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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 1, 3, 12, and 52

[FAR Case 2013-022; Docket No. 2013-0022; Sequence No. 1]

RIN: 9000-AM69

Federal Acquisition Regulation; Extension of Limitations on Contractor Employee Personal Conflicts of Interest

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

ACTION: Proposed rule.

SUMMARY: DoD, GSA, and NASA are proposing to amend the Federal Acquisition Regulation (FAR) to implement a section of the National Defense Authorization Act (NDAA) for Fiscal Year 2013 to extend the limitations on contractor employee personal conflicts of interest to apply to the performance of all functions that are closely associated with inherently governmental functions and contracts for personal services.

DATES: Interested parties should submit written comments to the Regulatory Secretariat at one of the addressees shown below on or before **[Insert 60 days after publication in the FEDERAL REGISTER]** to be considered in the formation of the final rule.

ADDRESSES: Submit comments in response to FAR Case 2013-022 by any of the following methods:

- Regulations.gov: <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by searching for "FAR Case 2013-022." Select the link "Comment Now" that corresponds with "FAR Case 2013-022." Follow the instructions provided at the "Submit a Comment" screen. Please include your name, company name (if any), and "FAR Case 2013-022" on your attached document.
- Fax: 202-501-4067.
- Mail: General Services Administration, Regulatory Secretariat (MVCB), ATTN: Hada Flowers, 1800 F Street, NW., 2nd Floor, Washington, DC 20405.

Instructions: Please submit comments only and cite FAR Case 2013-022, in all correspondence related to this case. All comments received will be posted without change to <http://www.regulations.gov>, including any personal and/or business confidential information provided.

FOR FURTHER INFORMATION CONTACT: Ms. Cecelia L. Davis, Procurement Analyst, at 202-219-0202, for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at 202-501-4755. Please cite FAR Case 2013-022.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA are proposing to revise the FAR to implement section 829 of the NDAA for Fiscal Year 2013 (Pub. L. 112-239). Section 829 required the Secretary of Defense to review the guidance on personal conflicts of interest for contractor employees, issued pursuant to section 841(a) of the NDAA for Fiscal Year 2009 (Pub. L. 110-417), in order to determine whether it would be in the best interest of DoD and the taxpayers to extend such guidance to personal conflicts of interest by contractor personnel performing any of the following:

(1) Functions other than acquisition functions that are closely associated with inherently governmental functions (as that term is defined at 10 U.S.C. 2383(b)(3)).

(2) Personal services contracts (as that term is defined in 10 U.S.C. 2330a(g)(5)).

(3) Contracts for staff augmentation services (as that term is defined in section 808(d)(3)) of the NDAA for Fiscal Year 2012 (Pub. L. 112-81).

A. Section 841(a) of the National Defense Authorization Act for Fiscal Year 2008.

1. Section 841(a) (now codified at 41 U.S.C. 2303(b)) required the Administrator for Federal Procurement Policy to develop and issue a policy to address personal

conflicts of interest for contractor employees who perform acquisition functions closely associated with inherently governmental functions. The final rule to implement section 841(a) in the FAR was published in the Federal Register at 76 FR 68017 on November 2, 2011, effective December 2, 2011. The rule added FAR subpart 3.11, Preventing Personal Conflicts of Interest for Contractor Employees Performing Acquisition Functions, and FAR clause 52.203-16, Preventing Personal Conflicts of Interest.

2. Section 841(b) (now codified at 41 U.S.C. 2303 Note) required the Administrator for Federal Procurement Policy, in consultation with the Director of the Office of Government Ethics, to determine whether revisions to the FAR were necessary to address personal conflicts of interest by contractor employees with respect to functions other than those described in section 841(a).

DoD, GSA, and NASA, in consultation with the Office of Federal Procurement Policy (OFPP) and the Office of Government Ethics, published a request for information in the Federal Register on November 2, 2011, seeking public comment on whether additional guidance is necessary to address personal conflicts of interest by employees of Government contractors. Only one response was received. The respondent recommended that it was premature at that time to extend the FAR coverage on personal conflicts of

interest, because the rule had only been in effect for one month, and was just beginning to be applied to new contracts and task orders.

B. Section 829 of the National Defense Authorization Act for Fiscal Year 2013.

The Secretary of Defense reviewed existing FAR guidance on personal conflicts of interest for contractor employees by issuing a data call on February 28, 2013, to the military departments and defense agencies, requesting feedback on the questions posed by section 829. Responses were received from 23 military departments and defense agencies. The majority of the respondents indicated that protection or agreements covering additional functions would be helpful, as would a contractor-managed personal conflicts of interest identification and mitigation program, similar to that required by section 841(a).

