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FUTURE MARITIME CONTRACTING: A STRUCTURED COMPROMISE?

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JCSP 41

Exercise *Solo Flight*

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CANADIAN FORCES COLLEGE – COLLÈGE DES FORCES CANADIENNES
JCSP 41 – PCEMI 41
2014 – 2015

EXERCISE *SOLO FLIGHT* – EXERCICE *SOLO FLIGHT*

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Word Count: 5169

Compte de mots : 5169

INTRODUCTION

Throughout history, the Naval Team persistently planned ahead to ensure the organization was capable to maintain and operate a technically ready fleet. The recent reduction of available resources compounded with an aggressive search for efficiency gain has been a catalyst for an in-depth review of naval ship maintenance concepts.[1] The Defence Renewal (DR) initiative is one of the most prominent change initiative that triggered departmental wide program reviews.

The DR team was stood up in August 2012. The DR initiatives goals are minimizing inefficiencies, streamlining business processes and maximizing operational results.[2] The DR team identified Maintenance and Materiel as one of six performance theme where efficiencies could be gained. Finding efficiencies in a naval organization facing resource challenges when the most significant re-capitalization program is about to deliver is not without significant challenges.[3]

It was assessed that the Naval In-Service Support concept needed to evolve to produce any significant efficiency gain. Therefore, the Director General Maritime Equipment Program Management (DGMEPM) requested a complete review of the existing Naval In-Service Support Concept. As a result, the Future In-Service Support

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[1] National Defence, *Program Charter: Future in-Service Support* (Ottawa: Her Majesty the Queen in Right of Canada, [2013]).

[2] Government of Canada, "Defence Renewal Overview," www.forces.gc.ca/en/about/defence-renewal.page (Accessed 03/15).

[3] National Defence, *Program Charter: Future in-Service Support.*

(FISS) Program was stood up in 2013. "The goal of this program is to define and establish a comprehensive naval materiel In-Service Support system […] to meet the needs of the future fleet in 2018 and beyond […]"[4]

The development of a Navy specific FISS program is very complex. It involves multiple stakeholders and could arguably be considered as a whole-of-government renewal program lead by the Naval Team.[5] As the program evolves and undergoes rigorous analysis, multiple road blocks are identified. The intent of this paper is to conduct an analysis of a road block identified during the program System Analysis. More specifically, the contracting conflict of interest issue identified in the FISS System Analysis Document will be the subject of this paper.[6]

The concept of organizational conflicts of interest is not new by any means. However, the increase requirement to out source what used to be an in-house capability created new challenges. The current Canadian conflict of interest contracting clauses and regulations could have significant impact on DND's ability to use Canadian industry to design, build and support the current and future fleet. The analysis will demonstrate that the Canadian contracting conflict of interest regulations are not adapted to the current contracting environment and should be amended and adopt a structured compromised approach. The paper will recommend aspects of a workable solution as well as provide the basis for further analysis. A risk based approach recently developed and trialed in a

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[4] *Ibid*., p.3
[5] *Ibid*.
[6] National Defence, *Future in-Service Support Project: ISS System Analysis Document (Draft V3)*,[2014].

specific engineering contract (3-bucket solution) will be used as a baseline for a possible new solution a later defined. The conflict of interest issue is not unique to the FISS program. The current report will draw similar issues from the Naval Shipbuilding Procurement Strategy (NSPS) program to provide a broader perspective.

The paper will define the essence of the problem for the FISS and NSPS program in the Canadian context and highlight recent developments. The second section will be a review of the approach utilized by the United States (US) Department of Defense (DOD) and United Kingdom (UK) Ministry of Defence (MoD) to deal with conflict of interest situations. The UK MoD is a good comparative to the Canadian DND when analyzing procurement capability related issues. The department structures and the In-house/Out-source ratio are fairly similar. The US DOD acquisition program is obviously significantly bigger than the Canadian DND program. However, their large defence industry produces plenty of documentation (comments and recommendations) on government contracting issues and many are related to conflict of interest and valuable for analysis.

