

Preventing the Fox from Guarding the Henhouse: FAR Proposed Rule Overhauls Organizational Conflicts of Interest Rules for Federal Procurement

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On January 15, 2025, the Federal Acquisition Regulatory Council (FAR) issued a long-anticipated FAR proposed rule, “Preventing Organizational Conflicts of Interest in Federal Acquisition.” 90 Fed. Reg. 4376 (Jan. 15, 2025). The proposed rule makes extensive changes to coverage of organizational conflicts of interest (OCIs) in the FAR, relocating provisions within the FAR to incorporate new and updated definitions, provide expanded guidance and illustrative examples, and establish new solicitation provisions and contract clauses.

This proposed rule evolved in part from an earlier, abandoned rulemaking. Almost a decade-and-a-half ago the FAR council issued a proposed rule under FAR case 2011-001, “Organizational Conflicts of Interest.” 76 Fed. Reg. 23236 (Apr. 26, 2011). The proposed rule languished for years and was withdrawn due to the passage of time. 86 Fed. Reg. 14863.

The new rule is the result of a statutory mandate, the “Preventing Organizational Conflicts of Interest in Federal Acquisition Act,” signed in late 2022 in response to public outcry over a consultancy advising drug companies and the Federal Drug Administration simultaneously. (Pub. L. 177-324, 41 U.S.C. § 2303 or the “statute”). The statute directed the FAR Council to revise the FAR regulatory framework for OCIs, which it was supposed to do by last summer.

Among other things, the proposed rule creates a new FAR subpart 3.12, Organizational Conflicts of Interest, moving the coverage from FAR Part 9 (contractor qualifications) to FAR Part 3 (contractor business practices). Relocation of the OCI regulations to FAR Subpart 3.12 would leave intact much of the existing rule’s structure. The reason appears to be that OCI is more properly aligned with the business ethics topics addressed in FAR Part 3. Consistent with this view, the title of FAR Part 3 would be changed from “Improper Business Practices and Personal Conflicts of Interest” to “Business Ethics and Conflicts of Interest.” The 2011 proposed rule also proposed moving OCI coverage to FAR Part 3, but it did not rename the Part.

A key aspect of the proposed rule is the definitional updates and additions. The definition of “organizational conflict of interest” would be revised to state that an entity or its affiliates has (1) *Impaired Objectivity* or (2) 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. An unfair competitive advantage, in turn, results from either *Biased Ground Rules* or *Unequal Access to Information*. Those three critical terms: *Impaired Objectivity*, *Biased Ground Rules*, and *Unequal Access to Information*, are defined as follows under the proposed rule:

- *Impaired Objectivity* is 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.

- *Biased Ground Rules* is 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.
- *Unequal Access to Information* is 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.

The proposed rule would also add a definition under new FAR section 3.1201 for the term *Firewall*, defining it “as a barrier against the unauthorized flow of information [that] 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.”

The 2011 proposed rule did not include this level of granularity with respect to new defined terms. Rather, the 2011 Proposed Rule separated the coverage of unequal access to nonpublic information from general OCI coverage, placing it in FAR Part 4. The new definitions are consistent with decisions of the Government Accountability Office, the Court of Federal Claims, and the Court of Appeals for the Federal Circuit, and it is helpful to have these terms formally adopted and defined within the regulations.

The proposed rule also incorporates illustrative examples under new FAR section 3.1204 designed to aid contracting officers in identifying and mitigating potential OCIs. The non-inclusive examples are divided into two categories, each corresponding with: (a) impaired objectivity or (b) unfair competitive advantage. The impaired objectivity examples describe scenarios where one entity’s relationships with other entities can create undue influence or otherwise impair its performance on a government contract. The illustrative examples of unfair competitive advantage are separated into circumstances where the unfair advantage originates from either biased ground rules or from unequal access to information. The 2011 proposed rule did not include these kinds of illustrative examples, but the FAR Council has now provided them as required by the 2022 statute.

