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Proposed Rules Issued For Prevention of Personal Conflicts of Interest for Contractor Employees Performing Acquisition Functions

Background. On November 12, 2009 the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council ("Councils") issued a proposed rule for prevention of personal conflicts of interest for contractor personnel performing acquisition functions on behalf of federal agencies. 74 Fed. Reg. 58584 (FAR Case 2008-025). The proposed rule imposes specific requirements on contractors supporting federal acquisitions, creates a FAR clause for inclusion in contracts for "performance of acquisition functions closely associated with inherently governmental functions," and establishes processes for mitigating or waiving such conflicts as well as government remedies for contractor violations of the proposed rule.

The Councils have developed the proposed rule as required by the Duncan Hunter National Defense ^[1]

Authorization Act for 2009 ("2009 NDAA") (P.L. 110-417, section 841(a)). Previously, only government employees have been subject to laws and regulations that specifically concern personal conflicts of interest (see, e.g., 18 U.S.C. § 208, 5 C.F.R. Part 2635). Contractor employees, on the other hand, have typically only been subject to contract-specific conflicts of interest and nondisclosure requirements and any policies maintained by their companies.

Proposed Rule. The proposed rule establishes a new FAR Subpart and clause (FAR Subpart 3.11 and FAR 52.203-16).

- Contractors providing acquisition support services will be responsible for:

(1) Establishing procedures to screen covered employees for potential personal conflicts of interest, including obtaining financial disclosure statements when employees are assigned to a contract and ensuring that these statements are updated at least annually and whenever the employees have any changes in personal/financial circumstances.

(2) Preventing personal conflicts of interests by not assigning or allowing employees with personal conflicts to work under a contract, prohibiting the use of non-public government information for personal gain, and executing nondisclosure agreements.

(3) Informing employees of their obligations to report potential conflicts of interest, not to use non-public government information for personal gain, and to avoid even the appearance of a conflict of interest.

(4) Maintaining effective oversight to verify compliance with conflict of interest safeguards.

(5) Taking appropriate disciplinary action in the case of employees who fail to comply with the policies at FAR Subpart 3.11 and FAR 52.203-16.

(6) Reporting any personal conflict of interest violations by contractor employees to the Contracting Officer, including a description of the action taken by the contractor in response to the violation.

- The proposed rule includes detailed definitions of:

(1) "Acquisition functions closely associated with inherently governmental functions" which embraces every aspect of acquisition planning, source selection, and contract administration.

(2) "Covered employees" subject to the proposed rule, which includes all contractor and subcontractor employees and consultants that perform acquisition functions closely associated with inherently governmental functions.

(3) "Personal conflict of interest" which is broadly defined to include any financial interest, personal activity or relationship that could influence an employee's ability to act impartially and in the government's best interests in performing acquisition support services under a government

contract. Financial interests of “close family members, or other members of the employee’s household” are imputed to the covered employees.

- The proposed rule provides that contractors may submit a request through the Contracting Officer to the Head of the Contracting Activity to seek approval of a plan to mitigate a conflict of interest or to waive a conflict, but indicates that these requests are available only “[i]n exceptional circumstances.”
- The government’s remedies under the proposed rule for violations include suspension of contract payments, loss of award fee for the performance period during which the contractor was not in compliance with the FAR requirements, termination for default or cause, disqualification of the contractor from subsequent related contractual efforts, and suspension and debarment.
- The proposed rule’s requirements must be flowed-down to all subcontracts in excess of the simplified acquisition threshold which involve acquisition support services.
- The deadline for comments on the proposed rule is January 12, 2010. Comments should refer to FAR Case 2008-25 and may be submitted (1) online at www.regulations.gov, (2) by fax to (202) 501-4067, or (3) by mail to: General Services Administration, Regulatory Secretariat (MVPR), 1800 F. Street, NW, Washington, DC 20405, Attn: Hada Flowers.

Analysis: The proposed rule, if implemented, will impose significant specific requirements on contractors that provide acquisition support services to the federal government. For the first time, contractors performing these sorts of services will be required to obtain and maintain detailed employee disclosures of financial and personal matters that could give rise to personal conflicts of interest, and to then monitor covered employees to determine whether they may have a personal conflict of interest that may preclude them from being assigned to a particular contract. Moreover, contractors will be required to disclose any violations that may occur and will be subject to potentially severe sanctions for violations.

In its current form, the proposed rule may prove problematic to administer if implemented. For example, the OGE regulations that currently apply to federal employees include a detailed and relatively clear description of the sorts of financial interests that will be imputed to an employee, which include the interests of the employee’s spouse, minor children, general partners, and any organization in which the employee serves as an officer, partner or employee (5 C.F.R. 2635.402(b)(2)). The proposed rule, in contrast, merely refers to “close family members, or of other members of the household” and to “[o]ther employment or financial interests” (proposed rule at 52.203-16(a)). Depending on the perspective of the contractor interpreting the proposed rule, the contractor’s covered employees might be subject to a broader or narrower range of imputed interests than federal employees.

Similarly, the proposed rule provides little guidance as to what sorts of information relating to covered employee’s financial and personal interests should be included in the employees’ disclosure statements. Presumably, contractors may use a format similar to the OGE Form 450 (Confidential Financial Disclosure Report) used by federal employees and their supervisors to disclose and identify potential conflicts of interest. Given the lack of guidance in the proposed rule, however, it is uncertain whether the OGE Form 450 format will be sufficient.

The proposed rule illustrates the inherent complexities of efforts to more closely regulate government contractors. Many of the issues are unclear and potentially require government contractors to seek far more personal and private information from employees than is usual in the private sector, which generally relies on company policies requiring only the reporting of specific financial and personal interests that may create a conflict of interest (rather than the comprehensive annual disclosure of all financial and personal interests required under the proposed rule). Moreover, the non-compliance provisions of the proposed rule provide harsh sanctions that may cause such government contractors to compel their employees to provide otherwise unnecessary personal and private information.

As an initial step, government contractors and those seeking to do business with the federal government may wish to review their current Codes of Business Ethics, ethics awareness and compliance programs, and internal controls to determine what changes may be necessary to comply with the detailed requirements under the proposed rule.

[1]

The 2009 NDAA separately directed the Office of Management and Budget and the Office of Government Ethics (OGE) to perform a broader review of contractor employee personal conflicts of interest as well as organizational conflicts of interest (OCIs) and to report to Congress not later than March 10, 2010 whether additional FAR revisions are necessary to address contractor personal and organizational conflicts of interest. P.L. 110-417, section 841(b).

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