

AMERICAN BAR ASSOCIATION
SECTION OF ADMINISTRATIVE LAW AND REGULATORY PRACTICE
REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

- 1 RESOLVED, That the American Bar Association urges the Federal Acquisition Regulatory
2 Council (FAR Council) to promulgate, for use in contracts posing a high risk of either personal
3 conflicts of interest or misuse of certain non-public information, model contract language that
4 focuses on the most significant ethical risks that arise in government contracts as well as the
5 activities most likely to implicate those risks;
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- 7 FURTHER RESOLVED, That the American Bar Association urges the FAR Council to
8 encourage agencies to include the model Federal Acquisition Regulation (FAR) provisions in
9 contracting actions involving procurements that pose risks of personal conflicts of interest and
10 procurements that pose risks of contractor disclosure or misuse of non-public information;
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- 12 FURTHER RESOLVED, That the American Bar Association supports model FAR provisions
13 that prohibit agencies from using contractors to establish and manage scientific or technical
14 advisory committees without requiring such contractors to apply to prospective and actual
15 members of such committees the same ethical requirements that would apply if such individuals
16 were special government employees; and
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- 18 FURTHER RESOLVED, That the American Bar Association urges agencies not covered by the
19 FAR to consider using or modifying the model FAR provisions when negotiating contracts for
20 activities likely to implicate significant ethical risks.

REPORT

I. Introduction

The proposed Resolution is based on Administrative Conference Recommendation 2011-3, *Compliance Standards for Government Contractor Employees – Personal Conflicts of Interest and Use of Certain Non-Public Information*, which was adopted by the Administrative Conference of the United States (“ACUS” or “the Conference”) on June 17, 2011.

The Section of Administrative Law and Regulatory Practice (“the Section”) believes, along with ACUS, that it is important to ensure that services provided by government contractors—particularly those services that are similar to those performed by government employees—are performed with integrity and that the public interest is protected.

To that end, the Section recommends that the American Bar Association (“ABA”) support ACUS Recommendation 2011-3 (“ACUS Recommendation”) and urge the Federal Acquisition Regulatory Council (“FAR Council”) to promulgate model language in the Federal Acquisition Regulation (“FAR”)¹ for agency contracting officers to use when negotiating or administering contracts that pose particular risks of government contractor employee personal conflicts of interest or misuse of non-public information. The Section also makes an additional recommendation to address the inconsistency in ethical regimes created when federal agencies use contractors to establish and manage scientific or technical advisory committees, rather than undertaking those tasks themselves.

The Section recognizes that there has been regulatory activity on similar matters by the FAR Council, including activity that has occurred since the passage of the ACUS Recommendation. For example, the members of the FAR Council (the Department of Defense, General Services Administration, and National Aeronautics and Space Administration) issued a proposed rule in April 2011 on organizational conflicts of interest and contractor access to nonpublic information.² In November 2011, the FAR Council member agencies issued a final rule entitled “Preventing Personal Conflicts of Interest for Contractor Employees Performing Acquisition Functions.”³ In that final rule, the FAR Council recognized that the FAR “contains

¹ The FAR is a set of uniform policies and procedures that all executive agencies must use in procurements from sources outside of the government. 48 C.F.R. Ch. 1, available at http://www.ecfr.gov/cgi-bin/text-idx?SID=9dbf9900440fedc78c123da39b891bc0&tpl=/ecfrbrowse/Title48/48tab_02.tpl. All executive agencies must comply with the FAR when purchasing from contractors, though individual agencies can also adopt agency-specific supplements to the FAR by regulation or provide additional requirements in individual contracts. *See, e.g.*, 48 C.F.R. Ch. 2 (Defense Federal Acquisition Regulation Supplement for the Department of Defense). The FAR Council consists of the Administrator for Federal Procurement Policy, the Secretary of Defense, the Administrator of National Aeronautics and Space, and the Administrator of General Services. *See* 41 U.S.C. §§ 1102, 1302.

² 76 Fed. Reg. 23236 (April 26, 2011).

³ 76 Fed. Reg. 68017 (Nov. 2, 2011).

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very little coverage on preventing conflicts of interest for contractor employees” and indicated that the final rule was intended to help fill this gap in the FAR.

The Section believes that this resolution goes farther than current regulatory activity by the FAR Council in several respects. Most important, the 2011 final rule only addresses personal conflicts of interest in the context of “meta-contracting,” in which contractors assist the government in contracting with other contractors. In other words, the 2011 final rule is limited to contractor employees who perform various acquisition functions closely associated with inherently governmental functions, which is defined in the rule to include supporting or providing advice or recommendations with regard to planning acquisitions, determining what supplies and services the government should acquire, evaluating contract proposals, awarding government contracts, and administering and terminating contracts, among other functions.⁴ The 2011 final rule does not address the ACUS Recommendation’s language regarding conflicts of interest in other high-risk areas. Finally, the 2011 final rule does not speak to the risk of misuse of non-public information. While the 2011 proposed rule does speak to the topic, that proposal has yet to be finalized.

Because the Section endorses the ACUS Recommendation in its entirety, the Section has to that extent adopted, with permission, the text of the ACUS Recommendation in preparing this Report in support of the proposed Resolution.⁵ The Section has supplemented the report with additional explanation regarding the issue of advisory committees, as well as updated references to the final policy letter of the Office of Federal Procurement Policy entitled “Performance of Inherently Governmental and Critical Functions” and the 2011 FAR Council final rule.

In order to ensure that its recommendation did not create excessive compliance burdens for contractors or unnecessary monitoring costs for agencies, ACUS limited it to those areas that it had identified as the top priorities: contractor employees who perform certain activities identified as posing a high risk of personal conflicts of interest or misuse of non-public information. The Section believes the impacts of its recommendation would not be materially greater.

