Almost 30 years after going into effect, the Federal Acquisition Regulation rules governing organizational conflicts of interest are set to be revised. The current OCI rules (found at FAR Subpart 9.5, “Organizational and Consultant Conflicts of Interest”) have been the subject of frequent criticism by practitioners, contractors, and even agency officials for, among other things, a conspicuous lack of clarity and total absence of guidance explaining how to conduct a meaningful OCI analysis. Over the past 30 years, the OCI rules have given rise to many irrational agency decisions and inconsistent protest rulings by the Government Accountability Office and the U.S. Court of Federal Claims. The many inadequacies of the OCI rules are fully on display in protest proceedings concerning two unrelated construction procurements—both of which were decided one way before the GAO only to see the COFC reach a different conclusion in subsequent protest proceedings. ¹

In April 2011, the FAR Council issued proposed regulations that, if adopted, will noticeably reform the OCI rules.² This Briefing Paper, the fifth to address OCIs,³ examines the current OCI rules in light of recent rulings by the GAO and COFC and applies the proposed rules to those same procurement controversies to test whether the new rules would effectively cure the ailments that have for so long afflicted agency decisions

Hilary S. Cairnie is a partner with Baker Hostetler LLP and the head of its Government Contract group and represented McTECH Corp. in the procurement protests discussed in this Briefing Paper. Dena S. Kessler is an associate with Baker Hostetler LLP.
resulting from the OCI rules. While the proposed rules offer some improvement over the current OCI rules, the new rules (if adopted) do not go far enough to achieve consistent outcomes between and among the agency personnel who are charged with conducting OCI analyses and deciding which entities should be excluded from competing for agency requirements because of actual or potential OCIs. In that regard, agencies may be better served by implementing standardized guidance and developing more effective training while using the OCI rules of the past 30 years, rather than adopting a completely new set of rules that will once again require many years of application and adaptation before the procurement community fully understands how the proposed rules are designed to operate.

Current OCI Rules

■ Purpose Of OCI Rules

The OCI rules serve two fundamental purposes: (1) ensure that offerors do not receive an unfair competitive advantage when bidding on a procurement based on their business relationships or prior involvement with the requirements at issue in the procurement, and (2) ensure that the awardee’s objectivity during performance is not impaired by virtue of its prior involvement in planning or developing the requirements that are at issue in the contract that it has been awarded.  

The OCI rules were first promulgated in 1963 as a way to address growing concerns about how federal acquisitions were being conducted in the aftermath of World War II. At that time, a select number of research and development firms were called upon by the Department of Defense to play significant, even leading, roles in planning the DOD’s future requirements. The Government contracting community was growing concerned that the R&D contractors would unfairly benefit in future procurements that were intended to fulfill the very requirements that they helped to plan and develop. The Government recognized the unfairness inherent in those types of situations, so it developed a first rendition of rules to provide agency personnel with a framework for identifying actual and potential OCIs and for addressing those conflicts in a way that was fair and reasonable as viewed by aggrieved offerors (the unsuccessful bidders) and the competitive field as a whole. Over time, those original rules were revised to arrive at the OCI rules that are now found at FAR Subpart 9.5. The OCI rules have been nominally adjusted from time to time during the past 30 years, but by and large, the substance of those rules has not materially changed.

■ Application Of OCI Rules In Turner & McTECH

During 2010 to 2012, two unrelated construction procurements led to separate sets of protests at the GAO and the COFC challenging the application of the OCI rules by the U.S. Army Corps of Engineers. In the first case, the Corps, following the protest of a contract award concerning an acquisition to construct a hospital for the DOD valued in excess of $300 million, performed an extensive OCI analysis under FAR 9.504 of the contract awardee, Turner Construction Co., based upon Turner’s dealings with another entity that was earlier involved in developing requirements for the construction project on which Turner
bid. The agency concluded that Turner did not have a disqualifying OCI. Two aggrieved offerors protested to the GAO.

The GAO concluded that Turner had an unequal access to information and a biased ground rules OCI. The agency took corrective action by reversing its earlier decision, adopting the GAO’s recommendation and stripping Turner of the contract. Turner then filed a separate protest with COFC challenging the agency’s corrective action as being arbitrary and irrational. The COFC found the agency’s corrective action to be unwarranted, concluding that the original OCI analysis was sufficiently detailed and that the agency’s original determination that any significant potential OCI involving Turner had been adequately mitigated. In other words, it was the GAO that misconstrued the OCI rules and improperly suggested to the agency that it should adopt corrective action. The COFC concluded that the agency must possess “hard facts” showing that an offeror received unauthorized access to competitively sensitive, nonpublic information to find the existence of a significant potential OCI.

In the second case, McTECH Corp. protested to the GAO its exclusion from the competition for construction of a dormitory building for the Department of Homeland Security at its Harpers Ferry, West Virginia training compound. The project was valued at between $50 and $100 million. The Corps excluded McTECH from the competition because of an adverse OCI finding by the Contracting Officer that was based upon the possibility that McTECH could have received unauthorized access to nonpublic, competitively sensitive information through one of its subcontractors, who also happened to be a member of a joint venture that was awarded the design contract for the dormitory. Before the GAO, McTECH argued that the mere possibility of acquiring access to nonpublic information was not a sufficient basis to find a significant potential OCI. Moreover, the Corps failed to contemporaneously document its OCI analysis. In the absence of a contemporaneous record, FAR 9.504(d)—which requires a written record when an adverse OCI finding has been made—calls for simply sustaining the protest because the agency could not establish the reasonableness of its analysis or its decisions based thereon.

The GAO denied the protest, thereby sustaining the agency’s OCI analysis and its exclusion of McTECH from the competition. McTECH then filed a new protest before the COFC challenging the exact same agency actions. After McTECH filed its motion for judgment on the administrative record, the agency opted to take corrective action in lieu of responding to McTECH’s motion; the agency withdrew its earlier OCI finding—as though never issued—and reinstated McTECH into the competition, among other actions. Ultimately, McTECH was found not to have a disqualifying OCI, but the COFC refused to dismiss McTECH’s protest that had been amended to challenge the adequacy of the agency’s corrective action. The case is scheduled for further legal proceedings into January 2013.

While there are many highlights presented in the McTECH protest, one that is especially germane to the OCI rules is the fact that, according to the Corps of Engineers Fort Worth District Office, across the entire Corps, the agency does not have an established written procedure for how procurement personnel are to conduct an OCI analysis under FAR Subpart 9.5. Nor has the Corps developed, conducted, or required its procurement personnel to participate in any OCI training courses.

- **A Notable Lack Of Guidance & Specificity**

The FAR OCI rules provide agency procurement personnel with broad discretion, virtually no meaningful guidance, and no structured process or framework for how to conduct OCI analyses. As evidenced by the Turner and McTECH cases, the result over the past 30 years has been scattershot at best: (a) inconsistent application of rules from agency to agency or office to office, (b) poorly documented agency actions, (c) the misapplication of the OCI rules in protests presented to the GAO, and (d) agency and GAO decisions that are simply wrong. A review of the OCI rules readily reveals the many weaknesses inherent in those rules; and in the absence of agency specific guidelines and training, it is easy to see why agency personnel may not be equipped to conduct reasonably scoped OCI analyses.
(1) The CO’s Amorphous Duties—Under FAR 9.504(a), the CO is supposed to (1) “[i]dentify and evaluate potential organizational conflicts of interest as early in the acquisition process as possible,” and (2) “[a]void, neutralize or mitigate significant potential conflicts before contract award.”18 The OCI rules urge the CO to seek information from both governmental and nongovernmental sources anytime while conducting an OCI analysis19 and to obtain the advice of counsel and assistance from technical specialists.20 The need for assistance is especially acute when developing any necessary solicitation provisions and contract clauses.21

It is here, under FAR 9.504(a), where the rules first fail to adequately instruct agencies: there is no requirement that agency counsel or technical specialist of contracting personnel possess a basic understanding of the process for conducting an OCI analysis. In McTECH, the nonexistent administrative record indicated that the CO’s advisors (her attorney and her contract specialist) lacked an understanding of the OCI rules. For example, had the CO received competent legal counsel, she would have understood, among other things, that the absence of a written record would violate FAR 9.504(d) and leave the agency vulnerable in a protest. But, if the advisors know little if anything about the OCI rules, and the CO has no experience under those same rules, any resulting OCI analysis (or the decision that no such analysis is warranted) is in doubt right from the outset.

