



EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

OFFICE OF FEDERAL
PROCUREMENT POLICY

August 18, 2011

The Honorable Joseph I. Lieberman
Chairman
Committee on Homeland Security
and Governmental Affairs
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

Section 841 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, Public Law 110-417, requires the Administrator for Federal Procurement Policy to review the Federal Acquisition Regulation (FAR) to identify contracting methods, types and services that raise heightened concerns for potential personal and organizational conflicts of interest, and to determine whether revisions to the FAR are necessary to address them. Section 841 further requires that the Administrator report the findings and determinations resulting from the required review, together with an assessment of any revisions to the FAR that may be necessary. This letter addresses these reporting requirements, and describes the steps the Administration has taken and is taking to establish appropriate safeguards related to contractor conflicts of interest.

Personal Conflicts of Interest

The FAR has traditionally been silent on personal conflicts of interest (PCIs) with respect to contractor employees. PCI is the term used to describe situations in which an individual has a financial interest, personal activity, or other relationship that could impair the ability to act impartially or in the best interest of the government. Section 841 required the Administrator to develop a standard policy to prevent PCIs by contractor employees performing acquisition functions closely associated with inherently governmental functions, including the development, award, and administration of government contracts. The Federal Acquisition Regulatory Council (FAR Council), which is chaired by the OFPP Administrator, issued a proposed rule to implement section 841 and, after careful consideration of public comment, anticipates issuing a final rule to implement this policy later this summer. When the coverage is finalized, contractors will be required to train employees regarding their responsibilities with respect to PCIs, maintain effective oversight, and report any PCI violations to the contracting officer.

The FAR Council believes that PCIs are most likely to arise in connection with the performance of acquisition functions closely associated with inherently governmental functions and has not identified other functions currently in need of regulatory coverage. In light of the importance of the issue in reinforcing public confidence in our procurement system and the integrity of the acquisition process, the Council will issue a notice simultaneously with the publication of the final rule seeking public feedback on whether there are additional areas that warrant regulatory coverage. This feedback will be used to assist OFPP and the FAR Council in completing the assessment of the adequacy of PCI coverage required by section 841.

Organizational Conflicts of Interest

In recent years, a number of trends in acquisition and industry have led to the increased potential for organizational conflicts of interest (OCIs). These trends include (1) increased consolidation in industry; (2) expanded reliance by the government on contractors for services, especially where the contractor is tasked with providing advice to the government; and (3) the expanded use of multiple-award task- and delivery-order contracts, which permit large amounts of work to be awarded among a limited pool of contractors. Despite these trends, regulatory coverage on OCIs has remained largely unchanged since the 1960s. In reviewing these regulations, currently in Subpart 9.5 of the FAR, the Acquisition Advisory Panel (established pursuant to section 1423 of the Services Acquisition Reform Act of 2003 (“SARA Panel”)) concluded that they do not adequately address “the range of possible conflicts that can arise in modern Government contracting.” The SARA Panel observed that contracting officers and agencies have encountered difficulties implementing appropriate OCI avoidance and mitigation measures, in large part because the FAR provides no detailed guidance on how to detect and mitigate actual and potential OCIs. The SARA Panel called for improved guidance, to possibly include a standard OCI clause or set of clauses.

OFPP concluded that revisions to the FAR are necessary to achieve sufficiently rigorous, comprehensive, and uniform government-wide policies to prevent and mitigate OCIs in federal contracting. This determination was based on a review of the SARA Panel’s recommendations; case law from the Government Accountability Office (GAO) and Court of Federal Claims, upon which much of the current regulatory coverage is based; public responses to an advance notice of proposed rulemaking issued in 2008 and public comments received in response to a proposed Department of Defense regulation that would have expanded coverage of OCIs in the Defense Federal Acquisition Regulation Supplement (DFARS).

OFPP specifically concluded that regulatory changes should achieve the following objectives:

- Clarify key terms and provide more detailed guidance regarding how contracting officers should identify and address OCIs, while emphasizing that each OCI case may be unique and therefore must be approached with thoughtful consideration.
- Provide standard OCI clauses, with the opportunity for contracting officers to tailor the clauses as appropriate for particular circumstances.
- Apply to all contract types, but emphasize (as does the current FAR) that OCIs are more likely to arise in the context of services for acquisition support or other advisory and assistance services.
- Address unique policy issues and contracting officer responsibilities associated with OCIs arising in the context of task- and delivery-order contracts and address OCI concerns that may arise both in connection with award of the umbrella contract and orders placed thereunder since not all future OCI concerns can be foreseen at the time of award of the base contract.