II. Background

As noted in the ACUS Recommendation, the federal government has increasingly relied upon private contractors to perform services previously provided in-house by civil servants.⁶

⁴ 76 Fed. Reg. at 68,024.

⁵ Administrative Conference of the United States, Government Contractor Ethics, Final Recommendation, *available at* <http://www.acus.gov/research/the-conference-current-projects/government-contractor-ethics/>. The Section is indebted to Shawne C. McGibbon and Reeve Bull of ACUS for their efforts in support of this resolution, particularly in providing permission to base this report on Recommendation 2011-3.

⁶ Specifically, federal spending on service contracts increased by 85% in inflation-adjusted dollars between 1983 and 2007. Kathleen Clark, *Ethics for an Outsourced Government* Table 3 (forthcoming), *available at* <http://www.acus.gov/research/the-conference-current->

Despite this expansion in the use of government contractors, there continues to be a substantial disparity between the ethics rules regulating government employees and those applicable to government contractor employees. Whereas an array of statutes and regulations creates an extensive ethics regime for government employees, the rules currently applicable to contractor employees vary significantly by agency.

Government employees are subject to various statutes and regulations that create a comprehensive ethics regime governing, among other things, their financial interests, use of government resources, outside activities, and activities in which they may engage after leaving government.⁷ By contrast, the compliance standards applicable to contractor employees are much less comprehensive and can vary significantly from contract to contract. A handful of statutes apply to contractor employees and prohibit their offering bribes or illegal gratuities,⁸ serving as foreign agents,⁹ disclosing procurement information,¹⁰ or offering or receiving kickbacks.¹¹

The FAR requires contracting officers to identify organizational conflicts of interest (in which the *contractor* has a corporate interest that may bias its judgment or the advice it provides to the government) and either address or waive such conflicts.¹² The FAR also requires that contracting firms that have entered into one or more government contracts valued in excess of \$5 million and requiring 120 days or more to perform have in place “codes of business ethics and conduct.”¹³ A handful of agencies have adopted ethics regulations supplementing the FAR,¹⁴ and still other agencies impose additional ethics requirements by contract.¹⁵

projects/government-contractor-ethics. Over the same period, the number of executive branch employees declined by 18%. *Id.* In this light, the relative significance of the contractor workforce vis-à-vis the federal employee workforce has increased substantially in the last few decades.

⁷ *Id.* at 7.

⁸ 18 U.S.C. §§ 201(b)-(c).

⁹ *Id.* § 219.

¹⁰ 41 U.S.C. § 2102.

¹¹ *Id.* §§ 8701-07 (prohibiting kickbacks to contractors, subcontractors, and their employees).

¹² 48 C.F.R. § 9.500 *et seq.* The FAR provision applies only to organizational conflicts of interest, wherein the *firm itself* possesses such business interests, and not to personal conflicts of interest, wherein one of the *firm's employees* has a business or financial interest that could influence his or her decisionmaking in performing a contract.

¹³ *Id.* §§ 3.1000-04. These codes must ensure that the firm has adequate systems for detecting, preventing, and reporting illegal conduct and violations of the civil False Claims Act and that it “otherwise promotes an organizational culture that encourages ethical conduct.” *Id.* § 52.203-13. The FAR does not dictate, however, what types of potential ethical misconduct the internal corporate codes must address.

¹⁴ Agencies that have adopted ethics regimes supplementing those contained in the FAR include the Department of Energy, Department of Health and Human Services, Department of the Treasury, Environmental Protection Agency, Nuclear Regulatory Commission, and United

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Finally, certain contracting firms, most notably some performing work for the Department of Defense, have voluntarily adopted internal ethics codes, some of which provide fairly detailed rules relating to such important ethical issues as personal conflicts of interest, confidentiality, gifts and gratuities, protection of government property, and other major ethical areas, and that establish internal disciplinary processes for employee violations of such codes.¹⁶

Nevertheless, these voluntary internal codes do not generally require that unethical conduct that is not otherwise illegal or unlawful be reported to the contracting agency.¹⁷ Furthermore, though the voluntary internal codes can provide certain protections for the government,¹⁸ they generally only require contractor employees to protect against personal conflicts with their *employer's* interest, rather than the *government's* interest or the broader *public* interest.¹⁹ Finally, many contractors (particularly those outside of the defense setting) do not have internal ethics codes.

States Agency for International Development. Clark, *supra* note 6, Table VII. These supplemental regimes are not comprehensive, however, and generally apply only to specific types of contracts. By contrast, the Federal Deposit Insurance Corporation, though it is not covered by the FAR, has implemented a comprehensive ethics system that applies to all of its contractor employees. *Id.*; *see also* 12 C.F.R. § 366.0 *et seq.*

¹⁵ *See, e.g.*, USAID Acquisition Regulation 148, *available at* <http://www.usaid.gov/policy/ads/300/aidar.pdf>.

¹⁶ *See generally* DEF. INDUS. INITIATIVE ON BUS. ETHICS & CONDUCT, PUBLIC ACCOUNTABILITY REPORT (2009), *available at* <http://www.dii.org/files/annual-report-2008.pdf>. Many of the most extensive internal codes are implemented by companies that are members of the Defense Industry Initiative (“DII”), which includes 95 defense contractors that agree to implement such ethics codes and comply with certain values in maintaining an ethical workplace. Contractor employees can be disciplined internally for violating their company’s ethics code, and companies commit to disclose violations of the law and “instances of significant employee misconduct” to the contracting agency. *Id.* at 49.

¹⁷ *See id.* at 49-50 (contractors only *required* to report those violations covered by FAR § 52.203-13).

