VIA REGULATORY PORTAL, FACSIMILE, AND U.S. MAIL

General Services Administration
Regulatory Secretariat (MVCB)
1275 First Street, NE., 7th Floor
Washington, DC 20417
Attn: Hada Flowers


Dear Ms. Flowers:

On behalf of the Section of Public Contract Law of the American Bar Association ("the Section"), I am submitting comments on the above-referenced proposed rule ("Proposed Rule"). The Section consists of attorneys and associated professionals in private practice, industry, and government service. The Section's governing Council and substantive committees contain members representing these three segments to ensure that all points of view are considered. In this manner, the Section seeks to improve the process of public contracting for needed supplies, services, and public works.¹

The Section is authorized to submit comments on acquisition regulations under special authority granted by the American Bar Association’s Board of Governors. The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and,

¹ The Honorable Thomas C. Wheeler, a member of the Section’s Council, and Sharon L. Larkin, the Secretary of the Section, did not participate in the Section’s consideration of these comments and abstained from the voting to approve and send this letter.
therefore, should not be construed as representing the policy of the American Bar Association.²

INTRODUCTION

Section 841 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 required a review of the Federal Acquisition Regulation (“FAR”) coverage on organizational conflicts of interest (“OCIs”). This Proposed Rule was developed as a result of a review conducted in accordance with Section 841 by the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council and the Office of Federal Procurement Policy (“OFPP”), in consultation with the Office of Government Ethics (“OGE”). The 2007 Report of the Acquisition Advisory Panel also called for revisions to the FAR to improve guidance regarding OCIs. That report was followed by an Advance Notice of Proposed Rulemaking (“ANPR”), under FAR Case 2007–018, 73 Fed. Reg. 15962, to gather comments from the public with regard to whether and how to improve the FAR coverage on OCIs.

COMMENTS

The Section commends the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (collectively “the Council”) for their work on the Proposed Rule. The new analytical framework provided by the Proposed Rule and the step-by-step guidelines for addressing an OCI are particularly helpful.

The Section agrees with the drafters that unequal access to information or access to nonpublic information significantly affects the integrity of the procurement process, but should not be viewed as an OCI. In addition, the Section notes that the drafters treated biased ground rules and impaired objectivity differently on the perception that biased ground rules can impact the integrity of the determined process while impaired objectivity normally is a contract performance issue.

Despite the length of the comments, the Section enthusiastically supports the overall approach taken by the drafters to provide a new framework to address OCIs. Our comments focus on specific areas where we believe the guidance in the Proposed Rule can be improved.

² This letter is available in pdf format under the topic “Compliance and Conflicts of Interest” at: http://apps.americanbar.org/contract/federal/regscomm/home.html.
I. DISTINCTION BETWEEN “INTEGRITY OF COMPETITION” AND “BUSINESS INTEREST” RISK

The Proposed Rule creates a distinction between the two types of harm that OCIs cause to the procurement system: harm to the integrity of the competitive acquisition process and harm to the Government’s business interests. See 76 Fed. Reg. 23244, Proposed § 3.1203(a)(1) & (2). If an OCI risks impairing the integrity of the competitive acquisition process, the Proposed Rule provides that “the contracting officer (“CO”) must take action to substantially reduce or eliminate this risk.” Id. § 3.1203(b)(2). If, on the other hand, the only risk created by an OCI is a performance risk relating to the Government’s business interests, the Proposed Rule affords COs “broad discretion to select the appropriate method for addressing the conflict, including the discretion to conclude that the Government can accept some or all of the performance risk.” Id. § 3.1203(b)(3).

This new distinction between the two types of harm caused by OCIs is significant and represents a welcome paradigm shift. It allows agencies to move beyond the traditional categories of OCIs established in the case law, and it permits discretionary determinations about the impact of a potential OCI that affects only the agency’s business interests. The Section views this added flexibility as a positive development and a welcome change from the current analytical framework for OCIs established in FAR Subpart 9.5 and existing case law.

Nonetheless, the Proposed Rule provides no guidance on how to determine when an OCI affects the “integrity” of the competitive acquisition process to such a degree that it must be eliminated or substantially reduced, and when an OCI merely creates a “business risk” that can be accepted by the Government. In contrast, the Proposed Rule sets forth detailed steps and considerations to assist COs in performing the necessary analysis in other respects. For example, the Proposed Rule provides helpful guidance regarding the four methods of addressing OCIs (avoidance, limitation on future contracting, mitigation and acceptance), Proposed § 3.1204; the steps to take at each point of the procurement process to identify and address OCIs, Proposed § 3.1206; the factors to consider in understanding the nature of the relationship between an offeror and an affiliate, Proposed § 3.1204-1(c)(3); and potential Government and non-Government sources of information, Proposed § 3.1206-3(a)(2).

The drafters may have had a legitimate concern that inclusion of examples might be viewed as a constraint on the exercise of discretion. Indeed, the Proposed Rule recognizes the need for flexibility, stating that “[a]gencies must examine and address organizational conflicts of interest on a case-by-case basis, because such conflicts arise in various, and often unique, factual settings.” Proposed
§ 3.1203(b)(1). Nonetheless, to assist often understaffed COs in making efficient decisions, the Section believes it would be helpful for the Final Rule to include, possibly in the preamble, some examples of what types of OCIs are more likely to fall within each of the two categories and how to identify them, with the understanding that the examples are not intended to be exhaustive.

For example, a typical “biased ground rules” OCI, where an offeror or its affiliate has participated in the preparation of the specifications for a procurement but is also a competitor under the procurement, raises “integrity of competition” concerns. So too does the “impaired objectivity” OCI where an affiliate may be evaluating an offeror’s proposal on the instant procurement. On the other hand, a downstream impaired objectivity OCI where a firm’s work under the contract for which it is competing may require it to evaluate its own performance or that of an affiliate, appears to be the type of OCI that affects the Government’s business interests only.

A. Need For Additional Guidance In Addressing “Integrity Of Competition” Risk

If an OCI risks impairing the integrity of the competitive acquisition process, the Proposed Rule provides that “the contracting officer must take action to substantially reduce or eliminate this risk.” Proposed § 3.1203(b)(2). Thus, in addressing OCIs that impair the integrity of a competition, the Proposed Rule appears to provide less discretion to COs than does the current rule. Because the existing FAR rule does not differentiate between the significance of different types of OCIs, it affords the same broad discretion to COs in addressing all types of OCIs. See, e.g., Axiom Res. Mgmt. Inc. v. United States, 564 F.3d 1374, 1381 (Fed. Cir. 2009) (“the FAR recognizes that the identification of OCIs and the evaluation of mitigation proposals are fact-specific inquiries that require the exercise of considerable discretion”); CACI, Inc.-Federal, B-403064.2, Jan. 28, 2011, 2011 CPD ¶ 31 (applying the same standard and explaining “where an agency has given meaningful consideration to whether an OCI exists, we will not substitute our judgment for the agency’s, absent clear evidence that the agency’s conclusion is unreasonable.”). On the other hand, the Proposed Rule also suggests that the enumerated avoidance and mitigation techniques (such as requiring a conflict-free subcontractor to perform the work, implementing barriers, or establishing internal controls) may be sufficient, if implemented early enough in the process, to reduce OCI risks impairing the integrity of the competitive acquisition process. See, e.g., Proposed § 3.1204-3(a)(1) (“Mitigation is any action taken to reduce the risk that an organizational conflict of interest will undermine the public’s trust in the Federal Acquisition System.”). Given the different amounts of discretion apparently afforded by the Proposed Rule depending on the type of OCI, the Section
recommends that the Final Rule contain additional guidance in addressing this significant paradigm shift, including:

- The nature of the “risk” that must be reduced or eliminated. Consider the example where a contractor provides a document to the Government with no understanding or expectation that it will be included in the statement of work for a separate procurement (an outcome to which it would have objected if it had been asked). See, e.g., Energy Systems Group, B-402324, Feb. 26, 2010, 2010 CPD ¶ 73. If the contractor’s corporate affiliate wants to compete for the contract in that separate procurement, is the CO required to “take action to substantially reduce or eliminate this risk” or can the CO find that the risk of any harm to the competitive acquisition process is so attenuated that it does not rise to the level of the “integrity of competition” risks that must be addressed under the rule?

