

(ii) The requester has previously failed to pay a fee in a timely fashion.

(2) When the FOIA Officer requires a requester to make an advance payment, the 20-day period described in § 1515.6(a) shall begin when the FOIA Officer receives the payment.

(f) *No assessment of fee.* CEQ shall not charge a fee to any requester if:

(1) The cost of collecting the fee would be equal to or greater than the fee itself; or

(2) After the effective date of these regulations CEQ fails to comply with a time limit under the Freedom of Information Act for responding to the request for records where no unusual or exceptional circumstances apply.

§ 1515.13 Fees for categories of requesters.

CEQ shall assess fees for certain categories of requesters as follows:

(a) *Commercial use requesters.* In responding to commercial use requests, CEQ shall assess fees that recover the full direct costs of searching for, reviewing, and duplicating records.

(b) *Educational and non-commercial scientific institutions.* CEQ shall provide records to requesters in this category for the cost of duplication alone, excluding charges for the first 100 pages. To qualify for inclusion in this fee category, a requester must show that the request is authorized by and is made under the auspices of a qualifying institution and that the records are sought to further scholarly research, not an individual goal.

(c) *Representatives of the news media.* CEQ shall provide records to requesters in this category for the cost of duplication alone, excluding charges for the first 100 pages.

(d) *All other requesters.* CEQ shall charge requesters who do not fall within paragraphs (a) through (c) of this section fees that recover the full direct cost of searching for and duplicating records, excluding charges for the first 100 pages of reproduction and the first two hours of search time.

§ 1515.14 Other charges.

CEQ may apply other charges, including the following:

(a) *Special charges.* CEQ shall recover the full cost of providing special services, such as sending records by express mail, to the extent that CEQ elects to provide them.

(b) *Interest charges.* CEQ may begin assessing interest charges on an unpaid bill starting on the 31st day following the day on which the FOIA Officer sent the billing. Interest shall be charged at the rate prescribed in 31 U.S.C. 3717 and will accrue from the date of billing.

(c) *Aggregating requests.* When the FOIA Officer reasonably believes that a requester or a group of requesters acting in concert is attempting to divide a request into a series of requests for the purpose of avoiding fees, the FOIA Officer shall aggregate those requests and charge accordingly.

§ 1515.15 Payment and waiver.

(a) *Remittances.* Payment shall be made in the form of check or money order made payable to the Treasury of the United States. At the time the FOIA Officer notifies a requester of the applicable fees, the Officer shall inform the requester of where to send the payment.

(b) *Waiver of fees.* CEQ may waive all or part of any fee provided for in §§ 1515.12 and 1515.13 when the FOIA Officer deems that disclosure of the information is in the general public's interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester. In determining whether a fee should be waived, the FOIA Officer may consider whether:

(1) The subject matter specifically concerns identifiable operations or activities of the government;

(2) The information is already in the public domain;

(3) Disclosure of the information would contribute to the understanding of the public-at-large as opposed to a narrow segment of the population;

(4) Disclosure of the information would significantly enhance the public's understanding of the subject matter;

(5) Disclosure of the information would further a commercial interest of the requester; and

(6) The public's interest is greater than any commercial interest of the requester.

§ 1515.16 Other rights and services.

Nothing in this subpart will be construed to entitle any person, as of right, to any service or to the disclosure of any record to which such person is not entitled under the FOIA.

§§ 1515.16–1515.19 [Reserved]

Dated: October 23, 2009.

Nancy H. Sutley,

Chair, Council on Environmental Quality.

[FR Doc. E9–27234 Filed 11–12–09; 8:45 am]

BILLING CODE 3125–W9–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 3 and 52

[FAR Case 2008–025; Docket 2009–0039, Sequence 1]

RIN 9000–AL46

Federal Acquisition Regulation; FAR Case 2008–025, Preventing Personal Conflicts of Interest for Contractor Employees Performing Acquisition Functions

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) are proposing to amend the Federal Acquisition Regulation (FAR) to address personal conflicts of interest by employees of Government contractors as required by section 841(a) of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (Pub. L. 110–417).

DATES: Interested parties should submit written comments to the Regulatory Secretariat on or before January 12, 2010 to be considered in the formulation of a final rule.