¹⁸ *See id.* at 33 (noting that DII member company codes require them to protect government property).

¹⁹ *See id.* at 34 (“Employees are prohibited from having personal, business, or financial interests that are incompatible with their responsibility to their employer.”); *see also* U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-08-169, ADDITIONAL PERSONAL CONFLICT OF INTEREST SAFEGUARDS NEEDED FOR CERTAIN DOD CONTRACTOR EMPLOYEES 3 (2008) (“Most of the contractor firms have policies requiring their employees to avoid a range of potential interests—such as owning stock in competitors—that conflict with the *firm's* interest. However, only three of these contractors’ policies directly require their employees to disclose potential personal conflicts of interest with respect to their work at DOD so they can be screened and mitigated by the firms.”).

III. Scope of the Problem

Contractors performing certain services, particularly those that can influence government decisions or have access to non-public information, are in a position of public trust and responsibility for the protection of public resources, as is the government itself. The Section therefore believes that it is critical that contractor employees behave with the same high degree of integrity as government employees, and do not exploit positions of public trust for improper personal gain.

Irrespective of whether there has been any widespread pattern of ethical abuses, the Section believes that the mere existence of significant ethical *risks* could potentially erode public confidence both in the government procurement process as well as in the government itself. Accordingly, it is in the public interest to hold contractors and contractor employees to a high ethical standard of conduct.

At present, a significant disparity exists between the ethical standards applicable to government employees, which are comprehensive and consist predominantly of specific rules, and those applicable to contractor employees, which are largely developed and applied on an ad hoc basis and involve significantly vaguer standards.²⁰ While many contractors have undertaken efforts to promote a culture of compliance through the implementation of company-specific ethics standards,²¹ these types of voluntary internal standards have not been adopted by all contractors.

That said, however, some disparity between government employee and contractor employee ethics standards may be acceptable. The Section shares ACUS' view that applying the rules governing the ethics of government employees (particularly those dealing with financial disclosures to guard against personal conflicts of interest) directly to contractors could create excessive and unnecessary compliance burdens for contractors and monitoring costs for agencies.²²

²⁰ As indicated in the Introduction, there is a pending FAR rule relating to protection of non-public information, 76 Fed. Reg. 23236 (Apr. 26, 2011), which has not yet been adopted and only covers some of the topics addressed in this recommendation.

²¹ See generally DEF. INDUS. INITIATIVE ON BUS. ETHICS & CONDUCT, *supra* note 16.

²² REPORT OF THE ACQUISITION ADVISORY PANEL 418 (Jan. 2007). Various agencies have extended certain aspects of the ethics standards applicable to government employees to contractor employees, see, e.g., 12 C.F.R. § 366.0 *et seq.* (FDIC contractor regulations), and their decision to do so has not necessarily created excessive compliance or monitoring costs. Nevertheless, extending *all* government employee ethics rules to *all* contractor employees serving all agencies, without consideration of the specific ethical risks presented, would likely impose costs that are excessive in relation to the benefits received. Accordingly, the Conference believes that the FAR Council and individual agencies should proceed carefully in ensuring that any expansion of the current ethics regime is cost-effective, while at the same time protecting the government's interests.

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Consequently, the ACUS Recommendation and this resolution focus on the areas involving the most significant ethical risks that arise in government contracts, as well as the activities most likely to implicate those risks. More specifically, both the Section and ACUS have determined that contractor employees' personal conflicts of interest and contractor employee use of non-public information are the two areas which require greater measures to prevent misconduct. The Section has also determined that ethical concerns – involving both conflict of interest and lack of impartiality – are particularly prominent in cases where agencies use contractors to establish and manage scientific or technical advisory committees.

IV. Personal Conflicts of Interest and Misuse of Certain Non-Public Information

The most common ethical risks currently addressed in specific agency supplements to the FAR (as well as in contractors' own internal codes of conduct) include personal conflicts of interest, gifts, misuse of government property, and misuse of non-public information.²³ While some of these improprieties are captured by various existing laws and regulations, many are not.

For example, existing criminal laws would address and capture contractors offering or receiving gifts and the misuse of government property. With respect to gifts, criminal bribery laws would prohibit a contractor employee's *offering* anything of value to a federal employee to obtain favorable treatment,²⁴ and the Anti-Kickback Act would prohibit a contractor employee from *accepting* gifts from a potential sub-contractor or other party that are aimed at improperly obtaining favorable treatment under the contract.²⁵ With respect to misuse of property, traditional criminal laws against larceny and embezzlement would prohibit a contractor employee's misappropriating public property, and federal criminal law prohibits a contractor employee's misusing or abusing government property.²⁶

Yet, a contractor employee is far less likely to face sanctions under existing laws if he or she acts despite a personal conflict of interest or exploits non-public information for personal gain. Though the Anti-Kickback Act would prevent a contractor employee's directing business to a third party in exchange for an actual payment,²⁷ nothing under current law would prevent a

²³ See *id.*; Kathleen Clark, *supra* note 6, Table VII; Marilyn Glynn, *Public Integrity & the Multi-Sector Workforce*, 52 WAYNE L. REV. 1433, 1436-38 (2006); DEF. INDUS. INITIATIVE ON BUS. ETHICS & CONDUCT, *supra* note 16, at 29-60.

²⁴ 18 U.S.C. § 201(c).

²⁵ 41 U.S.C. § 8702. Of course, in light of the severity of criminal sanctions, many instances of misconduct are likely to go unpunished under the current regime. For instance, resource constraints may make it unlikely that a United States Attorney would prosecute a contractor employee for accepting a lavish meal from a prospective sub-contractor. Nevertheless, the mere threat of criminal prosecution may deter potential misconduct.

