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PRACTICAL TIGHT-KNIT BRIEFINGS INCLUDING ACTION GUIDELINES ON GOVERNMENT CONTRACT TOPICS

PREVENTING PERSONAL CONFLICTS OF INTEREST AMONG CONTRACTOR EMPLOYEES PERFORMING ACQUISITION SUPPORT SERVICES

By Keith R. Szeliga and Franklin C. Turner

On November 2, 2011, the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council issued a final rule amending the Federal Acquisition Regulation to impose upon contractors onerous new obligations relating to the identification and prevention of personal conflicts of interest among employees performing

“acquisition functions closely associated with inherently governmental functions.”¹ The PCI rule also requires contractors to prohibit covered employees from using non-public information accessed through the performance of a Government contract for personal gain and to obtain from covered employees executed non-disclosure agreements prohibiting the dissemination of such information.² Although the rule is limited to contractor employees performing acquisition functions, the FAR Councils have suggested that it could be expanded to include additional services.³ Thus, some view the rule as a pilot program for a broader PCI framework.

This BRIEFING PAPER explains the requirements imposed by the new rule. It also offers strategies for complying with those requirements.

Keith R. Szeliga is a partner and Franklin C. Turner is an associate in the Government Contracts, Investigations & International Trade Practice Group of Sheppard Mullin Richter & Hampton LLP's Washington, DC office. Their practice focuses on Government contracts litigation and counseling.

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Background

The impetus for the PCI rule traces its origins to the January 2007 Report of the Acquisition Advisory Panel to the Office of Federal Procurement Policy and the United States Congress,⁴ which was issued pursuant to the Services Acquisition Reform Act of 2003.⁵ The Panel found that contractor employees frequently work alongside Government employees performing identical functions, including acquisition support.⁶ Yet contractor employees are not subject to the numerous statutory and regulatory conflict-of-interest provisions designed to avoid preferential treatment and self-dealing by Government employees.⁷ The Panel noted that this disparity has given rise to questions as to whether contractor personnel should be subject to some or all of the rules that apply to Government employees.⁸

The Panel cautioned against simply imposing upon contractor personnel the “extensive and complex [PCI] requirements imposed on federal employees.”⁹ Doing so, reasoned the Panel, would entail significant training, monitoring, and enforcement costs that contractors would pass on to the Government.¹⁰

In light of its findings, the Panel recommended, among other things, that the Federal Acquisition Regulatory Council “review existing rules and regulations, and to the extent necessary, create new, uniform, government-wide policy and clauses dealing with...personal conflicts of interest...as well as the protection of contractor confidential and proprietary data.”¹¹ In the PCI context, the Panel suggested that the FAR Council consider developing a standard clause or group of clauses setting forth the requirement that the contrac-

tor perform with “a high level of integrity.”¹² Similarly, with respect to proprietary contractor data, the Panel recommended that the FAR Council provide additional regulatory guidance vis-à-vis standardized clauses pertaining to the use of non-disclosure agreements, the sharing of information among contractors, and remedies for improper disclosure.¹³

Slightly more than a year after the Panel issued its report, the Government Accountability Office issued a separate report echoing many of the Panel’s findings.¹⁴ The GAO’s March 2008 report highlighted the Government’s reliance on contractors to perform critical acquisition functions.¹⁵ The GAO also pointed out that the Government’s increase in spending has been met with a commensurate increase in contractors performing tasks that affect billions of dollars in federal expenditures.¹⁶ The GAO Report noted, for example, that the Department of Defense routinely hires contractors to provide “key mission-critical” functions that bear a close nexus to tasks traditionally executed by Government workers, including (1) developing contract requirements, (2) preparing requests for proposals, (3) evaluating contractor responses to requests for proposals, (4) analyzing contractors’ cost, schedule, and performance data, (5) assisting in award-fee determinations, (6) developing long-range financial plans, and (7) preparing yearly budgets.¹⁷

Like the Panel, the GAO noted that a multitude of laws and regulations address PCIs that may arise amongst Government employees,¹⁸ although very little of this authority relates to PCIs among contractor employees.¹⁹ Accordingly, the GAO expressed concern regarding the “greater risks”

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of PCIs for contractor employees performing acquisition functions closely associated with inherently governmental functions.²⁰ To ameliorate these risks, the GAO recommended, among other things, that the Secretary of Defense authorize the development and implementation of a policy to require contractors to identify and prevent PCIs for employees performing “mission-critical” tasks relating to the “development, award, and administration of government contracts and other advisory and assistance functions.”²¹ Also like the Panel, the GAO recommended that the policy be implemented through a standard contract clause.²²

In the wake of these reports, Congress took action. The Duncan Hunter National Defense Authorization Act for Fiscal Year 2009²³ mandated that the OFPP promulgate a standardized policy to “prevent personal conflicts of interest by contractor employees performing acquisition functions closely associated with inherently governmental functions (including the development, award, or administration of Government contracts) for or on behalf of a Federal agency or Department.”²⁴ The Act specifically required that the policy define PCIs and obligate contractors whose employees perform acquisition support functions to:²⁵

- (a) Identify and prevent PCIs;
- (b) Prohibit contractor employees who have access to non-public information obtained while performing acquisition functions from using that information for personal gain;
- (c) Report any PCI violation to the Contracting Officer as soon as it is identified;
- (d) Maintain effective oversight to verify compliance with PCI safeguards;
- (e) Implement procedures to screen for potential PCIs; and
- (f) Take appropriate disciplinary action against employees who violate the policies relating to PCIs and non-public information.

