January 12, 2010

VIA FEDERAL RULEMAKING PORTAL AND FACSIMILE

General Services Administration
Regulatory Secretariat (VPR)
1800 F. Street, NW.
Room 4035
Washington, D.C. 20405
Attn: Ms. Hada Flowers

Re: FAR Case 2008-025, Preventing Personal Conflicts of Interest,
74 Fed. Reg. 58584 (November 13, 2009)

Dear Ms. Flowers:

On behalf of the Section of Public Contract Law of the American Bar Association (“the Section”), I am submitting comments on the above-referenced matter (hereafter “Proposed Rule”). The Section consists of attorneys and associated professionals in private practice, industry, and government service. The Section’s governing Council and substantive committees have members representing these three segments, to ensure that all points of view are considered. By presenting their consensus view, the Section seeks to improve the process of public contracting for needed supplies, services, and public works.¹

The Section is authorized to submit comments on acquisition regulations under special authority granted by the Association’s Board of Governors. The views expressed herein have not been approved by the House of Delegates or the Section.

¹The Honorable Thomas C. Wheeler, a member of the Council of the Section of Public Contracts Law, did not participate in the Section's consideration of or voting on these comments.
Board of Governors of the American Bar Association and, therefore, should not be construed as representing the policy of the American Bar Association.²

I. BACKGROUND

Through Section 841(a) of the Duncan Hunter National Defense Authorization Act (“NDAA”) for Fiscal Year (“FY”) 2009, Congress directed the Office of Federal Procurement Policy (“OFPP”) to develop policy to prevent personal conflicts of interest (“PCIs”) by contractor employees performing acquisition functions for or on behalf of a federal agency or department. Pub. L. No. 110-417. Congress also directed OFPP to develop a PCI clause for inclusion in solicitations, contracts, task orders, and delivery orders. OFPP collaborated with the Civilian Agency Acquisition Council and Defense Acquisition Regulations Council (“Councils”) in issuing the Proposed Rule to implement the Congressional mandate in Section 841(a). The Proposed Rule includes a new FAR subpart 3.11, Preventing Personal Conflicts of Interest for Contractor Employees Performing Acquisition Functions, which would set forth policies and procedures for identifying and preventing PCIs. The Proposal Rule also includes a new FAR clause 52.203-16, Preventing Personal Conflicts of Interest.

II. SECTION COMMENTS ON THE PROPOSED RULE

The Section strongly believes that contractor employees should act impartially in performing their work for the Government, as well as for any customer or other client. The Section offers the following specific comments that it hopes will help to improve the Proposed Rule to most effectively and efficiently accomplish this goal. The Section does not necessarily believe the same approach for Government employees, mandated by statute in many cases, necessarily should apply to contractor employees to ensure impartial contract performance.

A. The Council Should Revise the Proposed Rule to Clarify the Definition of “Acquisition Function Closely Associated With Inherently Governmental Functions.”

The Proposed Rule’s definition of “acquisition function closely associated with inherently governmental functions” includes preparing “any contractual documents.” See 74 Fed. Reg. 58567-88 (proposed FAR 3.1101 and 52.203-16(a)). The Section is concerned that this definition is overbroad and ambiguous.

² This letter is available in pdf format at http://www.abanet.org/contract/regscomm/home.html under the topic “Ethics.”
Although the Proposed Rule would include eight useful examples, we would recommend that the Councils narrow the definition. In the normal course of many procurements, the Government will seek input on contractual provisions from prospective offerors. In addition, in contract negotiations, contractors often prepare sections of a proposed contract (at least when the contract will be a sole source award) or modifications to an existing government contract, or provide revisions to drafts of such documents that were originally prepared by the Government. The Proposed Rule should specifically exclude from the definition of “developing . . . contractual documents” in subparagraph (3) the efforts of contractor employees who are essentially negotiating the terms of an agreement by creating or revising a draft on behalf of the contractor for subsequent evaluation by the Government. The Section does not believe that Congress intended such efforts to be included in Section 841. Such a restriction essentially would limit the constructive and iterative process of exchanging draft documents back and forth between the two parties during contract negotiations, which clearly is not an inherently governmental function. Only contractor employees preparing contract documents on behalf of the Government (i.e., efforts by support contractor employees) should be covered by the Proposed Rule. The Section believes it would be helpful if this clarification of “on behalf of the Government” be incorporated in subparagraph (3) of the definition.

