ARNOLD & PORTER LLP

ADVISORY

May 2011

FAR Council Proposes Alternative OCI Rules Revision

On April 26, 2011, the Federal Acquisition Regulation Council[1] (Council) proposed to revise substantially the Federal Acquisition Regulation (FAR) provisions addressing organizational conflicts of interest (OCIs). Changing the OCI rules has been a matter under formal consideration since 2008, and widely discussed in government and industry for more than a decade. In an unusual procedure, instead of proposing a single set of rules for comment, the Council advanced its approach (Council rule) as an alternative to an expansive OCI draft rule that the Department of Defense (DOD) issued in April, 2010.[2] Public comments are due by June 27, 2011. Perhaps reflecting some internal debate, the Council included a specific request for comments on whether the Council's approach is preferable to the Defense Federal Acquisition Regulations Supplement (DFARS) proposal (or whether some hybrid of the two proposals would be preferable). Regardless of which alternative is selected, this rulemaking will constitute a major rewrite and expansion of the FAR's OCI rules.

Executive Summary

The FAR and DFARS proposed changes share broad areas of similarity and seek to render OCI policy more transparent and easier to implement. Both proposals would transfer the OCI rules from the FAR section addressing contractor qualifications, to the section addressing improper business practices.[3] Both rules preserve the requirement for a case-by-case analysis, at the contract- and task-order level,[4] of each OCI issue, and therefore leave the burden for detecting and dealing with these issues squarely upon the contracting officer (CO). Both rules "clarify key terms and provide more detailed guidance" for COs performing such analysis.[5]

1 The Council, chaired by the Administrator for Federal Procurement Policy, oversees the FAR and includes representatives from the Department of Defense, NASA, and the General Services Administration.

2 *See* 75 FR 20954-20965.

3 The Council proposes to move the OCI rules from FAR 9.5 to a new FAR 3.12. The proposed DOD rule would have moved the DFARS OCI rules from DFARS 209 to DFARS 203. The Council interprets the DFARS references contained in the proposed DOD rule as references to the parallel FAR provisions. 76 FR 23238. This is unaffected by the fact that in the limited *final* DOD rule, DOD did not move the OCI rules, and instead revised DFARS 209.

4 *Id.*

5 76 FR 23238.

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Despite the broad similarities, however, there are very real distinctions between the approaches taken by the two rules. Of particular significance are the following three:

- The 2010 proposed DFAR (and the caselaw upon which it was based) focused primarily upon *defining* an OCI, i.e., identifying the types of relationships or facts that create an OCI. The Council's proposed rule provides an alternative lens to examine such situations based on the OCI's potential harm, thus distinguishing between OCIs that pose risks for the procurement system and those that might harm only the government's business interests.[6] This may defuse potential OCI problems for contractors that may previously have been disqualified.
- Unlike the DFARS rule and the caselaw, the Council rule does not consider unequal access to nonpublic information to be an OCI. The Council proposes stand-alone coverage of this situation under FAR Part 4 to protect competitive integrity interests.[7] The rule strongly prefers mitigation of such situations. However, the rule does permit the government to share proprietary offer information with its third-party contractors with relative ease. Contractors may object that the rule does not notify the owner of such information when it is being shared.
- For OCIs triggered by the work of corporate affiliates, the Council proposes to permit mitigation of "impaired objectivity" and "biased ground rules" OCIs by a blended use of internal controls, organizational measures, and firewalls. In contrast, the proposed DFARS revision confirms the Government Accountability Office's (GAO) practice of declaring such conflicts largely unmitigable by purely internal means.

The proposed DOD rule offers continuity with the caselaw that has defined these issues for the past 15 years, and contractors who have adapted their practices to the existing rules may value such consistency. However, the proposed Council OCI rule offers more flexibility for contractors and the government to fashion mitigation solutions to conflict problems than was previously available.

