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Let's Get Personal: A Guide to the Interpretation and Implementation of the FAR Personal Conflicts of Interest Rules

By DAVID J GINSBERG AND ROBERT R. BOHN



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If you are like many government contractors, you are already well aware of the sweeping new personal conflicts of interest (PCI) regulations requiring contractors to identify and prevent both personal conflicts of interest in the performance of federal government contracts, and the unauthorized use of nonpublic information by their employees for personal gain.¹ Perhaps you are also one of the fortunate few who have already translated these broad rules into corporate policy, implemented training, and collected and screened your employees' personal information. However, if you are like most contractors, you have recently received your first solicitation with the new PCI clause, and after trying to assert that the clause does not belong in your contract, you have now realized that your company needs to design and implement yet another extensive compliance program.

Contractors will no doubt recall the Contractor Business Ethics Compliance Program and Disclosure Requirements final rule from 2008 and its similar call to action for them to design and establish formal business ethics and compliance programs.² While this article may not provide your company with all of the answers, it will give you an overview of the new PCI rules and identify the various challenges to their interpretation and implementation. Like the contractor code of business ethics and conduct, the new PCI rules encompass numerous ambiguities. However, as is usually the case in most compliance activities, contractors may be better suited to interpret the rules for

themselves, and to design a unique compliance program that works for their specific organizations, contracts, and employees.

Background

On November 2, 2011, the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) issued a final rule amending the Federal Acquisition Regulation (FAR) to require that contractors identify and prevent PCIs among their "covered employees."³ The general substance of the final rule has its roots in section 841(a) of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009.⁴ Section 841(a) required that the Office of Federal Procurement Policy (OFPP) develop policies to prevent PCIs among contractor employees who perform acquisition functions closely associated with "inherently governmental functions" for or on behalf of a federal agency or department.⁵ In addition, section 841(a) also required OFPP to collaborate with the Department of Defense (DoD), the General Services Administration (GSA), and the National Aeronautics and Space Administration (NASA) to develop regulatory guidance, including the crafting of a new policy and FAR contract clause to aid in the prevention of PCIs among those contractor employees performing such acquisition functions.⁶

In response, DoD, GSA, and NASA published a proposed rule on November 13, 2009.⁷ The proposed rule contemplated a policy whereby each contractor that has employees performing acquisition functions closely associated with inherently governmental functions would be charged with identifying and preventing PCIs among those covered employees.⁸ The proposed rule also would have required that contractors' covered employees be prohibited from using nonpublic government information for personal gain.⁹ Most importantly, perhaps, the proposed rule also made contractors responsible for: (1) having procedures to screen for PCIs; (2) informing covered employees of their obligations with regard to such procedures; (3) maintaining effective oversight to verify compliance; (4) reporting PCI violations to the contracting officer; and (5) taking appropriate discretionary action with those employees who failed to adhere to the procedures.¹⁰ Not surprisingly, the controversial substance of the proposed regulations drew the attention of the contracting community, and the councils received nearly two dozen comments addressing the proposed rule.

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Issuance of the Final Rule

A series of definitions. In order to properly analyze the effects of the final rule, you must first consider a series of definitions in the newly created FAR Subpart 3.11. First, the phrase “acquisition function closely associated with inherently governmental functions” means supporting or providing advice or recommendations with regard to the following federal agency activities: (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, including documents that define contract requirements, incentive plans, and evaluation criteria; (4) evaluating contract proposals; (5) awarding government contracts; (6) administering contracts, which includes ordering changes or giving technical direction in contract performance or quantities, evaluating performance, and accepting or rejecting the provision of goods or services; (7) terminating contracts; and (8) determining whether contract costs are reasonable, allowable, and allocable.¹¹ This list appears to be exclusive,

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with... the use of...
...
...
... for personal gain.*

but other activities may be added to the definition.

The councils have also provided a definition for “covered employees.” According to the final rule, such employees are those who perform any of the activities described above and are employees of the contractor, or a subcontractor who is a self-employed individual treated as a covered employee of the contractor because there is no other employer to which such self-employed individual could submit the required disclosures.¹²

For the first time, the FAR Councils have also provided guidance as to what constitutes a PCI for contractor employees. The final rule prescribes that a PCI entails 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 government’s best interest when performing a contract.¹³

The final rule also references several sources of PCIs. For example, we are informed that a PCI can arise from any of the following: (1) financial interests of the covered employee, of close family members, or of other members of the covered employee’s household; (2) other employment or financial relationships, which includes seeking or negotiating for prospective employment or business; and

(3) gifts, including travel.¹⁴ These broad definitions create challenges for implementation of a compliance program.