The Act also required the OFPP to develop a PCI clause for inclusion in solicitations, contracts, task orders, and delivery orders.²⁶

On November 13, 2009, the FAR Councils issued a proposed rule designed to implement the requirements of the Act.²⁷ After receiving comments from industry and Government sources, the Councils promulgated the final rule on November 2, 2011.²⁸ The final rule creates a new FAR Subpart 3.11, entitled “Preventing Personal Conflicts of Interest for Contractor Employees Performing Acquisition Functions,” and a new contract clause at FAR 52.203-16, entitled “Preventing Personal Conflicts of Interest.”²⁹

On the same day that the new rule was promulgated, the FAR Councils issued a separate request for information regarding “expanded coverage” of the rule.³⁰ The RFI sought public commentary as to whether there are other “contracting methods, types, and services” which give rise to “heightened concerns” for possible PCIs.³¹ The RFI also requested comments on whether the rule should be “expanded to address personal conflicts of interest by contractor employees with respect to functions other than those covered by [the rule],” to “ensure policies for the prevention and mitigation of personal conflicts of interest are sufficiently rigorous, comprehensive, and uniform.”³²

Applicability

Contracting Officers must include the new PCI clause in contracts, task orders, and delivery orders issued on or after December 2, 2011, that contemplate the performance of “acquisition functions closely associated with inherently governmental functions.”³³ The rule also instructs COs to modify existing task or delivery order contracts, on a bilateral basis, to include the new PCI clause for future orders.³⁴ The contractor’s leverage in the “bilateral” negotiation of these changes, however, is virtually nonexistent. If a contractor refuses to accept the modification, it will be ineligible to receive additional orders under the contract.³⁵

Procurements for commercial items are exempt from coverage,³⁶ as are those valued at or below the simplified acquisition threshold.³⁷ The commercial item exemption is particularly significant. Many contractors offer acquisition support services under the General Services Administration

Schedules contract program. For example, the GSA's Mission Oriented Business Integrated Services (MOBIS) Schedule 874 contains Special Item Number 874-6 for Acquisition Management Support Services. The services available under this SIN relate to many of the tasks implicated by the rule, including, for example (1) market research and the recommendation of a procurement strategy, (2) the development of cost/price estimates, (3) the development of statements of work, and (4) assistance in supporting proposal evaluations, including performing cost/price analyses and/or technical proposal analyses.³⁸ Because the GSA Schedules program is limited to commercial items,³⁹ all such services provided under a GSA Schedule contract will be exempt from the rule.

In the event that a procuring agency does not include the PCI clause in cases where it is required by the rule, the clause nevertheless may be incorporated by operation of law pursuant to the "*Christian* doctrine," which provides for the inclusion of an omitted contract clause that reflects a "deeply ingrained strand of public procurement policy."⁴⁰ The *Christian* doctrine seems likely to apply in this context because the clause addresses concerns relating to the integrity of the procurement process and was created pursuant to a congressional directive.

Key Definitions

■ Covered Employees

The obligations imposed by the PCI rule do not apply to all contractor personnel, but are limited instead to "covered employees."⁴¹ The rule defines a "covered employee" to mean an individual who performs an "acquisition function closely associated with inherently governmental functions" and is either (a) an employee of the contractor or (b) a "subcontractor that is a self-employed individual."⁴²

The definition of "covered employee," as well as the preamble to the rule, makes clear that a prime contractor is not directly responsible for subcontractor employees.⁴³ The sole exception relates to subcontractors that are self-employed individuals.⁴⁴ Such individuals are treated as "cov-

ered employees" because, pursuant to the flowdown requirement included in the rule,⁴⁵ they otherwise would be responsible for reviewing their own PCI disclosures and reporting their own violations, without oversight from any other person.⁴⁶

An employee who is not a "covered employee" at the inception of a contract may later become covered if he or she is assigned to a new task involving an "acquisition function closely associated with inherently governmental functions." Accordingly, as explained below, the rule effectively requires contractors either to implement a system for identifying whether each new task could trigger status as a "covered employee" or to treat all employees as "covered employees" for purposes of the rule.

■ Acquisition Function Closely Associated With Inherently Governmental Functions

The phrase "acquisition function closely associated with inherently governmental functions," the performance of which triggers an individual's status as a "covered employee," is defined to "[m]ean[] supporting or providing advice or recommendations with regard to the following activities of a Federal agency,"⁴⁷ which are enumerated specifically in the rule:⁴⁸

- (1) Planning acquisitions;
- (2) Determining the supplies or services to be acquired, including developing statements of work;
- (3) Developing or approving any contractual documents, including documents defining requirements, incentive plans, and evaluation criteria;
- (4) Evaluating contractor proposals;
- (5) Awarding contracts;
- (6) Administering contracts, including ordering changes, providing technical direction, evaluating performance, and accepting or rejecting supplies or services;
- (7) Terminating contracts; and
- (8) Determining the reasonableness, allocability, and allowability of contract costs.

The language of the rule, including defining “an acquisition function closely associated with inherently government functions” to “mean,” rather than “include,” the foregoing activities, suggests that this list is exhaustive. Nevertheless, the list seems broad enough to encompass virtually any activity relating to the procurement process.

■ Personal Conflict Of Interest

The rule defines a PCI as 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.”⁴⁹

The rule identifies three potential sources of PCIs: (1) financial interests of the covered employee as well as those of “close family members” or other members of the covered employee’s household, (2) other employment or financial relationships, including seeking or negotiating for prospective employment or business, and (3) gifts, including travel.⁵⁰

Examples of “financial interests” covered by the rule include:⁵¹

- (a) Compensation, including wages, salaries, commissions, professional fees, or fees for business referrals;
- (b) Consulting relationships, including commercial and professional consulting and service arrangements, scientific and technical advisory board memberships, or serving as an expert witness in litigation;
- (c) Services provided in exchange for honorariums or travel expense reimbursements;
- (d) Research funding or other forms of research support;
- (e) Investment in the form of stock or bond ownership or partnership interest, excluding diversified mutual fund investments;
- (f) Real estate investments;
- (g) Patents, copyrights, and other intellectual property interests; and

- (h) Business ownership and investment interests.