- How a CO can “substantially reduce” OCI risks that threaten the integrity of the competition? In a relatively recent OCI case, GAO sustained a protest challenging an agency’s determination that the awardee did not have a biased ground rules OCI where a firm that was in negotiations to purchase the awardee’s design subcontractor provided procurement development services to the agency that put it in a position to affect the competition in favor of the acquired subcontractor. See McCarthy/ Hunt JV, B-402229.2, Feb. 16, 2010, 2010 CPD ¶ 68. Under slightly altered facts, assume that the acquiring firm was one of a dozen prospective acquirers for the design subcontractor. Would that scenario create a threat to the integrity of the competition that would need to be substantially reduced or eliminated? Could a CO reasonably determine that none of the dozen potential acquirers currently had an identity of interest with the design subcontractor creating such a conflict?

- Whether one can reduce an “integrity” risk to the point that it becomes a mere business risk that the Government can accept? As discussed more fully below, the rule appears to contemplate the possibility that a CO could, in appropriate circumstances, allow a company to establish multiple barriers and internal controls rather than divest a conflicted affiliate to address an OCI potentially impacting the integrity of a procurement. It would be helpful for the final rule to make clear that structural barriers and internal controls are acceptable means of addressing an “integrity of competition” OCI. While divestiture is a means of eliminating OCIs, it also may create substantial unnecessary
and costly disruption in the industry and delay in the acquisition process.

B. Mitigation Of “Integrity Of Competition” Risk Through Reliance On Structural Barriers And Internal Controls

A significant feature of the Proposed Rule is its indication that any OCI might at least potentially be avoided or mitigated by implementation of structural or behavioral barriers, internal controls or both. For example, Proposed § 3.1204-1(a)(3)(b) addresses a typical “biased ground rules” scenario (“Preparing statements of work or other requirements and solicitation documents”) and indicates that structural barriers and/or internal controls may be implemented to avoid a potential biased ground rule OCI in future contracts. It identifies as an OCI avoidance method:

Requiring the contractor (and its affiliates, as appropriate) to implement structural barriers, internal corporate controls, or both, in order to forestall organizational conflicts of interest that could arise because, for example, the contractor will be participating in preparing specifications or work statements in the performance of the immediate contract. This avoidance method differs from mitigation in that it is used to prevent organizational conflicts of interest from arising in future acquisitions, rather than addressing organizational conflicts of interest in the instant contract.

Id. (emphasis added).

Likewise, Proposed § 3.1204-3(c)(2) identifies implementation of structural barriers and/or internal controls as a possible means of mitigating OCIs that otherwise will undermine the public’s trust in the Federal acquisition system.

Requiring the contractor to implement structural or behavioral barriers, internal controls, or both. (i) This method can be used to lessen the risk that the potentially conflicting financial interests of an affiliate will influence the contractor’s exercise of judgment during contract performance. The choice of specific barriers or controls should be based on an analysis of the facts and circumstances of each case.

Id.
In other words, under the new paradigm, it appears that no particular type of OCI, even a “biased ground rules” OCI potentially impacting the integrity of the competitive acquisition process, is incapable of being avoided or mitigated through use of appropriate structural or behavioral barriers or internal controls. The Section believes that the Rule, or at least the preamble, should state that point clearly. Alternatively, a biased ground rules OCI that the Government deems acceptable under the circumstances could be addressed through the waiver process with a supporting determination and finding.

The Proposed Rule provides new and helpful information in its examples of structural or behavioral barriers and internal controls. Proposed § 3.1204-3(e)(2). Nevertheless, the Proposed Rule lacks the analytical steps necessary to facilitate the factual analysis necessary to identify and assess the risk posed by corporate structures or relationships and to determine the appropriate structural barrier or internal controls to address the circumstances. Where an OCI could affect the integrity of the competition, the contractor must be prepared to submit information about its organizational structure and internal controls to demonstrate that its barriers and controls will be effective. The Proposed Rule appropriately suggests that the key is early identification of potential OCIs, and contractor as well as government action to address them. Thus, the emphasis is on early identification and resolution of potential OCIs.

1. Potential Conflicts Identified Pre-Solicitation

The best way to address OCI risks is to identify and assess them in the pre-solicitation phase. The Section recommends that the Council provide steps to guide the identification and analysis of the corporate and business relationships between the business segment with the work that may be the source of the potential conflict (the current requirement) and the segment with the potentially conflicted opportunity.

Agencies cannot address mitigation without an understanding whether there is a risk of an OCI and the nature and extent of such a risk. As an initial matter, existing cases such as Aetna Government Health Plans; FoundationHealth Federal Services, Inc., B-254397, July 27, 1995, 95-2 CPD ¶ 129, and McCarthy/Hunt JV show that agencies, understandably, may not be particularly well versed in corporate and business structural issues and may have difficulty understanding

---

3 The Weapon Systems Acquisition Reform Act (“WSARA”) specifically prohibited certain types of OCIs, driving the final DFARS OCI rule; however, that legislative prohibition does not apply to other FAR covered agencies.
those relationships. Initially, the CO and agency counsel need to obtain basic information about the ownership and control of the offeror or contractor. The CO should require the company to provide information such as organizational charts (wiring diagrams), stock ownership, composition of boards of directors, and internal controls. Nevertheless, before doing so, the agency should review information from public sources concerning the specific companies and their affiliates. Examples of such sources include: the company’s website, Dun and Bradstreet, OneSource, the Wall Street Journal, Bloomberg, Lexis/Nexis, Google Search/Company websites, and Complinet. For publicly-traded companies, SEC filings contain detailed corporate structure information.

The Proposed Rule offers certain minimum considerations a CO must examine in evaluating the relationship between affiliated entities. For example, Proposed § 3.1204-1(c)(3) indicates that OCI risks may be reduced if

- The offeror and affiliates are separate legal entities and are managed by separate boards of directors;
- The corporate organization has instituted recurring OCI training;
- The affiliate is not in a position to influence the offeror’s control of its contractual requirements;
- The overall corporate organization has established internal barriers, such as corporate resolutions, management agreements or restrictions on personnel transfers, that limit the flow of information personnel and other resources within the relevant entities, or all or some of the above.

The Proposed Rule also provides a few helpful examples of the different kinds of barriers and internal controls contractors may implement to address potential OCIs. Proposed § 3.1204-3(c)(2).

The clear implication is that if a contractor, before entering into a contract that may involve preparation of specifications or work statements, sets up structural barriers and internal corporate controls that sufficiently separate it from any potential affiliated future offeror under those specifications or work statements, it may be possible for the CO in the future procurement to determine that the OCI risk has been avoided or significantly reduced. The Section noted in its comments on the DoD’s proposed WSARA rule" that an explicit statement should be included.

4 Comments submitted to Amy Williams, OUSD (AT&L) DPAP (DARS), July 20, 2010 at 12-13.
in the Final Rule explaining to COs that the mere existence of an affiliate relationship is not conclusive evidence of the existence of a significant OCI. We believe the same is necessary here. The Section recommends that the Rule provide additional guidance to COs concerning the analysis of relationships between affiliated entities and the making of judgments about their efficacy in reducing risk. Accordingly we propose addition of the following additional provision:

####

An OCI may be avoided or mitigated by the appropriate use of barriers and internal controls. The Government may use various analytical approaches and techniques to ensure that adequate measures have been taken. The complexity and specific facts of each situation should determine the specific details of the analysis required. Examples of analytical steps to identify and assess the nature and extent of risk to the integrity of the competition by affiliated entities include, but are not limited to the following inquiries:

(i) What type of work is performed by the affiliated business segments and how do any similarities or differences in this work affect the imputation of OCI between the affiliates?

(ii) What measures have been instituted to assure that common or aligned financial interests will not influence the work or advice that one of the affiliates provides to the government?

(iii) If the work resides in separate business segments, what is the nature of the separation, e.g., do the business segments have independent management and business systems (e.g., IT networks and personnel systems), and are they geographically separated?

(iv) Are the business segments separate legal entities?

(v) Do the business segments have legal and management authority to make independent decisions in the area that is of concern or are they subject to direction by a common parent? If so, to what extent?

(vi) Are there internal barriers such as corporate resolutions or management agreements that restrict the business or
management of one or both segments, or that restrict the flow of information between the segments?

(vi) In the case of a joint venture or LLC, what is the level of ownership of the party(ies) of interest? Is ownership the sole test of control, or are there other mechanisms such as management agreements that affect control? Does the offeror possess only an investment interest? What rights, if any, do the parties have to review and approve contracts, or other activities, between and among members of the joint venture?

If the CO determines that the risk of an OCI has been identified and adequately addressed, the CO should allow the offeror to participate in the procurement.