A financial interest may arise from any of the following: (1) compensation, including wages, salaries, commissions, professional fees, or fees from business referrals; (2) consulting relationships; (3) services provided in exchange for honorariums or travel expense reimbursements; (4) research funding or other forms of research support; (5) investment in the form of stock or bond ownership interest, excluding diversified mutual fund investments; (6) real estate investments; (7) patents, copyrights, and other intellectual property interests; or (8) business ownership and investment interests.¹⁵ Finally, the councils acknowledged the possibility that a covered employee might have a de minimis financial interest that would not impact that employee’s ability to act impartially.¹⁶

Mandated procedures for contractor compliance.

In addition to the new definitions, the final rule also mandates a new series of compliance obligations for contractors. Specifically, the regulations provide that any contractor with employees who perform acquisition functions closely associated with inherently governmental functions must establish and adhere to a compliance program aimed at identifying and addressing PCIs. Contractors are now required to have procedures in place to screen covered employees for potential PCIs by obtaining from each covered employee—and maintaining with current information—a disclosure of interests that might be affected by the task to which the employee has been assigned.¹⁷ That is, such employee screening must take place when the employee is initially assigned to the task under the contract, and the screening and corresponding disclosures must be repeated any time the employee’s personal or financial circumstances change in such a way that a new PCI might occur because of the task the employee is performing.¹⁸ The employee being screened must disclose any financial interests, both for the employee as well as for any close family or household members.¹⁹ The employee must also disclose the existence of any other employment or financial relationship, as well as any gifts, including travel, that may impair the employee’s impartiality.²⁰

The contractor is also required to act diligently to prevent PCIs, in part by not assigning or allowing a covered employee to perform any task under the contract for which a PCI was identified, unless the contractor or employee can satisfactorily prevent or mitigate the PCI with the assistance of the contracting agency.²¹ The contractor is also charged with prohibiting the use of nonpublic information accessed through government contract performance for personal gain.²² Further, the contractor may be able to limit PCIs through the use of a signed nondisclosure agreement (NDA) to prohibit disclosure of any nonpublic information accessed through contract performance.²³

The contractor is also required to inform all covered employees of their obligation to disclose and prevent PCIs, as well as to inform covered employees to avoid even the appearance of PCIs.²⁴ Contractors must also maintain ef-

fective oversight to verify compliance with PCI safeguards and to take appropriate disciplinary action in the case of covered employees who fail to comply with these policies.²⁵

Finally, the final rule places an obligation on the contractor to report any PCI to the contracting officer.²⁶ The disclosure must include a description of the violation and the proposed actions to be taken by the contractor in response to such violation, as well as providing follow-on reports of any corrective action taken by the contractor.²⁷ PCI violations may include: (1) failure by a covered employee to disclose a PCI; (2) use by a covered employee of nonpublic information accessed through performance of a government contract for personal gain; and (3) failure of a covered employee to comply with the terms of a nondisclosure agreement.²⁸ If a contractor reports a PCI violation to the contracting officer, the contracting officer is required to review the actions taken by the contractor and determine if such action has resolved the violation satisfactorily. The contracting officer then may take any other appropriate action in consultation with agency legal counsel.

The possibility does exist, however, for PCIs to be either mitigated or waived. If the contractor cannot satisfactorily prevent a PCI, the contractor may submit a request, through the contracting officer, for the head of the contracting activity to agree to a mitigation plan for the PCI, or to waive the requirement to prevent the PCI.²⁹ The head of the contracting activity then has the discretion to determine that such action is in the best interest of the government. Of course, if the government agrees to the mitigation plan, the contractor must require compliance to the plan by the covered employee, as well as comply with any conditions imposed by the government that are deemed necessary to mitigate the PCI.³⁰ In lieu of the covered employee's compliance, the contractor may remove the contractor or subcontractor employee from performance of the contract, or terminate the applicable subcontract.³¹ Contractors should be aware, however, that the final rule prescribes that such mitigation or waiver would only be applicable in "exceptional circumstances."³²

The final rule also imposes a contract clause that must be included in all solicitations and contracts that exceed the simplified acquisition threshold³³ and include a requirement for services by contractor employees that involve acquisition functions closely associated with inherently governmental functions.³⁴ However, if only a portion of a contract is for the performance of such acquisition functions, then the contracting officer must limit the applicability of the clause to that portion of the contract.³⁵ The final rule indicates that the contract clause must be flowed down to subcontracts that exceed \$150,000 and in which subcontractor employees will perform acquisition functions closely associated with inherently governmental functions.³⁶

Interpretation and Implementation Challenges

Given their many new and untested definitions and numerous ambiguities, the greatest challenge with the new PCI rules lies in their interpretation and implementa-

tion. While we identify and discuss many of these major interpretation and implementation issues below, we do not advocate for a specific resolution. Instead we provide guidance for contractors to engage in further internal debate towards reaching a resolution optimized for their organization, contracts, and employees.

