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ALERT

FAR Council Proposes Wholesale Revamp of Organizational Conflict of Interest Rules

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WHAT: On January 15, 2025, the Federal Acquisition Regulatory Council (FAR Council) issued a proposed rule to implement the Preventing Organizational Conflicts of Interest in Federal Acquisition Act (Pub. L. No. 117-324). The proposed rule is a wholesale revision to the FAR organizational conflict of interest (OCI) rules. It includes moving the rules from FAR Part 9 to FAR Part 3, and introduces new definitions and examples, along with several new OCI clauses.

WHEN: The proposed rule was published January 15, 2025; comments are due March 17, 2025.

WHAT IT MEANS FOR INDUSTRY: Congress required the FAR Council to revise its OCI rules, particularly in connection with conflicts that might arise between a contractor's work with the Government and with a private entity. The FAR Council previously attempted an update of its rules over a decade ago, but that effort languished and was eventually withdrawn. Now, the FAR Council has taken up a broad recrafting of its OCI rules, with new proposed clauses that may impose broad disclosure requirements and short time periods to identify changed circumstances. Industry should review the proposed rule and be prepared to participate in its recrafting.

OCI Rules Move From FAR Subpart 9 to New FAR Subpart 3.12

The FAR Council proposes moving OCI coverage from FAR Subpart 9.5 to a new FAR Subpart 3.12. According to the Council, FAR Part 9 addresses contractor qualifications, and although "the ability to provide impartial advice and assistance is an important qualification of a Government contractor, the larger issues that underlie efforts to identify and address OCI are more directly associated with some of

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the business practice topics discussed in FAR [P]art 3" – and the rules regarding personal conflicts of interest are also in that part. FAR Part 3 would also be retitled from "Improper Business Practices and Personal Conflicts of Interest" to "Business Ethics and Conflicts of Interest."

Proposed Rule Incorporates Bid Protest Case Law on "Incumbent Advantage" and the Need for "Hard Facts" on OCIs

The proposed rule emphasizes that there are two situations that raise OCI concerns: impaired objectivity and unfair competitive advantage, the latter of which encompasses biased ground rules or unequal access to information. A contractor's "natural advantage" – often referred to in bid protest cases as "incumbent advantage" – resulting from work previously performed is neither unfair nor an OCI concern in the proposed rule, however, and proposed FAR 3.1203(b) would explicitly recognize this. "Although incumbent contractors will often have a natural advantage based on their experience, insights, and expertise, this situation must be distinguished from situations in which an incumbent contractor also has had access to information that could provide an unfair competitive advantage," the Council said in the proposed rule. Incumbents with "knowledge and expertise developed during contract performance," or development contractors that have "done the most advanced work in a field and may be able to start production earlier, or offer products of a higher quality," do not have an "unfair" competitive advantage.

Further, drawing from case law terminology, e.g., *Turner Constr. Co. v. United States*, 645 F.3d 1377 (Fed. Cir. 2011), proposed FAR 3.1203(b)(2) cautions that contracting officers (COs) "should not disqualify a contractor based on mere innuendo and supposition unsupported by the record (i.e., no hard facts), or when the contractor's advantage is speculative and too remote from the present procurement to establish an [OCI]. Additionally, any allegation that a contractor could theoretically act in bad faith while performing on a contract is not a basis for a finding of a conflict of interest and therefore not a basis to disqualify an offeror from a competition."

Proposed Definitions

The proposed rule introduces several definitions related to OCIs for FAR 2.101 and new FAR Subpart 3.12:

- **OCI**: "[A]n entity or its affiliate(s) has impaired objectivity or an unfair competitive advantage as a result of other activities or relationships with other entities or their affiliates, including with public, private, domestic, and foreign entities." As noted above, an unfair competitive advantage may arise from biased ground rules or through unequal access to information.
- **Biased Ground Rules**: "[A] situation in which an entity or its affiliate, as part of its performance of a Government contract, has or may have materially influenced the development of the requirement, evaluation criteria, or other source selection procedures for another Government contract. The primary concern is that the entity could skew the future competition, whether intentionally or not, in favor of itself."
- **Impaired Objectivity**: "[A] situation in which an entity or its affiliate has or may have financial or other interests or an incentive to provide other than impartial advice to the Government, or the entity or its

affiliate's objectivity in performing the contract work is or might be otherwise impaired."

