

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 3 and 52

FAR Case 2008-025

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 Section 841(a) of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009.

DATES: *Effective Date:* [Insert date 30 days after publication in the FEDERAL REGISTER]

Applicability Date: 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, at 202-501-2658 for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Branch at (202) 501-4755. Please cite FAR Case 2008-025.

SUPPLEMENTARY INFORMATION:

TABLE OF CONTENTS

- I. Background
- II. Discussion and Analysis of Public Comments_
 - A. General
 - B. Definitions
 - C. Applicability
 - D. Contractor procedures
 - E. Mitigation or waiver
 - F. Violations/remedies

- G. Clause flowdown
- H. Cost and administrative burden
- I. Miscellaneous Comments
- III. Executive Order 12866
- IV. Regulatory Flexibility Act
- V. Paperwork Reduction Act

I. Background

Section 841(a) of the Duncan Hunter National Defense Authorization Act (NDAA) for Fiscal Year 2009 (Pub. L. 110-417) 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(s) 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 the 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.

The Councils published a proposed rule in the Federal Register on November 13, 2009(75 FR 58584). OFPP and the 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 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 to the final rule, including the following more significant changes:

- Moved the definition of “nonpublic information” to FAR subpart 2.101 to allow more general usage throughout the FAR.
- Revised the definition of “covered employee” to clarify applicability to subcontracts.
- Revised the contracting officer procedures at 3.1103(a)(1) and (3) and (b)(3).
- Revised the discussion of violations at 3.1105.
- Added a new paragraph 3.1106(c) to provide additional clarification on use of clause 52.203-16 when contracting with a self-employed individual.
- Revised the clause at 52.203-16 by—
 - o Clarifying the financial disclosure requirements in paragraph (b)(1);
 - o Adding to the list of possible personal conflicts of interest violations in (b)(6);

- o Removing the list of remedies in paragraph (d);
and
- o Clarifying the clause flowdown.

A. General

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 FFRDCs.

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 conflict of interest coverage, or the current coverage in FAR subpart 3.10 regarding the contractor Code of Business Ethics, nor should it be limited to exclude FFRDCs.

Several respondents addressed the issue of whether personal conflict of interest coverage for contractor employees should mirror the ethics rules that apply to Government employees. The Councils recognize that most of

the ethics statutes that apply to Government employees are not applicable to contractor employees; consequently, 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."

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 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.

The Councils do not concur with the suggested changes to this definition. 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.

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.

The Councils concur, and 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 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.

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

The Councils concur and 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.

Likewise, the Councils note that 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 subpart 9.5.

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

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.

The Councils do not concur. The definition, as amended, is clear that an employee is only covered under the rule if

they perform 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."

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.

The Councils do not concur with these suggested revisions to the definition of "non-public Government information." 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. Moreover, the definition of "non-public 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."

Many respondents commented on the definition of "personal conflict of interest" in proposed section 3.1101 and also in the clause at 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 C.F.R. Part 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 (TARP) regulations at 31 C.F.R. 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.

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 (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. Nor do the Councils think the definition of personal conflict of interest requires a change to address *de minimis* interests; the regulation affords flexibility in this regard 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

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. The Councils do not concur. 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.

One respondent stated that the statutory requirement that the clause be included in task or delivery orders is not recognized in the rule. 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). More than half the respondents commented on this issue, and provided a variety of concerns and suggestions. 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 section 3.1103(a) created ambiguity, the Councils have substituted the word "by," to indicate that financial disclosure is the mandated screening mechanism. Next, in response to a wide variety of responses regarding the breadth of required disclosures, the Councils have made several revisions to section 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."

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 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.

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.

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.

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."

The Councils do not concur with these recommendations. 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.

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.

The Councils do not concur with the recommended changes to these areas of the coverage. 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 contractors

responsibility to ensure that such agreements are enacted and enforced.

b. Non-disclosure agreements (NDAs).

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?
- Is there 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?

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.

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."

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.