What is a covered contract? The introduction of many contractors to the new PCI contract clause may have been through the inclusion of the clause in a solicitation or contract modification that does not appear to call for the performance of an "acquisition function closely associated with inherently governmental functions." As with the inclusion of many other FAR clauses, reasonable people will differ in their interpretation of whether a contract will require the performance of a "covered" function and thus require the inclusion of FAR § 52.203-16. Notwithstanding the PCI clause's direction that the enumerated list of activities that could be defined as "acquisition functions closely associated with inherently governmental functions" is purportedly exhaustive, surely you can imagine a scenario in which the government argues that this definition extends beyond: (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, including documents that define contract requirements, incentive plans, and evaluation criteria; (4) evaluating contract proposals; (5) awarding government contracts; (6) administering contracts, which includes ordering changes or giving technical direction in contract performance or quantities, evaluating performance, and accepting or rejecting the provision of goods or services; (7) terminating contracts; and (8) determining whether contract costs are reasonable, allowable, and allocable.³⁷

Accordingly, contractors will need to be especially diligent in analyzing the contract tasks that their employees are performing. Nevertheless, you can and should "push back" on those solicitations or modifications that include the clause without justification or otherwise assert that the performance of an acquisition function closely associated with inherently governmental functions will be required. This identification and verification of those covered contracts also provides a logical first step for the establishment of any PCI compliance program.

Who are covered employees? The logical second step for a compliance program will be the identification of the "covered employees" under covered contracts.³⁸ As this task appears to be completely up to contractors, this appears to be the first area with an identifiable risk for noncompliance. Further, determining who is a covered employee is a significant "gating" activity, as once an employee is deemed covered, the employee must complete and update a detailed personal disclosure form, be screened by the contractor for PCIs, be trained by the contractor regarding PCIs, and execute an NDA.³⁹

So, what are the considerations for a contractor's interpretation and implementation of a covered employee

identification scheme? It really depends on the contractor, how many covered contracts it has, and how much of the work under the covered contract or contracts is likely to be performed by covered employees. Perhaps a simpler way to think about the possible identification scheme is as a spectrum. At one end of the spectrum would be a contractor that does not believe that it will have many covered contracts and even fewer covered employees. This contractor would be on the narrow end of the spectrum and have procedures to identify the fewest number of individuals as possible. (Of course, a contractor can do no less than the rule requires and must at a minimum identify those employees performing “acquisition functions closely associated with inherently governmental functions” as covered employees). This contractor may be well served by a system in which a senior program manager or another person with specific knowledge of both the contract’s requirements and the employees’ activities could manually review the statement of work and staffing plan, and individually identify only those employees likely to perform a covered task. On the other, broader end of the spectrum is a contractor that

Government employees are on a fixed wage scale, so that the disclosure of personal financial information may not be as critical to the employee's career path.

has or will have many covered contracts with the majority of the work on covered tasks. This contractor may need to implement a broad identification scheme in which the majority, if not all, of the employees performing work under the contract presumed to be covered until proven otherwise. No matter where a contractor finds itself on this spectrum, the identification of covered employees is an important task that should be carefully undertaken.

What information must be collected? Whether a contractor has identified one or 1,000 covered employees, the contractor will need to design and implement a disclosure process to collect detailed information regarding its employees’ financial interests, personal activities, and relationships. Again, the breadth and depth of the disclosure is best thought of as a spectrum. At one end of the spectrum, again, are contractors with few covered contracts and fewer covered employees. These contractors may be well served to design a highly customized disclosure process dependent upon the specific contract and the work that its employee is performing. For example, if a contractor has one covered contract, with one covered employee, the contractor may consider designing a customized disclosure form to collect data on the specific areas for potential PCI concern (for

example, if an employee will be evaluating cost data for company XYZ, the contractor could provide the employee with a simple questionnaire asking whether the employee has any financial interest, personal activity, or employment relationships that would create a PCI with his or her work related to company XYZ). On the other end of the spectrum is the contractor with many covered contracts and many covered employees. This contractor may be well served to develop a more standardized and comprehensive employee disclosure form. The disclosure form for such a contractor’s employees would ask general questions about an employee’s financial interests, personal activities, and relationships. This form could then be used to evaluate the employee for PCIs on multiple projects (provided that the form is periodically updated by the employee). The current Office of Government Ethics (OGE) form provides a starting point for this type of broad disclosure.⁴⁰