Background

The FAR's OCI regulations (FAR 9.5) have remained largely unchanged since 1984, and provide a general framework for analyzing OCI situations—placing responsibility for such analysis upon the government, specifically the CO for a given procurement.[8] Failures to analyze OCIs properly have been fertile ground for bid protests challenging the sufficiency of COs' actions. Both the GAO and the US Court of Federal Claims (COFC) developed an extensive jurisprudence regarding OCIs, significantly augmenting the definitions, restrictions, and analytical framework provided in FAR 9.5. Therefore, in order to comply with FAR 9.5, a CO or contractor was responsible for understanding not only the rules, but also an evolving body of caselaw.

In the 2000's, observers both within and outside government called for revision and expansion of the OCI rules. In 2008, the Council issued an Advance Notice of Proposed Rulemaking, which opened the formal rulemaking process. In a parallel effort, DOD began evaluating potential changes to its own OCI regulations in the DFARS, which provided only modest additional guidance to DOD's COs.[9] DOD initially proposed a broad rewrite of the DFARS OCI rules in an attempt to incorporate the analytical framework set forth in GAO and COFC caselaw, but in the final rule issued in December 2010, opted instead for a more limited new rule that did not seek to incorporate the evolving OCI analysis from bid protest cases.[10]

Although DOD chose not to implement it, the Council's rulemaking action has effectively revived DOD's April 2010 proposed rule as an alternative to the Council's own new proposal. The Council observed that "[t]he fundamental

6 *Id.*

7 *Id.*

8 *See* FAR 9.504.

9 DFARS 209.

10 *See* 75 FR 81908-15. *See also*: Arnold & Porter LLP, "Advisory: Department of Defense Issues Limited Final OCI Rules," (Jan. 2011) *available at*: http://www.arnoldporter.com/public_document.cfm?id=17167&key=23H3.

approach provided in the proposed [April 2010] DFARS rule is sound and provides a regulatory framework that thoroughly implements the established OCI caselaw."[11] The Council noted, however, that as a rulemaking body, it was not necessarily required to hew to these precedents.[12] The proposed DFARS changes specifically adopted the OCI framework set forth in *Aetna Government Health Plans, Inc.; Foundation Health Federal Services, Inc.*, B-254397 *et al.*, July 27, 1995, 95-2 CPD ¶ 129, which defined and distinguished between three basic categories of OCI: impaired objectivity, biased ground rules, and unequal access to information.[13] Among other material differences, the Council's proposed rule largely bypasses this taxonomy. By proposing an alternative approach to this long-standing body of OCI doctrine, the Council clearly hopes to foster a conversation about how the government should approach these complex situations.

A. Proposed FAR Council OCI Rule (FAR Part 3.12)

DOD's proposed DFARS changes were programmatic in identifying and setting procedures for dealing with specific factual situations designated as OCIs, and adhered closely to prior caselaw. The Council's proposed rule takes a somewhat different approach. Instead of enforcing rigid categories, the Council's proposed rule directs contracting officers to identify situations that present genuinely conflicting interests, then to respond by evaluating what is at stake and what action is appropriate under the circumstances.

Definition

The Council proposes new definitions for OCIs that echo only two *Aetna* categories: impaired objectivity and biased ground rules:

> Organizational conflict of interest means 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
>
> (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.[14]

Thus, the Council's proposal focuses on *influence*—the influence of the contractor's other interests upon its objectivity, and the influence a contractor may have upon an acquisition. The Council also appears to preserve the consideration evident in the current FAR (as well as GAO and COFC decisions) on potential or *apparent*, and not merely *actual*, OCIs, by means of the references to whether a "reasonable person *might have* concern" in situations where a contractor "*could have* an unfair competitive advantage."

Applicability

The Council's proposed rule would apply broadly to all contracts, including contracts for commercial items, task and delivery orders, and contract modifications. It may also apply to contracts for commercially available off-the-shelf items (COTS) if the contracting officer determines that contractor performance might trigger an OCI.[15] It would apply to transactions with profit-making and nonprofit entities.[16] The proposed rule does not, however, oust the coverage of agency-specific rules. For example, if enacted as proposed, the rule would not supersede the new provisions at DFARS 209, enacted in December 2010.[17]

11 76 FR 23238.

