VIA REGULATORY PORTAL AND FACSIMILE

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

Re: FAR Case 2013-022; Federal Acquisition Regulation; Extension of Limitations on Contractor Employee Personal Conflicts of Interest, 79 Fed. Reg. 18503 (Apr. 2, 2014)

Dear Sir or Madam:

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 (Proposed Rule). 1 The Section consists of attorneys and associated professionals in private practice, industry, and Government service. The Section’s governing Council and substantive committees include 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.

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 Board of Governors of the American Bar Association and, therefore, should not be construed as representing the policy of the American Bar Association. 2

1 Sharon L. Larkin, Section Chair, Jeri K. Somers, Section Budget and Finance Officer. Mary Ellen Coster Williams, Section Delegate to the ABA House of Delegates, Candida Steel, and Anthony N. Palladino, members of the Council, did not participate in the Section’s consideration of these comments and abstained from voting to approve and send this letter.

2 This letter is available in pdf format at: http://www.abanet.org/contract regscomm/home.html under the topic “Personal and Organizational Conflicts of Interest.”
I. BACKGROUND

The existing Federal Acquisition Regulation (FAR) regulations concerning personal conflicts of interest (PCI) of contractor employees were finalized in December 2011\(^3\) in response to Section 841(a) of the Duncan Hunter National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2009,\(^4\) which required the Office of Federal Procurement Policy to draft a rule to prevent PCIs by contractor employees performing acquisition functions closely associated with inherently governmental functions for, or on behalf of, a federal agency or department. The rule is now codified in FAR subpart 3.11 and the associated clause, FAR 52.203-16, Preventing Personal Conflicts of Interest. FAR 3.1106 currently prescribes 52.203-16 for contracts and subcontracts that exceed the simplified acquisition threshold and require the involvement of contractor employees in performing “acquisition functions closely associated with inherently governmental functions” (e.g., planning acquisitions, developing requirements documents or evaluation criteria, evaluating proposals).

Contractors and subcontractors subject to FAR 52.203-16 are required to implement procedures to screen and prevent PCIs for “covered employees” during contract performance. A “covered employee” is any contractor or subcontractor employee, consultant, partner, or sole proprietor who performs an acquisition-support function under a contract subject to FAR 52.203-16. When applicable, that clause requires that contractors and subcontractors take the following steps to address the risks of PCIs:

- inform covered employees of their obligations under the PCI rules, including the obligation to avoid even the appearance of a PCI;
- obtain and maintain disclosures from each covered employee detailing: (i) the employee’s own financial interests, as well as the financial interests of his or her close family members and members of his or her household, (ii) the employee’s current and prospective “outside” employment and financial relationships, including consulting relationships, and (iii) gifts that the employee has accepted;
- obtain updated disclosures from covered employees whenever the information provided in earlier disclosures changes materially;
- avoid assigning a covered employee to a task that would expose the employee to a PCI;
- prohibit covered employees from using non-public information for personal gain;

• obtain non-disclosure agreements (NDAs) from covered employees;
• maintain effective oversight of covered employees to verify compliance with the PCI safeguards;
• discipline employees who do not comply with the requirements; and
• report any PCI violations to the appropriate contracting officer “as soon as . . . identified;” and flow down FAR 52.203-16 in subcontracts valued over $150,000 that involve the performance of covered services.\(^5\)

Section 829 of the NDAA for FY 2013\(^6\) directed the Secretary of Defense to consider whether the current PCI rules should be extended beyond employees performing acquisition-related functions.\(^7\) Specifically, the law required that the Secretary consider whether the rules should apply to the following:

• Employees performing functions other than acquisition functions that are closely associated with inherently governmental functions, as defined in 10 U.S.C. § 2383(b)(3);
• Employees performing personal service contracts, as defined in 10 U.S.C. § 2330a(j)(5),\(^8\) and
• Employees performing contracts for staff augmentation services, as defined in Section 808(d)(3) of the FY 2012 NDAA.

Based in part on the results of the Department of Defense’s (DoD’s) review required by Section 829, the FAR Councils have proposed to extend the applicability of the PCI rules to contractor employees (i) performing any functions closely associated with inherently governmental functions, and/or (ii) performing under a personal services contract.

