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Federal Crimes & Offenses

Bribery of U.S. Public Officials

Proposed Change To Federal Acquisition Regulation Would Extend Some Personal Conflicts Of Interest Restrictions To Government Contractor Employees

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Government employees long have been subject to civil and criminal conflict of interest restrictions designed to preclude self-dealing and promote impartial decision-making. On November 13, 2009, the Federal Acquisition Regulations (FAR) Councils published a proposed rule that, for the first time, would impose personal conflict of interest restrictions on government contractor employees beyond the bribery and kick-back proscriptions of, e.g., [18 U.S.C. § 201](#). The proposed rule would prohibit personal conflicts of interest, defined to include any "financial interest, personal activity or relationship" that impairs or appears to impair objectivity, for contractor employees "performing acquisition functions closely associated with inherently governmental functions." The proposed rule also would require contractors to maintain "effective" oversight of employee compliance and report any violations to the Contracting Officer. 74 Fed. Reg. 58,584 (Nov. 13, 2009), FAR Case 2008-025, *Preventing Personal Conflicts of Interest for Contractor Employees Performing Acquisition Functions*. Comments on the rule are due January 12, 2010.

The Proposed Rule Reflects Long-Standing Government Concern That Only One Side of Today's "Blended Workforce" Is Adequately Regulated for Personal Conflicts of Interest

For several years, Congress, United States Government Accountability Office (GAO) and federal agencies have expressed concern over the growing gap between increasingly complex government procurements and diminishing federal acquisition resources. In January 2007, the congressionally mandated Acquisition Advisory Panel found that "[t]he federal government does not have the capacity in its current acquisition workforce necessary to meet the demands that have been placed upon it."¹ The Panel reported that the resulting "multisector workforce, where contractor employees are co-located and working side-by-side with federal employees, has blurred the line between" commercial activities and inherently governmental functions.² While the Panel concluded that a "blanket application of the government's ethics provisions to contractor personnel would create issues of cost, enforcement, and management," the Panel recommended that the FAR Council "consider whether development of a standard ethics clause would be appropriate" to

include in government solicitations and contracts.³

The Acquisition Panel's recommendation was echoed by GAO in March 2008, in GAO's report entitled "Defense Contracting: Additional Personal Conflict of Interest Safeguards Needed for Certain DoD Contractor Employees."⁴ GAO evaluated 21 United States Department of Defense (DoD) offices with large contractor workforces, and found that, as to contractor personnel working side-by-side with government acquisition employees,

DoD oversight officials as well as OGE [Office of Government Ethics] officials believe[] that current requirements are inadequate to prevent certain conflicts of interest from arising, especially financial conflicts of interest, impaired impartiality, and misuse of information and authority.⁵

In October 2008, Section 841(a) of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 required the Administrator for Federal Procurement Policy to "develop and issue a standard policy to prevent personal conflicts of interest by contractor employees performing acquisition functions closely associated with inherently governmental functions"⁶ The rule proposed by the FAR Councils, in collaboration with the Office of Federal Procurement Policy (OFPP), would implement that requirement, and would create significant disclosure and reporting obligations for contractors whose employees closely support or assist in inherently governmental functions, under any portion of a government contract. The proposed rule would add subsection 3.1.1 to the FAR, entitled "Preventing Personal Conflicts of Interest for Contractor Employees Performing Acquisition Functions," and add to FAR Part 52.203 a corresponding clause for inclusion in solicitations and contracts.

Requirements of the Proposed Rule for "Covered Employees"

"Covered employees" under the proposed rule are employees of contractors, subcontractors, consultants, partners and sole proprietors, who perform "acquisition function[s] closely associated with inherently governmental functions."⁷ In developing a definition of that phrase, the FAR Councils reviewed FAR subpart 7.5, "Inherently Governmental Functions, particular FAR 7.503(d), to identify acquisition-related functions." Those functions are defined to include supporting or providing advice or recommendations with regard to the following Federal agency activities:⁸

- Planning acquisitions
- Determining what supplies or services are to be acquired by the Government, including developing statements of work
- Developing or approving any contractual documents, including documents defining requirements, incentive plans and evaluation criteria

