

Organizational and Consultant Conflicts of Interest



Guiding Principle

- Contracting Officers are responsible for performing a thorough analysis of potential offeror conflicts of interest to ensure impartiality and objectivity in the performance of the Government's contractual objectives.

[References: [FAR 9.5](#), [DEAR 909.5](#), [DEAR 952.209-8](#), [DEAR 952.209-72](#), [DEAR 970.0905](#), [NNSA Supplement for Organizational Conflicts of Interest](#)]

1.0 Summary of Latest Changes

This update: (1) elaborates on existing OCI guidance for Contracting Officers, (2) updates relevant references, and (3) includes administrative changes.

2.0 Discussion

This chapter supplements other more primary acquisition regulations and policies contained in the references above and should be considered in the context of those references. This chapter provides a general overview of Contracting Officer (CO) responsibilities for identifying, analyzing, and resolving Organizational Conflicts of Interest (OCI) issues. Currently, Federal Acquisition Regulation (FAR) coverage of OCI is found in Subpart 9.5. This coverage provides the foundational principles and processes for identifying and addressing OCI issues. The existing FAR coverage relies primarily upon examples to describe OCI circumstances. This coverage, however, does not provide the entire universe of potential situations needing OCI analysis, and does not provide any Government-wide standard OCI solicitation provisions or contract clauses. DOE-specific OCI guidance is included in the Department of Energy Acquisition Regulation (DEAR) at 909.5, and does include relevant OCI solicitation provisions and contract clauses.

FAR 9.5 is essentially unchanged from the OCI coverage included in the FAR when it was first published. Since that time there have been numerous interpretations of OCI issues in case law and GAO decisions, none of which have been incorporated into the FAR. Given this outdated OCI coverage, the General Services Administration, which administers the FAR, has initiated a comprehensive FAR case to update the FAR OCI coverage. A proposed rule was issued and the FAR staff is presently addressing and responding to public comments that were received in response to the proposed rule. When the FAR rule is published in its final form, the DEAR and this Guide chapter will be updated to comport with the new FAR coverage. Until that time, this Guide chapter re-states and elaborates on existing OCI policy and procedures; no new guidance is being issued in this update.

2.1 **Types of OCI.** Organizational conflicts of interest generally fall into the following three categories.

2.1.1 **Unequal Access to Information.** An OCI due to unequal access to information is created when a contractor has access to nonpublic information, which may provide the firm an unfair competitive advantage in a later competition for a Government contract. In these cases, the concern is the risk of the firm gaining a competitive advantage. There is no issue of bias. An OCI based on unequal access to information is discussed at FAR 9.505-4, which specifically addresses a contractor that obtains access to proprietary information. This type of OCI may also involve other nonpublic Government data, such as source selection information, or other nonpublic Government data that would be useful in a future competition.

2.1.2 **Impaired Objectivity.** An OCI due to impaired objectivity is created when a contractor's judgment and objectivity in performing the contract requirements may be impaired because the substance of the contractor's performance has the potential to affect other interests of the contractor. The OCI principle involved here is bias due to the existence of conflicting roles that might influence the contractor's judgment. Conflicts based upon impaired objectivity most closely correlate to the discussion at FAR 9.505-3 regarding the providing of evaluation services.

2.1.3 **Biased Ground Rules.** An OCI due to biased ground rules is created when a firm, as part of its performance of a Government contract, has in some sense set the ground rules for another Government contract by, for example, writing the statement of work or the specifications. In these biased ground rules cases, the primary concern is that the firm could skew the future competition, whether intentionally or not, in favor of itself. These situations also involve concerns that a firm, by virtue of its special knowledge of the agency's future requirements, would have an unfair advantage in the competition for those requirements. In these situations, both of the principles of bias and unfair competitive advantage exist. Conflicts based on biased ground rules best correlate to the discussion at FAR 9.505-2 regarding the preparation of specifications or work statements. In that example, a contractor prepares and furnishes complete specifications covering nondevelopmental items, to be used in a competitive acquisition.

2.2 **Addressing and Resolving OCI Issues.**

2.2.1 **Avoiding OCI's.** This involves preventing the occurrence of an actual or potential OCI through actions taken early in the acquisition process, such as excluding sources from competition, or eliminating a segment of work from a contract or task.

2.2.2 **Neutralizing OCI's.** This involves negating a potential or an actual OCI through specific actions taken by the Contracting Officer and the Government, such as invoking a limitation on a contractor's future competition or contracting.

2.2.3 **Mitigating OCI's.** This involves reducing or alleviating the impact of unavoidable OCIs to an acceptable level of risk to the Government, such as the inclusion of a contractor's OCI mitigation plan in a contract award.

Each individual contracting situation should be examined on the basis of its particular facts and the nature of the proposed contract. The exercise of common sense, good judgment, and sound discretion is required in both the decision on whether a significant potential conflict exists and, if it does, the development of an appropriate means for resolving it.

2.3 **FAR Requirements for the Contracting Officer.**

Contracting Officers shall analyze planned acquisitions in order to identify and evaluate potential organizational conflicts of interest as early in the acquisition process as possible, and avoid, neutralize, or mitigate significant potential conflicts before contract award.

