

Government Contracts Update

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Proposed FAR Amendment Would Expand the Scope of Personal Conflict of Interest Rules

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The Department of Defense (DoD), General Services Administration (GSA), and the National Aeronautics and Space Administration (NASA) have proposed to amend the Federal Acquisition Regulation (FAR) to expand the scope of contractor duties with respect to their employees' personal conflicts of interest (PCIs). The FAR currently imposes PCI prevention requirements only where contractor personnel are performing "acquisition functions closely associated with inherently governmental functions." The proposed amendment would extend those requirements to apply where contractor employees are performing *any* "function closely associated with inherently governmental functions," including such tasks as organizational and strategic planning, budget preparation, training, and inspection services. This proposed rule change would significantly impact a large number of contracts across a range of services, and its development should be followed closely.

Current PCI Requirements

Under the FAR, **a PCI arises** when an employee "has a financial interest, personal activity, or relationships that could impair the employee's ability to act impartially and in the best interest of the Government when performing under [a] contract." The FAR's current PCI rules only apply where a contractor's employee is performing an "acquisition function closely associated with inherently governmental functions." The activities covered by that term are relatively straightforward, and are enumerated in the regulation as follows:

1. Planning acquisitions;
2. Determining what supplies or services are to be acquired by the Government, including developing statements of work;
3. Developing or approving any contractual documents, to include documents defining requirements, incentive plans, and evaluation criteria;
4. Evaluating contract proposals;
5. Awarding Government contracts;
6. Administering contracts (including ordering changes or giving technical direction in contract performance or contract quantities, evaluating contractor performance, and accepting or rejecting contractor products or services);
7. Terminating contracts; and
8. Determining whether contract costs are reasonable, allocable, and allowable.

The rules do not apply to contracts that do not exceed the simplified acquisition threshold – currently \$150,000 – or acquisitions of commercial items.

The FAR PCI rules require that contractors have procedures in place to identify, avoid, and mitigate PCIs for each covered employee. These procedures include obtaining and maintaining disclosures from covered employees of any interests that might be affected by the work performed for the government, such as financial interests of the employee and members of the employee's family and household, other employment or financial relationships, and gifts. Contractors must ensure that covered employees keep this information updated. In addition, contractors have a responsibility not to assign an employee to a task that implicates an identified PCI, must prohibit the use of non-public information for personal gain, and must require covered employees to sign a non-disclosure agreement. Contractors must report any PCI violations and subsequent corrective action to the contracting officer. Although this list is not exhaustive, the administrative burden of PCI compliance clearly is not insignificant.

The Proposed Amendment

The proposed amendment to the FAR PCI rules was prompted by the **National Defense Authorization Act for Fiscal Year 2013**, which required the Secretary of Defense to examine whether the PCI rules should be extended beyond contractor personnel performing acquisition functions to cover (1) functions other than acquisition functions; (2) personal services; and (3) staff augmentation services. After requesting and reviewing feedback from 23 military departments and defense agencies, the DoD determined that extension of the PCI rules was in the best interest of the taxpayers.

The proposed amendment would extend the scope of the PCI rules to apply where contractor personnel perform not just acquisition functions, but any function closely associated with inherently governmental functions. The *Federal Register* notice announcing the proposed amendment suggests that FAR 7.503 (d) would provide the definition of a "function closely associated with inherently governmental functions." Notably, FAR 7.503(d) states that it is meant to be "a list of examples of functions generally *not* considered to be inherently governmental functions" (emphasis added), but which might "approach being in that category" under certain circumstances. The list of activities contemplated by FAR 7.503(d) is far-reaching:

1. Services that involve or relate to budget preparation, including workload modeling, fact finding, efficiency studies, and should-cost analyses, etc.;
2. Services that involve or relate to reorganization and planning activities;
3. Services that involve or relate to analysis, feasibility studies, and strategy options to be used by agency personnel in developing policy;
4. Services that involve or relate to the development of regulations;
5. Services that involve or relate to the evaluation of another contractor's performance;
6. Services in support of acquisition planning;
7. Contractors providing assistance in contract management (such as where the contractor might influence official evaluations of other contractors);
8. Contractors providing technical evaluation of contract proposals;
9. Contractors providing assistance in the development of statements of work;
10. Contractors providing support in preparing responses to Freedom of Information Act requests;
11. Contractors working in any situation that permits or might permit them to gain access to confidential business information and/or any other sensitive information (other than situations covered by the **National Industrial Security Program** described in 4.402(b));
12. Contractors providing information regarding agency policies or regulations, such as attending conferences on behalf of an agency, conducting community relations campaigns, or conducting agency training courses;
13. Contractors participating in any situation where it might be assumed that they are agency employees or representatives;
14. Contractors participating as technical advisors to a source selection board or participating as voting or nonvoting members of a source evaluation board;
15. Contractors serving as arbitrators or providing alternative methods of dispute resolution;
16. Contractors constructing buildings or structures intended to be secure from electronic eavesdropping or other penetration by foreign governments;
17. Contractors providing inspection services;
18. Contractors providing legal advice and interpretations of regulations and statutes to Government officials; and
19. Contractors providing special non-law-enforcement, security activities that do not directly involve criminal investigations, such as prisoner detention or transport and non-military national security details.

While the amended rule still would not apply to acquisitions not exceeding the simplified acquisition threshold or commercial items, the breadth of the list of activities in **FAR 7.503(d)** causes the proposed rule to encompass a large number of contracts. Indeed, based on data from the **Federal Procurement Data System**, the agencies estimate that between March 1, 2012 and March 1, 2013, there were

22,716 contract actions over the simplified acquisition threshold that were coded as functions closely associated with inherently governmental functions. Thus, the proposed amendment would require that many previously unaffected contractors put PCI prevention protocols into place.

Public Comments

The Defense Acquisition Regulations Council and the Civilian Agency Acquisition Council are accepting written comments on the proposed amendment until June 2, 2014, and have expressly requested comments from small business concerns. The matter number is **FAR Case 2013-022**.

For more information on how this proposed regulatory amendment might impact your business, or to better understand the requirements regarding personal conflicts of interest, please contact **Paul Debolt** at , **Keir Bancroft** at , **Nathaniel Canfield** at , or any of the other attorneys in Venable's **Government Contracts Practice Group**.