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January 12, 2010

General Services Administration
Regulatory Secretariat (VPR)
1800 F Street, NW, Room 4041
ATTN: Hada Flowers
Washington, DC 20405

Submitted via: <http://www.regulations.gov>

Subject: FAR Case 2008-025, Preventing Personal Conflicts of Interest for Contractor Employees Performing Acquisition Functions
CODSIA Case No. 01-10

Dear Ms. Flowers:

The undersigned members of the Council of Defense and Space Industry Associations (CODSIA)¹ appreciate the opportunity to comment on the proposed rule entitled “Preventing Personal Conflicts of Interest for Contractor Employees Performing Acquisition Functions” that was published in the *Federal Register* on November 13, 2009. The proposed rule is in response to section 841(a) of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (hereafter FY09 NDAA). Section 841(a) requires that the Office of Federal Procurement Policy (OFPP) develop policy to prevent personal conflicts of interest (PCI) by contractor employees performing acquisition functions closely associated with inherently governmental functions for or on behalf of a Federal agency or department. Section 841 (a) also requires OFPP to develop a personal conflicts-of-interest clause(s) for inclusion in solicitations, contracts, task orders, and delivery orders. While we applaud the government’s effort to manage the potential impact of PCI on government service contracts and still insure that best value principles are respected, it is clear from the drafting of the proposed rule that there are a significant number of issues that may need to be resolved through further rulemaking beyond the scope of this proposed rule.

As a threshold matter, and as detailed in the attached comments, the proposed rule is inconsistent with current law and regulation and includes many terms of art that require clarity if the goal of the government in preventing and mitigating personal conflicts of interest in the targeted areas is to be successful. Among other things, the proposed rule contains a broadly drafted list of remedies that are largely redundant with existing Federal Acquisition Regulation remedies, but which, in some cases, are missing due process procedures, or, in the case of

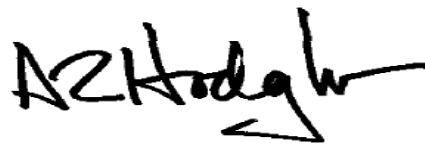
¹ CODSIA was formed in 1964 by industry associations with common interests in federal procurement policy issues, at the suggestion of the Department of Defense. CODSIA consists of seven associations –the Aerospace Industries Association (AIA), the American Shipbuilding Association (ASA), the National Defense Industrial Association (NDIA), the Professional Services Council (PSC), the American Council of Engineering Companies (ACEC), TechAmerica, and the U.S. Chamber of Commerce. CODSIA’s member associations represent thousands of government contractors nationwide. The Council acts as an institutional focal point for coordination of its members’ positions regarding policies, regulations, directives, and procedures that affect them. A decision by any member association to abstain from participation in a particular case is not necessarily an indication of dissent.

disqualification, are new but could effectively result in suspension or debarment. Such measures are unnecessary to meet the goals required in the FY09 NDAA and would potentially deny contractors due process throughout the pre and post-award phases of the acquisition cycle. In addition, the nature and extent of financial disclosure and the review standards contractors are to use to determine compliance are not specified. The costs and time needed to develop and deploy the necessary compliance systems associated with this process may be significant. Thus, we recommend that after the conclusion of this proposed rulemaking comment cycle, including consideration of the attached comments, the Councils publish a revised proposed rule for further public comment. If you have any questions, please contact the CODSIA project officer, Richard Sylvester, Vice President, Acquisition Policy, AIA, at 703-358-1045 or Bettie McCarthy, Administrative Officer, CODSIA, at 703-875-8059.

Sincerely,



Richard K. Sylvester
Vice President, Acquisition Policy
Aerospace Industries Association



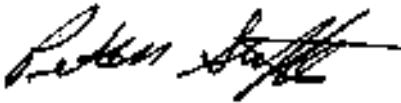
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Peter Steffes
Vice President, Government Policy
National Defense Industrial Association



R. Bruce Josten
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Cindy Brown
President
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Attachment

ATTACHMENT

CODSIA Comments, FAR Case 2008-025, Personal Conflict of Interest

1. Definitions (FAR 3.1101 and 52.203-16(a)).

Acquisition Function Closely Associated with Inherently Governmental Functions. The proposed definition of an acquisition function closely associated with inherently Governmental functions is unduly and unmanageably broad and vague. As proposed, the term is defined to mean “supporting [emphasis added] or providing advice or recommendations” with regard to eight listed categories of activities of Federal agencies.

