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CLIENT ALERT

Proposed FAR Provision Governing Organizational Conflicts of Interest

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On April 26, 2011, the government issued a proposed rule governing organizational conflicts of interest. Comments are due on or before June 27, 2011.

Overview

The FAR Councils, in consultation with the Office of Federal Procurement Policy and the Office of Government Ethics, have issued a proposed rule governing organizational conflicts of interest ("OCI") that deviates substantially from the current approach to OCIs set forth in FAR 9.5, and from certain aspects of decades of decisional law from the U.S. Government Accountability Office and the Court of Federal Claims. Moreover, this proposed rule is also quite different from the approach to OCIs that the Department of Defense ("DoD") proposed last year. Click here for our detailed analysis of that proposed rule.

In this regard, the Councils noted this new proposal is markedly different than the framework presented in the proposed DFARS rule, and the Councils "are seeking specific feedback regarding which course of action, or whether some combination of the two, is preferable."

There are similarities between the proposed FAR provision and the provisions that DoD proposed last year for all DoD procurements:

- Move OCI Coverage To FAR Part 3. Under both proposals, instead of being located in Part 9 (relating to contractor responsibility and eligibility), where the current OCI rules can be found, the new rules would be located in Part 3 (relating to improper business practices and other integrity issues).
- Definitions And Detailed Guidance. Both proposals offer detailed definitions and detailed guidance regarding how contracting officers should identify and address OCIs, while emphasizing the fact-specific nature of these conflicts.
- Standard Clauses. Both proposals offer standard OCI solicitation clauses, coupled with the opportunity for contracting officers to tailor the clauses as appropriate for particular circumstances.
- Task And Delivery Orders. Both proposals offer mechanisms to address unique policy issues and contracting officer responsibilities associated with OCIs arising in the context of task and delivery orders.

However, there are also some stark differences between the proposed FAR provision and the provisions that DoD proposed last year:

- Analysis Of Risk. The proposed FAR provision asserts that there are two kinds of risk that can flow from OCIs – (i) harm to the integrity of the competitive acquisition system and (ii) harm to the government's business interests. The proposed rule sets forth different treatment based on that distinction.

- Acceptance Of Risk Of Harm To Government Business Interests. In circumstances where the OCI harms the competitive acquisition system, the DoD proposal required that the OCI must be substantially reduced, eliminated, or waived. In contrast, the FAR Councils' proposal provides that the risk of harm to the government's business interests may sometimes be assessed as an acceptable performance risk and further action may not be necessary to address the conflict.
- Recognition Of Corporate Structural Barriers And Internal Controls.Unlike the DoD proposal, the proposed FAR provision recognizes that corporate structural barriers – such as independent boards of directors – may, in some circumstances, constitute sufficient mitigation.
- Removal Of Unequal Access To Nonpublic Information From The OCI Framework. Also unlike the DoD proposal, the proposed FAR provision removes the concept of unequal access to nonpublic information from the definition of OCIs, and treats it separately under FAR Part 4.

What follows is an overview of the key aspects of this proposal. Adopting for purposes of this analysis the distinction in the proposed rule between OCIs and unequal access to nonpublic information, we turn first to OCIs and then to the proposed treatment of unequal access to nonpublic information.

We also note that, because of the statutory restrictions imposed by the Weapons Systems Acquisition Reform Act of 2009, whichever approach is ultimately selected, it will not alter the treatment of OCI issues that arise in the context of Major Defense Acquisition Programs. Click here for our detailed analysis of the DFARS final provisions, issued on December 29, 2010, that govern OCIs in Major Defense Acquisition Programs.

Proposed Treatment Of Organizational Conflicts of Interest

- Definition. In order to carve out the concept of unequal access to nonpublic information, the FAR Councils have proposed to define OCI as a situation in which:

  > (1) A Government contract requires a contractor to exercise judgment to assist the Government in a matter (such as in drafting specifications or assessing another contractor's proposal or performance) 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
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  > (2) A contractor could have an unfair competitive advantage in an acquisition as a result of having performed work on a Government contract, under circumstances such as those described in paragraph (1) of this definition, that put the contractor in a position to influence the acquisition.

- Applicability. The proposed rule would apply to all acquisitions, contracts, and subcontracts, including those for commercial items and commercially available off-the-shelf ("COTS") items. The rule would also apply to task or delivery orders, modifications, and profit and nonprofit organizations ("including nonprofit organizations created largely or wholly with Government funds.").

