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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 1, 3, 12, and 52

[FAC 2005-54; FAR Case 2008-025; Item II; Docket 2009-0039, Sequence 1]

RIN 9000-AL46

Federal Acquisition Regulation; Preventing Personal Conflicts of Interest for Contractor Employees Performing Acquisition Functions

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: DoD, GSA, and NASA are issuing a final rule amending the Federal Acquisition Regulation (FAR) to address personal conflicts of interest by employees of Government contractors as required by statute.

DATES: Effective Date: [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER.]

Applicability Date: Except for contracts, including task or delivery orders, for the acquisition of commercial items, this rule applies to—

- Contracts issued on or after the effective date of this rule; and
- Task or delivery orders awarded on or after the effective date of the rule, regardless of whether the contracts, pursuant to which such task or delivery orders are awarded, were awarded before, on, or after the effective date of this rule.

Contracting officers shall modify, on a bilateral basis, in accordance with FAR 1.108(d)(3), existing task- or delivery-order contracts to include the FAR clause for future orders. In the event that a contractor refuses to accept such a modification, the contractor will not be eligible to receive further orders under such contract.

FOR FURTHER INFORMATION CONTACT: Mr. Anthony Robinson, Procurement Analyst, at (202) 501-2658, for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501-4755. Please cite FAC 2005-54, FAR Case 2008-025.

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I. Background

Section 841(a) of the Duncan Hunter National Defense Authorization Act (NDAA) for Fiscal Year 2009 (Pub. L. 110-417), now codified at 41 U.S.C. 2303, requires that the Office of Federal Procurement Policy (OFPP) develop policy to prevent personal conflicts of interest by contractor employees performing acquisition functions closely associated with inherently governmental functions for, or on behalf of, a Federal agency or department. The NDAA also requires OFPP to develop a personal conflicts-of-interest clause for inclusion in solicitations, contracts, task orders, and delivery orders. To address the requirements of section 841(a) in the most effective manner possible, OFPP collaborated with DoD, GSA, and NASA on this case to develop regulatory guidance, including a new subpart under FAR part 3, and a new clause for contracting officers to use in contracts to prevent personal conflicts of interest for contractor employees performing acquisition functions for, or on behalf of, a Federal agency or department.

DoD, GSA, and NASA published a proposed rule in the Federal Register at 74 FR 58584 on November 13, 2009. OFPP and DoD, GSA, and NASA proposed a policy that would require

each contractor that has employees performing acquisition functions closely associated with inherently governmental functions to identify and prevent personal conflicts of interest for such employees. In addition, such contractors would be required to prohibit covered employees with access to non-public Government information from using it for personal gain. The proposed rule also made contractors responsible for—

- Having procedures to screen for potential personal conflicts of interest;
- Informing covered employees of their obligations with regard to these policies;
- Maintaining effective oversight to verify compliance;
- Reporting any personal conflicts-of-interest violations to the contracting officer; and
- Taking appropriate disciplinary action with employees who fail to comply with these policies.

Comments were received from 19 respondents; these are analyzed in the following sections.

II. Discussion and Analysis of the Public Comments

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) have reviewed the public comments in development of the final rule. As a result of this review, the Councils have incorporated some

changes in the final rule, including the following more significant changes:

- Revised the definition of “covered employee” to clarify applicability to subcontracts.
- Revised the contracting officer procedures at FAR 3.1103(a)(1) and (a)(3), and (b)(3).
- Revised the discussion of violations at FAR 3.1105.
- Added a new paragraph FAR 3.1106(c) to provide additional clarification on use of FAR clause 52.203-16 when contracting with a self-employed individual.
- Amended 12.503(a) to clarify that the statute does not apply to contracts for the acquisition of commercial items.
- Revised the clause at FAR 52.203-16 by—
 - Clarifying the financial disclosure requirements in paragraph (b)(1), including deletion of the requirement for an annual update of the disclosure statement;
 - Adding to the list of possible personal conflicts-of-interest violations in (b)(6);
 - Removing the list of remedies in paragraph (d); and
 - Clarifying the clause flowdown.

A. General

Comments: Several respondents commented on general elements of the proposed coverage. Some supported implementing the proposed coverage, while others stated that the proposed rule is not necessary, is duplicative, or should not apply to certain organizations, such as DoD-sponsored Federally Funded Research and Development Centers (FFRDCs).

Response: The Councils concur with those respondents who support the rule. In addition to implementing a statutory requirement, contained in section 841(a) of the NDAA for FY 2009, the proposed coverage fills a current gap in the FAR, which contains very little coverage on preventing personal conflicts of interest for contractor employees. The proposed coverage is not duplicative of current organizational conflicts-of-interest coverage, or the current coverage in FAR subpart 3.10 regarding the contractor Code of Business Ethics, and should not be limited to exclude FFRDCs.

Comments: Several respondents addressed the issue of whether personal conflicts-of-interest coverage for contractor employees should mirror the ethics rules that apply to Government employees.

Response: The Councils recognize that most of the ethics statutes that apply to Government employees are not

applicable to contractor employees. The differences between the coverage here and the ethics standard applicable to Federal employees reflect those differences in the underlying statutes.

B. Definitions

1. Acquisition function closely associated with inherently governmental functions

Comments: Some respondents suggested that the definition be limited, either by explicitly restricting it to actions performed on behalf of the Government or by removing the term "supporting" from the definition. Some respondents argued that the proposed definition was problematic because it was inconsistent with current FAR coverage or the statutory language in the NDAA. Two respondents suggested waiting to issue a final rule until the Office of Management and Budget's (OMB) review of inherently governmental functions was complete, to ensure compatibility with any definitions issued as a result of that review. One of these respondents recommended publication of a revised proposed rule rather than a final rule.