12 *See* 76 FR 23238.

13 *See* 75 FR 20955.

14 76 FR 23243 (FAR 2.101).

15 The proposed DFARS revision would have similar coverage, except that it would not have applied to contracts for COTS items. 75 FR 20960.

16 76 FR 23244 (FAR 3.1202).

17 *Id.* (FAR 3.1202(d)).

Policy

The Council's proposal would establish the OCI policy to "identify, analyze, and address" all OCIs.[18] The Council goes on, however, to distinguish between (1) OCIs that represent potential harm to the integrity of the competitive acquisition system; and (2) OCIs that harm only the government's business interests.[19]

The rule establishes type (1) OCIs as much more significant than type (2). These "integrity" OCIs relate to the preservation of a "level playing field" for government competitions.[20] Where an OCI unbalances the playing field, and one competitor has an unfair advantage, there is a potential for "seriously flawed competitions," which is "unacceptable in terms of good governance, fairness, and maintenance of the public trust."[21] Under the Council's proposed rule, the CO "**must** take action to substantially reduce or eliminate" this type of risk.[22]

On the other hand, type (2) OCIs only affect the government. Under the Council's proposed rule, COs have the discretion to accept such conflicts as an acceptable performance risk. While type (1) OCIs are well-understood from the protest caselaw, the Council rule does not provide specific examples or definitions of this "business interest" OCI, or any guidance to COs about how and where to make such distinctions. One possibility, however, is that this rule might apply to conflicts such as those at issue in *U.S.* v. *Science Applications Intern. Corp.(SAIC)*, 626 F.3d 1257 (D.C. Cir. 2010). In *SAIC*, a contractor providing consulting services to the Nuclear Regulatory Commission (NRC) regarding future rules governing nuclear power in the US was revealed to have contracts with private companies whose nuclear recycling businesses could be affected by such rules.[23] The court found that this represented an OCI, because these commercial agreements might affect SAIC's objectivity when advising the NRC about regulations that could potentially govern operations of SAIC's partner businesses.[24] Under the construct in the Council's proposed rule, however, this was arguably a situation where the integrity of the government procurement system was not at stake; the NRC was not engaged in any *procurements* that were potentially impacted by SAIC's role. Under the Council's proposed approach, while such conflicts are required to be disclosed and evaluated, the CO would be authorized to accept the known risk of nonobjective advice and proceed with the contract. As the rule implies, where such bias is known, the government is sophisticated enough to decide whether the value of the performance sought and obtained is greater than any adverse impact from the conflict situation.[25]

Methods to Address OCIs

The Council's proposed rule sets out four methods for dealing with an OCI: avoidance, limitation on future contracting, mitigation, and determining that the OCI presents an acceptable risk. The latter method is available where the CO first determines that the OCI presents risks only to government business interests.

Avoidance. The Council proposes several strategies to avoid conflicts by modifying or imposing contract requirements, or simply excluding a contractor. COs are encouraged, when possible, to limit the scope of a proposed acquisition so as to exclude activities that would involve contractor subjective judgment for the government, such as recommending action, or preparing statements of work.[26] A contract under which the contractor has no discretion cannot be influenced by the contractor's bias, regardless of strength or origin. Where this is impossible, COs may require contractors and affiliates to put in place "structural" barriers and internal corporate controls in order to forestall an OCI.[27] The Council describes this approach

18 *Id.* (FAR 3.1203(a)).

19 *Id.*

20 *Id.* (FAR 3.1203(a)(1)).

21 *Id.*

22 *Id.* (FAR 3.1203(b)(2) (emphasis added)).

23 *SAIC* at 1263.

24 *Id.* at 1272-73.