- **Unequal Access to Information**: "[A] situation in which an entity or its affiliate has or may have an unfair competitive advantage because— (i) Access to the information was provided to the entity or its affiliate by the Government. Such information may include proprietary and source selection information, e.g., proposals, financial information; (ii) The information is not available to all potential offerors; and (iii) Having access to the information would assist the entity in obtaining the contract." Proposed FAR 3.1203(c)(1) notes that this type of OCI arises only from situations where the information was provided by the Government directly or indirectly "through sources such as former Government employees . . . or employees of other contractors or subcontractors who received the nonpublic information from the Government."
- **Firewall**: This definition is added because the FAR Council recognizes that firewalls are a common mitigation strategy. The proposed rule defines a firewall as "a barrier against the unauthorized flow of information. Firewalls may consist of a variety of elements, including organizational and physical separation; facility and workspace access restrictions; information system access restrictions; independent compensation systems; and individual and organizational nondisclosure agreements."
- **Entity**: This definition is proposed to clarify that in the context of OCIs, an entity can be an individual, corporation, or other organization.
- **Contractor Team Arrangement**: This definition is proposed to clarify situations where multiple entities team to compete for an opportunity.

Applicability and Treatment of Commercial Product and Commercial Service Contracts and Subcontracts

Although the proposed rule contemplates application of OCI rules to acquisitions of commercial services at the prime level, the proposed rule would not apply to prime contracts for commercial products (including commercially available off-the-shelf (COTS) items). The proposed rule includes a determination that many of the situations in which the Government is vulnerable to OCIs occur when it acquires commercial services. One situation, identified in the Preventing Organizational Conflicts of Interest in Federal Acquisition Act, is "when a 'regulatory' agency acquires consulting services – which is a commercial service – from a contractor, and the contractor has the same employees perform both under the agency's contract as well as on a contract with a private sector client that is regulated by said agency." The FAR Council also notes that the Government purchases far more commercial services than commercial products. As such, the proposed rule states that it is not in the best interest of the Government to exempt acquisitions of commercial services from the proposed revisions. The proposed rule also states that due to the nature of commercial products and the fact that protections will be applied against OCIs at the prime contract level for commercial services, it was not in the best interest of the Government to apply the proposed revisions to acquisitions of commercial products or COTS items. For the same reasons, the FAR Council elected not to apply the proposed rule to subcontracts for commercial services, commercial products, or COTS items. The proposed rule also does not currently apply to contracts at or below the simplified acquisition threshold (SAT) but seeks public comment on applying the statute to contracts below the SAT that could lead to larger contracts with potential OCIs.

The proposed rule includes revisions to FAR 8.405 and 16.505, the ordering provisions for Federal Supply Schedules and task orders, respectively, to require offerors to identify if they have an unequal access to information OCI; the proposed revisions are silent as to other OCI types. But application to task and delivery orders, blanket purchase agreements, basic ordering agreements, and interagency acquisitions is also addressed more expansively in proposed FAR 3.1207-6, which also explains which organization is responsible for considering OCIs on orders that are interagency acquisitions.

Methods of Addressing OCIs, Including a New Acceptance of OCI Risk, and OCI Waivers

The proposed rule outlines four primary methods for addressing OCIs:

- **Avoidance, FAR 3.1205-1**: Proactive measures are taken to prevent OCIs from arising. This includes developing statements of work that do not require contractors to exercise subjective judgment, seeking advice from multiple contractors instead of a single contractor, and disqualifying offerors with a potential unfair advantage.
- **Limitation on Future Contracting, FAR 3.1205-2**: Restricting a contractor and its affiliates from participating in future contracts related to the work where an OCI exists. COs are instructed to make these limitations time-bound or event-triggered. Notably, proposed FAR 3.1207-4(c)(2) would allow an affiliated entity to request a waiver of the limitation in accordance with the OCI waiver provision and provides guidance on the factors to be considered.
- **Mitigation, FAR 3.1205-3**: Implementing measures to reduce the risk associated with an OCI. This may involve government or contractor actions, or both, often outlined in a mitigation plan. As discussed below, the proposed rule would require contractual incorporation of any approved OCI mitigation plan.
- **Determination of Acceptable Risk, FAR 3.1205-4**: Accepting the remaining risk associated with an impaired objectivity OCI after mitigation efforts if deemed in the Government's best interest. Factors to consider are whether the benefits of having a contractor with an OCI are greater than the risks and whether the performance risk is manageable (for example, the risk is low after mitigation measures are implemented or the agency has sufficient oversight controls).