If the CO decides under FAR 9.504(a) that a particular situation involves “significant potential” OCIs, before the solicitation is issued, the CO must prepare a written analysis with a recommended course of action for eliminating the conflict, proposals for amending the solicitation, and must otherwise resolve the conflict before awarding the contract.22 The OCI rules endeavor to impose on contracting personnel a commonsense rule by requiring agency personnel to exercise “common sense, good judgment, and sound discretion” in (a) deciding whether a significant potential conflict exists and, if it does, (b) developing of an appropriate means for resolving it.23 One noted scholar likens these instructions to telling agency personnel “you figure it out.”24

(2) No Guidance On When Or How To Identify OCIs—The OCI rules do not instruct procurement personnel how to go about identifying actual or potential OCIs or when to begin the process of considering whether an OCI analysis may be warranted. While the OCI rules do urge the agency to identify potential OCIs “as early…as possible,”25 this phrasing is largely left to interpretation, i.e., individual discretion, whereby it will mean different things to different agencies and offices within agencies (perhaps even officials within offices). But, practically speaking, what constitutes as early as possible? The CO is instructed to “[a]void, neutralize, or mitigate significant potential conflicts” before the contract is awarded, but the OCI rules do not instruct as to when in the procurement process the CO must commence and complete his or her OCI analysis.26 The timing may well vary from one acquisition to the next, but even so, why not include a fixed period of time unless exigencies warrant a more expedited timeframe?

Equally troubling is the absence of a standardized process, mechanism, or procedure for how agencies should conduct an OCI analysis. For example, FAR 9.506 provides that the agency “should” seek information from within the Government or “other readily available sources,” but does not mandate that such information must be sought out or describe the steps to identify sources of such information.27 In McTECH, the Corps declined to seek helpful and relevant information from other federal agencies, suggesting that such information would not have influenced the CO’s analysis or decision. The problem with that logic is that it is outcome determinative: the official decided, sight unseen, that she would not consider the information no matter what it may confirm or suggest. Under the OCI rules, agency personnel can elect not to seek information, can elect to consider some while excluding still other information, and can decline to conduct an exhaustive or even reasonably scoped search for information.

The OCI rules offer no uniform standard for identifying or approach for analyzing potential conflicts and in the absence of such, every OCI analysis must, by definition, be ad hoc. The absence of structure in the OCI rules is further exacerbated
by the lack of agency (or office) specific guidelines to assist procurement personnel in achieving consistent results.

(3) No Requirement For Agency To Inquire About Offerors Or Interested Parties—The OCI rules do not provide much in the way of structure to assist the agency in detecting whether it might encounter potential OCIs in any given acquisition. Under FAR 9.506, contracting personnel are urged to consider information available from Government sources or non-Government sources including publications, credit rating services, trade and financial journals, and the like. A problem with this approach is that many potentially conflicting relationships are of the sort that are not a matter of public record or would not be reflected in Government databases or files. As such, agency personnel would not be aware of those potentially conflicting relationships.

Also missing from the list of informational sources are offerors, contractors, and potentially interested parties. Stated differently, the OCI rules do not impose on agency personnel a requirement to seek disclosure from offerors, contractors, and potentially interested parties (potential offerors). This lack of a mandatory disclosure (of potentially conflicting business relationships) naturally gives rise to a Catch-22: if the Government databases and public databases do not reveal the existence of a potentially conflicting relationship, does that mean that no such relationships exist? But, if there is no requirement for agency personnel to mandate self-reporting by offerors, contractors, and potentially interested parties, then how will the agency ever discover the existence of potentially conflicting relationships? Contacts have no incentive to self-report and no penalty for failing to self-report, and procurement personnel have no incentive to seek out relationship information from contractor personnel.

It is true that there is nothing to stop the agency from soliciting information from offerors, and some agencies do so as part of the solicitation process, but in the absence of a mandate the propensity is not to ask. In McTECH, the Corps issued a solicitation knowing that potential conflicts might arise, and yet, it failed to include a self-reporting form for offerors to disclose business relationships. Had it done so, the agency may have avoided more than a year of protest litigation. The idea of self-reporting is not new: an author of an earlier Briefing Paper has advised that prospective contractors “should identify potential organizational conflicts and propose a mitigation plan to the Government.”

Until self-reporting is mandated, however, offerors and potentially interested parties can quietly sit back without saying a word and hope that the agency fails to detect on its own the offensive relationship. The result is that a contract could be awarded to an offeror that has a disqualifying conflict of interest, and the agency failed to detect the conflict. On the other hand, by self-reporting what the contractor perceives may be a potential conflict, the offeror risks bringing unwanted scrutiny on itself (while other offerors choose to hide from such scrutiny by not self-reporting) and potentially losing the opportunity to compete for award. As such, a contractor with anything other than the most egregious conflict of interest is disincentivized by self-preservation from self-reporting its business relationships and will be content to wait and see of the agency identifies the same business dealings and takes steps to conduct an OCI analysis.

In the absence of a required self-reporting mechanism, it may be left to competitors to call out business relationships that they perceive give rise to conflicts of interest. Such was the case in McTECH where the Corps’ OCI analysis was prompted not by its own due diligence (it conducted no informational due diligence under FAR 9.506), but rather by receipt of an “anonymous” package of documentation provided to it. The problem with this approach is that an anonymous source probably does not possess complete information, or may be misinformed, or may elect to disclose on selected information in the hope of shading the agency’s judgment.

(4) No Meaningful Guidance For Distinguishing Between Significant And Insignificant Potential OCIs—Once a CO determines that a “significant” potential conflict exists, the CO “shall” issue a written analysis with a recommended course of action for “avoiding, neutralizing or mitigating” the conflict. But the OCI rules present no guidance...
as to what criteria are to be used to distinguish between a significant versus insignificant potential OCI. In the case of McTECH, the CO erroneously and arbitrarily concluded there existed or was the potential existence of an OCI despite what McTECH asserted was mere speculation and no evidence that any nonpublic information had been passed between the companies.34 In contrast, in Turner, the agency conducted an exhaustive OCI analysis, identified substantial evidence of dealings between a Turner subcontractor and another entity that was connected to the project planning, and determined that there was a significant potential OCI, but concluded that Turner developed and implemented adequate mitigation measures and that it could compete for the award.35

From a timing standpoint, the OCI rules require the identification of significant potential OCIs as early as possible in the acquisition process (although no absolute timeframe is specified); if a significant potential OCI is identified, the agency may “avoid, neutralize or mitigate” the conflict right up to the time of award.36 And, if there is a potential OCI but it is not significant, the agency need not take any further action; there is no need to avoid, neutralize or mitigate, and no need to record the OCI analysis. The OCI rules recognize that significant potential OCIs can generally be resolved by imposing some kind of restraint on the contractor’s eligibility for future contracts or subcontracts, but they are otherwise ambiguous as to what those restrictions might later be to avert a future potential OCI.37

Interestingly, the OCI rules do not include any standard clauses concerning addressing conflicts. So, for example, there is no contract clause that speaks to how to avoid, neutralize, or mitigate significant potential OCIs; contractors are supposed to figure that out on their own.38 Rather, the rules only call on the CO to “[s]tate[ ] the nature of the potential conflict as seen by the contracting officer.”39 While the OCI rules provide that such restraints cannot be endless, the only limitation is that they “be limited to a fixed term of reasonable duration, sufficient to avoid the circumstances of unfair competitive advantage or potential bias. This period varies.”40 Once again, the restraints on future contracting are left, essentially, entirely up to the CO’s discretion. This substantially inadequate means of avoiding future conflicts would seem to have relevance and applicability in connection with design and development contracts, as opposed to construction or implementation contracts. Such a restriction would prohibit a designer from teaming with another entity to participate in the future construction contract.

The OCI rules do not define or categorize what constitutes an actual or potential OCI. Instead, the rules present nine examples of conflicts, along with a proposed mechanism for how one might reasonably address each situation.41 The few examples provided are of limited utility, however, because the fact patterns are simplistic, fairly straightforward, and provide no process guidance for discovering the facts to even inform of the existence of such simplistic potential OCIs. The examples do not address more complex and nuanced situations of the sort that are more commonly encountered in actual procurement settings.

(5) One Size Does Not Fit All Situations—A Case Of Too Much Flexibility—Flexibility is inherent in the OCI rules. The architects of those rules undoubtedly realized that if the rules were too detailed, there would inevitably be gaps, so they erred on the side of preserving as much flexibility as possible. But, the problem with flexibility is that it affords agency personnel so much discretion such that the rules can be distorted to mean whatever the agency official needs or wants them to mean.

