

Government Contracts Blog

Posted at 12:40 PM on December 8, 2009 by Sheppard Mullin

Proposed FAR Rule Places Greater Responsibility on Contractors to Eliminate Personal Conflicts of Interest

Under the terms of a proposed FAR rule issued November 13, contractors that perform systems engineering and technical assistance ("SETA") type work for Government agencies soon will face enhanced obligations to prevent personal conflicts of interest on the part of their employees. The proposed rule applies to all contractors with covered employees who perform acquisition functions "closely associated with inherently Government functions" such as planning acquisitions, evaluating contract proposals, and awarding Government contracts.

For SETA firms and other contractors "embedded" in Agency acquisition departments, the proposed rule demands proactive steps to identify and prevent personal conflicts of interest. Under the rule, a contractor would be required to:

- Screen covered employees for potential personal conflicts of interest by establishing procedures that include obtaining financial disclosure statements and updating the statement every year or whenever a new personal conflict of interest arises;
- Prohibit covered employees from performing any contractual task that would create a personal conflict of interest, unless the conflict can be prevented or mitigated in consultation with the contracting agency;
- Obtain a signed non-disclosure agreement to prohibit disclosure of non-public Government information;
- Prohibit use of non-public Government information for personal gain; and
- Inform covered employees of their obligation to disclose changes in personal or financial circumstances, avoid using non-public Government information for personal gain, and prevent even the appearance of personal conflicts of interest.

The Government's remedies for a contractor's noncompliance with these requirements range in severity from loss of contract payments or award fees to termination for default and suspension or debarment. As written, the proposed rule casts a wide net by defining "covered employees" to

include subcontractors, consultants, and partners, along with sole proprietors.

Along with strong internal controls aimed at identifying and preventing personal conflicts of interest, the proposed rule would require ongoing vigilance by contractors to verify compliance and impose appropriate disciplinary action where needed. Significantly, the proposed rule would also require contractors to report to the contracting officer any violation of personal conflict of interest requirements by their covered employees. In "exceptional circumstances," the rule allows the contractor to resolve a personal conflict of interest by mitigating the conflict; however, any mitigation plan can be implemented only with written authorization from the head of the contracting activity.

The proposed FAR rule comes at a time of heightened scrutiny for contractors that help Government agencies plan acquisitions and administer contracts. In March 2008, GAO reviewed conflict of interest policies at various Department of Defense acquisition offices with blended public/private workforces. Based on its review, GAO recommended that contractor employees should be held to similar conflict of interest requirements as their Government counterparts. In light of GAO's recommendations, Congress inserted a provision in the 2009 Defense Authorization Act requiring the Office of Federal Procurement Policy to issue a standard policy to prevent personal conflicts of interest by contractor employees performing various federal acquisition functions. OFPP and the FAR Councils crafted the proposed FAR rule to fulfill that statutory mandate.

Comments on the proposed rule are due at the FAR Secretariat by January 12, 2010.

Authored by:

[Jesse J. Williams](#)

(202) 218-0028

jwilliams@sheppardmullin.com