- Policy. Rather than categorize OCIs by nature of the conflict (*e.g.* biased ground rules and impaired objectivity), the proposed rule categorizes OCIs by nature of the harm to the government's interest. In so doing, the proposed rule identifies two primary ways in which an OCI harms the government's interests: harm to the integrity of the competitive acquisition process and harm to the government's business interests. Agencies must address or waive any and all OCIs, but the available means for doing so will depend on the category of the government interest at stake. For example, acceptance of the performance risk that stems from an OCI is an option only for OCIs whose sole impact is on governmental business interests (*i.e.*, not for OCIs that are determined to harm the integrity of the procurement process).

- Identification Of OCIs. The contracting officer has responsibility for identification of OCIs. Indeed, the proposed standard form OCI clause provides that the "Contracting Officer is the final authority in determining whether an organizational conflict of interest exists and whether the organizational conflict of interest has been adequately addressed."
    - *Initial Assessment*. In the early stages of procurement planning, the contracting officer must analyze the nature of the work to be performed and consider whether it has the potential to create an OCI. This initial assessment must also prospectively consider whether the performance of the present contract could, by itself, create OCIs with foreseeable future procurements such that the contract recipient may be precluded from competing for certain future contracts, or be required to implement preemptive avoidance and mitigation measures to prevent such a preclusion.
    - *Pre-solicitation Activities.* Where the contracting officer concludes that a procurement has the potential for OCIs, the proposed rule identifies a series of factors which "should" be considered, including the extent and severity of the OCI, the extent of the agency's oversight controls to limit the impact of the OCI, whether the OCI creates an unfair competitive advantage, and the degree to which a potential OCI would reduce the value of the services sought.
    - *Evaluation Of Offers.* In addition to considering the scope of self-reported potential OCIs and evaluating submitted OCI mitigation plans from offerors, the proposed rule requires contracting officers to seek readily available information about the financial interests of the offerors from the offerors,from government sources (such as other contracting offices at the agency), and from non-governmental sources (such as the offeror's website, business directories, and trade and financial journals).

- Addressing OCIs. According to the proposed rules, "Organizational conflicts of interest may be addressed by means of avoidance, limitations on future contracting, mitigation, or the Government's assessment that the risk inherent in the conflict is acceptable. In some cases, a combination of methods may be appropriate."
    - *Avoidance*. In the solicitation preparation process, contracting officers should consider whether a statement of work can be drafted so as to exclude the sorts of tasks that invite the most common OCI problems, such as subjective recommendations and evaluations of other industry members, and drafting future solicitations. Where tasks with OCI risks cannot be avoided, contracting officers should consider adding terms and conditions to contracts that require the contractor upon award to implement preemptive measures, such as firewalls and corporate structural barriers, to prevent the company from conflicting itself out of future work. Where an OCI is specific to a particular firm and no other method of addressing the OCI resolves the concern, exclusion of the offeror is the appropriate avoidance method of last resort.

- *Limitation on future contracting*. Where work on the present contract will create future conflicts with other procurements down the road, and those conflicts cannot be avoided through preemptive measures, adding terms to the initial contract that require the contractor to agree to pass up bidding on particular future procurements is an effective way to avoid an OCI.
- *Mitigation*. The proposed rule endorses three broad forms of mitigation – (i) subcontracting the portion of work from which the conflict arises (if possible), (ii) soliciting advice from multiple sources so as to limit the impact of impaired objectivity, and (iii) working with the contracting agency to establish internal mitigation measures such as firewalls, independent members of the board of directors, non-disclosure agreements, and the hiring of a senior-level OCI compliance officer to supervise all mitigation efforts.
- *Acceptance of Risk.* Where the threat of the conflict is only to the government's business interests and not to the integrity of the competitive acquisition process, the contracting officer may elect to accept the risk of the OCI so long as the risk is manageable and the potential harm of the OCI is outweighed by the expected benefit from having the conflicted offeror perform the contract.

- Waiver. In "exceptional circumstances," the head of the agency or his designee (at a level no lower than the head of contracting activity), may waive an OCI, but only when the waiver is necessary to accomplish the agency's mission and it is determined that the OCI is neither acceptable, because of its impact on the competitive acquisition process, nor susceptible to feasible mitigation or avoidance efforts.