25 The Council's proposed rule thus would permit the agency to accept performance under such a scenario, and it would be up to the agency to determine the contractual performance conditions. The rule is discretionary, however; the agency could also require the OCI to be addressed.

26 76 FR 23245 (FAR 3.1204-1(a)).

27 *Id.* (FAR 3.1204-1(b)).

as differing from mitigation; rather than blunting an OCI's impact, this avoidance strategy seeks to ensure that no conflict ever arises.[28]

The final and harshest form of avoidance described in the proposed rule is excluding a conflicted contractor from competing. Exclusion could only be used as a last resort, after the CO formally determines that (i) there is an OCI problem related to either the contractor having developed procurement ground rules or to impaired objectivity greater than the government is willing to accept *and* (ii) no other method (including mitigation) will adequately protect the government's interest.

Contracting officers and contractors, as well as the GAO and COFC, have struggled with scenarios where work by a competing contractor's affiliate creates the OCI risk. The Council's proposed rule would require that the CO in such situations, before excluding the contractor from a procurement competition, "identify and analyze the corporate and business relationship between the offeror and the affiliate" to determine whether the OCI risk can be mitigated.[29] The CO would be expected to analyze issues of common ownership/location, internal controls and restrictions, legal separations, maintenance of separate boards of directors, the affiliate's ability to influence the offeror's performance, and other factors.[30] Although the proposed rule sets out the CO's obligation to analyze the affiliate relationship that presents an OCI risk, and prescribes a nonexclusive list of things to examine, there are no standards or guidelines provided to inform the CO's judgment on whether offeror exclusion should proceed, other than calling for a determination of "whether the risk associated with the [OCI] can be addressed through mitigation."[31]

Neutralization. The Council's proposed rule refers to limitations on future contracting by current contractors as "neutralization" of future conflicts. This method is deemed appropriate where current performance would not create an OCI, but future performance of related work would grant the contractor "an unfair advantage in competing for award" (or, if the potential conflict arises from a subcontractor, "could provide the prime contractor with such an advantage").[32] Such restrictions must be of a "fixed term of reasonable duration that is sufficient to neutralize the organizational conflict of interest," and must end at a certain date, or upon occurrence of a specified event.[33] This provision poses the potential for controversy, as parties will disagree about what constitutes a "reasonable duration."

Mitigation. Like the proposed DFARS OCI rule, the Council has expressed a clear preference for mitigating OCIs.[34] The Council's proposal would require the integration of government-approved mitigation plans into awarded contracts. The proposed rule identifies three (nonexclusive) methods to mitigate OCIs. First, the proposed rule suggests assigning the "conflicted portion of the work" to a "conflict-free" subcontractor or affiliate. This method is akin to neutralization or avoidance, and will likely require implementation of firewalls, internal controls, and neutralization methods to be effective.[35] The proposed rule also suggests obtaining advice from multiple sources in order to lessen the government's reliance on a source known to have an OCI-based bias.[36] This method appears particularly relevant to the less serious "business interest" OCIs.[37]

28 *Id.*

29 *Id.* The proposed DFARS OCI rule shares a preference for mitigation, but accepting the potential effectiveness of aggressive mitigation strategies in the context of impaired objectivity and biased ground rules OCIs triggered by an affiliate's work is a unique aspect of the proposed Council rule.

30 *Id.* (FAR 3.1204-1(c)(3)).

31 *Id.* The April 2010 proposed DFARS revision, consistent with GAO and COFC decisions, extended OCI restrictions to affiliates, and treated "impaired objectivity" and "biased ground rules" OCIs as not subject to mitigation purely by means of internal controls. 75 FR 20961.

32 *Id.* (FAR 3.1204-2(a)).

33 *Id.* (FAR 3.1204-2(b)).

34 75 FR 20960 (Proposed DFARS preference for mitigation).

35 *Id.* (FAR 3.1204-3(c)(1)).

36 *Id.* (FAR 3.1204-3(c)(3)).

