

Walking the Line with OCI

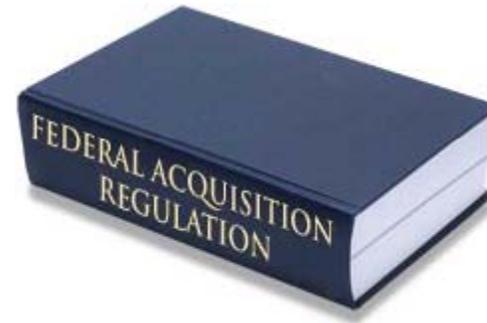
Industry Engagement in Development Planning

NDIA Mission Analysis Committee

October 30, 2013

Agenda

- Background
- Early SE Industry Input
- Current State of OCI
- OCI Definitions
- Future of OCI



Mission Analysis Committee

2013 Task Plan

Proposed 2013 Tasks:

- Support NDIA SED DPWG activities
 - Complete S&T/IRAD Final Report
 - OCI Discussion Forum
 - ASD R&E Defense Marketplace Innovation Engagement WG
 - Lab Engagement WG
- Pre-MDD Architecture Tradespace
- Pre-Milestone A Program Protection Planning

Deliverables/Products

- Final report on the Integration of S&T/IRAD to support Development Planning
- Final report Addendums following 2013 follow-on WGs/Forums

Schedule / Resources

- Working Groups/Forums
 - ASD R&E Defense Marketplace Innovation Engagement WG – April '13
 - OCI Discussion Forum – June '13
 - Lab Engagement WG – August '13
- Reports
 - Complete S&T/IRAD Final Report – February '13
 - Addendums – 60 days after WG/Forum Completion

Issues / Concerns:

- Diminishing number of contributing committee members
- Inadequate resources to work both DPWG and assigned committee efforts

NDIA DPWG Workshops

- June 8th & 9th 2010
- June 21st & 22nd 2012
- OCI identified as potential barrier every time

“The number one barrier to early collaboration is OCI”

*-Development Planning Report
January 2011*

OSD/NDIA
Development Planning WG Workshop
June 8 & 9 2010

Development Planning
Discussions & Outbrief

- Pre- MDD
- Post- MDD

NDIA DPWG Workshop

NDIA Systems Engineering Division
In conjunction with the Military Operations Research Society
Development Planning Working Group
Collaborative Engagement Workshop
on
Development Planning, S&T, Pre-milestone A SE, and IR&D Interactions

Lockheed Martin Global Vision Center
2121 Crystal Drive, Arlington (Crystal City), VA
June 21 - 22

- 43 Senior Level Attendees
 - Approximate 2:1 Government to Industry
 - The Services were well represented

National Defense Industrial Association
Systems Engineering Division
Development Planning Working Group

Report - Phase I
Industry's Role in Development Planning

File: 04-2011

- 1 Purpose
This report is a product of the Development Planning Working Group of the National Defense Industrial Association (NDIA), Systems Engineering Division to identify potential industry support roles to the Government's early technical analysis and planning for DoD Acquisition during Development Planning. The report was coordinated with the Deputy Under Secretary of Defense, Systems Engineering (DASD/SE) and summarizes the findings of the initial Working Group meeting held on June 8 - 9, 2010.
- 2 Background
The Development Planning capability within the DoD was recently mandated by the Weapons Systems Acquisition Reform Act 2009 (WSARA) and is defined as the upfront technical analysis and planning required for the successful selection and development of a materiel solution. Development Planning is a process that is inherently performed by Government personnel and would greatly benefit from the proper application of the intellectual capital that industry can provide.

OSD is implementing the Development Planning mandate through an update to existing OSD acquisition policy and guidance. The National Defense Industrial Association (NDIA) Systems Engineering (SE) Division formed a Working Group to explore and provide recommendations for how industry could support the Government's Development Planning activities, specifically to identify potential industry roles in the early technical analysis and planning for DoD Acquisition during Development Planning. The Working Group was established with 43 senior level Government/industry members. A Working Group Workshop was held on June 8 - 9, 2010, in Alexandria, VA with 55 attendees.