The analysis section will identify potential advantages and disadvantages of the UK MoD and US DOD approaches if applied in the Canadian context. The final section will provide recommendations for the basis of a workable solution.

CANADIAN CONFLICT OF INTEREST REGULATIONS

The use of In-Service Support Contracts (ISSCs) is not a new maintenance concept for the Royal Canadian Navy (RCN). As a matter of fact, it is a widely spread contracting mechanism throughout the department and probably the primary contracting mechanism used when outsourcing level 2 and level 3 systems maintenance.

This section will first provide an historical background to convey an understanding of the origin and the significance of the conflict of interest issue for FISS and NSPS programs. The recently developed risk based approach initiative will also be describe and used later in the document as a baseline for comparison.

Canada has historically kept the conflict of interest contract regulations flexible and accepted the inerrant subsequent risk. This practice was acceptable in a previous era as most contracts were for completion of production work or basic system maintenance. At the time, the engineering capability to design systems and managed contracts resided within DND. The situation significantly evolved in the last decade with DND increasingly outsourcing the engineering work. The increased outsourcing promoted the development of the private industry that in turn created a more complex and interconnected market.[7]

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[7] Mark Seely, *Independence Article (Discussion Paper from Senior Director Marine Sector)*,[28 Jan 2015].

The conflict of interest accepted risk level was re-evaluated as a consequence of a court challenge on the basis of conflict of interest.[8] (See Irving Shipbuilding Inc. v. Canada, 2009). The crown prevailed but the "independence" related articles meant to prevent such court challenge were subsequently revised. The articles included added restrictions on future contracts and expanded the definition of company to any affiliates.[9]

The recent modification of the independence related articles has raised the concern of the private industry. In the current era, as much as true independence might be ideal, it is not possible. This situation is especially true when considering the limited number of specialized engineering firms in Canada.[10] With the revision of the independence related articles, engagement of companies in the early design stage of a project precludes them (company and affiliates) from competing on future related work. It is believe that such situation is unsustainable for the Canadian engineering industry.[11]

PWGSC has worked with DND and industry to developed a conflict of interest risk based approach for NSPS related contracts to address the relevant concerns. The aim was to evaluate the potential risk for unfair advantage that the completion of a specific task could have on future related work. This balanced solution does not provide maximal protection to the Crown but provides a realist and predictable position for industry. The proposed solution is comprised of three categories of work: the first one is for a task or

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[8] Mark Seely, *Independence Article (Discussion Paper from Senior Director Marine Sector)*,[28 Jan 2015].

[9] *Ibid.*

[10] CADSI Marine Industries Working Group, *Government Ships - Designed, Built and Supported by Canadian Industry*,[May 2009], p. 17.

[11] Seely, *Independence Article*.

contract where its completion would not provide any unfair advantage on future work. The second category is for task or contract where its completion might provide an unfair advantage and a mitigation plan needs to be in place. The third category is for task or contract where its completion does provide an unfair advantage on subsequent work and the bidder will be excluded from future related work. Additionally, this solution includes an indication on the awardee's ability to compete on future related task in the proposal, providing the appropriate warning.[12]

The proposed three bucket solution has limitations. It is been implemented in a specific contract but is not formal policy nor commonly used across the PWGSC marine sector or related DND sections.[13] As the number of NSPS related contracts and engineering company affiliates increases, sections relying only on the independence related articles or being risk adverse can find themselves without bidders for their proposal. The situation is very similar for the FISS program.