####

As the Section also suggested in response to the proposed DoD WSARA rule, an agency may consider designating certain COs who are experts in dealing with OCI issues, or creating multi-disciplined OCI review panels within each acquisition organization to be used in procurements and contract administration activities to assure the appropriate expertise is dedicated to the identification and analysis of OCI issues.5

2. Potential Conflicts Identified Post-Solicitation

If the CO is not made aware of a conflict potentially impairing the integrity of the competition until after issuance of a Solicitation, during the proposal evaluation process, or even after award, an important ingredient of any analysis will be the extent to which the information demonstrates that actions were taken to avoid or mitigate the potential OCI before it could have affected the competition. For example, to the extent a company has put in place structural or behavioral barriers or internal controls such as those set forth in the proposed regulatory language above before preparation of specifications or work statements to be used in the instant procurement, it may be possible for the CO to find that an affiliate of the company that helped prepare the specifications or work statements already has sufficiently avoided or mitigated the OCI risk and may compete. In such circumstances, a valuable source of information for the CO under the instant

---

5 Id. An example noted is the Air Force Electronic Systems Center OCI Review Panel, which was created in 2005 and includes GS-15 personnel from Contracting, Acquisition Planning, and Legal staff. See http://herbb.hanscom.af.mil/OCI-IDB2008.ppt,
contract is the CO (and agency counsel) involved in the separate contract for preparation of the specifications or work statement, who previously analyzed (or is analyzing on an ongoing basis) the issue under that contract and for prospective activities.

To the extent that the CO does not become aware of a potential OCI impacting the integrity of the competitive acquisition process until after issuance of the instant solicitation, and the contractor has not previously taken steps to avoid or mitigate the concern, such risk, particularly if it involves preparation of specifications or work statements, may be substantially more difficult for the contractor and the CO to address. Implementation of mitigation techniques after the fact may not necessarily provide sufficient confidence that the risk has been substantially reduced or mitigated. Nonetheless, even in such circumstances a CO could find that the relationship at issue is so attenuated and the evidence is such that the identified risk is sufficiently mitigated or reduced. For example, in *Turner Construction Co. v. United States*, No. 2010-5146 (Fed. Cir. July 14, 2011), the Federal Circuit held that in some cases identification and evaluation of OCIs may be proper even if conducted after award:

If the first time an allegation or evidence of a potential OCI appears is after award, then the earliest time to evaluate that potential OCI . . . might be at that time. A CO’s post-award evaluation can clear the air of any OCI taint by showing that no significant OCI existed.

*Id.* at 17. In *Turner*, although an affiliate of a subcontractor of the awardee had been involved in an auction to potentially acquire a design contractor who helped provide a “concept” for the construction project at issue, the CO found that at the relevant times when the design contractor performed its effort, the affiliate was not the only or even the highest bidder and that none of the employees assisting with the design concept had any knowledge of the potential acquisition. The Court characterized the relationship underlying the potential OCI as “attenuated” and found the CO’s judgment that no significant OCI existed to be reasonable and entitled to deference.

The Section believes that guidance about how the analysis may vary depending upon when in the process COs learn of the OCI would enhance the Proposed Rule. We suggest the following provision:

###
In addition to the considerations in XXX above, if the CO becomes aware after the issuance of the solicitation of a potential OCI that may affect the integrity of the acquisition process, the CO should immediately take the following steps:

(i) Inform the offeror of the concern.

(ii) Request from the offeror a complete statement of the facts surrounding the potential OCI, including a complete description of the prior work, the agency involved, and any OCI plan or measures instituted to avoid or mitigate a future OCI.

(iii) Determine the specific facts of the relationship between the entity that performed the prior work and the offeror, including any organizational barriers or internal controls that may be in place.

(iv) Determine the flow of information between the entities and whether the entity or individuals involved at any time were aware of the affiliated company’s intended role as a potential or actual offeror.

The burden is on the offeror to demonstrate to the CO that it had in place adequate barriers and internal controls to ensure that no competitive advantage was conferred upon the affiliated entity participating in the instant procurement.

If the offeror meets that burden, the CO may conclude that any risk of an OCI is sufficiently attenuated such that the offeror may participate in the procurement. The CO’s determination is required to be in writing and included in the record of the procurement.

###

C. Need For Additional Guidance In Addressing Harm To The Government’s Business Interests

COs would have the discretion under the Proposed Rule to make a decision to accept OCI risks affecting only the Government’s business interests. Proposed § 3.1204-4. Nevertheless, the Rule does not provide useful guidance as to when a performance risk may be acceptable, indicating simply that COs must assess that
General Services Administration
Regulatory Secretariat (MVCB)
July 27, 2011
Ms. Hada Flowers
Page 13

“[t]he risk is manageable and . . . [t]he potential harm to the Government’s interest is outweighed by the expected benefit from having the conflicted offeror perform the contract.” Id. § 3.1204-4(b).

It would be helpful for the Final Rule to offer some considerations as to what makes a risk manageable. For example, the CO may consider the anticipated number of times a conflict is likely to arise during contract performance (if relatively limited, the risk may be manageable) and the ability of the program office to manage any business interest conflict by establishing “swim lanes” and assigning particular tasks to different multiple award contractors. Also, does the statement “potential harm to the Government’s interest is outweighed by the expected benefit from having the conflicted offeror perform the contract” mean that the CO’s decision may depend on whether there are only two other potential offerors versus ten other potential offerors? In other words, does the Government have less of an interest in addressing an OCI under the Proposed Rule if it already has adequate competition? Likewise, might the OCI analysis turn on whether the conflicted offeror presents the best value to the Government, thus providing an “expected benefit” that outweighs potential harm caused by the conflict? Guidance along these lines could assist the CO in deciding whether to accept OCI risks affecting the Government’s business interests.

Additional guidance also would help COs determine whether to use OCI considerations as an evaluation factor. Under the Proposed Rule, if a CO concludes that the only risk associated with an OCI is a risk to the Government’s business interests, the CO may choose to include (or not include) consideration of potential OCI risks as an evaluation factor in the technical rating. Proposed § 3.1206-2(b)(2). If the Government determines that treatment of an OCI through the use of an evaluation factor is appropriate, it must include such an evaluation factor in the solicitation. Id. If, on the other hand, the Government decides not to include consideration of OCI as an evaluation factor, it must address performance risks associated with any OCI outside of the evaluation process. Id.

The Proposed Rule contains no guidance regarding how a CO should decide whether to include OCIs as an evaluation factor. Nor does the Rule identify what considerations are appropriate if the decision is made to evaluate (or not evaluate) OCIs. For example, should the Government consider the administrative burden and costs of managing and monitoring OCIs during performance as part of its evaluation? Conversely, if the CO does not include OCIs as an evaluation factor but then determines in reviewing proposals that there is an OCI risk, may the Government consider that risk as part of its evaluation? The Section recommends that the Final Rule include additional guidance regarding how a CO should decide whether to include OCIs as an evaluation factor, what considerations are
appropriate as part of that evaluation and what steps the Government should take if an OCI risk is not identified until after proposal submission.

II. MOVING THE OCI REGULATIONS TO FAR PART 3 IS UNNECESSARY AND INCONSISTENT WITH THE GENERAL THRUST OF THE PROPOSED RULE

The Proposed Rule removes OCI provisions from FAR Subpart 9.5 and places them in FAR Part 3. Currently, FAR Part 9 covers “Contractor Qualifications,” while FAR Part 3 is entitled “Improper Business Practices and Personal Conflicts of Interest.” (Emphasis added). The Section believes this move may create an unintended implication that OCIs are somehow unethical. The majority of subparts in Part 3 involve ethical proscriptions that focus on intentional misconduct. Violations of some of these proscriptions can result in criminal liability. See, e.g., FAR 3.104-8 (criminal and civil penalties may apply to conduct that violates Procurement Integrity Act); FAR Subpart 3.2 (contractor gratuities to Government personnel); FAR Subpart 3.3 (reports of suspected antitrust violations); FAR 3.502-2(b) (stating that Anti-Kickback Act of 1986 imposes criminal penalties); FAR Subpart 3.9 (limitation on payment of funds to influence Federal transactions). Since FAR Subpart 3 was promulgated in 1984, it has been titled “Improper Business Practices and Personal Conflicts of Interest,” and thus it carries years of association with rules involving misconduct.

OCIs generally are not associated with improper contractor business practices. Rather, OCIs are usually the byproduct of normal business practices, such as contractor mergers and acquisitions and the Government’s expansion of the size and scope of contractor support services. As the Preamble to the Proposed Rule notes, one of the trends in recent years that has led to increased potential for OCIs is “Industry consolidation.” Proposed, 76 Fed. Reg. at 23237. This confirms that OCIs involve structural aspects of companies that conduct business with the Government—their “organizational” makeup.

