

COUNCIL OF DEFENSE AND SPACE INDUSTRY ASSOCIATIONS
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June 2, 2014

General Services Administration
Regulatory Secretariat (MVCB)
1800 F Street, NW, 2nd Floor
Washington, DC 20405-0001

Attn: Ms. Hada Flowers

Ref: FAR Case 2013-022: Extension of Limitations on Contractor Employee Personal Conflicts of Interest

Via Email: hada.flowers@gsa.gov

Dear Ms. Flowers:

On behalf of the Council of Defense and Space Industry Associations (CODSIA)¹ we are pleased to submit the following comments on the proposed rule titled "Extension of Limitations on Contractor Employee Personal Conflicts of Interest," published in the Federal Register on April 2, 2014. We appreciate the 60 day comment period. While the undersigned CODSIA members recognize the merits of avoiding personal conflicts of interest (PCI) among contractor personnel, for the reasons outlined below CODSIA associations oppose this proposed expansion of the current PCI regulations. In summary, we believe that the government has failed to fully address the need for PCI expansion, is dismissing the costs of implementation to the federal contracting community, and is proliferating implementation challenges that exist as a result of shortcomings of previous regulations attempting to eliminate PCI among contractor employees.

Government Has Failed to Demonstrate a Need for Expanded PCI Coverage

There have been two statutory requirements adopted since 2009 that require either government-wide or DoD review of PCI requirements for contractor personnel. Section 841(a) of the fiscal year 2009 National Defense Authorization Act (NDAA; P.L. 110-417) directed the Office of Federal Procurement Policy (OFPP) to develop and issue a policy to address personal conflicts of interest for contractor employees who perform acquisition functions that are closely associated with inherently governmental functions (emphasis added). Section 841 further directed OFPP to review FAR regulations to determine whether additional FAR changes are necessary to address PCI by contractor employees with respect to

¹ CODSIA was formed in 1964 by industry associations with common interests in federal procurement policy issues at the suggestion of the Department of Defense. CODSIA consists of seven associations – the Aerospace Industries Association (AIA), the American Council of Engineering Companies (ACEC), the Information Technology Alliance for the Public Sector (ITAPS), the National Defense Industrial Association (NDIA), the Professional Services Council (PSC), TechAmerica, and the Chamber of Commerce of the United States. CODSIA's member associations represent thousands of government contractors nationwide. The Council acts as an institutional focal point for coordination of its members' positions regarding policies, regulations, directives, and procedures that affect them. A decision by any member association to abstain from participation in a particular case is not necessarily an indication of dissent.

functions other than acquisition functions that are closely associated with inherently governmental functions and to report its findings to designated congressional committees. On August 18, 2011, OFPP sent a letter to such committees stating:

“The FAR Council believes that PCIs are most likely to arise in connection with the performance of acquisition functions closely associated with inherently governmental functions and has not (emphasis added) identified other functions currently in need of regulatory coverage.”²

The letter went on to state that in light of the importance of reinforcing public confidence in our procurement system and the integrity of the acquisition process, the FAR Council would issue a notice simultaneously with the publication of the “acquisition functions closely associated with inherently government functions” final rule seeking public feedback on whether there are additional areas that warrant regulatory coverage. On November 2, 2011, the FAR Councils issued a Request for Information (RFI) posing the question to the public of whether additional guidance on PCI is necessary. Only one response was received, from PSC, a CODSIA member association, opposing the expansion of PCI coverage beyond acquisition functions at that time.³ OFPP took no further public action regarding the RFI.

The fiscal year 2013 NDAA (P.L. 112-239) included a provision (Section 829) that directed a new review by the Secretary of Defense to determine whether it would be in the best interest of the department and the taxpayers to extend PCI guidance to contractors performing any functions other than acquisition functions that are closely associated with inherently governmental functions, services under a personal services contract, or staff augmentation services. Section 829 also directed the Secretary of Defense to revise the Defense Supplement to the FAR (DFARS) as necessary if the review determined that the guidance on PCI should be extended.

The background section accompanying this April 2014 proposed rule states that the Secretary of Defense reviewed existing FAR guidance on PCI 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 and that, of those that responded, the majority indicated that protections or agreements covering additional functions would be helpful. The background section provides no other details about the review or the feedback and DoD has not made any of this information public. Based on this limited internal DoD-only data call, in June 2013 DoD decided to consider amendments to the DFARS only, but also decided to consult with the FAR Council about government-wide coverage. We are not aware of any data from the civilian agencies addressing concerns with the scope of coverage of the current PCI rule or any requests or justification for expanding coverage to even DoD, let alone to all federal agencies.