Response: Contextual text and applicability already limit the definition to an appropriate class of actions, and striking the word "supporting" would imply that contractors were performing inherently governmental tasks, which is

prohibited by law and regulation. While the definition provided is not identical to that provided in FAR 7.503(c)(12) or to the summary definition provided in the NDAA, it builds on both of those definitions and is not inconsistent with them, and no changes were made to the final rule that would require that it be delayed or published as a revised proposed rule. Finally, if changes will be required as a result of future OMB guidance regarding work closely associated with inherently governmental functions, a separate case will be opened to implement them.

2. Covered employee

a. Prime contractor should not be responsible for employees other than own employees

Comments: Several respondents were concerned that the definition of "covered employee" could be interpreted to include employees of contractors, subcontractors, consultants, and partners. Respondents were concerned that assuming responsibility for all of these employees would create an unreasonable burden because the prime contractor could not impose disciplinary actions against other companies' employees or adequately identify or address personal conflicts of interest with respect to such employees.

Response: The Councils have modified the definition to clarify that the contractor is not directly responsible for the employees of subcontractors. The subcontract flowdown portion of the clause at FAR 52.203-16(e) will ensure that subcontractor employees are adequately covered while making sure that the subcontractor bears responsibility for its employees.

b. Self-employed individual

Comment: One respondent stated that in the case of a self-employed individual, the disclosure forms would be submitted to the same person filling out the form.

Response: The Councils have addressed this issue in the final rule. When a self-employed individual is a subcontractor and that individual is personally performing the acquisition function closely associated with inherently governmental functions, rather than having an employee of the subcontractor perform the function, then the self-employed individual will be treated as a covered employee of the prime contractor for purposes of this rule and the clause will not flow down. In such case, the clause could not meaningfully flow down to the subcontractor, because there is no employer/employee relationship involved at the subcontract level of performance. The individual completing the disclosure form and the individual accepting and reviewing those forms cannot be one and the same. The

definition of "covered employee" was modified to reflect this.

Similarly, the clause cannot meaningfully apply at the prime level if the functions are to be performed by a self-employed individual, rather than a contractor employee. Since a self-employed individual is a legal entity, conflicts of interest relating to a prime contract with an entity (whatever its composition) are covered under the organizational conflicts of interest coverage at FAR subpart 9.5.

c. Limit covered employee to those specifically performing the acquisition functions under the contract

Comment: One respondent raised the concern that agencies might interpret "covered employee" to mean all employees who work for a Government contractor, and suggested that the definition should be revised to clarify that a covered employee is an employee that is remunerated specifically to perform acquisition functions closely associated with inherently governmental functions.

Response: The definition, as amended, is clear that an employee is only covered under the rule if the employee performs acquisition functions closely associated with inherently governmental functions. Further, "acquisition function closely associated with governmental functions" is

defined to tie directly to support of the activities of a Federal agency.

3. Non-public Government information

Comments: One respondent suggested that the definition of "non-public Government information" be limited by providing more specific guidance. One specific approach that was suggested involved requiring that any protected information be explicitly designated as such in writing by the Government. Another respondent suggested that the rule should be broadened to prohibit contractor employees from using any information related to the contract on which they work. This respondent stated that anything less would "open the floodgates" for mitigation or waivers, and debates over timelines of when information was publicly available.

Response: It would be overly burdensome to require that all such information be explicitly marked by the Government. The definition of "non-public Government information" was intended to have a broad meaning, including proprietary data belonging to another contractor as well as information that could confer an unfair competitive advantage to a contractor for whom the employees work. This proposed definition requires the use of judgment on the part of contractors. A contractor employee should presume that all information given to a contractor has not been made public unless facts clearly indicate the contrary.

Further, the definition of "non-public Government information" is similar to the standard Government employees use executing their jobs—a standard that is particularly appropriate when tasks involve acquisition functions closely associated with inherently governmental functions.

This topic is relevant to other pending and forthcoming FAR cases, and for that reason, some structural changes have been made to the definition to harmonize this case with potential future usage. Specifically, the qualification that the information be accessed through performance on a Government contract has been removed from the definition, but has been applied in the rule text in appropriate places.

4. Personal conflict of interest

Comments: Many respondents commented on the definition of "personal conflict of interest" in proposed FAR 3.1101 and also in the clause at FAR 52.203-16(a).

One cautioned against defining the term "personal conflict of interest" by relying solely on terminology used in the Government's Standards of Conduct for Employees of the Executive Branch (Standards), at 5 CFR 2635, urging the Councils to take differences between the Government and contractor workforce into account.

Several other respondents considered the proposed definition of "personal conflict of interest" to be imprecise. Each of these respondents identified terms in

the definition that are undefined or that they deemed ambiguous or overly broad, including "personal activity," "relationship," "close family members," "other members of the household," other employment or financial relationships," "gifts," "compensation," and "consulting relationships." Although one of these organizations counseled against relying too heavily on language in the Government's standards, as discussed above, four others recommended that the Councils borrow from comparable definitions in existing Government regulations.

One respondent suggested an alternative definition of the term "personal conflict of interest" that it considered an amalgam of the proposed definition and definitions in the ethics regulations and the Troubled Asset Relief Program regulations at 31 CFR 31.201, while another respondent urged that the definition of "personal conflict of interest" not rely on a listing of examples that is incomplete, yet not specifically designated as non-exclusive.

One respondent urged that the rule "incorporate some element of contemporaneous 'knowledge' on the part of the covered employee before the PCI requirements are triggered," and that coverage be included to exclude de minimis ownership or partnership interests. On the other hand, another respondent recommended that the definition of "personal conflict of interest" be expanded in scope to

capture personal conflicts of interest that can arise from prior work or employment undertaken in support of Government acquisition functions.