As mentioned before, the aim of the FISS program is to meet the need of the fleet in 2018 and beyond as well as making optimum use of limited resources.[14] As part of the analysis the FISS team conducted, it was determined that DND might not only sub-contract the maintenance but might need to sub-contract the management and the setup of future maintenance contract. It will therefore require the assistance of contractors for the development of Statement of Requirement (SOR) and with the management of Tier 1

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[12] *Ibid*.
[13] Seely, *Independence Article (Discussion Paper from Senior Director Marine Sector)*
[14] National Defence, *Program Charter: Future in-Service Support*

contractors. Those contractors are referred to as a Tier 0 contractor. The Tier 0 contractor could have access, or draft a significant amount of engineering material. The Tier 0 contractor could end up being involved in the first stage of every ship building projects. A true independent Canadian system is a significant road block to that concept. "Conflict of interest remains a significant challenge in the Canadian marine acquisition and support industry because the industry is small and there are a limited number of specialist contractors involved."[15] The independence related articles would basically prevent the Tier 0 contractor and their affiliates to bid on any subsequent production or service work. "The involvement of a contractor in direct support of Government for Concept Exploration or Feasibility Design stage work, when combined with a role in structuring the management of a project, prevents them having a role in the subsequent Design and Build or In-Service Support Contracts."[16]

Canada cannot afford to remain firm or default to status quo with its conflict of interest regulatory framework. The high volume of tasks generated by NSPS and follow on In-Service Support will quickly dry out the independent pool of contractors. The problem Canada faces is challenging but not unique, the US DOD and UK MoD are dealing (or have dealt) with similar challenges. The next section provides an overview of the relevant US DOD and UK MoD conflict of interest regulations.

UNITED STATES DOD CONFLICT OF INTEREST REGULATION

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[15] National Defence, *Future in-Service Support Project: ISS System Analysis Document (Draft V3)*

[16] CADSI Marine Industries Working Group, *Government Ships - Designed, Built and Supported by Canadian Industry*, p. 17.

The United States Department of Defense (US DOD) procurement spending is approximately $100 billion (US) a year. Additionally, the DOD spends another $63 billion (US) in Research Development Test & Evaluation (RDT&E).[17] The US defense industry is well developed, the top five prime contractors are awarded with approximately $76 billion (US) yearly. Lockheed Martin Corp. was the top awardee with $25 billion (US) in contracts in 2014.[18] However, similar to any other Western countries, their acquisition process is not without problems. Before 2009, the Government Accountability Office (GAO) studied 96 Major Defense Acquisition Programs (MDAPs) and identified a cumulative cost overruns of $296 billion as well as an average delay of Initial Operational Capability (IOC) of 22 months.[19] Keeping in mind the significant difference in the procurement environment, the intent of this section is to analyze the US DOD conflict of interest regulations and identify specific portions assessed as useful for further analysis.

The US DOD procurement activities are mostly governed by three distinct regulations: The Federal Acquisition Regulation (FAR), the Defense Federal Acquisition Regulation Supplement (DFARS) and the Component specific FAR supplements.[20] The FAR provides generic regulations, The DFARS provides the DOD specific regulations and takes precedence over the FAR if the information is conflicting. The Navy Marine

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[17] Aerospace & Defense Intelligence Report, "U.S. DOD Defense Spending," http://www.bga-aeroweb.com/Defense-Spending.html, 4 May 2015.

[18] *Ibid.*

[19] J. David Berteau, Joachim Hofbauer and Stephanie Sanok, *Implementation of the Weapon Systems Acquisition Reform Act of 2009, A Progress Report*, [26 May 2010].

[20] Moshe Schwartz, *Defense Acquisitions: How DOD Acquires Weapon Systems and Recent Effeorts to Reform the Process.* Congressional Research Service, [23 May 2014].

Corps Acquisition Regulation Supplement (NMCARS) is one example of a FAR supplement and provides further regulations for the Navy and Marine Corps. The organizational and consultant conflict of interest regulation is found in FAR Subpart 9.5. The DoD specific regulations are contained in DFARS Subpart 209.5. The NMCARS Subpart 5209.5 does provide minor supplement mostly related to specific delegation of authorities but nothing related to the current discussion, hence not further discussed.

