Organizational Conflicts of Interest at the Federal, State, and Local Levels

BY KEN KANZAWA AND DANICA IRVINE

Ken Kanzawa

Danica Irvine

In public contracting, whether at the federal, state, or local level, a contractor's organizational conflict of interest (OCI) can affect the integrity of the procurement process—possibly even the quality of the promised performance—such that an OCI might disqualify a contractor's proposal for a specific procurement. Even after a contract is awarded, previously undetected or newly created OCIs can taint performance, meaning an undisclosed or otherwise unresolved OCI can render the contractor in material breach of contract or give rise to liability for false claims. Laws and policies governing OCIs thus play a significant role in maintaining the integrity and fairness of the procurement process.

However, OCI and other conflicts policies are not uniform across jurisdictions. While there are some commonalities, there also are significant distinctions. Policies vary as to what constitutes a conflict, what suffices as mitigation, and how OCI issues may be enforced. To illustrate, this article starts by summarizing OCI requirements under the Federal Acquisition Regulation (FAR), which applies to procurement contracts. Second, we compare FAR-based requirements with laws and regulations on OCIs for grants and other nonprocurement programs. Third, we address personal conflicts of interest under federal law, which are often a related issue. Fourth, and finally, we cover OCI policies from several states and localities.

Given that OCI requirements can differ among various government entities, contractors should familiarize themselves with the particular policies that apply to their activities. When operating across several jurisdictions, it can be best to adopt a broad compliance posture.

OCIs Under the Federal Acquisition Regulation

Under the FAR, an OCI arises when, "because of other activities or relationships with other persons, a person is unable or potentially unable to render impartial assistance or advice to the Government, or the person's objectivity in performing the contract work is or might be otherwise impaired, or the person has an unfair competitive advantage" in a specific procurement.[1]

Bid protest decisions from the Government Accountability Office (GAO) and US Court of Federal Claims have described OCIs as generally falling into three categories:

- The first is where a contractor has conflicting roles or interests that might bias its judgment or recommendations for a government customer.[2] This is called "impaired objectivity" and can arise in situations where a government contract would place a contractor in a position to evaluate (a) its own work or the work of its affiliates,[3] (b) a team member's work,[4] or (c) a competitor's work.[5]
- The second, called "unequal access to information," arises where a contractor possesses nonpublic, competitively useful information obtained from others, absent proper restrictions.[6] This can arise where, for example, work under one contract gives a contractor access to the government's internal projections and other nonpublic information, and the contractor later competes for work to which the nonpublic information is relevant.[7] Or where a former subcontractor switches teams and provides the new prime access to its competitor's prior proposal, that too can result in an unequal access to information OCI.[8]
- The third category of OCI arises where a contractor prepares the specifications or statement of work or circumstances otherwise place the contractor in a position to skew a competitive acquisition for which it will be competing.[9] This is called "biased ground rules." Biased ground rules can arise from a contractor's or subcontractor's prior work preparing specifications for a procurement,[10] or from the hiring of an employee who was previously engaged in developing the specifications for a specific procurement.[11]

Ken Kanzawa is a senior associate with Kelley Drye & Warren LLP, and is based in Washington, DC. Danica Irvine is a senior attorney and Ethics & Financial Disclosure program manager with the Department of Defense General Counsel's Standards of Conducts Office. The views presented in this article are her personal views and do not necessarily represent the views of the Department of Defense or its components. *The authors are grateful to their co-panelists from the 2023 ABA Public Procurement Symposium, whose insight helped make this article possible.*

According to the FAR, the risk for OCIs is highest under contracts involving management support or professional consulting services, work involving technical evaluations, or systems engineering and technical direction work.[12]

Some agencies' supplemental procurement regulations expand on the definition of what constitutes an OCI or contain unique criteria for determining whether an OCI exists.[13] Some are more stringent than the FAR.[14] It is therefore critical for contractors to familiarize themselves with the unique policies of their particular agency customers.

When it comes to addressing conflicts, government contracting officers must identify and evaluate potential OCIs "as early in the acquisition process as possible" and "avoid, neutralize, or mitigate significant potential conflicts before contract award."[15] Contractors play an important role, too. In response to solicitations, they may need to make representations or disclosures concerning OCIs or submit mitigation plans for the contracting officer's consideration.[16] Post-award, contractors may be required by a contract clause to disclose and mitigate OCIs arising during performance.[17] Failure to comply may amount to a breach of contract or lead to enforcement under the False Claims Act.[18] To ensure that competitors' potential conflicts are reviewed and addressed appropriately, contractors can file bid protests, provided they have "hard facts" to indicate the existence or potential existence of a conflict.[19]

