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New DFARS Rule Underscores the Importance of Compliance With Employment Restrictions

A change to the Department of Defense (DoD) Federal Acquisition Regulation (FAR) Supplement (DFARS) requires contractors that employ certain former DoD senior officials and acquisition personnel and are competing for DoD contracts to represent that those officials and personnel are in compliance with their post-government employment restrictions. Specifically, DFARS § 252.203-7005(b) requires the following representation:

> By submission of this offer, the offeror represents, to the best of its knowledge and belief, that all covered DoD officials employed by or otherwise receiving compensation from the offeror, and who are expected to undertake activities on behalf of the offeror for any resulting contract, are presently in compliance with all post-employment restrictions covered by 18 U.S.C. 207, 41 U.S.C. 2101–2107, and 5 CFR parts 2637 and 2641, including Federal Acquisition Regulation 3.104–2.

As defined in DFARS § 252.203-7000, "covered DoD officials" include any individual who left DoD service on or after January 28, 2008 and

- Participated personally and substantially in an acquisition (as defined in 41 U.S.C. 131) with a value in excess of $10 million and served in (i) an Executive Schedule position under subchapter II of chapter 53 of Title 5, United States Code, (ii) a position in the Senior Executive Service under subchapter VIII of chapter 53 of Title 5, United States Code, or (iii) a general or flag officer position compensated at a rate of pay for grade O-7 or above under section 201 of Title 37, United States Code; or
- Served in DoD in one of the following positions: Program manager, deputy program manager, procuring contracting officer, administrative contracting officer, source selection authority, member of the source selection evaluation board, or chief of a financial or technical evaluation team for a contract in an amount in excess of $10 million.

The post-government employment restrictions that are referenced in the new DFARS representation and contained in 18 U.S.C. § 207, 41 U.S.C. §§ 2101–2107, 5 C.F.R. parts 2637 and 2641, and FAR § 3.104–2 are not limited to former DoD officials and employees. 18 U.S.C. § 207 is a criminal statute that includes various post-government employment restrictions, the scope and extent of which are explained in 5 C.F.R. Part 2641. 41 U.S.C. §§ 2101–2107 is the Procurement Integrity Act that is implemented by FAR § 3.104-2.

That these statutory and regulatory post-government employment restrictions are not limited to former DoD employees is important in light of certain responses provided by DoD to various comments submitted in connection with the promulgation of the new DFARS representation. These responses, which are set forth below, make it clear that the contractor's compliance obligations regarding the referenced post-government employment restrictions extend beyond "covered DoD officials" and DoD procurements.

The following two "Comments" and "Responses" were included under a heading entitled "Contractor Compliance Responsibility" in the commentary that accompanied the final DFARS rule:

> **Comment:** Two respondents noted that compliance with ethics rules is the responsibility of the covered officials, not the contractor employing them. According to the respondents, although contractors instruct and train employees to observe all post-government employment restrictions, contractors have no official compliance responsibility regarding employees' post-government employment restrictions.
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> **Response:** FAR subpart 3.10, entitled "Contractor Code of Business Ethics and Conduct," requires, among other things, that contractors exercise due diligence to prevent and detect criminal conduct and otherwise promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law. Contractors must also timely disclose to the Government any credible evidence of a violation of criminal law, which would include, for example, a violation of 18 U.S.C. 207 (post-Government employment restrictions). Accordingly, contractors, as employers of covered officials, have an affirmative compliance responsibility regarding employees' restrictions. Contractors must ensure their employees avoid engaging in criminal conduct while carrying out duties on the contractor's behalf. Stated individuals' resumes generally do not include every particular matter on which they worked. Hiring contractors have a duty to interview their new hires who formerly worked for DoD and screen their work experiences for relevant particular matters.
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> **Comment:** Two respondents asserted that implementation of the proposed rule would require contractors to establish compliance systems to identify, track, educate, and require periodic certifications from employees and consultants across their businesses (rather than those specific to a contract) to identify former DoD covered officials. According to the respondents, such systems would require additional compliance mechanisms and personnel to design, implement, execute, test, and evaluate, thereby raising overhead costs for contractors, which could ultimately increase costs to the Government.
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> **Response:** Contractors should know on what particular matters covered officials worked and already ensure employees are not assigned to work on those matters because there are current requirements to maintain and track this information. FAR subpart 3.10 requires contractors to be aware of employees who are covered officials and any existing prohibitions and requirements relating to their employment. In addition, when contractors hire covered DoD officials, DFARS 252.203–7000(b) requires them to determine whether the covered officials sought and received advice regarding post-employment restrictions on behalf of the contractor. This rule does not require the creation of new compliance systems, and additional costs should not be incurred.[1]