The rule refers to each of these items as an “example” of a covered financial interest,⁵² and the preamble indicates that the list is “not exhaustive.”⁵³ Accordingly, with two narrow exceptions specifically identified by the rule, virtually any type of financial interest, whether actual or contingent, could be deemed to create a PCI.⁵⁴

The first exception is for diversified mutual fund investments.⁵⁵ Such investments are not deemed to create a PCI because a covered employee does not control the composition of such funds and only a small portion of the employee’s holdings will consist of the securities of any particular contractor. Thus, the rule deems diversified mutual funds not to create an incentive that would bias a covered employee’s judgment.

The second exception is for a “*de minimis* interest that would not ‘impair the employee’s ability to act impartially and in the best interest of the Government.’”⁵⁶ The rule provides no guidance regarding the factors that a contractor should consider in determining whether a financial interest meets this standard.⁵⁷ Relevant considerations might include the absolute dollar value of the financial interest, the relative value of that interest compared to the employee’s other assets, and the monetary value of the relevant contract, either in the absolute sense or as compared to the financial resources of the entity in which the financial interest is held. Although agencies may be more likely to focus on the absolute dollar value of the procurement, the rule contains no such requirement.

To complicate matters further, a number of other important definitions are missing from the rule. For example, the rule does not identify the individuals who qualify as “close family members” or “other members of the household.”⁵⁸ When pressed to further clarify these phrases, the Government declined to do so and deemed the rule’s wording “adequate.”⁵⁹

Although the rule is silent, any reasonable definition of “close family members” would include, at minimum, the spouse and minor children of a covered employee. Whether the definition

also includes adult children, parents, siblings, and step-relatives is less clear. Arguably, such individuals should not be deemed “close family members” because treating them as such would expand the rule to a broader sphere of actors than encompassed by the Government ethics regulations, which impute a family member’s financial interest to a Government employee only in the case of a spouse or minor child.⁶⁰

With regard to the phrase “other members of the household,” family members residing with the covered employee on a full-time basis almost certainly would be included. It is possible, however, that the phrase could be interpreted to include other individuals, such as roommates and live-in employees. In the absence of specific guidance in these areas, a contractor would be wise to assume the Government will opt for a broad interpretation of the phrase.

Another complication arises from the fact that the regulatory definition of a PCI does not include any knowledge requirement.⁶¹ Thus, a covered employee could be deemed to have a PCI even if he or she is not aware of the financial interest that gives rise to the conflict. The preamble concedes 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.”⁶² It is not clear whether the same reasoning would apply to cases in which the financial interest is theoretically knowable but not actually known, such as instances in which a covered employee is unaware of a relevant financial interest held by a member of his or her household. In the absence of any guidance on this point, contractors should advise covered employees that they are responsible for ascertaining the financial interests of close family and household members. Although it is unlikely that covered employees will seek or obtain financial disclosures from such individuals in all cases, informing them of the obligation to do so will protect the contractor’s interests.

■ Non-Public Information

For purposes of limiting use and disclosure, the PCI rule defines non-public information to include (1) information that is exempt from disclosure under the Freedom of Information Act⁶³

or otherwise protected from disclosure by statute, Executive Order, or regulation *and* (2) information that has not been disseminated to the general public in cases where the Government has not yet determined whether such information can or will be released.⁶⁴ This definition was intended to have “broad meaning,” to include proprietary data belonging to other contractors as well as Government information that could give rise to an unfair competitive advantage.⁶⁵ Moreover, the information need not be marked with a restrictive legend to qualify as “non-public” under the rule.⁶⁶ In fact, the preamble suggests that contractor employees should presume that all information furnished during performance of a Government contract meets the definition of non-public information “unless facts clearly indicate the contrary.”⁶⁷

The preamble also suggests that the rule defines “non-public information” in a manner that is “similar” to the definition used for Government employees, a standard that the Government deems “particularly appropriate” for service contractors performing acquisition functions covered by the rule.⁶⁸ However, there is an important difference between the definitions.⁶⁹ Unlike the definition applicable to contractor employees, the Office of Government Ethics defines non-public information, in part, as information that the employee “*knows or reasonably should know* has not been made available to the general public.”⁷⁰ Thus, Government employees face a less stringent, knowledge-based standard when determining whether information qualifies as non-public, while contractor employees are instructed to assume that all information is protected. Moreover, the definition promulgated by the OGE provides contextual examples regarding the circumstances in which information should or should not be disclosed.⁷¹ The PCI rule provides no such guidance.

New Requirements

The PCI rule imposes a host of burdensome compliance obligations on contractors performing acquisition functions.

■ Screening Procedures

The rule requires contractor implementation of procedures that screen covered employees

for PCIs by (1) ensuring that covered employees disclose any financial or other interests (including interests of their close family and other household members) that might be affected by each new task to which they are assigned⁷² and (2) mandating that covered employees update their disclosures whenever their “personal or financial circumstances” change in a way that might create a PCI.⁷³

Compliance with the rule’s screening requirement is predicated upon the submission of a financial disclosure form.⁷⁴ Consistent with the Government’s view that contractors must self-police PCIs, the rule affords contractors broad latitude in the development and implementation of the requisite screening procedures.⁷⁵ The rule is also silent with respect to the content of the disclosure form.⁷⁶

A contractor could choose to comply with the rule’s screening obligations by requiring covered employees to disclose, and submit continuous updates regarding, *all* of their financial interests. The contractor would then review the covered employee’s financial disclosure and all updates to determine whether any of his or her financial interests might create a PCI.