ADDRESSES: Submit comments identified by FAR case 2008–025 by any of the following methods:

- *Regulations.gov:* <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by inputting “FAR Case 2008–025” under the heading “Comment or Submission”. Select the link “Send a Comment or Submission” that corresponds with FAR Case 2008–025. Follow the instructions provided to complete the “Public Comment and Submission Form”.

Please include your name, company name (if any), and “FAR Case 2008–025” on your attached document.

- *Fax:* 202–501–4067.
- *Mail:* General Services Administration, Regulatory Secretariat (MVPR), 1800 F Street, NW., Room 4041, Washington, DC 20405, *Attn:* Hada Flowers.

Instructions: Please submit comments only and cite FAR case 2008–025 in all correspondence related to this case. All comments received will be posted without change to <http://www.regulations.gov>

www.regulations.gov, including any personal and/or business confidential information provided.

FOR FURTHER INFORMATION CONTACT:

Ms. Suzanne Neurauter, Procurement Analyst, at (202) 219-0310 for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat division at (202) 501-4755. Please cite FAR Case 2008-025.

SUPPLEMENTARY INFORMATION:

A. Background

The Duncan Hunter National Defense Authorization Act (NDAA) for Fiscal Year 2009, section 841(a), requires that the Office of Federal Procurement Policy (OFPP) develop policy to prevent personal conflicts of interest by contractor employees performing acquisition functions closely associated with inherently governmental functions for or on behalf of a Federal agency or department. The NDAA also requires OFPP to develop a personal conflicts-of-interest clause(s) for inclusion in solicitations, contracts, task orders, and delivery orders. To address the requirements of section 841(a) in the most effective manner possible, OFPP collaborated with the Councils on this case to develop regulatory guidance, including a new subpart under FAR part 3, and a new clause for contracting officers to use in contracts to prevent personal conflicts of interest for contractor employees performing acquisition functions for or on behalf of a Federal agency or department.

OFPP and the Councils are proposing a policy that will require each contractor that has employees performing acquisition functions closely associated with inherently governmental functions to identify and prevent personal conflicts of interest for such employees. In addition, such contractors will be required to prohibit covered employees with access to non-public Government information from using it for personal gain. The proposed rule also makes contractors responsible for (1) Having procedures to screen for potential conflicts of interest, (2) informing covered employees of their obligations with regard to these policies, (3) maintaining effective oversight to verify compliance, (4) reporting any personal conflict-of-interest violations to the contracting officer, and (5) taking appropriate disciplinary action with employees who fail to comply with these policies.

This proposed rule does not address the issue of personal conflicts of interest by contractor employees with respect to other functions, or the issue of

additional coverage addressing organizational conflicts of interest. Those issues, which were the subject of an Advance Notice of Proposed Rulemaking (see **Federal Register** at 73 FR 15961 on March 26, 2008, and **Federal Register** at 73 FR 34600 on June 17, 2008), will be addressed consistent with the requirements of section 841, which requires review by the Administrator for Federal Procurement Policy, in consultation with the Director of the Office of Government Ethics, to determine whether further revision to the FAR, and action by the FAR Council, is necessary.

1. *Sources Reviewed.* In developing the proposed rule in this case, the Councils reviewed the Government Accountability Office (GAO) Report to the Committee on Armed Services, U.S. Senate, GAO-08-169, Defense Contracting: Additional Personal Conflict of Interest Safeguards Needed for Certain DoD Contractor Employees, dated March 2008, and internal policies, procedures, and regulations of various Federal agencies.

2. *Definitions (FAR 3.1101) and 52.203-16.*

a. Personal conflict of interest. The legislation requires development of a definition for "personal conflict of interest". The Councils reviewed various documents on personal conflicts of interest in developing the proposed definition, including identification of sources of personal conflicts of interest and examples of financial interests.

b. Acquisition function closely associated with inherently governmental functions. The statute requires that contractors, whose employees perform acquisition functions closely associated with inherently governmental functions, identify and prevent personal conflicts of interest for employees of the contractor who are performing such functions. The Councils developed the definition of "acquisition function closely associated with inherently governmental functions" by reviewing FAR subpart 7.5, Inherently Governmental Functions, especially 7.503(d), and identifying those functions that are acquisition related. Supporting or providing advice or recommendations with regard to any such acquisition function is defined to be an acquisition function closely associated with inherently governmental functions. Additional changes may be made to this guidance as part of the Office of Management and Budget's (OMB) review of the definition of inherently governmental function and the manner in which agencies identify critical functions to be performed by