Additionally, what about a procurement concerning a highly specialized field with a limited number of contractors possessing the capability to perform the needed work within a very short period of time or in a remote area of the world where the United States has ongoing operations? For example, when the Government needed assistance valuing the assets of investment bank Bear Stearns in advance of its orchestrated takeover by JPMorgan Chase in 2008, the Federal Reserve Bank of New York and the U.S. Department of the Treasury tapped asset management firm BlackRock.42 Later, BlackRock received contracts to manage assets of troubled insurance giant American International Group, as well as Fannie
The potential for conflict is readily apparent: an asset manager with its own vast holdings could have an ownership interest or investment in that very same distressed company whose assets it has been tasked with managing. Just the appearance of a conflict could significantly undercut public confidence in the public procurement system. Further, the assets being managed are public assets and do not belong to the contractor firm managing the assets, thereby reducing the risk and increasing the reward to the contractor/asset manager. However, the highly specialized nature of the work and the limited number of firms with the capacity and resources needed to successfully and timely perform the work certainly help to make a case for not disqualifying BlackRock from consideration.

While flexibility may be critical in some limited procurement scenarios, such flexibility is actually counterproductive in the majority of procurement settings that do not reflect the unique sorts of considerations as those encountered in the Bear Stearns case.

### High Bar To Reverse Agency’s OCI Determination

When an aggrieved offeror is confronted with an adverse OCI analysis (one that results in award to a competitor or excludes that offeror from competing for the award), it must lodge a protest to have any chance of reversing its fortunes. The disappointed offeror must overcome a very high evidentiary bar to demonstrate that the agency got it wrong. The protester must demonstrate that the agency’s OCI analysis and any decision based thereon is arbitrary, capricious, unreasonable, irrational, or otherwise violates applicable procurement laws and regulations. Only if the protester can make that type of showing will the agency’s OCI analysis (and associated procurement decisions) be overturned by the GAO or the COFC.

When reviewing a bid protest, however, the GAO and COFC give great deference to the agency’s OCI findings and conclusions, assuming that the agency’s action has been reasonably documented so that there is a contemporaneous record to examine. This evidentiary burden is especially onerous for protesters where, as here, the OCI rules afford the agency maximum discretion in conducting the OCI analysis. Even so, the agency’s discretion is not unchecked as evidenced by the COFC’s rulings in *McTECH*.

### Inconsistent Outcomes Due To Maximum Rule Flexibility & Lack Of Meaningful Guidance

The inconsistencies that can result from the agency’s OCI analysis are fully exposed in the *McTECH* and *Turner* protest cases. This section of the paper undertakes a more thorough examination of these cases because they illustrate the flaws inherent in the OCI rules and the difficulties each agency must confront in trying to get to a meaningful OCI analysis for each affected acquisition. They also reveal the difficulties faced by the GAO in understanding the OCI rules and analyzing the agency’s actions and inactions in connection with conducting OCI analyses. In both of these cases, the GAO erred in its analysis of the rules and the underlying evidence, and separate protest proceedings to the COFC were needed to put right that which the GAO fouled up.

### McTECH

(a) **McTECH’s Challenge To Its Exclusion From Competition**—As discussed above, *McTECH* concerned the U.S. Army Corps of Engineers’ conduct of an acquisition for the construction of a DHS facility in Harper Ferry, West Virginia. The procurement was valued by the Government at between $50 and $100 million. The designer of record was BrooAlexa Design Joint Venture, LLC. The Design Joint Venture consisted of two different entities: BrooAlexa LLC (BAX LLC), a construction firm headquartered in West Virginia, and a separate design firm. *McTECH* Corporation, a construction firm based in Cleveland, Ohio, submitted an offer in response to the solicitation for construction.

Before submitting a bid on the Harpers Ferry project, *McTECH* operated as a mentor to BAX LLC, its protégé. In this mentor/protégé capacity, *McTECH* and BAX LLC created several joint ventures. The Design Joint Venture that designed the dormitory project was not a venture between
McTECH and BAX LLC. As of the date of McTECH’s proposal on the construction project, none of its joint ventures with BAX LLC resulted in the award of any contracts, or the generation of any revenue, cost incurrence, profit or work. All these joint ventures were formed separate and apart from the Design Joint Venture. No one from McTECH was involved with the Design Joint Venture, nor did anyone from McTECH have any connection with the award, performance or administration of the contract to design the dormitory.

(b) The Corps’ OCI Analysis Based In Minimal Evidence—Shortly after issuance of the solicitation, the agency came to possess certain information about McTECH and its protégé firm, BAX LLC regarding their joint venture dealings. After receiving that information, the agency accessed the Central Contractor Registry where it was discovered that BAX LLC listed a total of six joint ventures between it and McTECH. The agency contacting McTECH via letter, stating: The question of an organizational conflict of interest has arisen regarding the subject solicitation and your participation in the site visit on 14 September 2011. A search of the Central Contractor Registration Database revealed that you have six (6) joint venture agreements with BrooAlexa [...]

BrooAlexa is under contract with the Government to provide the Scope of Work and is intimately involved with the solicitation process. FAR 9.5 sets forth guidance on identification of an Organizational Conflict of Interest (OCI).

In order to ensure that no OCI exists, please provide your rationale to include backup documentation to the undersigned by COB 5 Oct. 2011.

In short, the agency letter asked McTECH to comment on the potential presence of a conflict. The letter did not communicate that it had already made a finding of a conflict that could not be mitigated or that a mitigation plan was warranted.

McTECH responded with a letter detailing the relationship between McTECH and BAX LLC. The letter explained that McTECH was not connected with the Design Joint Venture, which was a separate legal entity from BAX LLC. McTECH’s letter went on to explain that McTECH had no interaction or connection in any way with the execution of the design contract. McTECH even attached a confidential joint venture agreement to provide the CO an example of the nature of the relationship between McTECH and BAX LLC.

Relying on the information from the CCR and state corporate and registration documents showing that the Design Joint Venture and BAX LLC shared an address and a manager, the agency concluded that either an actual or potential OCI existed based upon an ongoing and substantial business relationship between McTECH and the Design Joint Venture. The agency based its determination on the existence of an “ongoing partnership with an entity that served as the managing partner” of the Design Joint Venture. Based on these conclusions, the CO determined that McTECH’s OCI could not be mitigated and disqualified McTECH from competing for the contract.

The CO never asked or in any way directed McTECH to submit a mitigation plan, nor did she consider any other information or documentation concerning the nature of the relationship between McTECH and BAX LLC. What’s more, it was common knowledge to Government representatives working on the project well before the solicitation was issued that McTECH was interested in bidding, yet the CO failed to investigate this issue or take any actions that could have prevented or mitigated the potential conflict until after the solicitation was issued. Finally, the solicitation did not provide a form for offerors to disclose relationships and transactions that could give rise to an actual or a potential OCI, and the CO’s actions seemingly imposed on McTECH the duty to mitigate despite the FAR tasking the CO with that duty. McTECH submitted a motion for judgment on the record.

(c) McTECH’s Protest To The GAO—McTECH filed a preaward protest with the GAO disputing the disqualification and asserting that the CO’s determination was unreasonable. McTECH argued that the OCI determination was speculative and that the CO lacked evidence that nonpublic information passed from the Design Joint Venture to McTECH. The GAO denied the protest.

The GAO acknowledged that the Design Joint Venture and BAX LLC were separate legal entities,
but noted that the CO “reasonably” found them to be affiliated. According to the GAO’s decision, the record demonstrated common management and control; this information, combined with the entities having the same mailing address, demonstrated the entities were affiliates, which created an OCI.

Citing Turner, the GAO went on to state that the agency conducted a “reasonable investigation” to determine that there were sufficient “hard facts” to demonstrate there existed or there was the potential for an OCI. On this point, the GAO implicitly accepted the agency’s understanding of FAR 9.504(a)(2) that the “mere possibility” of gaining access to nonpublic information constitutes a “significant potential OCI” that could not be mitigated. Finally, the GAO cited a handful of decisions for the proposition that a contractor preparing specifications for a contract gives the contractor an “inherent advantage sufficient to warrant exclusion from the competition,” and that this prohibition applies to the contractor’s affiliates.

(d) McTECH’s Protest Before The COFC—McTECH timely filed a protest before the COFC challenging the same procurement flaws as were raised before the GAO. Whereas before the GAO the agency vigorously defended its OCI analysis and decision to exclude McTECH from the competition, before the COFC, the agency elected to take corrective action after McTECH filed motion for judgment on the administrative record. The adequacy of the agency’s corrective action is the subject of ongoing protest proceedings 12 months after the initial protest was filed at the GAO.

■ Turner

(1) Background Facts—Turner concerned a U.S. Army Corps of Engineers procurement for construction of an Army hospital in Fort Benning, Georgia. A joint venture between Hayes, Seay, Mattern & Mattern (HSMM) and Hellmuth, Obata & Kassbaum and another firm had been awarded the contract to prepare the design concept for the hospital and to conduct a technical review of bids submitted to build the hospital. At the time the contract was awarded and during contract performance, HSMM was owned by AECOM Technology Corp. While HSMM was performing under the contract, its parent AECOM began considering purchasing Ellerbe Becket, an architectural firm. AECOM and Ellerbe entered into confidentiality agreements, and a team of 25 to 30 AECOM employees began conducting due diligence into Ellerbe’s affairs. None of these AECOM employees were part of the HSMM team performing under HSMM’s contract.

