

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
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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.

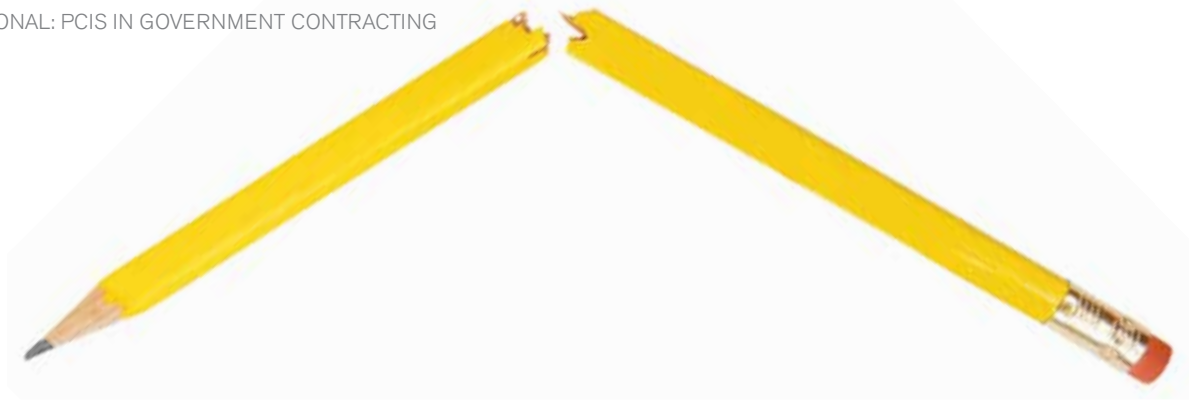
The rule, which implements Section 841(a) of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009,² creates a new FAR Subpart 3.11 and a new contract clause at FAR 52.203-6, titled “Preventing Personal Conflicts of Interest.” Contracting officers must include the new clause in contracts, 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**

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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).