Alternatively, the rule’s preamble indicates that another 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.⁷⁷ This approach has the advantage of reducing both the number of financial interests disclosed and the frequency of updates. The result is a corresponding reduction in both the contractor’s screening burden and the likelihood that a relevant financial interest will be overlooked. There is no associated increase in risk for the contractor because the rule makes clear that the contractor will not be held liable for a covered employee’s failure to disclose a PCI.⁷⁸

Regardless of the particular screening method chosen, the rule provides that the contractor must require each covered employee to update the disclosure statement whenever his or her personal or financial circumstances change in such a way that a new PCI might arise.⁷⁹ It is critical to advise employees of this obligation. Contrac-

tors may even wish to include in their disclosure forms a requirement for covered employees to certify that they will update the disclosure if their circumstances change. In addition, a contractor would be well advised to require a covered employee to disclose any potentially conflicting financial interest(s), or represent that he or she has no such interest(s), each time the employee is assigned to a new task involving acquisition functions.

Contractors must decide who in their organization will be responsible for reviewing the financial disclosures of covered employees for PCIs. Although the rule is silent on this point, it would be wise to vest responsibility for such review in personnel who have the necessary experience and training to deal with conflict-of-interest issues and whose objectivity will not be impaired by their direct involvement in the relevant contract or program. Compliance officers would seem to be an ideal choice for this role. At minimum, consultation with a compliance officer or the law department should be encouraged in close cases.

■ Preventing Personal Conflicts Of Interest

The rule requires contractors to prevent PCIs, including ensuring that covered employees do not perform any task for which a PCI has been identified.⁸⁰ This provision effectively requires contractors to review an employee’s financial disclosures and related updates before assigning that employee to any new acquisition function to ensure that the task will not create a PCI. If a PCI would arise, the employee either must not be assigned to the task or the contractor must obtain approval for mitigation or waiver of the PCI.⁸¹ The rule provides no further guidance in this area, consistent with the Government’s position that the contractor is best suited to “manage its employees” to ensure that a PCI does not occur.⁸²

If the contractor is uncertain whether the assignment of a particular employee to a particular task would create a PCI, the contractor should either refrain from assigning the employee to that task or solicit guidance from the CO. Although the preamble makes clear that the contractor, not the CO, is responsible for screening financial disclosure statements,⁸³ nothing in the rule

absolves the CO of his or her responsibility to interpret the requirements of the contract, including the new PCI clause, whether in the abstract or as applied to the financial circumstances of a particular employee.

■ Prohibiting The Use Of Non-Public Information Through Non-Disclosure Agreements

The PCI rule requires contractors to prohibit the use of non-public information accessed through performance of a Government contract for personal gain.⁸⁴ To effectuate this objective, the rule mandates that contractors obtain from each covered employee a signed non-disclosure agreement that prohibits the disclosure of such information.⁸⁵ The rule offers little guidance concerning the specific requirements for the NDA,⁸⁶ and the FAR Councils specifically rejected the request to promulgate a standard form agreement.⁸⁷ The preamble suggests only that each covered employee will have to sign an NDA, that the content of the NDA should “protect the interests of the information owner(s),” including the contractor and its employees, and that the NDA should last for an “appropriate length” of time, which the FAR Councils suggest is “often indefinitely.”⁸⁸

To comply with the NDA requirement, contractors should review their existing agreements to ensure that they are consistent with the new rule. Most NDAs limit protection to information that is confidential or proprietary. Many exclude unmarked information from coverage. Some limit the obligation to protect information to a finite duration. Such terms are inconsistent, or potentially inconsistent, with the rule’s definition of non-public information as including essentially any information that is not yet in the public domain,⁸⁹ and its suggestion that the appropriate duration for protection is often indefinite.⁹⁰

Although not expressly required by the rule, contractors may wish to implement additional protections to prevent the unauthorized use and disclosure of non-public information. Such protections could include, for example, logging access to non-public information, implementing physical and electronic access control measures, establishing document control protocols, and conducting periodic audits to ensure compliance.

■ Informing Covered Employees Of Their PCI-Related Duties

The rule requires contractors to inform covered employees of their obligations to disclose and prevent PCIs, to refrain from using non-public information accessed through performance of a Government contract for personal gain, and to “avoid even the appearance” of a PCI.⁹¹ The rule provides little guidance regarding when, how, and in what level of detail contractors should inform their employees of these obligations.

To comply with the requirement to inform covered employees of their obligations under the rule, contractors should update their codes of business ethics and conduct to include information that addresses those obligations. Contractors also would be well advised to update their Government contracts compliance training materials to educate employees regarding their obligations under the new rule. At minimum, such materials should (1) identify the categories of work that trigger status as a covered employee, (2) provide detailed guidance regarding the circumstances that can give rise to a PCI, including the use of concrete examples, (3) educate employees regarding their obligations under the rule with respect to both PCIs and non-public information, (4) explain the procedures for obtaining disclosure statements, including the requirement for submissions to be complete, accurate, and updated, (5) require mandatory internal reporting of violations, and (6) identify the appropriate point(s) of contact for employee questions and reporting.

Contractors should ensure that each employee has received the requisite training before he or she is assigned to a task involving acquisition functions. In addition, contractors should consider requiring employees to submit a signed certification that they have received the training and maintain such records in accordance with the FAR’s recordkeeping requirements.⁹²

■ Oversight

The rule requires contractors to maintain effective oversight to verify compliance with PCI safeguards on an ongoing basis for the full duration of any covered contract.⁹³ The Government offers no further guidance in the “oversight”

area, other than to acknowledge that it effects a “burden” upon small businesses.⁹⁴ Thus, contractors must themselves determine who within the corporate hierarchy should be charged with oversight responsibility and what that responsibility should entail.⁹⁵

To demonstrate a commitment to effective oversight, contractors should assign ultimate responsibility for PCI compliance to an individual at a relatively high level within the organization. Personnel responsible for screening and monitoring functions should be adequately trained and should have no involvement in the relevant contract or program. Internal reporting of violations should be mandatory. Contractors also may wish to require annual PCI refresher training and conduct periodic audits to ensure compliance.