- Evaluating contract proposals
- Awarding contracts
- Administering contracts, including ordering changes or giving technical direction in contract performance or quantities, evaluating performance, and acceptance or rejection of performance
- Terminating contracts
- Determining whether contract costs are reasonable, allocable and allowable

The FAR Councils define a "personal conflict of interest" ("PCIs") as

"a situation in which a covered 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."⁹

The Rule further defines PCIs by example.¹⁰ Among the sources of PCIs are

- Financial interests of the covered employee, his or her "close family members," or "other members of the household
- Other employment or financial relationships, including seeking or negotiating for prospective employment or business
- Gifts, including travel
- Financial interests arising from compensation, including wages, salaries, commissions, and professional or referral fees
- Consulting relationships, including commercial and professional consulting and service arrangements, scientific and technical advisory board memberships, or serving as an expert witness
- Services provided in exchange for honorariums or travel expense reimbursements
- Research funding or other forms of research support
- Stock or bond ownership (excluding diversified mutual fund investments) or partnership interests
- Real estate investments

- Intellectual property interests, including patents and copyrights
- Business ownership and investment interests

The specific examples published, while not co-extensive with PCI restrictions applicable to Government employees, incorporate some of the same standards. The FAR Councils' express reference to OGE regulations in the Supplementary Information published with the proposed rule suggests that the extensive guidance contain in the factual examples provided at, e.g., [5 C.F.R. §2635 et seq.](#), "Standards of Ethical Conduct for Employees of the Executive Branch," may be useful in determining whether particular situations would fall within the scope of the proposed rule.

Requirements of the Proposed Rule for Contractors with Covered Employees

The Supplementary Information to the proposed rule states that contractors will be required to "identify and prevent" personal conflicts of interest by maintaining "effective" oversight procedures:

The proposed rule . . . makes contractors responsible for (1) [h]aving procedures to screen for potential conflicts of interest, (2) informing covered employees of their obligations with regard to these policies, (3) maintaining effective oversight to verify compliance, (4) reporting any personal conflict-of-interest violations to the contracting officer, and (5) taking appropriate disciplinary action with employees who fail to comply with these policies."¹¹

Contractors also would be required to "prohibit" covered employees with access to "non-public government information" from using such information for "personal gain."¹² The Councils adapted the definition of non-public government information from [5 C.F.R. § 2635.703](#), the OGE regulation entitled, "Use of nonpublic information." Non-public government information is defined as "any information gained by a contractor employee by reason of work under a government contract," that "the covered employee knows, or reasonably should know, has not been made public." This includes information protected by the Freedom of Information Act (FOIA) or other statute or regulation, and other information "not authorized by the agency to be made available to the public."¹³

By use of the contract clause at proposed 52.203-16, government contractors would have broadly defined inquiry and reporting requirements under the proposed rule, including:

- Having procedures in place to screen periodically all covered employees for potential PCIs, including employee disclosure statements updated yearly or as a new PCI arises¹⁴
- Informing covered employees of their obligation to disclose and prevent even the appearance of personal conflicts of interest

- "Prevent[ing]" PCIs, including not assigning or allowing a covered employee who has a PCI to work under the contract if the PCI cannot be prevented or mitigated
- Maintaining effective oversight to verify compliance with PCI safeguards
- Reporting PCIs to the contracting officer as soon as identified, including a description of the violation and the actions taken by the contractor
- Taking "appropriate disciplinary action" with respect to covered employees who fail to comply with the regulation
- Prohibiting covered employees who have access to non-public Government information from using such information for personal gain

The new contract clause, 52.203-16, Preventing Personal Conflicts of Interest, would be included in solicitations and contracts (including task orders and delivery orders) that exceed the simplified acquisition threshold (\$100,000) and "involve performance of acquisition functions closely associated with inherently governmental functions" on behalf of a Federal agency.¹⁵ If only portions of a contract include such functions, contracting officers still are required to apply these rules, but compliance obligations extend only to covered employees performing functions under the affected portion of the contract.¹⁶