The FAR Subpart 9.5 is significantly more elaborated then the clauses found in the SACC manual on "Conflict of Interest - Unfair Advantage". The Subpart identifies Contracting Officer responsibilities with regards to conflict of interest. The responsibilities are first to identify and evaluate the potential conflict as early as possible in the acquisition process and second to avoid, neutralize, or mitigate significant potential conflict before contract award. The regulation provides details about contracting *Systems Engineering and Technical Direction* and *Specifications and Work Statements*. Based on Subpart 9.505-1, the contractor that provided such services shall not be awarded a contract (or be a subcontractor) to supply the system or major components. The intent of the subpart 9.505-1 is similar to the spirit of the Canadian unfair advantage clause and independence related articles. However, the US Subpart excludes contractors providing assistance when supervised and controlled by Government representative. Therefore, from a US perspective, embedded contractors working under supervision would not be restricted to bid on subsequent work. Embedded contractor is not current practice in the US. There are more than 40 Federally Funded Research and Development Centers

(FFRDC) that are mandated to provide system engineering and technical assistance.[21] Those centers are mandated to be the primary source of independent technical expertise, not outside contractors.

The US regulations provide guidelines on imposing restraints on future work. When a potential conflict of interest is detected by the nature of the good or service requested, the regulations mandate that the solicitation contains a provision defining the nature of the restraint (duration and nature) on future bidding. Inserting restraints in the solicitation provides full visibility on the government's intent and allows the potential suppliers to understand the consequence of a contract award on future projects.

The DFARS contains exceptions to the limitation clause on future contracts if an approved mitigation strategy could be adopted. The DFARS Subpart 209.571-7 does provides a clause to limits future contracting similar to FAR Subpart 9.505-1 and -2 but adds exceptions that provides relief for the *Systems Engineering and Technical Direction* and *Specifications and Work Statements* Contracts. Based on DFARS Subpart 209.571-7, the restriction on future contracting related to the development and production on the system is waived if it is demonstrated that an unbiased advice is possible based on an agreed-to mitigation strategy. In the case where this contractor is a successful bidder on subsequent work, a Government Approved Organizational Conflict of Interest Mitigation Plan would become contractually binding.

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[21] National Science Foundation, "Master Government List of Federally Funded R&D Centers," http://www.nsf.gov/statistics/ffrdclist/ 4 May 15.

The Weapon System Acquisition Act is the most recent legislation that had impacts on the acquisition regulations.[22] The revision and tighten of the conflict of interest guidelines specifically for Major Defense Acquisition Programs (MDAPs) (The Canadian Ship Building Program would be considered a MDAP) was one of the key provisions. The result of the Weapon System Acquisition Act section 207 was recently included in the DFARS subpart 209.5 amendment (29 Jan 2014). The newly created section, DFARS section 209.571 provides additional regulations and exemption when dealing with Major Defense Acquisition Programs. Specifically, Subpart 209.571-6 is very descriptive on what a Contracting Officer should consider as potential conflict of interest. The Subpart provides clarity on conflict of interest related to ownership of business units, award of subsequent contracts to affiliates and on conducting technical evaluation. The Subpart content is further discussed in the analysis section and was the main subject of a Lockheed Martin report. Of note, the exception mentioned above still applies to this specific Subpart.

This is of course a quick summary of the relevant US DOD conflict of interest regulations to prevent an unfair advantage. The US regulations are very explicit on the type of conflict of interest that could be experience in different kind of contracts. The regulations emphasis on detecting conflict of interest early in the process as well as on the development of a mitigation strategy. In the case where a mitigation strategy is not

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[22] Schwartz, *Defense Acquisitions: How DOD Acquires Weapon Systems and Recent Efforts to Reform the Process.*

possible, the US model imposes clear restraints in the solicitation to ensure the potential bidders fully understands limitations on subsequent contracts (FAR 9.507-2). It also provides a relief for embedded contractors. For MDAPs, the definition of conflict of interest has been reviewed as mandated by the Weapon Systems Acquisition Act of 2009. Exception are also possible if an approved mitigation action plan can be implemented.