Further, the current FAR OCI rules and the Proposed Rule recognize that OCIs can be mitigated and, if they cannot be sufficiently mitigated, can be waived. The Proposed Rule goes even further to allow COs to accept the risks associated with an OCI if it is limited to a risk to the Government’s business interests. In contrast, mitigation is not permissible in cases of subcontractor kickbacks, procurement integrity violations, and other proscriptions in FAR Part 3 and

6 The other two trends cited, agencies’ growing reliance on contractors for services and the use of multiple-award task- and delivery-order contracts, constitute legal acquisition conduct and thus do not support moving the regulations to Part 3.
agencies generally do not have authority to waive and Contracting Officers do not have discretion to accept the risks associated with the Part 3 prohibitions.

The Proposed Rule would change the title of FAR Part 3 to “Business Ethics and Conflicts of Interest.” Proposed, 76 Fed. Reg. at 23243. If DoD, GSA, and NASA decide to keep OCI coverage in FAR Part 3 (as opposed to returning it to FAR Part 9), the Section believes this change in the title of Part 3 is a step in the right direction. Nonetheless, given that the title of Part 3 has included “Improper Business Practices” for more than two decades, and given the ethical proscriptions that predominate in Part 3, the Section believes further steps are necessary. For example, language should be added to make clear that the existence of potential OCIs and attempts to avoid, neutralize, and mitigate OCIs are not “improper.”

Finally, the Section recommends clarification of the distinction between personal conflicts of interest and OCIs. Currently, FAR 3.101-1 states that “[t]he general rule is to avoid strictly any conflict of interest or even the appearance of a conflict of interest in Government-contractor relationships.” Because OCIs can be mitigated, “strict” avoidance of OCIs is not required. Nor is there a strict rule against the “appearance” of OCIs. Accordingly, the referenced language in 3.101-1 should be revised to state that it is limited to personal conflicts of interest.

In sum, we believe the placement of the OCI provisions in Part 3 is inconsistent with the approach taken by the rule and sends a contradictory message. The changes we have recommended should help a discerning reader; nevertheless, the better solution would be a different placement – if not FAR Part 9 (Contractor Qualifications), then perhaps Part 6 (Competition Requirements) would be appropriate.

III. THE PROPOSED DISCLOSURE REQUIREMENT WOULD IMPOSE UNREALISTIC EXPECTATIONS ON CONTRACTING OFFICIALS AND EXPOSE OFFERORS TO BURDENSOME AND UNDULY RISKY COMPLIANCE OBLIGATIONS

One of the tasks that COs would be required to perform under the Proposed Rule involves reviewing a potentially large amount of information submitted by offerors pursuant to proposed clause 52.203-XX, which requires offerors to disclose “all relevant information regarding any [OCI], including information about potential subcontracts.” (Emphasis added). This proposed requirement is problematic for several reasons. First, the acquisition workforce may not have the time, resources, and expertise to review and analyze the information produced by
offerors in response to 52.203-XX. In light of the liability risks discussed below, offerors are likely to “over disclose” to avoid an allegation that they did not provide all relevant information. As a result, Contracting Officers would be required to review and analyze a significant volume of information, a large percentage of which may be tangentially relevant or even irrelevant to the issue at hand. The Section is concerned that overworked COs may use their discretion to lean towards excluding offerors rather than reviewing disclosures, digging into the details of offerors’ circumstances, and assessing the viability of other techniques to address a potential OCI (e.g., avoidance or mitigation).

Further, in addition to raising concerns about the burdens placed on the acquisition workforce, the potentially large amount of information required to be disclosed by proposed clause 52.203-XX (“all relevant information regarding any [OCI], including information about potential subcontracts”) raises concerns with respect to the obligations it imposes on offerors. The term “all relevant information” is ambiguous and extremely broad. The issue of what information is “relevant” could be open to various interpretations, which could have significant negative repercussions.

First, the ambiguity could generate bid protests over whether an offeror’s disclosure - no matter how voluminous - was sufficient. Additionally, subparagraph (a)(3) of the clause may subject offerors to false statement allegations by requiring a formal representation that, to the best of the offeror’s knowledge and belief, it has disclosed “all relevant information” regarding any OCI. Although most offerors will endeavor in good faith to meet this disclosure requirement, some offerors may overlook information that is relevant to a disclosed OCI or potential OCI. With the benefit of hindsight, the non-disclosure may look more egregious than the full context would suggest. Thus, for example, an offeror could face allegations of misrepresentation for disclosing the existence of an issue involving an affiliate, but failing to provide the text of relevant clauses from the affiliate’s contract that creates the possible conflict. The Section is concerned that this could expose offerors to an unfair risk of civil False Claims Act liability that would be difficult—if not impossible—for companies to guard against.

Accordingly, the Section strongly recommends that if the Council retains the disclosure obligations in 52.203-XX, they revise the clause to provide a more

---

7 The clause also states that, if the offeror or the Government identifies an OCI on the current acquisition, the offeror shall explain the actions it intends to use to address the conflicts, such as by submitting a mitigation plan and/or accepting a limitation on future contracting. The Section recommends that DoD, GSA, and NASA consider the amount of information the clause requires offerors to submit, and the corresponding burdens on COs.
realistic disclosure obligation focused on the type of information most relevant to the Government’s OCI analysis. At the least, the clause should be revised to limit the disclosure obligation to “materially relevant information.” More generally, the Section believes that, to the extent possible, this information disclosure process should be collaborative. Instead of imposing an overly broad obligation on contractors to disclose all potentially relevant information and presumably holding the contractors liable for potential breaches of contract and False Claims Act allegations for any supposed omissions, the Council should strive for an approach that encourages and facilitates cooperation between offerors and the Government.

To that end, the Council also should consider revising the clause to require the CO to tailor the scope and focus of the disclosure requirement to the context of a particular procurement. In many cases, the CO will be in the best position to decide the type of information that the Government will need from offerors to conduct its OCI analysis. In other instances, offerors will have information but may be uncertain about its relevance. The Section has significant concerns about the proposed approach, which would treat all acquisitions the same (so long as there was a baseline decision that some OCI risks exist).

The regulations should emphasize that the integrity of the system depends on COs and offerors communicating and working together to identify and address the issue of concern and the relevant facts. To address an OCI, a reasonable assessment is necessary at the outset of the procurement of the type of information potentially relevant to the OCI analysis. Both the CO and potential offerors should work together to provide for the disclosure of that type of information.

Additionally, any clauses imposing disclosure obligations should state explicitly that the offeror or contractor is not required to disclose information if doing so would constitute a violation of law. For example, if a company is in the process of acquiring an acquisition-support contractor, it could identify a potential (though likely attenuated) OCI associated with procurements in which the support contractor could be called upon to evaluate its potential buyer and future owner. If the buyer is a publicly traded company, it may be restricted under the securities laws and the regulations of the Securities and Exchange Commission from disclosing information related to the potential purchase. FAR 52.203-XX should provide an exception from disclosure and/or special protection of information for companies in that situation and comparable situations. We recommend a similar change to 52.203-XXZ, which would require disclosure of OCIs discovered after contract award.

Finally, the Proposed Rule would prescribe 52.203-XX whenever the CO determines “that contractor performance of the work may give rise to
organizational conflicts of interest.” Proposed, 76 Fed. Reg. at 23,248. Nevertheless, it does not provide much guidance to COs in making that determination. The Section is concerned that, without proper guidance, COs will include 52.203-XX in all solicitations even if there is no risk of OCIs. If the Council retains 52.203-XX, we recommend adopting guidance concerning when COs should include that provision in solicitation. At the least, the FAR should state that COs have authority to (and indeed are encouraged to) hold exchanges with industry before the issuance of the solicitation to assess the risks of potential OCIs. Without an express statement that discussions are allowed at the pre-solicitation phase, COs may be reluctant to engage in open dialogues with industry and potential offerors. Those discussions would provide the added benefit of giving potential offerors a sense of the CO’s preliminary, non-binding view of the OCI risks associated with the contemplated acquisition.

IV. THE PROPOSED RULE APPEARS TO CURTAIL THE DISCRETION OF AN AGENCY TO WAIVE ORGANIZATIONAL CONFLICTS OF INTEREST

The Proposed Rule would limit waiver to instances of “exceptional circumstances” where the waiver “is necessary to accomplish the agency’s mission.” FAR 3.1205(a). The Proposed Rule also requires the agency head to provide a written explanation why the waiver is necessary to accomplish the agency’s mission. Id. The Council distinguishes OCIs that represent potential harm to the integrity of the competitive acquisition system from OCIs that would cause harm only to the Government’s business interests. FAR 3.2103(a). The Proposed Rule suggests that the waiver provision applies only to the first category of OCIs, given that the Proposed Rule enables COs to accept risks associated with OCIs that threaten only the Government’s business interests. FAR 3.1204-4. Nevertheless, the preamble indicates that waivers should be “extremely rare.” Preamble II.B.2.a.

