



Committee on Administration and Management

Minutes

December 9, 2010

Members Attending

John Cooney (Chair)

Robert I. Cusick

Paul Bardos

Willard K. Tom

John Kamensky

Arlene Klepper

James Tozzi

Michael Ravnitzky

Helgi Walker (by phone)

ACUS Staff Attending

Paul R. Verkuil

Jonathan Siegel

Reeve T. Bull

(Chairman)

(Director of Research & Policy)

(Attorney Advisor, DFO)

Funmi Olorunnipa

(Attorney Advisor)

Invited Guests Attending

Kathleen Clark (Consultant)

Daniel Gordon (by phone)

Leigh Bradley

Introductory Remarks and Preliminary Business

Committee Chairman John Cooney called the meeting to order. Mr. Cooney then recognized the Chairman of the Administrative Conference of the United States (“ACUS”), Paul Verkuil. Chairman Verkuil noted the importance of the issue of contractor ethics and stated that the Committee will likely aim to complete its work by the June Plenary Session.

Mr. Cooney then introduced two motions for consideration of the Committee. First, he proposed that all alternate attendees and invited guests be permitted to speak during the meeting. The Committee unanimously consented to this first motion. Mr. Cooney then proposed that the Committee approve the minutes from the prior meeting, held on November 3, 2010. Mr. Kamensky suggested that future minutes include sub-headings. The Committee unanimously consented to approval of the November 3 meeting minutes.

Discussion of Draft Recommendation

Mr. Cooney reminded the Committee that, at the last meeting, he had proposed drafting a strawman document to initiate discussion of potential ethics regimes for government contractor employees. In that light, the draft recommendation presented at this meeting was intentionally



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written broadly to identify all of the major areas an ethics system might cover. Mr. Cooney noted that the first meeting yielded consensus that a problem exists, and the draft recommendation simply illustrates one possible means of resolving that problem.

Mr. Cooney invited the remarks of Mr. Cusick of the Office of Government Ethics (“OGE”). Mr. Cusick began by acknowledging that contractor employees undoubtedly face ethical issues, most notably personal conflicts of interest. Nevertheless, Mr. Cusick expressed some reservations about the draft recommendation and any effort to extend ethics rules to contractor employees without additional study. First, Mr. Cusick stated that regulating all service contractor employees is overbroad, since certain service contractor employees may not need to be regulated, resulting in unnecessary bureaucracy. Second, Mr. Cusick noted that the Federal Acquisition Regulation Council (“FAR Council”) has already addressed certain contractor ethics issues, and the Office of Federal Procurement Policy (“OFPP”), whose Administrator chairs the FAR Council, should therefore be part of any discussion on whether to expand such rules. Third, Mr. Cusick suggested that, to the extent the draft recommendation is based on the experience of the Federal Deposit Insurance Corporation (“FDIC”), receiving the FDIC’s input on how well that regime has worked might be helpful. Fourth, Mr. Cusick proposed that the recommendation advise that individual agencies identify the ethics rules most useful to them rather than recommending a broad regime applicable to all agencies; he also expressed doubt that individual agencies have the authority to supplement a common regime. Fifth, Mr. Cusick noted that individual contract clauses between agencies and contractors addressing ethical issues may be the most efficient means to tackle the problem. Sixth, Mr. Cusick stated that any set of rules adopted should be based on empirical evidence, and he suggested that surveying agencies as to their “top 5” ethical issues may be an efficient means of gathering such data. Seventh, Mr. Cusick recommended that agencies strive for uniformity in the penalties applied to similar ethical transgressions even if they are afforded a great deal of discretion in which rules they adopt. Eighth, Mr. Cusick expressed opposition to the recommendation that certain contractor employees be deemed government employees for purposes of ethics rules, stating such proposals have been entertained in the past and found unworkable. Mr. Cusick also suggested various revisions to the language of the preamble and enumerated recommendations of the draft.

Mr. Siegel explained that the draft recommendation discussed by Mr. Cusick represented a product of the ACUS staff informed by the views of the drafting sub-committee (John Cooney, Robert Cusick, and John Kamensky) and Professors Kathleen Clark and Steven Schooner. The drafting sub-committee did not ultimately reach consensus on a common draft. In that light, this meeting was designed to achieve two primary objectives. First, the Committee should consider whether the FAR Council should adopt a common ethics regime or whether individual agencies should have discretion to design their own ethics rules. Second, the Committee should consider whether additional research is needed to determine what regulation is necessary and, if so, how



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long such research will take. Mr. Kamensky agreed that these were important fault lines and added a third major distinction to consider: whether the system should be based on broad principles/values or instead on specific standards/rules. Mr. Cusick expressed doubt that a values-based regime would be enforceable.

