, several of the comments related to aspects of the rule that have been eliminated from this more focused final rule.

One respondent recommended adding language into the regulation that would exempt from OCI restrictions small

businesses that are not involved in hardware or major software developments. In addition, the same respondent recommended imposing the OCI restrictions on prime contractors and large subcontractors, and allowing small subcontractors (those with less than 10 percent of total award) and small businesses to continue to provide both development and contract efforts with approved OCI plans.

Response: DoD notes that the rule, per the statute, requires that a SETA contract for a major defense acquisition program contain a provision prohibiting the contractor or any affiliate of the contractor from participating as a prime contractor or a major subcontractor in the development or construction of a weapon system under the program. Therefore, "small," *i.e.*, other than major, subcontractors are exempted. The statute, however, does not provide for a specific exemption for small businesses. In addition, the rule does allow offerors, whether large or small, to continue to provide both development and contract efforts with approved OCI plans and an appropriate determination by the head of the contracting activity in accordance with 209.571-7(b).

H. Paperwork Reduction Act

Comments: Although no respondents specifically commented on the estimated burden hours published with the proposed rule, several respondents commented on the burden imposed by the disclosure requirement of 252.203-XX(e)(1)(ii).

Response: This requirement is no longer included in the rule. The only requirement now is for submission of a mitigation plan under a SETA contract if the offeror is requesting an exception to the limitation on future contracting.

III. Executive Order 12866

This is a significant regulatory action and, therefore, is subject to Office of Management and Budget review under section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

IV. Regulatory Flexibility Act

DoD certifies that this final rule will not result in a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the requirements of subpart 209.572 do not differ substantially from the burden currently imposed on offerors and contractors by FAR subpart 9.5.

With regard to major defense acquisition programs, the prohibition

against a SETA contractor participating in the development or production contract applies only to the prime contract or a major subcontract. Therefore, small businesses are less likely to be affected. Further, the rule allows for avoidance, neutralization, or mitigation of organizational conflicts of interest. A final regulatory flexibility analysis has, therefore, not been performed.

V. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. chapter 35) applies because the final rule contains information collection requirements.

Title: Defense Federal Acquisition Regulation Supplement (DFARS); Organizational Conflicts of Interest in Major Defense Acquisition Programs.

Number of Respondents: 150.

Responses per Respondent: 3.

Annual Responses: 750.

Average Burden per Response: 20.

Annual Burden Hours: 15,000.

Needs and Uses: DoD needs the information required by 252.209-7008 to identify and resolve organizational conflicts of interest, as required by section 207 of the Weapon Systems Acquisition Reform Act of 2009.

The burden hours are substantially reduced in comparison to the proposed rule because the final rule only addresses organizational conflicts of interest in major defense acquisition programs.

The information collection requirements for this final rule have been approved under OMB Clearance Number 0704-0477, Organizational Conflicts of Interest in Major Defense Acquisition Programs ICR.

List of Subjects in 48 CFR Parts 209 and 252

Government procurement.

Amy G. Williams,

Editor, Defense Acquisition Regulations System.

■ Therefore, 48 CFR parts 209 and 252 are amended as follows:

■ 1. The authority citation for 48 CFR parts 209 and 252 continues to read as follows:

Authority: 41 U.S.C. 421 and 48 CFR chapter 1.

PART 209—CONTRACTOR QUALIFICATIONS

■ 2. Sections 209.571, 209.571-0, 209.571-1, 209.571-2, 209.571-3, 209.571-4, 209.571-5, 209.571-6, and 209.571-7, and 209.571-8 are added to read as follows:

* * * * *

209.571 Organizational conflicts of interest in major defense acquisition programs.

209.571-0 Scope of subpart.

209.571-1 Definitions.

209.571-2 Applicability.

209.571-4 Mitigation.

209.571-5 Lead system integrators.

209.571-6 Identification of organizational conflicts of interest.

209.571-7 Systems engineering and technical assistance contracts.

209.571-8 Solicitation provision and contract clause.

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209.571 Organizational conflicts of interest in major defense acquisition programs.

209.571-0 Scope of subpart.

This subpart implements section 207 of the Weapons System Acquisition Reform Act of 2009 (Pub. L. 111-23).

209.571-1 Definitions.

