



PROJECT ON GOVERNMENT OVERSIGHT

Exposing Corruption. Exploring Solutions.

June 2, 2014

General Services Administration
Regulatory Secretariat (MVCB)
ATTN: Hada Flowers
1800 F Street, NW, 2nd Floor
Washington, DC 20405

Submitted via Regulations.gov

Subject: FAR Case 2013-022

Dear Ms. Flowers:

The Project On Government Oversight (POGO) provides the following public comment to “Extension of Limitations on Contractor Employee Personal Conflicts of Interest,” (79 Fed. Reg. 18503, April 2, 2014). POGO is an independent nonprofit organization committed to achieving a more accountable and transparent federal government. POGO has a longstanding interest in the intersection of federal contracting and ethics—namely, ensuring that the same conflict of interest rules that apply to federal employees apply to contractor employees.

The Defense Acquisition Regulations Council and the Civilian Agency Acquisition Council (the Councils) are proposing to revise the Federal Acquisition Regulation (FAR) to implement section 829 of the National Defense Authorization Act for Fiscal Year 2013 (Pub. L. 112-239). This section will amend FAR subpart 3.11 by extending guidance on contractor employee personal conflicts of interest (PCI) to an individual who performs a function closely associated with inherently governmental functions¹ or performs under a personal services contract.²

POGO supports the proposed FAR amendment as a necessary expansion of safeguards against PCI. It will ensure that contractor employees perform their duties with integrity and in the public’s interest rather than for personal or financial gain, especially in instances when contractor employees have access to non-public information. Holding contractor employees to a lower ethical standard than government employees erodes public confidence in the government and the federal contracting process. As articulated in FAR subpart 3.101-1:

Government business shall be conducted in a manner above reproach and...with complete impartiality and with preferential treatment for none. Transactions relating to the expenditure

¹ Functions closely associated with inherently governmental functions are categorized as such “because of the nature of the function and the risk that performance may impinge on Federal officials’ performance of an inherently governmental function.” 76 Federal Register 56227, 56238, September 12, 2011. <http://www.gpo.gov/fdsys/pkg/FR-2011-09-12/pdf/2011-23165.pdf>. FAR Subpart 2.101 defines an inherently governmental function as “a function that is so intimately related to the public interest as to mandate performance by Government employees.”

² A personal services contract is a contract that creates a direct employment relationship between the government and the contracted employee. FAR Subparts 2.101 and 37.104. Because personal service contracts avoid civil service hiring rules, they are only permitted when specifically authorized by statute.

of public funds require the highest degree of public trust and an impeccable standard of conduct.

Several years ago, the Government Accountability Office (GAO) found that contractor employees outnumbered government employees in many Department of Defense (DoD) offices, sometimes by as much as 7 to 1.³ Even with the decrease in federal contract spending over the last few years, contractor employees remain a substantial and omnipresent part of the federal workforce.⁴ Moreover, contractor employees sometimes succumb to temptation and improperly enrich themselves at taxpayers' expense.⁵

The GAO recommended that DoD develop and implement conflict of interest standards for defense contractor employees that are similar to those required of DoD's federal employees.⁶ DoD and civilian agencies finalized such a rule in 2011, but they narrowly defined the activities to which the rule applied.⁷

The current rule in FAR subpart 3.11 only applies to contractor employees who perform acquisition functions closely associated with inherently governmental functions (e.g., planning acquisitions, developing requirements or evaluation criteria, evaluating proposals). The dangers posed by PCI, however, are present in a far broader range of functions. They arise any time a contractor employee is in a position to influence government decisions or has access to government resources or non-public information. As the Councils note in the analysis of the proposed rule, over the course of just one year (March 2012 to March 2013) a total of 22,716 contract actions over the simplified acquisition threshold involved functions closely associated with inherently governmental functions. The Councils also report that the Department of Defense determined that extending personal conflict of interest protections to cover additional functions would be helpful and would be in the best interest of the government and taxpayers.