B. The Council Should Revise the Proposed Rule to Clarify the Financial Interests that Create PCIs.

The Proposed Rule would define a “personal conflict of interest” 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.” 74 Fed. Reg. 58587-88 (proposed FAR 3.1101 and FAR 52.203-16(a)). The Rule’s definition of “personal conflict of interest” also would provide the following guidance:

(1) Among the sources of personal conflicts of interest are—

   (i) Financial interests of the covered employee, of close family members, or of other members of the household;

   (ii) Other employment or financial relationships (including seeking or negotiating for prospective employment or business); and

   (iii) Gifts, including travel.

(2) Financial interests may arise from—
(i) Compensation, including wages, salaries, commissions, professional fees, or fees from business referrals;

(ii) Consulting relationships (including commercial and professional consulting and service arrangements, scientific and technical advisory board memberships, or serving as an expert witness in litigation);

(iii) Services provided in exchange for honorariums or travel expense reimbursements;

(iv) Research funding or other forms of research support;

(v) Investment in the form of stock or bond ownership or partnership interest (excluding diversified mutual fund investments);

(vi) Real estate investments;

(vii) Patents, copyrights, and other intellectual property interests; or

(viii) Business ownership and investment interests.

The Section has several concerns with the proposed definition of “personal conflict of interest.”

First, although the Proposed Rule indicates that a PCI can arise from “relationships,” including “employment or other financial relationships,” the Rule does not define the scope of “relationships” that can trigger PCI concerns. See 74 Fed. Reg. 58587-88 (proposed FAR 3.1101 and 52.203-16(a)). The Section recommends that the Councils revise the definition to provide clear guidelines concerning what is and what is not considered a “relationship” for purposes of the definition of “personal conflict of interest.” The Councils should explore existing standards and consider incorporating an appropriate standard in the Rule. For instance, the Office of Government Ethics’ (“OGE’s”) Standards of Ethical Conduct for Executive Branch Employees (“Standards of Ethical Conduct”) in 5 C.F.R. Part 2635 provide a comprehensive definition of a “covered relationship” for purposes of the impartiality standards applicable to Executive Branch employees.\footnote{5 C.F.R. § 2635.502(b)(1) provides:} The Councils could use that definition as a model in developing a
definition of “relationship” to apply to the definition of “personal conflict of
interest” in proposed FAR 3.1101 and 52.203-16.

Second, the Proposed Rule provides that a PCI can arise from the financial
interests of “close family members” and “other members of the household” of the
covered employee without explaining who would be encompassed within those
phrases. 74 Fed. Reg. 58587 and 58589 (proposed FAR 3.1101 and 52.203-16(a)).
Therefore, the Section recommends revising the Rule to clarify the scope of the
phrases “close family members” and “other members of the household” or omitting
the phrases altogether. Notably, the approach adopted by the OGE in defining
disqualifying financial interests limits “imputed interests” of family members to the
employee’s spouse and minor child and excludes other household members unless
they qualify under another prong of the definition (e.g., business partners). See 5
C.F.R. § 2635.402(b)(2).

An employee has a covered relationship with:

(i) A person, other than a prospective employer described in § 2635.603(c), with
whom the employee has or seeks a business, contractual or other financial
relationship that involves other than a routine consumer transaction;

Note: An employee who is seeking employment within the meaning of §2635.603
shall comply with subpart F of this part rather than with this section.

(ii) A person who is a member of the employee’s household, or who is a relative
with whom the employee has a close personal relationship;

(iii) A person for whom the employee’s spouse, parent or dependent child is, to
the employee’s knowledge, serving or seeking to serve as an officer, director,
trustee, general partner, agent, attorney, consultant, contractor or employee;

(iv) Any person for whom the employee has, within the last year, served as
officer, director, trustee, general partner, agent, attorney, consultant, contractor or
employee; or

(v) An organization, other than a political party described in 26 U.S.C. § 527(e),
in which the employee is an active participant. Participation is active if, for
example, it involves service as an official of the organization or in a capacity
similar to that of a committee or subcommittee chairperson or spokesperson, or
participation in directing the activities of the organization. In other cases,
significant time devoted to promoting specific programs of the organization,
including coordination of fundraising efforts, is an indication of active
participation. Payment of dues or the donation or solicitation of financial support
does not, in itself, constitute active participation.

Note: Nothing in this section shall be construed to suggest that an employee
should not participate in a matter because of his political, religious or moral
views.
C. The Councils Should Reconsider Whether It Is In the Best Interests of the Government to Mandate Financial Disclosure For All Covered Employees.

