BRIEFING PAPERS® SECOND SERIES

PRACTICAL TIGHT-KNIT BRIEFINGS INCLUDING ACTION GUIDELINES ON GOVERNMENT CONTRACT TOPICS

Organizational Conflicts Of Interest / Edition VI: Is The OCI Pendulum Swinging Back At The GAO?

*By Fred W. Geldon and Caitlin Conroy**

For several years it seemed that the Government Accountability Office (GAO) would deny any protest that challenged a Contracting Officer's (CO's) organizational conflict of interest (OCI) determination. Sometimes this meant that COs were getting it right (albeit in some cases only after taking corrective action). And clearly the GAO was heeding the direction provided by the U.S. Court of Appeals for the Federal Circuit in a series of cases decided between 2009 and 2011, admonishing that the GAO should give greater deference to CO determinations—that "hard facts" must be shown before an OCI should be considered disqualifying or before a CO's decision should be overturned.

Recent GAO OCI decisions suggest that this deference may be weakening, and the pendulum may be swinging the other way. The GAO appears to have stopped following Aaron Burr's advice (as presented in *Hamilton*[1]) to "talk less, smile more" (or its canine version, "bark less, wag more"[2]). A good example is the recent decision in *C2C Innovative Solutions, Inc.*,[3] where the GAO rejected OCI determinations made by the CO both before award and during the protest. Nor is this the only sounding of the GAO's bark—during the past two years the GAO has sustained OCI protests by seven offerors, marking a significant turnaround from recent years. Is the pendulum swinging back?

This Briefing Paper, the sixth to address OCI's,[4] discusses the recent movement of the OCI pendulum in a historical context. In addition, no OCI update would be complete without discussing the regulatory changes mandated by Congress in 2009.[5] These changes led to a 2010 Defense FAR Supplement (DFARS) OCI final rule,[6] resulting in significant deconsolidation in the defense industry. And though the proposed FAR OCI rule[7] has not been issued in final form, some of its guidance can be implemented immediately where it is in the interest of the Government to do so.

*Fred W. Geldon and Caitlin Conroy are senior counsel and associate, respectively, in Steptoe & Johnson, LLP's Washington, D.C. office and members of the firm's government contracts practice group.

IN THIS ISSUE:

THOMSON REUTERS®

Mat #42154848 ISSUE 18-13 ★ DECEMBER 2018

History Of GAO Organizational Conflict Of Interest Decisions

The GAO OCI pendulum has had several significant swings over the past 55 years. (Note: Court of Federal Claims OCI bid protest decisions are not discussed further in this BRIEFING PAPER, but in general they follow similar trends.)

Pre-FAR OCI Bid Protests

Between June 1, 1963 (when the first OCI regulation was issued[8]) and April 1, 1984 (the effective date of the Federal Acquisition Regulation[9] (FAR)), the GAO protest forum was relatively ineffective, and the GAO (and the courts) rarely overturned CO OCI determinations. There were several reasons for this. First, protester rights at the GAO were limited, with little discovery opportunity. There was no provision for an "automatic stay,"[10] which meant that the remedy following a successful protest was often illusory. Second, the OCI rule (which only applied to Department of Defense (DOD) procurements) was not considered to be "self-executing." Unless a contract specifically restricted future activities (e.g., if a contract to assist in preparing specifications for a future procurement explicitly restricted the contractor from competing in that future procurement), the GAO found that the OCI rule did not apply.[11]

As a result, with rare exception the CO's decision, whichever way it went, would not be overturned. If the CO excluded an offeror on OCI grounds, the decision would be sustained. If the CO allowed a challenged offeror to compete, that decision would also be sustained. Even when the GAO found that the agency had not properly considered an OCI, its recommendation was usually limited to future corrective action, rather than overturning the challenged contract award itself, especially where the awarded contracts had already been fully performed.[12] This did not mean that OCI regulations were irrelevant. It simply meant that discretion to interpret those regulations and "enforce" OCI concerns stayed in the hands of the COs.

OCI Bid Protests In The FAR Era

After April 1, 1984, the OCI pendulum started to swing. The FAR expanded coverage by the OCI regulations[13] to civilian agencies as well as the DOD. Protest forums, which now included the General Services Administration Board of Contract Appeals (GSBCA), as well as the GAO and the Court of Federal Claims, grew teeth. Congress gave the GSBCA jurisdiction over bid protests of automatic data processing contracts for a three-year test period,[14] which was subsequently made permanent and then eliminated,[15] and the GAO's processes were strengthened.[16] Most significantly, both the GSBCA and the GAO now had "automatic stay" provisions, suspending contract performance during the pendency of a protest. That meant that protest relief could affect the challenged contract and not be limited to hortatory recommendations for future behavior.

Although protest forums were more effective, very few OCI protests were actually granted. Most CO decisions to exclude an offeror on OCI grounds, or not to do so, were still upheld by the GAO. And COs, even though they were now subject to FAR OCI regulations and meaningful protest enforcement, tended to avoid dealing with OCI issues as much as possible. They were particularly reluctant to decide, in advance of an award determination, whether an OCI could be "avoided, neutralized, or mitigated," presumably to avoid expending needless energy issuing "advisory opinions" to offerors who might not be selected.

Reluctance by the CO to address OCI issues often gave an offeror a Hobson's choice, since an attempt to resolve OCI issues early in the process might signal that an award to the offeror would raise OCI issues that could be avoided by

Editor: Valerie L. Gross

Briefing Papers® (ISSN 0007-0025) is published monthly, except January (two issues) and copyrighted by Thomson Reuters, 610 Opperman Drive, P.O. Box 64526, St. Paul, MN 55164-0526. Customer Service: (800) 328-4880. Periodical Postage paid at St. Paul, MN. POSTMASTER: Send address changes to Briefing Papers, 610 Opperman Drive, P.O. Box 64526, St. Paul, MN 55164-0526.

awarding the contract to a competitor. This put an offeror with a potential OCI issue in a bind—they could either withdraw from the procurement, which might be winnable, or invest significant bid and proposal dollars in a procurement that might lead to a dead end.[17] This resulted in wasted resources, lost opportunities, and reduced competition.

Aetna And Its Aftermath

The seminal *Aetna Government Health Plans, Inc.* decision in 1995[18] formalized OCI analysis and moved the OCI enforcement pendulum to its apogee. In *Aetna*, a consulting company that helped the agency evaluate proposals was affiliated with a subcontractor on the awardee's proposal team. The agency had approved a proposed mitigation plan that included a firewall, separate compensation systems, and a limitation on the consultant's scope of work. In an opinion written by Daniel Gordon, then with the GAO Office of General Counsel, the GAO found that these mitigation measures were inadequate, and indeed that the impaired objectivity OCI that had been created could not be mitigated. More important, the opinion reviewed OCI regulations and prior decisions and, for the first time, formalized the OCI classifications that continue to be used.[19]

Following the *Aetna* decision, the GAO and the Court of Federal Claims became more aggressive in applying OCI rules and overturning contract awards. *Aetna* was the first of a number of protests that were sustained on the basis that the CO failed to properly evaluate potential OCIs.[20] In some of these cases the GAO even reversed CO determinations made after what seemed to be a serious and reasonable investigation and analysis, raising doubt as to whether the GAO was paying mere lip service to its self-proclaimed deference standard.[21]

