

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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Today's faculty features:

Robert A. Burton, Partner, **Venable LLP**, Washington, D.C.

Keith Szeliga, Partner, **Sheppard Mullin Richter & Hampton**, Washington, D.C.

Shauna E. Alonge, Partner, **Crowell & Moring**, Washington, D.C.

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Conflicts of Interest

Attorney Offers Advice to Contractors In Light of Recent Final Rule on PCIs

A Federal Acquisition Regulation rule went into effect Dec. 2 placing greater onus on contractors to prevent personal conflicts of interest (PCIs) on the part of their employees who perform agency acquisition functions “closely associated with” inherently governmental functions.

In addition, such contractors will be required to prohibit covered employees with access to nonpublic government information from using it for personal gain (96 FCR 475, 11/8/11).

Robert Burton, an attorney with 30 years of experience in procurement law who served as deputy administrator of the Office of Federal Procurement Policy, talked to BNA about these and other significant provisions in the rule.

What is the overall significance of this rule for contractors?

For the first time, we have Federal Acquisition Regulation coverage for PCIs. This really is a sea change, the beginning of what I think will be expanded coverage of PCIs to other government functions in addition to procurement.

What is the most important part of the rule?

It sets forth a contracting officer’s actions if a contractor violates the rule’s requirements. The contracting officer “shall contact the agency legal counsel for advice and/or recommendations on a course of action.” The councils clarified that a contractor is only responsible for a violation of the contractor, not the employee. However, noticeably absent is the type of liability that attaches to contractor violations. In the current climate, the False Claims Act, suspension and debarment, and termination could be applicable.

What are the best ways for contractors to identify potential PCIs?

The best way to identify PCIs will vary from workforce to workforce, which the councils acknowledged by affording contractors flexibility in setting up screening mechanisms. For most contractors, identifying PCIs in the initial bid planning stage will be important.

Further, identifying and maintaining records on the major financial interests of key personnel can aid in spotting potential problems. Regardless of current records, though, a contractor should obtain disclosure from each covered employee when the employee is initially assigned to a task under the contract, and should

remind employees to update their disclosure statements when their circumstances change.

What types of information-gathering techniques should be used?

One method specifically described by the councils includes a disclosure form in which contractors review a list of affected entities and either disclose a possible conflict of interest or confirm that there is none. In this way, contractors may choose to utilize the least intrusive information-gathering technique. These forms should be drawn up whenever a contractor assigns a covered employee a new task, as well as for each of a contractor’s proposals at the initial proposal stages to stave off a potential protest of an award if key employees are later identified as having a PCI.

Do all PCIs that an employer discovers need to be disclosed?

Only actual, realized PCIs need to be disclosed. The councils were clear that “[i]t is up to a contractor to manage its employees, and to assign them in a way that prevents PCIs. The government only needs to be informed if violations occur, or if the contractor needs approval for a mitigation plan or requests a waiver.”

Should the final rule have been more specific about how contractors may elicit information about financial interests that could lead to PCIs?

On the one hand, setting forth specific procedures gives contractors a safe harbor to ensure that they are procedurally compliant. However, the rule’s flexibility appropriately enables contractors to formulate the most effective and efficient screening mechanisms. Flexibility provides for differences across industries and contractor size, and allows contractors to work this type of screening into their existing mechanisms and staffing procedures.

Are any of the rule’s other provisions overly ambiguous?

Some aspects of what constitutes “an acquisition function closely associated with inherently governmental functions” may be too broad and interpreted differently by different contractors. For example, contractors may have different perspectives on what constitutes an employee who is “closely associated with” “administering” a contract.

Further, each agency’s interpretation could differ. The ambiguity of the definition is especially difficult to administer when applying the rule where only part of a contract is for the performance of acquisition functions closely associated with inherently governmental functions. In those cases, it might be difficult to determine which parts of the contract are governed by the rule and which are not.

Should contractors review their current codes of business ethics and internal controls to make sure they comply with rule?

