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2010-2011

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June 10, 2011

VIA ELECTRONIC MAIL

Reeve Bull
Attorney Advisor
Administrative Conference of the United States
1120 20th Street, NW
Suite 706 South
Washington, D.C. 20036

Re: ACUS Government Contractor Ethics Recommendation

Dear Mr. Bull:

On behalf of the Section of Public Contract Law of the American Bar Association ("the Section"), I am submitting comments on the above-referenced matter. The Section consists of attorneys and associated professionals in private practice, industry, and Government service. The Section's governing Council and substantive committees have members representing these three segments, to ensure that all points of view are considered. By presenting their consensus view, the Section seeks to improve the process of public contracting for needed supplies, services, and public works.

The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, therefore, should not be construed as representing the policy of the American Bar Association. The Section is submitting these comments under an approved Request for Blanket Authority.

I. BACKGROUND

The Administrative Conference of the United States ("ACUS") has published notice of a public meeting in the Federal Register, 76 Fed. Reg. 30088 (May 24, 2011). The notice states that a meeting of the ACUS Assembly is scheduled for June

16 and 17, 2011 to consider certain proposed recommendations that deal with, among other topics, “enhanced ethics requirements for contractors that do business with the government.” The notice further states that the Government Contractor Ethics recommendation “is addressed primarily to the Federal Acquisition Regulatory Council” and “recommends, in part, that the FAR Council adopt model contract clauses on contractor ethics that agencies could use when entering into contracts for government services.” The notice also invites members of the public to submit written comments on the recommendations.

ACUS’ website indicates that the ACUS Committee on Administration & Management held a meeting on the Government Contractor Ethics Project on April 18, 2011. At that meeting, the Committee came to a consensus on a draft recommendation. The ACUS Council has reviewed the proposed recommendation, which will be considered at the June 16-17, 2011, Plenary session. The website provides a copy of the proposed recommendation. The Section is submitting these comments on that proposed recommendation.

II. SECTION COMMENTS ON THE GOVERNMENT CONTRACTOR ETHICS RECOMMENDATION

The Section strongly believes that contractor employees should act impartially in performing their work for the Government, as well as for any customer or other client. The Section offers the following comments that it hopes will be helpful to the ACUS Plenary Session as it considers the Government Contractor Ethics recommendation (the “Recommendation”). The Section does not necessarily believe that the same approach for government employees, mandated by statute in many cases, should apply to contractor employees to ensure impartial contract performance.

Nevertheless, as discussed below, the Section does not believe that there is a pressing need for the ACUS Government Contractor Ethics Recommendation.

A. There Is Substantial Relevant Statutory and Regulatory Activity Related To Contractor Employee Personal Conflicts of Interest and Access to Nonpublic Information

The Recommendation references the Federal Government’s increasing reliance in recent years on private contractors to perform services previously provided in-house by civil servants and discusses an area that the Section agrees warrants attention: possible government contractor employee personal conflicts of interest (“PCIs”) and possible misuse of non-public information. Nevertheless, this area already has received substantial attention in recent years and is the subject of numerous completed or pending statutory and regulatory actions, as discussed below.

1. FAR Advanced Notice of Proposed Rulemaking

For example, the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the “Councils”) published an Advance Notice of Proposed Rulemaking (“ANPR”) on March 26, 2008 stating that the Councils were:

interested in determining if, when, and how service contractor employees’ personal conflicts of interest (PCI) need to be addressed and whether greater disclosure of contractor practices, specific prohibitions, or reliance on specified principles would be most effective and efficient in promoting ethical behavior.