37 The new distinction between "competition" and "business interest" OCIs would likely lead to different results in some GAO cases. *See*, e.g., *Nortel Government Solutions, Inc.*, B-299522.5, B-299522.6, Dec. 30, 2008 (GAO rejects agency assertion that an impaired objectivity OCI is mitigated by obtaining advice from multiple sources).

Regarding the second method, the Council has proposed a notable break from prior caselaw. The draft rule states, consistent with GAO precedent, that a simple firewall serving only to limit information sharing is alone "generally not effective" to address an OCI.[38] The rule states, however, that firewalls could be one part of an approach to mitigate OCI risks that arise from "potentially conflicting financial interests of an *affiliate*," if used in conjunction with "structural or behavioral barriers," and "internal controls . . . that serve to mitigate connections to the "contractor's exercise of judgment during contract performance."[39] Whereas *Aetna* and its progeny held that OCIs arising from common ownership or financial ties could not be mitigated by purely internal measures, under the Council's proposed approach, this would no longer appear to be true. The rule offers several examples of internal measures that could suffice, depending on the "circumstances of each case," including:

- an agreement that the contractor's board of directors will adopt a binding resolution prohibiting certain directors, officers, or employees, or parts of the company from any involvement with contract performance;
- a condition for a nondisclosure agreement between the contractor performing the contract and all of its affiliates;
- a condition that the contractor's board of directors include one or more independent directors who have no prior relationship with the contractor; and
- the creation of a corporate organizational conflict of interest compliance official at a senior level to oversee implementation of any mitigation plan.[40]

While these "structural or behavioral barriers" and "internal controls" may be different in degree from the typical firewall, it is not clear whether they are different in kind. In fact, in the new proposed FAR Part 4, the Council defined a firewall as an "internal barrier."[41] These measures therefore could allow an offeror whose affiliate creates an OCI to perform a contract with its own personnel, subject to some form of internal organizational mitigation regime isolating it from the affiliate. This result is *not* contemplated by the proposed DFARS rule, nor by the current caselaw. In fact, *Aetna* explicitly rejected such a proposal as inadequate to mitigate the potential conflict of loyalties arising from shared ownership of affiliates.[42]

Given that an "affiliate," by definition, is in control of or under common control with an offeror,[43] the FAR Council's proposal for "mitigation" as a means to reduce the risk that an OCI will undermine public trust in the acquisition system is likely to generate some debate. Notwithstanding internal arrangements limiting the individuals who provide direction, shared financial objectives among contractors has been a critical consideration in raising doubts about procurement integrity, which is why "mitigation" in affiliate situations has not been previously considered an acceptable OCI cure.

Reflecting the complex situations that may trigger OCI issues, the FAR Council acknowledges the need for flexibility in terms of which mitigation measures will be appropriate, noting considerations such as the complexity of the OCI and size of the procurement. The mitigation plan, in whatever form, must be government-approved, included in the contract, and government-enforceable.[44]

Acceptance of the Risk. As noted, in a "business interests" OCI, the agency may simply accept the performance risk as a necessary cost of obtaining valuable services from a contractor. This determination must be in writing. To the extent possible, the performance risk should be limited by mitigation methods.[45]

Contracting Officer Responsibilities.
The Council rule sets significant responsibility upon the CO to assess "early in the acquisition process" whether the

38 76 FR 23246 (FAR 3.1204-3(c)(2)(D)(ii)).
39 *Id.* (FAR 3.1204-3(c)(2)).
40 *Id.*
41 76 FAR 23249 (FAR 4.402-4(c)(2)).
42 *Aetna, supra,* at 11 ("walling off" conflicted affiliate was insufficient to mitigate OCI.).
43 FAR 2.101
44 *Id.* (FAR 3.1204-3(b)).
45 *Id.* (FAR 3.1204-4).

planned work is likely to create any OCIs,[46] and to continue to analyze the OCI posture of the procurement and contractors throughout the contracting process.