The addition of this final method of risk acceptance for impaired objectivity type OCIs (only) is new. The FAR Council explains that the proposed rule revises a CO's obligation from having to "resolve" OCIs to having responsibility to "address" them. "The new term reflects the range of flexibilities that are allowed under the new, risk-based approach to OCIs. While existing case law requires the [CO] to determine that a conflict has been adequately mitigated, the proposed rule allows the [CO] to accept a risk when the conflict results from impaired objectivity and the risk to performance is low."

In addition to allowing a "determination of acceptable risk," the proposed rule carries over the current ability to waive OCIs in proposed FAR 3.1206. The proposed rule states that only the agency head or a delegee not below the head of the contracting activity may waive the OCI. This will likely change in the final rule because the Fiscal Year (FY) 2025 National Defense Authorization Act (NDAA) prohibits delegation for OCI waivers below the level of the deputy head of the agency. Different from the existing waiver rule in FAR 9.503, the

proposed rule would require the waiver determination to "not include a class of contracts" and "[e]xplain why other methods of addressing the [OCI] are not feasible or not adequate." Further, the waiver must explain why it is in the Government's interest, which is consistent with the requirement in the FY2025 NDAA that a waiver request must include a written justification for the waiver. Currently, FAR 9.503 requires the agency head to make a determination that the waiver is in the Government's interest, but there is no express requirement that the determination be in writing.

New Proposed FAR Clauses

The rule introduces five new FAR clauses intended to standardize treatment of OCIs. Some of these clauses include broad disclosure obligations beyond mere work on other government contracts – which could create False Claims Act risk – and impose short time periods for disclosure:

- **Potential Organizational Conflict of Interest – Disclosure and Representation (52.203-XX)**: The clause requires disclosure of "all relevant information of which the Offeror is aware regarding past (within the past twelve months), present, or currently planned financial or other interests that could result in an [OCI], including information about affiliates, clients, and potential subcontracts, except where such disclosure would constitute a violation of law (e.g., the Securities Exchange Act of 1934, 15 U.S.C. 78a *et seq.*)" and identifies the minimum information to be disclosed. It also includes a representation that the offeror has disclosed all relevant information, identification of actions to be taken to address any identified OCI, and a commitment to update the disclosure if there is a change. The clause also proposes that the CO will identify the contractors disqualified as a result of a preexisting limitation on future contracting or because "they participated in the preparation of the statement of work or other requirements documents, including cost or budget estimates, or otherwise participated in development of the solicitation." The clause requires flowdown to affected subcontractors, except subcontracts for commercial products or services.
- **Post-Award Disclosure of Organizational Conflict of Interest (52.203-DD)**: This clause requires written notification within five days of a "[f]inancial or other interest[] that could result in an [OCI]," a change in any relevant facts relating to a disclosed OCI, or "[s]pecific client and industry relationships, if identified by the [CO], that may present a conflict with the work to be performed," and details the contents of such a disclosure. The clause requires flowdown to affected subcontractors, except subcontracts for commercial products or services, and is prescribed when clause 52.203-XX is included in the solicitation.
- **Mitigation of Organizational Conflicts of Interest (52.203-MM**): Requires incorporation of OCI mitigation plans, addresses changes to plan, and requires reporting of noncompliance with a plan. If an offeror does not submit an OCI mitigation plan, the clause should not be included. The clause requires flowdown to affected subcontractors, except subcontracts for commercial products or services.
- **Limitation on Future Contracting (52.203-LL)**: The clause is required when there will be a limitation on future contracting opportunities and requires the CO to identify the nature of the limitation and the duration. The clause requires flowdown to affected subcontractors, except subcontracts for commercial products or services.