73 Fed. Reg. 15,961 (Mar. 26, 3008).

The ANPR identified the same PCI issue covered by the ACUS Recommendation: the Federal Government’s increasing use of contractors to perform a wide array of work, resulting in contractor employees who work side-by-side with federal employees but who are not subject to the same ethical safeguards that have been put in place for federal employees. *Id.* The ANPR also identified two other publications that are cited in the ACUS Recommendation, and that highlight the fact that relevant stakeholders were focused on PCIs even before the ANPR: (1) a GAO Report, GAO-08-169, *Additional Personal Conflict of Interest Safeguards Needed for Certain DOD Contractor Employees* (Mar. 7, 2008), and (2) the January 2007 Report of the Acquisition Advisory Panel (“AAP”) to the Office of Federal Procurement Policy and Congress (Congress chartered the AAP at Section 1423 of the Services Acquisition Reform Act). *Id.* In addition, the ANPR stated that the Councils were “considering the need for standard PCI clauses or a set of standard PCI clauses, if appropriate, for inclusion in solicitations and contracts as recommended by the [AAP’s] Final Report.” *Id.* The Councils are expected to issue a proposed or interim rule in this rulemaking during 2011.

2. Section 841 of the FY 2009 NDAA and Implementing FAR Rule Applicable to Acquisition Support Contractor Employees

In October 2008, Congress enacted the Duncan Hunter National Defense Authorization Act (“NDAA”) for Fiscal Year (“FY”) 2009, Pub. L. 110-417. Section 841(a) of the FY 2009 NDAA required the Administrator for the Office of Federal Procurement Policy (“OFPP”) to develop and issue, within 270 days after enactment of the NDAA, a standard policy to prevent PCIs by contractor employees performing acquisition functions closely associated with inherently governmental functions, including the development, award, and administration of Government contracts. Again, this is the same PCI issue covered in the ACUS Recommendation. Among other requirements, the NDAA mandated that the OFPP develop a clause or set of clauses for solicitations and contracts for performance of acquisition functions closely

associated with inherently government functions. The elements of the NDAA policy also required contractors whose employees perform acquisition functions closely associated with inherently governmental functions to prohibit employees with access to non-public government information obtained while performing such functions from using the information for personal gain. This overlaps with the second basic issue covered by the ACUS Recommendation.

Section 841(b) of the NDAA required, within 12 months after enactment of the NDAA, the Administrator for Federal Procurement Policy, in consultation with the Director of the Office of Government Ethics, to review the FAR to (1) identify contracting methods, types, and services that raise heightened concerns for potential PCIs, and (2) determine whether FAR revisions are necessary to address PCIs by contractor employees with respect to functions other than acquisition functions closely associated with inherently governmental functions.

On November 13, 2009, the Councils published a proposed rule to amend the FAR to address PCIs by contractor employees as required by the NDAA. 74 Fed. Reg. 58,584 (Nov. 13, 2009). OFPP collaborated with the Councils to develop the proposed rule, which would add a new subpart under FAR Part 3 and a new clause for use in contracts. The proposed rule includes a policy that covers the same two basic issues in the ACUS Recommendation, stating that it is the Government's policy to require contractors to (1) identify and prevent PCIs of their "covered employees" (a term that includes subcontractors and consultants), and (2) prohibit covered employees with access to non-public Government information from using such information for personal gain.

In addition, the proposed rule includes a clause for use in solicitations and contracts that exceed the simplified acquisition threshold and that require performance of acquisition functions closely associated with inherently government functions. The clause specifies, among other requirements, that the contractor must: obtain and maintain a financial disclosure statement from each covered employee; prohibit use by each covered employee of non-public information for personal gain; obtain a non-disclosure agreement from each covered employee; and report to the contracting officer any PCI violation by a covered employee as soon as it is identified. The clause also grants various remedies to the Government, including contract termination and suspension or debarment, for failure on the part of the contractor to comply with certain aspects of the clause.