- *Prior to issuing the solicitation*, the CO must assess whether the "nature of the work" could produce an OCI, either on the instant contract or on future contracts. The CO should consult with the program office and any relevant technical personnel to make this determination.[47] If the work as currently planned has the potential to create an OCI, then the CO must determine whether the scope of the work can be changed to avoid the OCI.[48]

  If the CO determines that the OCI cannot be avoided, then the CO must analyze the potential severity and impact of the OCI, and whether the CO believes that any mitigation will be possible.[49] In an interesting new development, where the CO determines that the only interest implicated by the OCI is the government's business interest, the rule requires the CO to consider including potential OCI risk as an *evaluation category*.[50]

  When COs have completed their review of these issues, they must include the relevant solicitation provisions in the solicitation to put offerors on notice of the potential OCI, and require submission of sufficient information to allow meaningful review of OCIs.[51] The required disclosures would include "all relevant information" regarding any OCIs (including subcontractor information), unexpired limitations on future contracting, and actions intended to address any conflicts. The proposed solicitation provision includes blank spaces for the CO to list the various entities that have performed consulting services on the procurement, in order to enable offerors to identify potential conflicting relationships.[52] Contracts calling for subjective judgment or advice that could create an unfair competitive advantage must include a clause limiting future contracting.[53]

- *During evaluation of offers*, the CO will use the information provided by the offerors to determine if OCIs exist. The rule requires the CO to review numerous sources of information. It is here that the new rule would provide significantly more specific guidance on the obligations of COs in their OCI review. COs should examine "readily available information" about the "financial interests of the offerors, the affiliates of the offerors," and any prospective subcontractors, and "compare this information against information provided by the offeror."[54] COs should look to sources within and outside the government, including (but not limited to):
  - the contracting office issuing the solicitation;
  - other contracting offices;
  - the cognizant government administration, finance, and audit entities;
  - the requiring activity;
  - offerors' web sites;
  - trade and financial journals;
  - business directories and registers; and
  - annual corporate shareholder reports.[55]

  The CO should determine if any of the obtained information affects the likely effectiveness of proposed mitigation measures, or creates previously undetected OCI issues. Where mitigation plans are required to be submitted, the CO can open formal discussions to provide an offeror with an opportunity to modify its plan to address information discovered during an evaluation.[56]

46 The April 2010 proposed DFARS revision included a similar expectation (75 FR 20960). The expectation to determine whether there are *any* OCI's "early in the acquisition process" suggests some increased vigor relative to the current FAR 9.5 requirement to "avoid, neutralize, or mitigate significant potential conflicts before award."

47 *Id.* (FAR 3.1206-2(a)).

48 *Id.*

49 *Id.* (FAR 3.1206-2(b)).

50 76 FR 23246-47 (FAR 3.1206-2(b)(2)).

51 76 FR 23247 (FAR 3.1206-2(b)(3)).

52 76 FR 23251 (FAR 52.203-XX).

53 76 FR 23247 (FAR 3.1206-2(b)(3)(iv)).

54 76 FR 23247 (FAR 3.1206-3(a)(2)).

55 *Id.*

56 *Id.*

- *At contract award,* when OCI risk was not included as an evaluation factor, the CO may engage in exchanges with offerors to assess OCI issues and mitigation plans (which will not constitute discussions).[57] The awardee may be selected, but an award will be subject to the CO's determination that OCIs are addressed. A contractor selected for an award, but to which it is being withheld based on an OCI, will be given notice and an opportunity to respond.[58]

  If OCI was not an explicit evaluation factor, then the CO must formalize any determination to exclude a contractor on the basis of an OCI. The CO must also confirm a determination to accept the risk of a "business interests" OCI in writing, or to seek a waiver for an unmitigated "competition" OCI, at time of award.[59] To the extent possible, the CO should identify potential OCI issues at the time of award of any task- or delivery-order contracts or blanket purchase agreements. If such issues can be identified prior to the competition or issuance of any task orders, then the CO must require that a mitigation plan or limitation of future contracting be incorporated into the basic contract.[60]