UNITED KINGDOM MoD CONFLICT OF INTEREST REGULATIONS

The UK Ministry of Defense (MoD) spending for acquisition of new equipment and support of existing equipment is approximately $25 billion (CAD) yearly.[23] Similar to the US, the UK MoD has a well-developed defence industry. For Fiscal Year 2012/13, the Top 5 contractors were awarded with about $12 billion (CAD) in contracts. BAE Systems has the lead with almost $5 billion (CAD) yearly.[24] The UK MoD has recently conducted a review of its Defence Equipment and Support (DE&S) organization that is responsible for the procurement and support of MoD equipment. The review lead to significant organizational changes aimed at improving their procurement efficiency and effectiveness. Part of the changes was the hiring of Bechtel and CH2M to work embedded in the Defence Equipement and Support (DE&S) organization and act as managed service providers (similar to the Tier 0 contractor concept). The two firms will be providing project management and other enabling acquisition related skills.[25]

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[23] U.K. Government, "Defence Equipment and Support," https://www.gov.uk/government/organisations/defence-equipment-and-support 4 May 15).

[24] U.K. Government, "MOD Trade, Industry and Contracts: 2013," https://www.gov.uk/government/statistics/mod-industry-trade-and-contracts-2013 4 May 15).

The UK contract regulations are a mix of UK specific regulations and European Union (EU) regulations. The UK Public Contracts Regulations 2015 apply to all Public Contracts except most of the Defense and Security related acquisitions. For Defense and Security related contracts, the EU regulations applies in most cases and will be of interest for this section. The implementation of the EU Defence and Security Public Contracts Regulations (DSPCR) 2011 into UK law became effective on 21 Aug 2011.[26] The EU member States were mandated to include the DSPCR into their national law to ensure consistency and fair competition across the EU.[27] Similar to the previous section, the following will highlight specific aspects of the UK conflict of interest regulations assessed as relevant to the current analysis.

Before getting into the details of specific regulations, it is important to highlight a significant difference in the UK tendering process compare to the standard Canadian process. The UK acquisition process under the DSPCR normally includes a supplier selection (bidder pre-qualification) phase. Chapter 14 of DSPCR is dedicated to supplier selection regulations. The Chapter provides guidance and regulations on the process utilized to identify adequate supplier before issuing the Invitation to Tender (ITT). The DSPCR also contains regulation for mandatory and discretionary reasons for rejecting a supplier.

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[25] David Rogers, "Bechtel and CH2M to Help Project Manage UK's Armed Forces." *Global Construction Review* 5 Nov 2014.

[26] Defence Equipment and Support and Ministry of Defence, *The EU Defence and Security Public Contracts Regulations (DSPCR) 2011*,[2011]). Chapter 1 - Overview.

[27] *Ibid.*

The Procurement Officer (referred to as "Procurer" in the DSPCR) is required to evaluate the contractor using a Pre-Qualification Questionnaire (PQQ), Annex A of DSPCR chapter 14.[28] The 39 page document is a standard template provided to the interested suppliers for their information and completion. It also contains a Questionnaire Evaluation Matrix (QEM) providing the company with an overview of the potential provider selection criteria (mandatory and/or weighted).

The PQQ includes an informative section on conflict of interest that re-affirm the requirement for fair competition. It provides an overview of the concept and describes the authorities' right to reject a supplier if conflict of interest is identified. The PQQ requests the company to conduct a conflict of interest internal review and report the findings. Based on results, the authority might request the potential bidder to demonstrate that satisfactory mitigation measures will be put in place to prevent an unfair advantage. If acceptable and the supplier is the winning bidder, the mitigation measures could become contractually binding.