Anticipating employees’ privacy concerns. Even in the case of a limited disclosure, employees are likely to be concerned about providing personal and financial data to their employers. Employees may argue that several unintended consequences could flow from such disclosures. First, employers may gain increased leverage in salary and benefits negotiations. Second, there are alarming privacy concerns for the employee workforce. Third, if there is a PCI violation that must be disclosed, will the employer disclose the name of the employee and the financial interests that are at stake? One commentator on the proposed rule has noted that a key difference between government employees and private sector employees is that government employees are on a fixed “GS” wage scale, so that the disclosure of personal financial information may not be as critical to the employee’s career path, while private sector salaries and benefits packages are more fluid and the disclosure of an employee’s financial information further muddies the waters.⁴¹

Moreover, the employee’s disclosure obligation extends to the employee’s close family or household members. This could lead to very complicated scenarios. The final rule does not define either “close family” or “household members.” If a contractor employee has a niece or nephew who lives with the employee, is that familial relationship included as part of “close family” or “household members?” The OGE includes a more workable definition for imputed interests. That definition extends to the financial interests of the employee’s spouse, the employee’s minor child, or the employee’s general partner.⁴²

Training considerations. Once a contractor identifies and screens its covered employees, it must then train those covered employees on the identification, prevention, and disclosure of PCIs. Importantly, covered employees must be trained on the obligation to “avoid even the appearance of a PCI.”⁴³ Contractors should consider whether PCI training will be discrete or, perhaps, part of larger compliance training course, including an ethics component. Contractors must also require covered employees not to use non-public information for personal gain, and to sign NDAs

preventing such use. Executed NDAs must be maintained in accordance with FAR record-retention requirements. Contractors should also consider requiring signed statements demonstrating that covered employees have completed the required training and have verified the accuracy of their disclosed personal information before their assignment to work on any new covered task.

Conclusion

While the new PCI rules leave much room for debate, it is certain that they will fundamentally impact the operations of many service contractors. If your organization has yet to receive a solicitation or contract that includes the new PCI clause, you will be well served to analyze the rules proactively and perform an internal organizational review to assess the potential impact of the rules on your organization. If you have already received your first solicitation that includes the new clause, we hope this article has provided you with a meaningful road map to what undoubtedly will be several internal discussions about a PCI compliance plan that best suits your organization, employees, and contracts. ¶

Endnotes

1. See 76 Fed. Reg. 68,017 (Nov. 2, 2011) (Preventing Personal Conflicts of Interest for Contractor Employees Performing Acquisition Functions).

2. See 73 Fed. Reg. 67,064 (Nov. 12, 2008).

3. See 76 Fed. Reg. 68,017 (Nov. 2, 2011).

4. Pub. L. No. 110-417, § 841(a) (codified at 41 U.S.C. § 2303).

5. See *id.*

6. See *id.* The policy set forth the following six requirements for contractors with employees performing acquisition functions closely associated with inherently governmental functions: (1) “identify and prevent personal conflicts of interest for employees of the contractor who are performing such functions;” (2) “prohibit contractor employees who have access to non-public government information obtained while performing such functions from using such information for personal gain;” (3) “report any personal conflict-of-interest violation by such an employee to the applicable contracting officer or contracting officer’s representative as soon as it is identified;” (4) “maintain effective oversight to verify compliance with personal-of-interest safeguards;” (5) “have procedures in place to screen for potential conflicts of interest for all employees performing such functions; and” (6) “take appropriate disciplinary action in the case of employees who fail to comply with policies established pursuant to this section.” Pub. L. No. 110-417, § 841(a) (codified at 41 U.S.C. § 2303).

7. See 74 Fed. Reg. 58,584 (Nov. 13, 2009).

8. *Id.* at 58,585.

9. See *id.*

10. See *id.* at 58,589 (proposed FAR § 52.203-16(b)(1)). The proposed rule also provided for a number of remedies in the case of a PCI violation. Specifically, the proposed rule contemplated suspension of contract payments, loss of award fee, termination of the contract for default, disqualification of the contractor from subsequent related efforts, suspension, or debarment. However, based on the comments received in response to the proposed rule, the FAR Councils ultimately removed the remedial provisions because “the FAR contains adequate remedies to address non-compliance with any material requirement of a contract”

and the PCI rule “was not intended to create new remedies.”