As used in this section—

"Lead system integrator" is defined in the clause at 252.209-7007, Prohibited Financial Interests for Lead System Integrators.

"Major Defense Acquisition Program" is defined in 10 U.S.C. 2430.

"Major subcontractor" is defined in the clause at 252.209-7009, Organizational Conflict of Interest—Major Defense Acquisition Program.

"Pre-Major Defense Acquisition Program" means a program that is in the Materiel Solution Analysis or Technology Development Phases preceding Milestone B of the Defense Acquisition System and has been identified to have the potential to become a major defense acquisition program.

"Systems engineering and technical assistance."

(1) "Systems engineering" means an interdisciplinary technical effort to evolve and verify an integrated and total life cycle balanced set of system, people, and process solutions that satisfy customer needs.

(2) "Technical assistance" means the acquisition support, program management support, analyses, and other activities involved in the management and execution of an acquisition program.

(3) "Systems engineering and technical assistance"—

(i) Means a combination of activities related to the development of technical information to support various acquisition processes. Examples of systems engineering and technical assistance activities include, but are not limited to, supporting acquisition efforts such as—

(A) Deriving requirements;

(B) Performing technology assessments;

(C) Developing acquisition strategies;
 (D) Conducting risk assessments;
 (E) Developing cost estimates;
 (F) Determining specifications;
 (G) Evaluating contractor performance and conducting independent verification and validation;

(H) Directing other contractors' (other than subcontractors) operations;

(I) Developing test requirements and evaluating test data;

(J) Developing work statements (but see paragraph (ii)(B) of this definition).

(ii) Does not include—

(A) Design and development work of design and development contractors, in accordance with FAR 9.505–2(a)(3) or FAR 9.505–2(b)(3), and the guidance at PGI 209.571–7; or

(B) Preparation of work statements by contractors, acting as industry representatives, under the supervision and control of Government representatives, in accordance with FAR 9.505–2(b)(1)(ii).

209.571–2 Applicability.

(a) This subsection applies to major defense acquisition programs.

(b) To the extent that this section is inconsistent with FAR subpart 9.5, this section takes precedence.

209.571–3 Policy.

It is DoD policy that—

(a) Agencies shall obtain advice on major defense acquisition programs and pre-major defense acquisition programs from sources that are objective and unbiased; and

(b) Contracting officers generally should seek to resolve organizational conflicts of interest in a manner that will promote competition and preserve DoD access to the expertise and experience of qualified contractors. Accordingly, contracting officers should, to the extent feasible, employ organizational conflict of interest resolution strategies that do not unnecessarily restrict the pool of potential offerors in current or future acquisitions. Further, contracting activities shall not impose across-the-board restrictions or limitations on the use of particular resolution methods, except as may be required under 209.571–7 or as may be appropriate in particular acquisitions.

209.571–4 Mitigation.

(a) Mitigation is any action taken to minimize an organizational conflict of interest. Mitigation may require Government action, contractor action, or a combination of both.

(b) If the contracting officer and the contractor have agreed to mitigation of an organizational conflict of interest, a

Government-approved Organizational Conflict of Interest Mitigation Plan, reflecting the actions a contractor has agreed to take to mitigate a conflict, shall be incorporated into the contract.

(c) If the contracting officer determines, after consultation with agency legal counsel, that the otherwise successful offeror is unable to effectively mitigate an organizational conflict of interest, then the contracting officer, taking into account both the instant contract and longer term Government needs, shall use another approach to resolve the organizational conflict of interest, select another offeror, or request a waiver in accordance with FAR 9.503 (but see statutory prohibition in 209.571–7, which cannot be waived).

(d) For any acquisition that exceeds \$1 billion, the contracting officer shall brief the senior procurement executive before determining that an offeror's mitigation plan is unacceptable.

209.571–5 Lead system integrators.

For limitations on contractors acting as lead systems integrators, see 209.570.

209.571–6 Identification of organizational conflicts of interest.

When evaluating organizational conflicts of interest for major defense acquisition programs or pre-major defense acquisition programs, contracting officers shall consider—

(a) The ownership of business units performing systems engineering and technical assistance, professional services, or management support services to a major defense acquisition program or a pre-major defense acquisition program by a contractor who simultaneously owns a business unit competing (or potentially competing) to perform as—

(1) The prime contractor for the same major defense acquisition program; or

(2) The supplier of a major subsystem or component for the same major defense acquisition program.