■ Disciplining Employees

The rule mandates that contractors take “appropriate disciplinary action” in the case of employee violations.⁹⁶ The text of the rule provides little guidance, and thus affords contractors broad discretion, in determining what constitutes “appropriate disciplinary action” in any given case. Relevant considerations might include, among other things, the nature and amount of the financial interest, the significance of the employee’s role in the acquisition, whether the violation was negligent or willful, whether the employee promptly reported the violation, and the employee’s level of cooperation in the resulting investigation.

The preamble reflects an expectation that the contractor will “propose corrective action” and “develop a solution acceptable to the Government.”⁹⁷ Thus, although the rule itself does not authorize the Government to approve or reject the contractor’s determination, it would be wise to coordinate with the CO in determining what corrective action is appropriate or, at minimum, to obtain the CO’s buy-in before making any definitive pronouncement.

■ Reporting Violations

The rule requires contractors to report a PCI violation by a covered employee to the CO “as soon as [it is] identified,”⁹⁸ so that “if necessary,

the [CO] can take immediate steps to protect the Government.”⁹⁹ A reportable violation is defined to include any covered employee’s (a) failure to disclose a PCI, (b) use of non-public information accessed through performance of a Government contract for personal gain, and (c) failure to comply with the terms of an NDA.¹⁰⁰ The preamble states that contractors will not be held liable for any of these transgressions, as long as they have taken “appropriate steps to uncover and report the violation.”¹⁰¹ Accordingly, it is critical for contractors to investigate suspected PCI violations immediately and thoroughly and to comply strictly with the rule’s reporting requirements.

The mere allegation or suspicion of a PCI need not be reported. Rather, the preamble clarifies that a violation has not been “identified” for purposes of triggering the reporting requirement “until the [c]ontractor has performed sufficient investigation to confirm that a violation has occurred.”¹⁰² Although the rule does not mandate a specific timeframe for the contractor’s initial disclosure, the preamble conveys the expectation that contractors “will be able to identify the conflict, initially assess its scope, and even evaluate potential corrective actions relatively quickly.”¹⁰³

In terms of content, the rule requires the contractor’s report to include a description of the violation and the proposed actions to be taken by the contractor.¹⁰⁴ Where necessary, the rule requires the contractor to submit one or more follow-up reports that identify the contractor’s corrective action in response to the violation.¹⁰⁵

The rule generally does not require the contractor to provide the report of an employee violation to the agency Inspector General.¹⁰⁶ The preamble makes clear that the Government will treat the report as a “contractual issue” in most cases.¹⁰⁷ To the extent that an employee violation also constitutes a violation of federal criminal law, however, the contractor may be required to submit a report to the agency Inspector General pursuant to the FAR’s mandatory disclosure rule.¹⁰⁸ Such an obligation could arise, for example, in the case of a PCI that results from a bribe or kick-back. Moreover, the PCI rule does not prohibit agencies from implementing procedures that ultimately would funnel PCI violation reports to the agency Inspector General.¹⁰⁹

In terms of best practices for complying with the reporting requirement, contractors can leverage many of the same strategies used to achieve compliance with the FAR's mandatory disclosure requirement. For example, the contractor's policies and procedures should clarify that employees must report actual or suspected violations internally and identify the point(s) of contact for such reporting. Potential violations should be investigated immediately and thoroughly. The investigation should occur at the direction of counsel to preserve the attorney-client privilege, and all reports should be reviewed and approved by appropriate law department personnel before submission to the Government.

■ Flowdown Requirement

Although the prime contractor is not responsible for screening its subcontractor's employees,¹¹⁰ prime contractors must flow down the new PCI clause, including all of the foregoing obligations, in subcontracts valued in excess of \$150,000 that involve acquisition functions.¹¹¹ While the current \$150,000 threshold tracks the simplified acquisition threshold,¹¹² the threshold will remain constant during subcontract performance.¹¹³ If the simplified acquisition threshold changes, then the clause will be modified for future contracts.¹¹⁴ Subcontracts for commercial items also are exempt from the flowdown requirement.¹¹⁵

■ Mitigation & Waiver

If a contractor cannot satisfactorily prevent a PCI, it may submit a request for mitigation or waiver through the CO to the head of the contracting activity.¹¹⁶ The rule authorizes the mitigation or waiver of a PCI only in "exceptional circumstances."¹¹⁷ For such a request to be granted, the HCA, without delegation, must issue a written determination that mitigation or waiver is in the best interest of the Government.¹¹⁸

The rule provides no guidance regarding the specific circumstances under which mitigation or waiver might be appropriate. Relevant considerations are likely to include, among other things, the nature and magnitude of the PCI, the subject matter and dollar value of the procurement or contract, the type of acquisition support or contract administration services being provided, the availability of non-conflicted personnel having the requisite skill and experience to meet the agency's requirements, and whether such personnel can be obtained within the necessary timeframe at a fair and reasonable price.

Neither the rule nor the preamble provides any guidance regarding specific strategies for mitigating PCIs.¹¹⁹ In the absence of such guidance, the HCA will have broad discretion to approve whatever mitigation approach seems reasonable under the circumstances. Possibilities might include limitations on the type of acquisition functions that can be performed by individuals with PCIs as well as review and monitoring of conflicted employees' work by either governmental or other non-conflicted personnel.

The rule is also silent with respect to the timing in the acquisition cycle during which requests for mitigation or waiver should be submitted by the contractor.¹²⁰ Accordingly, contractors should submit such requests as soon as the PCI is identified.

