

FAR Councils Release Rewrite of OCI Rules

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The Civilian Agency Acquisition Council and Defense Agency Regulations Council (FAR Councils) have issued a proposed rule that would substantially revise regulations regarding organizational conflicts of interest (OCIs). 76 Fed. Reg. 23236 (Apr. 26, 2011). The Proposed Rule was issued in response to increased industry consolidation and Government reliance on service contractors, coupled with direction from Congress in section 841 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, Pub. L. No. 110-417, and conclusions of the Acquisition Advisory Panel (also known as the SARA Panel) in its 2007 report regarding inadequacies in the current OCI FAR provisions. In crafting the Proposed Rule, the FAR Councils, in conjunction with the Office of Federal Procurement Policy, considered recent Government Accountability Office (GAO) and Court of Federal Claims caselaw on OCIs, the SARA Panel's findings, comments on a 2008 Advance Notice of Proposed Rulemaking on OCIs, and public comment on proposed DFARS OCI rules, which were finalized at the end of 2010. The Proposed Rule makes significant changes-both structurally and substantively-to the current FAR regime for addressing OCIs. Although the Proposed Rule strives to clarify the definition and handling of OCIs, if implemented, it also imposes numerous new requirements on contractors to address potential OCIs during the pre-award process and during contract performance.

OCI Rules Moved to FAR Part 3. The Proposed Rule moves the regulations covering OCIs from FAR Part 9, Contractor Qualifications, to FAR Part 3, Improper Business Practices and Personal Conflicts of Interest. Notably, the Department of Defense (DoD) proposed a similar shift of OCI rules to DFARS Part 203 in 2010, but several commentators, including the ABA Section of Public Contract Law, observed that such a move sends a chilling message that OCIs

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constitute improper behavior that justifies penalty, rather than situations that can be mitigated. DoD ultimately chose not to relocate its OCI rules, but to await instead publication of the Proposed FAR Rule. Now that this rule has been published, the debate over where the FAR's OCI rules will be located will likely start anew.

Defining the Government's Interests and OCI Risks. The Proposed Rule defines the underlying policy interests that OCI regulations are intended to serve, a critical matter not addressed in the current FAR Subpart 9.5, but sorely needed to ensure that agency OCI decisions remain tethered to reality. In doing so, the Proposed Rule introduces a new method of addressing OCIs—"acceptance"—in addition to the traditional avoidance, mitigation, and limitation on future contracting methods. Section 3.1203 of the Proposed Rule, entitled "Policy," discusses two interests that OCI rules are intended to protect: (1) "the integrity of the competitive acquisition process," and (2) "the Government's business interests." The Proposed Rule underscores the discretion afforded to contracting officers (COs) to identify and mitigate the latter type of OCI, but appears to substantially limit COs' discretion with respect to the first type. For a risk to the competitive acquisition process, the Proposed Rule instructs that "the [CO] *must* take action to *substantially reduce or eliminate this risk*." By contrast, the Proposed Rule states that "the [CO] has *broad discretion* to select the appropriate method for addressing" a risk to the Government's business interests, "including the discretion to conclude that the Government can accept some or all of the performance risk."

According to the FAR Councils, the distinction in harms is important because harm to the integrity of the competitive procurement process potentially undermines "good governance, fairness, and maintenance of the public trust." An OCI that might affect the Government's business interests alone, however, "may sometimes be assessed as an acceptable performance risk." This common sense approach requires the Government to weigh the harm that might result from an OCI against the harm that would result from limiting competition or contracting with a lesser-qualified entity. Although these provisions will help guide agency and contractor personnel in identifying and addressing OCIs, they imply that some categories of CO decisions may be subject to heightened scrutiny, including whether a given OCI creates a risk of harm to the integrity of the competitive acquisition system, and whether such a risk has been substantially reduced or eliminated.

Redefining OCIs to Focus on True Conflicts. The Proposed Rule redefines OCIs to reflect the "impaired objectivity" and "biased ground rules" scenarios in the Government Accountability Office's bid protest jurisprudence. The FAR 2.101 proposed definition of OCIs encompasses situations in which "(1) A Government contract requires a contractor to exercise judgment to assist the Government in a matter . . . 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 . . . that put the contractor in a position to influence the acquisition."

Separate Treatment of Unequal Access to Nonpublic Information. The Proposed Rule carves out "unequal access to information" situations—the third OCI scenario in GAO's bid protest jurisprudence—for separate treatment. The FAR Councils determined that situations that involve unequal access to nonpublic information do not necessarily arise from a "conflict of interest" and, therefore, propose addressing concerns over any

unfair competitive advantage that may result from these situations in FAR Part 4. Among other things, the FAR Councils propose to define "nonpublic information" in FAR 2.101 and establish procedures that contractually obligate contractors to protect nonpublic information to which they obtain access during contract performance.