Response: As explained in the preamble to the proposed rule, the Councils considered various sources of guidance when developing the definition of "personal conflict of interest." The definition of "personal conflict of interest" provided by the rule clearly borrowed from the Government ethics provisions. On the other hand, the Councils intentionally did not create a mirror image of either 18 U.S.C. 208 or the Government's impartiality provision. The Government's impartiality standard judges a public servant's circumstances from the perspective of a "reasonable person," whereas the FAR standard focuses on the contractor's obligation to the Government and defines a "personal conflict of interest" as a situation "that could impair the employee's ability to act impartially and in the best interest of the Government when performing under the contract." (A verb other than "impair" was inadvertently used in the proposed contract clause. The Councils have corrected this error to make the clause consistent with the rule text.)

Similar to the Government's approach in its ethics regulations, the proposed definition of "personal conflict of interest" listed "sources" of conflicts, including the

financial interests of an employee and other members of his or her household, and then listed types of financial interests in subparagraphs (2)(i) through (2)(viii). In response to several comments, the Councils have decided to revise the wording of paragraph (2) of the definition to make it clear that this listing is intended to amplify the term "financial interest" as used earlier in the definition. The Councils have also inserted the words "[f]or example" at the beginning of paragraph (2) to clearly indicate that the listing in subparagraphs (2)(i) through (2)(viii) is not exhaustive.

The Councils have not attempted to further define other terms or phrases used within the definition of "personal conflict of interest." The Councils consider the proposed terminology adequate to enable a contractor to develop screening procedures that will elicit relevant information from its covered employees. In the definition of "personal conflict of interest", the regulation affords flexibility regarding de minimis interest, since it may be determined that a de minimis interest would not "impair the employee's ability to act" with the required objectivity. Separately, although no "knowledge" element has been added, the Councils acknowledge that neither a contractor nor its employees can apply the impartiality standard if it cannot yet be known what interests may be affected by a particular acquisition.

C. Applicability

Comments: One respondent recommended that specific language be added to the proposed rule limiting its application to those contractor employees who directly support Government buying offices.

Response: Section 841(a) of the NDAA for FY 2009 required that policy be developed to prevent personal conflicts of interest by all contractor employees performing acquisition functions closely associated with inherently governmental functions for, or on behalf of, a Federal agency or department, and not all such work occurs in direct support of a buying office.

Comment: One respondent stated that the statutory requirement that the clause be included in task or delivery orders is not recognized in the rule.

Response: The applicability to task or delivery orders against existing contracts is addressed under the applicability date in this preamble. Such transitional issues are not included as part of the regulation, because they are only temporary, until the clause is included in most existing contracts.

D. Contractor procedures

1. Screening of covered employees (including financial disclosure)

Comments: More than half the respondents commented on this issue, and provided a variety of concerns and suggestions, which are addressed more specifically in the following response.

Response: In response to these comments, the Councils have narrowed the scope of the required disclosures in a number of ways. First, in response to concern that the word "including" in FAR 3.1103(a) created ambiguity, the Councils have substituted the word "by," to indicate that disclosure is the mandated screening mechanism. Next, in response to a wide variety of comments regarding the breadth of required disclosures, the Councils have made several revisions to FAR 3.1103(a)(1) to make it clear that contractors are afforded some flexibility in determining how to implement the screening requirement (i.e., one method of effective screening might require each covered employee to review a list of entities affected by the upcoming work and either disclose any conflict or confirm that he or she has none), and to allow that disclosures be limited to financial interests "that might be affected by the task to which the employee has been assigned." Finally, the Councils recognized that other potential sources of conflicts, including employment or gifts, should be covered by these procedures as well.

The Councils have also made changes in response to a number of respondents that noted inconsistencies and other concerns regarding updates to employee financial disclosures. These changes include ensuring that the language in FAR part 3 is consistent with the language in the clause, and that both require an update only when "an employee's personal or financial circumstances change in such a way that a new personal conflict of interest might occur because of the task the covered employee is performing." If it is the task that changes, rather than the financial circumstances, the situation will be covered by the requirement to obtain information from a covered employee "when the employee is initially assigned to the task under the contract." Implementing "as needed" disclosure addresses one respondent's concern about selling and repurchasing assets to avoid personal conflict of interest requirements, and also eliminates the need for disclosure on an annual basis.

Comments: In addition, several respondents addressed other areas related to the financial disclosure requirement. Several respondents were generally critical of the burden involved in the requirement to screen employees for conflicts of interest, arguing that it is short-sighted and "has an element of impossibility," or that it would be "onerous and unproductive" to require disclosure, for

example, every time a covered employee's retirement portfolio, or that of his or her spouse, might include potential contractors. Other respondents stated that the financial disclosure requirement is intrusive, and would provide employers with "unprecedented insight into employee private financial data" that would give the employer leverage during negotiations about salary, benefits, and work conditions.

Response: The Councils carefully considered the comments that were critical of the burdensome or intrusive nature of the screening process involving financial disclosure, but have determined that the concerns expressed are outweighed by the importance of assuring the integrity of the Government's acquisition process.

Comments: Finally, two respondents recommended clarification of roles and responsibilities concerning the review of financial disclosure statements. One recommended that the rule should specify that contractors acting in good faith may rely on the information submitted by their employees or that the rule specify that review by the employee's supervisor and legal counsel or ethics officer is sufficient. The other recommended that the contractor should be required to designate an official to solicit and review financial disclosure statements, but also suggested that the Government's contracting officer should review the

statements and be able to access the services of subject matter experts to assist with the review. The same respondent also suggested that the rule should require that the covered employee's submission "be accompanied by a certification as to the accuracy, completeness and truthfulness of the submission."

Response: The Councils consider that it is the contractor's responsibility to decide how to review employee disclosures. Government contracting officers have not been assigned the responsibility to review disclosures of financial interests. Further, there is a statutory prohibition on adding non-statutory certification requirements to the FAR without express written approval by the Administrator for Federal Procurement Policy (see FAR 1.107).