If the request to mitigate the PCI is approved, the contractor must ensure that the covered employee for whom the request was initiated complies with all obligations imposed by the Government.¹²¹ Alternatively, the contractor may decide either to remove the covered employee or subcontractor employee from performance of the task or terminate the relevant subcontract.¹²²

GUIDELINES

These *Guidelines* are intended to assist you in complying with the FAR PCI rule as you perform acquisition functions for the Government. They are not, however, a substitute for professional representation in any specific situation.

1. Ensure that your code of business ethics and conduct includes general policy statements regarding the identification, prevention, and reporting of PCIs as well as the prohibitions on use and disclosure of non-public information

accessed through performance of a Government contract.

2. Understand that the PCI rule, in its present form, is limited to “covered employees,” a term that is defined broadly to include virtually any contractor personnel performing acquisition functions for the Government.

3. Prepare detailed policies and procedures for identifying covered employees, both initially and during performance. Remember that an individual who is not initially a covered employee can later become a covered employee if he or she is assigned to a new task involving acquisition functions. Thus, it is critical to monitor work assignments to identify new tasks that may require the submission of an updated disclosure statement.

4. Be aware that a PCI can arise from any financial interest, activity, or relationship that could impair a covered employee’s ability to act impartially and in the best interest of the Government.

5. Prepare a standard form disclosure statement that provides guidance regarding the circumstances that could give rise to a PCI and requires covered employees to disclose all potential PCIs relating to their current and future assignments. The form should emphasize that employees are responsible for updating their disclosure statements to reflect new financial interests and relationships as they arise.

6. Develop and consistently follow a strategy for reviewing all disclosure statements to determine whether there may be a PCI. Ensure that those responsible for analyzing the disclosure statements have the necessary training to determine whether there may be a covered PCI.

7. Require all covered employees to execute an NDA that prohibits the unauthorized use and disclosure of non-public information. Review the adequacy of standard form NDAs vis-à-vis the requirements of the PCI rule and update the agreements as necessary. Pay special attention to the definition of non-public information and ensure that the duration for protection is indefinite.

8. Advise your employees to presume that all information provided in connection with a Government contract is non-public unless the facts clearly indicate otherwise.

9. Develop and implement training materials to educate employees regarding their obligations under the PCI rule. At minimum, such materials should (a) identify the categories of work that trigger status as a covered employee, (b) provide detailed guidance regarding the circumstances that can give rise to a PCI, including the use of concrete examples, (c) educate employees regarding their obligations under the rule with respect to both PCIs and non-public information, (d) explain your procedures for obtaining disclosure statements, including the requirement for submissions to be complete, accurate, and updated, and (e) identify the appropriate point(s) of contact for employee questions and reporting.

10. Update your standard form contracts to provide for flowdown of the new FAR clause where appropriate.

11. To minimize the potential for liability, develop and implement a protocol to investigate suspected violations of the PCI rule as soon as they occur. Ensure that each investigation is conducted at the direction of counsel to preserve the attorney-client privilege.

12. Report any violation of the PCI rule promptly. Your initial report should include a description of the violation with proposed corrective actions. As necessary, submit follow-up report(s) of corrective action. Maintain a dialogue with the cognizant CO throughout the entirety of this process. All reports should be reviewed and approved by appropriate law department personnel before submission to the Government.

13. Remember that covered employees with PCIs cannot perform covered acquisition support tasks unless the conflicts are mitigated or waived. Requests for mitigation or waiver are likely to be rare, as they require HCA approval and are only authorized by the PCI rule in “exceptional circumstances.”

★ REFERENCES ★

- 1/ Final rule, Preventing Personal Conflicts of Interest for Contractor Employees Performing Acquisition Functions, 76 Fed. Reg. 68017 (Nov. 2, 2011).
- 2/ 76 Fed. Reg. 68017.
- 3/ 76 Fed. Reg. at 68046.
- 4/ Report of the Acquisition Advisory Panel to the Office of Federal Procurement Policy and the United States Congress (Jan. 2007).
- 5/ National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, § 1423(d), 117 Stat. 1392, 1663 (2003).
- 6/ Report of the Acquisition Advisory Panel to the Office of Federal Procurement Policy and the United States Congress 417 (Jan. 2007).
- 7/ Report of the Acquisition Advisory Panel to the Office of Federal Procurement Policy and the United States Congress 407–10, 417–18 (Jan. 2007); see, e.g., 18 U.S.C.A. § 201(b) (prohibiting Government employees from seeking, accepting, or agreeing to receive or accept anything of value in return for being influenced in the performance of an official act or for being induced to take or omit to take any action in violation of official duties); 18 U.S.C.A. § 208 (prohibiting an employee from participating personally and substantially in any particular matter in which he or she, or certain others with whom he or she is associated, has a financial interest); 18 U.S.C.A. § 209 (prohibiting Government employees from receiving any salary or supplementation of their salary from private sources as compensation for services to the Government); 5 C.F.R. § 2635.502 (requiring Government employees to disqualify themselves from particular matters in which a reasonable person with knowledge of the relevant facts would question the employee's partiality).
- 8/ Report of the Acquisition Advisory Panel to the Office of Federal Procurement Policy and the United States Congress 407, 410–411 (Jan. 2007).
- 9/ Report of the Acquisition Advisory Panel to the Office of Federal Procurement Policy and the United States Congress 423 (Jan. 2007).
- 10/ Report of the Acquisition Advisory Panel to the Office of Federal Procurement Policy and the United States Congress 418 (Jan. 2007).
- 11/ Report of the Acquisition Advisory Panel to the Office of Federal Procurement Policy and the United States Congress 25 (Jan. 2007).
- 12/ Report of the Acquisition Advisory Panel to the Office of Federal Procurement Policy and the United States Congress 423 (Jan. 2007).
- 13/ Report of the Acquisition Advisory Panel to the Office of Federal Procurement Policy and the United States Congress 424 (Jan. 2007).
- 14/ GAO, Defense Contracting: Additional Personal Conflict of Interest Safeguards Needed for Certain DOD Contractor Employees (GAO-08-169, Mar. 7, 2008).
- 15/ GAO, Defense Contracting: Additional Personal Conflict of Interest Safeguards Needed for Certain DOD Contractor Employees (GAO-08-169, Mar. 7, 2008).
- 16/ GAO, Defense Contracting: Additional Personal Conflict of Interest Safeguards Needed for Certain DOD Contractor Employees 5 (GAO-08-169, Mar. 7, 2008).
- 17/ GAO, Defense Contracting: Additional Personal Conflict of Interest Safeguards Needed for Certain DOD Contractor Employees 8 (GAO-08-169, Mar. 7, 2008).
- 18/ See, e.g., 18 U.S.C.A. § 208; 5 C.F.R. §§ 2635.101(b)(8), 2635.501–503 (requiring Government employees to be and appear to be impartial in performing official duties); 5 U.S.C.A. app. §§ 101–107 (requiring certain Government employees to disclose financial interests); 5 C.F.R. § 2635.703 (prohibiting Government employees from using non-public information for personal gain and from engaging in a