The proposed rule will further impress on contractors and subcontractors the need to identify, report, and, most importantly, prevent their employees' conflicts of interest and misuse of non-public information in all activities where the contractor employee is performing work that is closely associated with an inherently governmental function. Additionally, the regulations will apply to individuals performing personal services, which, due to the lack of a corporate entity, are subject to almost no regulation. As a result, the proposed rule will compel all contractors to strengthen their ethical practices and policies.

³ Government Accountability Office, *Defense Contracting: Additional Personal Conflict of Interest Safeguards Needed for Certain DOD Contractor Employees* (GAO-08-169), March 2008, p. 7. <http://www.gao.gov/new.items/d08169.pdf> (Downloaded May 28, 2014) (hereinafter GAO-08-169)

⁴ In 2013, New York University Professor Paul C. Light, an expert in government workforce and contracting issues, estimated that the number of contract employees is approximately 6.5 million to 7.5 million, compared to approximately 2 million government employees. See *Sequestration and Federal Contractors*, C-SPAN TV, March 4, 2013. <http://www.c-span.org/video/?311283-7/sequestration-federal-contractors>

⁵ See, for example, *Former Employee Of Defense Contractor And Wife Sentenced For Conspiring To Obtain Millions In Fraudulent Scheme Involving Vehicle Parts For Afghan National Army*, February 14, 2014. <http://www.justice.gov/usao/vae/news/2014/02/20140214johnsonnr.html> (Downloaded May 28, 2014); and *Former Unisys Engineer and Girlfriend Admit Receiving Nearly \$100,000 In Kickbacks In Connection With TSA High-Tech Phone Contract*, May 1, 2014. <http://www.justice.gov/usao/nj/Press/files/Metzger,%20Neil%20Sentencing%20and%20Anderson%20and%20Idoux-Walz%20Plea%20PR.html> (Downloaded May 28, 2014)

⁶ GAO-08-169, pp. 31-32.

⁷ 79 Federal Register 18503, November 2, 2011. <http://www.gpo.gov/fdsys/pkg/FR-2011-11-02/pdf/2011-27780.pdf>

POGO disagrees, however, with the proposed rule's continuation of the commercial item exception. The government spends approximately \$110 billion a year on commercial items,⁸ which places taxpayer dollars at risk because many checks and balances of the contracting system are avoided when items are designated as commercial. The government has invoked the commercial item exception for blatantly non-commercial items, such as military aircraft. Therefore, we recommend that the Councils consider extending the current and proposed FAR rules to cover commercial item acquisitions.

POGO also urges the Councils to define the term "non-public government information" in FAR Subparts 3.1101 and 52.203-16(a). One aim of the PCI rule is to "prohibit covered employees who have access to non-public information by reason of performance on a government contract from using such information for personal gain." However, neither the current nor the proposed rules define non-public information.

We would also like to see specific remedies outlined in the final rule. FAR Subpart 3.1105 only states that "the contracting officer shall contact the agency legal counsel for advice and/or recommendations on a course of action." For example, the rule should state that violations may result in:

- (1) Requiring the contractor to remove a contractor employee or employees from the performance of the contract;
- (2) Requiring the contractor to terminate a subcontract;
- (3) Suspension of contract payments;
- (4) Loss of award fee, consistent with the award fee plan, for the performance period in which the Government determined Contractor non-compliance;
- (5) Termination of the contract for default or cause, in accordance with the termination clause of the contract; or
- (6) Suspension or debarment.

POGO urges the Councils to also consider adding a provision requiring that violations immediately be entered into the Federal Awardee Performance and Integrity Information System (FAPIIS).

In conclusion, POGO supports the proposed rule, but we hope the Councils will give due consideration to our suggested modifications. If you have any questions, you may contact me at (202) 347-1122.

Sincerely,



Neil Gordon
Investigator
ngordon@pogo.org

⁸ Federal Procurement Data System, Ad Hoc Reports, Commercial Items, run May 27, 2014.
https://www.fpds.gov/fpdsng_cms/index.php/en/