Contracting Officers should obtain the advice of counsel and the assistance of appropriate technical specialists in evaluating potential conflicts and in developing and using any necessary solicitation provisions and contract clauses.

Before issuing a solicitation for a contract that may involve a significant potential conflict, the Contracting Officer shall recommend to the Head of the Contracting Activity a course of action for resolving the conflict.

If the Contracting Officer decides that a particular acquisition involves a significant potential organizational conflict of interest, the Contracting Officer shall, before issuing the solicitation, submit for approval to the Procurement Director:

- A written analysis, including a recommended course of action for avoiding, neutralizing, or mitigating the conflict.
- A draft solicitation provision.
- If needed, a proposed contract clause.

Once approval to proceed is received, the Contracting Officer shall:

- Include the provision and any clause in the solicitation and contract.
- Consider additional information provided by prospective contractors in response to the solicitation or during negotiations.
- Before awarding the contract, resolve the conflict or the potential conflict, consistent with the approval and direction of the Head of the Contracting Activity.

2.4 **DEAR Requirements for the Contracting Officer.**

The Contracting Officer shall insert the DEAR solicitation provision at 952.209-8, Organizational Conflicts of Interest Disclosure - Advisory and Assistance Services, in solicitations for advisory and assistance services that are expected to exceed the simplified acquisition threshold. This provision notifies potential offerors that OCI procedures apply to the acquisition, and requires the apparent successful offeror, or all offerors determined to be in the competitive range, to submit relevant and comprehensive OCI information to the Government for evaluation prior to award.

The Contracting Officer shall evaluate the information provided by the apparent successful offeror, or by all firms in the competitive range, for interests relating to a potential organizational conflict of interest in the performance of the proposed contract. Using that information and any other credible information, the Contracting Officer shall make a written determination of whether those interests create an actual or significant potential organizational conflict of interest, and identify any actions that may be taken to avoid, neutralize, or mitigate such conflict. In fulfilling their responsibilities for identifying and resolving potential conflicts, Contracting Officers should avoid creating unnecessary delays, burdensome information requirements, and excessive documentation.

As required by FAR 9.504 and DEAR 909.504, the Contracting Officer shall award the contract to the apparent successful offeror, unless a conflict of interest is determined to exist that cannot be avoided, neutralized, or mitigated. Before determining to withhold award based on organizational conflict of interest considerations, the Contracting Officer shall notify the offeror, provide the reasons therefore, and allow the offeror a reasonable opportunity to respond. If the conflict cannot be avoided, neutralized, or mitigated to the Contracting Officer's satisfaction, the Contracting Officer may disqualify the offeror from award and undertake the disclosure, evaluation, and determination process with the firm next in line for award. If the Contracting Officer finds that it is in the best interest of the Government to award the contract notwithstanding a conflict of interest, a request for waiver shall be submitted in accordance with DEAR 909.503. The waiver request and decisions shall be documented in the contract file.

The Contracting Officer shall insert the clause at 952.209-72, Organizational Conflicts of Interest, in each solicitation and contract for advisory and assistance services that is expected to

exceed the simplified acquisition threshold. The Contracting Officer shall include this clause's Alternate I in contracts when a meaningful amount of subcontracting is expected for advisory and assistance services. The purpose of this clause is to ensure that adequate OCI protections exist during the term of the contract. The clause places relevant restrictions on the contractor during contract performance, requires the contractor to monitor OCI issues, requires the contractor to report new OCI issues to the Contracting Officer, and requires the contractor to flow-down to appropriate subcontractors relevant OCI requirements. Contracting Officers may modify the clause as necessary to address the potential for OCI in individual contracts.

Contracts that are not subject to DEAR Part 970, but provide for the operation of a DOE site or facility or environmental remediation of a specific DOE site or sites, shall contain the organizational conflict of interest clause at 952.209-72. The organizational conflicts of interest clause in such contracts shall include Alternate I to that clause.

Pursuant to DEAR 970.0905, Management and Operating (M&O) contracts shall contain an OCI clause substantially similar to the clause at 952.209-72, and which is appropriate to the statement of work of the individual contract. Alternate I to the clause shall be included to ensure that M&O contractors adopt OCI policies and procedures in the award of subcontracts.

2.5 **Best Practices.**

2.5.1 FAR Examples. FAR 9.505 provides the general rules regarding OCIs, and FAR 9.505-1 through 9.505-4 illustrate the numerous situations where conflicts may arise. FAR 9.508 provides several more detailed examples of situations where OCIs may arise, and states that these examples are not all-inclusive but are intended to help the Contracting Officer apply the general rules to individual contract situations.

2.5.2 NNSA OCI Supplement. The National Nuclear Security Administration (NNSA) has published the *NNSA Supplement to the DOE Acquisition Guide - Pre and Post Award Guidance for Identifying and Documenting Contractor Organizational Conflict of Interest and Personal Conflicts of Interest*. Although this Supplement is intended to address NNSA contracting situations, it reflects the basic FAR and DEAR OCI guidance and can be referenced as a best practices guide by all DOE contracting and program staff. The Supplement elaborates on OCI regulatory coverage and provides additional detailed examples of situations in which OCIs may arise.