  Another clause that the FAR Council's proposal would require in any solicitation that might give rise to an OCI, would require disclosures of: any OCI not previously addressed or waived, any changed circumstances to prior OCIs, or an OCI that arises during contractor performance. Such later-disclosed situations may be a basis for contract termination if the OCI cannot be addressed. This requirement will flow down to subcontractors.[61]

- *Waiver.* When all else fails, the FAR Council proposal includes provision for the agency head to waive the need to address an OCI in a given acquisition. Waiver will require a determination that mitigation and other means to address an OCI are not feasible, and the waiver "is necessary to accomplish the agency's mission." The waiver authority could not be delegated below the head of a contracting activity.[62]

B. Proposed 2011 FAR Council Nonpublic Information Rule (FAR Part 3.12)

The Council again deviated from GAO practice and the *Aetna* framework by excluding unequal access to nonpublic information by a contractor from the new rule's definition of an OCI. The Council proposes to deal with these issues under a new rule, which defines nonpublic information and sets out procedures for addressing the situations which, under previous practice (and under the proposed DOD rule), would be dealt with as OCIs. The Council recognizes unequal access to information as a significant competitive issue (and invites the agencies to propose even more restrictive rules than proposed by the Council).[63]

In promulgating the proposed FAR Amendment, the FAR Council recognized that access to nonpublic information, which creates an unfair competitive advantage, can arise in many ways. The proposed rule attempts to impose "a new uniform Government-wide policy regarding the disclosure and protection of nonpublic information to which contractors may gain access during contract performance."[64]

Definitions

The proposed Council rule incorporates an existing definition of "nonpublic" information, with reference to the Freedom of Information Act (FOIA):[65]

> Nonpublic information, as used in this clause, means any Government or third-party information that [i]s exempt from disclosure under the FOIA or otherwise protected from disclosure by statute, Executive order, or regulation; or [h]as not been disseminated to the general public, and the Government has not yet determined whether the information can or will be made available to the public.[66]

57 76 FR 23247 (FAR 3.1206-2(b)(2)(ii), 3.1206-3(b)(2)(ii))
58 76 FR 23247 (FAR 3.1206-2(b)(2)(ii), 3.1206-4(a) and (b)).
59 *Id.* (FAR 3.1206-3).
60 *Id.* (FAR 3.1206-3(d)).
61 75 FR 23248 & 23251 (FAR 3.1207 (b); 52.203-ZZ).
62 75 FR 23246 (FAR 3.1205).
63 76 FR 23248 (FAR 4.401–2).
64 76 FR 23240.
65 5 U.S.C. 552.
66 76 FR 23252 (FAR 52.204-XX(a)).

By involving FOIA (and incorporating the extensive body of FOIA precedent defining the reach of the various FOIA exemptions limiting release), the proposed rule might create an opportunity for a contractor that wishes to test the applicability of this provision to certain information that is currently nonpublic. A contractor who wishes to compete for a contract, but does not wish to be subject to this new rule, may choose to file a FOIA request for information that "[h]as not been disseminated to the general public, and the Government has not yet determined whether the information can or will be made available to the public." By so doing, a contractor could force the government (and the third-party owner of the information, if any) to clarify the boundaries of this coverage for a specific effort, and potentially challenge this determination under the FOIA.

A frequently used term in the proposed rule that is *not* defined is "access." The GAO and the COFC have confronted a number of situations where the specifics of a contractor's "access" to nonpublic, competitively sensitive information has been a central aspect of the controversy. The FAR Council's proposed rule does not address whether "access" must involve actual possession and examination of the information, or merely the unconstrained opportunity to view the information. It is not clear whether the proposed rule's many references to "access" refer to situations where "access" has been exploited.