- **Unequal Access Information – Representation (52.203-AA)**: The proposed clause requires an offeror, prior to submission of an offer or proposal, to identify whether it or any affiliate had unequal access to information that could provide a competitive advantage. The clause includes a representation that the offeror either has no firewall because no OCI was identified or that a firewall was planned, implemented, and not breached during the preparation of the offer. If a firewall was not implemented or was breached, that too must be disclosed and explained.

Communications Regarding OCIs – Discussions or Not?

The proposed rule adds language to FAR 15.306, "Exchanges with offerors after receipt of proposals," to clarify that exchanges about OCIs are not "necessarily" considered discussions. The proposed rule explains: "Exchanges on an offeror's OCI mitigation plan are similar to responsibility determinations when OCI is not an evaluation factor," meaning that such exchanges would not be discussions such that the agency would be required to have exchanges with all offerors. If, however, "the other parts of the technical proposal and/or cost proposal are changed due to the exchanges," then such exchanges would constitute discussions, which would then need to be conducted equally with other offerors.

Revised Examples of OCIs

Proposed Section 3.1204 includes proposed examples of impaired objectivity scenarios, including those that may involve a contractor's private-sector work or work on behalf of a foreign government, and unfair competitive advantage examples through biased ground rules or unequal access to information. One such example, which has been the subject of bid protest litigation, relates to hiring of former government employees. Although not always treated as an OCI in the case law, the proposed rule provides a biased ground rules example of a contractor employing a former government employee "who was involved in developing the requirement for the product or service as part of such employee's Government job." An unequal access to information OCI could arise from information in the possession of a former government employee if the information was obtained while working for the Government, is contractor proprietary or source selection information, and the former government employee "is in a position in which use of the information could provide an unfair competitive advantage to an offeror, e.g., working on or being a consultant to a team preparing a proposal in response to a competitive solicitation."

Regulatory and Small Business Impacts

The proposed rule describes numerous expected benefits from the proposed FAR revisions compared to "de minimis" costs. The potential benefits include supporting fair competition and maintaining the integrity of the procurement process, preventing legal challenges and delays by effectively identifying and addressing OCIs, assisting the Government with protecting its interests and complying with relevant laws and regulations, maintaining public trust in the procurement process, and promoting standardization in OCI clauses and direction across government agencies, which could allow contractors to streamline their proposal preparation processes. The proposed rule emphasizes that the new FAR provisions would be replacing existing procedures and requirements, and the FAR Council believes any costs will largely be offset by current compliance costs

because the new FAR provisions will replace existing agency-specific requirements that already require contractors to conduct activities such as submitting mitigation plans, monitoring for new or overlooked OCIs, and reporting OCI-related information. Nonetheless, the impact analysis also states that the proposed rule "is expected to have significant economic impact on a substantial number of small entities." While noting that there are more than 360,000 small businesses registered in the System for Award Management, all of which may be required to comply with the new proposed FAR provisions, the FAR Council stated that it did not have data on the number of procurements that may be affected by OCIs. The proposed rule estimated that a relatively small number of entities – a total of 4,143 – would be required to provide disclosures, representations, mitigation plans, or other reporting under the proposed new provisions.

Takeaways

Many of the revisions in the proposed rule would provide welcome clarification and explanation to long-standing OCI rules, which would be beneficial to the entire procurement system. The proposed rule also increases flexibility for addressing OCIs by allowing COs to accept the risk of impaired objectivity OCIs. But some of the proposed changes are a significant departure from government and industry practices, most notably the types of OCIs that must be disclosed and the tight proposed timelines. Moreover, the added representations and disclosure obligations may increase False Claims Act risks. Contractors should take advantage of the public comment opportunity for this proposed rule. Notwithstanding the FAR Council's expectation of de minimis costs, if the final rule is implemented as proposed, contractors may need to establish larger and more complex OCI compliance programs, particularly contractors that also perform commercial work that currently is not subject to OCI review or analysis. Contractors may also need to revise agreements with commercial customers to allow disclosure of those relationships to the Government when necessary to comply with OCI provisions.

Wiley's Government Contracts Practice routinely advises contractors of all sizes on OCIs and litigates OCI bid protests regularly in all bid protest forums. We will continue to monitor developments on this significant proposed change to the FAR's OCI rules.

Jack Raineri, a Law Clerk in the Government Contracts practice, contributed to this alert.