

Organizational Conflicts of Interest in
Major Defense Acquisition Programs
DFARS Case 2009-D015

Draft Proposed Rule Provisions and Clauses with Information
Collection Requirements

February 22, 2010

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203.1206 Solicitation provision and contract clauses.

(a) The contracting officer shall include a solicitation provision substantially the same as 252.203-70XX, Notice of Potential Organizational Conflict of Interest, upon determining that contractor performance of the work may give rise to organizational conflicts of interest.

(1) The contracting officer should fill in paragraph (c) of the provision when the Government has taken action prior to release of the solicitation to address or resolve potential organizational conflicts of interest.

(2) If the contracting officer has decided on an approach for resolving organizational conflicts of interest prior to release of the solicitation, the contracting officer may include information regarding the type of resolution the contracting officer believes will be necessary to resolve the conflict. For example, the contracting officer may determine in advance that a limitation on future contracting is the most appropriate method for resolving the conflicts.

(3) The representation in this provision is not in the Online Representations and Certifications Application (ORCA) database.

(b)(1) The contracting officer shall include in solicitations and contracts a clause substantially the same as 252.203-70YY, Mitigation of Organizational Conflicts of Interest, when the contract may involve an organizational conflict of interest that can be resolved by an acceptable contractor-submitted mitigation plan prior to contract award.

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(2) The contracting officer shall consider whether the mitigation plan should include a limitation on reassignments of personnel with unfair access to non-public information. The contracting officer and the contractor shall agree upon a reasonable period of time for the restriction on reassignments. In the case of access to non-public pre-solicitation information, a reasonable period of time is after contract award and expiration of the protest period.

(c) The contracting officer shall include in solicitations and contracts a clause substantially the same as 252.203-70YZ, Limitation on Future Contracting, when the resolution of the organizational conflict of interest will involve a limitation on future contracting.

(1) The contracting officer shall fill in the nature of the limitation on future contractor activities in paragraph (b) of the clause.

(2) The contracting officer may modify the duration of the limitation, but the duration shall be sufficient to neutralize any unfair competitive advantage or potential bias.

(d) The contracting officer shall include in solicitation and contracts a clause substantially the same as 252.203-70ZZ, Disclosure of Organizational Conflict of Interest after Contract Award, when the solicitation includes the provision 252.203-70XX, Notice of Potential Organizational Conflict of Interest.

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PART 212-ACQUISITION OF COMMERCIAL ITEMS

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212.301 Solicitation provisions and contract clauses for the acquisition of commercial items.

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(f) * * *

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(xiv) Except when acquiring commercially available off-the-shelf items, the contracting officer shall use the provision and clauses relating to Organizational Conflicts of Interest as prescribed at 203.1206 and 203.1270-7 when applicable. The representation in this provision is not in the Online Representations and Certifications Application (ORCA) database.]

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PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

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252.203-70XX Notice of Potential Organizational Conflict of Interest.

As prescribed in 203.1206(a), insert a provision substantially the same as the following:

NOTICE OF POTENTIAL ORGANIZATIONAL CONFLICT OF INTEREST (DATE)

(a) *Definitions.* As used in this provision—

conflict of interest" means a situation in which, with reference to a particular acquisition—

- (1) An offeror, or any of its prospective subcontractors, by virtue of its past or present performance of another Government contract—
 - (i) Had access to non-public information that may provide it an unfair advantage in competing for some or all of the proposed effort; or
 - (ii) Was in a position to set the ground rules, and thereby affect the competition, for the proposed acquisition; or
- (2) The contract awardee or any of its subcontractors—
 - (i) Will have access to non-public information that may provide it an unfair competitive advantage in a later competition for a Government contract;

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- (ii) May, from the perspective of a reasonable person with knowledge of the relevant facts, be unable to render impartial advice or judgments to the Government; or
- (iii) Will be in a position to influence a future competition, whether intentionally or not, in its own favor.

"Resolve" means to implement an acquisition approach that will enable the Government to acquire the required goods or services while adequately addressing any organizational conflict of interest.

