

A photograph showing the lower legs and feet of a person in dark trousers and shoes walking on a light-colored, textured surface. A faint circular mark is visible on the ground in front of the person.

Conflicts of Interest in Government Contracting: Reducing Risk in an Age of Increased Visibility

February 9, 2012

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Agenda

- Understanding what constitutes an organizational conflicts of interest (“OCI”)
- Resolving organizational conflicts of interest
- OCI changes on the horizon
- New FAR personal conflict of interest provisions
- New DoD revolving door representation
- Questions and discussion

Why Conflicts of Interest Should Be Taken Seriously in the Current Enforcement Environment

- Increased IG and congressional focus
- Changing regulatory landscape with increased compliance obligations
- Protest risk – fewer procurement dollars means every piece of business is more likely to be fought for and every contractor is under the microscope
- False Claims Act risk
- Suspension and debarment

ORGANIZATIONAL CONFLICTS OF INTEREST

Organizational Conflict of Interest Principles

- FAR Definition (FAR 2.101)
 - “An OCI arises when, because of other relationships or circumstances, a contractor may be ***unable, or potentially unable, to render impartial advice or assistance*** to the government, the contractor’s ***objectivity in performing the contract work is or might be impaired***, and/or the contractor ***would have an unfair competitive advantage***”

- Special DFARS provisions for major acquisitions

OCI Principles

- FAR Definition (FAR 2.101)
 - An OCI arises when, because of other relationships or circumstances, a contractor may be ***unable, or potentially unable, to render impartial advice or assistance*** to the government, the contractor's ***objectivity in performing the contract work is or might be impaired***, and/or the contractor ***would have an unfair competitive advantage***
 - “Contractor” is a broad concept
 - ✓ Entire corporate family -- all affiliates and related entities upstream and downstream
 - ✓ Teaming and JV partners and subcontractors

OCI Principles

- Applicability - FAR § 9.502(c)
 - An organizational conflict of interest may result when factors create an actual or potential conflict of interest on an instant contract, or when the nature of the work to be performed on the instant contract creates an actual or potential conflict of interest on a future acquisition. In the latter case, some restrictions on future activities of the contractor may be required.

OCI Principles

- Per FAR 9.504(a), Procurement Contracting Officers must:
 - Identify and evaluate potential organizational conflicts of interest as early in the acquisition process as possible; and
 - Avoid, neutralize, or mitigate significant potential conflicts before contract award

OCI Principles

- Three categories
 - Biased ground rules
 - Impaired objectivity
 - Unequal access to information

OCI Categories

- Biased ground rules (FAR 9.505-2)
 - “a [contractor], as part of its performance of a government contract, has in some sense set the ground rules for another government contract by, for example, writing the statement of work or the specifications.” *Aetna Gov’t Health Plans, Inc.; Foundation Health Fed. Servs., Inc., B-254397, et al.*, July 27, 1995, 95-2 CPD ¶ 129

OCI Categories (Biased Ground Rules)

- Specifications
 - If contractor prepared and furnished complete specification for non-developmental item
 - ✓ May not furnish that item either as prime or sub
- Statement of work
 - Contractor excluded from providing system or services if
 - ✓ Prepared or assisted in preparing a work statement to be used in competitively acquiring a system or services
- A few limited exceptions

OCI Categories (Biased Ground Rules)

- Not limited to Specifications and Statements of Work
 - Any document which directly or indirectly influences the way proposals will be evaluated could give rise to a biased ground rules OCI
 - Cost estimates
 - Testing guidelines
 - White papers that would influence the way in which the technical evaluation is conducted

OCI Categories (Biased Ground Rules)

- Example #1
 - Company A works with the Air Force to prepare a statement of work for inclusion in an RFP for aircraft maintenance
 - Company A and Company B form a joint venture to pursue the aircraft maintenance contract

OCI Categories (Biased Ground Rules)