2. Prevent personal conflicts of interest (including nondisclosure agreements)

a. Preventing personal conflicts of interest

Comments: Some respondents provided comments in this area concerning the role of the Government in contractor processes. For example, one respondent pointed out that the requirement to reassign tasks does not oblige the contractor to report known or reported conflicts of interest to the contracting officer in order for reassignment to occur. Others suggested that the required non-disclosure agreements

be submitted to the contracting officer for review and approval.

Response: It is up to the contractor to manage its employees, and to assign them in a way that prevents personal conflicts of interest. The Government only needs to be informed if violations occur, or if the contractor needs approval for a mitigation plan or requests a waiver. Similarly, while employer/employee non-disclosure agreements will be available for Government inspection for recordkeeping compliance purposes, it is the contractor's responsibility to ensure that such agreements are enacted and enforced.

b. Non-disclosure agreements (NDAs)

Comments: One respondent stated that the proposed rule did not provide any specific guidance concerning the NDA requirement. This respondent requested that the Councils address—

- Which parties are required to sign an NDA;
- Whether the contractor and/or the contractor employee are required to execute the NDA for each entity that provides information to which it will have access;
- Whether an entity that submitted non-public information is entitled to know who has signed an NDA relating to that information; and

- Whether there is a required duration for the NDA.

If an NDA is not indefinite, how should a contractor address protection of non-public information when the NDA expires?

Response: The rule requires that each employee sign an NDA with respect to information obtained during the course of the work being performed under the contract. The agreements should be structured to protect the interests of the information owner(s), the contractor, and the contractor employee, including protection of appropriate length (often indefinitely or until the information is otherwise made public). Since these agreements will be executed between each individual contractor and that contractor's employees, and contractors are not required to provide any notice of those agreements, there will be no means of providing an entity with a listing of those who have signed NDAs which cover their information.

3. Appearance of a conflict

Comments: Several respondents expressed concern about the difficulty contractors face in identifying circumstances that suggest "even the appearance of personal conflicts of interest." These respondents state that the standard is vague and too difficult for contractors and their employees to implement. One respondent points out that there are likely different standards in the "healthcare, defense, or

transportation industries" and suggests limiting language along the lines of "consistent with industry norms."

Response: The rule requires that contractors inform covered employees of their obligation to avoid even the appearance of personal conflicts of interest. That same obligation is imposed on Government employees by FAR 3.101-1. Nothing in this rule requires a report of an "appearance of conflict." Concern about how to deal with an "appearance of a conflict," where in fact there is actually no conflict, is difficult, but once sensitized to the issue of appearances, contractors and contracting officers can develop solutions to the appearance questions that will protect the public's trust in the acquisition system.

The Councils do not concur with the suggestion that the rule incorporate industry norms as a standard. While there very well may be different ways of doing business in the healthcare, defense, and transportation industries, the threshold provided here is the minimum level of coverage required across all industries regarding personal conflicts of interest and the appearance of such conflicts.

4. Report violations to the contracting officer

a. Timing of the report

Comments: Various respondents raised concerns regarding the report to the contracting officer. They pointed out that the proposed rule both required a report of

a conflict "as soon as it is identified" and also requires a full description of the violation and the actions taken. The respondents suggested that the rule permit some time for investigation and consideration of action before reporting the conflict. Another suggestion was to allow for a specified number of days to report.

Response: In response to these comments, the Councils have clarified that the initial report of immediate actions taken may be followed with a report of subsequent corrective action. The respondents correctly pointed to the apparent dilemma presented in the proposed rule which requires a report, as soon as the conflict is identified, and yet requires that the report include a full description and a contractor resolution. The rule necessarily requires that the contractor notify the contracting officer about a conflict "as soon as it is identified" so that, if necessary, the contracting officer can take immediate steps to protect the Government.

The violation has not been "identified" until the Contractor has performed sufficient investigation to confirm that a violation has occurred. Practically speaking, we would expect contractors will be able to identify the conflict, initially assess its scope, and even evaluate potential corrective actions relatively quickly. We would also expect that in proposing corrective action, it will be

necessary in many cases that the contractor takes the time to evaluate the seriousness of the matter and develop a solution acceptable to the Government, as well as the employee in some circumstances (where the violation was inadvertent, for instance). The final rule better reflects the requirements of such situations.

b. Report violations to the Inspector General

Comments: Several agency respondents recommend that the report be made to the Inspector General, as well as the contracting officer.

Response: Not all employee personal conflict-of-interest violations are violations of criminal law or nefarious. The contractor's report is treated here as a contractual issue to be addressed first by the contractor and then by the contracting officer. There is no reason to add a third party, such as the Inspector General, unless violation of Federal criminal law has occurred. In those cases, a report to the Inspector General will already be required in accordance with FAR 52.203-13(b)(3). On the other hand, nothing in this rule prevents individual agencies and their Inspector General from establishing internal procedures for coordinating contractor reports.

5. Specify period of record retention

Comments: One respondent recommended that the proposed rule should include language requiring that contractors

maintain records of financial disclosures and all actions taken in response to an alleged personal conflict of interest for a certain period of time (perhaps 3 or 5 years).

Response: FAR 4.703 provides requirements for retention of contractor records (generally 3 years after final payment). Subpart 4.7 applies to records generated under contracts that contain either of the FAR audit and records clauses (FAR 52.214-26 or FAR 52.215-2). Pursuant to these clauses, contractors must generally make records available to satisfy contract negotiation, administration, and audit requirements of the contracting agencies and the Comptroller General.

E. Mitigation or waiver

Comments: One respondent recommended removing the requirement that any mitigation or waiver be limited to exceptional circumstances. At the other end of the spectrum, one respondent suggested that mitigation and waiver not be allowed at all.

Response: While the goal of the rule is to prevent personal conflicts of interest, making provision for mitigation or waiver in exceptional circumstances is necessary to prevent potential negative consequences to the Government. Balancing these goals is achieved by requiring that any mitigation or waiver be approved in writing,

including a description of why such action is in the best interest of the Government.