II. COMMENTS

The Section strongly believes that contractor employees should act impartially in performing their work for the Government. The Section offers the following comments to help improve the Proposed Rule and to accomplish this goal more effectively and efficiently. As discussed below, the Section believes that the FAR Councils might be best served by delaying this rulemaking until the Government can assess the effectiveness of the existing PCI requirements and the FAR Councils finalize

\(^5\) See FAR 52.203-16(b) & (d).
\(^7\) See FAR 3.1106; FAR 52.203-16(a).
\(^8\) The Proposed Rule cites 10 U.S.C. § 2330a(g)(5)) for the definition of “personal service contract.”
their parallel rulemaking addressing the definition of “functions closely associated with inherently governmental functions,” which is central to the scope of this Proposed Rule.

A. The FAR Councils Should Assess the Efficacy of the Current FAR 52.203-16 Requirements Before Deciding Whether to Extend the Applicability of Those Requirements.

The Federal Register notice does not explain the basis for DoD’s conclusion that it would be advantageous to extend the applicability of existing PCI regulations. The notice states only that DoD concluded that the extension “may be in the best interests of DoD and the taxpayers,” but does not provide any details concerning the basis for this conclusion:

The Secretary of Defense reviewed existing FAR guidance on personal conflicts of interest 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. Responses were received from 23 military departments and defense agencies. The majority of the respondents indicated that protection or agreements covering additional functions would be helpful, as would a contractor-managed personal conflicts of interest identification and mitigation program, similar to that required by section 841(a).

Following analysis of the responses received, DoD concluded that extension of the FAR personal conflicts of interest regulations to additional functions and contract types may be in the best interest of DoD and the taxpayers. In a memo dated June 10, 2013, the Deputy Director of Defense Procurement and Acquisition Policy (DPAP) (Contract Policy and International Contracting) requested the Deputy Director Defense Acquisition Regulations System, to open a case to propose regulations relating to prevention of personal conflicts of interest. The memorandum further recommended that DPAP confer with OFPP and the FAR Council to determine whether to pursue such extension of coverage as a FAR change. The FAR signatories agreed to open this FAR case on August 2, 2013.9

The Section respectfully submits that in order to provide a meaningful opportunity for public comments, the FAR Councils should explain the basis for the DoD’s decision that it would be advantageous to extend the applicability of the PCI rules. Without a thorough explanation of the factors that DoD and the FAR Councils considered, it is difficult for the Section and for other commenters to address the key questions of

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whether the Proposed Rule is likely to accomplish the FAR Councils’ objectives and whether it represents the best approach—or at least a reasonable approach—to accomplishing those objectives.

The Federal Register notice also does not indicate that DoD or the FAR Councils analyzed (beyond the DoD’s review of responses to its February 2013 data call) whether the current PCI rules have been effective or whether the existing rules, primarily FAR 52.203-16, could be refined to improve their effectiveness. The Section recommends that the FAR Councils conduct that assessment before deciding to extend significantly the applicability of the current requirements. As the Councils noted, the current PCI rules have been in effect for over 29 months.\(^{10}\) Thus, it appears that now is an opportune occasion for the Councils to assess whether the substantive FAR Subpart 3.11 rules are accomplishing their intended purpose.

The Section believes that if the FAR Councils study the impact and effectiveness of the existing PCI regulations, they may find that the regulations are having their intended effect. The PCI regulations in FAR Subpart 3.11 and 52.203-16 undoubtedly serve an important purpose, identifying and avoiding PCIs among contractor employees performing acquisition-support functions,\(^ {11}\) but they also impose administrative burdens and costs on contractors and subcontractors and their covered employees subject to FAR 52.203-16. These costs often are paid directly or indirectly by the Government. Extending these requirements to other types of contracts could have repercussions that should be considered in this rulemaking and that might warrant considering changes to the existing substantive requirements.