11. See 76 Fed. Reg. 68,024 (FAR § 3.1101).

12. See *id.*

13. See *id.*

14. See *id.*

15. See *id.*

16. See *id.*

17. See *id.* at 68,026 (FAR § 52.203-16(b)(1)).

18. See *id.* (FAR § 52.203-16(b)(1)(i), (-ii)).

19. See *id.* (FAR § 52.203-16(b)(1)(A), (-C)).

20. See *id.*

21. See *id.* (FAR § 52.203-16(b)(2)).

22. See *id.*

23. See *id.* Nonpublic information is defined as any government or third-party information that is exempt from disclosure under the Freedom of Information Act (FOIA) (5 U.S.C. § 552) or otherwise protected from disclosure by statute, executive order, or regulation. See 76 Fed. Reg. 68,025 (FAR § 52.203-16(a)). This definition also includes any government or third-party information that has not been disseminated to the general public and the government has not yet decided if or when such information will be made available. See *id.*

24. See 76 Fed. Reg. 68,026 (FAR § 52.203-16(b)(3)).

25. See *id.* (FAR § 52.203-13(b)(4), (-5)).

26. See *id.* (FAR § 52.203-13(b)(6)).

27. See *id.*

28. See *id.*

29. See *id.* (FAR § 52.203-16(c)).

30. See *id.* (FAR § 52.203-16(c)(3)).

31. See *id.*

32. See *id.* (FAR 52.203-16(c)(1)).

33. Currently \$150,000, except for contracts in support of contingency operations or connected with nuclear, biological, chemical, or radiological threats. See FAR § 2.101.

34. See 76 Fed. Reg. 68,025 (FAR § 3.1106(a)).

35. See *id.* (FAR § 3.1106(b)).

36. See 76 Fed. Reg. 68,026 (FAR § 52.203-16(d)). The final rule also amends FAR Part 12 to clarify that the PCI policy does not apply to commercial item contracts.

37. See 76 Fed. Reg. 68,025 (FAR § 52.203-16(a)).

38. See *id.*

39. See *id.* (FAR § 52.203-16(b)).

40. See 5 C.F.R. § 2634, Subpart I. Financial Disclosure Form available at <http://tinyurl.com/bmm6333>.

41. See Public Submission of Greg Wilson, CAS, Inc. (Dec. 1, 2009), available at <http://tinyurl.com/cq8htaw>.

42. See 5 C.F.R. § 2635(b)(2).

43. See 76 Fed. Reg. 68,026 (FAR § 52.203-16(b)(3)(iii)).

Please click on **Events and CLE** in the following link for the complete listing of available CLE offerings that begin on Thursday, August 2:
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7:00 a.m. to 8:15 a.m.
Council Breakfast
Renaissance Room, 5th Floor
Executive session. For 2011-2012 and nominees for 2012-2013 Section Officers and Council Members only

8:00 a.m. to 10:00 a.m.
Convocation on Public Understanding About and Support for the Courts
Grand Ballroom A, River Level II, Westin River North
Primary Sponsor: Board of Governors Program, Evaluation, and Planning Committee

ABA entities with committees or projects relating to justice system issues will discuss ABA efforts in this area.

8:30 a.m. to 12:00 noon
Council Meeting
Grand Ballroom, 7th Floor
Open to all Section members

12:00 noon to 2:00 p.m.
Section Luncheon and Annual Alan E. Peterson Lecture
Renaissance Room, 5th Floor

Luncheon Speaker:
Gene L. Dodaro
Comptroller General of the United States
Government Accountability Office
Washington, DC

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2:00 p.m. to 2:15 p.m.

Annual Section Business Meeting

Renaissance Room, 5th Floor

Includes election of Officers and Council Members for 2012-2013 and other Section business

Presiding:

Hon. Carol N. Park-Conroy

2011-2012 Section Chair

Armed Services Board of Contract Appeals

Falls Church, VA

2:15 p.m. to 3:45 p.m.

2012-2013 Section Leadership Brainstorming Session

Renaissance Room, 5th Floor

4:00 p.m. to 5:30 p.m.

Battle Space and Contingency Procurements Committee Meeting

Wright Room, 8th Floor

4:00 p.m. to 5:30 p.m.

Cybersecurity, Privacy and Data Protection Committee Meeting

Sullivan Room, 8th Floor

4:00 p.m. to 5:30 p.m.

State and Local Procurement Division Meeting

Ohio Room, Upper 5th Floor

4:00 p.m. to 5:30 p.m.

Strategic Alliances, Teaming and Subcontracting Committee Meeting

Holabird Room, 8th Floor

6:30 p.m. to 8:30 p.m.

Section Reception

The Murphy, 50 East Erie Street

Advance reservations and payment of guest tickets must have been received by CDS/TP by July 17.