The Steady Drumbeat

Then the OCI pendulum reversed direction. Between 2009 and 2011 the U.S. Court of Appeals for the Federal Circuit issued three decisions[22] that sent a "steady drumbeat about the deference to be shown to the contracting officer."[23] In each of the three cases, the Federal Circuit supported the CO's OCI decision, reversing either the Court of Federal Claims or (implicitly) the GAO. The Federal Circuit emphasized the "arbitrary and capricious" standard of review and stated that a determination to exclude an offeror or to overrule a CO's decision must be based on hard facts that establish the existence or potential existence of an OCI, rather than mere suspicion.[24]

The protest forums took this guidance to heart, and became more deferential to COs, granting very few OCI protests. For example, in the two-and-a-half years between February 2012 and August 2014, protesters raised 40 OCI challenges in protests before the GAO and—with the exception of one protest where the agency waived a potential OCI at the last minute after receiving an unfavorable alternative dispute resolution (ADR) "outcome prediction"—in every case the GAO upheld the CO's decision that there was no disqualifying OCI.[25] This "win streak" reflected the Federal Circuit's guidance—clearly the legal bar had been raised. But it probably reflected as well enhanced analysis and decisionmaking on the part of COs. The GAO decisions were not rubber stamps—the GAO descriptions of the CO's investigation and decision typically extended for several pages. To be sure, some COs were not getting it right the first time. Many of the GAO decisions followed prior agency "corrective actions" that (at least temporarily) resolved earlier OCI protests, or deferred to CO determinations that were made after, not before, OCI protests were filed. So it might be said that COs were getting it right, but only because protesters were forcing them to.

C2C Protest Decision

Recent GAO OCI decisions suggest that the deference that followed the Federal Circuit's trifecta may be weakening, and the pendulum may be swinging back the other way. A good example is the case of *C2C Innovative Solutions, Inc.*[26] In this bid protest, C2C Innovative Solutions protested a task order issued by the Center for Medicare and Medicaid (CMS) to MAXIMUS Federal Services under a contract to provide qualified independent contractor (QIC) services related to durable medical equipment. In the Medicare system, QICs serve as the second level of review of claims and are in turn subject to a third level of review by the Office of Medicare Hearings and Appeals (OMHA) or an Administrative Law Judge (ALJ). If the OMHA or ALJ overturns a QIC decision, an administrative QIC (AdQIC) may refer the appeal to the Medicare Appeals Council, a fourth level.

C2C argued that CMS had failed to meaningfully consider whether the issuance of a task order to MAXIMUS would create an organizational conflict of interest as a result of the appeals review role being performed under a separate AdQIC contract held by Q2A, a wholly owned subsidiary of MAXIMUS. C2C argued that the Q2A AdQIC contract meant that its parent MAXIMUS had both "impaired objectivity" and "unequal access" OCIs. (C2C did not allege the third type of OCI—"biased ground rules"—which can oc-

cur when a contractor, as part of its performance of a Government contract, has in some sense set the ground rules for the competition for another Government contract and could therefore skew the competition, whether intentionally or not, in favor of itself.)

Timeliness

As a preliminary matter, the GAO rejected the awardee's argument that the protest was untimely because it was not raised prior to the deadline for receipt of proposals, restating the timeliness requirement applied by the GAO: "A protest concerning an alleged OCI need only be filed prior to the closing date for receipt of proposals where a solicitation is issued on an unrestricted basis, the protester is aware of the facts giving rise to the potential OCI, and the protester has been advised by the agency that it considers the potential offeror eligible for award."[27] The GAO determined that there was no evidence that C2C had been advised, prior to award, that the agency considered MAXIMUS eligible for award.[28]

Impaired Objectivity OCI

As stated by the GAO, under the FAR definition,[29] "an [impaired objectivity] OCI exists when, because of other activities or relationships with other persons or organizations, a person or organization is unable or potentially unable to render impartial assistance or advice to the government, or the person's objectivity in performing the contract work is or might be otherwise impaired."[30] The request for proposals (RFP) in the *C2C* procurement supplemented this definition: "If the firm is providing recommendations, judgment or advice, and its other business interest could be affected by that recommendation, judgment or advice, the firm's objectivity may be impaired."[31]

C2C noted that Q2A, as AdQIC, was in a position to make referrals to the Medicare Appeals Council of administrative decisions that overturn reconsideration decisions made by its parent MAXIMUS or its parent's competitors. C2C argued that Q2A would be "financially motivated to withhold issues regarding its [parent's] processing of QIC reconsiderations while at the same time, emphasizing to CMS any discrepancies or aberrancies in the reconsideration processing of its competitors," in order to "tarnish the reputation of their competitors and help MAXIMUS gain corporately when the task order is re-competed."[32]

CMS and MAXIMUS, however, contended that no OCI would exist because the AdQIC would be examining only the sufficiency of the intervening level 3 ALJ review. CMS added that there was no potential OCI because the AdQIC would not have formal responsibility for performance evaluation of the QICs, and relied on MAXIMUS' own conclusions as to the absence of any conflict.[33]

The GAO disagreed. It found that the contractual structure satisfied the "hard facts" requirement for a potential conflict of interest, since Q2A would be in the position of reviewing requests for further appeal of decisions issued by Q2A's parent. It reiterated the presumption applied by the GAO that "once it has been determined that an actual or potential OCI exists, the protester is not required to demonstrate prejudice; rather, harm from the conflict is presumed to occur."[34]

After twice repeating the mantra that the GAO would not substitute its judgment for the agency's decision, absent clear evidence that the agency's conclusion is unreasonable, the GAO then proceeded to review the agency's evaluation.[35] It recognized that the agency had conducted OCI reviews on two occasions (before award and during the pendency of the protest), but found that the scope of those reviews was inadequate. Specifically, the GAO determined that "[t]he record indicates that the agency did not give meaningful consideration to the potential impaired objectivity OCI involving Q2A's and MAXIMUS' dual roles as the AdQIC and the QIC."[36] It held that the agency, in characterizing the AdQIC role as "merely reviewing ALJ decisions, sidestep[ped] the fact that the ALJ decision is itself a review of the QIC reconsideration."[37] The GAO found that the agency's inquiry was limited to whether the AdQIC participated in the performance evaluation of the QICs, but did not investigate whether the presence of related firms operating within the same chain of review created an impaired objectivity OCI. Because the record showed that "the agency ha[d] not meaningfully examined whether Q2A (in essence, MAXIMUS itself) could render objective advice to the agency while simultaneously serving as both the QIC and the AdQIC," the GAO sustained the protest.[38]

An atypical aspect of this part of the protest decision is that the potential impaired objectivity OCI would apply to the previously awarded Q2A AdQIC contract, rather than to the newly awarded and challenged MAXIMUS QIC task order.

Unequal Access To Information OCI

An unequal access to information OCI arises where, as

part of its performance of a Government contract, "a firm has access to nonpublic information, and where that information may provide the firm an unfair competitive advantage in a later competition for a government contract."[39] The concern is that a firm may gain a competitive advantage based on its possession of "[p]roprietary information that was obtained from a Government official without proper authorization," or "[s]ource selection information. . .that is relevant to the contract but is not available to all competitors, and such information would assist that contractor in obtaining the contract."[40] The GAO noted that the RFP had defined the unequal access to information OCI more broadly, to apply to "situations in which a firm has access to non[-]public information (including proprietary information and non-public source-selection information) as part of its performance of a Government contract and that information may provide the firm with a competitive advantage in a later competition for a Government contract."[41] By implication, such information would include, but apparently not be limited to, proprietary and source selection information. The GAO restated the presumption that to demonstrate prejudice, a protester "need not demonstrate that the awardee's access to competitively useful nonpublic information provided an actual advantage."[42]

C2C argued that MAXIMUS had an unequal access to information OCI, since MAXIMUS' subsidiary Q2A, as an AdQIC, had access to nonpublic, competitively useful information held in the Medicare appeals system, including C2C's case files. The agency conceded that "[t]he AdQIC contract allows Q2A access to all information within the Medicare Appeals System (MAS) relative to level 2 appeals," including "access to appeal reconsideration decision letters, case file documents, and any other information regarding appeals within the MAS."[43] The agency concluded, however, that the AdQIC's access to information in the MAS did not grant Q2A unequal access to information because (1) the information was neither the property of, nor proprietary to, C2C, and (2) C2C's access to its own files was equivalent to Q2A's access to C2C's files. In effect, the agency determined only that MAXIMUS did not have access to proprietary or source selection information.[44]

Again, the GAO found the scope of the agency's review insufficient, because it did not address whether Q2A had access to any nonpublic information that might provide a competitive advantage, even if that information did not fit the definition of proprietary or source selection.[45] The GAO did not even address the agency's specious equivalence between Q2A's access to C2C's files and C2C's access to *its* own files. The appropriate comparison would have been to C2C's (lack of) access to MAXIMUS's case files.