Regarding the suggestion to allow approval of mitigation at the chief of the contracting office level, mitigation and waiver should only be employed in exceptional circumstances, and one means of ensuring this is requiring the approval of the head of the contracting activity.

F. Violations/remedies

1. Description of violations by covered employees (FAR 3.1103(a)(6) and FAR 52.203-16(b)(6))

Comment: One respondent recommended several changes to this section, which are addressed more specifically in the following response.

Response: While the Councils do not concur with recommendations to create a definitive list of violations to replace the examples, or to alter the requirement to report violations to tie specifically to a failure to update the required financial disclosure form, the Councils do concur with the suggestion to include "Failure of a covered employee to comply with the terms of a non-disclosure agreement," in the list of violations. This covers situations where the inappropriate disclosure of information might not be due to a personal conflict of interest or for personal gain, but instead results from thoughtless or

careless action. Furthermore, this is parallel to the construction of the requirements in FAR 3.1103(a)(2)(iii).

2. Violations by the contractor

a. Clarification of contractor liability

Comments: Two respondents expressed concern about the imposition of liability upon contractors, and suggested that an employer should only be sanctioned 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.

Response: A contractor should only be held liable for a violation if the contractor fails to comply with paragraphs (b), (c)(3), or (d) of the clause at FAR 52.203-16. There is nothing in the clause that establishes contractor liability for a violation by an employee, as long as the contractor followed the appropriate steps to uncover and report the violation.

Because the rule addresses both violations by a covered employee and violations by the contractor, the Councils have clarified in each instance what type of violation is being addressed (FAR 3.1103(a)(6) and (b); FAR 3.1105(a) and (b); and FAR 52.203-16(b)(6)). This should help the concern of the respondent that the contractor may be subject to remedies for violations by covered employees, rather than compliance with the clause requirements.

In addition, the Councils have adopted two suggested changes to the text of FAR 3.1105(b). "Pursue" has been changed to "consider," to more accurately reflect the contracting officer's obligation. The Councils also deleted the term "sufficient" before the word "evidence" in describing the conditions for considering appropriate remedies. If the contracting officer finds evidence of a violation, the contracting officer should consider appropriate remedies. The term "evidence" on its own presents the requirement for a level of certainty beyond a mere rumor or suspicion.

3. Remedies for violations by the contractor

Comment: One respondent objected to inclusion of the list of remedies in the clause at FAR 52.203-16(d), stating that the FAR contains adequate remedies to address non-compliance with any material requirement of a contract, which includes the proposed FAR clause 52.203-16.

Response: While the list of remedies included within FAR 52.203-16 specifically identified those remedies available for violations involving potential conflicts, it was not intended to create new remedies. For this reason, the Councils have removed the paragraph regarding remedies from the clause. Removal of this section also addresses comments from several respondents related to individual remedies included in the list.

Comment: One respondent recommended adding a provision stating that certain violations should immediately be entered into the new Federal Awardee Performance and Integrity Information System (FAPIIS).

Response: Inclusion in the FAPIIS database is already adequately covered. For violations that result in suspension, debarment, or termination of the contract for default or cause, such actions will be entered into FAPIIS in accordance with the requirements published in the Federal Register at 75 FR 14059 on March 23, 2010. The other violations are of a type that would be entered in FAPIIS through the contracting officer performance evaluation of the contractor.

G. Clause flowdown

1. Flowdown requirements should mirror clause

Comments: Respondents were concerned that the proposed rule requires the prime contractor to be responsible for subcontractor personnel, and that the requirements for inclusion in a subcontract are broader than the requirements for including the clause in a prime contract.

Response: The Councils have made changes to clarify the flowdown requirements. First, the definition of "covered employee" has been clarified to indicate that the prime contractor is not responsible for screening subcontractor employees. See also the response to comment

B.2., definition of "covered employee." Additionally, the flowdown provision, which stated that the clause should be included in subcontracts that "may" involve performance of certain work in the proposed rule, has been revised to only apply to subcontracts that "will" involve such work, for consistency with the requirements for inclusion in prime contracts.

2. Subcontract threshold

Comment: The flowdown of the clause should be conditioned on subcontracts that exceed the simplified acquisition threshold, rather than specifying \$150,000.

Response: The threshold for application to subcontracts will not be subject to change during the performance of the contract, if the simplified acquisition threshold changes, so stating a dollar amount is preferable. When the simplified acquisition threshold changes, the clause will be changed for future contracts, but those changes will not be imposed on existing contracts.

H. Cost and administrative burden

1. Costs of ethics compliance program

Comment: Several respondents expressed concerns about the costs involved with establishing a comprehensive compliance program to comply with the requirements of this rule.

Response: While the Councils recognize that there will be some administrative costs associated with implementation of this program, the Government anticipates that when preparing proposals for Government contracts vendors will account for these costs appropriately and through their normal procedures. Subcontractors also are expected to include their anticipated costs in their offered price to the prime contractor. The anticipated costs, therefore, are likely to be passed on to the Government.

2. Information collection requirements

Comments: One respondent stated that the estimates of the Paperwork Reduction Act burdens (information collection requirements) appear to be significantly underestimated, and do not take into account the many levels of internal reviews that would be required as well as efforts associated with coordinating with legal counsel, program staff, etc., as necessary.

Another respondent, in response to the notice published in the Federal Register at 76 FR 27648 on May 12, 2011, questioned the accuracy and currency of the supporting statement for the information collection requirement for the subject rule.

Response: In response, the Councils updated the data used in the supporting statement, including current Federal Procurement Data System data. This resulted in minor or

non-material changes in the estimated number of responses. For example, the estimate for the ratio of violations reported to the Department of Justice compared to the base of estimated number of Federal employees was doubled, due to correcting the base to include only Federal civilian employees. However, this approach only increased the estimated number of annual contractor employee violations from 10 to 22.