As a threshold and practical matter, defining what activities conclusively constitute a “supporting” work function or service would require an exhaustive amount of technical knowledge not often available to Contracting Officers (COs) on a transactional or even a programmatic basis. This is particularly true when many agency projects are inter-related and acquisition programs are conducted at many different geographic locations by many different COs concurrently and/or serially. As such, the term “supporting” and/or the function of support as implied in the proposed rule should be deleted from the list of work elements that are included in the definition of Acquisition Function Closely Associated with Inherently Governmental Functions

Second, the descriptions of many of the eight listed service categories are also unduly and unmanageably broad and vague (i.e., “planning” acquisitions, “developing” or approving any contractual document, “administering” contracts). Determining what constitutes the type of applicable service categories are subject to this rulemaking may involve a detailed analysis of factors and information not in evidence in this rule, such as a review of NAICS codes and/or consultation with technical publications or program representatives. While the type of work these categories include thus may appear to be clear in the rule, there are other preliminary market research and work analysis steps required by the CO that are not discussed in this rulemaking, and will need clarity before promulgating a final rule.

Third, the preamble to the *Federal Register* notice states that additional changes may be made to this guidance as part of the Office of Management and Budget's (OMB) review of the definition of inherently governmental functions and the manner in which agencies identify critical functions to be performed by Federal employees. OMB is performing this review in accordance with the President's March 4, 2009, Memorandum on Government Contracting and section 321 of the FY2009 NDAA. As such, it is premature that the definition of what is an acquisition function closely associated with an inherently governmental function be determined until such time as OMB concludes its statutory and overarching requirement to define the meaning of inherently governmental function.

Finally, with respect to definitively identifying an Acquisition Function Closely Associated with an Inherently Governmental Function, the proposed rule as drafted would be inconsistent with the enumerated functions in FAR 7.503(c)(12). The list in FAR 7.503(c)(12) should be used in the proposed rule in order to reduce confusion that would exist with several different regulatory definitions of functions closely associated with an inherently governmental function and to align with the requirements of 10 U.S.C. 2383(b).

Personal Conflict of Interest. The proposed definition of PCI is imprecise. PCI covers “financial interests, personal activity, and relationships” that could impair a covered employee’s ability to act in an impartial manner and in the best interest of the Government when performing under the contract. The definition includes a presumably non-exclusive list of examples, but that is not clear in the proposed rule. All of the cited examples relate to the financial interests of the employee, including close family and other household members. Non-financial examples are not provided for personal activities and relationships. Most of the examples contain key words that are not defined (i.e., close family members, other members of the household, other employment or financial relationships, gifts, compensation, consulting relationships). Many of the terms appear to presume a familiarity by contractor employees with terms ascribed to the government’s standards of conduct. For many individuals working in service companies, these terms may correlate to known standards of conduct or employee behavioral guidelines, but for many individuals, the terms articulated in the proposed rule as elements related to a PCI disclosure or as causing a violation will not be identical nor match their own company’s standards or prior experiences.

We believe that further explication of the many varied elements and circumstances involved in the terms “financial interests, personal activity and relationships” will be needed before any final rule can be applied consistently and fairly. Such clarity requires the Councils to craft a definition that does not rely on incomplete examples and to define all relevant and operative terms including reasonable parameters or thresholds that might provide more guidance to COs when making pre-or post award determinations about PCI. This is especially critical considering the potential remedies, since these CO determinations could not only cause companies to lose future contract opportunities, be terminated, suspended or debarred, but also cause individual contractor (and taxpaying) employees to be terminated and/or punished without just cause.

Moreover, any system attempting to define terms pertaining to PCIs should not be modeled solely on the government’s standards of conduct, or attempt to overlay those standards on existing industry compliance programs, since contractor employees and government employees have uniquely defined resource systems, differing employment interests, benefits, and standards of performance. Conversely, service contractor employees should not be held to a higher standard of conduct relative to PCI than government employees are in their own standards of conduct at 5 CFR 2635. Any final rule should allow for extensive training of government and contractor employees in PCI so that contractors can recognize factually when PCI exists and act properly throughout the acquisition cycle.

2. Procedures (FAR 3.1103 and 52.203-16(b)).

As drafted, FAR 3.1103(a)(1) and 52.203-16(b)(1) require contactors to have procedures in place to screen covered employees for PCI including [the financial disclosure statement requirements in the subsequent subparagraphs]. We recommend deleting the word “including” and substituting the word “by” since the screening requirements should be defined clearly. In FAR 3.1103(a)(1)(i) and 52.203-16(b)(1)(i), we recommend deleting the word “maintaining” and substituting the word “retaining” since we believe the intent is to require retention rather than maintenance of the completed financial disclosure statements.