Arguably, the GAO was not substituting its judgment for that of the agency, even though the GAO rejected the agency's OCI analysis and determinations. The GAO's rejection of the agency's OCI analysis in *C2C* was based on the limited scope of the agency's review and the agency's failure to examine what the GAO considered to be important issues, rather than a disagreement with the agency's findings on those issues. In fact, in its recommendation, the GAO made no substantive finding on the merits, but rather urged the agency to consider the issues that had not been considered and take appropriate action based on its determinations.[46]

Other Recent Sustained Protests

C2C is just one example of recent OCI protests that were sustained. During the past two years, six other protesters challenged the scope of a CO's review and cleared the "hard facts" hurdle at least once (and in one instance twice) or challenged the CO's failure to clear that hurdle. Other GAO decisions sustaining OCI protests or awarding costs on the basis of the agency's failure to reasonably address potential OCIs (listed in chronological order) include:

(1) *A-P-T Research, Inc.*[47]—The GAO sustained the protest where the RFP identified specific contracts that (if held by the awardee) could give rise to an OCI, and the awardee identified a subcontractor on its team that held one of the identified contracts and proposed a "firewalled subcontractor" mitigation plan, but the record did not document an assessment of the plan by the CO.

(2) *Dell Services Federal Government, Inc.*[48]—Copies of proposals that had been submitted by the protester in other solicitations were provided to the eventual awardee by a subcontractor employee, who had apparently come into possession of the proposals several years earlier while working for a different company that was reviewing the protester's performance of a different contract. The awardee immediately disclosed this receipt to the procuring agency, which determined that the violation would have no impact on the current procurement. Sustaining the protest, the GAO found that agency failed to take several material considerations into account and thus did not meaningfully evaluate whether the possible Procurement Integrity Act[49] violation would have an impact on the current acquisition, and whether there was an unequal access to information OCI.

A follow-on protest,[50] raising a new issue, was filed after the agency further investigated and concluded that these disclosures did not have an adverse impact on the acquisition because the information was dated and not competitively useful and the program requirements had fundamentally changed. During that investigation, however, it was determined that an individual participating in the preparation of awardee's proposal had access to competitively useful, nonpublic information about the protester under a different Independent Verification and Validation contract. This information was not, strictly speaking, proprietary or source selection sensitive. Nonetheless, the GAO granted this second protest, finding that while the agency had given detailed consideration to whether the individual had disclosed or used proprietary information, it had not considered whether the awardee had an unfair competitive advantage because it received or used other nonpublic competitively useful information. (The agency subsequently executed a waiver of any remaining OCIs, which was upheld in a third protest.)[51]

(3) *AdvanceMed Corp.*[52]—The GAO sustained a protest where the solicitation stated that performance as both the contractor under the procurement and as a Medicaid management information systems (MMIS) contractor in the same geographic jurisdiction would be considered a conflict, and the record did not demonstrate that the agency meaningfully considered the conflict that arose due to the awardee's parent company's performance of MMIS contracts in several states in the same jurisdiction.

(4) *Booz Allen Hamilton, Inc.—Costs*[53]—After an outcome-prediction ADR conference, the GAO recommended the award of costs where the agency had unduly delayed taking corrective action in response to a "clearly meritorious" OCI challenge. During the ADR conference, the GAO attorney assigned to the protest had advised the parties that the agency's OCI analysis was unreasonable because it "(1) relied on an unreasonable understanding of impaired objectivity conflicts [because the analysis did not address the issue of the awardee's evaluation of its competitors' products, on the flawed basis that the awardee would merely participate in the evaluation rather than have full responsibility for it,] (2) was based on a flawed search for potential areas of conflict [because its search used only acronyms, rather than full names], and (3) failed to account for the effect of the OCI mitigation plan on [the awardee's] proposed technical approach."[54]

(5) *PricewaterhouseCoopers Public Sector, LLP—Costs*[55]—During a litigation risk ADR teleconference, the GAO attorney advised the agency of a significant risk that the protest would be sustained on the basis that the agency failed to meaningfully consider whether the awardee had an impaired objectivity OCI, and, if so, whether the awardee had proposed an adequate mitigation plan. The GAO attorney further advised the agency that it was difficult to separate issues related to the OCIs from the issue of whether the agency had properly evaluated the awardee's ability to complete task order performance in accordance with the solicitation's independence standards. Finding nothing in the record that demonstrated that the agency meaningfully considered the awardee's potential OCI, the GAO recommended reimbursement of protest costs since the agency unduly delayed taking corrective action in response to a clearly meritorious protest.

(6) *Archimedes Global, Inc.*[56]—The GAO sustained a protest against the exclusion of an offeror. The offeror had proposed individuals who could have provided access to competitively useful, nonpublic information, but the evidence showed the contrary, and the agency's decision was not based on "hard facts" but rather on "innuendo and supposition" not supported by the record.

Regulatory Status

The FAR's OCI provisions[57] have not materially changed for 55 years. In 2009, however, Congress focused attention on organizational conflict of interest. In separate statutes, it directed the Department of Defense to "to revise the Defense Supplement to the Federal Acquisition Regulation to provide uniform guidance and tighten existing requirements for organizational conflicts of interest by contractors in major defense acquisition programs"[58] and directed the Office of Federal Procurement Policy (OFPP) to identify contracting types that raised heightened OCI concerns, determine if the FAR needs to be revised, and establish "best practices" relating to how to prevent OCIs.[59]

DFARS Rule

The Defense FAR Council acted quickly, publishing a proposed rule for comments on April 22, 2010.[60] Going beyond the congressional mandate, the proposed rule was not limited to major defense acquisition programs (MDAPs), but would have applied broadly to almost all DOD acquisitions. The DFARS final rule, however,[61] issued December 29, 2010, was limited in scope to MDAPs. An MDAP, as defined by statute, is an acquisition programs that

is so designated by the Secretary of Defense or that is estimated to require an eventual total expenditure for research, development, test, and evaluation of more than $300,000,000 or an eventual total expenditure for procurement, including all planned increments or spirals, of more than $1,800,000,000 (in each case based on fiscal year 1990 constant dollars).[62]

The DFARS OCI rule supplements the existing FAR OCI rule and takes precedence to the extent that the rules are inconsistent[63] or contrary to general practice.[64]

Policy

The DFARS rule sets forth separate policies that illustrate the inherent tension in OCI practice: "Agencies shall obtain advice on major defense acquisition programs and pre-major defense acquisition programs from sources that are objective and unbiased,"[65] but "[COs] generally should seek to resolve organizational conflicts of interest in a manner that will promote competition and preserve DOD access to the expertise and experience of qualified contractors."[66]

