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Contractors Should Fight Proposed Conflict Of Interest Rule

Law360, New York (May 05, 2014, 3:00 PM ET) -- All contractors must guard against conflicts of interest, both with their personnel and their organizations. For personal conflicts of interest, the Federal Acquisition Regulation currently requires contractors to take certain measures to avoid and mitigate conflicts of interest involving certain employees. For example, contractors must have procedures in place to screen covered employees for potential conflicts. This entails having employees disclose personal and financial information and to update these disclosures whenever an employee's personal or financial circumstances change such that a new personal conflict of interest might occur.

In early April, a proposed FAR amendment was issued that would significantly expand the coverage of the personal conflicts of interest rules. The rules presently apply to a contractor's "covered employees," which the FAR defines as a contractor employee performing any of the eight acquisition-related functions listed in FAR 3.1101 (e.g., evaluating contract proposals, awarding and terminating government contracts). The proposed rule would expand the definition of a "covered employee" to include employees performing any of the 19 "functions closely associated with inherently governmental functions" listed in FAR 7.503(d).

Importantly, the list in FAR 7.503(d) is not exhaustive, meaning there are more than 19 functions that would qualify an employee as a "covered employee" under the proposed rule. Moreover, of the 19 listed functions, only a few bear a direct relationship to the procurement process. As such, if the proposed rule is adopted, personal conflicts of interest would no longer be limited to contractor employees performing work closely related to the acquisition of government contracts. And the significant gray area in the rule would allow for further expansion of the definition of covered employee and will make it difficult for contractors to know when the rule applies and when it does not.

Contracting trade groups, such as the Professional Service Council, are not happy, arguing that the proposed rule is "overly broad and unnecessarily intrusive" and does not fall in line with congressional intent. See Dietrich Knauth, Contractors Blast Proposed Conflict of Interest Rule (April 4, 2014). Much of their frustration stems from a concern that the benefits of the proposed expansion of personal conflicts

of interest would not outweigh the associated burden and costs to contractors and their employees. So, are the complaints of the contractor trade groups justified? We think so.

The proposed rule extending personal conflicts of interest emanates from Section 829 of the National Defense Authorization Act for Fiscal Year 2013. Section 829 of the 2013 NDAA directed the secretary of defense to "review the guidance on personal conflicts of interest for contractor employees … in order to determine whether it would be in the best interest of the Department of Defense and the taxpayers" to expand the current regulations governing personal conflicts of interest. National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112- 239, 126 Stat. 1632, 829 (2013).

We interpret this provision to mean that Congress' intent was to have the secretary of defense assess a possible expansion of the personal conflicts of interest rules and that such expansion, if any, would apply only to the Department of Defense, as opposed to the governmentwide application contemplated by the proposed rule. That said, by throwing the best interest of the taxpayers into the mix, it could be argued that Congress intended Section 829 to mean that any proposed expansion of the personal conflicts of interest rules would be applicable to all government agencies, not just the Department of Defense. Still, if the congressional intent was in fact for the secretary of defense to assess a possible expansion of the personal conflicts of interest rules with a governmentwide application, one would think that the language of Section 829 of the 2013 NDAA would have been drafted in a less ambiguous fashion.

Regarding the breadth of the proposed rule, some of the functions included in FAR 7.305(d) are related to the government procurement process and, therefore, do seem to be of the type contemplated by the personal conflicts of interest rules added to the FAR in November 2011, which related just to acquisitions.

For example, "[s]ervices that involve or relate to the evaluation of another contractor's performance," "[s]ervices in support of acquisition planning," "[c]ontractors providing technical evaluation of contract proposals," and "[c]ontractors providing assistance in the development of statements of work" are all categorized as functions closely associated with inherently governmental functions. See FAR § 7.503(d)(5)-(6), (8)-(9).

On the other hand, "[s]ervices that involve or relate to analyses, feasibility studies, and strategy options to be used by agency personnel in developing policy" and "[c]ontractors providing support in preparing responses to Freedom of Information Act requests," are functions arguably not related (at least, directly) to the government procurement process and thus beg the question as to whether the government is truly at risk if contractor employees performing these functions are not covered by the personal conflicts of interest rules. Id. at §§ (d)(1), (10).

The proposed extension of personal conflicts of interest would result in increased costs to small business contractors forced to train, screen and maintain a compliance program for a much broader pool of employees. The proposed rule will also likely lead to pushback from employees who would be forced to divulge personal and financial information. And the gray areas in the proposed rule increase risk of

inadvertent noncompliance. For these reasons, we believe the proposed rule goes too far and we encourage contractors who feel the same to voice their concerns by submitting comments. Comments on the proposed rule are due by June 2, 2014

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