In addition, the Councils considered the comment that the hours per response are underestimated, due to the many levels of internal reviews that would be required as well as efforts associated with coordinating with legal counsel or program staff, as necessary. Although the Councils did not have specific data as to how much increase these reviews would require, the Councils doubled the previous estimates of 2 hours for reporting a violation and 4 hours for requesting mitigation, resulting in an estimate of 4 hours per violation report and 8 hours per mitigation request. As with any estimate of an average number, there will be a large range between the high end (as in a large corporation) and the low end where only a few people may be involved.

These revisions result in an increase of the estimated response burden hours from 1,820 hours in the proposed rule to 3,688 hours. The estimated recordkeeping hours remain unchanged at 61,200 hours.

I. Miscellaneous comments

The Councils considered, but did not implement, a variety of additional comments. These included suggestions that the rule require the following:

- Use of a standard non-disclosure agreement form, to be published by the Government.
- Use of a standards financial disclosure form, to be published by the Government.
- Placement of responsibility for compliance at a "high level" within the contractor organization.
- Use of established structures required for implementation of the Contractor Code of Business Ethics for implementation of these requirements.
- Certification from the contractor that no personnel have a personal conflict of interest.
- Establishment of training programs for contractor personnel.

In each of these cases, implementation of the recommendation is neither necessary nor desirable, because establishing additional structural requirements would eliminate the flexibilities provided to contractors. The proposed rule sets out the requirements with which each contractor must comply, but allows latitude for the

application of business judgment in structuring internal programs to achieve that compliance.

Comment: Finally, one respondent suggested that the proposed rule should require "that a contractor certify that... no covered personnel have a personal conflict of interest."

Response: A certification requirement would not add any substantial protections not already present in the rule.

III. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is a significant regulatory action and, therefore, was subject to review under section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

IV. Regulatory Flexibility Act

The Department of Defense, the General Services Administration, and the National Aeronautics and Space

Administration certify that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq., because the requirements of the clause are not significantly burdensome. The requirement to obtain and retain information on employees' potential conflicts of interest is limited to service contractors whose employees are performing acquisition functions closely associated with inherently governmental functions for, or on behalf of, Federal agencies. This class is a minority of Government contractors and is becoming smaller as Government agencies bring more such functions back in house. Further, there is no requirement to report the information collected to the Government. It is not a significant economic burden to report to the contracting officer personal conflict-of-interest violations by covered employees and the corrective actions taken. The final rule has also reduced potential burden by—

1. Not including a certification requirement;
2. Not requiring a formal training program;
3. Clarifying that the rule does not apply to commercial items;
4. Removing the requirement for an annual update of the financial disclosure statement; and

5. Allowing mitigation under exceptional circumstances.

Comments on impact on small business: Three respondents expressed concern about the potential impact this rule could have on small businesses and specifically that the reporting, prevention, and oversight requirement could be a burden for small businesses such that they might reconsider pursuing Federal contracts. One respondent believed that small businesses will be most affected by this rule because it could force divestitures.

Response: The Councils agree that the reporting, prevention and oversight requirements may cause some burden for small businesses. The rule requires that prime contractors have procedures in place to screen covered employees and requires avoidance or mitigation of any potential conflicts. It may be difficult for smaller companies to avoid or mitigate the conflict (e.g., remove the employee from that position on the contract when the business only has a few employees). However, the burden on small business is reduced because the rule—

- Provides the contractor with discretion on how best to implement its procedures;
- Does not hold the prime contractor liable for violations by employees, as long as the contractor

has procedures in place and deals appropriately with the violations;

- Clarifies the meaning of "covered employee" and requires a flowdown to all subcontracts involving performance of acquisition related functions by employees, so that the prime contractor is not directly responsible for assessing the subcontractor employee personal conflicts of interest, as many respondents feared; and
- Provides the contracting officer with discretion on the handling of personal conflicts of interest violations.

Further, the public law did not create an exception for small businesses with respect to implementation and it would be inconsistent with the purpose and intent of the public law to not apply the rules relating to personal conflicts of interest to any particular group of contracts where personnel are performing acquisition functions closely associated with inherently governmental functions.

V. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. chapter 35) applies. The final rule contains information collection requirements. OMB has cleared this information collection requirement under OMB Control Number 9000-0181, titled:

Preventing Personal Conflicts of Interest for Contractor
Employees Performing Acquisition Functions.

List of Subjects in 48 CFR Parts 1, 3, 12, and 52

Government procurement.

Dated: October 21, 2011.

/s/

Laura Auletta,
Acting Director,
Office of Governmentwide
Acquisition Policy,
Office of Acquisition Policy,
Office of Governmentwide Policy.

Therefore, DoD, GSA, and NASA amend 48 CFR parts 1, 3, 12, and 52 as set forth below:

1. The authority citation for 48 CFR parts 1, 3, 12, and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 1—FEDERAL ACQUISITION REGULATORY SYSTEM

1.106 [Amended]

2. Amend section 1.106, in the table following the introductory text, by adding FAR segments "3.11" and "52.203-16" and the corresponding OMB Control Number "9000-0181."

PART 3—IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST

3. Add Subpart 3.11 to read as follows:

Subpart 3.11—Preventing Personal Conflicts of Interest for Contractor Employees Performing Acquisition Functions

Sec.
3.1100 Scope of subpart.
3.1101 Definitions.
3.1102 Policy.
3.1103 Procedures.
3.1104 Mitigation or waiver.
3.1105 Violations.
3.1106 Contract clause.

Subpart 3.11—Preventing Personal Conflicts of Interest for Contractor Employees Performing Acquisition Functions

3.1100 Scope of subpart.

This subpart implements the policy on personal conflicts of interest by employees of Government contractors as required by section 841(a) of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (Pub. L. 110-417) (41 U.S.C. 2303).

3.1101 Definitions.

As used in this subpart—

Acquisition function closely associated with inherently governmental functions means supporting or providing advice or recommendations with regard to the following activities of a Federal agency:

- (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.

