

Caught in the Federal Procurement Fish Bowl

26th Annual Ounce of Prevention Seminar

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Proposed PCI Rules

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Statutory Background

- FY 2009 Defense Authorization Act
 - Pub. L. 110-417 enacted October 14, 2009
 - OFPP to “develop and issue a standard policy to prevent personal conflicts of interest (“PCI”) by contractor employees performing acquisition functions closely associated with inherently governmental functions

Background: GAO Report

- GAO Report 08-169, “Additional Personal Conflict of Interest Safeguards Needed for Certain DoD Contractor Employees”
 - Senate concerned PCI exposure would increase with increase in service contract spending
 - 78% increase in spending between 1996 and 2008

Proposed PCI Rules: Overview

- Issued November 13, 2009
- Comment period ended January 12, 2010
- Applies to contracts and task orders above simplified acquisition threshold
- Broad group of “covered employees”
 - Subcontractors, consultants, partners, sole proprietors
 - “Acquisition function closely associated with ‘inherently governmental function.’”

Policy Objectives

- Identification and prevention of “personal conflicts of interest”
 - “financial interest, personal activity, or relationship that could compete with the employee’s ability to act impartially and in the best interest of the Government when performing a government contract.”
- Enforce prohibition that “covered employees” who have access to non-public government information may not use such information for personal gain.

Overview of Required Contractor Procedures

- Screening
- Financial disclosures
- Manage Assignments to avoid PCI's
- NDA's
- Inform/train “covered employees”
- Oversight & enforcement

Contractor Officer Responsibilities

- Review contractor reports of violations and actions taken
- Coordinate with agency counsel
- Decide whether violation resolved, or whether further action needed.

Mitigation and Waiver

- Contractor to submit written plan
 - Explain why PCI not be preventable
 - Plan for mitigation
- HCA review and decision
 - May impose further conditions
 - Disapproval
 - Remove covered employee
 - Terminate subcontract

Government Remedies for Non-compliance

- Suspend Payments
- Deny Award Fee
- Termination for Default
- Disqualification from Future Efforts
- Suspension or Debarment

“Inherently Governmental Function”

- Defined term directly affects PCI analysis
- Definition under review and comment as part of OFPP Policy Letter
 - Work Reserved for Performance by Federal Government Employees,” dated March 31, 2010.
See 75 Fed. Reg. 16188; Comments due 6/1/2010
- “FAIR” Act of 1998 definition proposed to apply across procurement law and regulation
 - “so intimately related to the public interest as to require performance by Federal Government employees.”