²⁶ 18 U.S.C. § 641; *Morissette v. United States*, 342 U.S. 246, 272 (1952). In addition, agencies often stipulate by contract that government property may not be used for personal benefit (*e.g.*, a contractor employee's using government computers for personal use). Glynn, *supra* note 23, at 1437.

²⁷ 41 U.S.C. § 8702.

contractor employee from directing business towards a company in which he or she owns stock (*i.e.*, a personal conflict of interest). Similarly, though insider trading laws would apply if a contractor employee bought securities based upon information learned from government contracts,²⁸ nothing under current law would prevent a contractor employee from purchasing other items, such as land that will appreciate upon announcement of construction of a military base, on the basis of information learned while performing his or her contractual duties.

For these reasons, various governmental entities that have studied issues of contractor ethics have singled out preventing personal conflicts of interest and misuse of non-public information as areas that need to be strengthened.²⁹ By focusing on these two areas of risk, ACUS does not intend to discourage agencies from adopting additional ethics requirements regarding procurement activities by regulations or contract. Indeed, some agencies may choose to adopt rules regulating ethical risks such as contractor employee receipt of gifts or misuse of property as an additional prophylactic measure, notwithstanding the existence of criminal penalties covering similar conduct.

Rather, ACUS believes that personal conflicts of interest and protection of non-public information are two areas for which greater measures to prevent misconduct are particularly appropriate, and it therefore recommends targeted measures designed to address those risks. The resolution would serve as a floor upon which agencies could build and would not be intended to

²⁸ *Dirks v. Sec. Exch. Comm'n*, 463 U.S. 646, 655 n.14 (1983); 17 C.F.R. § 240.10b5-2(b).

²⁹ *See, e.g.*, Preventing Personal Conflicts of Interest for Contractor Employees Performing Acquisition Functions, 76 Fed. Reg. 68,017, 68024 (Nov. 2, 2011) (setting forth FAR rules regulating personal conflicts of interest and use of non-public information for personal gain in the case of contractors performing acquisition activities closely related to inherently governmental functions); Glynn, *supra* note 23, at 1436-37 (article by general counsel of the Office of Government Ethics recommending, *inter alia*, extending ethics rules to include contractor employee conflicts of interest and misuse of non-public information); U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 19, at 31 ("We recommend . . . personal conflict of interest contract clause safeguards for defense contractor employees that are similar to those required for DOD's federal employees."); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-693, STRONGER SAFEGUARDS NEEDED FOR CONTRACTOR ACCESS TO SENSITIVE INFORMATION 30 (2010) (recommending that the FAR Council provide guidance on the use of non-disclosure agreements as a condition to contractors' accessing sensitive information and on "establishing a requirement for prompt notification to appropriate agency officials of a contractor's unauthorized disclosure or misuse of sensitive information"); OFFICE OF GOV'T ETHICS, REPORT TO THE PRESIDENT & TO CONGRESSIONAL COMMITTEES ON THE CONFLICT OF INTEREST LAWS RELATING TO EXECUTIVE BRANCH EMPLOYMENT 38-39 (2006) (noting "expressions of concern" the Office has received regarding personal conflicts of interest and highlighting the possibility of agencies' including contract clauses to deal with such issues); REPORT OF THE ACQUISITION ADVISORY PANEL, *supra* note 22, at 423-25 (concluding that additional safeguards were necessary in order to protect against contractor employee personal conflicts of interest and misuse of confidential or proprietary information).

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deter adoption of a more expansive ethics regime, either individually or through the FAR Council, to the extent the agencies find it appropriate.

The Section wholeheartedly concurs with ACUS on these points and joins its recommendations. However, it goes beyond the ACUS recommendation in one specific regard, involving agency use of contractors to organize and manage scientific and technical advisory committees. As explained below, that practice has the effect – whether intended or not – of exempting such a committee from the federal ethics laws and rules that would apply if the agency were to establish the committee itself, and instead subjecting the committee’s operations to less comprehensive and more uncertain ethical requirements.

V. “High Risk” Contracts

A. PCI-Risk Contracts

In preparing its Recommendation, ACUS identified those types of activities most likely to create risks of personal conflicts of interest, situations in which a contractor employee may have some interest that may bias his or her judgment. Having considered the ACUS Recommendation, the Section adopts its findings in this area in their entirety.

ACUS determined, in part, that several statutes and regulations prohibit contractors from performing “inherently governmental functions,” which are defined as functions “so intimately related to the public interest” as to require performance by government employees.³⁰ Moreover, it noted that the FAR also contains a list of activities that “approach” being classified as “inherently governmental functions.”³¹

At the time of the ACUS Recommendation, ACUS further noted that the Office of Federal Procurement Policy had issued a proposed policy letter in which it recognized that contractors performing activities that are similar to “inherently governmental functions” should be subject to close scrutiny, given that the work that they perform is near the heart of the traditional role of the federal government.³² This policy letter has since been finalized, and it indicates that the Office of Federal Procurement Policy “intends to work with” the FAR Council

³⁰ Federal Activities Inventory Reform Act of 1998, Pub. L. No. 105-270, § 5(2)(A), 112 Stat. 2382, 2384; 48 C.F.R. § 2.101; OMB, Circular A-76, Performance of Commercial Activities, Attachment A, § B.1.a. Though each of these authorities uses slightly different wording in defining “inherently governmental function,” the differences are apparently of no legal significance. Office of Management & Budget, Work Reserved for Performance by Federal Government Employees, 75 Fed. Reg. 16,188, 16,190 (proposed Mar. 31, 2010).

³¹ 48 C.F.R. § 7.503(d).