The type of mitigation depends on the type of conflict. To address the potential for impaired objectivity, government agencies drafting solicitations can remove elements from the Performance Work Statement (PWS) or Statement of Work (SOW) that involve the contractor exercising subjective judgment. For example, rather than seeking a contractor to evaluate a team member's activities, an agency might seek a contractor to "monitor" the work, while having government personnel perform subjective evaluation of the work.[20] Contractors, for their part, can propose using firewalled subcontractors to perform work affected by impaired objectivity.[21] Or contractors can monitor and recuse themselves from that work (i.e., plan to remove evaluation of their own products or services from work to be performed).[22] A contractor might even consider divesting business operations that present a conflict,[23] a severe step that may be warranted given that GAO decisions have previously found intra-organizational firewalls inadequate to mitigate impaired objectivity concerns.[24]

To address unequal access, agencies can require contractors to execute nondisclosure agreements (NDAs) before they access nonpublic information that might be competitively useful.[25] If competitively useful information has already been accessed, agencies might consider disclosing that information to all offerors,[26] after accounting for other concerns associated with disclosure.

Contractors, meanwhile, can propose firewalling employees and using NDAs to preclude use of information they might obtain during performance of one contract that is competitively useful for another.[27] An after-the-fact firewall, however, generally will not resolve unequal access concerns, given the presumption of prejudice that attaches to actual or potential OCIs.[28]

To address biased ground rules, agencies drafting PWS requirements can use more than one contractor to assist in PWS preparation,[29] which helps to limit any one contractor's ability to tip the scales in its own favor. Also, in contracts for drafting specifications or statements of work, agencies might include clauses that limit the contractor's ability to subsequently perform work involving those specifications.[30]

Lastly, federal procuring agencies also may waive regulations governing OCIs with regard to a particular conflict or situation. However, a waiver must be in the government's interest and approved by the agency head.[31]

Federal Laws and Regulations on OCIs Outside the FAR

The FAR's provisions on OCIs have applications beyond the award and performance of procurement contracts. Regulations from the US Department of Agriculture (USDA) specifically incorporate FAR subpart 9.5 as the standard for determining conflicts of interest when it comes to consulting contracts funded by borrowers of funds from the Rural Utilities Service or its predecessor agency.[32] And regulations direct the Secretary of the Department of Energy, when deciding whether to waive property rights in sensitive inventions, to consider "[w]hether an organizational conflict of interest contemplated by Federal statutes and regulations will result" from that waiver.[33] And, when dealing with regulations other than the FAR, courts may still look to the FAR, or cases interpreting it, to determine what constitutes an OCI.[34]

Even if not required under federal regulations, non-FAR agreements such as "other transactions" may still incorporate the FAR rules for conflicts of interest. As one Army other transaction agreement (OTA) warns, "Performance under this Agreement may create an actual or potential organizational conflict of interest such as are contemplated by FAR Part 9.505-General Rules."[35]

OCI regulations outside the FAR also exist. Grants and other non-procurements are subject to uniform regulatory guidance at 2 C.F.R. part 200, called the "Uniform Guidance," which defines OCIs more narrowly than the FAR. Essentially, the Uniform Guidance addresses impaired objectivity only, stating: "Organizational conflicts of interest means that because of relationships with a parent company, affiliate, or subsidiary organization, the non-Federal entity is unable or appears to be unable to be impartial in conducting a procurement action involving a related organization."[36] Specific agency program regulations also appear to derive from this definition.[37] However, for projects funded by the Federal Transit Administration (FTA), which includes local public transit systems,[38] guidance states that all three types of OCIs are in fact prohibited

("by the Common Grant Rules," apparently a reference to prior guidance that has since been replaced).[39]

At first glance, OCI provisions in Federal Highway Administration (FHWA) regulations governing design-build projects funded by the FHWA (like highways, bridges, tunnels, and ferry systems) seem similar to the FAR. FHWA's definition of OCI is nearly identical to the FAR's, substituting only "owner" for "Government": "Organizational conflict of interest means that because of other activities or relationships with other persons, a person is unable or potentially unable to render impartial assistance or advice to the *owner*, or the person's objectivity in performing the contract work is or might be otherwise impaired, or a person has an unfair competitive advantage."[40] But in contrast to the multiple OCI prohibitions in the FAR,[41] FHWA regulations contain a single specific prohibition—that consultants who assist the owner in preparation of a solicitation not participate as a responding offeror or team member.[42] This prohibition is just a bare minimum, though. FHWA-funded projects can contain additional, more stringent OCI restrictions imposed by states,[43] and some are extensive enough that they might even be considered "FAR-like."

