

## **New Government Contractor Rules on Personal Conflicts of Interest and Revolving Door Restrictions**

Implementing Internal Controls to Comply With  
FAR PCI Requirements and DoD Post-Employment Restrictions

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# Understanding and Implementing the New FAR Contractor Personal Conflicts of Interest Provisions

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# Webinar Agenda

- Overview of the new FAR provision
- Background
- What the rule requires
  - Covered contracts, defined
  - Covered employees under covered contracts
  - Unresolved ambiguities
- New compliance requirements
  - Practicalities and industry implementation
  - Subcontractor obligations
- Questions

# Overview of the New Rule

- Congressional mandate that the FAR Councils provide clear rules about contractor personal conflicts of interest (“PCIs”)
- Rule applies exclusively to contracts which call for employees to perform specific, enumerated types of acquisition support work
- Where contract contains new FAR PCI clause, contractors must:
  - Identify “covered employees” and obtain financial disclosures
  - Supervise employee assignment process
  - Obtain signed NDAs from covered employees
  - Disclose violations to the contracting officer
  - Train covered employees to identify and avoid PCIs
  - Maintain PCI compliance oversight
  - Discipline covered employees who violate PCI obligations

# Legislative History

- Section 841(a) of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009
  - “Not later than 270 days after the date of the enactment of this Act, the Administrator for Federal Procurement Policy shall develop and issue a standard policy to prevent personal conflicts of interest by contractor employees performing acquisition functions closely associated with inherently governmental functions (including the development, award, and administration of Government contracts) for or on behalf of a Federal agency or department.”

# Rulemaking Timeline

- November 13, 2009: The FAR Councils published a proposed rule in the Federal Register at 74 FR 58584.
- January 12, 2010: Comments due. The FAR Councils report receiving comments from 19 sources.
- November 2, 2011: Final rule published at 76 FR 68017 with an effective date of December 2, 2011.

# Preamble to Final Rule

- Purpose & Scope

- “[To] 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 would be required to prohibit covered employees with access to non-public Government information from using it for personal gain.”

# New Definitions

- Contained in both the new FAR § 3.1101 and the FAR clause at FAR 52.203-16(a).
- Five important new definitions that drive the new requirements
  1. “Acquisition function closely associated with inherently governmental functions”
  2. “Personal Conflict of Interest”
  3. “Financial Interest”
  4. “Covered Employee”
  5. “Non-public information”

# Covered Contracts

- A covered contract is any contract or task order under which some or all of the work contemplated calls for the contractor to perform “an acquisition function closely associated with inherently governmental functions.”
- Applies to all contracts above the simplified acquisition threshold other than commercial items contracts under FAR Part 12.
- Effective December 2, 2011, covered contracts are to contain the FAR clause at FAR § 52.203-16.

# Acquisition Function Closely Associated With Inherently Governmental Functions, Defined

- “Acquisition function closely associated with inherently governmental functions” means supporting or providing advice or recommendations with regard to the following agency activities:
  - 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, to include documents defining requirements, incentive plans, and evaluation criteria;
  - Evaluating contract proposals;
  - Awarding Government contracts;
  - Administering contracts;
  - Terminating contracts; and
  - Determining whether contract costs are reasonable, allocable, and allowable.

# Personal Conflict of Interest, Defined

- Personal conflict of interest means 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.
  - Exception: “A *de minimis* interest that would not ‘impair the employee's ability to act impartially and in the best interest of the Government’ is not covered under this definition.”

# Personal Conflict of Interest, Defined

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# Personal Conflict of Interest, Defined

- Personal conflict of interest means 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.
- Among the sources of personal conflicts of interest are—
  - i. Financial interests of the covered employee, of close family members, or of other members of the covered employee's household;
  - ii. Other employment or financial relationships including seeking or negotiating for prospective employment or business; and
  - iii. Gifts, including travel.

# Financial Interest, Defined

- Personal conflict of interest means 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.

# Financial Interest, Defined

- Personal conflict of interest means a situation in which a covered employee has a financial interest . . . .
- ← ■ Financial Interests may 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; or
  - Business ownership and investment interests.

# Covered Employee, Defined

- Personal conflict of interest means 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.