On April 26, 2011, the FAR Council issued a proposed rule to amend the FAR's coverage on OCIs. As explained in the rule's preamble, the proposed FAR rule differs from the current coverage in at least three important respects:

- First, the proposed rule distinguishes between those OCIs that risk harm to the integrity of the competition for a contract and those that could harm the government's business interests but would not taint the competition for a contract. On this basis, the proposed rule would make certain refinements to the discretion given to contracting officers in addressing OCIs. Consistent with current practice, the proposed rule requires that any risk of harm to the integrity of the competition for a contract must be substantially reduced or eliminated, because such risk affects not only the Government, but also other vendors, and could damage the public's trust in the acquisition system. However, where a potential OCI would only involve risk to the Government's business interest, the rule vests the contracting officer with "broad discretion to select the appropriate method for addressing the conflict, including the discretion to conclude that the Government can accept some or all of the performance risk."
- Second, the proposed rule would no longer treat unequal access to nonpublic information as an OCI, because the harm to the integrity of the acquisition system caused by unequal access to nonpublic information, while serious, can arise regardless of whether a conflict of interest is present. Contracting officers would still be required to pay close attention to a contractor's handling of nonpublic information and contractor access to nonpublic information in accordance with coverage provided in a new subpart. Separate handling will allow for more focused coverage addressing the array of non-disclosure agreements used by agencies and contractors in service contracts.
- Third, the proposed rule provides contracting officers with a set of standard clauses to utilize in solicitations and contracts whenever the contracting officer determines that there is potential for an OCI. The current FAR does not provide any standard contract clauses to address OCIs. The new clauses will put offerors on notice regarding which opportunities may involve OCIs, address OCIs that arise during contract performance, and, when appropriate, limit the ability of a contractor to perform future work based on the performance of the current contract.

To maximize the value of public feedback on the proposed rule, OFPP and the FAR Council solicited response to a series of specific questions, including whether the new framework in the proposed rule strikes the right balance between providing detailed guidance for contracting officers and allowing appropriate flexibility for dealing with the variety of forms that OCI's take and the variety of circumstances under which they arise. The Council and OFPP have also solicited comment on whether the framework presented by the proposed rule is preferable to OCI regulatory revisions set forth in the proposed rule to the DFARS. Like the proposed FAR rule, the DFARS rule would have provided more detail regarding how contracting officers are to perform individualized OCI analyses, standard OCI-clauses, and specialized coverage related to OCIs in task- and delivery-order contracts and orders placed under those contracts. Unlike the FAR rule, the DFARS rule retains the basic distinctions on OCIs drawn in caselaw. Copies of the proposed FAR rule and the proposed DFARS rule are enclosed for your information.

The Administration is committed to ensuring that the FAR provides our contracting officers with the tools they need to secure required goods and services while protecting the interests of the taxpayer and the integrity of our contracting process. We believe the steps described above will result in substantially improved guidance to help our agencies and the contracts community effectively address conflicts of interest and avoid the challenges that can arise if they are not identified and managed properly. We look forward to working with Congress on this important endeavor.

Sincerely,

A handwritten signature in black ink, appearing to read "D. Gordon", with a long horizontal flourish extending to the right.

Daniel I. Gordon
Administrator

Enclosures

Identical Letter Sent to:

The Honorable Joseph I. Lieberman

The Honorable Susan M. Collins

The Honorable Darrell E. Issa

The Honorable Elijah E. Cummings

The Honorable Carl Levin

The Honorable John McCain

The Honorable Howard P. "Buck" McKeon

The Honorable Adam Smith

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CORRESPONDENCE TRACKING SHEET**

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<input checked="" type="checkbox"/> Correspondence	<i>Lieberman</i>	
<u>Outgoing:</u> Committee on Armed Services (House & Senate) Committee on Oversight and Government Reform (House) Committee on Homeland Security and Governmental Affairs (Senate)		

SPECIAL HANDLING INSTRUCTIONS

Please use IQ to track and forward.

SHORT SUMMARY OF MATERIAL

Attached is the report to Congress concerning Section 841 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, Public Law 110-417, which requires the Administrator for Federal Procurement Policy to review the FAR to identify contracting methods, types and services that raise heightened concerns for potential personal and organizational conflicts of interest, and to determine whether revisions to the FAR are necessary to address personal and organizational conflicts of interest in Federal contracting. Section 841 further requires the Administrator to report the findings and determinations resulting from the review, together with an assessment of any revisions to the FAR that may be necessary. This letter addresses these reporting requirements, and describes the steps the Administration has taken and is taking to establish appropriate safeguards related to contractor conflicts of interest.

Attachment

	PREPARED	CLEARED	CLEARED	CLEARED	CLEARED	CLEARED	CLEARED
Name/ Division	McCrary OFPP	Blum OFPP	Field OFPP	Gordon OFPP	Baer COMM	Bershteyn GC	Neill LA
Initials/ Date	<i>JCM</i> 7/11/11	<i>MB</i> 7/11/11	<i>WAF</i> 7/15/11	<i>TD</i> 7/18	<i>LSB</i> 15 Jul 11	<i>BB</i> 7/18/11	<i>AR</i> 7/18/11
	CLEARED	CLEARED	CLEARED	CLEARED	CLEARED	CLEARED	CLEARED
Name/ Division	Zients DDM	Blum King DO/SA	Blum Gordon EAD	Lew DO	Gordon OFPP		
Initials/ Date	<i>ZZ</i>	<i>BK8/9</i>	<i>W</i> 8/14		<i>LSB</i>		