- Example #2
 - Company A performs energy efficiency study and the results of that study (along with recommendations) are incorporated as requirements into an RFP for energy conservation services at naval installation
 - Company B, a second-tier subsidiary of Company A, submits a bid to provide these energy conservation services

OCI Categories

- Impaired objectivity (FAR 9.505-3)
 - If a contractor is in the position of evaluating its own performance or products, or the performance or products of a competitor
 - Making decisions based on contractor's commercial or policy interests, rather than best interests of government
 - Contractor's ability to "render impartial advice to the government will be undermined, or impaired, by its relationship to the product or services being evaluated" *Overlook Sys. Techs., Inc.*, B-298099.4, *et al.*, Nov. 28, 2006, 2006 CPD ¶ 185

OCI Categories (Impaired Objectivity)

- Example #1
 - A Division X of Company A has an ongoing contract to provide simulation data analysis for NASA
 - A Division Z of Company A submits a proposal in response to a NASA solicitation seeking a contractor to design and develop a rocket engine
 - NASA intends to ask Division X of Company A to run simulations on all of the proposals received in the rocket engine

OCI Categories (Impaired Objectivity)

- Example #2
 - Company A provides Medicare Part C and Part D coverage to beneficiaries in a particular region of the country
 - Company B bids on a contract from HHS to identify insurance fraud in the Medicare program in the same region of the country
 - Company B is a wholly-owned subsidiary of Company A

OCI Categories (Impaired Objectivity)

- Example #3
 - Company A is a major seller of chemical, biological, radioactive, and nuclear (“CBRN”) products and services
 - Company B is bidding on contract to provide consulting and assistance services to Department of Energy on CBRN policy and products
 - Company A wants to acquire Company B

OCI Categories

- Unequal access to information (FAR 9.505-4)
 - A firm gains access to nonpublic information through the performance of one federal contract that is competitively useful in obtaining a separate federal contract
 - ✓ Competitor's proprietary information
 - ✓ Government's confidential information
 - Must have a clear government nexus to be an unequal access to information OCI
 - Does not cover private trade secret disputes

OCI Categories (Unequal Access)

- Example #1
 - Company A provides advisory and support services for Navy's procurement office and has access to the confidential independent government cost estimate relating to an RFP for a large IT contract
 - Company B, which is an LLC partially owned by Company A, wants to bid on this IT contract

OCI Categories (Unequal Access)

- Example #2
 - Company A performs an ongoing maintenance support contract at a particular Army base that affords Company A access to a database with detailed information about all building, vehicle, and weapon maintenance activities at the base
 - Company B wants to bid on a separate maintenance contract at the same Army base and includes Company A as a subcontractor in its proposal

OCI Red Flag Activities

- Management support or consulting services
- Supporting and furnishing systems
- Technical evaluation services
- Preparing specifications or requirements
- Systems engineering and technical advice
- Making product recommendations
- Systems integration
- Development of agency policy

Due Diligence Practicalities

- Current contracts
 - *E.g.*, Is one entity supplying components and the other entity evaluating efficacy of that system
 - Level of analysis is not work being performed but potential scope of work
 - Not just prime contracts with government
 - Joint venture and teaming agreements
 - Subcontracts
 - Some contracts have explicit bars on future contract opportunities, including clauses incorporated by reference

Due Diligence Practicalities

- Business plans
 - Not just current business
 - Strategic planning efforts must consider how OCIs could limit future opportunity
 - Revenue projections and value proposition can be adversely impacted if OCIs curtail growth opportunities and perceived synergies
 - Divestiture of business units and/or contracts

OCI Mitigation/Avoidance

- Some OCIs easier to mitigate than others
- CO must approve and determination is afforded great discretion
- Mitigation is most effective for unequal access to information OCIs
 - Firewalls
 - ✓ Physical separation
 - ✓ Document control
 - ✓ Electronic partitioning
 - ✓ Employee training regarding purpose of firewall
 - Release of information to all