MDAP Restrictions

The main thrust of the DFARS rule addresses OCIs that may be created if a contractor that performs systems architecture or systems engineering and technical assistance (SETA) on an MDAP is permitted to compete for the implementation contract. The DFARS rule requires that the DOD obtain systems architecture advice and SETA services with respect to MDAP's or pre-MDAP's from sources that are objective and unbiased, such as Federally Funded Research and Development Centers (FFRDC's) or other sources that are independent of major defense contractors.[67] More specifically, the rule states that "a contract for the performance of systems engineering and technical assistance for a major defense acquisition program or a pre-major defense acquisition program shall prohibit the contractor or any affiliate of the contractor from participating as a contractor or major subcontractor [i.e., one who is awarded a subcontract that equals or exceeds both the certified cost and pricing data threshold and 10% of the contract value, or $55 million][68] in the development or production of a weapon system under such program."[69]

The final rule also contains standard clauses (which are not found in the FAR) to be used in solicitations and contracts for SETA services for MDAP's or pre-MDAP's.[70]

Changes To Industry

The DFARS OCI Rule has had major structural effects in the defense industry. Even before the final DFARS OCI rule was issued, and continuing thereafter, the provisions of WSARA caused several major companies to take steps to divest themselves of their SETA components, so that the formerly affiliated divisions could compete for both SETA/architecture contracts and production contracts. In effect, the sum of the parts was deemed to be greater than the whole. In December 2009, Northrop Grumman sold its TASC unit, which provides advanced systems engineering, technical assistance, and other analysis and advisory services. The CEO of Northrop Grumman explained that the sale "reflects Northrop Grumman's desire to align quickly" with WSARA requirements.[71] In August 2010, ITT completed a sale of CAS, its systems engineering and technical assistance business.[72] In December 2010, Lockheed Martin divested its Enterprise Integration Group, which provides systems engineering and integration services, "based on the Federal Government's increased concerns about perceived" OCIs.[73] In July 2012, defense contractor L-3 Communications spun off its services work (in the form of a new company called Engility) because "it got harder and harder for us to be a [systems engineering and technical assistance] provider at the same time [as] being a products company."[74] And in October 2013, SAIC divested itself of its systems engineering work by spinning off a new company ("New SAIC") and renaming the original company "Leidos." A major driver in the decision to divest was the desire to reduce the OCI burden of reviewing new business opportunities across the entire enterprise.[75]

Proposed FAR Rule

The proposed FAR OCI rule was issued on April 26, 2011,[76] with a comment period ending June 27, 2011, later extended to July 27, 2011.[77] The proposed rule has since been revised, based on both public comments and nonpublic comments from Government agencies. No revised version of the rule has been made public, however, and no final rule has yet been issued. The DOD listing of Open FAR cases as of December 14, 2018,[78] shows the status of the rule as "03/16/2017—Case on hold pending review under E.O. 13777."[79]

The provisions in the proposed FAR OCI rule may have been significantly changed (and in any event may or may not ever appear in a final rule[80]). Many of the details in the proposed rule have been discussed in a prior Briefing Pa-

PER,[81] but it is illuminating to review certain provisions in the proposed rule, particularly provisions (1) that would make significant structural changes to the regulation, (2) that would codify prior GAO guidance, (3) that would make material changes to OCI practices, and (4) that can (and perhaps should) be implemented immediately, regardless of whether they ever appear in a final rule.

Proposed Structural Changes

The proposed FAR rule restructures OCI coverage by splitting it into two separate regimes. "Impaired objectivity" and "biased ground rules" OCIs are moved to a new Subpart 3.12 ("Organizational Conflicts of Interest"), and "unequal access to information" OCIs are moved to a new Subpart 4.4 ("Safeguarding Information Within Industry").[82] The explanation given for this division is that (a) "unequal access to information" issues do not necessarily involve "conflicts" in the contractor's own motivation and interests, (b) such issues may arise any time one contractor is given access to the proprietary data of another contractor, whether or not it is during a competitive procurement, and (c) the methods of addressing these issues—typically, through firewalls or public disclosure—differ from the methods used to mitigate other types of OCIs.[83]

Provisions That Would Codify GAO Guidance

A number of the provisions in the proposed OCI rule codify GAO "common law" into regulation. The proposed rule recognizes the "natural advantage of incumbency," which has been the subject of numerous GAO decisions, stating:

> In competing for follow-on requirements, incumbent contractors will often have a natural advantage that is based on their experience, insights, and expertise rather than any unequal access to nonpublic information. This type of competitive advantage is not considered unfair. This situation must be distinguished from situations in which an incumbent contractor also had access to nonpublic information that could provide it, in a future acquisition, a competitive advantage that is unfair.[84]

In addition, the proposed rule recognizes several OCI mitigation strategies that have been approved by the GAO in protest decisions. The proposed rule provides that unequal access to information OCIs can be neutralized or mitigated if the information in question is shared with all potential offerors, either in the solicitation or by some other method (such as posting it online). This method is best implemented when the information belongs to the Government (rather than a third-party) and the information can be shared early enough in the acquisition to allow offerors to effectively use the information.[85] As an alternative, it may be possible to create an internal barrier (often called a firewall) between employees who have had access to the relevant nonpublic information and other employees who will be involved in the competitive process. The proposed rule identifies a number of elements that can be (but are not necessarily required to be) included in a firewall, including organizational and physical separation, facility and workplace access restrictions, independent compensation systems, and individual and organizational nondisclosure agreements.[86]

The proposed rule recognizes that impaired objectivity OCIs can be avoided by drafting the statement of work to exclude tasks that require contractors to utilize subjective judgment (such as those involving recommendations, analysis, evaluation, planning, studies, or preparing statements of work)[87] or mitigated by requiring a conflict-free team member to perform the conflicted portion of work (without input or influence from the conflicted entity)—the so-called "firewalled subcontractor" solution.[88]

The proposed rule states that biased ground rules OCIs can be avoided by obtaining advice from multiple sources.[89]

Proposed Changes To OCI Practices

The proposed rule would make several significant changes to OCI practice. It would give the CO the discretion to accept an impaired objectivity OCI. The proposed rule describes two complementary interests that OCIs can impair and offers different flexibility to agencies to address them.[90]

First, the proposed rule considers impaired objectivity, which affects only the Government's business interests. To get best value, the contractor's judgment should not be affected by its unrelated interests. The proposed rule would give the CO broad discretion to address this risk, including the authority to assess an OCI as an acceptable performance risk where it is in the Government's business interest to do so, after first taking steps to reduce the risk through a mitigation plan or Government oversight.[91]

Second, the proposed rule addresses biased ground rules, which affect the integrity of the procurement process and the need to preserve competition and maintain a level playing field. This risk must be reduced or eliminated to maximum extent possible. The CO would not have the authority to accept this risk. Instead, a waiver approved at a higher level would be required.[92]

This would be the first time the OCI regulations would give the CO discretion to accept an OCI where only the Government's business interests are involved—i.e., in impaired objectivity OCIs. The greater flexibility given to protect the Government's business interests versus protecting the integrity of the procurement process may be based on the Government's ability to protect itself through appropriate monitoring and other contractual means. This protection, of course, is not available to competitors.[93]

In addition, the proposed rule would permit OCI risk to be an evaluation factor (rather than an on/off switch) in the case of impaired objectivity OCIs, where the only risk is to Government's business interests.[94] This could be a useful acquisition strategy where no offeror has a disqualifying OCI, but offerors differ with respect to the likelihood that OCIs will arise during contract performance, or with respect to their prior demonstrated ability to address OCI issues. As stated by the National Aeronautics and Space Administration, it might be preferable to "consider the degree of mitigation as part of the mission suitability factor" in the evaluation process.[95]