Standard OCI and Unequal Access Clauses. The Proposed Rule contains a number of standard solicitation and contract clauses related to OCIs and unequal access to information situations. These clauses impose a variety of disclosure and reporting requirements on contractors, and in some cases may render contractors liable to the Government and third parties for misuse of information:

- The "Notice of Potential Organizational Conflict of Interest" clause (FAR 52.203-XX) requires offerors to disclose information about existing or potential OCIs and represent, to the best of their knowledge, that they have disclosed all relevant information.
- The "Disclosure of Organizational Conflict of Interest After Contract Award" clause (FAR 52.203-ZZ) requires contractors to promptly disclose OCIs that arise after the award of a contract or that were recently identified but not previously addressed.
- The "Mitigation of Organizational Conflicts of Interest" clause (FAR 52.203-YY) requires that if an OCI exists at the time of contract formation, the contractor's government-approved OCI mitigation plan must be incorporated into the contract. Thus, noncompliance with the mitigation plan will be considered noncompliance with the contract.
- The "Limitation on Future Contracting" clause (FAR 52.203-YZ) requires the CO to consider limitations on future contracting at the outset of a contract.
- The "Access to Nonpublic Information" clause (FAR 52.204-XX) precludes contractors from using any nonpublic information for any purpose unrelated to contract performance, requires contractors to safeguard the information, inform employees of their nondisclosure obligations and obtain nondisclosure agreements from them, and report any violations of the clause. The clause also requires the contractor to indemnify the Government for any misuse or disclosure of such information and bestows third-party beneficiary rights on information owners.
- The "Release of Pre-Award Information" clause (FAR 52.204-XY) provides that by submission of its offer, the offeror agrees that the Government may release submitted nonpublic information to other government contractors and subcontractors as appropriate. Those contractors and subcontractors must, in turn, be operating under a contract that includes proposed FAR clause 52.204-XX.
- The "Release of Nonpublic Information" clause (FAR 52.204-YY) provides permission for the Government to release a contractor's nonpublic information provided during the course of contract performance to other contractors or subcontractors, as appropriate. As with proposed solicitation provision FAR 52.204-XY, the contractors and subcontractors to which the Government would release the contractor's nonpublic information must be operating under a contract that includes proposed FAR clause 52.204-XX.
- Finally, the "Unequal Access to Information" clause (FAR 52.204-YZ), proposed for all solicitations that exceed the simplified acquisition threshold, would require an offeror to disclose if it or any of its

affiliates obtained access, directly or indirectly, from the Government to nonpublic information relevant to the solicitation and any actions the offeror proposes to take in response. If a firewall was established, the offeror must represent that it was implemented properly and has not been breached or, if not implemented or a breach occurred, so indicate and provide an explanation.

Mitigating OCIs with "Structural Barriers," "Internal Controls," and Conflict-Free Third Parties. Mitigation of OCIs, particularly "impaired objectivity" OCIs, has historically been difficult, and GAO has usually rejected intra-corporate firewalls as a viable mitigation strategy. Consistent with GAO's decisions, proposed FAR 3.1204-3(c)(2)(D)(ii) states that "a firewall that serves only to limit the sharing of information, by itself, is generally not effective in addressing an [OCI]." However, the Proposed Rule recognizes that more elaborate "structural or behavioral barriers" or "internal controls" may be effective, including binding board of directors resolutions prohibiting involvement in contract performance, nondisclosure agreements between the performing entity and all of its affiliates, the inclusion of independent directors with no prior relationship with the contractor, or the creation of a senior corporate OCI position to oversee the mitigation plan. Additionally, the proposed FAR 3.1204(c)(1) states that "[r]equiring a subcontractor or team member that is conflict-free to perform the conflicted portion of the work," may effectively mitigate an OCI, but only if such measures are "utilized in conjunction with a system of internal controls that can ensure that the conflicted entity has no input or influence" over the entity performing the conflicted portion of the work. This additional guidance in the FAR's OCI rules will provide needed flexibility in responding to various OCI situations.

Divergence from DFARS Proposed Rule and Request for Comments. The Councils noted that DoD originally proposed a substantial rewrite of the DFARS OCI rules in April 2010, but scaled these rules back in December 2010 in anticipation of a FAR rewrite. The Councils further noted that the Proposed FAR Rule "diverges substantially from the framework presented in the proposed DFARS rule." The Proposed Rule specifically requests comments on which of the two approaches is preferable, or whether some combination of the two should be pursued. The Proposed Rule also requests comments on several other issues, including, among others:

- Does the Proposed Rule provide an effective framework to evaluate and address OCIs;
- Is the new definition of OCI comprehensive, and do the proposed techniques to address OCIs adequately protect the Government's interests; and
- Do the proposed solicitation provisions and contract clauses adequately implement the Proposed Rule's policy framework?

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.