We urge the Councils to separately introduce for public comment a definitive type of financial disclosure statement in the FAR that would suffice to meet the requirements of the proposed rule.

Updating Financial Disclosure Statement. FAR 3.1103(a)(1)(iii) requires contractors to have procedures in place to require “each covered employee to update the disclosure statement whenever a new personal conflict of interest occurs.” FAR 52.203-16(b)(1)(iii) states that contractors must require “each covered employee to update the disclosure statement whenever his/her personal or financial circumstances change.” FAR 3.1103(a)(3)(i) requires contractors to inform employees of their obligation “to disclose changes in personal or financial circumstances and prevent personal conflicts of interest” (a similar requirement is not included in FAR 52.203-16(b)(3)(i)). These requirements are inconsistent and unreasonable. An employee may not know that a change in information reported previously on the financial disclosure statement creates a PCI. Accordingly, the requirement to report any change in personal or financial circumstance is unreasonable and inconsistent both because it relies on a technical knowledge by contractor employees about PCI. Not even the government standards of conduct require this type of rolling financial disclosure reporting. They require only yearly updates and apply only to a limited number of senior government positions. Thus, the requirement in 3.1103(a)(1)(iii) and FAR 52.203-16(b)(1)(iii) for disclosure updates based on an employees knowledge of PCI should be deleted.

Preventing PCI. FAR 3.1103(a)(2)(i) and 52.203-16(b)(2)(i) require contractors to prevent PCI including (emphasis added) not assigning or allowing a covered employee to perform any task under the contract if the Contractor (emphasis added) has identified a PCI for the employee that the contractor or employee cannot satisfactorily prevent or mitigate in consultation with the contracting agency (emphasis added).

Replacement of the term “including” with the term “by”. We recommend deleting the word “including” and substituting the word “by” in any coverage since the requirement to prevent PCI should be defined clearly.

Responsibilities of the Contractor. Identification of PCI should not be the sole responsibility of the contractor. The employee, contractor and the Government have a role in identifying PCI. The identification of PCI will be more difficult for contractors than identifying organizational conflicts of interest (OCI). Unlike OCI, PCI screening is dependent to a significant extent on information provided by employees. The FAR should specify that contractors acting in good faith may rely on the information submitted by employees on the financial disclosure statement. Review of the financial disclosure statement presents challenges. Contractors use sophisticated procedures and systems to screen for OCI. Typically, the solicitation and information regarding the proposal team is distributed widely across a corporation to identify potential OCI. In the largest corporations, hundreds of people review each OCI screening request. A different paradigm will be required for reviewing completed financial disclosure statements that will contain sensitive personal information. Because of the inclusion of personal information, wide-scale or even limited distribution of employee financial disclosure statements will not be practical and may be legally unsound, depending on the state where the employee or contractor resides or works and/or whether privacy concerns have been met by the contractor to the extent needed to fulfill both the requirements of this rulemaking process and other relevant federal and state employment and privacy laws. Alternatively, the FAR should specify that review of completed financial disclosure statements by the employee’s supervisor and legal counsel or ethics officer is sufficient.

Role of the Contracting Agency. The role of the contracting agency is not clear. It appears that the contracting agency has no role in identifying PCI. The Government may possess information unavailable reasonably to the contractor that could be used to identify PCI. The proposed rule requires consultation with the contracting agency only when the

contractor does not assign or allow a covered employee to perform any task under the contract due to a PCI that the contractor or employee cannot satisfactorily prevent or mitigate. It is not clear why consultation is required in this circumstance since a PCI that cannot be mitigated has already been identified by the contractor. In any case, we recommend deleting “contracting agency” and substituting “contracting officer”. We urge the Councils to clarify the role of the contracting officer in identifying, preventing, and mitigating PCI.