In a new and innovative section, the proposed rule states that if the OCI causing the potential exclusion arises because of work done by an affiliate of the offeror, the CO should consider the nature of the affiliation and whether the risk that the affiliate can influence the offeror's contractual performance has been or can be reduced through internal structural barriers such as corporate resolutions, management agreements, restrictions on personnel transfers or information, independent directors, or separate boards of directors.[96] This idea is not new; more than 30 years ago, an author of an earlier Briefing Paper suggested the possibility of "business insulation" between divisions.[97]

This would be the first suggestion that the CO may consider structural barriers and internal corporate controls as means of addressing OCIs that arise from the activities of an affiliated company. This approach is frequently used in other contexts to protect the Government's interests (such as the handling of classified documents, nondisclosure agreements used during corporate acquisitions, distinctions found in Government post-employment laws, and requirements involving foreign ownership, control, and interest (FOCI)). In the past, OCI rules and GAO cases have rigidly assumed that corporations and their employees act with unitary interests (and corporate-wide constructive knowledge) and have restricted competition, perhaps unnecessarily, based only on the "appearance" of a conflict as a result of corporate affiliations.[98]

Provisions That Can Be Implemented Immediately

Even if the proposed FAR OCI Rule never sees the light of day as a final rule, it contains several provisions that can be implemented immediately where it is in the interest of the Government to do so.

When evaluating information to determine if an OCI is present, the CO is directed to go beyond information submitted by offerors and seek "readily available information" about the financial interest and affiliations of offerors and prospective subcontractors. The proposed rule suggests that this information can come both from Government sources (including the requiring activity, contract administration, finance, and audit offices) and other public sources (offeror websites, trade journals, shareholder reports, etc.).[99]

In task and delivery order contracts (including those issued under Federal Supply Schedules), the CO is to consider potential OCIs both at the time of contract award and upon the issuance of each order.[100] No distinction is drawn between single-award and multiple-award task order contracts, though that difference will have a significant impact on mitigation strategies. Where multiple contractors can perform a task order, it is easier to establish a mitigation plan that would allow a contractor to refrain from competing and performing task orders in subject areas where it has potential conflicts. In addition, multiple-award contracts may allow the creation of subject matter "swim lanes" between contractors or groups of contractors.

The proposed rule provides that any accepted OCI mitigation plan and limitation on future contracting will be included in the contract.[101] This is already part of the DFARS OCI Rule.[102]

The proposed rule also requires the program office to identify any contactor(s) that participated in preparing the statement of work, requirements, or cost estimates and to identify contractors prohibited from competing due to preexisting limitations.[103] One would think this would be standard operating procedure and not require regulatory direction. Past protest decisions suggest, however, that it is not.[104]

In addition, the proposed rule also requires offerors to disclose any Government-provided nonpublic information in its position relating to the acquisition,[105] as well as information regarding any potential OCI and how they will be addressed—in other words, the offeror is no longer allowed to "let sleeping dogs lie."[106]

Filling a gap in the existing FAR OCI provisions, the proposed rule would add model clauses[107] that can be used (and tailored) by COs, addressing many of the issues identified in the proposed rule, including notice of potential OCIs that may result from performance, identification of contractors who participated in preparation of the solicitation (and who presumably would be excluded from the competition), offeror disclosure of OCI-related information including nonpublic information in its possession, and incorporation of OCI mitigation plans into the contract.[108]

The proposed rule recognizes the Government's increased use of "advisory and assistance" support contractors that require access to third-party proprietary information and would change the process for protecting that information. The FAR currently requires support contractors to agree with the third-party company(ies) that it will protect third-party information from unauthorized use or disclosure and will refrain from using the information for any other purpose. This requires support contractors to negotiate separate confidentiality agreements with each third-party company whose proprietary information may be accessed, which can be extremely burdensome when information from multiple companies is involved. The CO's only role is to obtain copies of these required confidential agreements.[109]

The proposed FAR rule includes model Government contract clauses that would replace the need for multiple inter-company confidentiality agreements. In essence, support service contractors would sign up to an "Access" clause,[110] requiring the support contractor to safeguard nonpublic information, limit access to those with a need to know, and use such information only for the purposes of performing the contract. The "Access" clause would give companies whose proprietary data is accessed third-party beneficiary status with the right to enforce this provision against the support services contractor. In turn, companies that provide proprietary information would sign "Release" clauses,[111] pursuant to which the company consents to the release of its nonpublic information to any support contractors who have agreed to the restrictions contained in the "Access" clause. It remains to be seen whether third-party information suppliers will be willing to sign up to a contract provision that permits the Government to share their proprietary information with any contractor (including any competitor) who signs up to the "Access" clause, without a requirement for advance notice or consent.

But to repeat the caveat given earlier, the proposed FAR OCI rule published in 2011 may be significantly changed before it becomes final—if it ever does.

Guidelines

These *Guidelines* are intended to assist you in understanding the legal issues Government agencies and contractors face related to organizational conflicts of interest. They are not, however, a substitute for professional advice and representation in any particular situation.

All Parties

1. An organizational conflict of interest is not a zero-sum game. All parties (agencies, awardees, and potential protesters) benefit when OCIs are addressed successfully.

Contractors

1. Consider developing a company-wide plan, including a standardized firewall process, to identify, address, and mitigate potential OCIs. Although any OCI plan will have to be tailored to address the issues raised in a particular procurement, a company- or division-wide plan can provide a process, checklist, and standardized terms that will facilitate OCI review and resolution.

2. Consider identifying an "OCI Officer" and creating a multi-disciplinary "OCI Team," with members from technical, program, operational, financial, contractual, and legal groups. This team can bring experience and expertise to the review of significant business opportunities.

3. Be particularly careful when a procurement opportunity or a task order will take the company into a new area of business, since it is less likely that prior OCI reviews will have identified potential business conflicts.

4. Consider OCIs when negotiating teaming and joint venture arrangements. Include "escape clause" provisions that will allow termination where OCI issues cannot be successfully resolved.

5. Be sensitive to OCI issues that may be created by the business engaged in by other parts of your company or by an affiliate. Internal business teams should communicate effectively so that one team does not unknowingly create an OCI that impacts another team.

6. Communicate with the agency about possible OCIs and mitigation steps as early in the procurement process as feasible, so that the agency can effectively address any OCI concerns before award. If you wait, the CO may not be able (or willing) to invest the time needed to resolve potential issues.

7. Don't hide your head in the sand. You can be sure that if there is an OCI issue, your competitors will make sure it surfaces through the protest process!

8. Fully respond to any OCI-related questions from the CO or OCI disclosure requirements in an RFP, erring on the side of full disclosure, even where you believe that there is no OCI. Do not hide potentially troubling issues; highlight and deal with them.

9. Involve your business and sales teams in the preparation and implementation of the OCI mitigation plan, to make sure it is realistic and can be followed.

10. Not all OCIs can be mitigated. Sometimes you have to decide whether a "bird in the hand" is worth "two in the bush."

11. Mitigation plans must be sufficient to describe actions that will be taken to avoid or mitigate potential OCIs, and why they will successfully do so, but do not make them too complicated to understand or comply with.

12. If you have "hard facts" that establish that your competitor has a potential OCI, consider the GAO's timeliness rules in deciding whether and when to file a protest.