- financial transaction using non-public information); 5 U.S.C.A. § 7353 and 5 C.F.R §§ 2635.201, 2635.202 (restricting acceptance of gifts by Government employees).
- 19/ GAO, Defense Contracting: Additional Personal Conflict of Interest Safeguards Needed for Certain DOD Contractor Employees 9–12 (GAO-08-169, Mar. 7, 2008).
- 20/ GAO, Defense Contracting: Additional Personal Conflict of Interest Safeguards Needed for Certain DOD Contractor Employees 26–31 (GAO-08-169, Mar. 7, 2008).
- 21/ GAO, Defense Contracting: Additional Personal Conflict of Interest Safeguards Needed for Certain DOD Contractor Employees 31 (GAO-08-169, Mar. 7, 2008).
- 22/ GAO, Defense Contracting: Additional Personal Conflict of Interest Safeguards Needed for Certain DOD Contractor Employees 31 (GAO-08-169, Mar. 7, 2008).
- 23/ DuncanHunterNationalDefenseAuthorization Act for Fiscal Year 2009, Pub. L. No. 110-417, § 841(a) 122 Stat. 4356, 4539 (codified at 41 U.S.C.A. § 2303).
- 24/ 41 U.S.C.A. § 2303(b)(1).
- 25/ 41 U.S.C.A. § 2303(b)(2).
- 26/ 41 U.S.C.A. § 2303(c).
- 27/ Proposed rule, Preventing Personal Conflicts of Interest for Contractor Employees Performing Acquisition Functions, 74 Fed. Reg. 58584 (Nov. 13, 2009).
- 28/ Final rule, Preventing Personal Conflicts of Interest for Contractor Employees Performing Acquisition Functions, 76 Fed. Reg. 68017 (Nov. 2, 2011).
- 29/ 76 Fed. Reg. at 68024–26; FAR 3.1100–3.1104, 52.203-16.
- 30/ 76 Fed. Reg. 68046 (Nov. 2, 2011).
- 31/ 76 Fed. Reg. 68046.
- 32/ 76 Fed. Reg. 68046.
- 33/ FAR 3.1106(a).
- 34/ Final rule, Preventing Personal Conflicts of Interest for Contractor Employees Performing Acquisition Functions, 76 Fed. Reg. 68017 (Nov. 2, 2011).
- 35/ 76 Fed. Reg. 68017.
- 36/ FAR 12.503(a)(9).
- 37/ FAR 3.1106(a)(1).
- 38/ Solicitation No. TFTP-MC-00874-B, at SIN 874-6 (Refresh 18, Feb. 24, 2012).
- 39/ FAR 8.402(a).
- 40/ G. L. Christian & Assocs. v. United States, 312 F.2d 418, 426 (Ct. Cl. 1963).
- 41/ FAR 3.1103, 52.203-16, para. (b); see also Final rule, Preventing Personal Conflicts of Interest for Contractor Employees Performing Acquisition Functions, 76 Fed. Reg. 68017, 68018 (Nov. 2, 2011). (“The definition, as amended, is clear that an employee is only covered under the rule if the employee performs acquisition functions closely associated with inherently governmental functions.”).
- 42/ FAR 3.1101, 52.203-16, para. (a).
- 43/ FAR 3.1101, 52.203-16, para. (a); see also 76 Fed. Reg. at 68018 (“Several respondents were concerned that the definition of ‘covered employee’ could be interpreted to include employees of contractors, subcontractors, consultants, and partners.... The Councils have modified the definition to clarify that the contractor is not directly responsible for the employees of subcontractors.”).
- 44/ FAR 3.1101, 52.203-16, para. (a); see also 76 Fed. Reg. at 68018.
- 45/ See FAR 52.203-16, para. (d).