# Covered Employee, Defined

- Personal conflict of interest means a situation in which a **covered employee** has a financial interest . . . .
- Covered employee means an individual who performs an acquisition function closely associated with inherently governmental functions and is—
  - 1) An employee of the contractor; or
  - 2) A subcontractor that is a self-employed individual treated as a covered employee of the contractor because there is no employer to whom such an individual could submit the required disclosures.
- Employees under a covered contract not performing the covered tasks are NOT considered covered employees.

# Definitional Summary

- A **personal conflict of interest** exists when a **covered contract** requires contractor employees to perform an **acquisition function closely associated with inherently governmental functions** and a **covered employee** performing that function has a **financial interest** in the agency's acquisition-related activity which he/she is supporting and/or providing advice about.

# Unresolved Definitional Questions

- Definitions raise numerous questions that will need to be sorted out over time. Among them:
  1. If a contractor employee is not performing one of the covered acquisition functions, is he or she immune from having a PCI?
  2. Is the FAR list of covered tasks under the definition of “acquisition functions closely associated with inherently governmental functions” exclusive?
    - List of tasks lacks a catch-all option for acquisition-related tasks not encompassed by the list.

# Unresolved Definitional Questions, Cont.

3. How far up the corporate ladder does the definition of “covered employee” flow?
  - Is someone with oversight authority over an employee performing acquisition support functions, but not doing such functions themselves, a covered employee? What about the supervisor’s supervisor? Legal department? Compliance officer? Internal auditors?
4. What is a “de minimis” financial interest?
  - Who decides the nature and amount? Possible guidance in 5 C.F.R. 2635 and OGE ethics opinions?
5. *Christian* Doctrine applicable if contract should contain FAR clause 52.203-16 but does not?

# New Compliance Requirements FAR § 3.1103 and 52.203-16(b)

# Obtaining Employee Financial Disclosures

- Contractors must have procedures in place to screen covered employees for potential personal conflicts of interest, by—
  - (i) Obtaining and maintaining from each covered employee, when the employee is initially assigned to the task under the contract, a disclosure of interests that might be affected by the task to which the employee has been assigned; and
  - (ii) Requiring each covered employee to update the disclosure statement whenever the employee's personal or financial circumstances change in such a way that a new personal conflict of interest might occur because of the task the covered employee is performing.

# Obtaining Financial Disclosures, Cont.

- Examples of implementation challenges:
  - Contractors subject to this new rule will need to prepare disclosure forms for covered employees to disclose the existence of personal conflicts.
    - Update triggers?
  - Apart from the training obligations for covered employees, contractors should also consider developing a training program and protocol for anyone who will be reviewing the disclosure forms to identify potential conflicts.
  - Some companies might decide to contract out the review process to lessen employee concerns about the compromise of personal data. These records must be maintained in accordance with the FAR record retention requirements.

# Supervising Employee Assignments

- Contractor must supervise assignment of employees who will perform covered tasks to prevent PCIs.
- Pursuant to FAR § 3.1104, “covered employees” with PCIs cannot be assigned to perform covered acquisition support tasks unless the conflict is mitigated or waived.
  - Mitigation and waiver are only appropriate in “exceptional circumstances” where prevention of the PCI is impossible.
  - Mitigation measures which reduce or neutralize the harm created by the PCI may be accepted upon approval by the Head of Contracting Activity ("HCA").
  - Alternatively, the contracting officer may seek HCA approval of a waiver of the requirement to avoid PCIs.

# Supervising Employee Assignments, Cont.

- Examples of implementation challenges:
  - Contractors must have processes in place to review disclosure forms received from covered employees and adjust staffing plans as necessary
    - 401(k) portfolios?
    - Adult children living at home – their employers?
  - Any ‘close call’ situations should be referred to compliance officers or legal for determinations, with the understanding that the obligation to avoid even the appearance of a PCI requires an abundance of caution.
  - Contracting Officer buy-in? *But* see the Rule’s Preamble:
    - “Government contracting officers have not been assigned responsibility to review disclosures of financial interests.

# Non-Disclosure Agreements & Protecting Non-public Information

- Contractors must prohibit covered employees from using non-public information accessed through performance of a Government contract for personal gain.
  - Non-public information is defined in the new FAR provisions as any Government or third party information that—
    1. Is exempt from disclosure under the Freedom of Information Act (5 U.S.C. § 552) or otherwise protected from disclosure by statute, Executive order, or regulation; or
    2. Has not been disseminated to the general public and the Government has not yet determined whether the information can or will be made available to the public.

