The Coalition
for Government
Procurement

June 27, 2011

General Services Administration
Regulatory Secretariat (MVCB)
Attn: Hada Flowers
1275 First Street, NE, 7th Floor
Washington, DC 20417

Re: FAR Case 2011-001, Federal Acquisition Regulation; Organizational Conflicts of Interest Proposed Rule, 76 Fed. Reg. 23236 (Apr. 26, 2011)

Dear Ms. Flowers,

On behalf of The Coalition for Government Procurement, the following comments are provided on the proposed rule amending the Federal Acquisition Regulation (FAR) according to the review required by Section 841 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 for FAR coverage of organizational conflicts of interest. The proposed rule was published in the Federal Register on April 26, 2011.

The Coalition for Government Procurement is a non-profit association of approximately 300 firms selling commercial services and products to the Federal Government. Our members collectively account for approximately 70% of the sales generated through the GSA Multiple Award Schedules (MAS) program and about half of the commercial item solutions purchased annually by the Federal Government. Many of our members also are information technology contractors on most, if not all, of the Governmentwide Acquisition Contracts. In addition, our members are contractors on many agency wide multiple award contracts as well as multi-agency contracts. Coalition members include small, medium and large business concerns. Our membership includes service contractors across the spectrum of government contracting. As such, the proposed revision of the organizational conflict of interest regulations is of particular interest. The Coalition is proud to have worked with Government officials over the past 30 years towards the mutual goal of common sense acquisition.

INTRODUCTION

The proposed FAR rule implements Section 841 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 ("Section 841"). As such, it is of particular interest to the Coalition's members. The Coalition appreciates the opportunity to provide our comments on the proposed rule. Section 841 required a review of the FAR coverage on organizational conflicts of interest ("OCIs"). This proposed rule was created as a result of a review conducted by the Civilian Agency Acquisition Council, and the Defense Acquisition Regulations Council, and the Office of Federal Procurement Policy ("OFPP") in consultation with the Office of Government Ethics. Additionally, the 2007 Report of the Acquisition Advisory Panel called for improved agency guidance on OCIs.

The Coalition supports the work done by the Councils and applauds their efforts on the proposed rule. We prefer the regulatory approach to OCIs taken in the FAR proposed rule. Our comments focus attention on areas where we believe that this proposed rule can be improved, which include:

- leaving OCI instructions under FAR Subpart 9.5,
- providing more specific guidance regarding the disclosure requirements,
- removing the indemnification and third party beneficiaries clauses, and
- providing further guidance on the distinction between the risk of harm to the integrity of the competitive process and harm to the Government's business interest.

I. OCI Coverage Should Remain under FAR Subpart 9.5

The Coalition believes that moving the OCI coverage under FAR Part 3 is unnecessary and sends the wrong message. FAR Part 3 deals with improper business practices including civil or criminal violations relating to government contracts such as fraud and bribery. OCIs are not generally the result of improper business practices.

OCIs are more typically the product of normal business transactions, such as mergers or acquisitions, or an expansion of the scope of a current government contract. Indeed, the reasons cited for the review and proposed changes to the OCI regulations are attributed to natural trends in Government and industry that have led to an increase

in the potential for OCIs. The growth in services, industry consolidation, and the use of multiple-award task and delivery-order contracts, which allow a large amount of work to be awarded to a limited pool of contractors, are specifically cited in the preamble to the rule as key factors driving the need to update the OCI regulations. The reasons for the proposed revisions make sense and Coalition supports this effort.

However, moving the OCI guidance to FAR Part 3 will likely create the perception that an OCI is actually an improper business practice. It also runs counter to the sound framework for addressing OCIs laid out in the proposed rule. For example, improper business practices currently addressed throughout FAR Part 3 do not contemplate mitigation plans or waivers as the proposed rule would provide for certain OCIs. In the Coalition's view, the proposed OCI regulations are inconsistent with the regulatory coverage contained in FAR Part 3.

Therefore, the Coalition recommends updating the OCI coverage in FAR 9.5 rather than placing any new coverage in FAR Part 3.

II. Disclosure Requirements for Both a Potential OCI and Nonpublic Information are Overly Broad

The Coalition is particularly concerned with the extremely broad disclosure requirement under the proposed rule for both OCIs and unequal access to nonpublic information. Our suggestion is that both disclosures be more focused and specifically related to the information that the Government seeks to gather and examine in relation to a potential OCI. In the case of disclosure and use of sensitive information, more specific guidance is necessary to protect contractor confidential and proprietary information.

A. Potential OCI Disclosure Requirements

Under proposed rule Section 3.1206-2 Pre-solicitation Responsibilities and Section 3.1207 Solicitation Provision and Contract Clause, if a contracting officer (CO) determines that a contractor may have the potential OCI, the CO must include the proposed clause, 52.203-XX, Notice of Potential Organizational Conflict of Interest. Under the proposed clause, the offeror must disclose "*all* relevant information regarding *any* OCIs, including information about potential subcontracts." The use of

the term "all relevant information" is problematic. The terminology is very broad and ambiguous. The result will likely be an unclear understanding or even a misunderstanding between the CO and the offeror as to the scope of disclosure. The lack of clarity in the clause when combined with the civil False Claims Act will likely increase risk to contractors. At the very least, the combination will increase the perception or calculation of risk regarding the potential failure to fully disclose "all relevant information." The risks associated with the proposed disclosure requirement will likely lead offerors to over report information to ensure compliance. In turn, expansive disclosure by offerors could unduly burden acquisition personnel.

The Coalition is also concerned that the disclosure requirement as currently structured will likely result in unfocused and unrelated inquiries into general business records, and is significantly beyond the scope of a more focused and applicable disclosure of a potential OCI. In this context, potential offerors may find the burden of disclosure overly risky and determine that protection of valued confidential and proprietary information is more important than the increased burdens of doing business with the Government. As a result competition would be reduced.