Contractors need to ensure that their ethical codes address personal conflicts of interest and seek to educate their workforces on what a PCI includes. They also should clearly establish the process for reporting a potential PCI, perhaps including supervisors, legal teams, and ethics officers.

Will firms have enough time before the rule is implemented to install complicated monitoring and reporting systems?

No. Contractors will need to act quickly, because contracting officers are instructed to include FAR 52.203-16 in the task and delivery orders of existing contracts awarded after Dec. 2. Contractors might be able to identify PCIs in time, but the real issue is whether they will

be able to meet the deadline should mitigation plans be required for personnel in existing contracts.

What other advice do you have for contractors in light of the final rule?

FAR 52.203-16 is likely a pilot provision for other functions, and all contractors should be watching the development of this rule. On Nov. 2, the Department of Defense, General Services Administration, and NASA issued a request for information on whether the rule should be expanded to functions that are not associated with inherently governmental functions. Officials are interested in whether there are other contracting methods, types, and services that raise heightened concerns for potential PCIs, and whether the existing rule should be expanded to include other functions.

BY JEFF KINNEY

This Time,
It's Personal:

PCIs in
Government
Contracting

FAR Councils
issue
final rule
regarding
preventing
personal
conflicts of
interest
for contractor
employees
performing
acquisition
functions.

**BY
KEITH R.
SZELIGA**



On November 2, 2011, the Department of Defense, General Services Administration, and National Aeronautics and Space Administration issued a final rule amending the Federal Acquisition Regulation (FAR) to impose upon contractors onerous new obligations relating to the identification and prevention of personal conflicts of interest (PCIs) among employees performing “acquisition functions closely associated with inherently governmental functions.”¹ The rule also requires contractors to prohibit covered employees from utilizing nonpublic information accessed through the performance of a U.S. federal government contract for personal gain and to obtain from covered employees executed nondisclosure agreements prohibiting the dissemination of such information.

The rule, which implements Section 841(a) of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009,² creates a new FAR Subpart 3.11 and a new contract clause at FAR 52.203-6, titled “Preventing Personal Conflicts of Interest.” Contracting officers must include the new clause in contracts, task orders, and delivery orders issued on or after December 2, 2011, that contemplate the performance of “acquisition functions closely associated with inherently governmental functions.”³ Procurements for commercial items are exempt from coverage,⁴ as are those valued at or below the simplified acquisition threshold.⁵

The rule instructs contracting officers to modify existing task or delivery order contracts, on a bilateral basis, to include the new PCI clause for future orders.⁶ The contractor’s leverage in the “bilateral” negotiation of these changes, however, is virtually nonexistent. If a contractor refuses to accept the modification, it will be ineligible to receive additional orders under the contract.⁷

Contractor’s Responsibilities

The rule imposes a host of burdensome compliance obligations on contractors performing acquisition and contract administration support services. Specifically, such contractors must:

- Implement procedures to screen covered employees for PCIs by:
 - Requiring covered employees to disclose any financial or other interests (including interests of their “close family members” and other members of their household) that might be affected by each new task to which they are assigned, and
 - Requiring covered employees to update their disclosures whenever their “personal or financial circumstances” change in a way that “might” create a new PCI⁸;
- Prevent PCIs, including ensuring that covered employees do not perform any task for which the contractor has identified a PCI⁹;
- Prohibit the use of nonpublic information accessed through performance of a government contract for personal gain¹⁰;
- Obtain signed nondisclosure agreements prohibiting the disclosure of such information¹¹;
- Inform covered employees of their obligations to disclose and prevent PCIs, to refrain from using nonpublic information accessed through performance of a government contract for personal gain, and to “avoid even the appearance” of a PCI¹²;
- Maintain effective oversight to verify compliance with PCI safeguards¹³;



- Take “appropriate disciplinary action” in the case of employee violations¹⁴; and
- Report PCI violations to the contracting officer.¹⁵