Part of HSMM’s contract included conducting a technical evaluation of proposals to construct the hospital. In July 2009, four HSMM employees were part of the Technical Review Board charged with analyzing construction bids. The Technical Review Board selected the bid submitted by Turner Construction Co.; Turner’s bid proposed using Ellerbe as a subcontractor. About a month after the construction contract was awarded to Turner, Ellerbe’s merger with AECOM—HSMM’s parent company—was finalized and publicly announced.

While the Technical Review Board was evaluating bids (including Turner’s bid that proposed using Ellerbe as a subcontractor), one of the HSMM employees learned about pending negotiations between AECOM and Ellerbe. This individual brought the potential OCI to the attention of the CO, though did not reveal with which offeror the potential conflict existed. It was determined that this individual was the only HSMM employee who knew its parent company AECOM was in negotiations to purchase Ellerbe, and the CO agreed that the individual recusing himself would sufficiently prevent any potential OCI. The agency’s OCI analysis was neither extensive nor adequately documented. The CO did not conduct a comprehensive OCI analysis before the contract was awarded.

(2) GAO Overturned Agency’s Finding Of No OCI—Two disappointed bidders protested the award before the GAO. Both alleged the existence of “biased ground rules” and “impaired objectivity” OCIs, and one also alleged an “unequal access to information” OCI. At the inception of the bid protests, the CO submitted a short statement about the potential OCI, which she later supplemented with a more thorough investigation. This comprehensive investigation by the agency spanned
150 pages and encompassed declarations from 42 witnesses involved in the dealings between the companies that were involved in procurement planning and AECOM/Ellerbe merger. The investigation concluded once again that a significant potential OCI existed, but it had been effectively mitigated.

In subsequent protest proceedings, the GAO disagreed with the agency and concluded that AECOM’s and Ellerbe’s interests as prospective buyer and seller were “effectively...aligned” due to corporate acquisition discussions between them, and that those interests were “sufficient to present at least a potential organization conflict of interest.” The GAO concluded it was unreasonable for the agency to have relied on AECOM’s mitigation plan, unreasonable for the agency to assume that AECOM did not possess competitively useful information based on its role in the procurement, and that there was no reasonable basis to assume the information had not been made available to Ellerbe. Accordingly, the GAO concluded there was an unequal access information OCI. The GAO also concluded the agency lacked a reasonable basis for concluding that AECOM's assistance to the agency did not place it in a position to skew the competition in favor of Turner and Ellerbe and found that there was a biased ground rules OCI. The agency adopted the GAO’s determination and subsequently eliminated Turner from the competition.

(4) Turner’s Protest To The COFC—Turner protested to the COFC its elimination from the competition and its loss of the original contract award, arguing that the GAO’s recommendation lacked a rational basis for concluding that AECOM’s assistance to the agency did not place it in a position to skew the competition in favor of Turner and Ellerbe and found that there was a biased ground rules OCI. The agency adopted the GAO’s determination and subsequently eliminated Turner from the competition.

The GAO’s conclusion that Turner had unequal access to competitively useful nonpublic information was not rooted in concrete facts. Finally, the COFC concluded that the GAO improperly dismissed findings of the agency’s postprotest investigation.

■ Procedural Flaws Exemplified

Both the McTECH and Turner protest cases are examples of procurements hampered by a failure to conduct and adequately document a reasonable OCI analysis. These cases also demonstrate how the very flexible—arguably too flexible—OCI rules can give rise to dramatically different processes for conducting OCI analyses. In McTECH, the agency relied on very little documentation, expended virtually no due diligence to learn more about the potentially problematic relationships, sought out no assistance from other Government offices that possessed information that was helpful and relevant to the OCI analysis, ignored the existence of nondisclosure agreements which the COFC found to be of material importance, and failed to memorialize its OCI analyses. In Turner, the agency reached a reasonable conclusion initially, but lacked a documented preaward analysis upon which to substantiate its conclusion. In response to the bid protests, the agency conducted an
exhaustive OCI review, extensively documented that review, and reached the same conclusion as it did the first time. It was only after the agency adhered to the GAO’s flawed analysis of selected evidence that the agency acted improperly when it changed its OCI determination.

These case outcomes are the result of two common considerations. First, the OCI rules do not provide meaningful guidance or structure for conducting a meaningful OCI analysis. Second, the agency in both cases lacked internal guidelines for instructing its procurement personnel as to how they should conduct a proper and reasonable OCI analysis. Do the proposed rules appear to correct these procedural flaws?

Proposed OCI Rules: Overview

A 2007 report by a panel established by the Services Acquisition Reform Act of 2003 concluded that the OCI rules do not adequately address the broad range of possible conflicts that can arise in the modern day contracting landscape. In particular, the SARA report noted that the OCI rules do not provide detailed guidance to COs on how they should detect and mitigate conflicts. Congress later called for a review of the OCI rules and for the development of appropriate revisions. Citing factors such as industry consolidation and agencies’ increasing reliance on contractors, the proposed rules were issued in April 2011.

The proposed rules were preceded by an Advance Notice of Proposed Rulemaking to gather comments from the public concerning whether and how to improve the OCI rules. After issuing the proposed rules in April 2011, the FAR Council solicited public comment over a two-month period. The FAR Council received comments from 18 respondents, including individuals, and groups including an association of research universities, a section of the American Bar Association, law firms, and trade associations.

Proposed OCI Rules: Organizational Changes

The proposed rules aim to help better classify OCIs by defining different kinds of conflicts and by separating OCIs from issues arising from unequal access to information.

First, the proposed rules move the OCI rules to a different section of the FAR. The proposed rules on conflicts would be located in FAR Part 3, “Improper Business Practices and Personal Conflicts of Interest.” The proposed rules addressing unequal access to information would be placed in FAR Part 4, “Administrative Matters.”

The proposed rules define “organizational conflict of interest” to mean any situation where either (a) a Government contract requires a contractor to exercise judgment to assist the Government and the contractor has a financial stake in the matter so that “a reasonable person” would be concerned that the contractor may be improperly influenced by its own interests rather than the Government’s best interests; or (b) a contractor has an unfair competitive advantage as a result of having performed work on another Government contract.

The proposed rules also classify potential conflicts into two new categories: (1) conflicts affecting only the Government’s business interests, and (2) conflicts affecting the overall integrity of the competitive procurement system. If a conflict only affects the Government’s business interests, a CO will have “broad discretion to select the appropriate method for addressing the conflict,” including a determination that the Government can accept some or all of the risk associated with the conflict. Under the proposed rules, however, a conflict implicating the integrity of the procurement system affords the agency no discretion for risk tolerance; instead, the agency must “take action to substantially reduce or eliminate” such a risk. Both kinds of conflicts can be waived, but only in “exceptional circumstances.”

Proposed OCI Rules: New Presolicitation Duties Imposed On Agency

The proposed rules mandate that an OCI analysis begin before issuance of the solicitation, rather than “as early in the acquisition process as possible” as required under the current OCI rules. The agency must make an initial assessment whether the nature of the work has
the potential to create an OCI, both in cases of contemplated solicitations and when there are “foreseeable future contracts.”120 If the agency concludes there is no potential to create a conflict, that determination must be documented.121

The proposed rules describe a detailed series of steps that the agency can or must undertake if it concludes that there is the potential for a conflict. For example, the agency “should” consult with the program office to determine whether the OCI can be avoided by drafting the requirements documents to exclude tasks requiring a contractor to exercise subjective judgment while performing the contract.122

If avoiding an OCI is not readily possible at that stage, the CO should consider whether a conflict concerns only the Government’s interests or the integrity of the procurement system.123 If the former, the CO can either include potential risks as an evaluation factor in the technical rating or simply review bids independent of any OCI considerations and later determine if a conflict can be properly addressed.124

If the CO determines performance of the contemplated work has the potential to create an OCI, the CO must take a variety of actions, including requiring the program office to provide a list of all contractors who participated in preparing requirements documents so the CO can analyze the nature and scope of a conflict.125 From there, the CO should, “if appropriate,” include a solicitation provision identifying contractors prohibited from competing as a prime contractor or a subcontractor due to any applicable preexisting limitations on subcontracting.126 Yet the proposed rules do not provide guidance on what is “appropriate,” reminiscent of the lack of guidance for what constitutes a significant conflict under the current OCI rules. The CO must also include provisions requiring bidders to disclose all relevant information regarding any potential OCI; bidders would also be required to explain actions they would take to address such conflicts, including proposing a mitigation plan or accepting a limitation on future contracting.127

In short, the proposed rules create the opportunity for the CO to require bidders to address potential conflicts and disclose relevant information early in the process, and they require offerors to propose mitigation plans. Under the OCI rules at FAR 9.504, the CO currently has the discretion to include similar disclosure requirements in solicitations.129 The difference, however, is that the proposed rules expressly inform the CO of such a measure, whereas the under the current rules, it is merely implicit.