(b) The proposed award of a major subsystem by a prime contractor to business units or other affiliates of the same parent corporate entity, particularly the award of a subcontract for software integration or the development of a proprietary software system architecture; and

(c) The performance by, or assistance of, contractors in technical evaluation.

209.571–7 Systems engineering and technical assistance contracts.

(a) Agencies shall obtain advice on systems architecture and systems engineering matters with respect to major defense acquisition programs or

pre-major defense acquisition programs from Federally Funded Research and Development Centers or other sources independent of the major defense acquisition program contractor.

(b) *Limitation on Future Contracting.*

(1) Except as provided in paragraph (c) of this subsection, a contract for the performance of systems engineering and technical assistance for a major defense acquisition program or a pre-major defense acquisition program shall prohibit the contractor or any affiliate of the contractor from participating as a contractor or major subcontractor in the development or production of a weapon system under such program.

(2) The requirement in paragraph (b)(1) of this subsection cannot be waived.

(c) *Exception.* (1) The requirement in paragraph (b)(1) of this subsection does not apply if the head of the contracting activity determines that—

(i) An exception is necessary because DoD needs the domain experience and expertise of the highly qualified, apparently successful offeror; and

(ii) Based on the agreed-to resolution strategy, the apparently successful offeror will be able to provide objective and unbiased advice, as required by 209.571–3(a), without a limitation on future participation in development and production.

(2) The authority to make this determination cannot be delegated.

209.571–8 Solicitation provision and contract clause.

(a) Use the provision at 252.209–7008, Notice of Prohibition Relating to Organizational Conflict of Interest—Major Defense Acquisition Program, if the solicitation includes the clause at 252.209–7009, Organizational Conflict of Interest—Major Defense Acquisition Program; and

(b) Use the clause at 252.209–7009, Organizational Conflict of Interest—Major Defense Acquisition Program, in solicitations and contracts for systems engineering and technical assistance for major defense acquisition programs or pre-major defense acquisition programs.

* * * * *

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 3. Sections 252.209–7008 and 252.209–7009 are added to read as follows:

252.209–7008 Notice of Prohibition Relating to Organizational Conflict of Interest—Major Defense Acquisition Program.

As prescribed in 209.571–8(a), use the following provision:

NOTICE OF PROHIBITION RELATING TO ORGANIZATIONAL CONFLICT OF INTEREST—MAJOR DEFENSE ACQUISITION PROGRAM (DEC 2010)

(a) *Definitions.* “Major subcontractor” is defined in the clause at 252.209–7009, Organizational Conflict of Interest—Major Defense Acquisition Program.

(b) This solicitation is for the performance of systems engineering and technical assistance for a major defense acquisition program or a pre-major defense acquisition program.

(c) *Prohibition.* As required by paragraph (b)(3) of section 207 of the Weapons System Acquisition Reform Act of 2009 (Pub. L. 111–23), if awarded the contract, the contractor or any affiliate of the contractor is prohibited from participating as a prime contractor or a major subcontractor in the development or production of a weapon system under the major defense acquisition program or pre-major defense acquisition program, unless the offeror submits, and the Government approves, an Organizational Conflict of Interest Mitigation Plan.

(d) *Request for an exception.* If the offeror requests an exception to the prohibition of paragraph (c) of this provision, then the offeror shall submit an Organizational Conflict of Interest Mitigation Plan with its offer for evaluation.

(e) *Incorporation of Organizational Conflict of Interest Mitigation Plan in contract.* If the apparently successful offeror submitted an acceptable Organizational Conflict of Interest Mitigation Plan, and the head of the contracting activity determines that DoD needs the domain experience and expertise of the highly qualified, apparently successful offeror in accordance with FAR 209.571–7(c), then the Contracting Officer will incorporate the Organizational Conflict of Interest Mitigation Plan into the resultant contract, and paragraph (d) of the clause at 252.209–7009 will become applicable.

(End of provision)

252.209–7009 Organizational Conflict of Interest—Major Defense Acquisition Program.