Consequences of Non-Compliance

The proposed rule directs contracting officers to whom a PCI violation is reported to "(1) [r]eview the actions taken by the contractor," (2) [decide whether the contractor has resolved the violation satisfactorily," and [t]ake any other appropriate action in consultation with agency legal counsel."¹⁷ In "exceptional circumstances" if the contractor cannot satisfactorily prevent a personal conflict of interest, the contractor may request a mitigation plan, or waiver, through the contracting officer to the head of the contracting activity, who may approve that request, in writing, if the action is in the best interest of the Government.¹⁸ Suspected violations of the proposed PCI clause must be reported by the contracting officer to agency legal counsel. If there is "sufficient evidence" of a violation, the contracting officer shall pursue the following remedies:

- Suspension of contract payments
- Loss of award fee for the period of performance in which the contractor is determined to have been in non-compliance with the clause
- Termination of the contract for default or for cause
- Disqualification of the contractor from "subsequent related contractual efforts"
- Suspension or debarment

- These remedies "are in addition to any other remedies available to the Government"

While some federal agencies already have imposed PCI restrictions on contractors and their employees similar to the proposed FAR rule,¹⁹ this is the first time such a rule has been proposed for all federal contractors. It is a natural consequence of the substantial growth in contracting out government support functions to the private sector and reflects recognition that *ad hoc* management of such risks had exposed the government to risks without clear tools to manage or remedy them. Both because of this reality and the statutory mandate, contractors should take this proposal seriously.

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Report of the Acquisition Advisory Panel to the Office Of Federal Procurement Policy and United States Congress, January 2007, Finding no. 5 at 335.

2

Id., Finding no. 2 at 394.

3

Id., Finding no. 10 at 395; Recommendation 5.2: Contractor Employees' Personal Conflicts of Interest, *id.* at 396.

4

GAO 08-169, available at www.gao.gov/cgi-bin/getrpt?GAO-08-169.

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Id. at 3–4. GAO defined a "personal conflict of interest" as a situation where an individual is employed by . . . a defense contractor company and is in a position to materially influence DoD's recommendations and/or decisions, and because of his/her personal activities, relationships, or financial interests, may lack or appear to lack objectivity or appear to be unduly influenced by personal financial interest. *Id.* at 2.

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[Pub.L. No. 110-417](#), §841(a), 122 Stat. 4537 (Oct. 14, 2008).

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[74 Fed. Reg. 58,584](#), 58587 (Nov. 13, 2009), §3.1101, *Definitions*.

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Id. The FAR Councils note that this definition may change as part of OMB's review of the manner in which agencies identify critical functions to be performed by federal employees, pursuant to Public Law 110-417 and the President's March 4, 2009 Memorandum on Government Contracting, which found that "the line between inherently governmental activities that should not be outsourced and commercial activities that may be subject to private sector competition has been blurred and inadequately defined." 74 Fed. Reg. 58,584, 58585, *Supplementary Information*.

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Id. at 58587, § 3.1101, *Definitions*. The proposed rule does not address personal conflicts of interest by contractor employees in non-acquisition functions, nor organizational conflicts of interest. However, those issues were the subject of an Advance Notice of Proposed Rulemaking, at [73 Fed. Reg. 15961](#) (Mar. 26, 2008) and [73 Fed. Reg. 34600](#) (June 17, 2008). Proposed revisions by the FAR Councils to FAR Part 9.5 are in process, and are expected by year-end.

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74 Fed. Reg. 58,584, 58587-88, §3.1101, *Definitions*.

11

Id. at 58585.

12

Id. at 58587, §3.1101, *Definitions*.

13

Id.

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The proposed rule would require the initial disclosure "when the employee is initially assigned to the task under the contract." *Id.* at 58588, §3.1103, *Procedures*.

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Id. at 58588, §3.1106, *Contract Clause*. Contractors and subcontractors also must flow down the clause to subcontracts that exceed \$100,000, in which subcontractor employees may perform acquisition functions closely associated with inherently governmental functions. *Id.* at 58589, §52.203-16(3), *Subcontract Flowdown*.

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Id. at 58588, §3.1106(b).

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Id. §3.1103(b), *Procedures*.

18

Id. §3.1104(a)-(b), *Mitigation or waiver*.

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There are individual agencies that have for some time addressed PCI management as part of their procurement design. For example, HHS at the Centers for Medicaid and Medicare Services require similar programs from the contractors who administer all aspects of their programs.

Legal Topics:

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