

New Organizational Conflict of Interest Proposed Rule Continues Trend in Transparency and Competition

Author: [Christopher L. Risetto](#), Partner, Washington, D.C.

Author: [Steven D. Tibbets](#), Associate, Washington, D.C.

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On April 26, 2011, the Federal Acquisition Regulation ("FAR") Council issued a proposed rule that would amend the rules governing organizational conflicts of interest ("OCI"). 76 F.R. 23236-54 (Apr. 26, 2011). Parties interested in submitting comments on the proposed rule must do so no later than June 27, 2011, to ensure that the FAR Council considers them.

The OCI rules at Subpart 9.5 are designed to help the Government in identifying and addressing circumstances in which a Government contractor may be unable to render impartial assistance or advice to the Government, or might have an unfair competitive advantage based on unequal access to information or prior involvement in setting the ground rules for an acquisition. In recent years, trends in the Government and contractor industry-industry consolidation, increased government reliance on contractors, and the like-have led policymakers to conclude that existing OCI regulations are inadequate.

In 2010, the U.S. Department of Defense ("DoD") amended the DoD Federal Acquisition Supplement ("DFARS") to strengthen the rules governing OCIs and when and how they may be mitigated. The FAR Council's proposed rule is similar to the DoD rule in some respects, but diverges in others. The two rules have the following in common: (1) they involve reorganizing the regulations so that OCI rules are situated adjacent to rules on personal conflict of interests and business practices; (2) they provide more detail regarding how contracting officers are to perform individualized OCI analyses for each case; (3) they provide standard OCI-related language for inclusion in contracts; and (4) they address the unique issues that arise when handling OCIs in the context of task- and delivery-order contracts.

The proposed FAR and final DFARS rules diverge in the following ways: (1) the FAR rule provides a framework to guide contracting officers in assessing the threat a particular OCI poses both to the integrity of the competitive acquisition system and to the Government's business interests; (2) the FAR rule acknowledges the harm that OCIs can cause to other offerors, thereby giving contracting officers more authority to base mitigation findings on how an OCI affects other offerors; (3) the FAR rule treats the concepts of unequal access to nonpublic information and the elimination of unfair competitive advantage as completely separate from OCIs; and (4) the FAR rule expands the coverage of what is considered to be contractor access to nonpublic information.

Perhaps most relevant for contractors is a new standard clause that contracting officers would be required to include in solicitations and contracts whenever the contracting officer determines that there is potential for an OCI with regard to a particular contract. Having such a clause will be helpful to contractors in identifying which opportunities are likely to involve OCIs that might limit the contractor's ability to pursue related opportunities in the future. On this point, the new FAR rule provides a template clause that addresses "Limitation of Future Contracting." Thus, there is now a formal and clear means by which a contracting officer may impose future limitations based on a brand new solicitation, whereas currently such OCIs are often first considered when a contractor potentially subject to an OCI, bids on or wins a contract perhaps years after award of the OCI-generating contract.

The FAR Council took the unusual step of soliciting comment responding to eight specific questions:

- Do the policy and associated principles set forth in the proposed rule provide an effective framework for evaluating and addressing conflicts of interest?
- Is the definition of "organizational conflict of interest" sufficiently comprehensive to address all potential forms of such conflicts?
- Do the enumerated techniques for addressing OCIs adequately address the Government's interests? Are any too weak or overbroad? Are there other techniques that should be addressed?
- Does the rule adequately address the potential conflicts that may arise for companies that have both advisory and production capabilities? What, if any, improvements might be made?
- Do the proposed solicitation provisions and contract clauses adequately implement the policy framework set forth in the proposed rule? For example, is a clause limiting future contracting an operationally feasible means of resolving a conflict? Would it be beneficial and appropriate for this information generally to be made publicly available, such as through a notice on FedBizOpps? Do the solicitation provisions and contract clauses afford sufficient flexibility to help an agency meet its individual needs regarding a prospective or actual conflict?
- Is there a need for additional guidance to supplement the proposed FAR coverage of OCIs (e.g., guidance addressing the management of OCI responsibilities)? If so, what points should the guidance make?
- Is the framework presented by this proposed rule preferable to the framework presented in the DFARS Proposed Rule 2009-D015 published in the *Federal Register* April 22, 2010 (75 FR 20954-20965)? Why or why not? Would some hybrid of the two proposed rules be preferable?

- Does the proposed rule strike the right balance between providing detailed guidance for contracting officers and allowing appropriate flexibility for dealing with the variety of forms that organizational conflicts of interest take, and the variety of circumstances under which they arise? Are there certain types of contracts, or contracts for certain types of services, that warrant coverage that is more strict than that provided by the proposed rule?
76 F.R. 23241-42 (Apr. 26, 2011).

Contractors with strong views on how these questions are resolved should prepare comments and submit them prior to June 27, 2011 to ensure that their views are considered. Reed Smith attorneys are tracking OCI regulations and other changes to the FAR as they evolve. For assistance in understanding these changes or learning how you can affect the regulatory process, please contact one of the authors.

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