Federal employees. OMB is performing this review in accordance with the President's March 4, 2009, Memorandum on Government Contracting and section 321 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (Pub. L. 110-417).

c. Covered employee. In order to simplify the regulation, the Councils defined the term "covered employee" so that term could be used in lieu of constantly repeating the phrase "contractor employee who performs an acquisition function closely associated with inherently governmental functions". In addition, the Councils have included in the definition of "covered employee" (i) subcontractor employees, (ii) consultants, (iii) partners, or (iv) sole proprietors. Although, these categories might not ordinarily be considered to be an employee of the contractor, the Councils believe that covering these categories is necessary to effectively meet the objective of the statute.

d. Non-public Government information. The statute requires that contractors must prohibit contractor employees who have access to non-public Government information obtained while performing such functions from using such information for personal gain. Therefore, a definition of "non-public Government information" is also necessary to implement the law. The Councils adapted the definition of non-public Government information found at 5 CFR 2635.703, the Office of Government Ethics regulation entitled "Use of nonpublic information," to make it applicable to contractor employees. Non-public Government information means any information that a covered employee gains by reason of work under a Government contract and that the covered employee knows, or reasonably should know, has not been made public (e.g., proprietary contractor information in the possession of the Government).

3. *Policy (FAR 3.1102).* The proposed policy would require contractors to identify and prevent personal conflicts of interest of their covered employees and prohibit covered employees who have access to non-public Government information from using such information for personal gain. The basis of the policy is derived from FAR section 841(a)(1)(B)(i) and (ii) of the statute.

4. *Procedures (FAR 3.1103(a) and 52.203-16(b)).*

a. Use of contract clause to impose requirements on contractors. The procedures at FAR 3.1103(a) mirror the requirements in paragraph (b) of the

clause, implementing the statutory requirement at FAR section 841(a)(1)(B) in more detail, adding the requirements to—

- Have procedures in place to screen covered employees for potential personal conflicts of interest (FAR section 841(a)(1)(B)(v));
- Inform covered employees with regard to their obligations to disclose and prevent personal conflicts of interest; not use non-public Government information for personal gain; and avoid even the appearance of personal conflicts of interest;
- Maintain effective oversight to verify compliance with personal conflict-of-interest safeguards (FAR section 841(a)(1)(B)(iv));
- Take appropriate disciplinary action in the case of covered employees who fail to comply with policies established pursuant to this section (FAR section 841(a)(1)(B)(vi)); and
- Report to the contracting officer any personal conflict-of-interest violation by a covered employee as soon as identified (FAR section 841(a)(1)(B)(iii)), including the actions taken by the contractor in response to the violation.

b. Contracting officer actions upon receipt of contractor reports of personal conflict-of-interest violation. At FAR 3.1103(b), the Councils have proposed the following general guidelines for the contracting officer to follow, upon receipt of a contractor report of a personal conflict-of-interest violation:

- (i) Review the actions taken by the contractor;
- (ii) Decide whether the contractor has resolved the violation satisfactorily; and
- (iii) Take any other appropriate action in consultation with agency legal counsel or an agency ethics official.

c. Non-disclosure agreements. The proposed rule requires contractors to obtain non-disclosure agreements from covered employees.

5. *Mitigation and waiver (FAR 3.1104 and 52.203–16(c)).* Although the statute did not specifically provide for mitigation or waiver authority, the Councils recommend allowing the head of the contracting activity, in exceptional circumstances, to agree to mitigation of a personal conflict of interest or waive the requirement to prevent conflict of interest for a particular employee, if he/she determines in writing that such mitigation or waiver is in the best interest of the Government. This authority cannot be re-delegated.

6. *Violations and remedies (FAR 3.1105 and 52.203–16(d)).* To ensure compliance with this policy, the proposed rule includes a “remedies” clause that spells out the additional

relief to which the Government may be entitled for contractor noncompliance, including suspension of contract payments, loss of award fee, termination for cause, and suspension or debarment. The Councils welcome comment on additional controls or remedies to help deter noncompliance, such as annual reporting requirements to verify compliance with the clause requirements, or certification by the contractor or by the contractor’s employees.