However, for the proposed rules’ mandatory disclosure provisions to come into play, the agency must first determine that a potential conflict exists. The proposed rules offer suggestions for how the agency can conduct this initial analysis, but they do not mandate that agency personnel take any particular steps to consult sources or gather information that would reveal potential conflicts. In that respect, the proposed rules miss an opportunity to better guide contracting personnel. As with the OCI rules now in effect, under the proposed rules the agency “should” get assistance in this process from the “appropriate technical specialists, and legal counsel,” but do not mandate such assistance.130 Nor do the proposed rules mandate that counsel or specialists be familiar with OCI principles.

The proposed rules list five evaluation factors a CO “should” consider, though they are not mandatory.131

(i) The extent to which the contract calls for the contractor to exercise subjective judgment and provide advice.

(ii) The extent and severity of the expected impact of the organizational conflict of interest (for example, whether it is expected to occur only once or twice during performance or to impact performance of the entire contract).

(iii) The extent to which the agency has effective oversight controls to ensure that the contractor’s actions are unaffected by an organizational conflict of interest during performance.

(iv) Whether the organizational conflict of interest risks creation of an unfair competitive advantage.

(v) The degree to which any impairment of the contractor’s objectivity may reduce the value of its services to the agency, and the agency’s willingness to accept the performance risk of that impairment.
The proposed rules also do not specify to what lengths a CO must go to collect information to conduct a sufficiently thorough initial assessment, nor how specific the assessment must be. So while the proposed rules create a framework for COs to mandate contractor disclosures early in the process, those disclosure requirements are not triggered unless the CO—through an undefined process—first determines that there is the potential for a conflict.

- **Proposed OCI Rules: New Duties When Evaluating Bids, Awarding Contracts**

After conducting the presolicitation analysis, the proposed rules provide significant leeway to agency personnel during evaluation of offers and award of contracts. Although the proposed rules do not expressly define what constitutes a “significant potential” OCI, they do inform interested parties about two categories of conflicts where the limits on the agency’s discretion are expressly established:

1. Where the potential OCI affects only the Government’s interests, the agency has discretion to accept all or less than all risk associated with such conflict, even if that means waiving the conflict.  
2. Where the potential conflict affects the integrity of the procurement process, then the agency must take appropriate action to neutralize or avoid such conflict.

When analyzing bids for conflicts issues, a CO must consider information provided by bidders (including information bidders provided in response to a mandatory disclosure clause in the solicitation), but “should” also seek out and consider “readily available information” about the offerors from both governmental and outside sources, including financial interests, affiliates, and prospective subcontracts. The proposed rules identify potential sources of information, including bidders’ websites and corporate filings whereas the current OCI rules are silent as to these latter sources of information.

- **Proposed OCI Rules: OCI As Evaluation Factor, Criterion**

The proposed rules allow but do not require the agency to establish OCIs as a proposal evaluation criterion. The agency can elect to include potential risks associated with the OCI as an evaluation factor in the technical rating or assess the OCI outside the technical rating by considering the performance risks associated with the conflict and engaging in exchanges with offerors to understand the OCI and assess the feasibility of addressing the risks. If the agency elects not to establish an OCI evaluation factor, if it has selected an offeror that is found to have a potential OCI, before withholding an award from the apparent successful offeror, the CO must notify the offeror and allow it a reasonable opportunity to address in writing the perceived conflict. And since the proposed rules allow the agency to consider information from many sources, including offerors, this preaward notification allows offerors an additional opportunity to clarify and supplement information presently before the CO.

- **Proposed OCI Rules: Guidance For Addressing Conflicts**

Under the proposed rules, agency personnel may address potential OCIs in any one of four ways: (1) avoidance, (2) limitations on future contracting, (3) mitigation, or (4) acceptance of the risk.

- **Proposed OCI Rules: Avoidance & Exclusion**

The proposed rules provide a nonexclusive list of techniques that the agency can use to “avoid” a potential conflict. These include (a) drafting statements of work to avoid or limit the amount of subjective judgment a contractor may be allowed to apply in performing the Government’s requirements and (b) requiring the contractor and its affiliates to develop and impose internal controls and structural barriers to prevent the flow of competitively sensitive information.
The agency can also exclude a bidder from a procurement when it determines (1) the bidder would have an unfair competitive advantage because of its prior involvement in developing the ground rules for a procurement, or (2) the risk that the contractor’s judgment would be impaired because performance has the potential to affect other of the offeror’s current or future activities “is more significant than the Government is willing to accept.” Before excluding a contractor because it would have an unfair advantage stemming from work done by an affiliate, the CO must “identify and analyze the corporate and business relationship” between an offeror and its affiliate. This inquiry “should” be directed toward understanding the nature of the relationship between the entities and, “at a minimum,” the contracting officer “should” examine whether (a) the entities are controlled by a common corporate headquarters, (b) the corporate organization has established internal barriers, (c) the entities are separate legal entities, (d) the corporate organization has instituted recurring training on OCIs, and (e) the affiliate can influence the offeror’s performance of its contractual requirements. Exclusion is available only if the agency concludes there is no less restrictive method; this determination must be documented in the contract file.

■ Proposed OCI Rules: Neutralization

Under the proposed rules, neutralization of an OCI can be accomplished by limiting the contractor’s opportunity to bid on future procurements while still allowing the contractor to perform the present contract. The limitation on future contracting must be restricted to a reasonable, fixed period of time; the restriction must end on a specific date or on the occurrence of a particular event.

■ Proposed OCI Rules: Mitigation

Under the proposed rules, mitigation is “any action” that reduces the risk that an OCI “will undermine the public’s trust” in the public procurement system. The proposed rules give examples of potential mitigation techniques, including requiring certain work to be subcontracted to a conflict-free contractor, imposing internal barriers or firewalls, and the Government obtaining advice on a particular issue from more than one source. Though the proposed rules do not impose any definitive requirements or benchmarks for successfully mitigating a conflict, it is helpful that they do provide specific examples of techniques that could be deployed to mitigate certain types of conflicts.

■ Proposed OCI Rules: Accepting Risk

Under the proposed rules, a CO can accept the risk posed by a conflict only when it affects the Government’s business interests; this option is not available when the conflict poses a risk to the integrity of the federal procurement system. Risk can be accepted only if it is “manageable” and the potential harm is outweighed by the expected benefit of having the conflicted contractor perform the work. Before making this determination, the CO must consider “all readily available information” as provided in proposed FAR 3.1206-3 (listing various Government and nongovernmental sources, including the relevant contracting office and trade and financial journals) and must document in writing the rationale for why it is in the Government’s best interest to accept the risk.

The proposed rules differ significantly from the current OCI rules, which do not expressly contemplate agency acceptance of risk due to a conflict, other than by formally requesting a waiver. Under the proposed rules, acceptance of risk can be determined at the CO’s level, whereas a formal waiver of conflict can only be approved by the agency head.

Proposed OCI Rules: Addressing Unequal Access To Information

As noted earlier in this Paper, another significant difference between the current OCI rules and the proposed rules concerns access to information. The proposed rules establish a new term—“nonpublic information”—as a catchall term for any type of procurement concerning sensitive information that is not known to the public at large. The FAR Council explained that access to nonpublic information will not necessarily
give rise to a potential conflict of interest, and as such, issues concerning nonpublic information merit different treatment. For example, an issue of nonpublic information may arise where a former Government employee with access to competitively useful information is hired by a contractor. Methods for resolving such situations differ from those needed to resolve a potential conflict of interest. The proposed rules separate the rules governing the handling of nonpublic information from those governing potential OCIs, and it is expected to lessen the confusion that is often associated with identifying and addressing access to information conflicts.

The proposed rules include a broad definition of “nonpublic information” that includes both (1) information belonging either to the Government or to a third party that is not generally made publicly available (e.g. that cannot be released under the Freedom of Information Act), and (2) information that has not been disseminated to the general public which the Government has not yet determined if it can or will be made public. A bidder can be disqualified if it has received an unfair competitive advantage because of access to nonpublic information.