Various respondents raised concerns regarding the report to the contracting officer. They point out 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 suggest the rule permit some time for investigation and

consideration of action before reporting the conflict. Another suggestion is to allow for a specified number of days to report. 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 point to the seeming dilemma presented in the proposed rule which requires a report, as soon as the conflict is identified, and yet requires that 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.

Several agency respondents recommend that the report be made to the Inspector General as well as the Contracting Officer. The Councils do not concur with this recommendation. 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 here 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 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.

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).

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 (52.214-26 or 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

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. The Councils do not concur with either recommendation. 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.

Similarly, in response to a respondent who suggested allowing approval of mitigation at the chief of the contracting office level, the Councils do not concur. 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 (3.1103(a)(6) and 52.203-16(b)(6)).

One respondent recommended several changes to this section. 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 3.1103(a)(2)(iii).

2. Violations by the contractor.

a. Clarification of contractor liability.

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.

The Councils concur that a contractor should only be held liable for a violation if the contractor fails to comply with paragraphs (b), (c)(3), or (e) of the clause. 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 (3.1103(a)(6) and (b); 3.1105(a) and (b); and

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 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.

One respondent objected to inclusion of the list of remedies in the clause at 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 clause 52.203-16.

The Councils concur. While the list of remedies included within 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.

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). The Councils do not concur, because 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 March of 2010 (75 FR 14059). 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.

The Councils have made changes to clarify the flowdown requirements in response to concerns 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.

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 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.

The Councils do not concur that flowdown of the clause should be conditioned on subcontracts that exceed the simplified acquisition threshold, rather than specifying \$150,000. 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.

Several respondents expressed concerns about the costs involved with establishing a comprehensive compliance program to comply with the requirements of this rule. While the Councils recognize that there will be some costs associated with implementation of this program, the Government will ultimately pay most of or all of these costs, which will be factored into the proposals of those bidding for Government contracts. Subcontractors also include their anticipated costs in their offered price to the prime contractor. The anticipated costs, therefore, would be included in the payment by the Government of the prime contract.

2. Information collection requirements.

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.

The information collection requirement estimated burden hours are not intended to cover the entire burdens imposed

by the program, but only the burdens associated with the collection of the required information. Furthermore, 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. The Councils do not have any credible basis upon which to revise the estimated information collection requirement burden 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, the Councils found implementation of the recommendation 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.

Finally, one respondent suggested that the proposed rule should require “that a contractor certify that... no covered personnel have a personal conflict of interest.” The Councils do not concur. A certification requirement would not add any substantial protections not already present in the rule.

III. Executive Order 12866 and Executive Order 13563

Executive Orders 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). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has been designated a "significant regulatory action" although not economically significant, under section 3(f) of Executive Order 12866. Accordingly, the rule has been reviewed by the Office of Management and Budget. This rule is not a major rule under 5 U.S.C. 804.

IV. Regulatory Flexibility Act

DoD, GSA, and NASA 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 conflict 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; and
3. 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 because the final rule contains information collection requirements. OMB has cleared this information collection requirement under OMB Control Number 9000-XXXX title: FAR Case 2008-025, Preventing Personal Conflicts of Interest for Contractor Employees Performing Acquisition Functions.

Annual Recordkeeping Burden.

List of Subjects in 48 CFR parts 3 and 52

Government procurement.

Dated:

Milissa Gary,

Acting Director, Office of Acquisition Policy.

FAC Intro Item

Item XX – Preventing Personal Conflicts of Interest for Contractor Employees Performing Acquisition Functions (FAR Case 2008-025)

This final rule amends the Federal Acquisition Regulation (FAR) to address 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). This rule requires the contractor to take the steps necessary to identify and prevent personal conflicts of interest for employees that perform acquisition functions closely associated with inherently governmental functions. The contracting officer shall consult with agency legal counsel for advice and recommendations on a course of action when the contractor reports a personal conflicts of interest violation by a covered employee or when the contractor violates the clause requirements.

Government procurement.