For example, applying the PCI controls to a broader swath of contractor employees could affect the willingness of some individuals to support the Government in situations where they would be subject to the obligations imposed by FAR 52.203-16. Notably, the FAR 52.203-16 controls and screening processes, including the requirement to disclose broadly-defined financial interests and to update those disclosures regularly, apply to all covered employees, not just individuals who suffer or might suffer from a conflict of interest. Thus, the extension of the requirements might deter individuals who pose no risk or a low risk of conflicts. The Government might find that as the PCI rules are extended, certain individuals are unwilling to perform work under contracts covered by FAR 52.203-16, restricting or limiting the Government’s access to certain highly-skilled experts and professionals.

Similarly, employers may be reluctant to assume the administrative burdens and compliance risks associated with additional PCI screening procedures. If the FAR 52.203-16 requirements are applied to a greater pool of employees (i.e., anyone who performs a function closely associated with an inherently governmental function or

\(^{10}\) See id.

\(^{11}\) See FAR 3.1102.
under a personal services contract), more contractors will be required to implement procedures for screening, preventing, identifying, and reporting PCIs, a process that many contractors may not already have in place. If the applicability of the FAR 52.203-16 requirements discourages companies from pursuing contracts subject to that clause, the Proposed Rule could decrease competition for these types of contracts and, in turn, could increase the costs to the Government while decreasing the contractor capabilities available to it.

Additionally, extending the applicability of the PCI rules may have a disproportionate impact on small businesses, which tend to be better positioned than large businesses to perform the type of advisory work that is likely to be subject to the PCI regulations under the Proposed Rule. One of the reasons is that such businesses generally present lower risk of organizational conflicts of interest (OCIs). The commentary accompanying the Proposed Rule indicates that small businesses constitute almost 47 percent of the contractors currently performing on contracts subject to the existing PCI rules. The Proposed Rule could affect the ability of small businesses to retain the personnel necessary to perform the type of contracts that would be subject to FAR 52.203-16 under the broader prescription.

There is no indication in the Federal Register notice that DoD or the Councils considered these potential repercussions of extending the applicability of the PCI requirements. The Section respectfully recommends that before deciding to extend the applicability of FAR Subpart 3.11 and 52.203-16, the Councils should consider the effect the rule could have on the availability of personnel to perform under contracts subject to FAR 52.203-16 and other potentially negative implications.

B. The FAR Councils Should Delay the Rulemaking in FAR Case 2013-022 until the Councils Finalize the Scope of Functions Closely Associated with Inherently Governmental Functions under FAR Case 2012-001.

If, after assessing the effectiveness of the current PCI regulations, the FAR Councils decide that those regulations should be extended to contracts under which employees will perform any functions closely associated with inherently governmental functions (and no longer apply only to acquisition-support functions) and to personal service contracts, it will be imperative for contracting officials and contractors to

12 There are three types of OCIs covered by FAR Subpart 9.5: “impaired objectivity,” “biased ground rules,” and “unequal or unfair access to information” OCIs. The concerns that underlie these types of OCIs overlap to some extent with the concerns that underlie the PCI regulations, except that OCI analysis focuses on the contacting entity, while PCI analysis focuses on individual contractor employees.

13 79 Fed. Reg. 18503 at 18505 (“Between March 1, 2012, and March 1, 2013, a total of 22,716 contract actions over the simplified acquisition threshold were coded as functions closely associated with inherently governmental functions. Of that total, 10,600 actions were awarded to small businesses, and 12,116 actions were awarded to other than small businesses.”).
understand the scope of services that are subject to FAR 52.203-16 and the substantive PCI requirements. The Section is concerned that the Proposed Rule may not provide sufficient guidance for contracting officials and clarity for contractors and prospective contractors surrounding the types of services and, in turn, types of contractor employees that would be covered by the PCI regulations and FAR 52.203-16 controls.