The objectives of the Working Group were to:

- Identify specific areas, activities and knowledge in the pre-milestone "A" timeframe where industry engagement could inform early technical analysis and engineering for DoD Acquisition Programs;
- Understand the available and potential mechanisms necessary to facilitate industry involvement in that early technical analysis and engineering;
- Recognize the issues, limitations, and questions and formulate recommendations to foster industry involvement in early technical analysis and engineering.

1

2012 DPWG Workshop Action Items

Action	Action Team	Status
1. Generate the DPWG Workshop Formal Report	NDIA	Draft report in work
2. Address the Issue of OCI (as a barrier to collaboration)	NDIA	Identifying "genuine" OCI requirements and key language
3. Address the Issue of IP (as a barrier to collaboration)	NDIA	DPWG Industry team collecting Industry input
4. Improve and Communicate the Systems Engineering Process in the Development Planning Timeframe (including SE as a part of S&T/IR&D)	NDIA	Applying NDIA DPWG Development Planning Analytics Table
5. Identify Methods to Better Leverage Tactical and Strategic S&T/IR&D in Development Planning	NDIA	Initial efforts in work
6. Identify Methods of Collaboration and Communication Mechanisms	NDIA/Gov't	Partnering with AFRL for 2013 continued efforts
7. Provide Suggestions for Improving the 6.1/6.2 Investment Strategy	NDIA/Gov't	Partnering with OASD R&E for 2013 continued efforts
8. Collaborate Across Government and NDIA DPWGs	NDIA/Gov't	Partnering with the Gov't DPWG for 2013 continued efforts

All Efforts To Be Coordinated Across Government and Industry

Finding: The issue of OCI is seen as a barrier to collaboration – an excerpt

- ***Clear & concise*** understanding of OCI language needed
 - Enables Industry participation in development planning activities
 - Current approach: use lowest-risk interpretation of language
 - Typically causes exclusion of Industry participation
- Review DoD Source documentation
 - Identify key language and “genuine” OCI requirements
- Provide recommendations that are practical and feasible
 - Clear guidance on what type of Industry involvement IS and IS NOT allowed would help mitigate the current reluctance
- Communicate the results

This finding suggests clarifying the OCI provisions, not loosening them

Top 3 Gov't Misconceptions

1

- Misconception – “We can’t meet one-on-one with a potential offeror”.
- Fact – Government officials **can** generally meet one-on-one with potential offers as long as **no vendor receives preferential treatment**.

2

- Misconception – “Since communication with contractors is like communication with registered lobbyists, and since contact with lobbyists must be disclosed, additional communication with contractors will involve a substantial additional disclosure burden, so we should avoid these meetings.”
- Fact – Disclosure is required only in certain circumstances, such as for meetings with registered lobbyists. **Many contractors do not fall into this category**, and even when disclosure is required, it is normally a **minimal burden** that should not prevent a useful meeting from taking place.

3

- Misconception – “A protest is something to be avoided at all costs - even if it means the government limits conversations with industry.”
- Fact – Restricting communication **won’t prevent a protest**, and limiting communication **might actually increase the chance of a protest** – in addition to **depriving the government** of potentially useful information.

“Myth-Busting”: Addressing Misconceptions to Improve Communication with Industry during the Acquisition Process (Memo) 2 February 2011

Why Have Early Industry Input?