The proposal to limit the use of waivers to “exceptional circumstances” where necessary to accomplish the agency’s mission represents a material policy change. The current waiver provision in the FAR allows an agency head to waive any general rule or procedure of FAR subpart 9.5 upon determining that its application in a particular circumstance “would not be in the Government’s interest.” FAR 9.503. The Proposed Rule would thus herald a significant curtailment of existing agency discretion to waive OCIs. The Section questions the benefit of reducing agencies’ waiver discretion given that agencies rarely waive OCIs despite their considerable existing discretion. The infrequent use of waivers suggests that agencies resort to waivers only where there is a legitimate public interest to be served.
The authority to waive an OCI represents one method among many by which an agency can address an OCI. Having the waiver authority at the agency head level provides an adequate safeguard that waivers will not be indiscriminately approved, without the need for criteria such as “exceptional circumstances” or mission failure. Although the inclusion of a waiver provision in the Proposed Rule suggests the legitimacy of properly exercised waiver authority, the Proposed Rule provides no examples of “exceptional circumstances” to assist COs in analyzing whether particular circumstances meet this new threshold. In addition, the requirement that an agency justify the use of a waiver by explaining that it cannot otherwise accomplish its mission could effectively eliminate waiver authority.

If an agency identifies a biased ground rules OCI prior to award, the use of the waiver process may be desirable for two reasons. First, it would subject the decision to proceed in spite of a biased ground rules OCI to higher level review within the agency. Second, it would reduce protest risk by providing a written record of the basis for agency’s decision (normally in the form of a determination finding) and appropriate legal review.

Finally, waiver represents an important method by which an agency can address a residual OCI that has not already been mitigated or avoided and that presents risks less significant than the public interest that would be served by a waiver. Therefore, the Section recommends that the Council remove the “exceptional circumstances” limitation from the proposed waiver provision and consider the necessity of any additional limitation of existing waiver discretion.

V. TASK AND DELIVERY ORDER CONTRACTS

A. Consideration In Streamlining The OCI Analysis For Orders

The Section believes that streamlining is a laudable goal; however in some cases efficiencies gained by streamlining cannot substitute for an appropriate, thorough analysis of an actual or potential OCI. The CO should perform an analysis sufficient to ensure that any actual or potential OCI is identified and addressed by the Government and contractor in each task order to ensure the integrity of the procurement process and the proper identification and acceptance by the Government of the business risks involved in that task order, and in the contract as a whole.

By design, the general intent of the Proposed Rule is to provide increased flexibility to accomplish the Government’s competing procurement versus performance goals of expanding the pool of qualified offerors, maintaining a fair and level playing field, and ensuring the Government can get what it needs.
However, the nature of the orders to be procured and the mandates of the actual proposed rules limit the ability to standardize and develop bright line tests.

Proposed Rule § 3.1206-5 requires COs to consider OCIs at the time of issuance of a task or delivery order by going through steps “comparable to those [in the presolicitation OCI analysis steps] in 3.1206-2, except that there is no solicitation involved in issuance of orders.” Id. § 3.1206-5(a). First, by requiring an analysis comparable to that in Proposed § 3.1206-2, the Proposed Rule directs that the same areas and concerns that must be analyzed at the contracting level, also must be considered at the ordering level for a proper OCI analysis to take place.

This mandate will limit the kind and amount of streamlining of the OCI evaluation process. Second, the supposition in this provision that the orders will not involve a “solicitation” may be incorrect. It has been the case for some time that agencies have the authority to issue (and in fact frequently issue) multiple award contract vehicles covering the same scope so that the Government can use them to issue “statements of work” to the more limited pool of potential offerors and ultimately “competitively” procure an order from among that pool of offerors.

Indeed the current interim FAR rules on Multiple-Award Contracts were issued to carry out the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 mandate for “enhanced competition for orders placed under multiple-award contracts, including GSA’s Federal Supply Schedule...” 76 Fed. Reg. 14548 (Mar. 16, 2011). Thus, where these kinds of contracting vehicles are in place, a mandate to provide comparable analysis for task order procurements will result in requiring the same kind of analysis as used in a competitive contract.

Further, it will place a potentially considerable workload on COs (as discussed more below). Because task-orders and delivery-orders can be issued from single-award task- and delivery-order contracts as well as from multiple-award contracts where contractors compete at the task order level on various scopes of work, the Proposed Rule’s assumption that there is no “solicitation” at the task order level should be corrected. The Final Rule should distinguish between and address how the evaluation of orders should be conducted for both multiple- and single-award task- and delivery-order contracts.

It will be difficult to determine in a vacuum whether a particular task order’s OCI analysis can be streamlined. OCIs can arise in orders of any value, scope, or duration. Even the award of a small order of limited value, scope, and duration may result in an OCI or form the basis for an OCI on a much larger contract or subsequent order down the road. The same can be said with regard to the identity and size of entities involved in a particular transaction. Just because the same parties are involved in one task- or delivery-order award does not mean that their performance on a new order would not create an OCI for any of the
involved contractors. The scope of the specific project, a change in an individual or contracting entity’s circumstances, a reorganization within any of the entities involved, or even new hires can create an actual or potential OCI scenario and can affect the sensitivities and acceptability of what is proposed as a plan to address OCIs and permissible business risk in the CO’s analysis.

Task- and delivery-order contracts can be for specific supplies or services, or can be extremely broad in scope as to either or both. Task and delivery orders are each considered individual contract awards in their own right, though bound by the parameters set on them by their specific overarching contracts, unless more specific terms in the order govern and supersede these provisions. Therefore each task must be evaluated separately. The process can be factually dense and difficult to navigate. Qualified personnel on all sides, who understand the guiding principles and particular rules for evaluation, are needed. Given this, the most important streamlining action that can be undertaken would be to ensure that adequate training and guidance is provided for contract and order analysis; both the CO and the contractor need to ensure that they have the same understanding of what are conflicts, what are valid considerations relative to their evaluation and mitigation, and the process of a conflict of interest evaluation.

There are multiple factors to consider in determining whether streamlining is possible: contract vehicle, contract and order scope, number of potential contracting entities eligible to receive the order, and the actual situation within the contracting entities (their ownership, business interests, personnel, business and personal alliances, products, capabilities).

1. **Single Contract With Single Contractor**

Where there is a single task- or delivery-order contract vehicle held by a single contractor, and the scope of the order is a follow on to the earlier task order, continuing with the same work, with the same personnel, and there are no changes in what will be done or the interests and state of the contractor remain the same, COs should be permitted to streamline their analysis on the issuance of such a follow on task- or delivery-order. In this circumstance, if the contractor confirms there have been no changes that might raise an actual or potential OCI, the CO’s initial OCI risk evaluation may be sufficient for the life of the contract.

Where the contractor does identify changes in its situation, the OCI analysis may be limited to reviewing those changes to determine whether an insurmountable OCI exists, or what if any changes should be made to the current mitigation plan to address the actual or potential OCI to the satisfaction of the CO.
2. **Multiple Contracts With Multiple Contractors**

When multiple contractors hold task- or delivery-order contract vehicles through which the Contracting Officer may seek competition, streamlining may be more difficult but still possible to accomplish. Where the task has been performed before by each contractor, an analysis similar to 1., above may be appropriate. Specifically, it may be appropriate to require contractors to identify (a) what has changed in their situation since the contract order was last awarded and (b) whether the change has created an actual or potential OCI. The CO would then have to evaluate such changes and determine their potential impact, and decide whether mitigation is needed, or whether the change(s) necessitate preclusion.

Where the scope or the new task is different from other tasks under the multiple award vehicle or where the contractor has received other contracts or orders for different work, there may be a need for further review of the areas of inquiry previously covered, as well as additional areas.

Multiple-award task- or delivery-order contracts also may allow the CO to establish OCI “swim lanes” with the contractors when the overarching vehicle is awarded that make burdensome mitigation plans unnecessary or avoid exposing contractors to exclusion from future contracts of interest. For example, contractors may agree with the Government to refrain from bidding on and performing task-order procurements in certain subject matter areas where the CO determines the conflict-inducing work can be confined to certain task orders and there is sufficient competition for those task-orders among the remaining contractors.