Discussion of Common FAR-Based Regime v. Agency-by-Agency Approach

Mr. Cusick suggested that agencies should integrate ethics-based contract clauses into agreements with contractors. He noted that such a system would require training agency contracting staff on when to apply specific contract provisions. Ms. Klepper expressed support for allowing individual agencies discretion in deciding upon the ethics regimes they will adopt, suggesting that agencies might be required to identify the major ethical risks they face and adopt an ethics regime without being told what that regime must include. Mr. Bardos endorsed Ms. Klepper's approach. Mr. Ravnitzky also endorsed Ms. Klepper's approach, noting that cost-benefit analysis should be part of the calculus agencies use in deciding what regime to adopt.

Mr. Siegel raised the question of what guidance an ACUS recommendation would actually provide if the approach adopted was that of leaving the formulation of standards entirely to individual agencies. Ms. Klepper suggested that the recommendation might include "best practices" that agencies could consider in formulating their ethics systems. Mr. Tom noted that a survey of agencies might help to identify such best practices. Mr. Tozzi suggested that part of this empirical study may entail determining whether existing ethics programs have worked effectively. Mr. Tozzi further noted that the recommendation might highlight particularly troublesome ethical areas, suggesting that one such area might be government contractors' participation in the drafting of agency rules. Chairman Verkuil expressed support for this approach, noting that contractors' participation in activities very similar to inherently governmental functions is particularly rife with ethical concerns. Professor Clark also endorsed this approach, noting that instances where contractors have access to confidential government information may also particularly benefit from regulation. Ms. Clark further noted that agencies should perhaps appoint an official to serve as a designated ethics officer in deciding what ethics standards will be applied in any given contract; the contracting officer should not serve this function insofar as he or she is often motivated simply to conclude the contract as quickly as possible. Mr. Tom noted that such a focus on specifically problematic issues may detract from the goal of providing comprehensive advice to agencies on how to address the full panoply of ethics issues that arise.

Mr. Kamensky invited Leigh Bradley of the Department of Defense ("DOD") to offer her agency's perspective, given that DOD spends a large percentage of federal procurement dollars. Ms. Bradley stated that each agency should identify its most pressing concerns and then look for the least expensive remedies to those issues. Simple training may be sufficient to resolve many



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ethics issues. She stated that the most pressing issue for DOD is conflicts of interest. Mr. Kamensky suggested that large agencies such as DOD might benefit most thoroughly from a set of general ethics principles/values whereas small agencies might be better served by a more detailed set of ethical standards/rules.

Mr. Cooney then invited Dan Gordon of OFPP to offer his perspective. Mr. Gordon stated that a government-wide approach implemented by the FAR or some other mechanism would be the optimal approach. Nevertheless, the FAR provisions need not be cookie-cutter: the FAR could lay out several alternative contractual provisions that agencies could integrate into individual contracts as appropriate. He noted that personal conflicts of interest and misuse of government information are likely the two most pressing issues to address by such a regime.

Mr. Siegel noted that earlier comments appeared to favor an agency-by-agency approach, but that Mr. Gordon seemed to recommend a government-wide system. Mr. Ravnitzky suggested that, to the extent such a common system is adopted, contracting officers should retain some discretion to revise contract clauses as appropriate. Mr. Tozzi expressed some reservations about placing a common regime in the FAR but agreed that individual agencies should not have complete discretion in devising ethics rules.

Discussion of Whether Additional Research Is Required

Mr. Cooney asked whether OFPP had already done research on what ethics issues are most salient in the contracting arena. Mr. Gordon noted that OFPP itself had not done such studies but that the Government Accountability Office (“GAO”) and Acquisition Advisory Panel may have issued reports that would contain useful information on that issue. Ms. Clark stated that the GAO has prepared reports addressing specific areas but has not performed a government-wide study on ethical issues facing government contractors.

Mr. Cusick recommended sending a survey to all agencies asking whether they have faced ethical concerns in specific areas. Ms. Klepper noted that such a study would necessarily be retrospective and thereby potentially overlook future risks and that it may be difficult to frame the survey questions in a way to produce meaningful responses. Mr. Gordon expressed a similar concern, noting that the survey would likely be either too general to elicit useful input or so specific that drafting it would be a massive undertaking. Ms. Clark suggested that a better approach may be gathering data on what agencies are already doing to address what they perceive as contractor abuses. Mr. Cooney endorsed this approach, suggesting that the survey could include specific questions on palliative approaches taken to address concerns in various areas. Mr. Gordon stated that such a survey would be useful. Mr. Ravnitzky noted that Inspectors General may have useful input to offer on what ethical issues are particularly



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pressing. Mr. Gordon offered the assistance of OFPP in designing such a survey and distributing it to appropriate agency respondents.

Concluding Remarks

Mr. Siegel stated that the meeting had provided useful information for the drafting sub-committee to consider going forward and noted that certain additional members may be appointed to the overall Committee prior to its next meeting. Mr. Cooney noted that the next draft will be revised to reflect the specific issues discussed during the meeting. Mr. Cooney then invited members of the public to submit any inquiries or comments. No member of the public did so. Mr. Cooney then adjourned the meeting.