



Conflicts of Interest It's a New Playing Field

**Steve Epstein
Judy Kim
Kim Rupert
Leigh Bradley**

June 19, 2009



Goals of Presentation

- Identify new requirements and risks which have emerged this year.
- Offer best practices to accommodate the new requirements and mitigate the new risks.
- Identify new risks and requirements on the horizon.
- Reap the wisdom in the room.



Agenda

- Personal Conflicts of Interest
- Organizational Conflicts of Interest
- Post-employment Restrictions
 - Including Ethics Pledge



Personal Conflicts of Interest

- National Defense Authorization Act for fiscal Year 2009:
 - Not later than 12 months after the enactment of the Act, the Administrator for Federal Procurement Policy, in consultation with the Director of the Office of Government Ethics, will review the Federal Acquisition Regulation (FAR) to determine whether revisions to the FAR are necessary to address personal conflicts of interest.
 - Not later than March 1, 2010, the Administrator shall submit to the Committees on Armed Services of the Senate and house, the Committee on Homeland Security and Governmental Affairs in the Senate, and the Committee on Oversight and Government Reform of the House a report setting forth its findings.



Personal Conflicts of Interest

- January 21, 2009 – Treasury Department Conflict of Interest Interim Rule, Federal Register, 1/21/09, page 3431: Are these new Treasury rules a sign of future government contracting?
 - New personal and organizational conflict of interest rules apply to contractors under the Troubled Assets Relief Program (TARP) effective January 21, 2009.

- Definition – Personal Conflict of Interest (PCI):
 - A personal, business or financial interest of an individual, spouse, minor child or other person with whom the individual has a close personal relationship that could adversely affect:
 - The individual’s ability to perform under the arrangement
 - His or her objectivity or judgment in such performance or
 - His or her ability to represent the interests of Treasury.



Personal Conflicts of Interest

- Contractors are responsible for obtaining information from management officials and key individuals about PCI prior to beginning work on the contract.

- Certain TARP contracts require contractors to obtain and review financial information from its employees such as:
 - Filer’s property interests and other assets
 - Transactions of property or investments
 - Gifts, reimbursements and travel expenses
 - Liabilities
 - Agreements or arrangements with employers
 - Outside positions
 - Compensation received in excess of \$5,000

- This is the same information required of federal employees on a public financial disclosure report, SF-278.



Personal Conflicts of Interest

- The Contractor's responsibilities regarding PCIs:
 - Disqualify employees with PCIs from performing work unless mitigation measures have neutralized the conflict.
 - Certify annually that management and key individuals performing work on the contract have no PCIs.
 - Adopt and implement procedures designed to discover, monitor, and report PCIs on a continuous basis.
 - Retain information needed to comply with the rule for three years following termination of contract.



OCI Basic Tenets

- Basics of FAR 9.5 regulation are designed to prevent:
 - Contractor's bias
 - Unfair competitive advantage

- FAR 9.502(c): An organizational conflict of interest may result when factors create an actual or potential conflict of interest on an instant contract, or when the nature of the work to be performed on the instant contract creates an actual or potential conflict of interest on a future acquisition. In the latter case, some restrictions on future activities of the contractor may be required.



New on the Horizon

- National Defense Authorization Act (NDAA)

- Weapons Systems Acquisition Reform Act (Levin/McCain)

- Other Trends:
 - Mitigation Plans and Firewalls
 - Increased requirements for disclosure/certification
 - Recent rulings



Best Practices

- Automated processes for identification and tracking
- Training programs
- Attacking the hidden risks
- Others?



Recent Post-Employment Issues

- Ethics Pledge (EO 13490)
- Section 847 (FY 08 NDAA)



Executive Order 13490, Jan. 21, 2009

Ethics Pledge Requirements

- Lobbyist Gift Ban – Obama Administration appointees may not accept gifts from registered lobbyists or lobbying organizations for duration of Government appointment; ban includes gift of free attendance at dinners, receptions, and similar “widely attended gatherings” if hosted by organization that files a lobbyist registration (many DoD contractors).
Exception: 501 (c) (3) organizations and colleges and universities.



Ethics Pledge Requirements

Incoming Revolving Door Ban

- Appointee entering the Government must be recused for two years from matters involving former employer or former clients, i.e., may not participate in any particular matter directly and substantially related to former company or former clients (law, consulting, etc.) unless a waiver is granted.
- “Former employer” and “former client” defined as person or entity for whom the appointee served or represented within two years of appointment.



Ethics Pledge Requirements

Additional recusal rules for incoming appointee who served as registered lobbyist within two years prior to appointment: Appointee may not seek or accept employment with any Executive agency the individual lobbied in last two years.



Ethics Pledge Requirements

- Revolving Door Ban for Outgoing Appointees – some, but not all, subject to a new, two-year cooling-off period
 - Departing “senior” appointees (defined by base pay – in 2009 it is \$153,105 or higher), must abide by a two-year cooling off period. This means the former senior official may not communicate with, lobby back to, or represent another before his or her former agency for two years after leaving Government service.



Section 847 (FY 08 NDAA)

- Departing DoD employees (within two years of leaving DoD) must request opinion.
- Ethics officials must provide opinion.
- DoD contractors may not hire without letter (or has requested it more than 30 days before receiving compensation).



Section 847

- Covered DoD Official (who left DoD after 1/28/08)
 - Senate – confirmed appointees,
 - Senior Executive Service (SES) officials, and
 - General and Admirals
 - Who personally and substantially participated in procurements greater than \$10M, or
- Any employee who served in a function identified by the Procurement Integrity act (PIA) (For contracts in excess of \$10M.):
 - Program manager
 - Deputy program manager
 - Procuring contracting officer
 - Administrative contracting officer
 - Member of source selection evaluation board
 - Chief of financial or technical evaluation team



Section 847

- References:
 - FY 08 NDAA (Pub L. No 110-181)
 - SOCO Advisory 8-03 (4/28/08)
 - www.dod.mil/dodgdc/defense_ethics/2008_Advisories_ADV-0803.htm



Post-Employment Best Practices

- Employment Discussions
 - Company policy regarding discussions
 - Communication/training of policy
 - No discussions without recusal
- Recruiting
 - Screening by ethics official
- Require ethics opinion
 - Procurement Integrity Act restrictions
 - 18 USC 207
 - Agency restrictions
- Indoctrination
 - Interview new employee. Confirm understanding of restrictions.
 - Advise employee's supervisor of restrictions.
 - Ensure no transfer of non-public information.



Questions & Comments