OCI Mitigation/Avoidance

- Biased ground rules and impaired objectivity are difficult (or impossible) to mitigate
 - Avoidance – e.g., for impaired objectivity, must hire independent third party subcontractor to perform portion of work that creates the conflict
 - Waiver – FAR 9.503 states that an agency may waive an OCI when enforcement of the OCI regulations “would not be in the Government’s interest”
 - ✓ Any OCI may be waived under current FAR rules
 - ✓ Must be approved by head of the procuring agency or the agency’s head of contracting activity (“HCA”)
 - ✓ Contracting officer request for waiver must be in writing, shall set forth the extent of the conflict

Unfair Competitive Advantage

- Unfair competitive advantage is a cousin of “unequal access to information” OCIs where access to competitively advantageous nonpublic information is acquired from a former government official who has relocated to the private sector
 - Technically, these types of cases are not OCIs because the information was not acquired by the firm in its performance of a separate federal contract, but the harm to the fairness of the procurement process is the same
- To avoid tainting the proposal drafting team and risking disqualification of the firm from the procurement, former government officials with inside knowledge of a particular procurement or contract program must be firewalled

Unfair Competitive Advantage

- Case Study: *HealthNet Federal Services*, B-401652.3, B-401652.5, Nov. 4, 2009, 2009 CPD ¶ 220
 - Awardee hired former high-level agency official to assist in drafting its proposal
 - The former official had attended procurement planning meetings and been afforded routine access to incumbent contractor's proprietary pricing and technical approach
 - No firewall was implemented and the agency never investigated the matter during the procurement
 - GAO sustained protest and instructed the agency to investigate the matter to assess if the awardee needed to be disqualified
 - Initial awardee was disqualified and protester-incumbent got the multi-billion dollar contract

Proposed Revisions to FAR OCI Provisions

- Proposed rule issued by FAR Councils on April 26, 2011
 - Also proposed DoD rule, but that largely tracks current law
- Would apply to all acquisitions, including task order acquisitions of any size
- Does not appear to dramatically alter the landscape from a bottom-line perspective of when some form of Contracting Officer intervention would be necessary
- However, the proposed rule:
 - Redefines some key concepts
 - Adds more guidance and more responsibilities for both contracting officers and contractors
 - Changes the periphery of acceptable ways in which contractors and contracting officers can address OCIs

Key Changes In Proposed FAR Rule

1. New Proposed Definition of OCIs
2. New Harm-Based OCI Policy
3. Agency Threshold OCI Risk Determination
4. Mandatory Disclosure of OCIs in Proposals
5. Consideration of OCI Information From Outside Sources
6. Increased Guidance on Available Mitigation Options
7. Contractor Post-Award OCI Disclosure Requirements

Proposed FAR Rule (Refining of the OCI Definition)

- Proposed rule would treat “unequal access to information” concerns as its own category of procurement integrity concern apart from OCIs
 - Unequal access rules would be moved to FAR Part 4
 - Situations involving former government officials would be merged with unequal access to information regulations
- OCIs would be limited to situations where circumstances require “a contractor to exercise judgment to assist the Government” in circumstances where the contractor has “financial interests in the matter”
 - Incorporates biased ground rules and impaired objectivity
 - New OCI rules would be located in FAR Subpart 3.12

Proposed FAR Rule (Harm-Based OCI Policy)

- In FAR Subpart 9.5, OCIs are categorized by the type of task, e.g. “Preparing specifications or work statements,” and “Providing evaluation services”
- The proposed rule migrates all OCI rules to FAR Part 3 and the new proposed FAR § 3.1203 categorizes OCIs by nature of the harm to the Government:
 - A. Harm to the integrity of the competitive procurement process
 - B. Harm to the Government’s business interests
- The Contracting Officer has the discretion to determine in which category an OCI falls.