3. Department of Defense Interim Rule Concerning Support Contractor Access to Technical Data

Through Section 821 of the FY 2010 NDAA, Congress expressly authorized agencies to allow certain types of government support contractors to have access to technical data belonging to prime contractors under other contracts and other third parties, but it conditioned such access on the execution of a nondisclosure agreement

("NDA"). Pub. L. 111-84 (Oct. 28, 2009). On March 2, 2011, the Department of Defense issued an interim DoD FAR Supplement ("DFARS") rule to implement Section 821. *See* 76 Fed. Reg. 11,363 (Mar. 2, 2011). The interim DFARS rule, consistent with Section 821, mandates specific restrictions for the Government support contractors that will receive proprietary technical data. Specifically, the support contractor must agree: (1) to use the nonpublic technical data only for the purposes stated in the contract; (2) to execute an NDA with the proprietary data owner; (3) to provide the contracting officer, upon request, a copy of any NDA executed with the proprietary data owner or a waiver from the data owner; (4) to "take all reasonable steps" to protect the data from disclosure; (5) to agree that breach could subject the support contractor to criminal, civil, administrative, and contractual actions by the U.S. and civil actions by the data owner; and (6) to agree not to use the technical data to compete against the owner for government or non-government contracts. The purpose of the rule is to ensure that the support contractors' access "does not threaten the data owner's competitive advantage due to the proprietary information."

While the interim DoD rule is focused on technical data, it overlaps significantly with the issues addressed in the ACUS Recommendation related to contractor employee access to nonpublic information.

4. Proposed FAR Rule Concerning Access to Nonpublic Information

On April 26, 2011, the FAR Councils issued a proposed rule that, if adopted, would substantially revise the FAR's organizational conflict of interest ("OCI") regulations. FAR Case 2011-001, Proposed Rule, *Organizational Conflicts of Interest*, 76 Fed. Reg. 23,236 (Apr. 26, 2011). Although issues related to a contractor's access to nonpublic information have traditionally been viewed as a "conflict" issue under FAR Subpart 9.5, the Councils have indicated that issues related to access to nonpublic information should be taken "out of the domain of OCI" and treated separately. 76 Fed. Reg. at 23,238. The proposed rule includes extensive coverage of issues related to access to "nonpublic information," which it defines as any information that is either (1) exempt from disclosure under the Freedom of Information Act and other disclosure laws; or (2) has not been disseminated to the public, and the Government has not made a determination to do so. These access issues and the potential for an associated unfair competitive advantage would not be characterized as OCIs and would be treated separately in an expanded FAR subpart 4.4.

The proposed rule includes two clauses, 52.204-XY, *Release of Pre-Award Information* and 52.204-YY, *Release of Nonpublic Information*, that would require all offerors and contractors to agree to release nonpublic information to third-party contractors for purposes of performing another government contract. Contractors with such access would be contractually obligated to protect all nonpublic information

obtained through contract performance. This obligation would be imposed through a new clause, 52.204-XX, *Access to Nonpublic Information*, which would preclude the contractor from using nonpublic information for any purpose unrelated to contract performance, and it would require the contractor to safeguard nonpublic information from unauthorized disclosure, disclose only on a “need to know” basis, educate employees of their obligation to protect the information, obtain NDAs from employees who have access to nonpublic information; and indemnify the Government for liability related to disclosure or misuse of the information. The rule also includes alternate versions of the clause that are prescribed for situations in which the contracting officer determines that the contractor should execute a confidentiality agreement with a third party or in which the contractor may require access to a third party’s facilities or nonpublic information that is not in the Government’s possession.

Further, under the proposed FAR rule, contracting officers would be required to address situations in which an offeror has access to nonpublic information that: (a) was provided by the Government; (b) is not available to other offerors; (c) is competitively useful; and (d) provides an unfair advantage. To assist agencies in identifying such situations, a new solicitation provision, 52.204-YZ, *Unequal Access to Nonpublic Information*, would require offerors to identify whether they or any affiliates possess nonpublic information that is “relevant to the current solicitation” and was provided by the Government. When resolution is required, the contracting officer has discretion to adopt an appropriate mitigation technique, which could include disclosing information to all offerors, obligating an offeror to implement a firewall, or disqualifying the offeror with access to the information.