The Proposed Rule would require contractors to obtain and retain financial disclosures for all covered employees. 74 Fed. Reg. 58588 (proposed FAR 3.1103(a)(1) and 52.203-16(b)(1)).

The Section recommends that the Councils reconsider whether financial disclosures should be required in all cases. The Councils should consider alternatives to the proposed regime, which would mandate financial disclosure as the means for screening covered employees for potential PCIs. The Section believes that the Rule should provide some discretion to contractors to determine how best to screen covered employees. In some cases it might be more effective and cost-efficient for contractors to provide periodic training for all covered employees and obtain certifications from those employees stating that they understand the restrictions. For instance, requiring employees to provide disclosures every time their 401 K investment portfolios or those of their spouses may include potential contractors would be onerous and unproductive.

To the extent the Councils retain the financial disclosure requirement, that requirement should be clarified, as the Proposed Rule does not provide sufficient guidance as to what will be expected of contractors and covered employees to comply with proposed FAR 3-1103(a)(1) and 52.203-16(a)(1). For example, the Proposed Rule does not address what financial information the contractor must obtain from covered employees or how long the employer must retain that information. Additionally, although the Proposed Rule would obligate the contractor to require its covered employees to “update the disclosure statement whenever his/her personal or financial circumstances change,” it does not state what changes would trigger this requirement. See 74 Fed. Reg. 58589 (proposed FAR 52.203-16(b)(1)(iii)). We note that proposed FAR 3.1103(a)(1)(iii) suggests that a new disclosure should be required when a new PCI occurs. See 74 Fed. Reg. 58588.

D. The Councils Should Revise the Proposed Rule to Clarify the Requirements Related to Non-Public Government Information.

The Proposed Rule would place an obligation on contractors to prevent employees from using "non-public Government information" for personal gain. See 74 Fed. Reg. 74 Fed. Reg. 58587-89 (proposed FAR 3.1103(a)(2) and 52.203-16(b)(2)(ii)). Additionally, the Proposed Rule would require contractors to obtain a
signed non-disclosure agreement ("NDA") from employees to prohibit the disclosure of non-public Government information. *Id.* at (iii).

The Proposed Rule would define "non-public Government information" as "any information that a covered employee gains by reason of work under a Government contract and that the covered employee knows, or reasonably should know, has not been made public." *74 Fed. Reg. 58587-89 (FAR 3.1101 and 52.203-16(a)).* It would further provide that the definition "includes information that – (1) Is exempt from disclosure under the Freedom of Information Act (5 U.S.C. 552) or otherwise protected from disclosure by statute, Executive order, or regulation; or (2) Has not been disseminated to the general public and is not authorized by the agency to be made available to the public." *Id.* The Section is concerned that, in practice, this definition would not provide sufficient guidance for contractors and employees to identify non-public government information—which will be imperative for contractors to meet the new compliance obligations. For instance, whether or not information is subject to Exemption 4 of the Freedom of Information Act ("FOIA") is a legal question about which different parties may reasonably reach different conclusions. As a general rule, the Government will be in a better position than contractors to determine whether information is "non-public government information," that is, exempt from FOIA or not otherwise disseminated to the public. The Council should consider adopting a definition for "non-Government public information" that provides more definitive guidelines concerning what information does and does not fall within the scope of the definition. One approach would be to define "non-public government information" as any information designated as such in writing by the Government. This approach would clarify the scope of information that is subject to the rule and give the Government control over that scope.

Additionally, although the Proposed Rule would require that contractors obtain a signed NDA from covered employees, it does not provide any specific guidance concerning the NDA requirement. If the NDA requirement is retained, the Councils should address the following issues:

- Which parties (e.g., contractor, contractor employees, Government, the source of protected information) are required to sign an NDA and with whom must each party sign an NDA?*

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* The requirement that contractor employees execute NDAs would seem to go beyond the obligations placed on Executive Branch employees involved in performing similar work.
• Are the contractor and/or the contractor employee required to execute an NDA for each entity that provides information to which it will have access? For example, if a support contractor has access to the proprietary information of three private companies in performing its contract, will the support contractor be required to execute an NDA with each entity?

• Will the Government provide a model or form for the NDAs?

• To whom must NDAs be provided?

• Would an entity that submits non-public information be entitled to know who has signed an NDA relating to that information?

• Is there a required duration for the NDAs?

• If an NDA is not indefinite, how should a contractor address protection of non-public Government information when the NDA expires?