13. The front line of OCI defense lies with customer-facing employees who may have access to information, be asked for input into solicitations, or provide advice to the Government. These employees must be sensitive to, and learn how to avoid, situations where OCI issues can arise.[112]

Agencies

1. Consider whether OCI should be an evaluation criterion, which will allow the Government to give more credit to a contractor with lesser OCI risk or more robust OCI mitigation experience. This may be especially appropriate in a task order contract where OCI issues are likely to arise during the performance of the contract.

2. Consider whether to reduce the likelihood of OCIs by limiting the use of support contractors in procurement functions or by excluding tasking that involves analysis, evaluation, or making recommendations. Such tasking can be performed in-house or by independent contractors.

3. Where it is possible to do so without violating confidentiality obligations, disclose OCI determinations, including both determinations that specific companies will be excluded from the competition (e.g., because they participated in the procurement planning process) and determinations that specific offerors (who are involved in other agency contracts) will be permitted to compete because they do not have a disqualifying OCI or have sufficiently mitigated any potential OCI. Disclosure "is a technique to obtain industry buy-in through the comment period and also lessens the protest risk."[113]

4. The solicitation should notify offerors about the potential that contract performance may create a future OCI and identify those areas and requirements where you believe an OCI could occur.

5. Avoid being categorical. Treating each situation based on the particular scope of work, rather than placing contractors into separate "swim lanes," may require more effort and analysis, but it will lead to substantially improved competition and fairness.

6. You should know (and maintain a list of) the contractors that are providing support services to the agency. Involve the program/requiring organization throughout the process, because they may have important information bearing on possible conflicts, and they may be able to redefine requirements to avoid conflicts yet ensure that they can meet mission requirements.

7. Be proactive, and as much as possible address all possible OCI issues and proposed mitigation plans fully and early. Early attention will improve the chances that a potential OCI can be satisfactorily resolved and will allow potential offerors to make sensible bid/no-bid decisions without incurring wasted bid and proposal costs (which will ultimately be shared by the Government).

8. When requesting information from offerors about potential OCIs, ask only for important and relevant information. Requiring more information than necessary will needlessly burden both the offeror and the agency (which must devote time, resources, and expertise to reviewing and analyzing the information) and may increase the chances that important information will be overlooked.

9. Do not insist that a mitigation plan be too complicated for the contractor to perform or for the agency to monitor.

10. Thoroughly document your OCI investigation and findings and decision rationale. It is prudent to do this even if you determine that a particular situation does not constitute a significant OCI.

11. Consider use of the agency's waiver authority where

a potential OCI will not affect the integrity of the competitive process.[114]

12. The front line of OCI avoidance lies in contractor-facing agency employees, who may be in a position to provide access to information, ask for input into solicitations, or seek contractor advice. These employees must be trained to recognize (and where appropriate avoid), situations where OCI issues can arise.

13. Avoid needlessly creating potential OCIs by sharing sensitive procurement-related information with contractors that do not have a bona fide need for such information, reflexively sending emails or documents to ill-defined distribution lists, or allowing contractors to participate in meetings where sensitive procurement-related information is being shared.

14. There is value in predictability. As much as possible, offerors and contractors should know how the rules will be applied and should be comfortable that an OCI decision represents the view or policy of the agency, and not just the policy of a particular CO that may not be followed by his or her successor.

15. Watch out for Catch-22: the reason you want the contractor to perform the work may be the precise reason why there is an OCI that cannot be mitigated. Balance the need for expertise with the need for impartiality.

ENDNOTES:

[1]Lin-Manuel Miranda, Hamilton, act 1.

[2]Bumper sticker wisdom.

[3]C2C Innovative Sols., Inc., Comp. Gen. Dec. B-416289, July 30, 3018, 2018 CPD ¶ 269.

[4]See Cairnie & Kessler, "Organizational Conflicts of Interest/Edition V," 12-13 Briefing Papers 1 (Dec. 2012); Cantu, "Organizational Conflicts of Interest/Edition IV, 06-12 Briefing Papers 1 (Nov. 2006); Madden, Pavlick & Worrall, "Organizational Conflicts of Interest/Edition III," 94-08 Briefing Papers 1 (July 1994); Taylor, "Organizational Conflicts of Interest/Edition II," 84-8 Briefing Papers 1 (Aug. 1984); Pasley, "Organizational Conflicts of Interest," Briefing Papers No. 64-6 (Dec. 1964), 1 BPC 97; see also Szeliga & Turner, "Preventing Personal Conflicts of Interest Among Contractor Employees Performing Acquisition Support Services," 12-4 Briefing Papers 1 (Mar. 2012) (addressing conflicts of interest involving individual contractor employees); Pasley, "Individual Conflicts of Interest," Briefing Papers No. 64-4 (Aug. 1964), 1 BPC 75 (addressing conflicts of interest involving individual Government employees).

[5]See Weapon Systems Acquisition Reform Act of 2009, Pub. L. No. 111-23, § 207, 123 Stat. 1704, 1728 (2009) (requiring DFARS revisions to address organizational conflicts of interest by contractors in major defense acquisition programs; implemented in DFARS 209.571, 252.209-7008, 252.209-7009); Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, Pub. L. No. 110-417, § 841(b), 122 Stat. 4356, 4539 (2008) (requiring review of the FAR provisions addressing conflicts of interest); see also 41 U.S.C.A. § 2304 (formerly cited as 41 U.S.C.A. § 405b; added by Department of Defense Appropriations Act, 1989, Pub. L. 100-463, § 8141, 102 Stat. 2270, 2270-48 (1988) (requiring Government-wide regulations establishing conflict of interest standards for persons who provide consulting services; implemented in FAR subpt. 9.5).

[6]75 Fed. Reg. 81908 (Dec. 29, 2010).

[7]76 Fed. Reg. 23236 (Apr. 26, 2011).

[8]Appendix G of the Armed Services Procurement Regulation ("Avoidance of Organizational Conflicts of Interest"), issued on June 1, 1963 as DOD Directive 5500.100.

[9]48 Fed. Reg. 42103 (Sept. 19, 1983).

[10]See FAR 33.103(f)(1), (f)(3).

[11]See, e.g., Vast, Inc., Comp. Gen. Dec. B-182844, Jan. 31, 1975, 75-1 CPD ¶ 71; Planning Res. Corp. Pub. Mgmt. Servs., Inc., Comp. Gen. Dec. B-184926, Mar. 29, 1976, 76-1 CPD ¶ 202; see also Taylor, "Organizational Conflicts of Interest/Edition II," 84-8 Briefing Papers 1, at *1–2 (Aug. 1984).

[12]See, e.g., J. Allen Grafton, Comp. Gen. Dec. B-212986, Mar. 5, 1984, 84-1 CPD ¶ 263.

[13]FAR subpt. 9.5; see Taylor, "Organizational Conflicts of Interest/Edition II," Briefing Paper No. 84-8 (Aug. 1984).

[14]Deficit Reduction Act of 1984, Pub. L. No. 98-369, div. B., tit. VII ("Competition in Contracting Act of 1984"), § 2713, 98 Stat. 494, 1182 (1984) (codified at 40 U.S.C.A. § 759(h)(1)).

[15]National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, div. E, tit. LI ("Clinger-Cohen Act of 1986"), § 5101, 110 Stat. 186, 680 (1996) (repealing 40 U.S.C.A. § 759).

[16]Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, § 1402, 108 Stat. 3243, 3290 (1994) (amending 31 U.S.C.A. § 3553).

[17]See Cairnie & Kessler, "Organizational Conflicts of Interest/Edition V, 12-13 Briefing Papers 1, at *5 (Dec. 2012).