3. **Existing Mitigation Plan**

Where there is an existing mitigation plan under the multiple-award contract vehicle, the contractor and CO must evaluate orders proscribed by the plan. In the event of changes in the scope of work or the contractor entity (or its contracts, business interests, employees, subcontractors), the plan also should be evaluated to determine whether the method of OCI analysis remains sufficient or whether additional areas of inquiry and consideration are needed.

4. **Changes In Contracting Officer**

Frequently changes in contract administration occur when a new CO is assigned to the contract. To streamline handling of OCI matters, a new CO should be briefed by the departing CO and a meeting conducted with both COs and the contractor to review the contract OCI plan and the handling of matters on a going forward basis.
5. Direct vs. Assisted Acquisition

With regard to “direct” versus “assisted” acquisitions under a multiple-award, task- or delivery-order contract vehicle, the ability to engage in any streamlining may vary. The Proposed Rule does not define “direct” versus “assisted” acquisitions. A “direct” acquisition likely involves only one contracting agency and CO. Under this scenario, the proposed streamlining scenarios identified above would apply. An “assisted” acquisition likely involves something comparable to a multiple award schedule contract or Federal Supply Schedule, administered by one master agency, but where the competition, award and supervision of individual orders are accomplished by the user agency. The user agency CO should determine whether the plan is acceptable for use given the agency’s needs, the scope and duration of the order, supplies or services to be provided, and the anticipated competition for the order.

B. Balancing The Additional Work For The Contracting Officer And The Benefit To The Procurement Process

Evaluation of OCI’s will tax already burdened contracting offices. These rules place the burden of evaluating the risks and benefits on the Contracting Officer. There are few situations in which the CO will not need to evaluate each award under a multiple award contract for potential OCIs. The benefit is flexibility versus a bright-line standard that might disqualify potential offerors that may be able to offer the Government best value.

The CO will have access to contract specialists, legal counsel, program managers, and staff to identify potential risk areas for OCIs, locate and review pertinent information, and evaluate the OCI risks for particular offerors for particular tasks. In addition, improved technology resources will ensure better recordkeeping, record retention, and facilitate more appropriate and accurate mining of data to locate key information.

The proposed rules also place a heavy burden on the contractor throughout the procurement and performance cycles to monitor itself and its employees and subcontractors for actual and potential OCIs, and to report to the CO when any are identified.

Proposed clause 52.203-XX, for example, would require the offeror to disclose to the CO all relevant information regarding any actual OCIs, including any potential subcontracts and active limitations on future contracting and to “represent” that it has disclosed “any conflicts of interest.” Proposed § 52.203-XX at (c)(3). Further, proposed clause 52.203-ZZ would require the contractor after award to continue to search and to make a “prompt and full disclosure” of any
actual conflict found. Proposed § 52.203-ZZ(b). Further, where a conflict is disclosed under a task- or delivery-order contract, the proposed clause expressly permits the CO to terminate the contract for convenience upon determining that the conflict cannot be “addressed in a manner acceptable to the Government.” Proposed § 52.203-ZZ at (c). With the necessary information from the contractor, the CO can effectively evaluate any conflicts of interest that need to be addressed. The CO will as a result be in the best position to understand the present requirement and future needs of the agency and to evaluate whether an OCI exists and to respond in the Government’s best interest as contemplated by 52.203-ZZ at (c).

The Final Rule should provide guidance on disclosure of actual and potential OCIs. Specifically, the proposed conflict of interest rules would require conflict of interest disclosure under 52.203-XX(c) when a contractor’s assessment of a proposal results in identification of an OCI. This provision does not require disclosure of a “potential” OCI, only identification of actual OCIs.

Additionally, once the Contracting Officer becomes aware of an OCI issue that will result in a decision to exclude a contractor from receiving or competing on a task-order requirement, the CO should be required to notify that contractor so that any responsive actions can be taken. It may also be necessary or advisable to disclose this decision to all potential offerors under the task-order procurement. In this regard, where procurement integrity concerns arise, potential offerors have an obligation to raise the issue before the due date for submission of proposals or risk being precluded from challenging a procurement integrity violation after award.

Finally on this point, the Section recommends that the Government take steps to ensure stability and consistency in the handling of OCIs on a particular contract (and procurements of task-orders under multiple award contract vehicles). This will insure continuity when COs change. Additionally, Contracting Officer OCI decisions should remain in place once implemented, barring adequate justification. Contractors may spend significant sums implementing plans in reliance on Contracting Officer determinations that a particular mitigation plan is satisfactory or other decisions resolving issues relating to an actual or potential OCI. Contracting Officer modifications to a mitigation plan should be documented in a manner similar to a Justification and Approval document required under FAR Part 6.

1. Early Identification Of Likely OCIs

To the extent possible, agencies should provide early guidance concerning where OCIs are likely to occur. Proposed clause 52.203-XX(b)(2) would provide a
location for the CO to list contractors that have participated in the preparation of the statement of work or other requirements documents. Proposed § 3.1206-2(b)(3)(i) would require that the CO have the program office or requiring activity identify in the pre-solicitation phase any contractor(s) that participated in preparation of the statement of work or other requirements documents, including cost or budget estimates.

Not only will this guidance aid contractors in identifying situations in which a CO may believe a conflict may exist, but it also may enable contractors to fashion steps to protect corporate assets and intellectual property. The CO should apply this same analysis to the information provided contractors for future task-order contracting.

Additionally, the CO should include in each solicitation and request for quotations a list of potential requirements where the CO anticipates that a conflict of interest could occur. The CO is already required to assess the nature and scope of any conflict of interest that could arise during contract performance. This additional requirement would require the CO to share that insight with contractors to permit planning and disclosure of potential conflicts.

2. Possible Obligation For A Prospective Offeror To Research Potential OCIs And Raise Them Early

Proposed clause 52.203-XX(c)(2) would require contractors to provide COs an identification of the limitations on future contracting to which both the contractor and a potential subcontractor will be involved. The Government should provide guidance regarding the content of this information.

Because task- and delivery-order contracts have such potentially large scopes and not all multiple award primes and subcontractors will be involved in performing all tasks (or even all of the work in any particular task), it will be difficult for a contractor to assess all potential OCIs before receiving a task-order and apportioning the work. This issue will be more complicated in assisted acquisition contracts where an OCI may arise at the subcontractor level on a task-order, when GSA holds the main contract vehicle.

The question arises whether the prime contractor will be required to interview each teammate subcontractor on a task- or delivery-order contract to determine whether the subcontractor has an OCI even if that particular subcontractor will not be involved with that order. The Section recommends that the Government clarify that the disclosure obligation for task- and delivery-order contracts will take into account these uncertainties and allow for more detailed or supplemental disclosures as specific task-orders are issued.
VI. UNEQUAL ACCESS TO NON-PUBLIC INFORMATION

The Proposed Rule would create new provisions in FAR Part 4 and new clauses to serve two general purposes: (1) to more effectively regulate contractors that gain access to nonpublic information during contract performance (proposed new Section 4.401), and (2) to identify and resolve situations in which a contractor’s access to nonpublic information may confer an unfair competitive advantage (proposed new Section 4.402). The Section applauds the relocation of these matters to provisions separate from organizational conflicts of interest. The Section agrees that contractor access to nonpublic information may pose concerns about OCIs, but may pose other concerns as well. The method of analysis will depend upon the types of information as well as the manner used by the contractor to gain access and the source of the information. By separating treatment of access to nonpublic information from treatment of OCIs, the Council creates the opportunity to address more comprehensively many concerns posed by contractor access to nonpublic information.

Nevertheless, the Section believes the FAR Part 4 provisions, and the new clauses that would implement them, would benefit from further revisions. Our comments in this regard relate to four issues:

(1) The definition of “Nonpublic Information” should be clarified in both clause 52.204-XX, Access to Nonpublic Information, and clause 52.204-YZ, Unequal Access to Nonpublic Information.

(2) The indemnification language in clause 52.204-XX should be modified.

(3) Consideration should be given to revise the third-party beneficiary provisions of clause 52.204-XX.

(4) The Council should be mindful not to add unduly to the burdens on COs.

A. Summary Of The New Provisions And Clauses

New Section 4.401-4, would require COs to include clause 52.204-XX, Access to Nonpublic Information, in solicitations and contracts “when the contractor (or its subcontractors) may have access to nonpublic information.” Under new Section 4.402-5, the CO would be required to include in all solicitations that exceed the simplified acquisition threshold a clause substantially the same as
52.204-YZ, Unequal Access to Nonpublic Information. Each of these clauses would significantly increase the obligations for contractors and the responsibilities for COs.