- **Bidders Would Be Required To Disclose Certain Nonpublic Information**

  The proposed rules create a system designed to uncover potential problems early in the procurement process in connection with the receipt and handling of nonpublic information. The CO must inquire of the relevant contracting agency (and its personnel) whether any potential bidders to a current acquisition may have received Government-provided access to nonpublic information concerning the current acquisition. Also, the CO must include a requirement in the initial acquisition announcement mandating that potential offerors indicate as soon as possible if they have had Government-provided access to nonpublic information. The solicitation must also include a prescribed provision requiring offerors to disclose if they are aware of anyone in their corporate organization, including affiliates, who has received such information. On this point, agencies will likely subscribe to the doctrine of imputed knowledge: if anyone in the corporation has had access to nonpublic information, that knowledge will be imputed to all corporate officials. For solicitations that exceed the simplified acquisition threshold, the solicitation must include a contract clause requiring offerors—before submitting any offer—to advise the CO about any Government-provided nonpublic information, as well as proposed actions to resolve the situation.

Resolution can be accomplished by sharing the information with all potential bidders, by employing a corporate firewall, or, if need be, by disqualifying the affected contractor. Disqualification is mandatory if the contractor has Government-provided information that would provide an unfair competitive advantage, and the situation cannot be resolved through any mitigation techniques. What constitutes an unfair advantage is not defined, and the adequacy of mitigation is left to the agency’s discretion.

The proposed rules concerning the handling of an offeror having received access to nonpublic information differ materially from the mechanism at work under the current OCI rules, which do not mandate offeror disclosure of access granted by the Government. This type of self-reporting should level the playing field across all competitors by making it more difficult for any one offeror to game the rules or play hide-and-seek with agency officials.

- **Nonpublic Information Would Not Always Mandate Agency Action**

  The proposed rules recognize that not all access to nonpublic information is materially unequal; and even if access is not equal across all offerors, this imbalance of information will not always result in a competitive disadvantage to the field. To determine if access to nonpublic information requires agency action, the CO must consider whether (1) access was provided by the Government, (2) the nonpublic information is available to all potential offerors, and (3) if the information is competitively useful to offerors. An offeror with an unfair competitive advantage because of unequal access to nonpublic information must be disqualified, unless the agency can otherwise resolve the matter by, for example,
disseminating the information to all potential offerors or setting up a firewall.\textsuperscript{173} If the bidder gained access to the information through a non-governmental source, or if the information is not competitively useful, the CO need not take steps to resolve the situation.\textsuperscript{174}

**Proposed OCI Rules: Application To McTECH & Turner**

The proposed rules provide significantly more guidance to COs than the existing regulatory regime. The current OCI rules are drafted in roughly four pages of the FAR, whereas the proposed rules encompass more than eight pages, not including mandatory clauses. Applying the proposed rules to the procurements at issue in the McTECH and Turner protests exposes some of their strengths and weaknesses.

(a) *Proposed Rules May Have Assisted Corps To Reach Correct OCI Determination On The First Attempt*—In McTECH, the CO’s initial conflict finding was seriously flawed in many ways: (1) she considered very little information, (2) she conducted minimal due diligence, sought out no information from other agencies, and disregarded information that was readily available to her, (3) she conferred with agency counsel without extensive familiarity of OCI legal issues, (4) she failed to identify potential conflicts as early as possible, (5) she failed to ask offerors to identify potentially problematic business relationships, (6) she failed to develop any evidence to establish whether there was a material risk of unequal access to competitively useful information, and (7) she fundamentally misunderstood the rules and her duties thereunder.

The proposed rules do provide agency personnel with more tools and specific guidance that probably would have benefited the Corps in its dealings with McTECH. For example, the proposed rules’ requirement that the CO conduct a presolicitation analysis of potential OCIs may well have resulted in identification of business relationships between prospective offerors, their team members and those several entities that were involved (as prime contractor, consultant, or subcontractor) during the project design. Upon learning presolicitation that there may have been a potential OCI, rather than simply disqualifying McTECH based on an unsubstantiated possibility, the CO would have been able to require actual offerors to disclose potentially conflicting business relationships as part of their proposals using a solicitation disclosure clause. The solicitation could also have required the submission of mitigation plans as part of the proposal. These steps alone would have required the agency to gather information from the entire competitive field rather than from just a single offeror. This type of approach is always inherently fair and preserves the integrity of the procurement process.

If directed in the solicitation to disclose its relationships and include a mitigation plan, McTECH and other similarly situated offerors would no doubt have included more information in their proposals. The mandatory disclosure provisions would have likely provided the CO with more information about the relationships between all offerors and their business partners so that the agency could make more informed judgments about whether there were potential conflicts of interest or incidents of unequal access to information.

Armed with that information, under the proposed rules the CO is guided to consider five evaluation factors—(1) the extent to which the contractor will exercise subjective judgment, (2) the extent and severity of the conflict, (3) the extent of agency oversight, (4) the potential for creating an unfair advantage, and (5) the degree of the contractor’s impaired objectivity and the effect on the value the contractor would bring to the agency\textsuperscript{175}—which may assist the CO to conduct a more thorough analysis.

Even after the additional information and guidance, if the CO still concluded that McTECH must be disqualified, she would have been required to meet the more stringent rules to document her disqualification rationale. Before excluding McTECH, the proposed rules also would have strongly suggested that the CO consider “at a minimum” certain issues, including whether the firms are separate legal entities and each firm’s ability to influence the other’s performance under the contract.\textsuperscript{176} These additional steps may have given the CO pause and caused her to reevaluate her conclusion.
(b) Proposed Rules May Have Disclosed Potential Conflict Earlier in Turner & Facilitated Faster Resolution Of OCI Dispute—As in McTECH, the COFC in Turner reversed a decision by the GAO, but only after the GAO in Turner improperly disregarded the CO’s conclusion that any potential conflict had been mitigated. In short, the CO got it right. That said, there may have been a faster and smoother resolution to the OCI dispute in Turner requiring less litigation had the solicitation been conducted under the proposed rules.

Conducting the Turner procurement under the proposed rules may have prompted the disclosure of the relationship between AECOM and Ellerbe earlier in the process. To the extent all parties involved knew of the relationship between AECOM and Ellerbe, more definitive steps could have been taken earlier to create a firewall between the employees involved in the procurement and those with knowledge of the merger discussion. The CO’s investigation concluded any potential conflict had been mitigated, but the bulk of the investigation took place postaward. The COFC noted that a postaward investigation should not be disregarded, but it is foreseeable that disappointed bidders will continue to call foul on such a report, arguing that the CO’s investigation is just an exercise to justify her conclusions. What’s more, the requirement for the CO to more fully document her conclusions and findings early in the procurement process may have also reduced some of the confusion in this case. Making such detailed findings may have resulted in greater consistency between the GAO and the COFC’s decisions by providing tribunals with a more developed factual record.

(c) Proposed Rules Do Not Guarantee Different Outcome In Turner—On the other hand, the particular facts in Turner suggest that conducting the procurement under the proposed rules may not have significantly altered the outcome of the case. The proposed rules’ mandatory conflict disclosure provisions go into effect only when a CO’s presolicitation assessment identifies a potential conflict. The merger discussions between AECOM and Ellerbe took place after the solicitation had already been issued. What’s more, the merger discussions were confidential—so confidential that many of HSMM’s own employees were unaware of the discussions. Accordingly, it is unlikely the CO would have learned of the potential conflict while HSMM was evaluating bids. Furthermore, the nonpublic information disclosure rules likely would not have brought these issues to light because such information appears not to have been shared with the bidder.

Proposed OCI Rules: Likely Problems & Potential Shortcomings

The proposed rules may introduce new complexities, ambiguities, and problems that will have to be resolved by the GAO and COFC in much the same way as they have done over the past 30 years when dealing with the OCI rules—through trial and error. Identified below are a variety of problems and shortcomings in the proposed rules, including the burdens imposed on stakeholders, the use of undefined terms, the lack of clarity concerning the interplay between some of the proposed rules, and the failure to clarify the consequences for failing to disclose. Additionally, the public comments received to date (discussed below) provide a glimpse of the problems contractors, industry groups, and other interested parties believe are likely to show up going forward as agencies endeavor to adapt to a more sophisticated regime of OCI rules should those rules ultimately be finalized.

■ New Burdens May Be Imposed On Contractors & Government Alike

One of the most apparent problems presented by the proposed rules is the potential that COs will demand significantly more disclosure from prospective bidders concerning not only their connections with contractors already engaged in the project, but also nonpublic information known by any employee or affiliate’s employee potentially relating to the procurement. As public contractors continue to merge and acquire other firms, this growing web of connections could pose a challenge for contractors to manage. Law firms are well accustomed to maintaining a database of client connections and conflicts, but this is not necessarily the case for other professional firms. Companies pursuing Federal Government contracts may be faced with the need to create
and maintain such a database—a significant undertaking in a weak economy when contractors are facing increasing competition for procurements.

