

Proposed FAR Rule Prohibits Personal Conflicts of Interest

Written by Administrator

Tuesday, 17 November 2009 00:00

The Federal Acquisition Regulation (at § 9.5) historically has focused on “organizational” conflicts of interest. An organizational conflict of interest (OCI) exists where a person (i.e., a contractor) cannot render impartial advice or assistance to the government. Generally, OCIs fall into three broad categories: (1) Unequal access to information, (2) Biased ground rules, and (3) Impaired objectivity. We have [previously noted](#) that OCIs have been under increasing scrutiny in recent years. In June 2008, FAR Case 2007-018 was published as an Advance Notice of Proposed Rulemaking; the objective of the ANPRM was to seek information from the public to determine whether the existing regulation “adequately addresses the current needs of the acquisition community or whether providing standard provisions and/or clauses, or a set of such standard provisions and clauses, might be beneficial.” The public comments to the ANPRM can be found [here](#). Now, in response to a statutory requirement found in the 2009 National Defense Authorization Act, the FAR Councils are proposing to revise the FAR rules to address “personal” conflicts of interest.

On November 13, 2009 FAR Case 2008-025 was published at 74 Federal Register 218 (pages 58584 – 58589) that would, if finalized as drafted, add a new FAR subpart at § 3.11 to –

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... require each contractor that has employees performing acquisition functions closely associated with inherently governmental functions to identify and prevent personal conflicts of interest for such employees. In addition, such contractors will be required to prohibit covered employees with access to non-public Government information from using it for personal gain. The proposed rule also makes contractors responsible for (1) Having 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.

The proposed rule would define a “personal conflict of interest” 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.” The proposed rule lists several sources of PCIs. A “covered employee” is “an individual who--

(1) Is an employee of the contractor or subcontractor, a consultant, a partner, or a sole proprietor; and (2) Performs an acquisition function closely associated with inherently governmental functions.” The rule would further define “closely associated with inherently governmental functions” as supporting or providing advice or recommendations with regard to certain listed Federal agency activities (including planning, evaluating or awarding Federal contracts).

Essentially, the proposed rule would compel service contractors supporting Federal agencies to establish controls on their employees, to prevent those employees from having PCIs in which their personal situations could impair their objectivity. The controls and constraints would be similar to those imposed on external auditors of publicly traded companies.

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The proposed rule includes a new contract clause (52.203-16) that, when included in a contract, would require the contractor to –

Have procedures in place to screen covered employees for potential personal conflicts of interest including--

(i) Obtaining and maintaining a financial disclosure statement from each covered employee when the employee is initially assigned to the task under the contract;

(ii) Ensuring that the disclosure statements are updated by the covered employees at least on an annual basis; and

(iii) Requiring each covered employee to update the disclosure statement whenever a new personal conflict of interest occurs.

The contract clause will be a “mandatory flowdown clause,” meaning that the clause must be included in all subcontracts that exceed \$100,000 in value and are those “in which subcontractor employees may perform acquisition functions closely associated with inherently governmental functions.”

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In addition to the foregoing, the contractors must prevent PCIs, prohibit use of non-public Government information for personal gain, and obtain a non-disclosure agreement from covered employees. There are other requirements in the proposed rule, such as the need to “report to the contracting officer any [PCI] violation as soon as identified” and “take appropriate disciplinary action in the case of covered employees who fail to comply” with the contractor’s PCI policies.

Failure to comply with the contract clause requirements may subject the contractor to –

(1) Suspension of contract payments; (2) Loss of award fee, consistent with the award fee plan, for the performance period in which the Government determined Contractor non-compliance; (3) Termination of the contract for default or cause, in accordance with the termination clause of this contract; (4) Disqualification of the Contractor from subsequent related contractual efforts; or (5) Suspension or debarment.

Clearly, the proposed rule (which can be reviewed in its [entirety here](#)) will be onerous. The FAR Councils note, however, that new requirements “are limited to service contractors whose employees are performing acquisition functions closely associated with inherently governmental functions for or on behalf of Federal agencies.” As the Councils note, “This class is a minority of Government contractors and is becoming smaller as Government agencies bring more such functions back in house, e.g., DOD announced in April that it is bringing 10,000 acquisition positions back in house.”

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Public comments may be submitted (as always) to www.regulations.gov . The comment period ends January 12, 2010.