Proposed FAR Rule (Harm-Based OCI Policy)

- As is the case under FAR 9.5 currently, OCIs under the proposed rule affecting the “integrity of the procurement process” must be avoided, neutralized, mitigated, or formally waived
- However, for OCIs affecting only the Government’s business interests, “**acceptance**” is an option on the Contracting Officer’s menu
 - A documented finding that the risk is tolerable would allow a conflicted offeror to continue participating even where the OCI cannot otherwise be mitigated and has not been formally waived

Proposed FAR Rule (Threshold OCI Risk Determination)

- Under the proposed FAR § 3.1207(a), the Contracting Officer is to make a threshold analysis of whether the subject procurement “may give rise” to OCIs
- If the Contracting Officer answers that question in the affirmative he or she would include a newly proposed FAR Clause, “Notice of Potential Organizational Conflict of Interest” (FAR § 52.203-XX) in the solicitation
 - FAR 52.203-XX sets out the basic framework for addressing OCIs via avoidance, neutralization, mitigation, or acceptance.
- If the Contracting Officer determines that the subject procurement will not give rise to OCIs, FAR § 52.203-XX would not be included in the solicitation.

Proposed FAR Rule (Mandatory Disclosure of OCI in Proposals)

- If FAR Clause 52.203-XX, Notice of Potential Organizational Conflict of Interest, is included in a solicitation, offerors would be required to make broader OCI disclosures than in the past
- Offerors would be obligated to disclose all relevant information regarding any organizational conflicts of interest, including information about potential subcontracts and limitations on future contracting
- By signing the offer, the contractor would make a formal “representation” that it has complied with the disclosure requirements
 - False Claims Act & False Statement Act exposure

Proposed FAR Rule (Agency Consideration of Outside Sources)

- In parallel with increased disclosure requirements would be the increased requirements for contracting officer's to seek out information about a firm's potential OCIs
 - Proposed FAR § 3.1206-3(a)(2): “The contracting officer should seek readily available information about the financial interests of the offerors, affiliates of the offerors, and prospective subcontractors from within the Government or from other sources and compare this information against information provided by the offeror.”
- Currently, FAR is silent on this subject
- Case law is vague and deferential in identifying what an agency must consider beyond the four corners of a proposal

Proposed FAR Rule (Agency Consideration of Outside Sources)

- Proposed FAR § 3.1206-3(a)(2): “The contracting officer should seek readily available information . . . **from within the Government** or from other sources and compare this information against information provided by the offeror.”
 - Government sources include the files and the knowledge of personnel within:
 - ✓ The contracting office
 - ✓ Other contracting offices
 - ✓ The cognizant contract administration, finance, and audit activities
 - ✓ The requiring activity

Proposed FAR Rule (Agency Consideration of Outside Sources)

- Proposed FAR § 3.1206-3(a)(2): “The contracting officer should seek readily available information . . . from within the Government or from other sources and compare this information against information provided by the offeror.”
 - Non-Government “other sources” which the Contracting Officer “should” consider in their OCI assessment include:
 - ✓ Offeror’s Websites
 - ✓ Annual corporate shareholder reports
 - ✓ Trade and financial journals
 - ✓ Business directories and registers

Proposed FAR Rule (New Guidance on Mitigation Options)

- The current FAR § 9.504 provides no guidance on mitigation, leaving it entirely to the creativity of the contractor and the discretion of the contracting officer to craft acceptable mitigation plans
- The proposed rule (FAR § 3.1204-3) endorses three specific forms of mitigation:
 - i. subcontracting the portion of work from which the conflict arises (if possible)
 - ii. soliciting advice from multiple sources so as to limit the impact of impaired objectivity, and
 - iii. working with the contracting agency to establish internal mitigation measures

Proposed FAR Rule (New Guidance on Mitigation Options)