Other Conflicts in Federal Procurements

In addition to conflicts posed by organizational interests, federal regulations also address "personal conflict of interest," where a contractor employee has a "financial interest, personal activity, or relationship that could impair the employee's ability to act impartially and in the best interest of the Government when performing under the contract."[44] For contractor employees performing acquisition functions closely associated with inherently governmental functions, FAR subpart 3.11 requires the contractor to screen for and prevent or mitigate any personal conflicts of interest. Although there are no specific consequences prescribed for failure to comply with these limitations, noncompliance could constitute breach of FAR 52.203-16, the implementing contract clause. In exceptional circumstances, the regulations under FAR subpart 3.11 may be waived.[45]

For government employees, there is a well-established framework of criminal statutes and regulations designed to identify and prevent conflicts of interest. The conflict of interest and post-employment restrictions under title 18 of the US Code and title 5 of the Code of Federal Regulations prohibit current and former Executive Branch personnel from participating in particular matters, including contracting actions, as a federal official that will affect their own actual or imputed financial interests and from engaging in certain post-government employment activities related to their former duties or agency.[46] Additionally, the Procurement Integrity Act restricts obtaining and disclosing procurement-related information, requires disclosure and recusal for contact with an offeror regarding possible employment, and prohibits compensation for certain post-government employment.[47]

Under 18 U.S.C. § 208, a financial conflict of interest exists when a government official participates personally and substantially in a particular matter that will have a direct and predictable effect on the official's actual or imputed financial interests.[48] Additionally, when an agency official participating personally and substantially in a federal procurement is contacted by an offeror regarding possible employment, the official must report the contact to the official's supervisor and to the designated agency ethics official and either reject the employment or recuse from further participation in that procurement.[49] Failure to abide by statutory requirements governing financial conflicts or procurement integrity can result in criminal punishment, fines, and civil penalties.[50]

There also are restrictions on officials representing nonfederal entities (NFEs) after their employment with the federal government. These include (1) a permanent restriction on representing an NFE back to the executive or judicial branches on a particular matter involving specific parties in which the former employee participated personally and substantially during government service;[51] (2) a two-year restriction on representing an NFE back to the executive or judicial branches on a particular matter involving specific parties that fell under the employee's official responsibility during the final year of government service;[52] and (3) a one-year restriction for former senior employees on representing an NFE back to their former agency on any matter.[53] These, too, carry criminal and civil penalties for failure to comply.[54] For former federal government personnel who served in certain roles or made certain decisions relating to an acquisition valued greater than $10 million, statutory procurement integrity provisions impose a one-year prohibition on accepting compensation from a contractor who participated in the acquisition.[55] Failing to comply may result in criminal punishment, civil penalties, contract rescission or cancellation, and debarment.[56]

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In addition to the specific federal laws and regulations restricting the actions of current and former government

personnel, there also is a catch-all standard for government acquisitions set forth in FAR subpart 3.1.[57] It states: "The general rule is to avoid strictly any conflict of interest or even the appearance of a conflict of interest in Government-contractor relationships," such that government personnel would "have no reluctance to make a public disclosure of their actions."[58] These types of conflicts arising under FAR subpart 3.1 cannot be waived.[59]

Like OCIs, personal conflicts can result in a contractor's disqualification from a procurement. Situations discussed in bid protest decisions include unfair competitive advantages arising from the hiring of former government officials who have had recent access to competitively useful information,[60] the negotiation of employment with an offeror by government officials involved in procurements,[61] personal relationships between an offeror and evaluation team member,[62] and, with regard to contractor personal conflicts, a contractor employee's role in proposal evaluation despite owning stock in an offeror following a corporate reorganization.[63] At GAO, the standard for assessing a potential unfair competitive advantage under the FAR subpart governing public officials is "virtually indistinguishable" from the standard for evaluating whether a contractor had an unfair competitive advantage arising from its unequal access to information under the FAR subpart governing OCIs.[64] And when reviewing contracting officer investigations of contractor personal conflicts of interest, GAO applies its typical "reasonableness" standard, deferring to an agency's judgment absent a showing that the agency's conclusion was unreasonable.[65]

States and Localities

Across those state and local jurisdictions recognizing OCIs, it is nearly universal that an OCI can disqualify a company from a procurement or give rise to a breach of contract. However, state and local policies vary substantially as to what constitutes an OCI, what mitigation techniques are recognized, and how OCIs may be enforced.

