



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Committee on Administration & Management

Draft Minutes

March 16, 2011

Members Attending

John Cooney (Committee Chair)	William Luneburg	James Tozzi
David Frederick	Paul Bardos	Robert Taylor
Robert Cusick	Amy Bunk	Max Stier (by phone)

ACUS Staff Attending

Paul Verkuil <i>Chairman</i>	Jonathan Siegel <i>Director of Research & Policy</i>	Scott Rafferty <i>Staff Counsel</i>
Reeve Bull <i>Project Advisor</i>	Francis Massaro <i>Intern</i>	

Invited Guests Attending

Kathleen Clark (Consultant)	Jill Wright (HHS OIG)	Steven Schooner (GWU)
Emory Rounds (OGE)	Alan Chvotkin (Professional Services Counsel)	Lenny Lowentrift (GSA)

The Committee on Administration and Management met from 9:00 to 11:30 AM. Conference Chairman Paul Verkuil welcomed the members, guests, and public visitors and expressed his hope that the recommendation could be voted on at the June plenary. Committee Chairman Cooney entertained a motion to approve the minutes of the December 9, 2010 meeting, which passed without objection.

The staff reviewed the two prior meetings, which resulted in a draft recommendation (1) to deem certain contractor employees subject to the ethical rules applicable to government employees and (2) to apply some of ethical standards to all contractor employees (including restrictions on personal conflicts of interest, gifts, misuse of government property and information, and preferential treatment). Following a survey of large contracting agencies, the drafting subcommittee determined to target the most serious risks - personal conflicts of interest, especially regarding activities close to inherently governmental functions, and misuse of sensitive information. The FAR Council would make a series of contract clauses available to agencies, which they would have some discretion to use or modify. Such clauses could require screening, training, or reporting requirements when the contractor learned of violations.

Mr. Frederick described the recommendation as “very fine,” but suggested it needed a more conscious sense that we are balancing the need for greater regulation against the costs that such regulation would impose. The tone edged toward the operational efficiency side, rather



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than aspiring to increase integrity. We need to emphasize that some unethical behavior does not rise to criminal violation. We need to emphasize the need for "scalpels" to supplement the sledgehammers of criminal prosecution. He advocated a "catchall" provision that would give agencies flexibility to impose sanctions for material violations that did not justify criminal enforcement.

Professor Clark observed that USAID, one of the few agencies that has specific statutory authority for personal service contracts, deems such contractors government employees. She also questioned the adequacy of debarment, which may require a showing of harm. Where contractors are fiduciaries, a mere violation, which risks harm, should be sufficient. Finally, contractors should not be able to solicit gifts from those affected by their work. Mr. Lowentratt said he was puzzled how USAID deems contractors employees, which has many implications, such as tort law. Mr. Cusick stated that the Office of Government Ethics ("OGE") had persistent trouble "deeming" contractor personnel as public employees.

Mr. Luneberg stated that the recommendation needed to say more to come to grips with important problems presented in the consultant report. He cited experience regarding contract lawyers during the thrift crisis (Rec. 87-03). Mr. Taylor and Professor Schooner emphasized the need to provide agencies with flexibility.

Mr. Tozzi expressed the need to move toward closure, and to focus on the increasing threat of information risk. Those opposing rule in litigation will go to contractors who have been involved in writing rules, and have knowledge of critical internal discussions that have not been publicly disclosed. Professor Clark agreed with the need for flexibility. She suggested that, if a contractor has a fiduciary role (ability to influence decisions or access to certain information), specific ethical requirements should apply, but the agency can exempt certain contracts.

The Committee recognized Alan Chvotkin, executive vice president of the Professional Services Council (PSC), which has 350 members who sell services to agencies. He observed that the largest contractors have sophisticated compliance systems, but that most volume is small businesses who come in short-term to help the nation and do not have the training and counsel to figure out how to comply.

Chairman Cooney reviewed progress. The drafting subcommittee had wrestled with three problems: (1) Recognizing that they could not prescribe a code of conduct, they decided to structure the proposal as recommendations to the FAR Council. (2) The FAR Council has experience in providing a range of clauses and could draft alternative clauses that afford individual agencies discretion in applying ethics standards to contractor employees. (3) In order to walk before running, the subcommittee determined to focus on the two most important aspects. The structure is unchallenged, but the committee has identified (1) a loss of balance in stating aspirations and keeping to the center-line and (2) a need for specificity in directing the



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FAR Council. As Professor Schooner stated, the draft needs to restore a sense that contractors are not government employees sworn to protect the government's interests.

