

Conflict Resolution? Bipartisan Bill Proposes New Conflict of Interest Requirements for Contactors

Litigation Alert

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On March 23, 2022, a group of bipartisan senators introduced a new bill entitled the [Preventing Organizational Conflicts of Interest in Federal Acquisition Act](#) (the Act) aimed at addressing potential organizational conflicts of interests (OCIs) created by federal contractors' business relationships. Citing the government's "reliance on contractors for mission support services" and recent Comptroller General bid protest decisions indicating "failures in proper identification and mitigation of [OCIs]," the Act purports to uphold the integrity of acquisition operations by fleshing out covered circumstances, increasing disclosure requirements, and directing agencies to tailor conflict-prevention procedures to address specific vulnerabilities. Current and prospective government contractors will want to keep a close eye on the status of this bill and consider how their businesses may be impacted by a change to the definition and treatment of OCIs in federal procurement.

Background

The purpose of the federal OCI rules and regulations is to promote fair competition in government contracting. The Federal Acquisition Regulation (FAR) defines an OCI in [FAR 2.101](#) as a situation where "because of other activities or relationships with other persons, a person is unable or potentially unable to render impartial assistance or advice to the Government, or the person's objectivity in performing the contract work is or might be otherwise impaired, or a person has an unfair competitive advantage." [FAR 9.5](#) "[p]rescribes responsibilities, general rules, and procedures for identifying, evaluating, and resolving" OCIs, and "[p]rovides examples to assist contracting officers in applying these rules and procedures to individual contracting situations."

In 2007, the Advisory Acquisition Panel released a [report](#) that indicated that "the potential for OCIs has increased significantly in recent years" and "[t]he contracting community needs more expansive and detailed guidance for identifying, evaluating, and mitigating OCIs." In the [Duncan Hunter National Defense Authorization Act for Fiscal Year 2009](#), Congress then called for the review of the protections against conflicts of interest and contract clauses outlined in the FAR, which led to the publication of a [proposed rule](#) to address OCI issues in 2011. That proposed rule, however, was never finalized. Instead, it was [withdrawn](#) in March 2021 based on the "amount of time that has passed since publication of the proposed rule and potential changed circumstances."

The Act

Against this backdrop, the Act seeks to respond to [recent reports](#) highlighting "the need to prevent conflicts of interest within companies that are awarded federal contracts" and emphasizes Congress's concern with potential conflicts of interest due to business relationships that could result in impaired objectivity and undue influence. According to [Senator Gary Peters \(D-MI\)](#), the bill's main sponsor, the Act "will ensure federal consultants and contractors disclose other parts of their business that conflict with the work they are bidding to perform for the government. . . . , ensur[ing] taxpayer dollars are being used to hire contractors that are focused on working in the best interest of the American people."

If the Act becomes law, the FAR Council must "identify contracting methods, types, and services that raise heightened concerns for potential [OCIs] beyond those currently addressed in the [FAR]" within 18 months of enactment. The Act would further direct the FAR Council to revise the FAR to, among other things:

- Address OCIs with "sufficiently rigorous, comprehensive, and consistent government-wide policy and guidance to prevent or effectively mitigate such conflicts of interest in Federal acquisition"
- Update definitions related to OCIs to include "contractor relationships with public, private, domestic, and foreign entities that may cause contract support to be subject to potential conflicts of interest, including undue influence"

- Provide executive agencies with a solicitation provision and contract clause that "require contractors to disclose information relevant to potential [OCIs] and limit future contracting with respect to potential conflicts of interest with work to be performed under the awarded contract"
- Require executive agencies to tailor their solicitation and contract clauses to address agency-specific needs
- Require executive agencies to establish or update agency OCI procedures to implement new requirements

Even in this preliminary stage, the Act raises many questions about what it could mean for the standard practices of federal contractors:

- Which "contracting methods, types, and services" would the FAR Council identify as raising heightened concerns that need to be addressed by revisions to the FAR?
- How would the FAR Council update the definitions related to OCIs and how would these updates impact which business relationships may raise potential conflicts of interest that require disclosure and/or mitigation?
- How would practices vary agency-to-agency to address the specific risks of conflicts?

Conclusion

Though still early in its journey to becoming law, the Act signals potential changes for government contractors in their reporting obligations regarding OCIs. We will continue to monitor and report on updates to the Act. In the meantime, if you have questions about the potential impact of the Preventing Organizational Conflicts of Interest in Federal Acquisition Act or how you can be preparing for possible increased disclosure requirements, please contact one of the Miller & Chevalier attorneys listed below:

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