



## **DOD, Others Finalize Personal Conflict Rule For Contracts**

By **Dietrich Knauth**

Law360, New York (November 02, 2011, 5:57 PM ET) -- The U.S. Department of Defense, the General Services Administration and NASA published a final rule Wednesday aimed at reducing the federal government's exposure to personal conflicts of interest that could arise from contractor support of government procurement functions.

Because of the heavy involvement of contractors in government decision-making, the agencies proposed the rule in November 2009, seeking to extend personal conflict of interest rules — which prevent government employees from having financial or personal interests that conflict with their government duties — to some contractors.

After tweaking the rule in response to 19 public comments, the government finalized a rule requiring contractors and subcontractors involvement in procurement decisions to report potential conflicts of interest by their employees.

"This is a new requirement — and a substantially burdensome requirement," said Peter Eyre, counsel in Crowell & Moring LLP's government contracts practice. "It's something that contractors will have to pay attention to."

Not all contractors are affected, however, as the rule applies only to contracts and subcontracts in support of acquisitions that are "closely associated with inherently governmental functions," including advising government agencies in procurement decisions, drafting contract requirements or statements of work, evaluating contract proposals, and determining whether contract costs are reasonable.

"It's a relatively narrow list, but for some companies, that's an extensive part of their portfolio," Eyre said.

For companies affected by the regulation, compliance will mean first evaluating the scope of tasks performed to determine whether the rule is triggered, and then gathering information from employees on potential conflicts of interest, including business ownership, consulting relationships, other employment, the financial interests of family members, real estate holdings and gifts including travel.

"Contractors will need to set up new policies and procedures to capture this information and determine if there is a conflict," Eyre said.

Even assuming that employees don't balk at turning over the information, which includes sensitive financial information and information on family members, companies will have to make costly investments in gathering, reviewing and retaining that data, according to Eyre. Employees will need to be trained on what data they need to report, and contractors' compliance staff will need training to properly review the disclosures, he said.

The new rule, which will go into effect Dec. 2, adds a definition of "personal conflicts of interest" to the Federal Acquisition Regulation for the first time, detailing the kinds of personal and financial relationships that are barred. The rule also requires contractors to keep an eye on how their employees use information learned during support of acquisition functions, and establishes a disclosure program for violations by contractor employees.

In response to comments that the previous rule wasn't clear about whether prime contractors would be responsible for reporting conflicts of interest by subcontractors, the agencies changed the rule to make each company responsible for its own employees.

The rule was developed by the White House Office of Management and Budget's Office of Federal Procurement Policy, under a mandate in the Duncan Hunter National Defense Authorization Act of 2009.

The personal conflict of interest rule is separate from a still-pending overhaul of organizational conflict of interest rules, which can bar companies from competing for government contracts when their relationships with other companies threatens to bias a procurement.

The DOD and the Federal Acquisition Regulatory Council have proposed competing frameworks for reform, with the defense agency embracing case law developed in bid protests at the U.S. Government Accountability Office and the Court of Federal Claims, and the FAR Council proposing more flexible approach that prioritizes competitive fairness and protection of nonpublic information over safeguarding the government's interests.

--Editing by Chris Giganti.

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