E. **The Council Should Revise the Proposed Rule to Allow a Contractor Reasonable Time to Investigate Before Disclosing PCI Violations.**

The Proposed Rule would require the contractor to report to the Contracting Officer any PCI violation by a covered employee “as soon as it is identified.” See 74 Fed. Reg. 58589 (proposed FAR 3.1103(a)(6) and 52.203-16(b)(6)). The Proposed Rule, nevertheless, also would dictate that the report include a description of the violation and the actions taken by the contractor in response to the violation. Id. These requirements are internally inconsistent. A contractor cannot disclose the actions it has taken to address a PCI violation as soon as the violation is identified. Such a disclosure would be impossible, because the contractor can take action only after it has identified the violation. Further, repercussions for PCI violations may be severe for contractor employees; a careful review of the facts and circumstances is appropriate. The Section recommends revising the rule to state that the contractor is required to “timely” report a PCI violation and state that this is intended to allow a contractor a reasonable period of time to investigate the matter. This approach would be similar to the approach adopted by the Councils after the thorough rulemaking in FAR Case 2007-006, Contractor Business Ethics Compliance Program Disclosure Requirements, where the Councils decided contractors should have an opportunity to conduct a preliminary investigation before making a mandatory ethics disclosure. See 74 Fed. Reg. 67064 at 67074. Further, the Councils should address how, if at all, the obligation to report PCI
violations relates to the obligations to disclosure certain crimes and civil False Claims Act violations under FAR Subpart 9.4 and 52.203-13.

F. The Councils Should Revise the Proposed Rule to Clarify the Application of the PCI Requirements to Subcontractor Employees and Subcontract Flow-Down Obligations.

As discussed above, many of the proposed requirements apply to “covered employees.” For example, the prime contractor would be responsible for screening covered employees, obtaining financial disclosure statements from each covered employee, and informing covered employees of their obligations. 74 Fed. Reg. 58588 (proposed FAR 52.203-16). A “covered employee” would include not only the contractor’s employees but also employees of subcontractors, consultants, and partners. 74 Fed. Reg. 58587 and 58589 (proposed FAR 3.1101 and 52.203-16(a)). Thus, the prime contractor would be responsible for screening all subcontractor personnel who qualify as covered employees regardless of whether or not the employees are performing under a subcontract subject to the clause. The proposed 52.203-16 would require the contractor to include the clause in subcontracts that exceed $100,000 and in which the subcontractor employees may perform acquisition functions closely associated with inherently governmental functions. 74 Fed. Reg. 58589 (FAR 52.203-16(e)). Accordingly, the prime contractor’s obligations to police “covered employees” is potentially inconsistent with the flow-down obligations. The Section believes that requiring the contractor to enforce the PCI requirements beyond its own organization is overly burdensome and not practical. The Councils should limit the obligations of contractors with respect to compliance of subcontractors and subcontractor employees.

G. The Councils Should Revise the Proposed Rule to Allow Waivers by the Contracting Officer.

The Proposed Rule would allow the Head of the Contracting Activity, in exceptional circumstances, to agree to mitigation of a PCI or waive the requirement to prevent PCIs for a particular employee with a written determination that the mitigation or waiver is in the best interests of the Government. See 74 Fed. Reg. 58588-89 (proposed FAR 52.203-16(c)). The Proposed Rule would state that this authority to mitigate or waive PCIs cannot be re-delegated. Proposed FAR 3.1104(c).

The Section is concerned that requiring the Head of the Contracting Activity to approve all waivers or mitigation plans will be unworkable in practice and result in significant negative consequences by impeding contractors who perform work subject to FAR 52.203-16. The Section recommends revising the
Regulatory Secretariat (VPR)
General Services Administration
January 12, 2010
Page 10

Rule to allow the Contracting Officer, in consultation with the chief of the contracting office, to agree to mitigate PCIs where appropriate. This approach would be similar to that used to mitigate organizational conflicts of interest in FAR Subpart 9.5. See FAR 9.506.

III. CONCLUSION

For the reasons discussed above, the Section recommends that the Councils revise the Proposed Rule to address the issues identified herein, which the Section believes will further the interest in identifying and preventing PCIs. The Section appreciates the opportunity to provide these comments and is available to provide additional information or assistance as you may require.

Sincerely,

Karen L. Manos
Chair, Section Public Contract Law

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5 Section 841 of the FY 2009 NDAA does not address mitigation and waivers and thus does not place any limits on the Councils’ authority to adopt reasonable mitigation and waiver provisions.