# Non-Disclosure Agreements & Protecting Non-public Information

- Examples:
  - Past performance information
  - Trade secrets
  - Information covered under procurement integrity – FAR 3.104
  - Note: there is no requirement that covered information be marked with a restrictive legend

# Non-Disclosure Agreements & Protecting Non-public Information, Cont.

- As part of the effort to protect non-public information, contractors are required to obtain a signed non-disclosure agreement from each covered employee which memorializes that the employee is prohibited from—
  - Using non-public information for personal gain, or
  - Disclosing non-public information accessed through performance of a Government contract

# Non-Disclosure Agreements & Protecting Non-public Information, Cont.

- Examples of implementation challenges:
  - Companies should prepare special NDAs for covered employees which reflect the fact that the NDAs are executed in order to comply with FAR § 52.203-16.
  - Only covered employees are required to sign NDAs, BUT many more will have access to non-public information.
    - Extend NDAs to all employees?
  - Broad definition of non-public information can complicate even internal discussions with managers and support personnel.

# Mandatory Reporting of Violations

- When covered employees fail to properly disclose their financial interests or fail to abide by their non-disclosure agreements, contractors must “[r]eport to the contracting officer any personal conflict-of-interest violation by a covered employee as soon as identified.”
  - The final rule clarifies that “as soon as identified” means that violations giving rise to potential PCIs should be disclosed immediately.
  - The initial report “shall include a description of the violation and the proposed actions to be taken by the Contractor in response to the violation [with] follow-up reports of corrective actions taken, as necessary.”

# Mandatory Reporting of Violations, Cont.

- Examples of implementation challenges:
  - SWAT team to conduct internal investigations into alleged violations.
  - Use same or different internal processes for investigating and reporting under FAR 52.203-13?
    - Who decides?
    - Content of report?
  - Advisable to have a process in place to manage and contain any inadvertent disclosure of non-public information.

# Training Covered Employees

- Contractors must train their covered employees so as to inform them of their obligation-
  1. To disclose and prevent personal conflicts of interest;
  2. Not to use non-public information accessed through performance of a Government contract for personal gain; and
  3. To avoid even the appearance of a personal conflict of interest.

# Training Covered Employees, Cont.

- “Contractors must train their covered employees so as to inform them of their obligation . . . .
  3. To avoid even the **appearance** of a personal conflict of interest”
- This is the only mention of the concept "appearance" of PCIs in the new rule. But the fact that it is mentioned at all suggests that a doctrine analogous to the "appearance of impropriety" doctrine in the organizational conflict of interest ("OCI") context found in FAR Part 9.5 or in the executive branch standards of conduct rules found in 5 CFR 2635 also can arise in the PCI context.

# Training Covered Employees, Cont.

- Examples of implementation challenges:
  - Contractors must devise PCI training programs and materials and ensure that covered employees are properly trained in what types of financial interests create PCIs and how to disclose changing financial circumstances that could give rise to PCIs.
  - Training as to avoiding “appearances” of PCIs is a challenge, as what constitutes an "appearance" of a PCI (as opposed to an actual PCI), and what contractors must do to avoid these "appearances," is an open question currently undefined in the rule.
    - Disclosure not required

# Continued Oversight

- Contractors must “maintain effective oversight to verify compliance with personal conflict-of-interest safeguards” on an ongoing basis for the full duration of any covered contract.
- Examples of implementation challenges:
  - Compliance efforts must be ongoing, not merely focused on transition periods
  - Periodic re-confirmation of each covered employee’s financial interests is an effective way to demonstrate a commitment to oversight
  - Annual training of covered employees is also recommended

# Sanctioning Violator Employees

- Finally, as part of their PCI compliance efforts, Contractors are required to “take appropriate disciplinary action in the case of covered employees who fail to comply with policies established pursuant to this clause.”
- Examples of implementation challenges:
  - No specifics are provided as to what types of discipline are appropriate
  - Contractors should consider and communicate types of discipline up front, and apply them consistently in all instances
  - All disciplinary action should be documented and retained

# Subcontractors

- The final rule clarifies that contractors are only responsible for managing their own compliance efforts with regard to PCIs
- **No prime contractor liability for the failures of a subcontractor to comply**
- However, the FAR clause at 52.203-16 has a mandatory flow-down provision for any subcontract over \$150,000 in value where the subcontract statement of work contemplates the performance of covered acquisition support tasks
- Compliance with the flow-down requirement is crucial

# Questions and Discussion

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