# Big Boeing Award, New Rules Won't End DOD Conflicts of Interest

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After a decade of delays and embarrassing missteps, on February 24 the Air Force awarded one of the largest contracts in military history, a $35 billion deal to build nearly 200 giant airborne refueling tankers, to the Chicago-based Boeing Company. At one point, the Air Force had awarded the contract to a team composed of Northrop Grumman and EADS North America, a unit of European Aeronautic Defence & Space Co. In 2008, however, the Government Accountability Office upheld Boeing's protest of the contract and the process began anew.

Part of the drama surrounding the contract occurred when Darleen Druyun, a senior Air Force procurement official, was alleged to have held employment discussions with Boeing while she was still employed at the Air Force and involved in the contract award. Druyun pleaded guilty to corruption and served prison time, as did the then CFO of Boeing. This blatant instance of impropriety spurred calls for reform of the conflict of interest rules for federal procurements. In addition, the recent consolidation within the defense industry, coupled with its explosive growth, often resulted in companies with a broad range of services and affiliates, with the distinct possibility that a conglomerate company could have input into Defense Department decisions that would help award a contract to an affiliate.

Partially in response to those concerns, the Department of Defense issued in late 2010 its final rules regarding organizational conflicts of interest. The department had initially proposed rules that provided a comprehensive approach applying to virtually all of its procurements. The final rules, however, turned out to be significantly narrower than the rules initially proposed.

Most significantly, the new rules are limited to major defense acquisition programs (MDAPs) and pre-MDAPs. An MDAP is an acquisition program that is not a highly sensitive classified program and is either designated by the Secretary of Defense as an MDAP or is estimated to cost at least $300 million for initial research, development, testing, and evaluation or an eventual total cost of at least $1.8 billion. Pre-MDAPs are programs in certain developmental phases that have been identified to have the potential to become a MDAP.

The new rules also mandate that the Department should obtain advice on MDAPs and pre-MDAPs from objective and unbiased sources and that contracting officers should resolve conflicts of interest in a manner that will promote competition and preserve the Department's access to the expertise and experience of qualified contractors. The rules require that the relevant contracting office consider specific areas of risk, such as common ownership between entities providing management support services to an MDAP or pre-MDAP and an entity competing for that program or awards for development of software to an affiliate of a competing entity.

Although the new rules attempt to limit the potential for organizational conflicts of interest and the basis for bid protests, we don't anticipate a radical change in the approach of bid protesters. It still remains common practice for federal employees to enter the private sector — and they will continue to seek employment in the industries that they got to know in the public sector.

Furthermore, companies will continue to broaden their services by acquiring or expanding into affiliated companies. This combination of facts should continue to contribute to future bid protests concerning alleged conflicts of interest.

*Crime in the Suites is authored by the Ifrah Law Firm, a Washington DC-based law firm specializing in the defense of government investigations and litigation. Our client base spans many regulated industries, particularly e-business, e-commerce, government contracts, gaming and healthcare.*

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