- The proposed rule provides particularly detailed guidance as to the third category, “internal mitigation”:
 - Internal firewalls
 - Independent members of the board of directors
 - Board of director resolution restricting certain employees from participating in contract performance
 - Non-disclosure agreements
 - The hiring of a senior-level OCI compliance officer to supervise all mitigation efforts
- Much of this guidance conflicts with the status quo developed in bid protest case law regarding mitigation of impaired objectivity and biased ground rules OCIs

Proposed FAR Rule (Post-Award OCI Disclosure Requirements)

- Proposed FAR Clause 52.203-ZZ, Disclosure of Organizational Conflict of Interest After Contract Award, would be included in any contract resulting from a solicitation in which the Contracting Officer has opted to include the clause at 52.203-XX, Notice of Potential Organizational Conflict of Interest
- FAR Clause 52.203-ZZ would require the contractor to continually monitor itself and proactively disclose any newly identified OCIs, including both:
 - OCIs that existed prior to award but were undiscovered
 - OCIs that developed for the first time after award

PERSONAL CONFLICTS OF INTEREST

Personal Conflicts of Interest

- Personal conflicts, unlike organizational conflicts, are specific to particular employees within the organization
 - *E.g.*, Personal financial interests and family relationships
- Historically, the FAR has not included detailed provisions for personal conflicts of interest
- Section 841(a) of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 called on the FAR Councils to “develop and issue a standard 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.”

Personal Conflicts of Interest Rulemaking Timeline

- November 13, 2009: The FAR Councils published a proposed rule in the Federal Register at 74 FR 58584
- January 12, 2010: Comments due. The FAR Councils report receiving comments from 19 sources
- November 2, 2011: Final rule published at 76 FR 68017 with an effective date of December 2, 2011

Personal Conflicts of Interest Overview

- Two key questions are addressed by new PCI rules
 - I. Who and what does the rule apply to?
 - ✓ New regulations apply exclusively to contracts which call for employees to perform specific, enumerated types of acquisition support work
 - II. When applicable, what must firms do to comply?
 1. Identify “covered employees” and obtain financial disclosures
 2. Supervise employee assignment process
 3. Obtain signed NDAs from covered employees
 4. Train covered employees to identify and avoid PCIs
 5. Maintain PCI compliance oversight
 6. Disclose violations to the contracting officer
 7. Discipline covered employees who violate PCI obligations

Personal Conflicts of Interest Preamble

- Purpose & Scope of FAR PCI Regulations
 - “[To] 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.”

Personal Conflicts of Interest Preamble

- Purpose & Scope of FAR PCI Regulations
 - “[To] 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.”
- Key definitions
 1. Acquisition functions closely associated with inherently governmental functions
 2. Covered employees
 3. Personal conflicts of interest

Personal Conflicts of Interest Covered Contracts

- A **covered contract** is any contract or task order under which some or all of the work contemplated calls for the contractor to perform “**an acquisition function closely associated with inherently governmental functions**”
- Applies to all contracts above the simplified acquisition threshold other than commercial items contracts under FAR Part 12
- Effective December 2, 2011, covered contracts are to contain the FAR clause at FAR § 52.203-16

Personal Conflicts of Interest Covered Acquisition Functions, Defined

- The following tasks constitute “acquisition function[s] closely associated with inherently governmental functions”:
 - Planning acquisitions
 - Determining what supplies or services are to be acquired by the Government, including developing statements of work
 - Developing or approving any contractual documents, to include documents defining requirements, incentive plans, and evaluation criteria
 - Evaluating contract proposals
 - Awarding Government contracts
 - Administering contracts
 - Terminating contracts
 - Determining whether contract costs are reasonable, allocable, and allowable

Personal Conflicts of Interest Covered Employee, Defined

- A **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
- For contracts with covered and non-covered elements of work, employees performing non-covered tasks are NOT considered **covered employees**

Personal Conflicts of Interest

Personal Conflict of Interest, Defined

- FAR § 3.1101: “**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.”
 - Exception: “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.”
 - **Financial interests, personal activity, or relationship** of non-covered employees do NOT constitute **personal conflicts of interest** under the FAR rules