[18]Aetna Gov't Health Plans, Inc., Comp. Gen. Dec. B-254397.15 et al., July 27, 1995, 95-2 CPD ¶ 12.

[19]See generally Gordon, "Organizational Conflicts of Interest: A Growing Integrity Challenge," 35 Pub. Cont. L.J. 25 (2005); Szeliga, "Conflict and Intrigue in Government Contracts: A Guide to Identifying and Mitigating Organizational Conflicts of Interest," 35 Pub. Cont. L. J. 639 (2006).

[20]See, e.g., Analysis Grp., LLC, Comp. Gen. Dec. B-401726.2, Nov. 13, 2009, 2009 CPD ¶ 237.

[21]See, e.g., Nortel Gov't Sols., Inc., Comp. Gen. Dec.

B-299522.5 et al., Dec. 30, 2008, 2009 CPD ¶ 10, 51 GC ¶ 58.

[22]Axiom Res. Mgmt., Inc. v. United States, 564 F.3d 1374 (Fed. Cir. 2009), 51 GC ¶ 202; PAI Corp. v. United States, 614 F.3d. 1347 (Fed. Cir. 2010), 52 GC ¶ 285; Turner Constr. Co. v. United States, 645 F.3d 1377 (Fed. Cir. 2011), 53 GC ¶ 245.

[23]Ralph White, GAO Managing Associate General Counsel, at West Government Contracts Year in Review Conference (Feb. 2012); see Geldon, "A Steady Drumbeat," Public Contracting Institute (Nov. 5, 2012), .

[24]See PAI Corp., 614 F.3d at 1352.

[25]See Geldon, "Organizational Conflict of Interest Challenges: Thirty-Nine in a Row!" Public Contracting Institute (Aug. 22, 2014), http://publiccontractinginstitute.com/organizational-conflict-of-interest-challenges/.

[26]C2C Innovative Sols., Inc., Comp. Gen. Dec. B-416289, July 30, 2018, 2018 CPD ¶ 269.

[27]C2C Innovative Sols., Inc., Comp. Gen. Dec. B-416289, July 30, 2018, 2018 CPD ¶ 269, at *3 n.7 (citing Honeywell Tech. Sols., Inc., Comp. Gen. Dec. B-400771 et al., Jan. 27, 2009, 2009 CPD ¶ 49, at *5, 51 GC ¶ 141).

[28]C2C Innovative Sols., Inc., Comp. Gen. Dec. B-416289, July 30, 2018, 2018 CPD ¶ 269, at *3 n.7.

[29]FAR 2.101.

[30]C2C Innovative Sols., Inc., Comp. Gen. Dec. B-416289, July 30, 2018, 2018 CPD ¶ 269, at *2.

[31]C2C Innovative Sols., Inc., Comp. Gen. Dec. B-416289, July 30, 2018, 2018 CPD ¶ 269, at *2.

[32]C2C Innovative Sols., Inc., Comp. Gen. Dec. B-416289, July 30, 2018, 2018 CPD ¶ 269, at *4.

[33]C2C Innovative Sols., Inc., Comp. Gen. Dec. B-416289, July 30, 2018, 2018 CPD ¶ 269, at *5.

[34]C2C Innovative Sols., Inc., Comp. Gen. Dec. B-416289, July 30, 2018, 2018 CPD ¶ 269, at *4 (citing AT&T Gov't Sols., Inc., Comp. Gen. Dec. B-413012 et al., July 28, 2016, 2016 CPD ¶ 237, at *5).

[35]C2C Innovative Sols., Inc., Comp. Gen. Dec. B-416289, July 30, 2018, 2018 CPD ¶ 269, at *4 (citing DRS Tech. Servs., Inc., Comp. Gen. Dec. B-411573.2 et al., Nov. 9, 2015, 2015 ¶ CPD 363, at *9).

[36]C2C Innovative Sols., Inc., Comp. Gen. Dec. B-416289, July 30, 2018, 2018 CPD ¶ 269, at *6.

[37]C2C Innovative Sols., Inc., Comp. Gen. Dec. B-416289, July 30, 2018, 2018 CPD ¶ 269, at *6.

[38]C2C Innovative Sols., Inc., Comp. Gen. Dec. B-416289, July 30, 2018, 2018 CPD ¶ 269, at *6.

[39]C2C Innovative Sols., Inc., Comp. Gen. Dec. B-416289, July 30, 2018, 2018 CPD ¶ 269, at *6 (citing FAR 9.505(b); Cyberdata Techs., Inc., Comp. Gen. Dec. B-411070 et al., May 1, 2015, 2015 CPD ¶ 150, at *5).

[40]FAR 9.505(b); see Arctic Slope Mission Servs., LLC, Comp. Gen. Dec. B-412851 et al., June 21, 2016, 2016 CPD ¶ 169, at *7.

[41]C2C Innovative Sols., Inc., Comp. Gen. Dec. B-416289, July 30, 2018, 2018 CPD ¶ 269, at *6–*7.

[42]C2C Innovative Sols., Inc., Comp. Gen. Dec. B-416289, July 30, 2018, 2018 CPD ¶ 269, at *7 (citing Health Net Fed. Servs., LLC, Comp. Gen. Dec. B-401652.3 et al., Nov. 4, 2009, 2009 CPD ¶ 220, at *28; Aetna Gov't Health Plans, Inc., Comp. Gen. Dec. B-254397.15 et al., July 27, 1995, 95-2 CPD ¶ 129, at *12.

[43]C2C Innovative Sols., Inc., Comp. Gen. Dec. B-416289, July 30, 2018, 2018 CPD ¶ 269, at *7.

[44]C2C Innovative Sols., Inc., Comp. Gen. Dec. B-416289, July 30, 2018, 2018 CPD ¶ 269, at *7.

[45]C2C Innovative Sols., Inc., Comp. Gen. Dec. B-416289, July 30, 2018, 2018 CPD ¶ 269, at *7.

[46]C2C Innovative Sols., Inc., Comp. Gen. Dec. B-416289, July 30, 2018, 2018 CPD ¶ 269, at *8.

[47]A-P-T Res., Inc., Comp. Gen. Dec. B-413731.2, Apr. 3, 2017, 2017 CPD ¶ 112, 59 GC ¶ 144

[48]Dell Servs. Fed. Gov't, Inc., Comp. Gen. Dec. B-414461, June 21, 2017, 2017 CPD ¶ 192, 59 GC ¶ 246.

[49]41 U.S.C.A. §§ 2101–2107.

[50]Dell Servs. Fed. Gov't, Inc., Comp. Gen. Dec. B-414461.3, June 19, 2018, 2018 CPD ¶ 213, 60 GC ¶ 234.

[51]Dell Servs. Fed. Gov't, Inc., Comp. Gen. Dec. B-414461.6, Oct. 12, 2018, 2018 CPD ¶ 374.

[52]AdvanceMed Corp., Comp. Gen. Dec. B-415062, Nov. 17, 2017, 2017 CPD ¶ 362, 59 GC ¶ 388.

[53]Booz Allen Hamilton, Inc.—Costs, Comp. Gen. Dec. B-414822.4, May 7, 2018, 2018 CPD ¶ 183.

[54]Booz Allen Hamilton, Inc.—Costs, Comp. Gen. Dec. B-414822.4, May 7, 2018, 2018 CPD ¶ 183, at *6.

[55]PricewaterhouseCoopers Public Sector, LLP—Costs, Comp. Gen. Dec. B-415205.3, May 9, 2018, 2018 CPD ¶ 185.

[56]Archimedes Global, Inc., Comp. Gen. Dec. B-415886, June 1, 2018, 2018 CPD ¶ 179.

[57]FAR subpt. 9.5.

