The Coalition for Government Procurement

1990 M Street, NW · Suite 450 · Washington, D.C. 20036 · (202) 331-0975 · Fax (202) 822-9788

www.thecgp.org

July 21, 2010

Ms. Amy Williams
OUSD (AT&L) DPAP (DARS)
3060 Defense Pentagon Room 3B855 Washington, D.C. 20301-3060

Re: Defense Federal Acquisition Supplement; Organizational Conflicts of Interest - Implementation of WSARA Section 207, DFARS Case 2009-D015, 75 Fed. Reg. 20954 (Apr. 22, 2010)

Dear Ms. Williams:

The Coalition for Government Procurement ("Coalition") appreciates the opportunity to submit these comments on Organizational Conflicts of Interest – Implementation of Section 207 the Weapons System Acquisition Reform Act of 2009, 75 Fed. Reg. 20954 (Apr. 22, 2010) ("Proposed Rule").

The Coalition for Government Procurement is a non-profit association of over 300 firms selling commercial services and products to the federal government. Our members comprise small, medium, and large businesses actively engaged in Federal business. Our members collectively account for approximately 70% of the sales generated through the GSA Multiple Award Schedules program and about half of the commercial item sales made to the government each year.

BACKGROUND

On April 22, 2010, DoD published the Proposed Rule to amend the DFARS with respect to OCIs and to implement Section 207 of the Weapon Systems Acquisition Reform Act (Pub. L. No. 111-23) ("WSARA"). The Proposed Rule followed an Advance Notice of Proposed Rulemaking published on March 26, 2008, and a public hearing on December 8, 2010.

The Proposed Rule is intended to be used by DoD in lieu of FAR 9.5 until the FAR OCI revision is completed, at which point DoD will follow the

FAR subject to any DoD-unique requirements. Thus, the Proposed Rule will replace FAR coverage for DoD contracts.

COMMENTS

1. Proposed Rule Reduces Competition

The Proposed Rule states that DOD favors mitigation as the preferred method of resolution (Section 203.1203). The Coalition believes that mitigation will help foster competition and agrees with mediation being the preferred avenue. However, the Proposed Rule creates a restriction on competition based simply on the "appearance" of a conflict of interest. The Proposed Rule holds that the Government must avoid the "appearance of impropriety", whether or not a conflict exists (Section 203.1203(a)(2).

This approach is overly broad and infers that the "appearance" of a conflict is the same thing as an "actual" conflict. The focus on a subjective "appearance" standard could lead to inconsistent application of the rule and have the unintended consequence of limiting competition. Instead, the Coalition recommends the DAR Council use the facts of each particular case, focusing on a company's actual risk and the company's structure and activities.

The Proposed Rule may have the unintended consequence of driving contractors that lack sophisticated tracking systems out of the marketplace. Contractors without internal systems to track sales of commercial items and services will be unable to accurately identify organizational conflicts of interest. These contractors will be forced to add such systems at a significant cost, or decide against doing business with DoD. Contractors who decide to upgrade their system will pass along that cost to customers, making their company less competitive.

2. Disclosure Requirement is Overly Broad and Overly Burdensome

The proposed rule requires a contractor to "disclose all relevant information regarding an OCI, or to represent, to the best of its knowledge and belief, that there is no OCI." And "regardless of whether the contractor discloses the existence of an OCI, the contractor must describe any other work performed on contracts and subcontracts within the past five years that is associated with the offer it plans to submit." Finally, the Proposed Rule states that failure to disclose to the contracting officer an OCI of which a successful contractor "was aware or should have been aware" before the contract was awarded, could result in termination of any resulting contract.

(See Section 252.203-70XX, Notice of Potential Organizational Conflict of Interest).

Requiring contractors to disclose all work performed on any contract within the past five years is overly burdensome to contractors who must collect the data, as well as contracting officers, who must review all of the information in deciding whether or not an OCI exists. Further, to comply with the new disclosure requirements, contractors will have to develop new internal procedures to collect and maintain data, which leads to more burden. The Coalition recommends limiting the required information to potential conflicts of interest. Agencies will benefit from less information to review, and contractors will have less data to analyze and collect.

The Proposed Rule also views the contractor as a single entity, even if a mere segment of the company is doing business with DoD. The Proposed Rule defines "contractor" to encompass "the total contractor organization, including not only the business unit or segment that signs the contract. It also includes all subsidiaries and affiliates." (See Section 203.1201). This approach could lead to excessive determinations of organizational conflicts of interest. Further, the Proposed Rule does not define "affiliates", while the FAR does. The final rule should define "affiliates", or make clear that the FAR definition is to be used.

3. Mediation of Organizational Conflicts of Interests

As stated above, the Coalition supports the position taken in the Proposed Rule that mitigation is the preferred method for resolving organizational conflicts of interest. Mitigation advances competition in the acquisition process, promotes transparency and allows for contracting officers to use their knowledge and expertise.

However, the Proposed Rule lacks sufficient guidance on the use of mitigation. As written, contracting officers will likely err on the side of rejecting a mitigation plan at the mere appearance of an OCI, which would hurt both industry and government. The Coalition recommends strong and direct wording in the final rule to assure acceptable mitigation techniques are not denied. When a contractor presents a mitigation plan sufficient to protect the Government's interest, a contracting officer should be required to accept the plan. Unless a contracting officer can recognize a material risk that could harm the Government, the CO should be directed to use mitigation.

4. Inspector Generals could become Involved in the Award Process

The Proposed Rule requires contractors to "disclose facts bearing on the possible