B. Existing Substantial Statutory and Regulatory Activity has Removed a Need for the Recommendation

ACUS has proposed six recommendations:

1. The [Councils] 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.
2. The model FAR provisions or clauses should apply to PCI-Risk and Information-Risk Contracts.
3. Agencies should have the discretion whether to use or modify the model FAR provisions or clauses.
4. The FAR should include model provisions or clauses for use in PCI-Risk procurements.
5. The FAR should include model provisions or clauses for use in Information-Risk procurements.

6. Agencies not covered by the FAR may use the FAR provisions or clauses as a resource when negotiating contracts for activities falling in either of the "high risk" categories.

As the discussion in Section II.A. above demonstrates, Congress, OFPP, the Councils, and DoD already have focused significant attention on issues related to PCIs and access to nonpublic information by contractors and contractor employees. We respectfully submit that the issues raised by the Recommendation are encompassed within the scope of the completed and pending FAR and DoD rulemakings discussed above. In short, there is no pressing need to recommend regulatory action because the Councils and DoD, with direction from Congress, already have acted through these rulemakings.

III. CONCLUSION

For the reasons discussed above, the Section does not believe there is a pressing need for the ACUS Government Contractor Ethics Recommendation. Congress, the Councils, DoD, and others are very aware of the issues of potential contractor employee PCIs and access to nonpublic information, and have taken formal steps to address them.

The Section appreciates the opportunity to provide these comments and is available to provide additional information or assistance as you may require.

Sincerely,



Donald G. Featherstun
Chair, Section of Public Contract Law

cc: Cameron Hamrick (via e-mail)
Agnes Dover (via e-mail)
Marilyn Neforas (via e-mail)

Reeve Bull

From: jean public [jeanpublic@yahoo.com]
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Subject: PUBLIC comment ON FEDERAL REGISTER

Follow Up Flag: Follow up
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THIS AGENCY IS A TOOTHLESS WONDER. YOU CAN SET UP ALL THE ETHICS RULES IN THE WORLD, BUT IF YOU DONT ACT TO ENFORCE THEM THEY ARE SIMPLY TAKING UP TIME, SPACE AND MONEY. THAT IS THE WAY THAT VIOLATORS GET AWAY WITH IT FOR 20 AND 30 YEARS TODAY. THEY ARE ENGAGED IN CRIMINAL AND ETHICS VIOLATION AND THERE IS NO ENFORCEMENT SO THESE CRIMINALS GET AWAY WITH VIOLATIONS. MAKING THIS LAW ALSO APPLY TO CONTRACTORS, WHEN IT IS CLEAR EMPLOYEES ARE CORRUPT TO THE CORE, MEANS MORE PEOPLE WILL HAVE AN ETHICS LAW THAT IS NOT ENFORCED. THIS AGENCY IS NOT WORTH THE MONEY THE TAXPAYER SPEND ON IT BECAUSE THERE IS NO ENFORCEMENT. NOBODY IN THE DAMN AGENCY BRINGS ANY CHARGES EVER. YOU ALSO COULD HAVE THIS CONFERENCE AS A ONE DAY CONFERENCE, NOT TWO DAYS, IF YOU EXTENDED THE HOURS A BIT. THAT WOULD SAVE TAX DOLLARS, BUT OF COURSE THE WELL PAID FAT CAT BUREAUCRATS IN WASHINGTON DC AGENCIES DONT CARE ONE BIT ABOUT SAVING THE TAXPAYERS ANY MONEY. THIS IS AN INEFFECTUAL AGENCY, DOING NOTHING TO HELP THE CORRUPT SITUATION IN WASHINGTON DC. IT COSTS TAXPAYERS HUGE BILLIONS OF DOLLARS AND IS NOT WORTH THE PAPER THE ETHICS IS PRINTED ON BECAUSE IT IS NOT ENFORCED.

