Government Contracts Advisory

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CONTACTS

For further information regarding the topic discussed in this update, please contact one of the professionals below, or the attorney or public policy advisor with whom you regularly work.

Alison Doyle
202.496.7604

FAR Organizational Conflict of Interest Proposal--A Major Departure

On April 26, 2011, the long-anticipated proposal to revise the Federal Acquisition Regulation ("FAR") provisions regarding organizational conflicts of interest ("OCIs") was published in the Federal Register. **76 Fed. Reg. 23236 (Apr. 26, 2011**). Issued as a proposed rule with request for comments, it includes some interesting and even encouraging changes from prior OCI practice, while confirming the basic principles of fair competition and avoidance of bias.

Because of the recent rulemaking on the same topic in the DOD FAR Supplement, the FAR Council explains that it is taking this opportunity to seek comments that address whether the DOD approach or the new proposal, or some combination of the two, may be most appropriate. The DFARS approach reorganized OCI coverage, but in a manner that did not depart substantially from current practice. DFARS Proposed Rule 2009-D015, 75 Fed. Reg. 20954 (Apr. 22, 2010). As discussed below, the new FAR proposed rule makes several major changes in OCI analysis. MLA highlights three of them in this alert and strongly recommends that clients with business interests affected by OCIs study the entire proposal carefully and consider providing comments to help refine the final rule.

First, like the DFARS proposal, in the new proposed rule the OCI coverage is moved from FAR Part 9 "Contractor Qualifications" to FAR Part 3 "Improper Business Practices and Personal Conflicts of Interest," because "the larger issues that underlie efforts to identify and address OCIs are more directly associated with some of the business practice issues discussed in FAR Part 3." 76 Fed. Reg. at 23238. Most comments on the DFARS proposal objected to OCIs being associated with the other topics in Part 3 (illegal gratuities, contingent fees, kickbacks, contractor code of ethics and mandatory disclosure), but it appears the FAR Council agrees with the DFARS approach.

Second, the definition and analysis of OCIs in the proposed rule focuses upon two core policy principles, avoiding a) harm to the integrity of the competitive acquisition process and b) harm to the government's business interests. This is a restatement of the analytical approach in the FAR that has been applied by the GAO for many years and is no surprise (although with better explanations and guidance). What is remarkable about this proposal, however, is the clear position taken that while the competitive process must be protected carefully from OCIs, *if an OCI only presents a risk of harm to the government's business interests, then agencies would have the option to accept this potential harm as a performance risk. See, e.g.,* Proposed Rule § 3.1203(b)(3).

To cite a simple example, the proposal would still require a contractor

that wrote a statement of work ("SOW") be excluded from competition for the work under that SOW because they would have an unfair competitive advantage. However, if the same contractor also had a risk of bias when it was hired to write the SOW, because a corporate affiliate works in the same field, the government could choose to hire the contractor to write the SOW as long as the performance risk was taken into account.

This is a departure from prior practice that is both a relief and a concern – the issue of OCI risk arising from simple corporate affiliation is one that has gotten much attention in recent years, because under the current rules affiliation it is presumed to create a risk of bias and generally cannot be mitigated. Some companies have had to divest affiliates in order to avoid this difficult rule. Agencies and contractors have had to engage in elaborate analyses and mitigation planning to avoid such OCI risks. The proposed rule would give contracting officers more flexibility to accept performance risk in such situations rather than eliminate offerors.

The third major difference in the proposed rule is the decision to handle the competitive impact of unequal access to information as part of a new and much needed set of basic principles for the handling of nonpublic information under contract, in FAR Part 4 “Administrative Matters”. This proposal would create a separate basis for possible disqualification of contractors (mostly agency support contractors) for unfair competitive advantage, independent of the OCI analysis. *See* Proposed Rule § 4.402. For contractors who have had to deal with the ad hoc ways in which different agencies handle issues of protecting proprietary information provided to the government, or tried to get appropriate assurances when agencies needed to share proprietary information with support contractors, this new FAR subpart should be a welcome development because it sets at least minimum standards for protection. The proposal includes clauses that impose mutually enforceable rights and obligations on both support contractors and third party information owners. This is an interesting approach, as it seems the ability to disqualify duplicates the remedy that is available under an OCI analysis, but the FAR Council’s concern seems to be that not every case will involve a competitive procurement where those rules can be applied, and thus broader and separate coverage is needed.

Comments on the proposed rule are due on or before June 27, 2011.