7. *Contract clause.*

a. Prescription (FAR 3.1106). A new contract clause was developed that specifically sets out the contractor’s duty to comply with the language in the legislation. In accordance with FAR section 841(a)(3)(A), the clause must be included in contracts that exceed the simplified acquisition threshold and are for services that involve performance of acquisition functions closely associated with inherently governmental functions for or on behalf of a Federal agency or department.

FAR Section 841(a)(3)(B) provides that, if only a portion of a contract is for the performance of acquisition functions described in that subparagraph, then the clause must be applied only to that portion of the contract (see FAR 3.1106(b)).

b. Flowdown (FAR 52.203–18(e)). The Councils have provided for flowdown to subcontracts that meet the same requirements as provided in the clause prescription, *i.e.*, subcontracts that exceed \$100,000 and in which subcontractor employees may perform acquisition functions closely associated with inherently governmental functions.

8. *Effective date and applicability.* The statute requires that the final rule shall apply to—

(a) Contracts entered into on or after the effective date; and

(b) Task or delivery orders awarded on or after that effective date. If the contracts pursuant to which such task or delivery orders are awarded do not contain the clause at FAR 52.203–16, then the clause must be included in such contracts by bi-lateral modification.

This is a significant regulatory action and, therefore, was subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

The Councils do not expect this proposed rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility

Act, 5 U.S.C. 601, *et seq.*, because the requirements of the clause are not significantly burdensome. The requirement to obtain and retain information on employees’ potential conflict of interest is limited to service contractors whose employees are performing acquisition functions closely associated with inherently governmental functions for or on behalf of Federal agencies. This class is a minority of Government contractors and is becoming smaller as Government agencies bring more such functions back in house, *e.g.*, DOD announced in April that it is bringing 10,000 acquisition positions back in house. Further, there is no requirement to report the information collected to the Government. It is not a significant economic burden to report to the contracting officer personal conflict-of-interest violations by covered employees and the corrective actions taken. The proposed rule has also reduced potential burden by—

1. Not including a certification requirement;
2. Not requiring a formal training program; and
3. Allowing mitigation under exceptional circumstances.

An Initial Regulatory Flexibility Analysis has, therefore, not been performed. We invite comments from small businesses and other interested parties. The Councils will consider comments from small entities concerning the affected FAR Parts 3 and 52 in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 601, *et seq.* (FAR case 2008–025), in all correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act does apply because the proposed changes to the FAR impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

Annual Recordkeeping Burden

The proposed rule will require the contractor to collect and review information from covered employees. There is, however, no requirement for the contractor to submit this information to the Government. There will be an estimated 250,000 covered contractor employees working for an estimated 10,000 contractors (recordkeepers). There will be an estimated 36 records per recordkeeper (using an average of 25 employees per recordkeeper and allowing for updates during the year when a covered employee’s reportable circumstances

change). We estimate that it will take approximately 10 minutes review time per response.

We estimate the annual total recordkeeping burden hours as follows:

<i>Recordkeepers</i>	10,000
<i>Records per recordkeeper</i>	× 36
<i>Total annual records</i>	360,000
<i>Review hours per response</i>	× 0.17
<i>Total recordkeeping burden</i> ..	61,200

Annual Reporting Burden

There will be an estimated 200 burden hours for the required reporting to the contracting officer of violations in connection with the award or performance of any Government contract or subcontract (10 violations × 2 hours per response) and 1,800 hours for submission of mitigation requests (450 responses × 4 hours per response).

We estimate the annual total reporting burden hours as follows:

<i>Respondents</i> : 460
<i>Responses per respondent</i> : 1
<i>Total annual responses</i> : 460
<i>Preparation hours per response</i> :
Approximately 3.96
<i>Total reporting burden hours</i> : 1,820

D. Request for Comments Regarding Paperwork Burden

Submit comments, including suggestions for reducing this burden, not later than January 12, 2010 to: FAR Desk Officer, OMB, Room 10102, NEOB, Washington, DC 20503, and a copy to the General Services Administration, Regulatory Secretariat (MVPR), 1800 F Street, NW., Room 4041, Washington, DC 20405.