In addition, contractors must flow down the new PCI clause, including all of the foregoing obligations, in all subcontracts valued in excess of \$150,000 that involve acquisition or contract administration support services.¹⁶

Covered Employees

The rule defines a *covered employee* as a contractor employee “who performs an acquisition function closely associated with inherently governmental functions.”¹⁷ Such functions are defined broadly to include “supporting or providing advice or recommendations” with regard to virtually any aspect of the procurement process, including:

- Planning acquisitions;
- Determining the supplies or services to be acquired, including developing statements of work;
- Developing or approving any contractual documents, including documents defining requirements, incentive plans, and evaluation criteria;
- Evaluating contractor proposals;
- Awarding contracts;
- Administering contracts, including ordering changes, providing technical direction, evaluating performance, and accepting or rejecting supplies or services;
- Terminating contracts; and

- Determining the reasonableness, allocability, and allowability of contract costs.¹⁸

Contractors are responsible for their own employees. They are not required to screen subcontractor employees,¹⁹ with the exception of self-employed individuals, who are treated as covered employees under the rule.²⁰

PCIs

The rule defines 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.”²¹ The rule identifies three potential sources of PCIs:

- Financial interests of the covered employee, as well as those of “close family members” or other members of the covered employee’s household;
- Other employment or financial relationships, including seeking or negotiating for prospective employment or business; and
- Gifts, including travel.²²

Examples of financial interests covered by the rule 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; and
- Business ownership and investment interests.²³

The definition of PCI expressly excludes a “*de minimis interest*” that would not impair an employee’s objectivity.²⁴ Although the rule provides no guidance in this area, it is likely that the *de minimis* exception will be interpreted narrowly.

Mitigation and Waiver

The rule authorizes the mitigation or waiver of a PCI only in “exceptional circumstances.”²⁵ The head of the contracting activity, without delegation, must issue a written determination that mitigation or waiver is in the best interest of the government.²⁶ The rule provides no guidance regarding the circumstances under which such a determination would be appropriate, nor does it identify any specific strategies for mitigating PCIs.

Nonpublic Information

For purposes of the limitations on use and disclosure, the rule defines *nonpublic information* to include:

- Information that is exempt from disclosure under the Freedom of Information Act or otherwise protected from disclosure by statute, Executive Order, or regulation; and
- Information that has not been disseminated to the general public in cases where the government has not yet determined whether such information can or will be released.²⁷

This definition was intended to have “broad meaning,” to include proprietary data belonging to other contractors as well as government information that could give rise to an unfair competitive advantage.²⁸

Further, information need not be marked with a restrictive legend to qualify as nonpublic information under the rule.²⁹ In fact, the preamble suggests that contractor employees should “presume that all information given to a contractor has not been made public unless facts clearly indicate the contrary.”³⁰

Reporting Violations

Contractors will not be held liable for employee transgressions, as long as they have taken “appropriate steps to uncover and report the violation.”³¹ A contractor must report to the contracting officer any PCI violation, including any covered employee’s:

- Failure to disclose a PCI,
- Use of nonpublic information accessed through performance of a government contract for personal gain, and
- Failure to comply with the terms of a nondisclosure agreement.³²

Such violations must be reported “as soon as identified,”³³ which, according to the preamble, allows the contractor time to perform “sufficient investigation to confirm that a violation has occurred.”³⁴ The report must include a description of the violation and the proposed actions to be taken by the contractor.³⁵

Compliance Strategies

The rule imposes a significant compliance burden on contractors that provide acquisition and contract administration support services to the government. To meet their obligations under the rule, such contractors should consider:

- Ensuring that the contractor’s code of business ethics and conduct includes general policy statements regarding the identification, prevention, and reporting of PCIs, as well as the prohibitions on use and disclosure of nonpublic information accessed through performance of a government contract;
- Preparing detailed policies and procedures for:
 - Identifying covered employees, both initially and during performance;
 - Obtaining and maintaining complete and accurate disclosure statements;