Some state and local policies are based on the FAR. In fact, some expressly incorporate FAR standards in procurement solicitations and contracts.[66] Others, while not incorporating FAR provisions, still recognize the three OCI categories from federal procurement law. South Carolina, Minnesota, Tennessee, and Washington, DC, are examples.[67]

Other states and localities have narrower policies that recognize only particular types of OCIs. In Florida, Miami-Dade County's OCI definition, which applies to procurements for professional services, encompasses impaired objectivity and unequal access types of OCIs, but not biased ground rules.[68] Florida's statutes, meanwhile, preclude contract award in situations where a contractor has unequal access to information or has established biased ground rules.[69]

Some policies are less specific, such that they might plausibly be read either broadly or narrowly. Hawaii's OCI statute requires contractors to refrain from any activity that would create "the appearance of impropriety or conflicts of personal interest and the interests of the State or counties."[70] California's focuses on "financial interest."[71]

Policies of government subdivisions may differ from statewide policies. Whereas Hawaii's statewide OCI policy covers conflicts between a contractor's "personal interests and the interests of the State,"[72] the Hawaii Tourism Authority, part of Hawaii's Department of Business, Economic Development & Tourism, has a policy that covers essentially the same three categories of OCIs as federal procurement law. It requires prospective contractors to disclose arrangements "that may restrict your effort or independent judgment in proposing or performing any part of the work" (i.e., that may impair objectivity) and to attest regarding "access to information" and "biased ground rules."[73] Likewise, whereas California's statewide conflicts statute centers on "financial interest,"[74] the California Department of Transportation policy for its Design-Build Demonstration Program specifically requires disclosure and mitigation measures for all three types of OCIs.[75]

OCI policies may cover only particular agencies or programs, like the OCI limitations specific to FHWA-funded design-build project solicitations (though some states have further codified those requirements in statute or regulation).[76] Some states have policies particular to other programs. For example, a New York statute covers aspects of biased ground rules and impaired objectivity for technology procurements. For technology procurements, vendors who prepare specifications cannot participate as a prime or subcontractor (with few exceptions), and contracts for evaluation of offers for products or services cannot be awarded to a vendor that then would evaluate its own offers for products or services.[77] As another example, Florida has an impaired objectivity-type provision covering its Summer Food Service Program, deeming it an OCI when, due to its relationships, a sponsor is unable or appears to be unable to be impartial in conducting a procurement action.[78]

It is not uncommon for states and localities to treat under a single conflicts policy what federal standards treat separately. The distinctions are not always clear as to what is an "organizational" conflict versus a "personal" one, or whether different standards apply for contractor employee conflicts, as compared to a government employee's conflicts. By its terms, California Government Code section 1090 appears to apply only to government officials, covering financial interests of "Members of the Legislature, state, county, district, judicial district, and city officers or employees." But the California Supreme Court has held that section also applies to independent contractors when they have duties to engage in or advise on public contracting that they are expected to carry out on the government's behalf.[79] And though personal conflicts prohibitions in Miami-Dade County's Conflict of Interest and

Code of Ethics Ordinance apply to government employees, they also can apply to contractor employees at the mayor's discretion on a case-by-case basis.[80]

State and local OCI policies also vary when it comes to mitigation. South Carolina and Miami-Dade County each have extensive guidance on mitigation that outlines techniques largely consistent with GAO case law.[81] Minnesota's policy, though less comprehensive, also identifies potential mitigation or neutralization measures of the type recognized by GAO, to include revising the statement of work, allowing vendors to propose the exclusion of task areas that create a conflict, asking the vendor for an OCI avoidance or mitigation plan, and making information available to all vendors to level the playing field.[82] Not all jurisdictions proactively publish guidance on mitigation.

In the absence of (or in addition to) published guidance on mitigation, advisory opinions from attorneys general or state or local government ethics offices can provide companies with clarity on potential OCI issues before making disclosures or proposing mitigation required by contract or solicitation. These authorities can also provide government officials tasked with reviewing potential conflicts with advice and guidance on mitigating those issues.[83]

Case law also is instructive, even at the state and local level. GAO and the Court of Federal Claims have developed an extensive body of bid protest decisions concerning OCIs that is cited even in nonfederal jurisdictions.[84] Some state and local jurisdictions, but not all, render bid protest or other decisions on OCIs as well (though not all jurisdictions publish their decisions).[85]

Whether companies have a right to challenge government conclusions concerning OCIs, whether as to a company's own eligibility or regarding a challenge to a competitor's OCI, is another issue that varies among jurisdictions.[86] Bid protests are not always available. And even when they are, it is not always the proper forum for OCI issues. In Miami-Dade County, for example, OCI issues have been handled outside the bid protest process. There, contractors can request and obtain opinions on OCI issues from the Commission on Ethics and Public Trust.[87] Or, informally, they can lobby the end-user department after a written recommendation for award is made to the Board of County Commissioners.