CODSIA is opposed to the expansion of the current PCI guidance as provided for in this proposed rule because this expansion represents a classic case of “a solution in search of a problem”. Two reviews were done to determine whether an expansion is necessary. The first, conducted by OFPP, included an

² OFPP letter to the Honorable Joseph Lieberman, Chairman, Senate Committee on Homeland Security and Governmental Affairs, August 18, 2011, available at <http://www.whitehouse.gov/sites/default/files/omb/procurement/reports/oci-report-to-congress-08182011.pdf>.

³ PSC Comments on November 2, 2011 FAR Council Request for Information regarding the expansion of PCI for contractor employees, January 3, 2012, available at http://www.pscouncil.org/PolicyIssues/EthicsCompliance/ConflictsofInterest/Comments_on_FAR_PCI_RFI.aspx.

opportunity for public comment and a determination based on the feedback and OFPP review that PCI coverage beyond acquisition functions that are closely associated with inherently governmental functions is not necessary. The 2013 DoD review conducted in a non-public manner simply stated that broadening coverage “would be helpful” and “may be” in the best interest of the department and the taxpayer. However, no additional details about the questions that were posed to the military departments or defense agencies nor any relevant details about the responses received by the Office of the Secretary of Defense have been shared with the public. We believe that such details should have been made publicly available and that the FAR Council should refrain from advancing with this rulemaking until such information is shared with stakeholders and an opportunity for discussions about the results of these reviews is afforded to stakeholders.

Proposed Rule Exceeds Statutory Coverage

Section 829 directed the Secretary of Defense to modify ONLY the DFARS if necessary, yet the proposed rule is a government-wide FAR change. CODSIA opposes the adoption of a DoD-wide or government-wide rule, particularly given that Section 829 did not direct a government-wide change and the OFPP finding that expanding coverage beyond acquisition functions that are closely associated with inherently governmental functions is not necessary.

Furthermore, the absence of a government-wide rule is not a constraint on agencies taking action to address potential PCI beyond acquisition functions on a case-by-case basis. Where a federal agency identifies specific circumstances that they believe merit coverage, agencies have been adopting their own coverage to meet these specific situations. For example, the Department of Treasury issued a final rule to implement the largely completed TARP program, as required by Section 108 of the Emergency Economic Stabilization Act of 2008 (EESA).⁴ That statute and its implementing rules identify separate coverage for organizational and for personal conflicts of interest. An interim rule was published on January 21, 2009.⁵ In adopting their final rule, Treasury revised the definition of a personal conflict of interest in section 31.201 to adopt the standards used in Office of Government Ethics Form 450. Also of significance, the Treasury final rule extends coverage of the personal conflict of interest provisions to only “key individuals of a retained entity,” as those terms are defined in the rule, not to every employee performing those functions.⁶

In addition, on August 25, 2011, the Department of Health and Human Services published an updated final rule providing a framework for identifying, managing, and ultimately avoiding investigators’ financial conflicts of interest, revising the 1995 regulations to update and enhance the objectivity and integrity of the department’s research process.

Other agencies, such as the Army and Air Force, have adopted specific contract clauses (so-called “H” clauses) to address their specific PCI coverage for individual procurement opportunities. There have been multiple contracting variants for PCI in use with little consistency across government agencies. CODSIA opposes adopting alternative PCI terms in Section H, separate agency rules for PCI, and any PCI

⁴ 76 F.R. 61046 (Oct. 3, 2011) available at <http://www.gpo.gov/fdsys/pkg/FR-2011-10-03/pdf/2011-25443.pdf>; this final rule applies to both financial agency agreements and procurement contracts. Procurement contracts are also subject to the FAR along with other regulatory requirements.

⁵ 74 F.R. 3431 (Jan. 21, 2009) available at <http://www.gpo.gov/fdsys/pkg/FR-2009-01-21/pdf/E9-1179.pdf>.

⁶ 74 F.R. 61050 (Oct. 3, 2011)

FAR regulatory framework that moves beyond the statutory authorities without a clear and compelling reason.