1. Proposed New Clause 52.204-XX – Conditions Of Access

Under proposed 52.204-XX, a contractor must commit to specific terms as a condition for gaining access to nonpublic information during performance of a contract or during a procurement, whether the nonpublic information belongs to the Government or a third party. Proposed § 52.204-XX(b)(1). The contractor must commit to: (i) use nonpublic information only to perform the contract and for no other purpose; (ii) safeguard nonpublic information from unauthorized use or disclosure; (iii) limit access to those persons who need it for performance; and (iv) inform its employees, agents and subcontractors of these obligations. Proposed § 52.204-XX(b)(2)(i)-(iv).

The clause requires the contractor to “indemnify and hold harmless” the Government (and others) for specified misuses of nonpublic information to which the contractor gained access. Contractors also must obtain a non-disclosure agreement (“NDA”) from each person who may have access to nonpublic information, and the clause prescribes minimum terms for these NDAs to include the terms of sections 52.204XX(b)(1) (e.g. indemnification and third-party beneficiary provisions) and (b)(2)(i) - (iv) discussed above. If necessary, contractors can add terms to the NDA. Proposed § 52.204-XX(2)(v). The clause states that third-party owners of the nonpublic information, to which a contractor may have access, are third-party beneficiaries with a right of direct action against the contractor, to seek damages or otherwise enforce the terms of the clause. Proposed § 52.204-XX(b)(1)(ii) and (d). The clause requires a contractor to report violations to the CO and notify the CO if the contractor receives information marked in a manner that indicates the contractor should not possess it. Proposed § 52.204-XX(b)(2)(vii), (3). The clause must be flowed down to subcontractors that need access to nonpublic information for performance. Proposed § 52.204-XX(f).

---

8 The Section focuses these Comments on proposed new clauses 52.204-XX, 52.204-YZ, and the related accompanying FAR provisions. Proposed new clauses, 52.204-XY, Release of Preaward Information, and 52.204-YY, Release of Nonpublic Information, contain provisions that mirror those of 52.204-XX and –YZ. The Section’s Comments apply equally to the new clauses 52.204-XX and –YZ.
2. Proposed New Clause 52.204-YZ – Disclosure Of Access

Proposed new clause 52.204-YZ, Unequal Access to Nonpublic Information, generally requires the contractor to notify the CO before submission of a proposal if the contractor has gained access to nonpublic information relevant to the solicitation. The clause would require offerors to disclose before submitting a proposal if the offeror “or any of its affiliates” possesses “any nonpublic information relevant to the current solicitation and provided by the Government, either directly or indirectly.” The clause would further require that if the offeror has a firewall to mitigate the impact of access to nonpublic information, it must represent whether the firewall was implemented as agreed and whether it was breached. Additional provisions within FAR 4.402-3 guide the CO in analyzing the information to be reported under 52.204-YZ, to determine whether an offeror’s access to nonpublic information may give it an unfair competitive advantage.

3. The Section’s Concerns

The policies underlying the new Part 4 provisions and clauses are laudable: to preclude contractor use or disclosure of nonpublic information for any purpose unrelated to contract performance; to ensure that contractors do not obtain unfair competitive advantages through access to nonpublic information; and to prescribe a minimum-level of restrictions, while permitting COs to impose more-restrictive measures, for release and disclosure of nonpublic information, when necessary. Nevertheless, the Section is concerned that some of the new provisions would create extra burdens and risks without meaningfully advancing these stated policies.

a. The Definition Of “Nonpublic Information” Should Be Narrowed

While the new Part 4 provisions hinge on the definition of “nonpublic information,” the definition of “nonpublic information” is too broad. The Section suggests that the Council (a) narrow the definition of “nonpublic information” in the manner described below, (b) modify the proposed language of FAR Part 4.401-4 to require inclusion of Clause 52.204-XX only when the CO identifies any specific nonpublic information needing special protection, and (c) require the CO to specify in clause 52.204-XX the nonpublic information to be protected. In addition, the Section recommends that the Council:

- Modify clause 52.204-XX (and related clauses) to require the parties to identify specifically the information to be protected, rather than require protection of all “nonpublic information” as currently defined.
• Modify clause 52.204-XY (and related clauses) to require contractors to disclose transactions and relationships through which contractors or subcontractors may gain access to nonpublic information, rather than disclose whether they actually gained access to “nonpublic information” as currently defined.

As described above, clause 52.204-XX would create new obligations for the contractor and new administrative burdens for the CO, and exposes the contractor to expanded liability risks. The new obligations, burdens, and risks should be triggered only when there is a genuine concern about misuse of nonpublic information – i.e., where there is nonpublic information in need of protection. Nevertheless, the new provisions and clauses define “nonpublic information” to mean not only information that “is exempt from disclosure under [FOIA] or otherwise protected from disclosure by statute, Executive Order, or regulation,” but also instances when “the Government has not yet determined whether the information can or will be made available to the public.” This last element – information that the Government has not yet determined whether to release – is too broad.

Typically, government agencies do not routinely analyze every element of information in their possession to determine if that information may be released publicly. Rather, agencies generally determine releasability on demand. For example, an agency typically does not analyze whether information may be released under FOIA until it receives a FOIA request for that information. Accordingly, the vast bulk of an agency’s information falls into the category of that which “the Government has not yet determined whether the information can or will be made available to the public.”

Proposed Section 4.401-4(a)(1) would require COs to include 52.204-XX in solicitations and contracts when the contractor (or its subcontractors) may have access to “nonpublic information.” Because of the breadth of “nonpublic information,” COs may interpret the new provisions to require inclusion of proposed § 52.204-XX in more contracts than are necessary to advance the underlying policies. Accordingly, the Section recommends modifying § 4.401-4(a)(1) to require inclusion of proposed § 52.204-XX only when the CO determines that there is nonpublic information in need of protection.

In addition, the clause requires the contractor to protect all of this broadly-defined “nonpublic information” from disclosure. The preamble suggests that agencies are allowed to “provide otherwise in their procedures.” But this permission is not evident in the clause or in the new FAR provisions. The clause contains no provisions permitting, or suggesting, that the parties specifically
identify the “nonpublic information” that needs protection. The overbreadth of “nonpublic information” would undermine the ability of the contractor to protect the information.

Broadening the scope of information to be protected will compound the difficulty of protection. Many people within a business across disciplines are involved in the task. It will be difficult for contractors to wall off information without more guidance than the term “nonpublic information.”

The Council may find instructive examples from protection of classified, procurement-sensitive, and proprietary information, such as during procurements or bid protests. In these contexts, the best practice is to define specifically the information to be protected. Documents containing that information can be marked, alerting persons who may handle that information as to its sensitivity and restrictions. Business systems containing that information can be restricted. Accordingly, rather than define “nonpublic information” broadly to include any information “not yet determined” to be releasable, the Section favors an approach that would require, or at least allow, the parties to identify the information to be protected, and specify that information in clause 52.204-XX. More specific definitions of “nonpublic information” would also enable the parties to fashion restrictions appropriate to the nature of the information. The definitions would also facilitate negotiations between the contractor and third parties over additional precautions.

Instead, the Section suggests adding, as a third element of the definition of “nonpublic information,” the identification by the CO of a specific risk that the information could be misused. One formulation would be defining “nonpublic information” to mean Information that

(a) has been determined to be exempt from disclosure under [FOIA] or otherwise protected from disclosure by statute, Executive Order, or regulation, and

(b) (i) for which the Government has made no determination that the information will be made available to the public and

(ii) which the CO deems to be at risk of misuse.

Examples of information that would be at risk of misuse would be helpful to aid the CO, such as: (a) information about potential mergers and acquisitions of publicly-traded companies; and (b) acquisition sensitive information that does not qualify for protection under the Procurement Integrity Act.
In addition, new clause 52.204-YZ, to be included in all solicitations above the simplified acquisition threshold, would require offerors to disclose before submitting a proposal if the offeror “or any of its affiliates” possess “any nonpublic information relevant to the current solicitation and provided by the Government, either directly or indirectly.” The same broad definition of “nonpublic information” is included in this new solicitation clause.

We believe that distinctions between pre-proposal disclosure and the post-award contexts warrant different definitions of “nonpublic information.” Information to be disclosed before a procurement should be broad enough to allow the Government to analyze future risk. In contrast, however, after contract award, the burdens of protecting that nonpublic information become significant.