Access to current market information is **critical** for agency program managers as they define requirements and for contracting officers as they develop acquisition strategies, seek opportunities for small businesses, and negotiate contract terms. Our **industry partners are often the best source** of this information, so productive interactions between federal agencies and our industry partners **should be encouraged** to ensure that the government clearly understands the marketplace and can award a contract or order for an **effective solution at a reasonable price.**



OFFICE OF FEDERAL
PROCUREMENT POLICY

“Myth-Busting”: Addressing Misconceptions to Improve Communication with Industry during the Acquisition Process (Memo) 2 February 2011

-Daniel I. Gordon, Administrator for Federal Procurement Policy

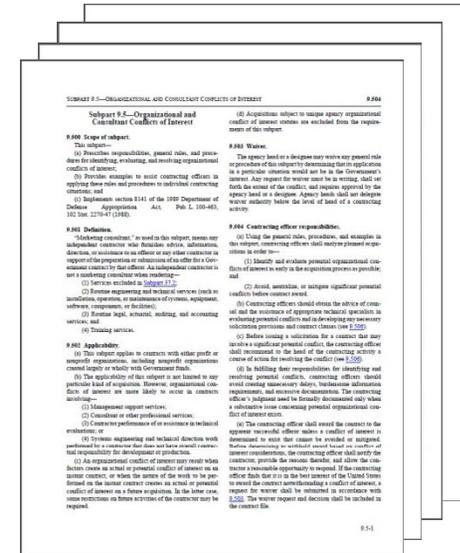
Gov't / Industry Engagements During Development Planning

- **Types of mechanisms (tools) is well understood**
 - Request for Information
 - Cooperative Research and Development Agreements
 - Study Contracts
 - Industry / Government Working Groups
 - Community of Practice
 - Industry Days
 - Technology Demonstrations and Industry Driven Experiments
 - Broad Agency Announcements
 - Small Business Independent Research
 - Industry “pools” in theater and in acquisition

- NDIA DPWG Workshop June 2010

NDIA DPWG OCI Action Objective

- Develop a clear and concise understanding of OCI language
- No intent to discuss changing any language



Improve Development Planning Industry Engagement

The Regulations

Federal Acquisition Regulation (FAR)

- “The primary regulation for use by all Federal Executive agencies in acquisition of supplies and services with appropriated funds”
- Principal set of rules in the Federal Acquisition Regulation System
- Subject to the approval of the Administrator of Federal Procurement Policy

Defense FAR Supplement (DFARS)

- Implements and supplements the FAR
- Contains requirements of law, DoD-wide policies, delegations of FAR authorities, deviations from FAR requirements, and policies / procedures that have a significant effect on the public
- Should be read in conjunction with the primary set of rules in the FAR
- Administered by the Department of Defense (DoD)

FAR OCI Current State

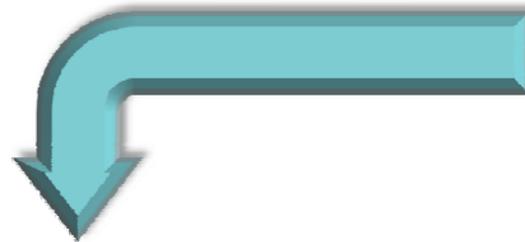
“FAR coverage on OCIs has remained largely unchanged since the initial publication of the FAR in 1984. The FAR coverage was adapted from an appendix to the Defense Acquisition Regulation, which dated back to the 1960s.”

-Federal Register Case 2011-001

Volume 76 Number 80

April 26, 2011

Proposed Rules



Proposing revisions to OCI coverage

- Public feedback period ended Fall 2012
- No final revisions made to date, final rule expected November 2013

➤ No final revisions made to date, final rule expected November 2013

FAR OCI Definitions

Current FAR 2.101 Definition

“Organizational conflict of interest” means that because of other activities or relationships with other persons, a person is unable or potentially unable to render impartial assistance or advice to the Government, or the person’s objectivity in performing the contract work is or might be otherwise impaired, or a person as an unfair competitive advantage.