As prescribed in 209.571–8(b), use the following clause:

ORGANIZATIONAL CONFLICT OF INTEREST—MAJOR DEFENSE ACQUISITION PROGRAM (DEC 2010)

(a) *Definition.*

“Major subcontractor,” as used in this clause, means a subcontractor that is awarded a subcontract that equals or exceeds

(1) Both the cost or pricing data threshold and 10 percent of the value of the contract under which the subcontracts are awarded; or

(2) \$50 million.

(b) This contract is for the performance of systems engineering and technical assistance

for a major defense acquisition program or a pre-major defense acquisition program.

(c) *Prohibition.* Except as provided in paragraph (d) of this clause, as required by paragraph (b)(3) of section 207 of the Weapons System Acquisition Reform Act of 2009 (Pub. L. 111–23), the Contractor or any affiliate of the Contractor is prohibited from participating as a prime contractor or major subcontractor in the development or production of a weapon system under the major defense acquisition program or pre-major defense acquisition program.

(d) *Organizational Conflict of Interest Mitigation Plan.* If the Contractor submitted an acceptable Organizational Conflict of Interest Mitigation Plan that has been incorporated into this contract, then the prohibition in paragraph (c) of this clause does not apply. The Contractor shall comply with the Organizational Conflict of Interest Mitigation Plan. Compliance with the Organizational Conflict of Interest Mitigation Plan is a material requirement of the contract. Failure to comply may result in the Contractor or any affiliate of the Contractor being prohibited from participating as a contractor or major subcontractor in the development or production of a weapon system under the program, in addition to any other remedies available to the Government for noncompliance with a material requirement of a contract.

(End of clause)

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DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 225 and 252

RIN 0750–AG80

Defense Federal Acquisition Regulation Supplement; Foreign Participation in Acquisitions in Support of Operations in Afghanistan (DFARS Case 2009–D012)

AGENCY: Defense Acquisition Regulations System; Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD is issuing a final rule to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to implement—

- Waiver of section 302(a) of the Trade Agreements Act of 1979, as amended, which prohibits acquisitions of products or services from nondesignated countries, in order to allow acquisition from the nine South Caucasus/Central and South Asian (SC/CASA) states; and
- Determination of inapplicability of the Balance of Payments Program evaluation factor to offers of products

(other than arms, ammunition, or war materials) from the SC/CASA states to support operations in Afghanistan.

DATES: *Effective Date:* December 29, 2010.

FOR FURTHER INFORMATION CONTACT: Ms. Amy Williams, Defense Acquisition Regulations System, OUSD (AT&L) DPAP/DARS), Room 3B855, 3060 Defense Pentagon, Washington, DC 20301–3060. Telephone 703–602–0328; facsimile 703–602–0350. Please cite DFARS Case 2009–D012.

SUPPLEMENTARY INFORMATION:

I. Background

DoD published a proposed rule on January 6, 2010 (75 FR 832) to implement—

- A waiver of the procurement prohibition of section 302(a) of the Trade Agreements Act of 1979 with regard to acquisitions by DoD or GSA, on behalf of DoD, in support of operations in Afghanistan from the following nine South Caucasus/Central and South Asian (SC/CASA) states: Armenia, Azerbaijan, Georgia, Kazakhstan, Kyrgyzstan, Pakistan, Tajikistan, Turkmenistan, and Uzbekistan; and

- A determination by the Deputy Secretary of Defense that it would be inconsistent with the public interest to apply the provisions of the Balance of Payments Program to offers of products (other than arms, ammunition, or war materials) and construction materials from these SC/CASA states acquired in direct support of operations in Afghanistan.

In addition, the proposed rule made corrections to—

- Alternate I of 252.225–7035, to delete the phrase “Australian or” from paragraph (c)(2)(i); and
- Alternate I of 252.225–7045, to add in paragraph (b), line 4, that the Bahrain Free Trade Agreement does not apply.

DoD did not receive any comments on the proposed rule.

Therefore, DoD is finalizing the proposed rule with no substantive change. The final rule does incorporate the following editorial and technical corrections:

- Incorporates the current DFARS baseline.
- Amends various clause prefaces to reference the correct clause prescriptions.
- Amends 225.1101(6)(i) to reference the World Trade Organization (WTO) Government Procurement Agreement (GPA) rather than the Trade Agreements Act, in conformance with FAR 225.1101(c)(1).
- Amends paragraph (d), added by Alternate II to the clause at 252.225–