

ALERT

Newly Enacted Legislation Calls for Updates to the FAR's OCI Rules

January 5, 2023

WHAT: President Biden signed into law the Preventing Organizational Conflicts of Interest in Federal Acquisition Act, Pub L. No. 117-324, which mandates updates to the Federal Acquisition Regulation's (FAR) provisions relating to identification and mitigation of organizational conflicts of interest (OCIs).

The Act directs the FAR Council to make various updates to FAR Subpart 9.5 to define the three familiar types of OCIs (unequal access to information, impaired objectivity, and biased ground rules) and provide further guidance and illustrative examples of other potential OCIs, such as "undue influence." The Act also directs the FAR Council to create new solicitation provisions and contract clauses to help agencies avoid or mitigate OCIs, subject to agencies' tailoring as necessary to address unique needs. The FAR Council must amend the FAR to allow contracting officers to consider professional standards and procedures used to prevent OCIs when identifying and evaluating a contractor's potential OCIs. Finally, once a final rule is issued, agencies must update their internal conflict of interest procedures to implement the revisions.

WHEN: The Act became law on December 27, 2022, and the FAR Council is directed to implement the Act and make necessary changes to the FAR within 18 months of enactment.

WHAT DOES IT MEAN FOR INDUSTRY: Today, FAR Subpart 9.5 provides general guidance regarding OCIs. It remains to be seen how much the forthcoming rulemaking will add truly new material versus adopt or adapt established practices.

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For example, the FAR Council may well draft the new FAR definitions of unequal access to information, impaired objectivity, and biased ground rules OCIs by re-organizing material already in Subpart 9.5 and/or importing the robust body of decisions by the Government Accountability Office, Court of Federal Claims, and Federal Circuit (*e.g.*, *Dell Servs. Fed. Gov't, Inc.* (GAO), *Turner Constr. Co.* (COFC), and *Turner Constr. Co.* (CAFC)) addressing OCI allegations in bid protests. Of course, the Act does not mandate particular definitions, suggesting that Congress gave the FAR Council leeway in defining these types of OCIs.

Another example, the FAR Council might develop the required solicitation provisions and contract clauses based on terms currently used by agencies today, such as the solicitation provisions promulgated by the Department of Homeland Security (HSAR 3052.209-72 and -73) and other agencies.

Regardless of what the FAR Council decides to propose, the rulemaking may still stretch beyond the established timeline. The last time the FAR Council proposed updating the OCI provisions (76 Fed. Reg. 23236 (Apr. 26, 2011)), the proposed rule remained open for ten years before ultimately being withdrawn (86 Fed. Reg. 14863 (Mar. 19, 2021)), underscoring the challenges the FAR Council will now face in promulgating the Act's required rules in a way that provides clarity while maintaining flexibility and adaptability to the unique circumstances of individual procurements. Wiley will be tracking the expected rulemaking and will provide further updates on developments.

Jonathan Clark, a Law Clerk at Wiley Rein LLP, contributed to this alert.