The Coalition recommends that the proposed regulation be revised to focus more quality attention on addressing a potential OCI, (*e.g.* through mitigation, avoidance, acceptance, etc.) and less on the quantity of information to be disclosed. A narrower focus will allow agencies to be more effective in solving and addressing potential OCI problems rather than wasting time and resources on the collection and examination of irrelevant information. This is especially of concern considering the already overburdened acquisition workforce.

B. Protection and Disclosure of Nonpublic Information

The Coalition is concerned that the definition of "non public information" is overly broad. Under FAR 2.101 of the proposed rule, nonpublic information is defined as "any Government or third-party information that (1) Is exempt from disclosure under the Freedom of Information Act (5 U.S.C. 552) or otherwise protected from disclosure by statute, Executive order, or regulation; or (2) Has not been disseminated to the general public, and the Government has not yet determined whether the information can or will be made available to the public."

The second prong of the definition, which includes information that the Government has not yet determined whether it can or will be released to the public, is of particular concern. It is a moving target. The Government does not typically make determinations on what information may or may not be released absent some triggering event, such as a Freedom of Information Act request. In essence, the rule asks the contractor to read the mind of the Government. The second prong of the definition should be revised to indicate that the nonpublic information is to be identified by the CO in the contract as protected from public disclosure. This is particularly important with regard to proposed FAR clause 52.204-XX, Access to Nonpublic Information, which should be revised to provide that the nonpublic information be identified as part of the contract. In that manner, the parties will clearly understand as part of the meeting of the minds via contract what information must be protected.

III. The Proposed Indemnification and 3rd Party Beneficiary Clauses Create Increased Potential of Unnecessary Litigation

The proposed clause, FAR 52.204-XX(b)(1)(i), would force a contractor to indemnify and hold the Government harmless for every claim or liability, including attorneys fees, court costs and expenses arising out of contractor misuse or disclosure of any nonpublic information to which it was given access during the performance of the contract. In addition, the proposed FAR 52.204-XX(b)(1)(ii) would create third party beneficiary status for third party owners of nonpublic information and a direct cause of action against a contractor to seek damages from any violation of the terms of the clause.

The Coalition recommends that the indemnification provision and the language creating third party beneficiaries be eliminated. Although we strongly agree that sensitive information should be protected, the indemnity and third party beneficiary provisions would create significant, if not unreasonable, uncertainty, unpredictability and risk for contractors. Currently there are more than adequate criminal, civil, administrative, contract requirement safeguards in place that protect, penalize, and compensate for contractor use or disclosure of nonpublic information. These include the civil False Claims Act, the Trade Secrets Act, and the Procurement and Integrity Act. Additionally many of these tools also provide a cause of action for third party protection of sensitive information. The result is that the indemnification provision and

the language creating third party beneficiary status are duplicative to laws that are already in existence, thus creating duplication where it is unnecessary.

Finally, under the broad definition of nonpublic information, and the above mentioned excessive disclosure requirements, third parties may enforce 52.204-XX in the context where Government contractors are disclosing information that they believe is relevant and required. In sum, overly broad disclosure, coupled with expansive indemnification and third party beneficiary provisions, creates an adversarial and litigation rich environment for all parties involved.

IV. Additional Guidance is Necessary to Assist Contracting Officers in Identifying OCIs That Involve Risks Associated with "Integrity of Competition" and "Business Interests"

The proposed FAR 3.1203 identifies two types of harms that OCIs may cause to the procurement system, (1) harm to the integrity of the competitive acquisition process; and (2) harm to the Government's business interest. The Coalition supports the proposed rule's framework and believes that it would be a significant improvement as compared to the current FAR 9.5 or the proposed Defense Federal Acquisition Regulation Supplement (DFARS) OCI rule. The framework provides needed flexibility to address OCIs based on the potential harm or lack of harm to the Government. It is a much more efficient approach than the current dynamic that categorizes OCIs by type and then looks to the potential impact.

However, the Coalition believes that additional guidance addressing the two OCI harms/risks would provide greater predictability and certainty for the procurement community. Under the proposed rule there is a lack of clear guidance regarding whether a risk is one that would harm the integrity or competition, or if it is a risk of harm to the Government's business interest. This initial determination is important because the CO may use broad discretion if the matter is a business interest, whereas if the risk may be one of integrity then the CO has to act to substantially reduce or eliminate the risk. Without further guidance, there is a significant likelihood that COs will default to the "integrity" OCI framework in order to reduce their oversight risk.

If an OCI risks impairing the integrity of the competitive acquisition process, that "contracting officer must take action to substantially reduce or eliminate this risk." On the other hand, if the only risk caused by an OCI is a performance risk relating to the Government's business interest, then the CO has "broad discretion to select the appropriate method of addressing the conflict, including the discretion to conclude that the Government can accept some or all of the performance risk." Therefore, to the extent contracting officers default to an "integrity" OCI analysis, competition will likely be reduced. In addition to providing additional guidance to assist in identifying the appropriate risk level, another possible approach would be to identify effective measures that would reduce an "integrity" risk to the level of becoming an acceptable business risk.

Overall, the Coalition believes that the increased flexibility of addressing risk of harm to the Government's business interest better facilitates full and open competition, and we encourage further guidance in this area. Moreover, attention should be focused on developing more feasible solutions to addressing OCI risks than the proposed method of protecting the integrity of the competitive process.

The Coalition appreciates the opportunity to submit comments on this proposed rule. If you have any questions, please contact me at (202) 331-0975 or rwaldron@thecgp.org.

Regards,

Roger Waldron
President