Public comments are particularly invited on: Whether this collection of information is necessary for the proper performance of functions of the FAR, and will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected; and ways in which we can minimize the burden of the collection of information on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.

Requester may obtain a copy of the justification from the General Services Administration, Regulatory Secretariat (MVPR), Room 4041, Washington, DC 20405, telephone (202) 501-4755. Please cite OMB Control Number 9000-00xx, Preventing Personal Conflicts of Interest for Contractor Employees Performing

Acquisition Functions, in all correspondence.

List of Subjects in 48 CFR Parts 3 and 52

Government procurement.

Dated: November 5, 2009.

Al Matera,

Director, Office of Acquisition Policy.

Therefore, DoD, GSA, and NASA propose amending 48 CFR parts 3 and 52 as set forth below:

1. The authority citation for 48 CFR parts 3 and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 3—IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST

2. Add Subpart 3.11 to read as follows:

Subpart 3.11—Preventing Personal Conflicts of Interest for Contractor Employees Performing Acquisition Functions

Sec.

3.1100	Scope of subpart.
3.1101	Definitions.
3.1102	Policy.
3.1103	Procedures.
3.1104	Mitigation or waiver.
3.1105	Violations.
3.1106	Contract clause.

Subpart 3.11—Preventing Personal Conflicts of Interest for Contractor Employees Performing Acquisition Functions

3.1100 Scope of subpart.

This subpart implements the policy on personal conflicts of interest by employees of Government contractors as required by section 841(a) of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (Pub. L. 110-417).

3.1101 Definitions.

As used in this subpart:

Acquisition function closely associated with inherently governmental functions means 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).

(7) Terminating contracts.

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

Covered employee means an individual who—

(1) Is an employee of the contractor or subcontractor, a consultant, a partner, or a sole proprietor; and

(2) Performs an acquisition function closely associated with inherently governmental functions.

Non-public Government information means any information that a covered employee gains by reason of work under a Government contract and that the covered employee knows, or reasonably should know, has not been made public. It includes information that—

(1) Is exempt from disclosure under the Freedom of Information Act (5 U.S.C. 552) or otherwise protected from disclosure by statute, Executive order, or regulation; or

(2) Has not been disseminated to the general public and is not authorized by the agency to be made available to the public.

Personal conflict of interest means 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 best interest of the Government when performing under the contract.

(1) Among the sources of personal conflicts of interest are—

(i) Financial interests of the covered employee, of close family members, or of other members of the household;

(ii) Other employment or financial relationships (including seeking or negotiating for prospective employment or business); and

(iii) Gifts, including travel.

(2) Financial interests may arise from—

(i) Compensation, including wages, salaries, commissions, professional fees, or fees for business referrals;

(ii) Consulting relationships (including commercial and professional consulting and service arrangements, scientific and technical advisory board memberships, or serving as an expert witness in litigation);

(iii) Services provided in exchange for honorariums or travel expense reimbursements;

(iv) Research funding or other forms of research support;

(v) Investment in the form of stock or bond ownership or partnership interest (excluding diversified mutual fund investments);

(vi) Real estate investments;
 (vii) Patents, copyrights, and other intellectual property interests; or
 (viii) Business ownership and investment interests.

3.1102 Policy.

It is Government policy to require contractors to—

(a) Identify and prevent personal conflicts of interest of their covered employees; and

(b) Prohibit covered employees who have access to non-public Government information from using such information for personal gain.

3.1103 Procedures.

(a) By use of the contract clause at 52.203–16, as prescribed at 3.1106, the contracting officer shall require each contractor whose employees perform acquisition functions closely associated with inherently Government functions to—

(1) Have procedures in place to screen covered employees for potential personal conflicts of interest including—

(i) Obtaining and maintaining a financial disclosure statement from each covered employee when the employee is initially assigned to the task under the contract;

(ii) Ensuring that the disclosure statements are updated by the covered employees at least on an annual basis; and

(iii) Requiring each covered employee to update the disclosure statement whenever a new personal conflict of interest occurs.