- Award Decisions. Before a contracting officer can withhold award from the apparent successful offeror because of OCI considerations, the contracting officer must (i) notify the contractor in writing, (ii) provide the reasons for the determination, and (iii) and allow the contractor a reasonable opportunity to respond. The proposed rule provides that a contracting officer shall award the contract to the apparent successful offeror only if all organizational conflicts of interest have been addressed.

- Task Or Delivery Orders. The proposed rules acknowledge the complexity of OCIs in the context of task or delivery orders. If an OCI can be identified at the time of task or delivery order contract award, the contracting officer must include a resolution plan in a basic contract. The contracting officer must reconsider OCIs at the time of issuance and each task or delivery order and, if necessary, include a resolution plan or revise the plan incorporated into the basic award. In the case of multiple-award task or delivery order contracts against which other agencies may place orders, the contracting officer for the ordering agency is responsible for administering a mitigation plan and/or determining that an OCI precludes award of an order.

- Pre-Award Disclosure Requirements. The proposed rule would make mandatory the inclusion of an OCI disclosure clause in any procurement that the contracting officer identifies as potentially susceptible to OCIs. The clause requires offerors to disclose "all relevant information regarding OCIs," including potential subcontracts, and other limitations on future contracting.

- Post-Award Disclosure Requirements. For any procurement that includes the pre-award disclosure clause, the proposed rule also calls for the inclusion of a post-award disclosure clause that requires the contractor to continually monitor itself and proactively disclose any newly identified OCIs, including both OCIs that existed prior to award but were

undiscovered, and OCIs that developed for the first time after award. As part of any disclosure, the offeror must identify actions it has taken or proposes to take and/or actions it recommends that the government take. If the disclosed OCI cannot be addressed in an acceptable manner, the agency may opt to waive the conflict or terminate the contract for convenience of the government.

Proposed Treatment Of Unequal Access To Nonpublic Information

The proposed rule recognizes that the risks and potential remedies for a contractor's unequal access to information are different that those required for OCIs and it therefore treats them separately. It therefore creates a new section within FAR Part 4, relating to Administrative Matters, to address unequal access.

- Definition Of Nonpublic Information. Nonpublic information is broadly defined and includes government or third-party information that is exempt from disclosure under the Freedom of Information Act ("FOIA") or otherwise protected by statute, Executive order or regulation. The proposed rule explicitly excludes from this definition any information that is (i) not provided by the government either directly through performance on a contract or indirectly through former government employees or other contractors, (ii) publicly available to all potential offerors, or (iii) not competitively useful as determined by the contracting officer after consultation with other market participants.

- Policy. The government must take action to "resolve" any situations in which "an offeror has obtained an unfair competitive advantage because of its unequal access to nonpublic information" because such an advantage risks tainting the integrity of the acquisition process. The proposed rule does not apply to the natural advantages incumbent contractors have "based on their experience, insights and expertise rather than any unequal access to nonpublic information."

- Identification. The contracting officer is responsible for identifying where there is a risk of disclosure of nonpublic information. During the acquisition planning, the contracting officer is required to ask the contracting activities whether any of the potential offerors may have had access to nonpublic information. When announcing an acquisition, the contracting officer would be required to ask all potential offerors if they have had access to nonpublic government-provided information, or whether any individual in their organization, including affiliates, has had such access. If so, the contracting officer is required to assess whether (i) that information is unavailable to all other offerors, (ii) is competitively useful in the solicitation, and (iii) provides an unfair advantage. If the answer is yes to all three, the contracting officer shall require the offeror to resolve the unequal access.

- Resolution. The three proposed resolution methods are (i) to share the information amongst all of the potential offerors to nullify any potential competitive advantages; (ii) to mitigate the effects by creating internal firewalls, either through organizational separation, facility or IT access restrictions, independent compensation or individual and organizational nondisclosure agreements ("NDAs"); or (3) to disqualify the contractor. Disqualification is only permitted if the contracting officer determines that the first two remedies will not "protect the fairness of the competition."

- Other Considerations, Including Release Of Nonpublic Information. The proposed rule also creates new FAR default clauses on "access" to and "release" of nonpublic information. The access clause requires a contractor to certify that it

will use nonpublic information only for the purposes specified in the contract, that it will safeguard the information from disclosure, and that it will obtain written NDAs from each person with access to nonpublic information. Correspondingly, the release clause gives the contractor's consent to the government's release of its nonpublic information to any contractors who have signed an NDA and need access to the information. The release clause preserves the contractor's rights against any potential third-party for improper release of the nonpublic information.

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