This gracious social gathering for Section members and their guests, and honoring the incoming Section Chair, is made possible through the generosity of the following Sponsors who have contributed to defray its expenses.

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7:00 a.m. to 9:00 a.m.

Strategic Planning Committee Breakfast Meeting
Exchange Room, 11th Floor

9:00 a.m. to 12:00 noon

**CLE Program—Constraints on Federal Procurement:
The Pressures of Public Scrutiny and the Scope of
Judicial Review**
Grand Ballroom, 7th Floor

Contracting officer authority is the bedrock of government contracting, but numerous influences can undermine this foundation. External pressure from Congress and the media threatens contracting officer independence and agency autonomy and bypasses established review forums. The program will explore why and how contractors use these external avenues to achieve their goals, and how agencies can respond within appropriate legal parameters. It will also explore how contracting officer actions are scrutinized in established judicial and administrative forums. Presenters will examine the independence of the contracting officer in both the pre-award and post-award context, the legal standards applied in reviewing contracting officer actions, and how the degree of deference varies based on the issue and the forum involved.

The Law Under Siege: The Impact of Congress and the Media on the Acquisition Process

From radio advertisements to full-page newspaper appeals, contractors (a/k/a constituents) are becoming increasingly aggressive in touting their suitability to perform high value procurements. Congress, in turn, has been active in asserting its oversight and funding roles for these high profile acquisitions. This panel will examine the impact of Congress and the media on the acquisition process, discuss how agencies have reacted to these pressures, and explore the legal implications of this interplay.

- What role, if any, should Congress play in the acquisition process? When does oversight become overstepping?
- What impact do the media and Congress have on agency requirements and how these requirements are met? Do Congress and the media impact source selection decisions? What are the procurement integrity implications?
- How do agencies respond to these external influences? Is resistance futile?
- Does it benefit contractors to “litigate” in the media and/or via Congressional surrogates? Is it easier to play offense or defense?

Kristen E. Ittig, Moderator
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Arlington, VA

Past and Present Legal Controversies Concerning Contracting Officer Authority, Discretion and Deference

Contracting Officers are “responsible for ensuring performance of all necessary actions for effective contracting, ensuring compliance with the terms of the contract, and safeguarding the interests of the United States.” The Contracting Officer “should be allowed wide latitude to exercise business judgment” while ensuring “that contractors receive impartial, fair, and equitable treatment.” (FAR 1.602-2) The role of a Contracting Officer in discharging these responsibilities has been for decades—and continues to be—a centerpiece of debate. This panel will conduct an examination of the role of the Contracting Officer as currently understood, including:

- Are protest tribunals affording Contracting Officers the appropriate range of discretion in addressing pre-award issues?
- What is the scope of judicial review of a Contracting Officer’s decision to take corrective action in response to protests?
- What does it mean that a Contracting Officer must exercise independent judgment when making a final decision?
- To what extent are a Contracting Officer’s actions constrained by the implied duty of good faith and fair dealing?

Hon. Eunice W. Thomas, Moderator, Vice Chairman
Armed Services Board of Contract Appeals
Falls Church, VA

Jonathan L. Kang
Deputy Assistant General Counsel
Government Accountability Office
Washington, DC

Kevin P. Mullen
Jenner & Block LLP
Washington, DC

Bryant G. Snee
Deputy Director, Civil Division
U.S. Department of Justice
Washington, DC

12:00 noon to 2:00 p.m.

**22nd Annual Margaret Brent
Women Lawyers of Achievement
Awards Luncheon**

Grand Ballroom, Gold Level, East Tower,
Hyatt Regency Chicago



2:00 p.m. to 5:00 p.m.

**CLE Program—The Changing Budgetary Environment:
Legal and Fiscal Challenges in Federal Procurement**

Grand Ballroom, 7th Floor

Despite federal budget cuts, agencies still have requirements, and contractors still have to meet their customers' demands. How can the federal procurement community buy more with less and become more efficient? Join us to hear legal and acquisition strategies for agencies and contractors for navigating the complexities of the government marketplace despite drastic cuts in spending and personnel. Industry experts will address emerging appropriation and budget law issues, as well as solutions and strategies for handling the likely increase in terminations, claims, and litigation stemming from fiscal constraints. Discussion will also cover topics such as whether government contracting opportunities will remain vibrant despite budget cuts, and potential strategies for contractors for maximizing their competitive stance in this changing fiscal environment.

***Shrinking Resources and Their Impact on the
Government Acquisition System***

Severe funding cuts demand fresh thinking about how the government buys goods and services. This panel will examine how agencies and contractors are addressing the new urgency to select the best contracting methods for individual programs and to find innovative ways to bolster performance within the existing legal framework. What can initially be seen as causing an acquisition crisis could actually inspire much needed improvements in the existing framework of statutes, regulations, and policies that govern public procurement—improvements that would otherwise be unattainable without the extreme pressure of necessity.