Following analysis of the responses received, DoD concluded that extension of the FAR personal conflicts of interest regulations to additional functions and contract types may be in the best interest of DoD and the taxpayers. In a memo dated June 10, 2013, the Deputy Director of Defense Procurement and Acquisition Policy (DPAP) (Contract Policy and International Contracting) requested the Deputy Director Defense Acquisition Regulations System, to open a case to propose regulations relating to prevention of

personal conflicts of interest. The memorandum further recommended that DPAP confer with OFPP and the FAR Council to determine whether to pursue such extension of coverage as a FAR change. The FAR signatories agreed to open this FAR case on August 2, 2013.

The FAR coverage of personal conflicts of interest has now been in effect since December 2, 2011, and section 829 did not propose any change to the FAR regulations at subpart 3.11 and section 52.203-16, other than to consider extending the coverage to additional functions and contract types.

II. Discussion and Analysis

A. Proposed extension of guidance on personal conflicts of interest.

This rule proposes to extend regulations on personal conflicts of interest to contractor employees performing all functions that are closely associated with inherently governmental functions (not just acquisition functions) and to personal services contracts (to the extent such contracts are authorized by law, e.g., legal or medical).

Section 736 of Division D of Pub. L. 111-8 defines "functions closely associated with inherently governmental functions" as follows:

"The term 'functions closely associated with inherently governmental functions' means the functions described in section 7.503(d) of the Federal Acquisition Regulation."

The Defense Acquisition Regulations Council and the Civilian Agency Acquisition Council (Councils) welcome comments with regard to the appropriateness and benefits of this proposal, particularly if there are certain functions not currently covered in FAR subpart 3.11 and section 52.203-16 that should definitely be included (or excluded) from the final rule.

The Councils also note that FAR Case 2012-001, Performance of Inherently Governmental Functions and Critical Functions, is currently being processed as a proposed rule to implement the OFPP Policy Letter 11-01, Performance of Inherently Governmental and Critical Functions, issued in the Federal Register at 76 FR 56227 on September 12, 2011, which also addresses functions closely associated with inherently governmental functions.

B. Inapplicability to commercial items and below the simplified acquisition threshold.

The current FAR regulations on contractor employee personal conflicts of interest do not apply below the simplified acquisition threshold or to acquisitions of commercial items. Section 841(a)(3) specifically stated that the law does not apply to contracts in amounts that do

not exceed the simplified acquisition threshold. The final rule under FAR Case 2008-025 added section 841(a) of the NDAA for Fiscal Year 2008 (now codified at 41 U.S.C. 2303(b)) to the list of laws inapplicable to contracts for the acquisition of commercial items (FAR 12.503). This rule does not propose to change the applicability of the regulations on contractor employee personal conflicts of interest to commercial items or acquisitions that do not exceed the simplified acquisition threshold.

C. Further changes.

Section 12.503(a)(9) is amended to clarify and update related citations. Further, corrections are made to the OMB Control Number in section 1.106.

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 not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 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

DoD, GSA, and the NASA do not expect this rule to 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. Nevertheless, an Initial Regulatory Flexibility Analysis (IRFA) has been prepared and is summarized as follows:

This proposed rule was initiated to amend the FAR to implement section 829 of the NDAA for Fiscal Year 2013 (Pub. L. 112-239), by considering extension of the contractor employees personal conflict of interest limitations at FAR subpart 3.11 (i.e., currently limited to individuals who perform an acquisition function closely associated with inherently governmental functions) to individuals who perform a function closely associated with inherently governmental functions or perform under a personal services contract and are—

(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.

By extending contractor employee personal conflict of interest limitations, the proposed rule furthers enforcement of Government policy that requires contractors and subcontractors 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.

Section 829 of the NDAA for Fiscal Year 2013 (Pub. L. 112-239) required the Secretary of Defense to review the guidance on personal conflicts of interest for contractor employees, issued pursuant to section 841(a) of the NDAA for Fiscal Year 2009 (Pub. L. 110-417), in order to determine whether it would be in the best interest of the DoD and the taxpayers to extend such guidance to personal conflicts of interest by contractor personnel performing any of the following:

(1) Functions other than acquisition functions that are closely associated with inherently governmental functions (as that term is defined at 10 U.S.C. 2383(b)(3)).