One last note of caution for practitioners. A bid protest lacking "hard facts" may not only lose on the merits, but (in certain jurisdictions) allegations proving untrue may also give rise to liability for a business tort. In *Lockheed Information Management Systems Co., Inc. v. Maximus, Inc.*, what began as a state-level bid protest by Lockheed alleging possible conflicts of interest due to two evaluators' pursuits of employment with bidders ended in Lockheed being liable for intentional interference with a business expectancy, after the protest resulted in cancellation of the award to Maximus.[88] Lockheed argued to the Supreme Court of Virginia that even if false and misleading, statements made in its protest concerning the evaluators' pursuits of employment were privileged because they (a) were made in the course of a quasi-judicial or administrative proceeding (i.e., the local protest); (b) were subject to the Noerr-Pennington Doctrine, which shields attempts to influence legislative or executive action from antitrust and business tort claims; and (c) were intended to protect the public interest. The court disagreed.[89] Even allegations proving true are not necessarily exempt from giving rise to tortious interference claims,[90] and so contractors should consult with counsel before launching a bid protest concerning a competitor's potential OCIs.

Conclusion

Given that OCI requirements can vary significantly between jurisdictions, programs, and agencies, and even on a project-by-project basis, contractors should familiarize themselves with the particular legal and contractual frameworks that may apply to their work. FAR-based OCI screening and mitigation may not be sufficient to avoid or address other categories of conflicts. Awareness of the specific requirements can help contractors avoid or address conflict issues before they become problematic. Though one size may not fit all when it comes to compliance with various conflicts regimes, broader compliance policies can be the safest way to keep contractors and their employees conflict-free and to prevent negative outcomes. PL

Endnotes

1. FAR 2.101 (defining "Organizational conflict of interest").
2. FAR 9.505-1, 9.505-3.
3. MANDEX, Inc., B-421664 et al., 2023 WL 5393491 (Comp. Gen. Aug. 16, 2023).
4. Nortel Gov't Sols., Inc., B-299522.5, B-299522.6, 2009 CPD ¶ 10 (Comp. Gen. Dec. 30, 2008).
5. Alion Sci. & Tech. Corp., B-297022.3, 2006 CPD ¶ 2 (Comp. Gen. Jan. 9, 2006).
6. FAR 9.505-4.
7. *MANDEX, Inc.*, 2023 WL 5393491.
8. Dell Servs. Fed. Gov't, Inc., B-414461, 2017 CPD ¶ 192 (Comp. Gen. June 21, 2017).
9. FAR 9.505-2.
10. L-3 Servs., Inc., B-400134.11, B-400134.12, 2009 CPD ¶ 171 (Comp. Gen. Sept. 3, 2009).
11. Northrop Grumman Sys. Corp.—Mission Sys., B-419560.3 et al., 2021 CPD ¶ 305 (Comp. Gen. Aug. 18, 2021).
12. FAR 9.502(b).
13. *See, e.g.*, 48 C.F.R. §§ 3052.209-75 (DHS), 209.570-2 (DoD lead system integrator), 3452.209-71 (DOE), 2009.570-3 (NRC).
14. The Atomic Energy Act of 1954 requires the Nuclear Regulatory Commission (NRC) to engage in "a more comprehensive organizational conflict of interest review … than what is contemplated by FAR 9.5." *Id.* § 2001.104-2(b)(2); *see also id.* § 2009.570-3 (outlining NRC's OCI review criteria). For the Centers for Medicare & Medicaid Services (CMS), based on a conflict of interest contract clause updated in October 2020, even attenuated "financial relationships" in a provider of services, payor organization, or health plan were potentially disqualifying. Such financial relationships included "[a] direct or indirect ownership or investment interest (including a stock option or non-vested

interest) in any entity that exists through equity, debt, or other means and includes any indirect ownership or investment interest no matter how many levels removed from a direct interest," and no minimum threshold was stated. *See* CMS, Conflict of Interest, clause H.1 (Oct. 2020), available at https://www.cms.gov/files/document/section-h1-coi-terms-and-conditions.docx.

15. FAR 9.504(a).

16. While there is no general FAR provision mandating disclosure, it is not uncommon for solicitations to contain OCI disclosure and mitigation requirements, and a number of agency-specific clauses impose such requirements. *See, e.g.*, 48 C.F.R. §§ 3052.209-72 (DHS); 1352.209-74 & 1352.209-70 (Dep't of Com.); 1552.209-70, 1552.209-71 & 1552.209-72 (EPA); 252.209-7009 & 252.209-7008 (DoD); 852.209-70 (VA); 2452.209-70 (HUD); 2009.570-72 (NRC).

17. *E.g.*, 48 C.F.R. §§ 1852.209-71 (NASA), 3052.209-72 (DHS).

18. *See* Press Release, US DOJ, Government Contractor Agrees to Pay $425,000 for Alleged False Claims Related to Conflicts of Interest (May 20, 2022), https://www.justice.gov/opa/pr/government-contractor-agrees-pay-425000-alleged-false-claims-related-conflicts-interest.