- Are funding cuts changing the mix of contracting types and the use of specific terms?
- Is greater recourse to commercial items and commercial-style contracting necessary and inevitable?
- Will austerity impede efforts to obtain the legal and contracting teams needed to achieve good contracting results, leading to more legal disputes?
- What elements of the existing legal framework stand in the way of getting better value for future expenditures?
- How will budget cuts affect the size and diversity of the supplier base and affect the ability of agencies to fulfill mandates to use competition to improve performance?

Professor William E. Kovacic, Moderator
George Washington University Law School
Washington, DC

Randall D. Culpepper

Acting Air Force Program Executive Officer
(Combat Mission and Support)
Office of the Assistant Secretary of the
Air Force (Acquisition)
Arlington, VA

Annejanette Heckman Pickens

Senior Counsel
Hewlett-Packard Company
Herndon, VA

Frank Camm

Senior Economist
RAND Corporation
Pittsburgh, PA

***How Fiscal Constraints Influence Terminations,
Claims, and Litigation***

Congressional appropriation cuts and related budget constraints have significant down-stream influence in government contracting. This panel will “follow the money” (or lack thereof) to see how these fiscal constraints affect government contracts litigation. The discussion will examine whether litigation in the various available forums will increase, how appropriation law will affect contract litigation, and what appropriation and contract law issues will be litigated.

- Will budget constraints lead to more terminations, claims and litigation?
- What appropriations and fiscal law issues will impact government disputes?
- What legal and business strategies are available to agencies and companies in the federal marketplace to manage the costs and risks of litigation in a tight federal budget environment?
- What new government contract legal issues could result from cuts in federal contracts dollars?
- What lessons from previous budget cuts can we use as guidance when faced with seemingly more drastic budget reductions?

Michael R. Golden, Moderator

Pepper Hamilton LLP
Washington, DC

Thomas H. Armstrong

Managing Associate General Counsel
Budget and Appropriations Law
Government Accountability Office
Washington, DC

W. Stanfield Johnson

Crowell & Moring LLP
Washington, DC

Levator Norsworthy, Jr.

Deputy General Counsel—Acquisition
Office of the Army General Counsel
Arlington, VA

7:00 a.m. to 7:30 a.m.

Construction Division Program Continental Breakfast
Empire Ballroom, 7th Floor

This continental breakfast is included in the ABA All-Access CLE Badge or CLE Program Ticket used for the program that follows:

7:30 a.m. to 9:00 a.m.

Construction Division CLE Program—Organizational Conflicts of Interest in Federal Construction Contracting: Unique Challenges Facing the Construction Industry
Empire Ballroom, 7th Floor

This 90 minute CLE program and 7:00-7:30 a.m. continental breakfast are made possible by our Gold Sponsor—The Kenrich Group LLC—and our Silver Sponsors—FTI Consulting, Smith, Currie & Hancock LLP and Smith Pachter McWhorter, PLC—whose contributions have helped to defray its expenses.

Organizational Conflicts of Interest (OCIs) pose unique challenges for the construction industry and government agencies involved with construction contracting. Proposed new regulations issued by the FAR Council on April 2011 and recent OCI decisions issued by the Government Accountability Office and U.S. Court of Federal Claims add new dimensions to current requirements. Panelists will address the important legal issues relating to OCIs, including the contracting officer's identification and investigation of OCIs, compliance challenges and issues presented by the proposed rules, emerging issues at the intersection of OCI and Personal Conflict of Interest, and the strategies construction contractors can undertake to mitigate the risk that OCIs will disqualify them from contract award.

- Legal and practical issues commonly involved in construction contractor OCI analyses
- Inside and outside perspectives for OCI mitigation plans
- Development of compliance systems to detect and protect against OCIs
- Effect of proposed and new OCI rules on compliance systems and proactive approaches to avoiding and mitigating OCIs for construction contractors

Daniel F. Edwards, *Moderator*
Thompson Hine LLP
Columbus, OH

Tamara M. McNulty
Fox Rothschild LLP
Washington, DC

Kathryn T. Muldoon
Smith Pachter McWhorter, PLC
Vienna, VA

Laura J. Arnett
Assistant District Counsel
U.S. Army Corps of Engineers
Savannah, GA

Amy Hernandez
Director of Government Compliance
Balfour Beatty Construction
Washington, DC

9:00 a.m. to 12:00 noon

CLE Program—New Approaches to Government Contract Oversight and Dispute Resolution
Grand Ballroom, 7th Floor

Transparency in the expenditure of taxpayer funds has become increasingly important in recent years as budgets at all levels of government have felt the pinch. This program will address the various legislative and regulatory initiatives to achieve transparency in the federal procurement system, their effectiveness, and their impact on all participants in the process. This program will also address new developments in alternative dispute resolution (ADR), a very effective way to resolve issues at all stages of the procurement process, and a particularly attractive option in light of shrinking resources.