(b) *Notice.* The Contracting Officer has determined that the nature of the work to be performed in the contract resulting from this solicitation is such that it may give rise to organizational conflicts of interest (see subpart 203.12, Organizational Conflicts of Interest).

(c) *Action already taken by Government to resolve organizational conflict of interest.*

_____ [Contracting Officer to describe the steps the Government has taken to resolve the conflict(s) of interest, if any.]

(d) *Pre-proposal requirement.* Applying the principles of FAR subpart 203.12, the offeror shall assess whether there is an organizational conflict of interest associated with the offer it plans to submit. Before preparing its offer, the offeror should inform the Contracting Officer of any potential conflicts of interest, including those involving contracts with other Government organizations, in order that the Government may assess whether the conflicts will require resolution.

(e) *Proposal requirements.*

(1) The offeror shall-

- (i)(A) Disclose all relevant information regarding any organizational conflicts of interest; or
- (B) Represent, to the best of its knowledge and belief, that there will be no organizational conflict of interest; and

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- (ii) Describe any other work performed on contracts and subcontracts within the past five years that is associated with the offer it plans to submit.
- (2) To the extent that either the offeror or the Government identifies any organizational conflicts of interest, the offeror shall explain the actions it intends to use to resolve such conflicts, e.g., by submitting a mitigation plan and/or accepting a limitation on future contracting.
- (3) If the offeror's proposed action to resolve an organizational conflict of interest is not acceptable, the Contracting Officer will notify the offeror in writing, providing the reasons why the proposed resolution is not considered acceptable and allowing the offeror a reasonable opportunity to respond before making a final decision on the organizational conflict of interest .
- (4) The Contracting Officer has the sole authority to determine whether an organizational conflict of interest exists and to determine whether the organizational conflict of interest has been adequately resolved.
- (f) *Resultant contract.* (1) If the offeror submits an organizational conflict of interest mitigation plan that the Contracting Officer approves, the resultant contract will include the Government-approved Mitigation Plan and a clause substantially the same as 252.203-70YY, Mitigation of Organizational Conflicts of Interest.
- (2) If the resolution of the organizational conflicts of interest involves a limitation on future contracting, the resultant contract will include a clause substantially the same as 252.203-70YZ, Limitation on Future Contracting.
- (g) *Termination for default.* If the successful offeror was aware, or should have been aware, of an organizational conflict of interest before award of this contract and did not fully disclose that conflict to the Contracting Officer, the Government may terminate the contract for default.

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(h) *Waiver.* The agency reserves the right to waive the requirement to resolve any organizational conflict of interest.

(End of provision)

252.203-70YY Mitigation of Organizational Conflicts of Interest.

As prescribed in 203.1206(b)(1), insert a clause substantially the same as the following:

MITIGATION OF ORGANIZATIONAL CONFLICTS OF INTEREST
(DATE)

(a) *Definitions.* As used in this clause—

“Contractor” means a party to a Government contract other than the Government and includes the total contractor organization, including not only the business unit or segment that signs the contract. It also includes all subsidiaries and affiliates.

“Organizational conflict of interest” means a situation in which, with reference to a particular acquisition—

- (1) An offeror, or any of its prospective subcontractors, by virtue of its past or present performance of another Government contract—
 - (i) Had access to non-public information that may provide it an unfair advantage in competing for some or all of the proposed effort; or
 - (ii) Was in a position to set the ground rules, and thereby affect the competition, for the proposed acquisition; or
- (2) The contract awardee or any of its subcontractors—
 - (i) Will have access to non-public information that may provide it an unfair competitive advantage in a later competition for a Government contract;
 - (ii) May, from the perspective of a reasonable person with knowledge of the relevant facts, be unable to render impartial advice or judgments to the Government; or
 - (iii) Will be in a position to influence a future competition, whether intentionally or not, in its own favor.

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(b) *Mitigation plan.* (1) The Government-approved Organizational Conflict of Interest Mitigation Plan (Mitigation Plan) and its obligations are hereby incorporated in the contract by reference.