*-Federal Acquisition Regulation
Subpart 2.1*

Proposed Definition

Organizational conflict of interest means a situation in which –

- (1) **A Government contract requires** a contractor to exercise judgment to assist the Government in a matter (such as in drafting specifications or assessing another contractor’s proposal or performance) and the contractor or its affiliates have financial or other interests at stake in the matter, so that a reasonable person might have concern that when performing work under the contract, the contractor may be improperly influenced by its own interests rather than the best interests of the Government;

or

- (2) A contractor could have an **unfair competitive advantage** in an acquisition as a result of **having performed work on a Government contract**, under circumstances such as those described in paragraph (1) of this definition, that put the contractor in a position to influence the acquisition.

- FAR vol 76 Issue 80

Awaiting final release scheduled for November 2013

FAR OCI Definitions

Current FAR 2.101 Definition

“Organizational conflict of interest means that because of the relationship or activities of a contractor or other persons, the contractor is unable to exercise independent and impartial judgment or advice to the Government, or the person’s objectivity in performing the contract work is or might be otherwise impaired, or a person as an unfair competitive advantage.

- Federal Acquisition Regulation
 Subpart 2.1

Doesn't define situations where OCI could happen



Proposed Definition

Organizational conflict of interest means a situation in which –

- (1) **A Government contract requires** a contractor to exercise judgment to assist the Government in a matter (such as in drafting specifications or assessing another contractor’s proposal or performance) and the contractor may be influenced by its own interests rather than the best interests of the Government; or
- (2) A contractor could have an unfair competitive advantage in an acquisition as a result of having **performed work on a Government contract**, under circumstances such as those described in paragraph (1) of this definition, that put the contractor in a position to influence the acquisition.

Clarifies OCI exists when a contractor is *on contract* to develop RFPs (or other documents) and would want to participate in an RFP response

- FAR vol 76 Issue 80

What Does the FAR Say?

9.505-2 Preparing specifications or work statements

(a)(1) If a contractor prepares and furnishes complete specifications covering nondevelopmental items, to be used in a competitive acquisition, that contractor shall not be allowed to furnish these items, either as a prime contractor or as a subcontractor, for a reasonable period of time including, at least, the duration of the initial production contract.

Source: Federal Acquisition Regulation Subpart 9.5

**Interpretation:
If a contractor develops requirements for an RFP, they cannot bid**

What Does the FAR Say?

9.505-2 Preparing specifications or work statements

(a)(1) ... **This rule shall not apply to -**

(i) Contractors that **furnish at Government request** specifications or data **regarding a product they provide**, even though the specifications or data may have been paid for separately or in the price of the product; or

(ii) Situations in which contractors, *acting as industry representatives*, help Government agencies prepare, refine, or coordinate specifications, regardless of source, *provided this assistance is supervised and controlled by Government representatives.*

Source: Federal Acquisition Regulation Subpart 9.5

Interpretation:
Industry can provide inputs to Government

DFARS 2010 Update: OCI in MDAPs

209.571–1 Definitions...

(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).

References FAR note on industry representatives

Source: Federal Register Volume 25 Number 249, December 29, 2010

The Future of OCI in the FAR

(FAR Case 2011-001)

- Removes references to contractors acting as industry representatives
- Specifies that OCI takes place if a contractor is **on contract** to develop SOWs or requirements and wants to bid contract
- Defense Acquisition Regulatory (DAR) Council resolving final FAR rule issues with GSA case manager

DAR Council drafting final FAR rule

Next Steps

- 2014 Activities
 - Collaboration between the NDIA DPWG and the Government DPWG to address the OCI topic
 - Develop a clear and concise understanding of the FAR / DFARS language
 - Communicate the findings across Government and Industry



Summary

- Industry input is necessary during development planning
- Current FAR allows Industry participation
 - Providing it is supervised & controlled by Government Representative
- DARC drafting final FAR rule
 - Expected November 2013
- **Clear & concise** understanding of OCI language is still needed
 - Enable Industry participation in development planning activities

What questions can I address?