This kind of conflicts database, however, may be inadequate to comply with contractors’ needs to disclose whether any employee has received any Government-sourced nonpublic information that creates an unfair advantage. Complying with the proposed rules on nonpublic information will require firms to develop systems for collecting and tracking this information.

The proposed rules also impose significant additional requirements on COs and other Government officials. Though they do not require COs to access and analyze any particular sources of data, the thrust of the proposed rules is to call on COs to do more presolicitation investigation. Required disclosures will likely lead to COs facing increasing volumes of data from prospective bidders. Though a CO having more information will (hopefully) lead to better and more consistent outcomes, it will likely slow the procurement process by requiring COs to analyze greater amounts of information than what is currently required.

Navigating Undefined Terms & Definitions In Proposed Rules

The proposed rules’ emphasis on the unique challenges posed by access to nonpublic information provides guidance to Government procurement officials and contractors in this arena, but also introduces new ambiguities. Most striking is what, exactly, constitutes “nonpublic information.” To what extent would “nonpublic information” include a bidder’s employee having learned an advantageous discrete fact concerning a procurement versus the employee having an understanding of an agency’s preferences and habits due to the employee having formerly worked with or for that agency? Presumably experience gained by an employee working at a Government agency or a contractor having previously worked with that agency is not to be treated as nonpublic information. The proposed rules provide that incumbent contractors may have natural advantages based on experience when competing for follow-on requirements, but does not provide similar specificity regarding other situations. But disputes over where to draw that line are easily foreseeable.

Similarly, the proposed rules’ distinction between conflicts affecting only the Government’s business interests and those affecting the integrity of the public procurement system could also likely spark debates over the boundaries of each category. The proposed rules provide little guidance on defining these distinctions. These definitions are particularly important because a CO has discretion to accept risks that affect only the Government’s business interests.

Potential Overlap Between Different Parts Of Proposed Rules

The proposed rules’ efforts to categorize and describe potential conflicts and problematic nonpublic information provide welcome guidance but do not address how a CO should handle situations where procurements invoke both the proposed rules on conflicts and on nonpublic information. For example, how must a CO proceed when a bidder’s affiliate has performed work on an existing project and certain of the affiliates’ employees have received from the Government competitively useful nonpublic information? Would creating a firewall around those particular affiliates be sufficient to mitigate both the nonpublic information issue and the conflict issue? Does one set of rules trump the other? Which one should receive greater emphasis in the event a solicitation is problematic under one set of rules but not the other? The proposed rules do not suggest how their different parts can or should overlap.

Ramifications For Failing To Disclose Under Proposed Rules

Questions may also arise as to the implications of a contractor failing to make mandatory disclosures, regardless of whether the failed disclosure was intentional. To what extent may a contractor face False Claims Act liability? Would intentionally withholding information give rise to such liability? As contractors adjust to the increased disclosure demands, to what extent would the
accidental failure to disclose, including resulting from the failure of a new system for tracking conflicts, give rise to such liability? Should a CO disqualify a bidder in the event of a missing mandatory disclosure?

Similarly, courts may face dilemmas about the role of withholding disclosures in the event of a bid protest. Courts may have to determine how heavily to weigh the effect of the missing information as they assess whether to uphold awards. And because the proposed rules do not detail consequences for failing to disclose, courts would need to address this new complication without guidance from the proposed rules.

**Concerns Identified In Public Comments Concerning Proposed Rules**

Though generally praised by those who submitted public comments, most of the 18 parties who submitted public comments expressed concern over what they believed to be shortcomings in the proposed rules, and suggested a variety of revisions in the final rules.

Several commenters called on the FAR Council to include in the final rules additional guidance on differentiating between an OCI that poses a risk to the public procurement system and an OCI that poses a risk only to the Government’s business interests. These concerns are “more than academic” because the distinction affects the discretion afforded a CO when addressing a potential OCI. Some addressed the discretion afforded COs under the proposed rules, particularly when a CO is charged with addressing an OCI. Several commenters expressed concern that COs may prefer to exclude an offeror rather than opt for the more time-intensive process of mitigation, and they suggested that the final rules include guidance that COs must employ the least restrictive technique available. One commenter noted that, while the proposed rules address how a CO can avoid OCIs, they “lack similar guidance with respect to mitigation of said OCIs.”

Finally, commenters weighed in on what they characterized as the proposed rules’ overly broad disclosure requirements. Several identified the proposed rules’ clause for disclosing potential conflicts, which requires offerors to disclose “all relevant information regarding any [OCI], including information about potential subcontracts” as being problematic. Not only would this impose a significant burden on bidders, but it may prompt offerors to over disclose, imposing on a CO a “significant volume of information, a large percentage of which may be...irrelevant.”

**Conclusions**

After almost three decades of operating under a regulatory system that is generally recognized to be problematic, contractors and Government procurement officials now face the prospect of adapting to a new and expansive FAR regime governing OCIs and unequal access to information. The proposed rules represent a significant opportunity to alleviate some of the problems in the current OCI rules. Requiring COs to conduct a conflicts analysis presolicitation creates better opportunities to bring to light concerns early in process, which would allow bidders the chance to take affirmative steps to alleviate those problems. Similarly, requiring offerors to disclose more information early would provide COs more information, which may assist them in conducting better and more consistent conflict analyses.

The proposed rules, however, still leave a significant amount of discretion in COs’ hands. While they aim to strike a balance between providing concrete guidance and allowing sufficient flexibility, some may question whether too much discretion would remain with COs. This is particularly troubling in light of the fact that the proposed rules do not detail exactly how to conduct a presolicitation conflict analysis or provide specific guidance on what constitutes an impermissible conflict.

And with new regulations come new complications. The proposed rules would likely impose greater burdens on contractors and Government procurement personnel alike. The proposed rules also raise questions as to how agencies and courts should address situations where a contractor fails to make a required disclosure.
The proposed rules are just that—proposed, and not final. As the public contracting community awaits the issuance of the final rules, taking time to understand the proposed rules may prove to be time well spent in preparing for whatever the final rules have in store. But no matter what the final rules contain, it is unrealistic to expect any new rules regime to be a magic cure-all for an ailing OCI system.

GUIDELINES

These Guidelines are intended to assist you in understanding the implications of the proposed rules governing organizational conflicts of interest and nonpublic information. They are not, however, a substitute for professional representation in any specific situation.

1. Be aware that the proposed rules impose many more duties on offerors and contract procurement personnel, including requiring offerors to disclose information about nonpublic information and potential conflicts and requiring a CO to conduct a presolicitation OCI analysis.

2. Keep in mind that under the proposed rules, the CO must ask in the procurement announcement that potential offerors indicate if they have Government-provided access to relevant nonpublic information. If these provisions become final rules, contractors should devise a system for determining if they have access to such information.

3. Remember that if the CO determines before issuing a solicitation that there is a potential for an OCI, the proposed rules require that the solicitation and contract include provisions asking offerors to disclose any potential conflicts. Contractors would likely need to establish a system for tracking conflicts.

4. Bear in mind that the proposed rules identify two categories of conflicts: those that harm solely the Government’s business interests and those that harm the integrity of the public procurement process.

5. Recognize that the proposed rules differentiate between conflicts and access to nonpublic information.

6. Keep in mind that under the proposed rules disqualifying nonpublic information is relevant information provided by the Government that is not generally known to the public and that gives an offeror an unfair competitive advantage.

7. Understand that the proposed rules detail four techniques for addressing an OCI: avoidance, neutralization, mitigation, and accepting risk.

8. Be cognizant that proposed rules still leave it to a CO’s discretion to determine what constitutes a significant OCI and how to address an OCI.

9. Be wary that the proposed rules still do not detail or mandate a process by which COs should conduct an OCI analysis.

REFERENCES


33/ FAR 9.506(b)(1).

34/ McTECH Corp., Comp. Gen. Dec. B-406100 et al., 2012 CPD ¶ 97, at 5, 7; see Turner Constr. Co. v. United States, 94 Fed. Cl. 561, 573 (2010), 52 GC ¶ 257, aff'd, 645 F.3d 1377 (Fed. Cir. 2011), 53 GC ¶ 245 (“An OCI must be established by ‘hard facts’ that indicate the existence or potential existence of a conflict.”).

35/ Turner, 94 Fed. Cl. at 575–76.

36/ FAR 9.504(a)(2).

37/ FAR 9.507–1.


39/ FAR 9.507-1(b) (emphasis added).

40/ FAR 9.507-2(b) (emphasis added).

41/ FAR 9.505, 9.508.


66/ McTECH Corp. Protest Complaint, Ex. 5.


73/ McTECH Corp. Protest Complaint ¶¶ 50–51.

74/ McTECH Corp. v. United States, 105 Fed. Cl. 729 (2012), 54 GC ¶ 275.


76/ Turner, 94 Fed. Cl. at 564.