Personal Conflicts of Interest Financial Interests, Defined

- Those **financial interests** potentially giving rise to **personal conflicts of interest** include:
 - Compensation, including wages, salaries, gifts, commissions, professional fees, or fees for business referrals
 - Consulting relationships (including commercial and professional consulting and service arrangements, scientific and technical advisory board memberships, or serving as an expert witness in litigation)
 - Services provided in exchange for honorariums or travel expense reimbursements
 - Research funding or other forms of research support
 - Investment in the form of stock or bond ownership or partnership interest (excluding diversified mutual fund investments)
 - Real estate investments
 - Patents, copyrights, and other intellectual property interests
 - Business ownership and investment interests

Personal Conflicts of Interest Summary of PCI Rule Scope

- Applies to all contracts containing FAR Clause 52.203-16
 - FAR Clause 52.203-16 will be included in the solicitation and resulting contract whenever the contracting officer believes that the scope of work may call for the contractor to perform an **acquisition function closely associated with inherently governmental functions**
- Only **covered employees** – those persons performing the **acquisition functions closely associated with inherently governmental functions** – are covered by the rules
- A **personal conflict of interest** arises when a **covered employee** has a **financial interest** in the covered work being performed

PCI Compliance Requirements Overview

- FAR 3.1103(a) sets out the PCI compliance requirements:
 1. Identify “covered employees” and obtain financial disclosures
 2. Supervise employee assignment process
 3. Obtain signed NDAs from covered employees
 4. Train covered employees to identify and avoid PCIs
 5. Maintain PCI compliance oversight
 6. Disclose violations to the contracting officer
 7. Discipline covered employees who violate PCI obligations

PCI Compliance Requirements Identifying Covered Employees

- The first step in implementing the PCI compliance requirements is to identify those persons to whom the requirements apply
 - ✓ Only **covered employees** must abide by the requirements
- Whenever a solicitation contains the PCI FAR Clause, 52.203-16, it is crucial to pre-plan which specific employees (or specific job positions if not yet filled) will be performing covered **acquisition functions** so that compliance efforts can be focused on those persons at primary risk of having a PCI

PCI Compliance Requirements Obtain Financial Disclosures

- Contractors must 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
 - (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

PCI Compliance Requirements Supervising the Assignment Process

- Contractor must supervise assignment of employees who will perform covered tasks to prevent PCIs
- Pursuant to FAR § 3.1104, “covered employees” with PCIs cannot be assigned to perform covered acquisition support tasks unless the conflict is mitigated or waived
 - Mitigation and waiver are only appropriate in “exceptional circumstances” where prevention of the PCI is impossible
 - Mitigation measures which reduce or neutralize the harm created by the PCI may be accepted upon approval by the Head of Contracting Activity (“HCA”)
 - Alternatively, the contracting officer may seek HCA approval of a waiver of the requirement to avoid PCIs

PCI Compliance Requirements Non-Disclosure Agreements

- As part of the effort to protect non-public information, contractors are required to obtain a signed non-disclosure agreement from each covered employee which memorializes that the employee is prohibited from—
 - Using **non-public information** for personal gain, or
 - Disclosing **non-public information** accessed through performance of a Government contract

PCI Compliance Requirements Non-Disclosure Agreements

- **Non-public information** is defined for the FAR PCI rules as 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
- **Examples of non-public information:**
 - Past performance information
 - Trade secrets
 - Information covered under procurement integrity – FAR 3.104

PCI Compliance Requirements Training for Covered Employees

- Contractors must train their covered employees so as to inform them of their obligation-
 1. To disclose and prevent personal conflicts of interest
 2. Not to use **non-public information** accessed through performance of a Government contract for personal gain
 3. To avoid even the appearance of a personal conflict of interest