- Monitoring work assignments to identify new tasks that may require the submission of an updated disclosure statement;
 - Analyzing disclosure statements to determine whether there may be a PCI;
 - Preventing covered employees from performing work that might create a PCI;
 - Reporting PCIs both internally and to the contracting officer;
 - Flowing down the new PCI clause to subcontractors;
 - Obtaining and maintaining adequate nondisclosure agreements; and
 - Verifying compliance through periodic internal audits;
- Developing and implementing training materials that:
 - Identify the categories of work that trigger status as a covered employee;
 - Provide detailed guidance regarding the circumstances that can give rise to a PCI, including the use of concrete examples;
 - Educate employees regarding their obligations under the rule with respect to both PCIs and nonpublic information;
 - Explain the contractor's procedures for obtaining disclosure statements, including the requirement for submissions to be complete, accurate, and updated;
 - Identify the appropriate point of contact for employee questions and reporting; and
 - Summarize other key aspects of the contractor's policies and

procedures relating to PCIs and non-public information;

- Preparing a standard form disclosure statement that provides guidance regarding the circumstances that could give rise to a PCI and requires covered employees to disclose all potential PCIs relating to their current and future assignments;
- Reviewing the adequacy of standard form nondisclosure agreements, *vis-à-vis* the requirements of the new rule; and
- Updating standard form contracts to provide for flow-down of the new FAR clause.

While this list of compliance strategies is by no means comprehensive, taking these steps should go a long way toward achieving compliance with the new rule. **CM**

ABOUT THE AUTHOR

KEITH R. SZELIGA is a partner in the Government Contracts, Investigations & International Trade Practice Group of Sheppard Mullin Richter & Hampton, LLP's Washington, DC, office. His practice focuses on government contracts litigation as well as advising clients regarding the full range of compliance issues facing government contractors. He can be contacted at kszeliga@sheppardmullin.com or 202-218-0003.

Send comments about this article to cm@ncmahq.org.

ENDNOTES

1. "Preventing Personal Conflicts of Interest for Contractor Employees Performing Acquisition Functions," *76 Fed. Reg.* 68017 (November 2, 2011).
2. *Pub. L.* 110-417 (codified at 41 U.S.C. §2303).
3. FAR 3.1106(a).
4. FAR 12.503(a)(9).
5. FAR 3.1106(a)(1).
6. *76 Fed. Reg.* at 68017.

7. *Ibid.*
8. FAR 3.1103(a)(1); FAR 52.203-6(b)(1).
9. FAR 3.1103(a)(2)(i); FAR 52.203-6(b)(2)(i).
10. FAR 3.1103(a)(2)(ii); FAR 52.203-6(b)(2)(ii).
11. FAR 3.1103(a)(2)(iii); FAR 52.203-6(b)(2)(iii).
12. FAR 3.1103(a)(3); FAR 52.203-6(b)(3).
13. FAR 3.1103(a)(4); FAR 52.203-6(b)(4).
14. FAR 3.1103(a)(5); FAR 52.203-6(b)(5).
15. FAR 3.1103(a)(6); FAR 52.203-6(b)(6).
16. FAR 52.203-6(d).
17. FAR 3.1101; FAR 52.203-6(a).
18. FAR 3.1101; FAR 52.203-6(a).
19. *76 Fed. Reg.* at 68018.
20. FAR 3.1101; FAR 52.203-6(a).
21. *Ibid.*
22. *Ibid.*
23. *Ibid.*
24. *Ibid.*
25. FAR 3.1104(a).
26. FAR 3.1104(b).
27. FAR 3.1101; FAR 52.203-6(a).
28. *76 Fed. Reg.* at 68018-19.
29. *Ibid.*, at 68018.
30. *Ibid.*, at 68019.
31. *76 Fed. Reg.* at 68022.
32. FAR 3.1103(a)(6); FAR 52.203-6(b)(6).
33. *Ibid.*
34. *76 Fed. Reg.* at 68021.
35. FAR 3.1103(a)(6); FAR 52.203-6(b)(6).