19. Turner Constr. Co., Inc. v. United States, 645 F.3d 1377, 1387 (Fed. Cir. 2011).

20. TDS, Inc., B-292674, 2003 CPD ¶ 204 (Comp. Gen. Nov. 12, 2003).

21. Soc. Impact, Inc., B-412941, B-412941.2, 2016 CPD ¶ 203 (Comp. Gen. July 8, 2016).

22. Paradyme Mgmt., Inc. v. United States, 167 Fed. Cl. 180 (2023).

23. *E.g.*, TriCenturion, Inc., B-406032 et al., 2012 CPD ¶ 52 (Comp. Gen. Jan. 25, 2012).

24. *E.g.*, Nortel Gov't Sols., Inc., B-299522.5, B-299522.6, 2009 CPD ¶ 10 (Comp. Gen. Dec. 30, 2008). In fact, in 2013, SAIC and Leidos formally separated in order to address OCI concerns raised by their government customers, allowing Leidos to continue performing national security work, while SAIC focused on helping government customers manage IT systems and providing technical services. *See* Amrita Jayakumar, *One Year Later: The Tale of SAIC and Leidos*, Wash. Post (Sept. 28, 2014), https://www.washingtonpost.com/business/capitalbusiness/one-year-later-saic-and-leidos/2014/09/26/d1fefd68-4273-11e4-b437-1a7368204804_story.html.

25. *E.g.*, 48 C.F.R. § 1852.237-72 (Access to Sensitive Information (NASA)).

26. The Cowperwood Co., B-274140.2, 96-2 CPD ¶ 240 (Comp. Gen. Dec. 26, 1996) (agency properly equalized protester's potential competitive advantage by disclosing similar information to the other offerors).

27. *E.g.*, Sys. Made Simple, B-412948.2, 2016 CPD ¶ 207 (Comp. Gen. July 20, 2016) (mitigation plan firewalled specific employees involved in assessment effort; prohibited transfer of information from assessment team to non-project personnel; and contained provisions regarding OCI training, management oversight, and disciplinary action in the event of violation).

28. NetStar-1 Gov't Consulting, Inc. v. United States, 98 Fed. Cl. 729 (2011); *see also* Guidehouse LLP, B-419848.3 et al., 2022 CPD ¶ 197 (Comp. Gen. June 6, 2022) ("Once it has been determined that an actual or potential OCI exists, the protester is not required to demonstrate prejudice; rather, harm from the conflict is presumed to occur.").

29. *Sys. Made Simple, Inc.*, 2016 CPD ¶ 207; FAR 9.505-2(b)(1)(iii).

30. 48 C.F.R. §§ 1852.209-71 (Limitation of Future Contracting (NASA)), 3052.209-72 (Organizational Conflict of Interest (DHS)).

31. FAR 9.503.

32. 7 C.F.R. § 1789.161.

33. 10 C.F.R. § 784.6(b)(3).

34. *E.g.*, Medco Behav. Care Corp. of Iowa v. State, 553 N.W.2d 556, 564 (Iowa 1996) (looking to FAR subpart 9.5 to interpret the meaning of "organizational conflicts of interest" in HHS regulations and concluding that there was an OCI in an Iowa Department of Human Services procurement that was incapable of mitigation).

35. *See* Other Transaction Auth. for Prototype Agreement Between Rigel Pharm., Inc. & Natick Contracting Div. at 32–33, Agreement No. W911QY-21-9-0018 (Jan. 29, 2021), *available at* https://www.hhs.gov/sites/default/files/contract-covid-related-medical-countermeasure-rigel-pharmaceuticals.pdf. Similarly, a consortium manager's template for a base agreement under Navy OTA No. N65236-22-9-0001, though not expressly referencing the FAR, warns consortium members that "[t]he Government has the right to limit Consortium Member's involvement under this Agreement or other action to mitigate Organizational Conflicts of Interest. In the event the Consortium Member believes that the OCI can be mitigated, the Consortium Member shall submit to the Agreements Officer, through the CM, an OCI mitigation plan." Information Warfare Research Project 2 (IWRP 2) Consortium Base Agreement (May 2023), https://www.theiwrp.org/wp-content/uploads/2023/05/IWRP2-Base-Agreement_20XX-XXX_MAY2023.pdf.

36. 2 C.F.R. § 200.318(c)(2).

37. 24 C.F.R. § 578.95(c) (HUD); 13 C.F.R. § 302.17 (Dep't of Comm.); 7 C.F.R. § 1789.151 (Dep't of Agric.).

38. *See Grant Programs*, Fed. Transit Admin., https://www.transit.dot.gov/funding/grants/grant-programs (last visited Feb. 21, 2024).