³² Office of Management & Budget, Work Reserved for Performance by Federal Government Employees, 75 Fed. Reg. 16,188, 16,193-94 (proposed Mar. 31, 2010).

to “develop and implement appropriate changes to the FAR to implement this policy letter.”³³ Several of the functions listed as those that “approach” inherently governmental functions, or that are “closely associated with the performance of inherently governmental functions,” involve activities wherein the contractor either advises in agency policymaking or participates in acquisition functions, which raise particular risks of employee personal conflicts of interest.³⁴ Other activities identified as raising particular risks of employee personal conflicts of interest include “advisory and assistance services” and “management and operating” functions.³⁵

The FAR contains provisions identifying activities that “approach” being “inherently governmental functions,”³⁶ feature “advisory and assistance services,”³⁷ or involve “management and operating” functions.³⁸ Many of these activities, such as those in which a contractor employee performs tasks that can influence government action, including the expenditure of agency funds, may pose a significant risk of personal conflicts of interest. Several contracting tasks, by their nature, elevate the risk of such conflicts. Those include substantive (as compared to administrative or process-oriented) contract work (hereinafter referred to as “PCI-Risk” contracts³⁹) such as:

- Developing agency policy or regulations
- Providing alternative dispute resolution services on contractual matters; legal advice involving interpretation of statutes or regulations; significant substantive input relevant to agency decision-making; or professional advice for improving the effectiveness of federal management processes and procedures
- Serving as the primary authority for managing or administering a project or operating a facility
- Preparing budgets, and organizing and planning agency activities

³³ Office of Management & Budget, Publication of the Office of Federal Procurement Policy (OFPP) Policy Letter 11-01, Performance of Inherently Governmental and Critical Functions, 76 Fed. Reg. 56,227, 56,230 (Sept. 12, 2011).

³⁴ 76 Fed. Reg. at 56,238, 56,241.

³⁵ REPORT OF THE ACQUISITION ADVISORY PANEL, *supra* note 22, at 411.

³⁶ 48 C.F.R. § 7.503(d).

³⁷ *Id.* § 2.101.

³⁸ *Id.* § 17.601.

³⁹ The Conference believes that these activities are particularly likely to pose a risk of personal conflicts of interest. To the extent that the FAR Council or individual agencies believe that other activities pose similar risks, they should remain free to regulate contracts for such activities.

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- Supporting substantive acquisition planning⁴⁰ or research and development activities
- Evaluating another contractor's performance or contract proposal⁴¹
- Assisting in the development of a statement of work⁴² or in contract management
- Participating as a technical advisor to a source selection board or as a member of a source evaluation board (*i.e.*, boards designed to select or evaluate bids or proposals for procurement contracts)

B. Information-Risk Contracts

ACUS further determined, and this Section again agrees, that existing regulations also do not comprehensively protect against contractor employees' disclosure or misuse of non-public governmental, business, or personal information learned while performing government contracts.⁴³ As with personal conflicts of interest, specific activities pose a grave risk of contractor disclosure or misuse of non-public information, which include (hereinafter referred to as "Information-Risk" contracts⁴⁴):

⁴⁰ The FAR Council has issued a final rule that establishes personal conflict of interest standards for contractor employees performing acquisition activities closely associated with inherently governmental functions. Preventing Personal Conflicts of Interest for Contractor Employees Performing Acquisition Functions, 76 Fed. Reg. 68,017, 68,018, 68,024 (Nov. 2, 2011). The existence of this rule, which addresses planning acquisitions, evaluating contract proposals, and developing statements of work, would appear to obviate the need for any additional FAR contract clauses with respect to these contracts.

⁴¹ *Id.*

⁴² *Id.*

⁴³ U.S. GOV'T ACCOUNTABILITY OFFICE, STRONGER SAFEGUARDS NEEDED FOR CONTRACTOR ACCESS TO SENSITIVE INFORMATION, *supra* note 29, at 30 (recommending that the FAR Council provide guidance on the use of non-disclosure agreements as a condition to contractors' accessing sensitive information and on "establishing a requirement for prompt notification to appropriate agency officials of a contractor's unauthorized disclosure or misuse of sensitive information").

⁴⁴ The Conference believes that these activities are particularly likely to pose a risk of disclosure or misuse of non-public information. This recommendation does not define the term "non-public information"; the FAR Council would be responsible for drafting language more precisely defining the types of information and services covered. In doing so, the FAR Council could choose to draw on existing definitions created for similar purposes. *See, e.g.*, 5 C.F.R. § 2635.703 (defining "nonpublic information" and prohibiting government employees from misusing such information, including information routinely withheld under 5 U.S.C. § 552(b) (FOIA exemptions)); U.S. GOV'T ACCOUNTABILITY OFFICE, STRONGER SAFEGUARDS NEEDED FOR CONTRACTOR ACCESS TO SENSITIVE INFORMATION, *supra* note 29, at 4-5 (defining a category of information that requires safeguards against unauthorized disclosure). To the extent that the FAR Council or individual agencies believe that

- Contracts in which certain employees will receive access to information relating to an agency’s deliberative processes, management operations, or staff that is not generally released to the public;
- Contracts in which certain employees will have access to certain business-related information, including trade secrets, non-public financial information, or other non-public information that could be exploited for financial gain;⁴⁵ and
- Contracts in which certain employees will have access to personally identifying or other non-public personal information, such as social security numbers, bank account numbers, or medical records.⁴⁶

The FAR Council’s proposed 2011 rule would encompass these scenarios, and should be finalized. In finalizing the rule, the FAR Council should strengthen the provisions regarding misuse of information for financial gain.⁴⁷

C. Scientific and Technical Advisory Committees

When federal agencies establish or utilize advisory committees to obtain expert scientific or technical advice, they ordinarily treat appointees to such committees as “special government appointees.”⁴⁸ These appointees are thus subject to the laws and rules regarding conflicting financial interests and lack of impartiality that apply to conventional government employees (including 18 U.S.C. § 208 and rules issued under that authority and the Ethics in Government Act⁴⁹). When an agency hires a contractor to organize and manage an advisory committee, however, these authorities are inapplicable (because advisory committee members in such cases typically are either subcontractors to or employees of the contractor), and the committee’s operations are instead subject to the ethical provisions of applicable acquisition regulations. Several thoughtful analyses have argued that the latter are less comprehensive and lack a

other activities pose similar risks, they should remain free to regulate such activities through appropriate solicitation provisions or contract clauses.