Avoiding the Appearance of PCI. FAR 3.1103(a)(3)(iii) and 52.203-16(b)(3)(iii) require contractors to inform employees of their obligation “to avoid even the appearance of PCI.” This requirement is not included in the statute and like other PCI tests and elements, would require a level of legal and technical knowledge not commensurate with the application of this proposed rule. Employees are subject to disciplinary action and contractors are subject to sanctions for failure to comply with PCI policies. Avoiding “the appearance” of PCI is a vague standard and would lead to arbitrary actions and disputes and litigation. We strongly urge the Councils to delete this requirement.²

Reports of Violations. FAR 3.1103(a)(6) and 52.203-16(b)(6) require contractors to report to the contracting officer any PCI violation by a covered employee “as soon as it is identified.” This requirement is contained in section 841(a)(1)(B)(iii) of the statute. The proposed regulations also require the report to the contracting officer to include a description of the violation “and the actions taken by the contractor in response to the violation.” This additional requirement is not included in the statute and the two elements appear to be facially inconsistent. It is not clear how contractors will report a violation “as soon as it is identified” and yet include in the report a description of actions taken by the contractor in response to the violation. Such actions will likely take time to consider and execute. Reports are required “as soon as [a violation] is identified.” The FAR should clarify that contractors may investigate suspected or potential violations in a timely manner (i.e., only confirmed violations are subject to the “as soon as it is identified” standard). The proposed rule does nothing to clarify whether violations of the proposed PCI rule constitute a mandatory disclosure under FAR Part 3.10 or clause 52.203-13, Contractor Code of Business Ethics or Conduct, or cross-reference those sections to provide proper notice that a PCI violation may or may not be subject to the requirements of other mandatory disclosure clause requirements.

Description of Violations. FAR 52.203-16(b)(6) specifies that PCI violations include (emphasis added) — (i) Failure of a covered employee to disclose a PCI; and (ii) Use by a covered employee of non-public Government information for personal gain. We recommend deleting the word “include” and substituting the word “by” in any coverage since PCI violations should be defined clearly. We recommend revising (i) to read “Failure of a covered employee to complete or update a financial disclosure statement as required by paragraph (b).” We recommend adding a third violation to paragraph (b)(8), “(iii) Failure of a covered employee to comply with the terms of a non-disclosure agreement.”

Finally, with respect to the overall process requirements of the proposed rule, compliance will certainly require the establishment of a comprehensive ethics compliance

² The “appearance” standard as it relates to conflicts of interest typically applies to government employees empowered to act in the public trust and in some professions where financial liability directly results from having such conflicts. In such professions, there are requirements to undergo extensive training to recognize the potential for such conflicts. This rule does not contemplate such a training regime for contractor employees, and such a vague standard should be stricken from the rule.

program related solely to identifying and managing PCIs over and above any existing ethics programs currently in force at contractor facilities or business units. The nature of this compliance process is different from the existing ethics program requirements because, at the very least, it requires contractors to collect and manage employee financial disclosures, which necessarily includes the assumption of a heightened level of legal and fiduciary risk by companies performing on certain types of service contracts.

The direct and indirect cost of such a compliance program has never been calculated or examined as part of this rulemaking process, even back to the original ANPR from March of 2008. We note that the ANPR process for FAR case 2007-017 issued in March of 2008, and serving as the regulatory precursor for this proposed rule, resulted in a significant amount of industry comment on many of the issues identified in the proposed rule and this letter, none of which have factored into the development of this rule to our knowledge. The cost of process compliance figured large in those comments as well as the idea of a phase-in period and a mandatory government sponsored training requirement for their own employees. These elements are mentioned nowhere in this proposed rule, nor do they appear to have figured in the Council's drafting of the proposed rule.

3. Mitigation and Waiver. FAR 3.1104 and 52.203-16(c) allow the head of the contracting activity, in exceptional circumstances, to agree to mitigation of a PCI or waive the requirement to prevent PCI for a particular employee if in the best interest of the Government. We agree with this concept, but the timing of such a process during the acquisition cycle is unclear, so we recommend the Councils develop a solicitation provision to allow offerors to seek mitigation or waiver at the time of proposal submittal and clarify the standard for what constitutes a PCI acceptable mitigation plan. The government should also be prepared to acknowledge and recognize that PCI compliance and mitigation or lack thereof could have a lingering negative impact on competition for the affected types of service contracts. In many cases, the competition may hinge on HCA approval of a mitigation plan far enough in advance of the competitive process to enable contractors to make informed business decisions and/or to devote limited bid and proposal costs to entering such potentially restrictive competitions. With mitigation plans looming over the competition for the affected types of services, there is a risk of decreasing full and open competition and increasing the number of sole source contracts.