39. FTA C 4220.1F, Rev. 4, ch. VI, at 5–6 (Mar. 18, 2013). This may be a reference to guidance since consolidated and replaced by 2 C.F.R. part 200, in 2014. OMB Circular A-110, for example, stated, "In order to ensure objective contractor performance and eliminate unfair competitive advantage, contractors that develop or draft specifications, requirements, statements of work, invitations for bids and/or requests for proposals shall be excluded from competing for such procurements," thus covering biased ground rules.

40. *Compare* 23 C.F.R. § 636.103 (emphasis added) *with* FAR 2.101 (defining "Organizational conflict of interest").

41. FHWA regulations do, however, refer to FAR standards when it comes to improper business practices and personal conflicts of interest. Under 23 C.F.R. § 636.117, "State laws and procedures governing improper business practices and personal conflicts of interest will apply to the owner's selection team members," but "[i]n the absence of such State provisions, the requirements of 48 CFR part 3, Improper Business Practices and Personal Conflicts of Interest, will apply to selection team members."

42. 23 C.F.R. § 636.116.

43. *Id.*; *see, e.g.*, Cal. Dep't of Transp., Conflict-of-Interest Policy Covering the Design-Build Demonstration Program at 1-2, https://dot.ca.gov/-/media/dot-media/programs/design/%E2%80%8Cdocuments/%E2%80%8Corganizational-conflict-of-interest-policy-a11y.pdf (providing "additional guidance and minimum standards" in addition to 23 C.F.R. § 636.116).

44. FAR 3.1101.

45. FAR 3.1104.

46. 18 U.S.C. §§ 207–208; 5 C.F.R. §§ 2635.502, 2641.201–2641.207.

47. 41 U.S.C. §§ 2101–2107.

48. 18 U.S.C. § 208.

49. 41 U.S.C. § 2103.

50. 18 U.S.C. § 216; 41 U.S.C. § 2105.

51. 18 U.S.C. § 207(a)(1).

52. *Id.* § 207(a)(2).

53. *Id.* § 207(c).

54. *Id.* §§ 207, 216.