⁴⁵ For instance, if an employee of a contractor performing auditing functions for the government were to learn that a large manufacturing firm intends to open a new plant in coming months, the employee could purchase property near the plant and reap a substantial financial windfall. The contemplated regime would require that the contractor train employees privy to such information on their obligations to keep the information confidential and to avoid transacting business on the basis of such information, penalize employees who violate such obligations, and report any employee violations to the contracting agency.

⁴⁶ U.S. GOV’T ACCOUNTABILITY OFFICE, STRONGER SAFEGUARDS NEEDED FOR CONTRACTOR ACCESS TO SENSITIVE INFORMATION, *supra* note 29, at 6.

⁴⁷ *See* note 45, *supra*.

⁴⁸ *See* 18 U.S.C. § 202(a).

⁴⁹ *See* 5 C.F.R. part 2635, subparts D and E.

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comparable body of interpretation.⁵⁰ The Office of Government Ethics has issued several advisories on the use of special government employees or private “representatives” (non-government employees) on advisory committees.⁵¹

Although ACUS has not yet taken a position about whether ethics standards for government employees should apply to contractor employees or subcontractors in the case of scientific and technical advisory committees,⁵² the Section believes that such consistency is desirable. There is congressional support for this position as well. In October 2011, the House of Representatives Committee on Oversight and Government Reform reported, by unanimous consent, legislation that would have the effect of applying federal ethics laws and rules to committees created under contract.⁵³

The Section therefore believes that the model FAR provisions urged in this Resolution should require that contractors who establish and manage scientific or technical advisory committees on behalf of government agencies impose ethical standards on committee members which are the same as those imposed on individuals who are special government employees.

⁵⁰ See Bipartisan Policy Center, *IMPROVING THE USE OF SCIENCE IN REGULATORY POLICY 25* (Aug. 5, 2009), <http://www.bipartisanpolicy.org/library/report/science-policy-project-final-report>; Reeve T. Bull, *The Federal Advisory Committee Act: Issues and Proposed Reforms 17-18, 20-21, 40-42, 66* (Draft for Committee Review Sep. 12, 2011), <http://www.acus.gov/wp-content/uploads/downloads/2011/09/COCG-Reeve-Bull-Draft-FACA-Report-9-12-11.pdf>.

⁵¹ Office of Government Ethics, DO-05-012, *Memorandum to Designated Agency Ethics Officials, Federal Advisory Committee Appointments* (Aug. 18, 2005); Office of Government Ethics, DO-04-022, *SGEs and Representatives on Federal Advisory Committees* (July 19, 2004).

⁵² In its recent recommendation regarding the Federal Advisory Committee Act, ACUS called for further study to see “whether such exemptions should be either eliminated entirely or scaled back so as to apply only in a specific set of circumstances.” *Administrative Conference of the United States, The Federal Advisory Committee Act - Issues and Proposed Reforms, Recommendation 2011-7*, at 8 n.31, <http://www.acus.gov/wp-content/uploads/downloads/2011/12/Recommendation-2011-7-Federal-Advisory-Committee-Act.pdf>.

⁵³ See H.R. 3124, the Federal Advisory Committee Act Amendments of 2011, § 3(c) (“(c) Committees Created Under Contract- Section 3(2) of the Federal Advisory Committee Act (5 U.S.C. App.) is amended in the matter following subparagraph (C) by adding at the end the following: ‘An advisory committee is considered to be established by an agency, agencies, or the President if it is formed, created, or organized under contract, other transactional authority, cooperative agreement, grant, or otherwise at the request or direction of an agency, agencies, or the President.’”).

VI. Conclusion

- A. The Federal Acquisition Regulatory Council (FAR Council) should promulgate model language for use in contracts posing a high risk of either personal conflicts of interest or misuse of certain non-public information.⁵⁴**

Current law and regulations do not adequately regulate against the risks of contractor employee personal conflicts of interest and misuse of non-public information. On occasion certain agencies impose additional ethics requirements by supplemental regulation or contract. In addition, certain contractors, especially large companies, have adopted and enforced internal ethics codes. Nevertheless, coverage varies significantly from agency to agency and contract to contract. In order to bring consistency to this process and ensure that the government's interests are adequately protected, the FAR Council finalize model language in the Federal Acquisition Regulation ("FAR") for agency contracting officers to use, with modifications appropriate to the nature of the contractual services and risks presented, when soliciting and negotiating contracts that are particularly likely to raise issues of personal conflicts of interest or misuse of non-public information.

- B. The model FAR provisions or clauses should focus on the most significant ethical risks that arise in government contracts as well as the activities most likely to implicate those risks, such as contractor employees' personal conflicts of interest and use of non-public information (PCI-Risk and Information-Risk Contracts).⁵⁵**

The proposed FAR provisions or clauses would apply only to PCI-Risk and Information-Risk contracts (or solicitations for such contracts). At the same time, contracting agencies should remain free to incorporate contract language (or to promulgate agency-specific supplemental regulations) dealing with other ethical risks they deem important whether or not the contract at issue qualifies as a PCI-Risk or Information-Risk contract. Thus, the model FAR provisions or clauses adopted in response to this recommendation would serve as a floor upon which agencies could build if they deemed it appropriate, but would not supplant existing programs that now provide or may in the future provide more demanding or expansive ethical protections.

