

FAR Council's Proposed Rule Modernizes the Regulations Governing OCIs But Requires More Guidance

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On April 26, 2011, the Federal Acquisition Regulation (FAR) Council issued a Proposed Rule that, if finalized, would substantially revise the regulations governing organizational conflicts of interest (OCIs). 76 Fed. Reg. 23236 (Apr. 26, 2011). The Proposed Rule modernizes the regulations governing OCIs and provides much-needed guidance to both contractors and contracting agencies on how to identify, avoid and mitigate OCIs. Key elements of the Proposed Rule include:

- **Risks to Integrity of Competition vs. Risks to Government's Business Interests:** The Proposed Rule distinguishes between risks to the "integrity of the competitive acquisition process" and risks to the "Government's business interests," demanding a more rigorous review for the former, while permitting COs more discretion to accept the performance risks associated with the latter. This is a positive change from the prior regulations because it returns the focus to the purposes behind regulating OCIs: (1) protecting public confidence in the competitive procurement system; and (2) protecting the Government's business interests. The Proposed Rule recognizes that even OCIs with little risk of actual harm can impair the public's perception of the fairness and objectivity of the competitive procurement process. Accordingly, the Rule requires COs to "take action to substantially reduce or eliminate" risks that could affect this public confidence. The Proposed Rule permits more flexibility in handling conflicts that affect only the Government's business interests.

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- **Acceptability of Certain Risks:** Consistent with the emphasis on flexibility when dealing with OCIs that only affect the Government's business interests, the Proposed Rule introduces the concept of acceptability into the OCI regulatory regime. The Proposed Rule recognizes that the Government, like any purchaser, must sometimes accept certain business and performance risks in order to obtain the best value, the highest quality or the most security. Accordingly, the Proposed Rule affords COs the discretion to deem risks to the Government's business interests acceptable, in addition to providing more options for appropriate mitigation strategies. This flexibility will prove to be important as contracting agencies are faced with increasing industry consolidation.
- **Mitigation Strategies:** The Proposed Rule permits the use of structural barriers, internal controls and conflict-free subcontractors to avoid and mitigate OCIs, including "impaired objectivity" OCIs. These types of strategies have long been recognized as sufficient to protect the Government's national security interests. It is therefore appropriate that the Proposed Rule suggests the endorsement of these strategies in the FAR.

Although the Proposed Rule, as a whole, improves the regulations governing OCIs in government contracting, there are a few areas that could be clarified or improved prior to finalization of the Rule:

- **Distinction between "Business Risk" and Risk to "Integrity of the Competition":** The distinction between the two types of harms that OCIs cause is a new paradigm, since prior OCI regulations and case law focused on the "type" of OCI as opposed to the risk it might present. Given this new proposed framework, the Final Rule would benefit from additional guidance regarding the difference between the two types of risk. Even if examples are not provided, COs and contractors would benefit from additional explanation of the types of risks that would affect the integrity of the competition and those that are of less concern because they affect the Government's business interests.
- **Clarification of "Acceptability" of Risks:** The Proposed Rule gives COs the discretion to accept certain OCI risks if they only threaten the Government's business interests, and not the public's confidence in the procurement process. This positive development appears to provide COs flexibility to weigh the costs and benefits of various contract proposals. The Final Rule could clarify, however, what factors a CO is permitted to consider when determining whether a risk is "acceptable," and could state more explicitly that a cost-benefit or trade-off analysis is acceptable and was contemplated by the Rule's drafters.
- **Standard Solicitation and Contract Clauses:** The Proposed Rule contains a number of new standard solicitation and contract clauses related to OCIs. These clauses will in some cases replace agency—or contract-specific—clauses and could help establish uniformity among agencies. Some of the clauses, however, impose disclosure and reporting requirements on contractors that are too broad and will have unintended impacts if enacted government-wide. For example, one clause requires offerors to disclose "all relevant information regarding any [OCI], including information about potential subcontracts." This clause is too broad and may result in offerors disclosing more information than necessary to avoid a later claim that they did not disclose "all" relevant information. A narrower disclosure standard with the potential for supplementation at the contracting agency's discretion would result in more efficient

evaluation of possible risks and a lower regulatory burden on both offerors and COs. Alternatively, the clause could be tailored by agencies to identify the types of information that may be “relevant” to a particular procurement or potential OCI concern.

- **Unequal Access to Nonpublic Information:** The Proposed Rule defines nonpublic information to include information that “is exempt from disclosure under [FOIA] or otherwise protected from disclosure by statute, Executive Order or regulation” as well as information that “the Government has not yet determined whether the information can or will be made available to the public.” The second half of this definition is overly broad. There is a large category of information, often available to contractors, that government agencies simply do not have the time or resources to make proactive disclosure decisions about until the information is sought for disclosure. The Final Rule would benefit from recognizing this fact and providing a more flexible definition. At a minimum, the drafters should clarify the impact on obligations if the Government subsequently decides to release information it previously had not released. In addition to the impact the definition of nonpublic information will have on unequal access to information determinations, by establishing a separate set of rules to address nonpublic information under proposed section 4.402, the Proposed Rule may conflict with the effort under Executive Order No. 13556 to develop consistent government-wide procedures for handling controlled unclassified information. The Final Rule may benefit from coordination with the National Archives and Records Administration, which is charged with coordinating agency policy under this Executive Order.

The Proposed Rule makes significant strides in modernizing the regulations governing OCIs, but as with any new framework, additional clarification and guidance would ease implementation. These are just a few of the clarifications that will help provide better guidance to both contractors and COs on how to effectively avoid and mitigate OCIs arising in the context of government contracting. The FAR Council is seeking comments on the Proposed Rule. Comments are due July 27, 2011. Undoubtedly, industry and agencies will propose additional clarifications and modifications; some may even suggest that the proposed framework be abandoned entirely. Nevertheless, the Proposed Rule is commendable for envisioning a new approach to OCIs that strives for greater flexibility.

Wiley Rein routinely advises contractors on OCI issues, including OCI mitigation issues, compliance with OCI requirements and OCI risks that may arise in acquisitions of contractors. Wiley Rein is following the FAR Council's Proposed Rule and will provide updates on developments on the rulemaking process.