(8) Determining whether contract costs are reasonable, allocable, and allowable.

Covered employee means an individual who performs an acquisition function closely associated with inherently governmental functions and is—

(1) An employee of the contractor; or

(2) A subcontractor that is a self-employed individual treated as a covered employee of the contractor because there is no employer to whom such an individual could submit the required disclosures.

Personal conflict of interest means 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. (A de minimis interest that would not "impair the employee's ability to act impartially and in the best interest of the Government" is not covered under this definition.)

(1) Among the sources of personal conflicts of interest are—

(i) Financial interests of the covered employee, of close family members, or of other members of the covered employee's household;

(ii) Other employment or financial relationships (including seeking or negotiating for prospective employment or business); and

(iii) Gifts, including travel.

(2) For example, financial interests referred to in paragraph (1) of this definition may arise from—

(i) Compensation, including wages, salaries, commissions, professional fees, or fees for business referrals;

(ii) Consulting relationships (including commercial and professional consulting and service arrangements, scientific and technical advisory board memberships, or serving as an expert witness in litigation);

(iii) Services provided in exchange for honorariums or travel expense reimbursements;

(iv) Research funding or other forms of research support;

(v) Investment in the form of stock or bond ownership or partnership interest (excluding diversified mutual fund investments);

(vi) Real estate investments;

(vii) Patents, copyrights, and other intellectual property interests; or

(viii) Business ownership and investment interests.

3.1102 Policy.

The Government's policy is to require contractors to-

(a) Identify and prevent personal conflicts of interest of their covered employees; and

(b) Prohibit covered employees who have access to non-public information by reason of performance on a Government contract from using such information for personal gain.

3.1103 Procedures.

(a) By use of the contract clause at 52.203-16, as prescribed at 3.1106, the contracting officer shall require each contractor whose employees perform acquisition functions closely associated with inherently Government functions to-

(1) Have procedures in place to screen covered employees for potential personal conflicts of interest by-

(i) Obtaining and maintaining from each covered employee, when the employee is initially assigned to the task under the contract, a disclosure of interests that might be affected by the task to which the employee has been assigned, as follows:

(A) Financial interests of the covered employee, of close family members, or of other members of the covered employee's household.

(B) Other employment or financial relationships of the covered employee (including seeking or negotiating for prospective employment or business).

(C) Gifts, including travel; and

(ii) Requiring each covered employee to update the disclosure statement whenever the employee's personal or financial circumstances change in such a way that a new personal conflict of interest might occur because of the task the covered employee is performing.

(2) For each covered employee—

(i) Prevent personal conflicts of interest, including not assigning or allowing a covered employee to perform any task under the contract for which the Contractor has identified a personal conflict of interest for the employee that the Contractor or employee cannot satisfactorily prevent or mitigate in consultation with the contracting agency;

(ii) Prohibit use of non-public information accessed through performance of a Government contract for personal gain; and

(iii) Obtain a signed non-disclosure agreement to prohibit disclosure of non-public information accessed through performance of a Government contract.

(3) Inform covered employees of their obligation—

(i) To disclose and prevent personal conflicts of interest;

(ii) Not to use non-public information accessed through performance of a Government contract for personal gain; and

(iii) To avoid even the appearance of personal conflicts of interest;

(4) Maintain effective oversight to verify compliance with personal conflict-of-interest safeguards;

(5) Take appropriate disciplinary action in the case of covered employees who fail to comply with policies established pursuant to this section; and

(6) Report to the contracting officer any personal conflict-of-interest violation by a covered employee as soon as identified. This report shall include a description of the violation and the proposed actions to be taken by the contractor in response to the violation, with follow-up reports of corrective actions taken, as necessary.

(b) If a contractor reports a personal conflict-of-interest violation by a covered employee to the contracting officer in accordance with paragraph (b)(6) of the clause at 52.203-16, Preventing Personal Conflicts of Interest, the contracting officer shall—

(1) Review the actions taken by the contractor;

(2) Determine whether any action taken by the contractor has resolved the violation satisfactorily; and

(3) If the contracting officer determines that the contractor has not resolved the violation satisfactorily, take any appropriate action in consultation with agency legal counsel.

3.1104 Mitigation or waiver.

(a) In exceptional circumstances, if the contractor cannot satisfactorily prevent a personal conflict of interest as required by paragraph (b) (2) (i) of the clause at 52.203-16, Preventing Personal Conflicts of Interest, the contractor may submit a request, through the contracting officer, for the head of the contracting activity to—

(1) Agree to a plan to mitigate the personal conflict of interest; or

(2) Waive the requirement to prevent personal conflicts of interest.

(b) If the head of the contracting activity determines in writing that such action is in the best interest of the Government, the head of the contracting activity may impose conditions that provide mitigation of a personal conflict of interest or grant a waiver.

(c) This authority shall not be redelegated.

3.1105 Violations.

If the contracting officer suspects violation by the contractor of a requirement of paragraph (b), (c) (3), or (d) of the clause at 52.203-16, Preventing Personal Conflicts of

Interest, the contracting officer shall contact the agency legal counsel for advice and/or recommendations on a course of action.

3.1106 Contract clause.

(a) Insert the clause at 52.203-16, Preventing Personal Conflicts of Interest, in solicitations and contracts that—

- (1) Exceed the simplified acquisition threshold; and
- (2) Include a requirement for services by contractor employee(s) that involve performance of acquisition functions closely associated with inherently governmental functions for, or on behalf of, a Federal agency or department.

(b) If only a portion of a contract is for the performance of acquisition functions closely associated with inherently governmental functions, then the contracting officer shall still insert the clause, but shall limit applicability of the clause to that portion of the contract that is for the performance of such services.

(c) Do not insert the clause in solicitations or contracts with a self-employed individual if the acquisition functions closely associated with inherently governmental functions are to be performed entirely by the self-employed individual, rather than an employee of the contractor.