The section presents the most significant conflict of interest aspect of the UK contracting regulations. The UK procurement process normally include a pre-selection stage that requires the potential bidders to conduct a conflict of interest review. Thereby, the UK regulations allow the potential suppliers to present a mitigation plan that would address potential conflict of interest.

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[28] *Ibid.*

PRIVATE SECTOR REACTION

The response from the private sector to the different regulations is of interest when evaluating the impact of a policy framework. The Canadian industry reaction to the modification of the independence related articles was previously exposed and will not be expanded further. This section analyzes how the US private sector responded to one of the latest and best documented conflict of interest policy reform that resulted from the Weapon Systems Acquisition Act of 2009.

Lockheed Martin provided, through an extensive report, very explicit comments and recommendations about the anticipated implementation of the Weapon System Acquisition Act of 2009 into the DFARS. Not surprisingly, Lockheed Martin presents in introduction a very familiar situation; consolidation leading to fewer companies, government local expertise divested and the increased complexity of the weapon systems. The seven page report is quite elaborate and makes recommendation to the government on how the Weapon Systems Acquisition Act should be implemented to prevent penalizing the industry. The reports provides a shopping list of mitigating options, implementable by industry that should be considered by the contracting officer when analyzing conflict of interest. The report also introduces the concept of a Special Independence Agreement (SIA). An SIA would isolate an entity from its parent or affiliated organization to prevent potential conflict of interest. Lockheed Martin promote a balanced approach to conflict of interest and re-affirms that the majority of the conflict

of interest situations can be mitigated. A minority of tasks or contracts require strict conflict of interest avoidance.[29]

The US DOD subsequently implemented the DFARS Subpart 209.571-6 which expands their definition of conflict of interest. In 2010, Lockheed Martin sold its Enterprise Integration Group (EIG) business based on the "government increased concerns about perceived organizational conflict of interest." Surprisingly, EIG was "always condoned off from the rest of the company so it could help customer develop the requirements for project and contracts."[30]

The government conflict of interest regulations might not have been the only reason why Lockheed divested of EIG as the article later discusses a comprehensive review of their portfolio. However, it demonstrates how conflict of interest can have significant impact on the US private sector. Considering the size of the Canadian industry, the branching off of engineering companies might not be viable for the long term.

The US has an entire business sector that specializes in solving contractor potential conflict of interest that could affect their ability to compete in government contracts. A quick internet search will result in a multitude of websites on software

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[29] Lockheed Martin, "Comments and Recommendations - Defense Acquisition Regulations System Public Meeting on Weapon Sysstems Acquisition Reform Act Organizational Conflicts of Interest Requirements" (8 Dec 2009).

[30] David Hunter, "Lockheed Finalizes $815M Sale of EIG Division," *Washington Technology* 29 Nov 2010.

designed to alleviate company's internal conflict of interest. It will also result in many websites about consultants who specialized in solving conflict of interest.

This section present a brief review of the reaction of the private sector to the conflict of interest regulations. More specifically, how the main US DOD contractor (Lockheed Martin) responded and adapted to the proposed government regulations. The US defence industry produces numerous reports on conflict of interest related issues. This section only presents the comments and recommendations from one contractor but many are readily available and could be usefully analyzed. The US private sector is adaptive and will do what it takes to stay in this lucrative business.

RESULT OF ANALYSIS

The intent of this section is to evaluate the potential value of specific US and UK regulations if implemented in the Canadian context. To put things in perspective, it is essential to first define the Canadian context. The Canadian DND spending on acquisition of new equipment and on supporting existing systems is about $5 billion yearly.[31] Canada does not have a well-established defence industry. The top largest military contractor ranking constantly changes. The no.1 largest contractor is often in that position because of the outside market (foreign sale). General Dynamics Land Systems Canada was the largest military contractor for 2013-14 and 2010-11 because of a contract with Saudi

[31] Government of Canada, "National Defence and the Canadian Armed Forces - Materiel More than just Procurement and Acquisitions." http://www.forces.gc.ca/en/news/article.page?doc=materiel-more-than-just-procurement-and-acquisitions/hpcdlng3 4 May 15).

