

UPDATE: Personal Conflicts of Interest (PCIs) Back in the News

Written by Administrator
Monday, 07 December 2009 00:00



In [prior articles](#) , we noted that, as contractors have filled more and more of the Federal government’s acquisition workforce needs, the government has become more concerned about organizational conflicts of interest (OCIs) that may arise and taint competitions for new contract awards. More recently, we [reported](#) on a proposed rule to revise the FAR to address “personal” conflicts of interest (PCIs).

As we discussed, the proposed FAR rule would address the situation where a contractor has “employees performing acquisition functions closely associated with inherently governmental functions” and would require those contractors to prohibit such employees with access to non-public governmental information from using it for personal gain. 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.”

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The proposed rule lists several sources of PCIs, including (but not limited to)—(i) financial interests of the covered employee, of close family members, or of other members of the household; (ii) other employment or financial relationships (including seeking or negotiating for prospective employment or business); and (iii) gifts, including travel. The proposed rule provides more details regarding what financial interest issues may give rise to a PCI, which include—

- Compensation, including wages, salaries, commissions, professional fees, or fees for business referrals
- Consulting relationships (including commercial and professional consulting and service arrangements, scientific and technical advisory board memberships, or serving as an expert witness in litigation)
- Services provided in exchange for honorariums or travel expense reimbursements
- Research funding or other forms of research support
- Investment in the form of stock or bond ownership or partnership interest (excluding diversified mutual fund investments)
- Real estate investments;
- Patents, copyrights, and other intellectual property interests;
- Business ownership and investment interests

We remind you of the foregoing because PCIs are back in the news again.

First, we note a November 24, 2009 memorandum from Dr. Ashton Carter, Under Secretary of Defense (Acquisition, Technology & Logistics) to various senior Pentagon executives, discussing contractor PCIs. The memo noted that “The Government's increased reliance on contracted technical, business and procurement expertise has increased the potential for PCIs. Unlike Government employees, contractor employees are not required to disclose financial or other personal interests to the Government that may conflict with the responsibilities they are

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performing on behalf of the Government.”

The memo contains two attachments designed to sensitize DOD employees to the risks of contractor PCIs. The first attachment “depicts levels of risk created as a function of the relationship between potential impacts of PCIs and the likelihood that contractors will influence Government decisions.” The memo notes that contract type and the items being acquired affect the risk that a contractor PCI will affect the acquisition, with fixed-price supply acquisitions denoted as being low risk. The second attachment provides six scenarios and discusses the associated risks, and sensitizes Pentagon employees as to the issues involved.

For example, one scenario discussed in the memo runs as follows—

Shirley is an employee of government contractor Company X. Company X has assigned Shirley to work supporting a Government office. That office has contract responsibility to ensure the swift and effective performance of specific aspects of a contract. The contract to which Shirley is assigned was awarded to Company X. The award is a cost-plus-award-fee contract. Shirley's yearly bonus will be based on the award-fee Company X receives on the contract. Shirley finds that the performance of the contract is impeded by an operational conflict over which she has influence.

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Risk: High. Shirley has two personal conflicts of interest. First she has a conflict because she has oversight responsibilities on a contract between the government and her employer. Second, she has another conflict because her bonus is not based on how well she carries out her contract oversight responsibilities in support of the Government Office, but rather on the overall quality of the performance of her employer's contract--the same contract on which she has oversight responsibilities. There is an actual or perceived risk that her decisions, rather than being based only on the best interests of the Government, might be influenced on what is best for Company X and her own financial interest.

Another scenario in the attachment is as follows—

Mr. Jones is an employee of government contractor Company G. After full and open competition, Company G has been awarded a firm fixed-price contract to manage a Defense Agency's depot. Company G has appointed Mr. Jones as their project manager for this contract. Mr. Jones' wife owns a moving franchise. In his role as project manager for Company G, Mr. Jones orders boxes, pallets, tape, and other like items from his wife's moving company.

Risk: Low to None. Although Mr. Jones' behavior may not appear ethical, this personal conflict of interest has no inappropriate financial effect on the Government. Company G's award was based on a firm fix price that was determined fair and reasonable as the result of full and open competition. Any loss to Company G due to Mr. Jones' actions has no effect on the

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Government.

See the entire memo [here](#) .

In an interesting coincidence, the Department of Justice announced on December 1, 2009 that a former NASA scientist had been sentenced to a fine, probation, and community service for a “felony conflict of interest charge” in connection with his participation in the award of NASA contracts to his wife’s company. According to the announcement, Mark Schoeberl—

admitted that: between July and September 2004, after encountering resistance to his proposal to appropriate \$20,000 directly to Animated Earth, he asked a colleague to approve the appropriation, knowing that the funds would eventually reach Animated Earth[his wife’s company]; between January and March 2009, Schoeberl asked GSFC personnel that Animated Earth be paid incrementally for work completed in one of its NASA contracts and after receiving advice from NASA personnel, Schoeberl instructed his wife as to how to invoice NASA for work performed by her company; in May 2009, Schoeberl prepared a ‘sole source justification’ document to justify Animated Earth being the only company eligible for a new contract for maintenance on kiosks that Animated Earth had previously installed on NASA grounds; in June 2009, Schoeberl directed financial personnel to initiate a \$60,000 procurement of software to be purchased from Animated Earth and provided a ‘sole source justification’ document for that procurement; and in June 2009, Schoeberl asked a NASA colleague to speak with another colleague about awarding federal stimulus package funds to Animated Earth.

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The [DOJ release](#) stated that—

As a senior NASA manager, Schoeberl was required to disclose in annual ethics reports any income he and his wife earned from outside activities. Schoeberl's 2007 financial disclosure form omitted any mention of his interest in Animated Earth, even though the company had generated over \$50,000 in income from NASA that year and Animated Earth had been included in Schoeberl's 2006 financial disclosure form.

As [GovExec.com](#) reports, "Prosecutors agreed Schoeberl did not deserve to go to jail, noting in court documents that he quickly accepted responsibility for his conduct, had no criminal history and had a lengthy record of service at NASA." Even though records show that Animated Earth received "more than \$190,000 in NASA contracts" over a three-year period—all of which were awarded without competition—"prosecutors said the government does not seem to have suffered a financial loss because 'Animated Earth appears to have completed the work that it contracted with the federal government,' according to the article.

To conclude, government employees have long been subject to PCI controls which—as can be seen from the story of Mr. Schoeberl—are not always completely effective. As the line between contractor and government employee blurs, the government is moving to have similar controls imposed on contractor employees who are deeply involved in governmental activities. Contractors with employees embedded in governmental support activities should consider getting in front of this issue, and not waiting for the final FAR rule to be issued, as this would seem to be an issue that will only become more sensitive over time.

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