⁵⁴ As noted, ACUS took no position on whether the contractual language adopted in individual contracts should "flow down" to sub-contractors and other persons besides prime contractors performing work on government contracts. That issue is best left to the discretion of the FAR Council.

⁵⁵ The draft language would appear in part 52 of the FAR and would consist of draft solicitation provisions (which are used in soliciting contracts) and contract clauses (which are integrated into negotiated contracts). The use of the plural forms "provisions" and "clauses" is not intended to exclude the possibility that the FAR Council could implement the recommendations with a single provision or clause. See pp. 9-11 above for the definitions of "PCI-Risk" and "Information-Risk" contracts.

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C. Agencies should have the discretion whether to use or modify the model FAR provisions or clauses, as well as to address other ethical risks by incorporating additional contract language and promulgating agency-specific supplemental regulations.

An agency contracting officer would have the option to use the model FAR provisions or clauses when soliciting and/or contracting for activities falling into the PCI-Risk or Information-Risk categories. Because the provisions or clauses would be optional, the contracting agency would enjoy the discretion to modify the FAR language on a case-by-case basis to fit the circumstances, and to decide to forego including any such language if it deems that the particular contract at issue is unlikely to pose a significant risk of personal conflicts of interest or misuse of non-public information by contractor personnel. Nevertheless, the FAR Council should encourage contracting officers to use the model FAR language when applicable.

D. The FAR should include model provisions or clauses for use in PCI-Risk procurements.

The FAR Council should encourage agencies to include these model provisions or clauses in contracting actions involving PCI-Risk procurements.

The proposed FAR provisions or clauses should require the contractor to certify⁵⁶ that none of its employees who is in a position to influence government actions⁵⁷ has a conflict of interest. The FAR Council “considered, but did not implement” such a proposal in the 2011 final rule.⁵⁸ The proposed FAR clause should require that conflicted employees will be screened from performing work under any contract. In the 2011 final rule, the FAR Council adopted a screening mechanism for employees performing acquisition functions closely related with inherently governmental functions.⁵⁹ Once a contractor is selected, the contract itself should

⁵⁶ The FAR should include a certification requirement rather than a disclosure process in order to minimize the burden on contractors. In order to fully perform their contractual obligations, contractors should be required to train their key personnel on recognizing and disclosing personal conflicts of interest. In the case of an anticipated conflict, a contractor employee should disclose the issue to the contractor, who must screen the employee from performing under the contract. The contractor should be responsible for disciplining employees who fail to disclose conflicts or honor a screening policy, and for disclosing such violations to the government.

⁵⁷ Every employee performing under the contract need not certify that he or she does not possess conflicting financial interests. For instance, in the case of a contractor assisting in the development of agency policy (a function falling within one of the “high risk” categories), employees performing administrative or other non-discretionary (particularly ministerial) tasks, such as those making copies of the report that the contractor will submit, need not perform such a certification.

⁵⁸ Preventing Personal Conflicts of Interest for Contractor Employees Performing Acquisition Functions, 76 Fed. Reg. 68,017, 68,023 (Nov. 2, 2011).

⁵⁹ 76 Fed. Reg. at 68,024.

include a clause requiring the contractor to train employees on recognizing conflicts, to implement a system for employees who can influence government action to report conflicts to the contractor, to screen any conflicted employees from contract performance, to report to the agency periodically on its efforts to protect against employee conflicts, and to disclose to the agency any instances of employee misconduct (as well as disciplinary action taken against any offending employee). While the FAR Council addressed reporting of PCI violations by covered employees in the 2011 final rule, the Council “considered, but did not implement” proposals on training in the 2011 final rule.⁶⁰ A contractor’s failure to implement an adequate system for employee conflict certification, to disclose or correct instances of employee misconduct, or to take appropriate disciplinary measures against employees who commit misconduct may be grounds for contract termination. In addition, a contractor that repeatedly proves incapable or unwilling to honor such contractual obligations may be subject to suspension or debarment in appropriate circumstances.

E. The FAR should include model provisions or clauses for use in Information-Risk procurements.

The FAR Council should encourage agencies to include these model provisions or clauses in contracting actions involving Information-Risk procurements.

The FAR language should require the contractor to ensure that its employees who have access to certain non-public information identified as posing an information risk are made aware of their duties to maintain the secrecy of such information and to avoid using it for personal gain. To the extent an employee breaches either of these obligations, the contractor should be responsible for reporting the breach to the government, minimizing the effects of the breach, and, where appropriate, disciplining the offending employee. A contractor’s failure to observe these contractual requirements may be grounds for contract termination. In addition, a contractor that proves repeatedly incapable or unwilling to fulfill its duties may be subject to suspension or debarment in appropriate circumstances.

The April 2011 proposed FAR Council rule would largely accomplish these tasks, and should be finalized. In so doing, the FAR Council might strengthen the requirement that contractor employees with access to nonpublic information “[u]tilize [it] only for the purposes of performing the services specified in this contract, and not for any other purposes”⁶¹ to more clearly prohibit use for personal gain. It might also include a requirement that contractors train relevant employees regarding these new obligations.

F. Agencies not covered by the FAR also should consider using or modifying the model FAR provisions or clauses when negotiating contracts for activities falling in either of the “high risk” categories (those likely to implicate significant ethical risks, such as contractor employees’ personal conflicts of interest and use of non-public information).

⁶⁰ 76 Fed. Reg. at 68,024, 68,026.

⁶¹ 76 Fed. Reg. at 23252.