The proposed rule emphasizes the use of a risk-based approach to addressing OCI and includes new FAR section 3.1205, which provides detailed guidance for contracting officers on avoidance (3.1205-1), limitations on future contracting (3.1205-2), mitigation (3.1205-3), and acceptable risk (3.1205-4). Broadly, these four concepts are as follows:

- Avoidance consists of Government action taken in one acquisition that is intended to prevent an OCI from arising in the current acquisition or in a future acquisition.
- A limitation on future contracting allows a contractor to perform on the current contract but precludes the contractor and its affiliates from entering into or participating as a contractor or subcontractor in certain future contracts.
- Mitigation is an action taken to reduce the risk from an OCI that may require Government action, contractor action, or a combination of both.

- Determination of acceptable risk is only available for OCIs resulting from impaired objectivity (i.e. not for OCI resulting from unfair competitive advantage) where the contracting officer determines that some or all of the performance risk associated with an OCI is outweighed by the expected benefit from having the offeror with an OCI perform the contract and the performance risk is manageable.

The proposed rule notes that contracting officers may address OCI risks using a combination of these methods.

The proposed rule further provides under new FAR section 3.1206 for waiver authority, to be exercised by the agency head, and non-delegable below the head of the contracting activity, in two discrete instances: (1) to address an OCI in a particular acquisition if methods of addressing the OCI are not adequate or feasible; and (2) where there was a preexisting limitation on future contracting. The 2011 proposed rule included a similar focus on avoidance, mitigation, and risk assessment, but with less focus on a risk-based approach to OCIs.

The proposed rule also consolidates the contracting officer's responsibilities into new FAR section 3.1207, providing more detailed guidance on identifying, analyzing, and addressing OCI throughout all phases of the acquisition process. The 2011 Proposed Rule also consolidated responsibilities but provided less detailed guidance comparatively.

While the proposed OCI coverage at FAR subpart 3.12 applies to most procurements, the proposed rule exempts acquisitions at or below the simplified acquisition threshold (SAT), which is currently set at \$250,000. The proposed rule also exempts from OCI coverage commercial **products**, including Commercially Available Off-The-Shelf (COTS) Items, in addition to subcontracts for commercial products or services. Notably, contracts for commercial **services** above the SAT **are** subject to OCI coverage. The FAR Council explains in the promulgating comments that exempting contracts for the acquisition of commercial services would not be in the best interest of the Government given the statute's explicit requirement to protect particular acquisitions of commercial services against OCIs and the prevalence of Government acquisition of commercial services. The 2011 proposed rule applied OCI coverage to contracts and subcontracts with both profit and nonprofit organizations, including commercial items if the contracting officer determined that performance may give rise to an OCI.

Finally, the proposed rule introduces five new solicitation provisions and contract clauses related to OCI. These include: FAR 52.203–XX Potential Organizational Conflict of Interest—Disclosure and Representation; FAR 52.203–DD Postaward Disclosure of Organizational Conflict of Interest; FAR 52.203–MM Mitigation of Organizational Conflicts of Interest; FAR 52.203–LL Limitation on Future Contracting; and FAR 52.203–AA Unequal Access to Information—Representation. The 2011 proposed rule sought to introduce four similar solicitation provisions and contract clauses related to OCI but did not include a clause pertaining to unequal access to information.

One wrinkle potentially created by the proposed rule is the change to the current FAR 9.505 which states that “[c]onflicts may arise in situations not expressly covered in this section 9.505 or in the examples in 9.508” and that:

[e]ach individual contracting situation should be examined on the basis of its particular facts and the nature of the proposed contract. The exercise of common sense, good judgment, and sound discretion is required in both the decision on whether a significant potential conflict exists and, if it does, the development of an appropriate means for resolving it.

The proposed rule does not include the caution that conflicts may arise in situations not expressly covered by the rule. That change is unfortunate as the current rule provides contracting officers and bid protest fora the express ability to ensure fair competition in the face of an unusual or unique conflict. It would be prudent to preserve this flexibility in the proposed rule.

Overall, if the proposed rule is finalized it will benefit both the Government and private industry by ensuring fair competition, maintaining the integrity of the procurement process, avoiding unfair advantage, and protecting against contract termination as a result of OCI.

The comment period for the notice of proposed rulemaking is open until March 17, 2025. The FAR Council invites public comments specifically on whether it would be in the best interest of the Government to apply the statute to certain contracts at or below the SAT.