Cost/Benefit Analysis is not Being Fully Considered

The cost for contractors to comply with an expanded PCI rule could be significant. Contractor costs would be incurred because of the requirement for contractors to obtain extensive information when an employee is 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. Contractors would also be required to obtain updated information when employees' personal or financial circumstances change in such a way that a new personal conflict of interest might occur in the performance of a task. It is likely that the financial or personal circumstances of contractor personnel could change on a regular basis, thus requiring multiple revisions to any forms required to help identify any perceived or potential conflicts of interest. Of note, not even the PCI standard applicable to covered government employees requires this type of continuous financial or personal information reporting. They require only annual updates.

Additionally, the need for contractor personnel required to oversee the contractor's PCI policies and compliance with this expanded PCI coverage will increase contractors' costs. CODSIA members believe that neither DoD nor the FAR Council has effectively weighed the impact of these costs compared to any perceived benefit that they may receive from the expanded PCI coverage. In fact, given the lack of supporting material to suggest that expanded PCI coverage is necessary, the proposed rule is incongruous with efforts being led by Congress and the Under Secretary of Defense for Acquisition, Technology and Logistics (AT&L) seeking to reduce non-value added burdens on both DoD and defense contractors.

Challenges Associated with Previous PCI Final Rule Must Be Addressed

Although companies are making a good faith effort to comply with the 2011 final rule, implementation is still a work in progress for many companies and for the agencies, and shortcomings and ambiguities remain that should be corrected or clarified. For example, definitions in the final FAR rule relating to "close family member" and "de minimus interest" are overly broad and are creating confusion about what information should be disclosed to the government. These concerns were raised in the PSC January 3, 2012 response to the RFI and CODSIA continues to be concerned that they have not been addressed.

We are also concerned about the imprecise, subjective nature of the definition of the term "closely associated with inherently governmental function." The FAR rule specifically refers to FAR 7.5(d) as the basis for determining whether a contractor employee will be performing functions that are closely associated with inherently governmental functions. However, FAR 7.5(d) does not, per se, include a specific definition of the term "closely associated with inherently governmental function." Instead it includes a non-exhaustive list of functions that are not considered to be "inherently governmental" functions but may approach being in that category. As the term "closely associated with inherently governmental function" is imprecise and open to interpretation, CODSIA recommends that federal contracting officers be required to include in solicitations an explanation for why the clause is being included and specifically designate the functions to be performed by contractor employees for which the clause will be applicable.

We support the decision of the FAR Council in this proposed rule to exempt the acquisition of commercial items and acquisitions below the simplified acquisition threshold. CODSIA recommends, however, that the December 2011 FAR rule be modified to expressly highlight the exemption in the rule for acquisitions of commercial items. Although such exemptions are included in FAR Part 12, neither FAR Part 3.11 nor the clause at FAR Part 52.203.16 (including its flow-down requirement) state that commercial item acquisitions are exempt.

CODSIA associations also recommend that the December 2011 FAR rule be amended to remove language that requires contractors to inform their employees of their obligation to avoid even the appearance of PCI. This requirement is not included in either the fiscal year 2009 or 2013 NDAA statutory language and establishes a vague standard and potentially arbitrary actions against a contractor and it is an unexecutable responsibility imposed on covered employees.

We will separately comment on the Initial Regulatory Flexibility Analysis published along with this proposed rule. Simply, we believe the FAR Council grossly underestimates both the number of respondents (shown as 188) and the number of responses (shown as 1).

Conclusion

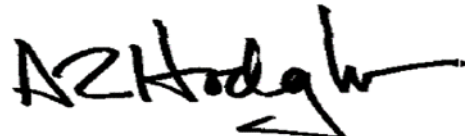
CODSIA opposes the expansion of the existing PCI regulations because there is no evidence that contractor performance of closely associated with inherently governmental functions or contractor performance under personal services contracts is creating personal conflicts of interests. We also oppose the expansion because it is contrary to current DoD efforts to remove non-value added burdens for federal contractors and the department and it would only exacerbate ongoing implementation challenges associated with the December 2011 FAR rule regarding PCIs for contractor personnel performing acquisition functions closely associated with inherently governmental functions. Lastly, the proposed rule unnecessarily would be applicable government-wide despite the lack of evidence to justify such an expansion, extends coverage beyond what the NDAA statutory language required, and runs counter to OFPP findings that an expansion of PCI coverage is not necessary.

Thank you for the opportunity to submit these comments. PSC welcomes the opportunity to discuss these comments further with the FAR Council. If you have any question or need additional information, please contact Alan Chvotkin or Roger Jordan, the CODSIA project officers at 703-875-8059 or Bettie McCarthy, CODSIA's Administrative Officer at 703-875-2051 or at codsia@pscouncil.org.

Sincerely,



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