PCI Compliance Requirements Maintain Ongoing Oversight

- Contractors must “maintain effective oversight to verify compliance with personal conflict-of-interest safeguards” on an ongoing basis for the full duration of any covered contract
 - Compliance efforts must be ongoing, not merely focused on transition periods
 - Periodic re-confirmation of each covered employee’s financial interests is an effective way to demonstrate a commitment to oversight
 - Annual training of covered employees is also recommended

PCI Compliance Requirements

Disclose Violations and Newly Discovered PCIs

- When covered employees fail to properly disclose their financial interests or fail to abide by their non-disclosure agreements, contractors must “[r]eport to the contracting officer any personal conflict-of-interest violation by a covered employee as soon as identified.”
 - The final rule clarifies that “as soon as identified” means that violations giving rise to potential PCIs should be disclosed immediately.
 - The initial 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”

PCI Compliance Requirements Discipline Violator Employees

- Finally, as part of their PCI compliance efforts, Contractors are required to “take appropriate disciplinary action in the case of covered employees who fail to comply with policies established pursuant to this clause.”
 - No specifics are provided as to what types of discipline are appropriate
 - Contractors should consider and communicate types of discipline up front, and apply them consistently in all instances
 - All disciplinary action should be documented and retained

Personal Conflicts of Interest Subcontractors

- The final rule clarifies that contractors are only responsible for managing their own compliance efforts with regard to PCIs
- **No prime contractor liability for the failures of a subcontractor to comply**
- However, the FAR clause at 52.203-16 has a mandatory flow-down provision for any subcontract over \$150,000 in value where the subcontract statement of work contemplates the performance of covered acquisition support tasks
- Compliance with the flow-down requirement is crucial

REPRESENTATION REGARDING FORMER DOD OFFICIALS

Revolving Door Representation

- New DFARS clause: “Representation relating to compensation of former DoD Officials” (252.203-7005)
- Effective on November 18, 2011
- Requires offerors submitting proposals to DoD to represent whether former DoD officials receiving compensation from the offeror are in compliance with post-employment restrictions
- Scope of the representation is limited to individuals that will have a role on any resulting contract
- Excludes commercial items

Revolving Door Representation

- Language of the clause:

“By submission of this offer, the offeror represents, to the best of its knowledge and belief, that all covered DoD officials employed by or otherwise receiving compensation from the offeror, and who are expected to undertake activities on behalf of the offeror for any resulting contract, are presently in compliance with all post-employment restrictions covered by 18 U.S.C. 207, 41 U.S.C. 2101–2107, and 5 CFR parts 2637 and 2641, including Federal Acquisition Regulation 3.104–2.”

Revolving Door Representation

- Covered DoD Official is defined as an individual that:
 - Leaves or left DoD service on or after January 28, 2008; and
 - Participated personally and substantially in an acquisition with a value in excess of \$10 million, and serves or served—
 - ✓ In an Executive Schedule position under subchapter II of chapter 53 of Title 5, United States Code;
 - ✓ In a position in the Senior Executive Service under subchapter VIII of chapter 53 of Title 5, United States Code; or
 - ✓ In a general or flag officer position compensated at a rate of pay for grade O-7 or above under section 201 of Title 37, United States Code;

OR

Revolving Door Representation

- Covered DoD Official is defined as an individual that:
 - Leaves or left DoD service on or after January 28, 2008; and
 - Serves or served in DoD in one of the following positions: program manager, deputy program manager, procuring contracting officer, administrative contracting officer, source selection authority, member of the source selection evaluation board, or chief of a financial or technical evaluation team for a contract in an amount in excess of \$10 million

Revolving Door Representation

- Substantive restrictions:
 - Many former government employees have “post-employment” or “revolving door” restrictions that restrict:
 - ✓ The companies they can work for and
 - ✓ The types of work assignments they may perform and positions that they may accept with the private sector
 - Compensation bans
 - Representation bans
 - Requirement to obtain ethics opinion prior to receiving compensation
- Best practices

Questions and Discussion

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