JEAN PUBLIC 8 WINTERBERRY COURT WHITEHOUSE STATION NJ 088889

[Federal Register: November 23, 2010 (Volume 75, Number 225)]
[Notices]
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From the Federal Register Online via GPO Access [wais.access.gpo.gov]
[DOCID:fr23no10-25]

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Notice of Public Meeting of the Committee on Administration

AGENCY: Administrative Conference of the United States.

ACTION: Notice of meeting.

SUMMARY: Notice is hereby given that the Administrative Conference of the United States will host a public meeting of the Committee on Administration of the Assembly of the Conference on Thursday, December 9, 2010 from 9 a.m. to 11 a.m. to consider a draft recommendation on the application of ethics rules to government contractors and their employees. To facilitate public participation, the Administrative

Conference is inviting public comment on the report and recommendation to be considered at the meeting, to be submitted in writing no later than December 6, 2010.

DATES: Meeting to be held December 9, 2010. Comments must be received by December 6, 2010.

ADDRESSES: Meeting to be held at Administrative Conference of the United States, Suite 706 South, 1120 20th Street, NW., Washington, DC

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20036. Submit comments to either of the following:

(1) E-mail: Comments@acus.gov, with ``Ethics Rules'' in the subject line; or

(2) Mail: Ethics Rules Comments, Administrative Conference of the United States, Suite 706 South, 1120 20th Street, NW., Washington, DC 20036.

FOR FURTHER INFORMATION CONTACT: Reeve T. Bull, Designated Federal Officer, Administrative Conference of the United States, Suite 706 South, 1120 20th Street, NW., Washington, DC 20036; Telephone 202-480-2083.

SUPPLEMENTARY INFORMATION: The Administrative Conference of the United States (ACUS) is charged with developing recommendations for the improvement of Federal administrative procedures (5 U.S.C. 591).

The Conference has engaged a Professor of Law at Washington University in St. Louis School of Law, Kathleen Clark, to research and prepare a report regarding whether ethics regulations analogous to those applicable to government employees should apply to government contractors and, if so, how such regulations should be imposed (the ``Ethics Report''). A copy of the Ethics Report is available at <http://www.acus.gov>. The Committee on Administration met on November 3, 2010 to discuss the Ethics Report and the broader issue of whether and how the regulations applicable to government contractors and their employees should be expanded.

From 9 a.m. to 11 a.m. on December 9, 2010, the committee will discuss a draft recommendation based on the Ethics Report and on the discussion from the first meeting. A copy of the draft recommendation will be made available at <http://www.acus.gov> prior to the December 9, 2010 meeting. This meeting will be open to the public and may end prior to 11 a.m. if business is concluded prior to that time. Members of the public are invited to attend the meeting in person, subject to space limitations, and the Conference will also provide remote public access to the meeting.

Anyone who wishes to attend the meeting in person is asked to RSVP to Comments@acus.gov. Remote access information will be posted on the Conference's Web site, <http://www.acus.gov>, by no later than December 6, 2010 and will also be available by the same date by calling the phone number listed above. Members of the public who attend the Committee's meeting may be permitted to speak only at the discretion of the Committee Chair, with unanimous approval of the Committee. The Conference welcomes the attendance of the public and will make every effort to accommodate persons with physical disabilities or special needs. If you need special accommodations due to a disability, please inform the Designated Federal Officer no later than 7 days in advance the meeting using the contact information provided above.

Members of the public may submit written comments on the report and recommendation to either of the addresses listed above no later than December 6, 2010. All comments will be delivered to the Designated Federal Officer listed on this notice. The Designated Federal Officer

will post all comments that relate to the report and/or recommendation on the Conference's Web site after the close of the comments period.

Dated: November 18, 2010.

Paul R. Verkuil,
Chairman.

[FR Doc. 2010-29506 Filed 11-22-10; 8:45 am]
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