Identification

Under the Council's proposed FAR amendment, the CO must consult with the requiring and contracting activity to examine whether any potential offerors have had past access to nonpublic information. As early as possible during the acquisition process (i.e., as early as a source's sought announcement, or, for task orders, in the "first announcement to contract-holders regarding the order"), the CO shall ask "that potential offerors indicate, as early as possible, if they have or had Government-provided access to any nonpublic information relevant to the acquisition."[67]

As part of their analysis of potential nonpublic information issues, COs must include one or more of the new FAR Part 52 clauses accompanying the new Part 4.2. Where a contractor is expected to require access to nonpublic information, the solicitation and eventual contract must include the "Access" clause.[68] This clause incorporates the new definition of nonpublic information, restricts the use of nonpublic information, requires the execution of nondisclosure agreements by all employees anticipated to have access to nonpublic information, and explicitly designates non-governmental owners of nonpublic information as third-party beneficiaries with private rights against contractors that breach the confidentiality provisions of the clause.[69]

More broadly, the Council rule requires the CO to include the "Pre-award Release" and general "Release" clauses in *all* solicitations.[70] The "Pre-award Release" clause permits the government to release offeror proposal data to the government's own "contractors, their subcontractors, and their individual employees."[71] This anticipates the government's use of Systems Engineering and Technical Assistance (SETA) and other contractors to provide technical assistance during procurements, and during contract administration. Under the "Release" clause, the government may release nonpublic contractor data to other contractors involved in the performance of the contract. The "Release" clause affirms that the government will only release nonpublic information to contractors who have contracts that include the Access clause at 52.204-XX.[72]

The interplay of the "Release" and "Access" clauses opens a potentially problematic area. To the extent contractors are disclosing technical data or trade secrets in the performance of a government contract, the limitations on other contractors (and their subcontractors) may be insufficient to protect competitive interests. The government has recently

67 76 FR 23249 (FAR 4.402-4(a)).

68 76 FR 23248 (FAR 4.401-4(a)(1)).

69 76 FR 23252 (FAR 52.204-XX(a),(b).

70 76 FR 23248 (FAR 4.402-4(b)).

71 76 FR 23253 (FAR 52.204-XY(b)).

72 *Id.* (FAR 52.204-XY(d); FAR 52.204-YY(d)).

presented this same concern for public comment in another setting, with an interim DFARS provision regarding "Government Support Contractor Access to Technical Data" (76 FR 11363 (March 2, 2011)), which has itself generated controversy in the contracting community.

Resolution

Upon gathering this information, the CO "shall determine whether resolution is required." Resolution is required where "[t]he nonpublic information is available to some, but not all, potential offerors, [t]he nonpublic information would be competitively useful in responding to a solicitation; and [t] he advantage afforded to the contractor by its access to the nonpublic information is unfair."[73] The rule contemplates resolving the issue through mitigation, dissemination, or both. Only when neither mitigation nor dissemination will "serve to protect the fairness of the Competition" can the CO consider exclusion of an offeror from a competition.[74]

If the CO finds that resolution is required, the rule notes that mitigation may be possible through straightforward application of internal firewalls.[75] The rule states that firewalls can 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."[76] If a firewall is used, then the offeror must represent that "to the best of its knowledge and belief, there were no breaches of the firewall during preparation of the proposal," or the offeror must explain any breach that occurred.[77]

If a firewall alone is not sufficient, then the rule suggests "disseminating the information in question to all potential offerors, either in the solicitation, in a solicitation amendment, or through some other method, such as posting it online."[78] This method is "generally available" for government information, but where a third party owns the information, the CO must obtain permission prior to release, and implement any necessary protections. If the information is to be disseminated, then it must be done early enough to allow all offerors to "effectively utilize the information."[79]

73 *Id.* (FAR 4.402-4(b)).
74 76 FR 23250 (FAR 4.402-4(c)(3)).
75 76 FR 23249 (FAR 4.402-4(c)).
76 *Id.* (FAR 4.402-4(c)(2)(ii)).
77 *Id.* (FAR 4.402-4(c)(2)(iii)).
78 *Id.* (FAR 4.402-4(c)(1)).
79 *Id.*

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