Arabia and US DOD respectively.[32] The recently initiated Defence Procurement Strategy (DPS) will hopefully better promote the development of the Canadian defence industry.[33] The comparison of the Canadian DND with the US DOD which has a significantly bigger spending budget and a well-established defence industry might appear irrelevant. However, there are interesting aspects of their regulations as well as responses from their defence industry that are applicable to the analysis and worth mentioning.

The first major US DOD regulation advantage is about the recognition that most conflict of interests can be mitigated. This approach leads to dialogue between the potential bidders and the contracting agent. The Canadian regulations would benefit from including the concept of mitigation, which is in other words, a risk management approach to conflict of interest. The current Conflict of Interest – Unfair Advantage Clause in the Standard Acquisition Clauses and Conditions (SACC) manual and contracting clauses only stipulate that a bid may be rejected if conflict of interest exist. The current regulations do not allow the company to even propose a plan. The US DoD regulation has a system in place where companies can demonstrate, in certain cases, that conflict of interest is mitigated through a mitigation action plan. An example from Lockheed Martin is available online and might be of value when investigating specific mitigation strategies.[34]

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[32] Ploughshares Articles, "Largest Canadian Military Prime Contractors 2010/11 to 2013/14," http://ploughshares.ca, 5 May 15).

[33] PWGSC, "Defence Procurement Strategy," http://www.tpsgc-pwgsc.gc.ca/app-acq/stamgp-lamsmp/sskt-eng.html, 5 May 15).

[34] Lockheed Martin Corp Space Systems Company, *Organizational Conflict of Interest Mitigation Plan*, [28 Mar 2008]).

Another interesting aspect of the US regulation is that embedded contractors working under the supervision of the government are not bound by the same restrictions as outside contractors. The actual implementation of such regulation in Canada might come with a requirement to modify the organizational structure (i.e. firewall) but would be worth investigating in the case of Tier 0 contractors.

The second major advantage of the US DOD conflict of interest regulations is their extensiveness. The regulations cover many different scenarios providing good guidance to the contracting officer and normalizing the acceptable risk level. The three bucket solution previously discussed provides a similar approach. PWGSC and the Shipbuilding Association of Canada have worked cooperatively to develop a standard list of tasks with relevant conflict of interest risk level. The Matrix identifies 22 generic tasks and associated impact that conducting the task has on the ability for the contractor to bid on future work. It basically further defines each categories of the three bucket solution: no impact, mitigation required or future bidding restricted.

The US DOD regulation proposed a balanced approach and attempts to provide clarity on the consequences (restraints) of conflict of interest in the proposal (solicitation). In case a restraint is necessary, it details scope and duration. In the Canadian context, the scope and duration of a restraint might be difficult to define. The US regulations normally restraints the bidder's ability to bid on related work until the end of the first contract build. DND does not produce long series of the same item through multiple contracts (i.e. U.S. Ships) but the concept still applies and a specific Canadian process should be

investigated. The three bucket solution is proposing a similar approach by including the consequence of conflict of interest in the solicitation.

The UK MoD regulations are also of interest as their procurement structure and budget order of magnitude is somewhat closer to the Canadian DND. The UK MoD regulations are vague and similar to the Canadian regulations. However, they promote a dialogue between industry and the contracting agent through the pre-selection phase.

There are definitively less documentation from the UK private industry on issues related to the conflict of interest regulations than what is produced in the US. The UK adopted a principle based approach towards conflict of interest compare to a rule based approach in the US.[35]

A procurement process that first pre-select potential bidders before issuing a Request for Proposal (RFP) could be advantageous as it allows for the proposal of a mitigation plan and promotes dialogue with industry. The two-stage competitive process is an official procedure in Canada. However, it is not a mandatory process and has a different intent. The aim of the Canada pre-qualification process is to allow bidders to demonstrate they possess the required expertise and experience to complete a project.[36] The process is not meant to assess the same criteria as the UK PQQ and can also be time consuming.