One of the challenges is that the definition of “functions closely associated with inherently governmental functions” is currently in flux, as the FAR Councils have opened a rulemaking to address the FAR treatment of such functions. The FAR Councils acknowledge the pending rulemaking in the Federal Register notice for the Proposed Rule:

The Councils also note that FAR Case 2012-001, Performance of Inherently Governmental Functions and Critical Functions, is currently being processed as a proposed rule to implement the OFPP Policy Letter 11-01, Performance of Inherently Governmental and Critical Functions, issued in the Federal Register at 76 FR 56227 on September 12, 2011, which also addresses functions closely associated with inherently governmental functions.\(^\text{14}\)

We believe that it may be premature to extend the PCI requirements to all contracts under which employees will perform any functions closely associated with inherently governmental functions before the FAR Councils finalize the rulemaking in FAR Case 2012-001. Until the FAR Councils resolve the uncertainty surrounding the definition of “functions closely associated with inherently governmental functions,” it would be difficult for contracting officials and contractors to apply the rule. This uncertainty also makes it difficult for the public to comment on the potential impact of the Proposed Rule. We recommend that if the FAR Councils decide to proceed with extending the applicability of the PCI rules once the definition of “functions closely associated with inherently governmental functions” is settled through FAR Case 2012-001, the FAR Councils should issue another proposed rule or at least another request for public comments on the proposed extension of the PCI rules under FAR Case 2013-022. This is necessary to provide the various stakeholders affected by the rule a meaningful opportunity to weigh in on the specific regulatory language, including, among other things, whether the rules would provide sufficient guidance to the contracting officials responsible for applying the critical definitions.

\(^{14}\) 79 Fed. Reg. 18503 at 18504.
C. The FAR Councils Should Revise FAR 3.1106 to Require Contracting Officers to Identify Affirmatively the Scope of Services that are Considered Subject to the FAR 52.203-16 Requirements.

Some contracts encompass both services that are subject to the PCI regulations and services that are not. This is the case even under the current rules. To address these situations, FAR 3.1106 provides that “[i]f only a portion of a contract is for the performance of acquisition functions closely associated with inherently governmental functions, then the contracting officer shall insert the clause, but shall limit applicability of the clause to that portion of the contract that is for the performance of such services.”

If the FAR Councils revise the FAR to extend the types of contracts to which FAR 52.203-16 applies, as proposed, the prevalence of contracts that include both covered services and non-covered services is likely to increase substantially. In that case, a contracting officer’s obligation to limit the applicability of FAR 52.203-16 to covered employees will take on heightened importance. Contractors must be able to discern which employees are covered by the PCI controls (including the financial disclosure obligations) and which are not. The onus should be on the procuring agency to specify in the solicitation and resulting contract the types of services and contractor employees to which the FAR 52.203-16 requirements apply. To this end, we recommend that the Councils revise FAR 3.1106 to require, when only a portion of a contract is for performance by covered employees, that contracting officers (i) indicate in the solicitation and resulting contract that FAR 52.203-16 applies only to a portion of the services, and (ii) affirmatively specify the scope of services to which the PCI requirements apply.

III. CONCLUSION

For the reasons stated above, we believe that it would be prudent to consider postponing issuance of an interim or final rule expanding the application of the PCI rules to additional types of contracts until the FAR Councils (a) provide a more thorough explanation for the purpose of the rule and allow an opportunity for the public to comment on whether the proposed approach is likely to accomplish that purpose, and (b) finalize the pending rulemaking addressing the definition of “functions closely associated with inherently governmental functions,” which is central to determining the types of contracts and contractor employees that are subject to the PCI controls, and allow an opportunity for the public to comment on whether the proposed regulations provide sufficient clarity surrounding the services and employees that would be covered by those controls.

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15 FAR 3.1106. See 79 Fed. Reg. 18503 at 18506 (proposing to revise FAR 3.1106 to provide: “[i]f only a portion of a contract is for the performance of services by covered employees, then the contracting officer shall insert the clause, but shall limit applicability of the clause to that portion of the contract that is for the performance of such services.”).
The Section appreciates the opportunity to provide these comments and is available to provide additional information or assistance as you may require.

Sincerely,

[Signature]

Stuart B. Nibley
Chair-Elect, Section of Public Contract Law

cc:
Sharon L. Larkin
David G. Ehrhart
James A. Hughes
Jeri Kaylene Somers
Council Members, Section of Public Contract Law
Chairs and Vice Chairs, Ethics, Compliance and Professional Responsibility Committee
Kara M. Sacilotto
Craig M. Smith