Mr. Stier joined the meeting by telephone and emphasized the need to maintain a database to identify problem contractors and to require the contractor to disclose prior incidents.

The Committee again recognized Mr. Chvotkin, who stated that PSC is pleased that the draft has evolved to focus on implementation challenges and to take a risk-management approach, but still has concerns about coverage of information risk. Ethical standards should focus on the nature, not location, of work, and should describe covered functions with particularity. A personal conflict of interest does not create an organizational conflict and vice versa. Few agencies address personal conflicts of interests, and any controls should respect the contractor organization's management of individual employees. With respect to information risk, Congress enacted a provision restricting access to technical data, and FAR recently issued a proposed rule governing access to a broad range of government data. Mr. Chvotkin discourages relying on debarment. Professors Clark and Schooner and Mr. Lowentrift observed that debarment was only a prospective protection, not a penalty.

Mr. Siegel noted that organizational conflict of interest and information risk could be treated in separate parts of the FAR. Professor Schooner observed that, if FAR severs the information risk issue, the odds of getting a personal conflict of interest rule would increase dramatically. Chairman Cooney suggested that the recommendation should ultimately leave to the FAR Council whether to handle two issues separately or together.

Jim Tozzi stated that information risk is more complex than personal conflict of interest. It is becoming a greater risk, especially when contractors de facto write rules, which is inevitable when statutes (*e.g.*, Health Care and Dodd-Frank) fail to add staff. Contractors do studies, and get their names in the record. Those opposing rule in litigation go to these contractors, who have knowledge of critical internal discussions that have not been publicly disclosed. Mr. Chvotkin agreed that access to information can be as important as personal conflicts of interest, but that GSA and agencies were proceeding on a parallel track to address information issues. Later in the meeting, Mr. Taylor reiterated Mr. Tozzi's concern that rules were needed to prevent contractors from using information gained by assisting in rule-writing to assist opponents of the rule in litigation.

Professor Clark suggested that there should be default position that if contractor has a fiduciary role (ability to influence decisions or access to certain information), certain ethical requirements apply, but the agency can exempt certain contracts, citing Mr. Taylor's case for flexibility. Professor Schooner stated that FAR Council is facile, but that mandates with exemptions can create memo-writing exercises and increase costs substantially for both government and contractors. Mr. Siegel suggested modifying Recommendation #3 to say



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something like “contracting agencies should integrate rules and then agencies can modify if the agency determines that the contract would not implicate ethics rules”

Mr. Luneberg argued that the preamble should show why it is important to adopt default provisions regarding particular sets of decisions, but that Professor Clark's points should also be in operative provisions. Professor Clark suggested "tweaking" the current list, but identifying specific types of services that implicate personal conflict of interest - and then applying a default with exemption, citing Treasury, TARP, and FDIC. However, Professor Schooner cautioned that these "small homogenous agencies" do not reflect DoD, NASA or other major procurement agencies. GAO will track agencies' invocation of exemptions, so if criteria are "fuzzy," agencies will be criticized.

Chairman Cooney asked the Committee to focus on specific suggestions to the staff. The Committee confirmed that it was pleased with the approach and wanted stronger aspirational language. There was agreement that grants should be excluded from this recommendation.

Professor Clark suggested that (1) the preamble make explicit that some service contractors are in a fiduciary position, (2) the FAR Council needs to adopt clauses that will protect the government's interests, and (3) the default position should be to require standards but allow the agency to exempt them where they are unnecessary. However, Messrs. Bardos and Taylor expressed a concern about the "memo writing burden" associated with justifying exemptions, proposing Mr. Siegel's formulation or even "softer language."

Chairman Cooney provided the following summary: The drafting sub-committee did not want to establish a code of conduct and wanted to make recommendations to the appropriate people in government making the rule. It knew that agencies needed to have substantial discretion. It also wanted to focus on what were the most pressing issues. Everyone seems to think that this has been the right way to go. The drafting sub-committee may not have been specific enough in directing that the FAR Council address aspirational issues.

The Committee recognized Ms. Robin Baum, special counsel for acquisition at the Nuclear Regulatory Commission, who emphasized that ACUS guidance would be very useful for their agency.

Chairman Verkuil stated how important it was to get this done by June. We have had a very successful committee process. If we cannot do everything, we can cover grants or other matters subsequently. Agencies are waiting in anticipation of what we might do.

The meeting adjourned at 11:30 AM.