(2) Personal services contracts (as that term is defined in 10 U.S.C. 2330a(g)(5)).

(3) Contracts for staff augmentation services (as that term is defined in section 808(d)(3) of the NDAA for Fiscal Year 2012 (Pub. L. 112-81)).

The Secretary of Defense reviewed existing FAR guidance on personal conflicts of interest for contractor employees by issuing a data call on February 28, 2013, to the military departments and defense agencies, requesting feedback on the questions posed by section 829. Responses were received from 23 military departments and defense agencies. The majority of the respondents indicated that protection or agreements covering additional functions would be helpful, as would a contractor-managed personal conflicts of interest identification and mitigation program, similar to that required by section 841(a).

Following analysis of the responses received, DoD concluded that extension of the FAR personal conflicts of interest regulations to additional functions may be in the best interest of DoD and the taxpayers. In a memo dated June 10, 2013, the Deputy Director of Defense Procurement and Acquisition Policy (DPAP) (Contract Policy and International Contracting) requested the Deputy Director Defense Acquisition Regulations System, to open a case to propose regulations relating to prevention of personal conflicts of interest. The memorandum further recommended that DPAP confer with OFPP and the FAR Council to determine whether to pursue such extension of coverage as a FAR change. The FAR signatories agreed to open FAR Case 2013-022, Preventing Personal Conflicts of Interest for Contractor Employees, on August 2, 2013.

Under the FAR clause at 52.203-16, as revised in the proposed rule, "covered employees" means an individual who performs a function closely associated with inherently governmental functions or performs under a personal services contract 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.

The following estimates are based on data reported to the Federal Procurement Data System (FPDS) between March 1, 2012 and March 1, 2013 (the first year during which such data was available), on contract actions over the simplified acquisition threshold (SAT) coded as being functions closely associated with inherently governmental functions, or personal services contracts (Product Service Code (PSC) R497).

- Between March 1, 2012, and March 1, 2013, a total of 22,716 contract actions over the simplified acquisition threshold were coded as functions closely associated with inherently governmental functions. Of that total, 10,600 actions were awarded to small businesses, and 12,116 actions were awarded to other than small businesses.

- During the same period, a total of 5,369 contract actions exceeding the simplified acquisition threshold were coded with a R497 Product Service Code (PSC), Support-Professional: Personal Services Contracts. Of that total, 2,732 actions were awarded to small businesses, and 2,637 were awarded to other than small businesses.

DoD, GSA, and NASA estimate that the 13,332 actions (10,600 for functions closely associated with inherently governmental functions and 2,732 for personal services contracts) awarded to small business were made to 4,444 unique small business entities (one-third of 13,332).

The clause at FAR 52.203-16 applies to contract actions over the simplified acquisition threshold, and only requires contractors to obtain information from each covered employee on an "as required basis," i.e., (1) when initially assigned to a task that requires a disclosure of interests that might be affected by the task to which the employee has been assigned; and (2) 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 that the covered employee is performing. Other associated information collection is required only to report to the contracting officer any personal conflict of interest violation by a covered employee as soon as it is identified, and, in exceptional circumstances, for the contractor to submit a request, through the contracting officer, for the head of the contracting activity to agree to a plan to mitigate the personal conflict of interest, or waive the requirement to prevent personal conflicts of interest. These requirements apply regardless of the size of the contractor.

The rule does not duplicate, overlap, or conflict with any other Federal rules.

There are no practical alternatives that will accomplish the objectives of the proposed rule.

The Regulatory Secretariat has submitted a copy of the IRFA to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the IRFA may be obtained from the Regulatory Secretariat. DoD, GSA, and NASA invite comments

from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD, GSA, and NASA will also consider comments from small entities concerning the existing regulations in subparts affected by the rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (FAR Case 2013-022), in correspondence.

V. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. chapter 35) applies. The proposed rule contains information collection requirements. Accordingly, the Regulatory Secretariat has submitted a request for approval of a revised information collection requirement concerning OMB clearance number 9000-0183, Preventing Personal Conflicts of Interest for Contractor Employees, to the Office of Management and Budget.

A. Public reporting burden for this collection of information is estimated to average 30 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

The annual reporting burden estimated as follows:

Respondents: 188.

Responses per respondent: 1.

Total annual responses: 188.
Preparation hours per response: 30 hours
Total response burden hours: 5,640.