- 46/ FAR 3.1101, 52.203-16, para. (a); see also 76 Fed. Reg. at 68018.
- 47/ FAR 3.1101, 52.203-16, para. (a).
- 48/ FAR 3.1101, 52.203-16, para. (a).
- 49/ FAR 3.1101, 52.203-16, para. (a).
- 50/ FAR 3.1101, 52.203-16, para. (a).
- 51/ FAR 3.1101, 52.203-16, para. (a).
- 52/ FAR 3.1101, 52.203-16, para. (a).
- 53/ Final rule, Preventing Personal Conflicts of Interest for Contractor Employees Performing Acquisition Functions, 76 Fed. Reg. 68017, 68019 (Nov. 2, 2011). The rule does not explicitly require a covered employee (or the employee's close family or household member) to have "knowledge" of the ownership interest that would give rise to the PCI. 76 Fed. Reg. at 68019. In response to a comment pointing out the absence of such a requirement, the Government declined to incorporate a knowledge standard, but conceded that neither a contractor nor its covered employees could possibly self-report an unknown interest. 76 Fed. Reg. at 68019.
- 54/ 76 Fed. Reg. at 68019.
- 55/ FAR 3.1101, 52.203-16, para. (a).
- 56/ 76 Fed. Reg. at 68019.
- 57/ FAR 3.1101, 52.203-16, para. (a).
- 58/ FAR 3.1101, 52.203-16, para. (a).
- 59/ 76 Fed. Reg. at 68019.
- 60/ 5 C.F.R. § 2635.402(b)(2).
- 61/ 76 Fed. Reg. at 68019.
- 62/ 76 Fed. Reg. at 68019.
- 63/ 5 U.S.C.A. § 552 et seq.
- 64/ FAR 52.203-16, para. (a).
- 65/ 76 Fed. Reg. at 68018–19.
- 66/ 76 Fed. Reg. at 68018.
- 67/ 76 Fed. Reg. at 68019.
- 68/ 76 Fed. Reg. at 68019.
- 69/ 76 Fed. Reg. at 68019.
- 70/ 5 C.F.R. § 2635.703(b) (emphasis added).
- 71/ 5 C.F.R. § 2635.703, Examples 1–5.
- 72/ FAR 3.1103(a)(1)(i), 52.203-16, para. (b)(1)(i).
- 73/ FAR 3.1103(a)(1)(ii), 52.203-16, para. (b)(1)(ii).
- 74/ 76 Fed. Reg. at 68020; FAR 3.1103(a)(1), 52.203-16, para. (b)(1).
- 75/ 76 Fed. Reg. at 68020.
- 76/ FAR 3.1103(a)(1), 52.203-16, para. (b)(1).
- 77/ 76 Fed. Reg. at 68020.
- 78/ 76 Fed. Reg. at 68022; see FAR 3.1105.
- 79/ FAR 3.1103(a)(1)(ii), 52.203-16, para. (b)(1)(ii).
- 80/ FAR 3.1103(a)(2)(i), 52.203-16, para. (b)(2)(i).
- 81/ FAR 3.1103(a)(2)(i), 52.203-16, para. (b)(2)(i); see FAR 3.1104, 52.203-16, para. (c).
- 82/ 76 Fed. Reg. at 68020.

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| <p>83/ 76 Fed. Reg. at 68020.</p> <p>84/ FAR 3.1103(a)(2)(ii), 52.203-16, para. (b)(2)(ii).</p> <p>85/ FAR 3.1103(a)(2)(iii), 52.203-16, para. (b)(2)(iii).</p> <p>86/ FAR 3.1103(a)(2)(iii), 52.203-16, para. (b)(2)(iii); see 76 Fed. Reg. at 68020.</p> <p>87/ 76 Fed. Reg. at 68023.</p> <p>88/ 76 Fed. Reg. at 68020.</p> <p>89/ FAR 52.203-16, para. (a).</p> <p>90/ 76 Fed. Reg. at 68020.</p> <p>91/ FAR 3.1103(a)(3)(iii), 52.203-16, para. (b)(3)(iii).</p> <p>92/ 76 Fed. Reg. at 68021.</p> <p>93/ FAR 3.1103(a)(4), 52.203-16, para. (b)(4).</p> <p>94/ 76 Fed. Reg. at 68023.</p> <p>95/ Proposed Rule Comments of the Department of Health and Human Services, Tracking No. 80a7c18c, at 1 (Jan. 12, 2010).</p> <p>96/ FAR 3.1103(a)(5), 52.203-16, para. (b)(5).</p> <p>97/ 76 Fed. Reg. at 68021.</p> <p>98/ FAR 3.1103(a)(6), 52.203-16, para. (b)(6).</p> <p>99/ 76 Fed. Reg. at 68021.</p> <p>100/ FAR 52.203-16, para. (b)(6).</p> <p>101/ 76 Fed. Reg. at 68022.</p> <p>102/ 76 Fed. Reg. at 68021.</p> | <p>103/ 76 Fed. Reg. at 68021.</p> <p>104/ FAR 3.1103(a)(6), 52.203-16, para. (b)(6).</p> <p>105/ FAR 3.1103(a)(6), 52.203-16, para. (b)(6).</p> <p>106/ 76 Fed. Reg. at 68021; FAR 3.1103(a)(6), 52.203-16, para. (b)(6).</p> <p>107/ 76 Fed. Reg. at 68021.</p> <p>108/ FAR 52.203-13, para. (b)(3); 76 Fed. Reg. at 68021. See generally West et al., "Contractor Business Ethics Compliance Program & Disclosure Requirements," Briefing Papers No. 09-5 (Apr. 2009).</p> <p>109/ 76 Fed. Reg. at 68021.</p> <p>110/ 76 Fed. Reg. at 68022.</p> <p>111/ FAR 52.203-16, para. (d).</p> <p>112/ FAR 2.101.</p> <p>113/ 76 Fed. Reg. at 68022.</p> <p>114/ 76 Fed. Reg. at 68022.</p> <p>115/ FAR 12.500(a)(2), 12.503(a)(9).</p> <p>116/ FAR 3.1104(a), 52.203-16, para. (c).</p> <p>117/ FAR 3.1104(a), 52.203-16, para. (c).</p> <p>118/ FAR 3.1104(b), (c).</p> <p>119/ 76 Fed. Reg. at 68017-26.</p> <p>120/ 76 Fed. Reg. at 68017-26.</p> <p>121/ FAR 52.203-16, para. (c)(3)(i).</p> <p>122/ FAR 52.203-16, para. (c)(3)(ii).</p> |
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