77/ Turner, 94 Fed. Cl. at 565.

78/ Turner, 94 Fed. Cl. at 565.

79/ Turner, 94 Fed. Cl. at 565.

80/ Turner, 94 Fed. Cl. at 567.

81/ Turner, 94 Fed. Cl. at 564.

82/ Turner, 94 Fed. Cl. at 567.

83/ Turner, 94 Fed. Cl. at 567.

84/ Turner, 94 Fed. Cl. at 567.

85/ Turner, 94 Fed. Cl. at 567.

86/ Turner, 94 Fed. Cl. at 569.


88/ Turner, 94 Fed. Cl. at 567.

89/ Turner, 94 Fed. Cl. at 569.

90/ Turner, 94 Fed. Cl. at 569.

91/ Turner, 94 Fed. Cl. at 569.


96/ Turner, 94 Fed. Cl. at 563.

97/ Turner, 94 Fed. Cl. at 563.

98/ Turner, 94 Fed. Cl. at 586.


100/ Turner, 94 Fed. Cl. at 563–567.

101/ Turner, 94 Fed. Cl. at 567.

102/ Turner, 94 Fed. Cl. at 577–79.

103/ Turner, 94 Fed. Cl. at 579.

104/ Turner, 94 Fed. Cl. at 579.

105/ Turner, 94 Fed. Cl. at 582.

106/ Turner, 94 Fed. Cl. at 576.


111/ Comments are available at http://www.regulations.gov/#/documentDetail;D= FAR-2011-0001-0011.


113/ 76 Fed. Reg. at 23240.

114/ 76 Fed. Reg. at 23243 (to be codified at FAR 2.101).

115/ 76 Fed. Reg. at 23244 (to be codified at FAR 3.1203(a)).

116/ 76 Fed. Reg. at 23244 (to be codified at FAR 3.1203(b)(3)).

117/ 76 Fed. Reg. at 23244 (to be codified at FAR 3.1203(b)(2)).

118/ 76 Fed. Reg. at 23244 (to be codified at FAR 3.1203(c)).

119/ 76 Fed. Reg. at 23246 (to be codified at FAR 3.1206-2(a)).

120/ 76 Fed. Reg. at 23246 (to be codified at FAR 3.1206-2(a)).

121/ 76 Fed. Reg. at 23246 (to be codified at FAR 3.1206-2(a)(3)).

122/ 76 Fed. Reg. at 23246 (to be codified at FAR 3.1206-2(a)(3)).

123/ 76 Fed. Reg. at 23246, 23247 (to be codified at FAR 3.1206-2(a)(4), (b)(1), (b)(2)).

124/ 76 Fed. Reg. at 23246, 23247 (to be codified at FAR 3.1206-2(b)(2)).

125/ 76 Fed. Reg. at 23247 (to be codified at FAR 3.1206-2(b)(3)).

126/ 76 Fed. Reg. at 23247 (to be codified at FAR 3.1206-2(b)(3)(i)).

127/ 76 Fed. Reg. at 23247 (to be codified at FAR 3.1206-2(b)(3)); 76 Fed. Reg. at 23248 (to be codified at FAR 3.1207); 76 Fed. Reg. at 23251 (to be codified at FAR 52.203-XX).
128/ 76 Fed. Reg. at 23248 (to be codified at FAR 3.1207(b)); 76 Fed. Reg. at 23251, 23252 (to be codified at FAR 52.203-2ZZ).

129/ FAR 9.504(b).

130/ 76 Fed. Reg. at 23246 (to be codified at FAR 3.1206-2(a)(2)).

131/ 76 Fed. Reg. at 23246 (to be codified at FAR 3.1206-2(b)(1)(i)–(v)).

132/ 76 Fed. Reg. at 23244 (to be codified at FAR 3.1203(a)(2), (b)(3)).

133/ 76 Fed. Reg. at 23244 (to be codified at FAR 3.1203(a)(1), (b)(2)).

134/ 76 Fed. Reg. at 23247 (to be codified at FAR 3.1206-3(a)(2), 3.1206-3(b)).

135/ 76 Fed. Reg. at 23247 (to be codified at FAR 3.1206-3(a)(2)(i), (ii)).

136/ FAR 9.506(a).

137/ 76 Fed. Reg. at 23246 (to be codified at FAR 3.1204-4); 76 Fed. Reg. at 23246–47 (to be codified at FAR 3.1206-2(b)(2)).

138/ 76 Fed. Reg. at 23246 (to be codified at FAR 3.1206-2(b)(2)(i)).

139/ 76 Fed. Reg. at 23247 (to be codified at FAR 3.1206-2(b)(2)(i)).

140/ 76 Fed. Reg. at 23247 (to be codified at FAR 3.1206-4(a)).

141/ 76 Fed. Reg. at 23247 (to be codified at FAR 3.1206-3(a)).

142/ 76 Fed. Reg. at 23244 (to be codified at FAR 3.1204).

143/ 76 Fed. Reg. at 23245 (to be codified at FAR 3.1204-1). 76 Fed. Reg. at 23245 (to be codified at FAR 3.1204-1(a)).

144/ 76 Fed. Reg. at 23245 (to be codified at FAR 3.1204-1(a)).

145/ 76 Fed. Reg. at 23245 (to be codified at FAR 3.1204-1(b)).

146/ 76 Fed. Reg. at 23245 (to be codified at FAR 3.1204-1(c)(1)(i)–(ii)).

147/ 76 Fed. Reg. at 23245 (to be codified at FAR 3.1204-1(c)(3)).

148/ 76 Fed. Reg. at 23245 (to be codified at FAR 3.1204-1(c)(3)(i)–(v)).

149/ 76 Fed. Reg. at 23245 (to be codified at FAR 3.1204-1(c)(2)).

150/ 76 Fed. Reg. at 23245 (to be codified at FAR 3.1204-2(a)).

151/ 76 Fed. Reg. at 23245 (to be codified at FAR 3.1204-2(b)).

152/ 76 Fed. Reg. at 23245–46 (to be codified at FAR 3.1204-3).

153/ 76 Fed. Reg. at 23245–46 (to be codified at FAR 3.1204-3(c)(1)–(3)).

154/ 76 Fed. Reg. at 23246 (to be codified at FAR 3.1204-4(a)).

155/ 76 Fed. Reg. at 23246 (to be codified at FAR 3.1204-4(a)(1)–(3)).

156/ 76 Fed. Reg. at 23246 (to be codified at FAR 3.1204-4(d)(e)).

157/ FAR 9.503.

158/ 76 Fed. Reg. at 23244 (to be codified at FAR 3.1203(c)); 76 Fed. Reg. at 23246 (to be codified at FAR 3.1205).

159/ 76 Fed. Reg. at 23243 (to be codified at FAR 2.101(b)(2)).


164/ 76 Fed. Reg. at 23248–49 (to be codified at FAR 4.402-2(b)).

165/ 76 Fed. Reg. at 23249 (to be codified at FAR 4.402-4(a)(1)).

166/ 76 Fed. Reg. at 23249 (to be codified at FAR 4.402-4(a)(2)).

167/ 76 Fed. Reg. at 23249 (to be codified at FAR 4.402(a)(3)).

168/ 76 Fed. Reg. at 23250 (to be codified at FAR 4.402-5).

169/ 76 Fed. Reg. at 23249 (to be codified at FAR 4.402-3(c)(1)–(2)).

170/ 76 Fed. Reg. at 23250 (to be codified at FAR 4.402-4(c)(3)).

171/ 76 Fed. Reg. at 23249 (to be codified at FAR 4.402-3).

172/ 76 Fed. Reg. at 23249 (to be codified at FAR 4.402-3(a)–(c)).

173/ 76 Fed. Reg. at 23248–49 (to be codified at FAR 4.402-2(b); 76 Fed. Reg. at 23249–50 (to be codified at FAR 4.402-4(c)).

174/ 76 Fed. Reg. at 23249 (to be codified at FAR 4.402-3(a)(3), (b)(2)).

175/ 76 Fed. Reg. at 23246 (to be codified at FAR 3.1206-2(b)(1)(i)–(v)).

176/ 76 Fed. Reg. at 23245 (to be codified at FAR 3.1204-1(c)(3)).


178/ 76 Fed. Reg. at 23247 (to be codified at FAR 3.1206-2(b)(3)); 76 Fed. Reg. at 23248 (to be codified at FAR 3.1207); 76 Fed. Reg. at 23251 (to be codified at FAR 52.203-XX).

179/ 76 Fed. Reg. at 23249 (to be codified at FAR 4.402-2(c)).


182/ 76 Fed. Reg. at 23251 (to be codified at FAR 52.203-XX(c)(2)(ii)) (emphasis added).

BRIEFING PAPERS