4. Violations and Remedies. 52.203-16(d) includes a list of remedies for the contractor's failure to comply with the requirements of the clause: suspension of contract payments; loss of award fee, consistent with the award fee plan, for the performance period in which the Government determined contractor non-compliance; termination of the contract for default or cause, in accordance with the termination clause of the contract; disqualification of the contractor from subsequent related contractual effort; or suspension or debarment. These remedies "are in addition to other remedies available to the Government." FAR 3.1105(b) specifies that if there is sufficient (emphasis added) evidence of a violation, the contracting officer shall pursue (emphasis added) appropriate remedies as listed in the clause. We object strongly to the inclusion of this list in the clause. If FAR 3.1105(b) is retained, we recommend revising "sufficient" evidence to read "substantial" evidence and revising "pursue" appropriate remedies to read "consider" appropriate remedies.

Suspension of Contract Payments. The FAR specifies the circumstances in which the contracting officer may suspend contract payments. For example, under 10 U.S.C. 2307(i)(2) and 41 U.S.C. 255, as amended by the Federal Acquisition Streamlining Act of 1994, Public Law 103-355, the agency head may provide for a reduction or suspension of further payments to a contractor when there is substantial (emphasis added) evidence that the contractor's

request for advance, partial, or progress payments is based on fraud. As another example, the contracting officer may reduce or suspend progress payments or performance-based payments due to the contractor's failure to comply with any material requirement of the contract (this would include failure to comply with 52.203-16). However, the contracting officer is cautioned "to take these actions only in accordance with the contract terms and never precipitately or arbitrarily." Contractors are provided notification and an opportunity for discussion in most circumstances. The contracting officer must "consider the general equities of the particular situation." In all cases, contracting officers must "act fairly and reasonably; base decisions on substantial evidence; and document the contract file." If the list is retained at 52.203-16(d) and it includes suspension of contract payments, FAR 3.1105 must provide due process for contractors that are similar to the due process that exists currently with respect to reduction or suspension of progress payments and performance-based payments.

Loss of Award Fee. Since any loss of award fee must be consistent with the award fee plan, this language is unnecessary. Moreover, award fees are highlighted and arbitrarily inserted into this rule since there is no evidence to conclude that award fee contracts may be more susceptible to PCI violations than other types of service contracts and there is no requirement in the statute to isolate award fee contracts for special treatment.

Termination for Default or Cause. Since the termination for default or cause must be in accordance with the termination clause of the contract, this language is unnecessary.

Disqualification of the Contractor. Disqualification of the contractor from subsequent related contractual efforts would amount to *de facto* suspension or debarment without any due process for contractors. There is no support for this extreme remedy and we thus object strongly to this concept as anti-competitive and overreaching.

Suspension or Debarment. Since suspension or debarment is addressed adequately in FAR 9.4, this language is unnecessary. If retained, the language should reference FAR 9.4.

We strongly disagree with the provisions set forth in the proposed clause at FAR 52.203-16(d) Remedies that states "...the Contractor's failure to comply with the requirements of paragraphs (b), (c)(3), or (e) ". This phrase makes the contractor responsible for an employee's wrongful acts without a need to prove that the contractor breached its responsibilities in one of the enumerated paragraphs. History has shown that all of the procedural and oversight mechanisms put in place to prevent misconduct, inadvertent errors will be made. Of the errors made, the majority of those errors do not involve intentional wrongdoing. A contractor should be subject to remedies when it fails to address issues within its control, not as a guarantor of flawless performance by its employees in the area of personal conflicts of interest. Ergo we urge the Councils to make plain in the Ergo we urge the Councils to make plain in the publication of the final rule that there is no imposition of absolute liability upon contractors, absent a showing that the contractor neglected one of its duties under the regulation. We strongly urge the Council to delete section d) of the proposed FAR 52.203-16 in its entirety.

We object strongly to the inclusion of this list of remedies in FAR 52.203-16. The preamble to the *Federal Register* notice stated that the Councils welcome comment on additional controls or remedies to help deter non-compliance such as annual reporting requirements to verify compliance with the clause requirements, or certification by the contractor or the contractor's employees. We believe the FAR contains adequate remedies to address

non-compliance with any material requirement of a contract including the proposed FAR 52.203-16.

5. Subcontract Flowdown

The Council needs to clarify the requirements for flowdown. FAR 52.203-16(e) mandates flowdown to subcontracts that exceed \$100,000 in which *subcontractor* employees perform acquisition functions closely associated with inherently governmental functions, but the definitions section at FAR 3.1101 refers to *covered* employees which term includes any individual who is an employee of a subcontractor, or a consultant, partner or sole proprietor. The Council should align these sections so that it is clear who is required to be included in the PCI process and at what level the clause would apply.

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