55. 41 U.S.C. § 2104.
56. *Id.* § 2105.
57. FAR 3.101-1.
58. *Id.*
59. Northrop Grumman Sys. Corp., B-412278.7, B-412278.8, 2017 CPD ¶ 312 (Comp. Gen. Oct. 4, 2017).
60. *E.g.*, Serco, Inc., B-419617.2, B-419617.3, 2021 CPD ¶ 382 (Comp. Gen. Dec. 6, 2021).
61. *E.g.*, Northrop Grumman Sys. Corp., B-412278.7, B-412278.8, 2017 CPD ¶ 312 (Comp. Gen. Oct. 4, 2017).
62. *E.g.*, Teledyne Brown Eng'g, Inc., B-418835, B-418835.2, 2020 CPD ¶ 303 (Comp. Gen. Sept. 25, 2020).
63. BAE Sys. Tech. Sols. & Servs., Inc., B-411810.3, 2016 CPD ¶ 174 (Comp. Gen. June 24, 2016).
64. *Serco*, 2021 CPD ¶ 382, at 12 n.34.
65. *BAE*, 2016 CPD ¶ 174, at 12.
66. *See, e.g.*, Fla. Agency for Health Care Admin., Invitation to Negotiate No. 010-22/23 (Apr. 11, 2023), Attachment A, Ex. A-2-c, at 2, https://vendor.myfloridamarketplace.com/search/bids/detail/4836 ("The standards on organizational conflicts of interest in Title 48, Code of Federal Regulations, Subpart 9.5—Organizational and Consultant Conflicts of Interest and Section 287.057(17), Florida Statutes, apply to this solicitation.").
67. S.C. State Fiscal Accountability Auth., Div. of Procurement Serv., Organizational Conflicts of Interest: Procedures, Guidance, and Information 3, § 1.4 (Aug. 2023, Ver. 1.0), https://procurement.sc.gov/files/20230319%20FINAL%20PGI-for%20publication%20sh.pdf; Minn. Dep't of Admin., Policy & Procedure Admin 01-13 (Oct. 6, 2008), https://mn.gov/admin/assets/PolicyOrganizationalConflictsofInterest_tcm36-521989.pdf; Tenn. Cent. Procurement Off., Business Conduct and Ethics Policy and Procedures, Policy No. 2013-009 (Aug. 17, 2017); D.C. Mun. Regs. tit. 27, § 2220.
68. *See* Miami-Dade Cty., Fla., Organizational Conflict of Interest, https://ethics.miamidade.gov/library/forms/county-policy-organization-conflict-of-interest.pdf.
69. Fla. Stat. § 287.057(19)(b).
70. Haw. Rev. Stat. § 103D-101(b); Haw. Code R. § 3-131-2(c)(2).
71. Cal. Gov't Code § 1090; People v. Super. Ct. of Riverside Cnty.. 3 Cal. 5th 230, 233 (2017) (applying section 1090 to independent contractors when they have duties to engage in or advise on public contracting that they are expected to carry out on the government's behalf).
72. Haw. Rev. Stat. § 103D-101; Haw. Code R. § 3-131-2(c)(2).
73. Haw. Tourism Auth., Organizational Conflicts of Interest Disclosure and Attestation (requiring disclosure of arrangements "that may restrict your effort or independent judgment in proposing or performing any part of the work," as well as attestations regarding "access to information" and "biased ground rules").
74. *See supra* note 71.
75. Cal. Dep't of Transp., Conflict-of-Interest Policy Covering the Design-Build Demonstration Program at 1, 5 (disqualification possible where, among other situations, a relationship "causes a conflict that potentially impairs the Proposer's ability to provide objective advice to the Department," a proposer has had "unfair access to 'inside' information," or the proposer has "help[ed] to create the ground rules for this solicitation").
76. *Id.*; Ill. Admin. Code tit. 44, § 6.930.
77. N.Y. State Fin. Law § 163-a (McKinney).
78 Fla. Admin. Code R. 5P-3.003 ("Organizational conflicts of interest, [sic] means that because of relationships with a parent company, affiliate, or subsidiary organization, the Sponsor is unable or appears to be unable to be impartial in conducting a procurement action involving a related organization.").
79. People v. Super. Ct. of Riverside Cnty., 3 Cal. 5th 230 (2017).
80. Miami-Dade County Ord. No. 2-11.1.
81. S.C. State Fiscal Accountability Authority, *supra* note 67.
82. Minn. Dep't of Admin., *supra* note 67.
83. *See, e.g.*, Op. S.C. Att'y Gen., 2004 WL 2247471 (Oct. 1, 2004); Idaho Op. Att'y Gen. No. 78-19, 1978 WL 22948 (Apr. 28, 1978); Op. No. 81-707, 65 Ops. Cal. Att'y Gen. 41, 1982 WL 156029 (Jan. 21, 1982).
84. *See, e.g.*, Medco Behav. Care Corp. of Iowa v. State, 553 N.W.2d 556, 564 (Iowa 1996) (citing COFC cases on FAR subpt. 9.5); Rochester City Lines, Co. v. City of Rochester, 868 N.W.2d 655, 663 (Minn. 2015) (same); Protest of K.B. Home & Assocs., DCCAB No. P-154, 1991 WL 633747 (Mar. 5, 1991) (citing GAO decisions on OCIs).
85. *See, e.g.*, Provaliant Holdings, LLC & Provaliant Retirement, LLC, Sol. No. PEBA0122016, Case No. 2017-4, 2017 WL 5589156, at *5 (S.C. Procure. Rev. Panel Aug. 4, 2017) (citing FAR subpt. 9.5); Dep't of Lab. & Emp. Sec., Div. of Emp. & Training v. Suncoast Bus. Dev., Inc., Case No. 82-243, 1982 WL 214721 (Fla. Div. Admin. Hrgs. Apr. 13, 1982) (reviewing disallowance of expenditures for failure to comply with regulations); Cubic Transp. Sys., Inc. v. Dep't of Transp., Case Nos. 14-2322BID, 14-2323BID, 2014 WL 4410437 (Fla. Div. Admin. Hrgs. Sept. 4, 2014).
86. *Medco*, 553 N.W.2d 556 (reviewing but ultimately denying contractor's challenge to court order disqualifying it from procurement due to conflict of interest); *Rochester City Lines*, 868 N.W.2d 655 (reviewing but denying contractor's challenge regarding competitor's alleged OCI).
87. *See* Miami-Dade Cnty. Comm'n on Ethics & Pub. Trust, Formal Op. re Request for Advisory Opinion RQO 11-13 (May 2, 2011) (concluding that company may not provide construction engineering and inspection services as long as the company is serving as bond engineer for the project); Miami-Dade Cnty. Comm'n on Ethics & Pub. Trust, Formal Op. re Request for Advisory Opinion RQO 11-04 (Feb. 9, 2011) (finding no conflict as to one contract for engineering and construction management, but that the company should not have construction management responsibilities as a subcontractor on another effort).
88. 524 S.E.2d 420 (Va. 2000); *see also* Maximus, Inc. v. Lockheed Mgmt. Sys. Co., Inc., 493 S.E.2d 375 (Va. 1997).
89. *Lockheed Info. Mgmt Sys.*, 524 S.E.2d at 424–27.
90. *See* Smithfield Foods, Inc. v. United Food & Com. Workers Int'l Union, 593 F. Supp. 2d 840, 845–47 (E.D. Va. 2008) (holding that under Virginia and North Carolina law, as predicted by the district court, truth is not an affirmative defense to tortious interference with business relations).