The Goals of Data Transparency Versus Regulatory Burdens: Where Is the Balance?

In the interest of transparency, Congress and the Administration have been pushing for more spending and performance data on government contracts. In December 2011, the Government Accountability and Transparency Board, created by Executive Order, issued recommendations for government-wide standards for transparency, which have also been addressed in legislative proposals in the House and Senate. This panel will discuss the impact of these transparency initiatives on the federal procurement system.

- What legal and other challenges do increased data requirements present for government contractors and procuring agencies?
- Is there a need for a permanent Transparency Board to oversee the collection and maintenance of contract spending and performance data, and is this the most cost-effective solution?
- Should the new Board have audit and investigative powers?
- Does the proposed transparency legislation adequately focus on improving existing contract data reporting systems?
- Has increased transparency reduced fraud and waste in the procurement system?

Robert A. Burton, *Moderator*
Venable LLP
Washington, DC

Hudson T. Hollister
Executive Director
Data Transparency Coalition
Washington, DC

Catherine E. Pollack
Senior Counsel, Technical Services Sector
Northrop Grumman Corporation
Herndon, VA

Johana R. Ayers
Assistant Director for Acquisition and
Sourcing Management
Government Accountability Office
Washington, DC

Effective Dispute Resolution: What's Working Now in ADR

Today, nearly every government contracts lawyer is familiar with the basics of alternative dispute resolution and has used ADR techniques at least once to resolve a case. The focus of this panel is recent cases and developments that have new ADR lessons to teach: how to achieve resolution in a complex, high dollar value case; how to achieve full disclosure of the basis for a source selection without a protest; the latest word on best practices in resolving prime-sub disputes.

- Lessons learned from the Logistics Modernization Program (LMP) ADR: how to organize and keep a complex ADR moving ahead on a tight schedule while still assuring decision-quality information; internally coordinating and externally negotiating a holistic resolution plan for appeals, REAs, and contract issues arising under an ongoing program; the benefits of working with co-neutrals to optimize evaluative feedback
- Extended debriefings: how the Air Force engages with outside counsel for unsuccessful offerors to quickly provide a full sight picture of why their client did not win. The procedure tolls the deadlines for filing a protest, while offering the benefits of a significant reduction in protest filings and sometimes corrective action
- Best practices in resolving prime contractor-subcontractor disputes: a look at arbitration, informal issue resolution techniques, and more

Lynda Troutman O'Sullivan, *Moderator*
Deputy General Counsel (Acquisition)
Department of the Air Force
Washington, DC

Donald M. Yenovkian
Director, Acquisition ADR Program
Department of the Army
Arlington, VA

Hon. Paul Williams, *Chairman*
Armed Services Board of Contract Appeals
Falls Church, VA

Behn M. Kelly
Chief, Enterprise Sourcing Group Litigation &
Deputy ESB Branch Air Force Acquisition Law &
Litigation Directorate (AF/JAQ)
Joint Base Andrews, MD

Nicole J. Owren-Wiest
Wiley Rein LLP
Washington, DC

12:00 noon to 2:00 p.m.

**10th Annual Ruth C. Burg Luncheon
for Women in Public Contract Law**
Burnham Ballroom C and D, Mid-America Club
Aon Center, 200 East Randolph Street

Business attire or business casual attire is required of all guests at the Mid-America Club. Because of security requirements, all luncheon attendees are required to show a state photo I.D. along with their ABA Annual Meeting badge and/or luncheon ticket at the lobby Security Desk.

This year's Luncheon is made possible through the generosity of the following Sponsors who have contributed to defray its expenses:

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NOVEMBER 1-3, 2012

Fall Educational Program and Open Council Meeting
The Brown Palace Hotel and Spa, Denver, CO

MARCH 14-16, 2013

**19th Annual Federal Procurement Institute and
Open Midyear Council Meeting**
Loews Annapolis Hotel, Annapolis, MD

MAY 2-3, 2013

8th Annual State and Local Procurement Symposium
Hilton Nashville, Nashville, TN

AUGUST 9-12, 2013

**Annual Educational Programs and Open Council
Meeting**
Westin St. Francis, San Francisco, CA