

## New Personal Conflict Of Interest Rules For Contractors

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**On December 2, 2011, Federal Acquisition Regulation Subpart 3.11 – Preventing Personal Conflicts of Interest for Contractor Employees Performing Acquisition Functions – takes effect.** The [new Rule](#) requires contractors to screen for and **prevent personal conflicts of interest when supporting Government acquisition functions.** [\[1\]](#) The Rule also requires contractors to prohibit covered employees from utilizing non-public information for personal gain and to obtain from covered employees executed non-disclosure agreements prohibiting the dissemination of such information.

The Rule defines “personal conflict of interest” to include situations 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. Under the Rule, “covered employees” include the contractor's employees and self-employed individuals who perform an “acquisition function closely associated with inherently governmental functions.” Covered acquisition functions include supporting or providing advice or recommendations with regard to the following activities of a Federal agency:

- (1) Planning acquisitions;
- (2) Determining what supplies or services are to be acquired by the Government, including developing statements of work;
- (3) Developing or approving any contractual documents, to include documents defining requirements, incentive plans, and evaluation criteria;
- (4) Evaluating contract proposals;
- (5) Awarding Government contracts;
- (6) Administering contracts (including ordering changes or giving technical direction in contract performance or contract quantities, evaluating contractor performance, and accepting or rejecting contractor products or services);

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(7) Terminating contracts; and

(8) Determining whether contract costs are reasonable, allocable, and allowable.

Examples of personal conflicts of interest covered by the Rule include: (1) financial interests of the employee and close family members or other members of the household, e.g., compensation, business and real estate investments, stock ownership, intellectual property interests; (2) employment and financial relationships, including seeking or negotiating prospective employment; and (3) gifts. The definition of “personal conflict of interest” excludes a “*de minimis* interest” that would not impair an employee’s objectivity, but the Rule provides no guidance in this area.

The Rule requires the insertion of standard contract clause 52.203-16, Preventing Personal Conflicts of Interest, in solicitations, contracts, and task or delivery orders awarded after December 2, 2011 for “acquisition functions closely associated with inherently governmental functions for, or on behalf of, a Federal agency or department.” Commercial item procurements are exempt from coverage as are procurements valued at or below the simplified acquisition threshold.

The Rule instructs contracting officers to modify existing task or delivery order contracts, on a bilateral basis, to include the new PCI clause for future orders. The contractor’s leverage in the “bilateral” negotiation of these changes, however, is virtually nonexistent. In the event a contractor refuses to accept such a modification, the contractor will not be eligible to receive any additional orders under the contract.

To comply with the new contract clause, Contractors are required to identify and prevent personal conflicts of interest through the following means:

- (1) Have procedures in place to screen covered employees for potential conflicts of interest, including obtaining financial disclosure statements from such employees each time they are assigned to a new task;
- (2) Prevent personal conflicts of interest, including by not assigning an employee to perform a task for which a personal conflict of interest has been identified, absent a mitigation plan or waiver (which may be approved only under “exceptional circumstances”);
- (3) Prohibit use of non-public information accessed through performance of a Government contract by obtaining signed non-disclosure agreements from employees;
- (4) Inform employees of their obligations to disclose and prevent personal conflicts of interest, not to use non-public information accessed through performance of a Government contract, and to avoid even the appearance of personal conflicts of interest;
- (5) Maintain effective oversight to verify compliance with safeguards;
- (6) Take appropriate disciplinary action against employees who fail to comply with conflict of interest policies;
- (7) Report any violation to the Contracting Officer as soon as identified with a description of

the violation and proposed actions to be taken in response.

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Reportable violations are defined to include a covered employee's failure to disclose a personal conflict of interest, use of non-public information for personal gain, and failure to comply with the terms of a non-disclosure agreement. Contractors will not be held liable for employee violations, provided they have taken "appropriate steps to uncover and report the violation."

The Rule requires contracting officers to flow down these obligations in subcontracts exceeding \$150,000 where the subcontractors' employees qualify as "covered employees." However, prime contractors are not responsible for screening their subcontractors' employees.

The Rule has the potential to impose a significant compliance burden on contractors that provide contract acquisition and administration support services. To comply with the new rule, such contractors should, among other things:

- Modify their codes of business ethics and conduct to include adequate coverage of PCIs
- Draft and implement specific policies and procedures relating to the identification, prevention, and reporting of PCIs
- Develop training materials to educate employees regarding their obligations relating to PCIs
- Create a standard form financial disclosure statement that addresses all potential sources of PCIs
- Review the adequacy of existing standard form NDAs vis-à-vis the requirements of the new rule
- Update their standard form subcontracts to provide for mandatory flow-down of the new contract clause

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