PART 12—ACQUISITION OF COMMERCIAL ITEMS

4. Amend section 12.503 by adding paragraph (a)(9) to read as follows:

12.503 Applicability of certain laws to Executive agency contracts for the acquisition of commercial items.

(a) * * *

(9) Pub. L. 110-417, section 841(a), Policy on Personal Conflicts of Interest by Employees of Federal Government Contractors 41 U.S.C. 2303 (see subpart 3.11).

* * * * *

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

5. Add section 52.203-16 to read as follows:

52.203-16 Preventing Personal Conflicts of Interest.

As prescribed in 3.1106, insert the following clause:

PREVENTING PERSONAL CONFLICTS OF INTEREST (DEC 2011)

(a) Definitions. As used in this clause—

Acquisition function closely associated with inherently governmental functions means supporting or providing advice or recommendations with regard to the following activities of a Federal agency:

(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.

(8) Determining whether contract costs are reasonable, allocable, and allowable.

Covered employee means an individual who performs an acquisition function closely associated with inherently governmental functions and is—

(1) An employee of the contractor; or

(2) A subcontractor that is a self-employed individual treated as a covered employee of the contractor because there is no employer to whom such an individual could submit the required disclosures.

Non-public information means any Government or third-party information that—

(1) Is exempt from disclosure under the Freedom of Information Act (5 U.S.C. 552) or otherwise protected from disclosure by statute, Executive order, or regulation; or

(2) Has not been disseminated to the general public and the Government has not yet determined whether the information can or will be made available to the public.

Personal conflict of interest means 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. (A de minimis interest that would not "impair the employee's ability to act impartially and in the best interest of the Government" is not covered under this definition.)

(1) Among the sources of personal conflicts of interest are—

(i) Financial interests of the covered employee, of close family members, or of other members of the covered employee's household;

(ii) Other employment or financial relationships (including seeking or negotiating for prospective employment or business); and

(iii) Gifts, including travel.

(2) For example, financial interests referred to in paragraph (1) of this definition may arise from—

(i) Compensation, including wages, salaries, commissions, professional fees, or fees for business referrals;

(ii) Consulting relationships (including commercial and professional consulting and service arrangements, scientific and technical advisory board memberships, or serving as an expert witness in litigation);

(iii) Services provided in exchange for honorariums or travel expense reimbursements;

(iv) Research funding or other forms of research support;

(v) Investment in the form of stock or bond ownership or partnership interest (excluding diversified mutual fund investments);

(vi) Real estate investments;

(vii) Patents, copyrights, and other intellectual property interests; or

(viii) Business ownership and investment interests.

(b) Requirements. The Contractor shall—

(1) Have procedures in place to screen covered employees for potential personal conflicts of interest, by—

(i) Obtaining and maintaining from each covered employee, when the employee is initially assigned to the task under the contract, a disclosure of interests that might be affected by the task to which the employee has been assigned, as follows:

(A) Financial interests of the covered employee, of close family members, or of other members of the covered employee's household.

(B) Other employment or financial relationships of the covered employee (including seeking or negotiating for prospective employment or business).

(C) Gifts, including travel; and

(ii) Requiring each covered employee to update the disclosure statement whenever the employee's personal or financial circumstances change in such a way that a new personal conflict of interest might occur because of the task the covered employee is performing.

(2) For each covered employee—

(i) Prevent personal conflicts of interest, including not assigning or allowing a covered employee to perform any task under the contract for which the Contractor has identified a personal conflict of interest for the employee that the Contractor or employee cannot satisfactorily prevent or mitigate in consultation with the contracting agency;

(ii) Prohibit use of non-public information accessed through performance of a Government contract for personal gain; and

(iii) Obtain a signed non-disclosure agreement to prohibit disclosure of non-public information accessed through performance of a Government contract.

(3) Inform covered employees of their obligation—

(i) To disclose and prevent personal conflicts of interest;

(ii) Not to use non-public information accessed through performance of a Government contract for personal gain; and

(iii) To avoid even the appearance of personal conflicts of interest;

(4) Maintain effective oversight to verify compliance with personal conflict-of-interest safeguards;

(5) Take appropriate disciplinary action in the case of covered employees who fail to comply with policies established pursuant to this clause; and

(6) Report to the Contracting Officer any personal conflict-of-interest violation by a covered employee as soon as it is identified. This report shall include a description of the violation and the proposed actions to be taken by the Contractor in response to the violation. Provide follow-up reports of corrective actions taken, as necessary. Personal conflict-of-interest violations include—

(i) Failure by a covered employee to disclose a personal conflict of interest;

(ii) Use by a covered employee of non-public information accessed through performance of a Government contract for personal gain; and

(iii) Failure of a covered employee to comply with the terms of a non-disclosure agreement.

(c) Mitigation or waiver. (1) In exceptional circumstances, if the Contractor cannot satisfactorily prevent a personal conflict of interest as required by paragraph (b)(2)(i) of this clause, the Contractor may submit a request through the Contracting Officer to the Head of the Contracting Activity for—

(i) Agreement to a plan to mitigate the personal conflict of interest; or

(ii) A waiver of the requirement.

(2) The Contractor shall include in the request any proposed mitigation of the personal conflict of interest.

(3) The Contractor shall—

(i) Comply, and require compliance by the covered employee, with any conditions imposed by the Government as necessary to mitigate the personal conflict of interest; or

(ii) Remove the Contractor employee or subcontractor employee from performance of the contract or terminate the applicable subcontract.

(d) Subcontract flowdown. The Contractor shall include the substance of this clause, including this paragraph (d), in subcontracts—

(1) That exceed \$150,000; and

(2) In which subcontractor employees will perform acquisition functions closely associated with inherently governmental functions (i.e., instead of performance only by a self-employed individual).

(End of clause)

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