(2) For each covered employee—

(i) Prevent personal conflicts of interest, including not assigning or allowing a covered employee to perform any task under the contract if the Contractor has identified a personal conflict of interest for the employee that the Contractor or employee cannot satisfactorily prevent or mitigate in consultation with the contracting agency;

(ii) Prohibit use of non-public Government information for personal gain; and

(iii) Obtain a signed non-disclosure agreement to prohibit disclosure of non-public Government information.

(3) Inform covered employees of their obligation—

(i) To disclose changes in personal or financial circumstances and prevent personal conflicts of interest;

(ii) Not to use non-public Government information for personal gain; and

(iii) To avoid even the appearance of personal conflicts of interest;

(4) Maintain effective oversight to verify compliance with personal conflict-of-interest safeguards;

(5) Take appropriate disciplinary action in the case of covered employees who fail to comply with policies established pursuant to this section; and

(6) Report to the contracting officer any personal conflict-of-interest violation by a covered employee as soon as identified. This report shall include a description of the violation and the actions taken by the contractor in response to the violation.

(b) If a contractor reports a personal conflict-of-interest violation to the contracting officer in accordance with paragraph (b)(6) of 52.203–16, Preventing Personal Conflicts of Interest, the contracting officer shall—

(1) Review the actions taken by the contractor;

(2) Decide whether the contractor has resolved the violation satisfactorily; and

(3) Take any other appropriate action in consultation with agency legal counsel.

3.1104 Mitigation or waiver.

(a) In exceptional circumstances, if the contractor cannot satisfactorily prevent a personal conflict of interest as required by paragraph (b)(2)(i) of the clause at 52.203–16, Preventing Personal Conflicts of Interest, the contractor may submit a request, through the contracting officer, for the head of the contracting activity to—

(1) Agree to a plan to mitigate the personal conflict of interest; or

(2) Waive that requirement.

(b) If the head of the contracting activity determines in writing that such action is in the best interest of the Government, the head of the contracting activity may impose conditions that provide mitigation of a personal conflict of interest or grant a waiver.

(c) This authority shall not be redelegated.

3.1105 Violations.

(a) If the contracting officer suspects violation of a requirement of the clause 52.203–16, Preventing Personal Conflicts of Interest, the contracting officer shall contact the agency legal counsel for advice and/or recommendations on a course of action.

(b) If there is sufficient evidence of a violation, the contracting officer shall pursue appropriate remedies as specified in paragraph (d) of the clause. These remedies are in addition to any other remedies available to the Government.

3.1106 Contract clause.

(a) Insert the clause at 52.203–16, Preventing Personal Conflicts of Interest, in solicitations and contracts that—

(1) Exceed the simplified acquisition threshold; and

(2) Include a requirement for services that involve performance of acquisition functions closely associated with inherently governmental functions for or on behalf of a Federal agency or department.

(b) If only a portion of a contract is for the performance of acquisition functions closely associated with inherently governmental functions, then the contracting officer shall still insert the clause but shall limit applicability of the clause to that portion of the contract that is for the performance of such services.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

3. Add section 52.203–16 to read as follows:

52.203–16 Preventing Personal Conflicts of Interest.

Insert the following clause in solicitations and contracts as prescribed at 3.1106.

Preventing Personal Conflicts of Interest (Date)

(a) *Definitions.* As used in this clause:

Acquisition function closely associated with inherently governmental functions means 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).

(7) Terminating contracts.

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

Covered employee means an individual who—

(1) Is an employee of the contractor or subcontractor, a consultant, a partner, or a sole proprietor; or

(2) Performs an acquisition function closely associated with inherently governmental functions.

Non-public Government information means any information that a covered employee gains by reason of work under a Government contract and that the covered employee knows, or reasonably should know, has not been made public. It includes information that—

(1) Is exempt from disclosure under the Freedom of Information Act (5 U.S.C. 552) or otherwise protected from disclosure by statute, Executive order, or regulation; or

(2) Has not been disseminated to the general public and is not authorized by the agency to be made available to the public.

Personal conflict of interest means a situation in which a covered employee has a financial interest, personal activity, or relationship that could compete with the employee's ability to act impartially and in the best interest of the Government when performing under the contract.

(1) Among the sources of personal conflicts of interest are—

(i) Financial interests of the covered employee, of close family members, or of other members of the household;

(ii) Other employment or financial relationships (including seeking or negotiating for prospective employment or business); and

(iii) Gifts, including travel.