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[35] National Audit Office, Comptroller and Auditor General, *Cross-Government Conflict of Interest*, [27 Jan 2015]). p. 19.

[36] PWGSC, "Doing Business on the Hill," http://www.tpsgc-pwgsc.gc.ca/collineduparlement-parliamenthill/fac-dbh-eng.html#prequalification 5 May 15).

As for the Tier 0 contractors, the UK is definitely a good case study for future analysis. The UK MOD recently hired two contractors to work embedded in their organization and provide support. At the time of producing this paper, detailed information was not available with regards to DE&S internal organizational practices and consequences on future related work for the contractors.

RECOMMENDATION

The analysis demonstrates that Canadian conflict of interest regulations are inadequate and do not favor and sustain a competitive contracting environment. The vague and risk adverse regulations will prevent companies to support the government. The current regulations are also counter productive to the Defense Procurement Strategy which aims at creating a strong defence industry in Canada.

The analysis determines that the three bucket solution proposed as the interim solution is comparable to the mitigation based approach from the US DOD and the UK MoD and should be formally implemented. The proposed balanced compromised technique promotes dialogue with industry and help them planned forward.

The current Canadian regulations does not promote the development of the Tier 0 contractor concept. Tier 0 contractors will become essential to compensate for the reduction of personnel resources. Only a conflict of interest balanced approach would allow companies to consider becoming a Tier 0 contractor for Canadian DND. The recent

UK structures with their managed service provider would need to be investigated in order to provide applicable recommendations on the use of Tier 0 contractor.

The value of the two-stage competitive procurement should be investigated as well. It could be further developed and include an aspect of conflict of interest similar to the UK MoD. However, the implementation of such process might be somewhat irrelevant if the current risk adverse regulations are not amended.

The three bucket solution is assess being a strong basis for a future regulatory framework. However, the Canadian contractors should provide comments and recommendations on a future framework. The CADSI report, which represents the Canadian private sector for this analysis, only recommends that the government regulations be amended. The private sector should provide options on how they can mitigate the risk of conflict of interest (in the Canadian context) similar to what Lockheed Martin public consultation report did for the US DOD. Industry has a pool of subject matter expert and should be able to provide detailed recommendations.

CONCLUSION

This paper used a comparative technique to determined if the Canadian conflict of interest regulations needed to be amended to better serve today's contracting environment. It first presented the issue by detailing how the current regulations can limit the ability for the NSPS and FISS related projects to harvest expertise from industry and fulfill their mandate. The first part also highlighted the recent initiative from PWGSC,

DND and industry described as a risk based approach. That three bucket solution is used as a basis for comparison throughout the analysis.

The second part of the paper reviews relevant US DOD and UK MoD conflict of interest regulations. The analysis of allied defence departments' perspective provides a good basis for defining a future regulatory framework. The second part also provides an analysis and recommendations.

The result of the comparison and analysis concludes that Canada should review its contracting conflict of interest regulations and adopt a risk based solution where the main intent should be finding a mitigation strategy. The analysis also concludes that the three bucket solution provides a strong basis for future regulatory framework. The three bucket solution is conceptually very similar to the UK MoD and the US DOD regulations. The paper also determines that Canada should further investigate the recent development of the UK DE&S with regards to the contracting of outside expertise to assist the organization. Those findings could provide clarity on the Tier 0 contractor concept.

This research is probably one of many dedicated to solving this pressing issue. The intent was to provide an analysis based on a comparison with allied organizations. Understanding that it might only provide an overview of certain aspect of the problem, the research should point interested parties in the right direction and hopefully be a catalyst for a change.

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