The annual recordkeeping burden is estimated as follows:

Recordkeepers: 9,361
Hours per recordkeeper: 59
Total recordkeeping hours: 552,299

B. Request for Comments Regarding Paperwork Burden.

Submit comments, including suggestions for reducing this burden, not later than **[insert date 60 days after publication in the FEDERAL REGISTER]** to: FAR Desk Officer, OMB, Room 10102, NEOB, Washington, DC 20503, and a copy to the General Services Administration, Regulatory Secretariat (MVCB), ATTN: Hada Flowers, 1800 F Street, NW., 2nd Floor, Washington, DC 20405.

Public comments are particularly invited on: whether this collection of information is necessary for the proper performance of functions of the FAR, and will have practical utility; whether the estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected; and ways in which the Government can minimize the burden of the collection of information on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.

Requesters may obtain a copy of the supporting statement from the General Services Administration, Regulatory Secretariat (MVCB), ATTN: Hada Flowers, 1800 F Street, NW., 2nd Floor, Washington, DC 20405. Please cite OMB Control Number 9000-0181, Preventing Personal Conflicts of Interest for Contractor Employees, in all correspondence.

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

Government procurement.

Dated: March 27, 2014.

William Clark,
Acting Director,
Office of Government-wide
Acquisition Policy,
Office of Acquisition Policy,
Office of Government-wide Policy.

Therefore, DoD, GSA, and NASA propose amending 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 51 U.S.C. 20113.

PART 1—FEDERAL ACQUISITION REGULATIONS SYSTEM

1.106 [Amended]

2. Amend section 1.106 by—

a. Removing from FAR segment 3.11, the OMB Control Number "9000-0181" and adding "9000-0183" in its place; and

b. Removing from FAR segment 52.203-16, the OMB Control Number "9000-0181" and adding "9000-0183" in its place.

PART 3—IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST

3. Revise Subpart 3.11 heading to read as follows:

SUBPART 3.11—PREVENTING PERSONAL CONFLICTS OF INTEREST FOR CONTRACTOR EMPLOYEES

4. Revise section 3.1100 to read as follows:

3.1100 Scope of subpart.

This subpart implements—

(a) Section 841(a) of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (Pub. L. 110-417) (41 U.S.C. 2303); and

(b) Section 829 of the National Defense Authorization Act for Fiscal Year 2013 (Pub. L. 112-239).

5. Amend section 3.1101 by—

a. Removing the definition “Acquisition function closely associated with inherently governmental functions”; and

b. Revising the introductory text of the definition “Covered employee”.

The revised text reads as follows:

3.1100 Definitions.

* * * * *

Covered employee means an individual who performs a function closely associated with inherently governmental functions (see subpart 7.5) or performs under a personal services contract (see 37.104) and is—

* * * * *

6. Amend section 3.1103 by revising the introductory text of paragraph (a) to read as follows:

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 with at least one covered employee to—

* * * * *

7. Amend section 3.1106 by revising paragraphs (a)(2), (b), and (c) to read as follows:

3.1106 Contract clause.

(a) * * *

(2) Include a requirement for services by contractor employee(s) that are covered employees, i.e., an individual who performs a function closely associated with inherently governmental functions or performs under a personal services contract and is—

(i) An employee of the contractor; or

(ii) 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.

(b) If only a portion of a contract is for the performance of services by covered employees, 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 services are to be performed entirely by the self-employed individual, rather than a covered employee of the contractor. In such cases, the contracting officer shall consider these matters as part of the Organizational Conflict of Interest analysis (see subpart 9.5).

PART 12-ACQUISITION OF COMMERCIAL ITEMS

8. Amend section 12.503 by revising 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) 41 U.S.C. 2303(b), Policy on Personal Conflicts of Interest by Contractor Employees and 41 U.S.C. 2303 note (see subpart 3.11).

* * * * *

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

9. Amend section 52.203-16 by—

- a. Revising the date of the clause;
- b. Removing from paragraph (a) the definition "Acquisition function closely associated with inherently governmental functions";
- c. Revising the introductory text of the definition "Covered employee"; and
- d. Removing from paragraph (d) (2) the word "acquisition".

The revised text read as follows:

52.203-16 Preventing Personal Conflicts of Interest.

* * * * *

PREVENTING PERSONAL CONFLICTS OF INTEREST (**DATE**)

* * * * *

Covered employee means an individual who performs a function closely associated with inherently governmental functions (see subpart 7.5) or performs under a personal services contract (see 37.104) and is-

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