(2) Financial interests may arise from—

(i) Compensation, including wages, salaries, commissions, professional fees, or fees for business referrals;

(ii) Consulting relationships (including commercial and professional consulting and service arrangements, scientific and technical advisory board memberships, or serving as an expert witness in litigation);

(iii) Services provided in exchange for honorariums or travel expense reimbursements;

(iv) Research funding or other forms of research support;

(v) Investment in the form of stock or bond ownership or partnership interest (excluding diversified mutual fund investments);

(vi) Real estate investments;

(vii) Patents, copyrights, and other intellectual property interests; or

(viii) Business ownership and investment interests.

(b) *Requirements.* The Contractor shall—

(1) Have procedures in place to screen covered employees for potential personal conflicts of interest, including—

(i) Obtaining and maintaining a financial disclosure statement from each

covered employee when the employee is initially assigned to the task under the contract;

(ii) Ensuring that the disclosure statements are updated by the covered employees at least on an annual basis; and

(iii) Requiring each covered employee to update the disclosure statement whenever his/her personal or financial circumstances change.

(2) For each covered employee—

(i) Prevent personal conflicts of interest, including not assigning or allowing a covered employee to perform any task under the contract if the Contractor has identified a personal conflict of interest for the employee that the Contractor or employee cannot satisfactorily prevent or mitigate in consultation with the contracting agency;

(ii) Prohibit use of non-public Government information for personal gain; and

(iii) Obtain a signed non-disclosure agreement to prohibit disclosure of non-public Government information.

(3) Inform covered employees of their obligation—

(i) To disclose and prevent personal conflicts of interest;

(ii) Not to use non-public Government information for personal gain; and

(iii) To avoid even the appearance of personal conflicts of interest;

(4) Maintain effective oversight to verify compliance with personal conflict-of-interest safeguards;

(5) Take appropriate disciplinary action in the case of covered employees who fail to comply with policies established pursuant to this clause; and

(6) Report to the Contracting Officer any personal conflict-of-interest violation by a covered employee as soon as it is identified. This report shall include a description of the violation and the actions taken by the Contractor in response to the violation. Personal conflict-of-interest violations include—

(i) Failure by a covered employee to disclose a personal conflict of interest; and

(ii) Use by a covered employee of non-public Government information for personal gain.

(c) *Mitigation or waiver.* (1) In exceptional circumstances, if the Contractor cannot satisfactorily prevent a personal conflict of interest as required by paragraph (b)(2)(i) of this clause, the Contractor may submit a request through the Contracting Officer to the Head of the Contracting Activity for—

(i) Agreement to a plan to mitigate the personal conflict of interest; or

(ii) A waiver of the requirement.

(2) The Contractor shall include in the request any proposed mitigation of the personal conflict of interest.

(3) The Contractor shall—

(i) Comply, and require compliance by the covered employee, with any conditions imposed by the Government as necessary to mitigate the personal conflict of interest; or

(ii) Remove the Contractor or subcontractor employee from performance of the contract or terminate the applicable subcontract.

(d) *Remedies.* In addition to other remedies available to the Government, the Contractor's failure to comply with the requirements of paragraphs (b), (c)(3), or (e) of this clause may render the Contractor subject to—

(1) Suspension of contract payments;

(2) Loss of award fee, consistent with the award fee plan, for the performance period in which the Government determined Contractor non-compliance;

(3) Termination of the contract for default or cause, in accordance with the termination clause of this contract;

(4) Disqualification of the Contractor from subsequent related contractual efforts; or

(5) Suspension or debarment.

(e) *Subcontract flowdown.* The Contractor shall include the substance of this clause, including this paragraph (e), in subcontracts that exceed \$100,000, and in which subcontractor employees may perform acquisition functions closely associated with inherently governmental functions.

(End of clause)

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DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

49 CFR Part 234

[Docket No. FRA-2009-0032; Notice No. 3]

RIN 2130-AC20

State Highway-Rail Grade Crossing Action Plans

AGENCY: Federal Railroad Administration (FRA), Department of Transportation (DOT).

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: On September 2, 2009, FRA published a direct final rule in the **Federal Register** requiring the ten States with the most highway-rail grade crossing collisions, on average, over the past three years, to develop State