While the definition of “nonpublic information” for pre-proposal disclosure should be broad, the proposed definition in 52.204-YZ is too broad and vague. First, contractors may not know whether information that they, or their affiliates, possess is nonpublic. In any case, they are unlikely to know if the Government has determined the information “can or will be made available to the public.” Accordingly, offerors may not know what information to disclose. Second, the standard for disclosing nonpublic information “relevant to the current solicitation” is vague. Offerors may under-disclose believing in good-faith belief that the information is not relevant. Third, a company may not know if information was “provided by the Government,” particularly information possessed by affiliates.

b. Suggested Approach – Disclosure Of Conduits

As an alternative, the Section suggests that the Council explore the disclosure of conduits of nonpublic information, such as prior relationships or transactions between the contractor and the Government. For instance, the contractor could be required to disclose (1) recent hires of former agency employees who had access to nonpublic information during their Government service; (2) recent contracts or subcontracts involving the same agency; or (3) personal relationships (e.g., spousal relationships or business dealings) between Government employees and contractor employees. Because many companies already track such information, the added administrative burden may not be significant. Also, the CO should be accustomed to analyzing such relationships and transactions. Analysis of conduits of information is more likely to enable COs to assess whether the contractor possesses nonpublic information, and to analyze whether the information needs of protection.
B. The Proposed Indemnification Is Unnecessary And May Add An Unwanted Increase In Price

Proposed Clause 52.204-XX would impose a new indemnification obligation on contractors for improper disclosure or use of nonpublic information. The Section is concerned that the proposed indemnity would impose significant new risks on contractors and would drive up costs while providing little or no benefit to the Government.

The proposed clause is overly broad, unbounded, and imposes a strict liability standard. Specifically, it requires that a contractor indemnify the Government for “every claim or liability” that results from “the misuse or unauthorized modification, reproduction, release, performance, display, or disclosure of any nonpublic information.” This clause would increase the cost that the Government pays for its services, but with little or no benefit. The circumstances in which the Government will need the indemnification are rare, and the Government already has powerful criminal, civil, and administrative remedies to address unauthorized release or misuse of non-public information.

The proposed unbounded, undefined liability would greatly increase risk to contractors. Contractors would need to self-insure or purchase commercial insurance to cover this new liability. The additional costs resulting from this clause ultimately will be borne by the taxpayers. Moreover, the added liability could have a depressing effect on competition.

The Government already has powerful criminal, civil, administrative, and contract remedies that protect it from a contractor's misuse or release of non-public information. These include the Procurement Integrity Act (41 U.S.C. §§ 2102, 2105 (recodified pursuant to Pub. L. No. 111–350)), the Trade Secrets Act, 18 U.S.C. §§ 1832, 1905, the civil False Claims Act (31 U.S.C. §§ 3729-3733), as well as administrative remedies such as suspension or debarment, and contract remedies such as termination for default. The proposed indemnity provision appears aimed at a non-existent problem. Accordingly, the Section recommends that the final rule not include an indemnification provision.

Should the final rule contain an indemnification provision, the contractor’s risk of liability should be reduced by:

- Stating that the use of the clause is prohibited in commercial item contracts and making the indemnification clause optional for use in non-commercial item type contracts.
• Clarifying that the contractors are not liable for claims or liability caused by actions or inactions of government officials. As stated in the proposed rule, contractors would be liable if the action or inaction that led to the “misuse or unauthorized modification” was taken by a government employee.

In addition:

• To avoid disputes over the concept of “authority,” the Section recommends adoption of a standard different from “unauthorized.” Only the CO has authority to direct changes under a contract, but other individuals have authority to “direct” work. If the Government directs release of information or modifications to data, the contractor should not bear the indemnification burden. In this instance, it should not matter whether the government individual directing the conduct was authorized or not.

• The term “misuse” does not impose a known legal standard, nor does the clause define it. The Section recommends that the more precise term “material breach” be replaced as the test.

• In commercial contracts, indemnification clauses typically incorporate a standard of “gross negligence or willful misconduct.” Accordingly, the Section recommends that the indemnification obligation apply only in the event of “the gross negligence or willful misconduct of the contractor by the contractor, its subcontractors, or agents to the extent that any such loss is not due to the actions or negligence of the Government or its agents.”

C. A New And Direct Remedy For Owners Of Nonpublic Information – Third Party Beneficiaries

The Proposed Clause 52.204-XX would also implement a dramatic change in the law regarding contractors as third-party beneficiaries. The new clause would explicitly provide that third-party owners of nonpublic information to which a contractor may have access are third-party beneficiaries with a right of direct action against the contractor to seek damages or otherwise enforce the terms of the clause. Proposed § 52.204-XX(b)(1)(ii) and (d).

1. Third-Party Beneficiary Status – An Unusual Remedy

The United States, as a sovereign, consents to be sued by only those parties “with whom it has privity of contract.” See Flexfarb, LLC v. United States, 424
F.3d 1254, 1263 (Fed. Cir. 2005) (internal citations omitted). A plaintiff to have standing to sue the United States on a contract claim, must be in direct privity of contract with the Government. *See Anderson v. United States*, 344 F.3d 1343, 1351 (Fed. Cir. 2003). While the Court of Federal Claims and its predecessors have acknowledged the possibility of claims by third-party beneficiaries (*see, e.g.*, *Maneeley v. United States*, 68 Ct. Cl. 623, 629 (1929)), there has been a substantial hurdle to obtain relief. In *Montana v. United States*, 124 F.3d 1269, 1273 (Fed. Cir. 1997), the Court of Appeals for the Federal Circuit adopted a two-prong test to be applied in deciding whether a party qualifies as a third-party beneficiary to a government contract. The Federal Circuit later clarified its third-party beneficiary test, holding: “In order to prove third-party beneficiary status, a party must demonstrate that the contract not only reflects the express or implied intention to benefit the party, but that it reflects an intention to benefit the party directly.” *Flexstar, LLC*, 424 F.3d at 1259 (citing *Glass v. United States*, 258 F.3d. 1349, 1354 (Fed. Cir. 2001)).

The Proposed Rule meets this test. Third-party owners of nonpublic information are explicitly made third-party beneficiaries. This reflects an intention to benefit those parties directly, avoiding any controversy over standing or jurisdiction.

2. **A Right Of Action For The Owner Should Benefit The Government**

To a substantial degree, the new clause takes the Government “out of the middle” and relieves the Government of the need to enforce the rights of third-party owners. The provision places responsibility on both the owner and the user of the information to act responsibly in the use and management of the information.

In this regard, section 821 of the National Defense Authorization Act for FY 2010 and the Interim Rule implementing that section have taken a different approach. 76 Fed. Reg. 11363 (Mar. 2, 2011). Under the DoD Interim Rule, the support contractor and the third-party owner enter into a non-disclosure agreement directly to allow the support contractor access to the owner’s technical data. The Proposed FAR Rule, on the other hand, would address situations where information is in the Government’s possession and will be provided by the Government to a contractor to perform work for the Government. To facilitate that result, the Proposed FAR Rule contains an express release section (52.204-YY) that provides that the Government may seek the third-party owner’s consent to release information for performance of the contract; provided that the contractor has agreed to the 52.204-XX clause. The Proposed FAR Rule would also require the contractor to execute a Government-approved NDA with a third-party whose
information is needed for performance. Unlike the DoD Interim Rule, the FAR Proposed Rule would require the 52.204-XX terms to be in the contract before any information is released.

Under the Proposed Rule, a third-party owner may not know to whom its information has been given for purposes of supporting the Government, even though the information is protected by the new 52.204-XX clause. As noted in the Section’s comments on the DoD Interim Rule, it also would be beneficial under the FAR Proposed Rule to require the contractor to notify any third-party upon receipt of information or data with any proprietary markings and to provide a similar notice annually to all third parties whose proprietary information they have received. ABA Section of Public Contract Law Comments on DoD Interim Rule (DFARS Case 2009-D031) dated May 2, 2011.

The drafters anticipated the potential for litigation by third-party owners using the express third-party beneficiary provisions of the Proposed Rule. But the drafters viewed the benefits of protection of information to override that risk, and to outweigh the additional workload imposed on Contracting Officers and their staffs. That view will likely be validated in practice, as parties become accustomed to the obligations and operation of the Proposed Rule, and the Government is relieved of detailed management of third-party information.
CONCLUSION

The Section appreciates the opportunity to provide these comments and is available to provide additional information or assistance as you may require.

Sincerely,

[Signature]

Donald G. Featherstun
Chair, Section of Public Contract Law

cc: Carol N. Park-Conroy
    Mark D. Colley
    Sharon L. Larkin
    David G. Ehrhart
    Council Members, Section of Public Contract Law
    Marcia G. Madsen
    James A. Hughes, Jr.
    Kara M. Sacilotto