[58]Weapon Systems Acquisition Reform Act of 2009, Pub. L. No. 111-23, § 207, 123 Stat. 1704, 1728 (2009).

[59]Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, Pub. L. No. 110-417, § 841(b), 122 Stat. 4356, 4539 (2008).

[60]75 Fed. Reg. 20954 (Apr. 22, 2010).

[61]75 Fed. Reg. 81908 (Dec. 29, 2010).

[62]10 U.S.C.A. § 2430(a)(1).

[63]DFARS 209.571-2(b).

[64]FAR 1.304(b)(2).

[65]DFARS 209.571-3(a).

[66]DFARS 209.571-3(b).

[67]DFARS 209.571-7(a).

[68]DFARS 252.209-7009.

[69]DFARS 209.571-7(b)(1).

[70]DFARS 252.209-7008 ("Notice of Prohibition Relating to Organizational Conflict of Interest—Major Defense Acquisition Program (DEC 2010)"); DFARS 252.209-7009 ("Organizational Conflict of Interest—Major Defense Acquisition Program (DEC 2010)").

[71]Ratnam & Kelly, "Northrop To Sell TASC To Comply With Conflict of Interest Rules," Wash. Post (Nov. 9, 2009), http://www.washingtonpost.com/wp-dyn/content/article/2009/11/08/AR2009110817943.html.

[72]Mandavia, "ITT To Sell CAS Unit for $235 Million," Reuters (Aug. 9, 2010) https://www.reuters.com/article/us-ittcorp-idUSTRE6781HD20100809.

[73]"Lockheed Martin Announces Completion of $815 Million EIG Divestiture," PRNewswire–FirstCall (Nov. 23, 2010), https://news.lockheedmartin.com/2010-11-23-Lockheed-Martin-Announces-Completion-of-815-Million-EIG-Divestiture.

[74]Censer, "Engility Spins Off From L-3 Communications," Wash. Post, July 18, 2012, at A17.

[75]Rohit T.K., "SAIC Board Approves Services Bureau Spin-Off," Reuters (Sept. 9, 2013), https://www.reuters.com/article/us-saic-spinoff/saic-board-approves-services-business-spin-off-idUSBRE98813T20130909.

[76]76 Fed. Reg. 23236 (Apr. 26, 2011).

[77]76 Fed. Reg. 38089 (June 29, 2011).

[78]Open FAR Cases as of December 14, 2018, at 11, https://www.acq.osd.mil/dpap/dars/opencases/farcasenum/far.pdf.

[79]Exec. Order No. 13777 of Feb. 24, 2017, "Enforcing the Regulatory Reform Agenda."

[80]Cf. Samuel Beckett, Waiting for Godot.

[81]Cairnie & Kessler, "Organizational Conflicts of Interest/Edition V, 12-13 Briefing Papers 1, at *11–16 (Dec. 2012).

[82]A portion of this section was subsequently separated from the proposed OCI rule and given its own FAR case number (2012-029, "Contractor Access to Protected Information"). However, it is no longer listed as separate FAR Case—the latest mention of FAR Case 2012-029 is in the Unified Regulatory Agenda—January 2014. See 79 Fed. Reg. 896, 1097 (Jan. 7, 2014).

[83]76 Fed. Reg. at 23240.

[84]76 Fed. Reg. at 23249 (proposed FAR 4.402-2(c)).

[85]76 Fed. Reg. at 23249 (proposed FAR 4.402-4(c)(1)).

[86]76 Fed. Reg. at 23249–50 (proposed FAR 4.402-4(c)(2)).

[87]76 Fed. Reg. at 23245 (proposed FAR 3.1204-1(a)).

[88]76 Fed. Reg. at 23245 (proposed FAR 3.1204-3(c)(1)).

[89]76 Fed. Reg. at 23246 (proposed FAR 3.1204-3(c)(3)).

[90]76 Fed. Reg. at 23244 (proposed FAR 3.1203(b)).

[91]76 Fed. Reg. at 23246 (proposed FAR 3.1204-4).

[92]76 Fed. Reg. at 23246 (proposed FAR 3.1204-4(a)).

[93]See Yukins, "Feature Comment: The Draft OCI Rule—New Directions and the History of Fear," 53 GC ¶ 148 (May 4, 2011).

[94]76 Fed. Reg. at 23246 (proposed FAR 3.1206-2(b)(2)(i)).

[95]National Aeronautics and Space Administration's Guide on Organizational Conflicts of Interest 27 (Mar. 2010), http://www.hq.nasa.gov/office/procurement/OCIGuide.pdf.

[96]76 Fed. Reg. at 23245 (proposed FAR 3.1204-1(c)(3), 3.1204-3(c)(2)).

[97]Taylor, "Organizational Conflicts of Interest/Edition II," Briefing Papers No. 84-8, at *4 (Aug. 1984).

[98]Aetna Gov't Health Plans, Inc., Comp. Gen. Dec. B-254397.15 et al., July 27, 1995, 95-2 CPD ¶ 12.

[99]76 Fed. Reg. at 23247 (proposed FAR 3.1206-3(a)).

[100]76 Fed. Reg. at 23247–48 (proposed FAR 3.1206-5).

[101]76 Fed. Reg. at 23245 (proposed FAR 3.1204-2(b)).

[102]DFARS 209.571-4(b).

[103]76 Fed. Reg. at 23247 (proposed FAR 3.1206-2(b)(3)(i)).

[104]See, e.g., Basile, Baumann, Prost & Assocs., Inc., Comp. Gen. Dec. B-274870, Jan. 10, 1997, 97-1 CPD ¶ 15.

[105]76 Fed. Reg. at 23249 (proposed FAR 4.402-4(a)(2), (3)).

[106]76 Fed. Reg. at 23247 (proposed FAR 3.1206-2(b)(3); 76 Fed. Reg. at 23248 (proposed FAR 3.1207(b)).

[107]76 Fed. Reg. at 23248 (proposed FAR 3.1207).

[108]76 Fed. Reg. at 23251–54 (proposed FAR 52.203-XX ("Notice of Potential Organizational Conflict of Interest"), 52-203-YY ("Mitigation of Organizational Conflicts of Interest"), 52-203-ZZ ("Disclosure of Organizational Conflict of Interest after Contract Award"), 52.203-YZ "(Limitation on Future Contracting"), and 52.204-YZ ("Unequal Access to Nonpublic Information")).

[109]FAR 9.505-4(b).

[110]76 Fed. Reg. at 23252 (proposed FAR 52.204-XX ("Access to Nonpublic Information")).

[111]76 Fed. Reg. at 23253 (proposed FAR 52.2.04-XY ("Release of Pre-Award Information") and 52.204-YY ("Release of Nonpublic Information")).

[112]See Madden, Pavlick & Worrall, "Organizational Conflicts of Interest/Edition III," 94-08 Briefing Papers 1, at *8–9 (July 1994).

[113]See National Aeronautics and Space Administration's Guide on Organizational Conflicts of Interest 25 (Mar. 2010), http://www.hq.nasa.gov/office/procurement/OCIGuide.pdf; see also Geldon, "Should the Kimono be Opened?—Organizational Conflicts of Interest (OCI) Best Practices," Public Contracting Institute (Aug. 31, 2012), http://publiccontractinginstitute.com/should-the-kimono-be-opened-organizational-conflicts-of-interest-oci-best-practices/.

[114]Concurrent Techs. Corp., Comp. Gen. Dec. B-412795.2 et al, Jan. 17, 2017, 2017 CPD ¶ 25, 59 GC ¶ 50.

NOTES:

BRIEFING PAPERS