(2) The Contractor shall update the mitigation plan within 30 days of any changes to the legal construct of the organization, subcontractor changes, or significant management or ownership changes.

(c) *Changes.* Either the Contractor or the Government may propose changes to the Mitigation Plan. Such changes are subject to the mutual agreement of the parties and will become effective only upon written approval of the revised Mitigation Plan by the Contracting Officer.

(d) *Noncompliance.* (1) The Contractor shall report to the Contracting Officer any noncompliance with this clause or with the Mitigation Plan, whether by its own personnel or those of the Government or other contractors.

(2) The report shall describe the noncompliance and the actions the Contractor has taken or proposes to take to mitigate and avoid repetition of the noncompliance.

(3) After conducting such further inquiries and discussions as may be necessary, the Contracting Officer and the Contractor shall agree on appropriate corrective action, if any, or the Contracting Officer will direct corrective action, subject to the terms of this contract.

(e) *Subcontracts.* The Contractor shall include the substance of this clause, including this paragraph (e), in subcontracts where the work includes or may include tasks related to the organizational conflict of interest. The terms "Contractor" and "Contracting Officer" shall be appropriately modified to reflect the change in parties and to preserve the Government's rights.

(End of clause)

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252.203-70ZZ Disclosure of Organizational Conflict of Interest after Contract Award.

As prescribed in 203.1206(d), insert the following clause:

DISCLOSURE OF ORGANIZATIONAL CONFLICT OF INTEREST
AFTER CONTRACT AWARD (DATE)

(a) *Definitions.* As used in this clause—

"Contractor" means a party to a Government contract other than the Government and includes the total contractor organization, including not only the business unit or segment that signs the contract. It also includes all subsidiaries and affiliates.

"Organizational conflict of interest" means a situation in which, with reference to a particular acquisition—

- (1) An offeror, or any of its prospective subcontractors, by virtue of its past or present performance of another Government contract—
 - (i) Had access to non-public information that may provide an unfair advantage in competing for some or all of the proposed effort; or
 - (ii) Was in a position to set the ground rules, and thereby affect the competition, for the proposed acquisition; or
- (2) The contract awardee or any of its subcontractors—
 - (i) Will have access to non-public information that may provide it an unfair competitive advantage in a later competition for a Government contract;
 - (ii) May, from the perspective of a reasonable person with knowledge of the relevant facts, be unable to render impartial advice or judgments to the Government; or
 - (iii) Will be in a position to influence a future competition, whether intentionally or not, in its own favor.

"Resolve" means to implement an acquisition approach that will enable the Government to acquire the required goods or services, while adequately addressing any organizational conflict of

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interest.

(b) If the Contractor identifies an organizational conflict of interest that has not already been adequately resolved and for which a waiver has not been granted, the Contractor shall make a prompt and full disclosure in writing to the Contracting Officer. Organizational conflicts of interest that arise during the performance of the contract, as well as newly discovered conflicts that existed before contract award, shall be disclosed. This disclosure shall include a description of-

- (1) The organizational conflict of interest; and
- (2) Actions to resolve the conflict that-
 - (i) The Contractor has taken or proposes to take, or
 - (ii) The Contractor recommends that the Government take.

(c) If, in compliance with this clause, the Contractor identifies and promptly reports an organizational conflict of interest that cannot be resolved in a manner acceptable to the Government, the Contracting Officer may terminate this contract for convenience of the Government.

(d) *Breach.* Any nondisclosure or misrepresentation of any relevant facts regarding organizational conflicts of interests will constitute a breach and may result in-

- (1) Termination of this contract for default; or
- (2) Exercise of other remedies as may be available under law or regulation.

(e) *Subcontracts.* The Contractor shall include the substance of this clause, including this paragraph (e), in subcontracts where the work includes or may include tasks that may create a potential for an organizational conflict of interest. The terms "Contractor" and "Contracting Officer" shall be appropriately modified to reflect the change in parties and to preserve the Government's rights.

(End of clause)]

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