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Agencies and government instrumentalities not covered by the FAR should nevertheless familiarize themselves with the FAR language promulgated in response to this recommendation. To the extent that they plan to enter into contracts for activities listed in the PCI-Risk or Information-Risk categories, they should consider employing or, if necessary, modifying these solicitation provisions and/or contract clauses.

- G. The model FAR provisions should prohibit agencies from using contractors to establish or manage scientific or technical advisory committees without requiring such contractors to apply to prospective and actual members of such committees the same ethical requirements that would apply if such individuals were special government employees.**

The same ethical standards should apply to the members of scientific and technical advisory committees that are organized and managed by contractors working for government agencies as apply when agencies organize and manage such committees themselves. The Section believes that the model FAR provisions urged in this Resolution should require that contractors who establish or manage scientific or technical advisory committees on behalf of government agencies impose ethical standards on committee members which are the same as those imposed on individuals who are special government employees.

Respectfully submitted,

James W. Conrad, Jr.
Chair, Section of Administrative Law and Regulatory Practice
February 2013

GENERAL INFORMATION FORM

Submitting Entity: Section of Administrative Law and Regulatory Practice

Submitted By: James W. Conrad, Jr., Chair

1. Summary of Resolution

The Resolution and Report are modeled on Recommendation 2011-3 of the Administrative Conference of the United States (ACUS), entitled *Compliance Standards for Government Contractor Employees – Personal Conflicts of Interest and Use of Certain Non-Public Information*, which was adopted by ACUS on June 17, 2011. Federal employees are subject to a completely different set of ethics rules than are contractor employees. Employees must comply with extensive limitations on conflicts of interest, gifts, post-employment contacts with the government, and the like. With limited exceptions, none of these apply to the employees of government contractors. Yet employees and contractors are in many ways functionally indistinguishable. The resolution rests on the conclusion that some, though not all, of the conflict principles applicable to employees should also apply to contractors. In particular, the resolution urges the Federal Acquisition Regulatory Council to issue model language, for use in contracts posing a high risk of either personal conflicts of interest or misuse of certain non-public information, that would subject contractor employees to new restrictions analogous to those that apply to federal employees. The Resolution also goes beyond the ACUS Recommendation in supporting model FAR provisions that would require expert advisory committees that are organized and managed by agency contractors to be subject to the same ethical requirements that would apply if they were organized and managed by the agency.

2. Approval by Submitting Entity

Approved by the Council of the Section of Administrative Law and Regulatory Practice Council on Saturday, April 21, 2012.

3. Has this or a similar resolution been submitted to the House or Board previously?

Yes, a similar resolution (109C) was submitted for the August meeting of the House, but that resolution was withdrawn before the meeting to permit discussions with the Section of Public Contract Law.

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?

A search of the “Policies Adopted – Ch. 13 of the Greenbook (including those adopted at the 2012 Midyear Meeting)” and consultation with Counsel in the Government Affairs Office did not reveal any existing Association policies that appeared to be on point.

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5. What urgency exists which requires action at this meeting of the House?

It would be appropriate to consider the resolution at this meeting because the matter is important and we believe the resolution would contribute to improving the current state of affairs. There is no special urgency, however.

6. Status of Legislation

Legislation that would implement one part of the Resolution (H.R. 3124) has been reported out of committee in the House and is currently pending in another committee. No comparable bill has been introduced in the Senate.

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates

In consultation with the Government Affairs Office, the Section would hope to meet with relevant federal officials to urge adoption of the actions endorsed in the resolution.

8. Cost to the Association. (Both direct and indirect costs)

None.

9. Disclosure of Interest. (If applicable)

N/A

10. Referrals

A previous draft was circulated to the Section of Public Contract Law (4/4/12 general notice; 5/7/12 text of resolution and report) and the Government and Public Sector Lawyers Division (5/7/12). This draft is being referred to all sections and divisions.

11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address)

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12. Contact Name and Address Information. (Who will present the report to the House?
Please include name, address, telephone number, cell phone number and e-mail address.)

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EXECUTIVE SUMMARY

1. Summary of the Resolution

In keeping with a recent recommendation from the Administrative Conference of the United States, the resolution urges the Federal Acquisition Regulatory Council to issue model language for use in contracts posing a high risk of either personal conflicts of interest or misuse of certain non-public information, which would subject contractor employees to new restrictions analogous to those that apply to federal employees. In addition, the Resolution also urges that expert advisory committees that are organized and managed by agency contractors be subject to the same ethical requirements that would apply if they were organized and managed by the agency.

2. Summary of the Issue that the Resolution Addresses

Federal employees must comply with extensive limitations on conflicts of interest, gifts, post-employment contacts with the government, and the like. With limited exceptions, none of these ethical constraints apply to the employees of government contractors. Yet in many areas government contractors outnumber actual government employees, and the two are often functionally indistinguishable.

3. Please Explain How the Proposed Policy Position will Address the Issue

The resolution proposes that with respect to conflicts of interest and potential misuse of non-public information, employees of government contractors be subject to the same ethical rules as federal employees.

4. Summary of Minority Views

The Section of Public Contract Law had reservations about the ACUS recommendation on which this Report and Resolution are based. These were expressed in a Blanket Authority letter submitted to ACUS in June 2011. The letter did not contest the substance of the proposal, but did argue that it was redundant and burdensome in light of other existing and planned legal requirements. The two Sections have been in contact.

The Section of Public Contract Law encouraged this Section to more specifically reference the FAR language in the 2011 final rule on personal conflicts of interest and non-public information, which is limited to contractor employees performing acquisition activities closely related to inherently governmental functions. As a result, this resolution distinguishes the ACUS recommendation from the 2011 FAR Council final rule and other regulatory activity.