The following two "Comments" and "Responses" were included under a heading entitled "Contractor Identification of 'Covered Officials' and 'Particular Matters'" in the commentary that accompanied the final DFARS rule:

> **Comment:** One respondent stated that "identifying which job applicants are 'covered officials' is not trivial." This respondent explained that "resumes are often tailored to the job being sought: Certain items are highlighted, others omitted entirely. Consequently, while it is usually simple to tell if a potential candidate was a 'senior official,' it is often difficult to identify if he or she was an 'acquisition executive.'"
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> **Response:** The term "covered DoD official" is defined in DFARS 252.203–7000(a) as an individual who "left DoD service on or after January 28, 2008," and either "participated

[1] 76 FR 71826-27 (Nov. 18, 2011).

personally and substantially in an acquisition as defined in 41 U.S.C. 131 with a value in excess of $10 million" and who served in specifically highlighted positions or served within DoD as "program manager, deputy program manager, procuring contracting officer, administrative contracting officer, source selection authority, member of the source selection evaluation board, or chief of a financial or technical evaluation team for a contract in an amount in excess of $10 million." Contractors need to seek clarification with job applicants and employees as to whether the applicant meets the DFARS definition in order to ensure employees are in compliance with DoD post-employment restrictions.

Comment: A respondent highlighted potential difficulties in identifying "particular matters" on which the job applicant worked. The respondent stated that ethics opinions rarely identify the "particular matters" upon which the former DoD official worked and to which post-employment restrictions apply. The respondent concluded that failure to identify "particular matters" is "a significant problem for individuals (and their employers) whose government portfolio was substantially broader" than simply working on one program during their Government career.

Response: It is not feasible or practicable to expect that a Government ethics official list all "particular matters" for a Government employee. The most likely, and probably only, source for this type of information is the Government official requesting the postemployment restrictions opinion from the ethics official. Failure of the Government employee to provide a comprehensive list would inappropriately limit the scope of the ethics opinion to those items listed. The former Government official is in the best position to (1) recall the particular matters that he or she worked during his or her Government tenure and (2) advise future employers of his or her involvement in "particular matters" when the employer provides work assignments. The Code of Federal Regulations contains a definition of "particular matter," as well as examples of what a "particular matter" is. The examples provide guidance for the types of situations and circumstances covered by the term. It is unrealistic to expect a finite set of examples listed in the regulations to cover all possible circumstances and situations that could arise regarding what constitutes a "particular matter."[2]

Although two respondents asserted that the new representation would require contractors to establish new compliance systems, DoD disagreed and found that contractors would not need to create any new compliance systems or incur any additional costs. The logic supporting DoD's finding is important to understanding how the government views the contractor's obligations under FAR Subpart 3.10 and essentially reasons as follows:

Because FAR Subpart 3.10 requires that contractors:

> exercise due diligence to prevent and detect criminal conduct and otherwise promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law and
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> timely disclose to the Government any credible evidence of a violation of criminal law (including the post-Government employment restrictions in 18 U.S.C. 207),

contractors as employers:

> have an affirmative compliance responsibility regarding their employees' post-Government employment restrictions, and
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> must ensure their employees avoid engaging in criminal conduct while carrying out duties on the contractor's behalf.

[2] 76 FR 71827 (Nov. 18, 2011).

SQUIRE SANDERS

In other words, DoD's position is that contractors that are complying with the mandate of FAR Subpart 3.10 will need to do nothing more to comply with the new representation in DFARS § 252.203-7005. DoD's commentary on the final rule provides the following guidance on a contractor's affirmative compliance responsibility under FAR Subpart 3.10 regarding its employees' post-government employment restrictions:

1. Because resumes generally do not include every particular matter on which an individual worked, contractors must interview job applicants and employees who formerly worked for the Government to clarify whether they are covered by post-Government employment restrictions and, if so, to screen their work experiences for relevant particular matters on which they worked during their Government tenure.
2. Contractors must maintain a list of the particular matters on which its employees worked while employed by the Government and adopt processes and procedures to assure that those employees are not assigned to work on any of those matters on behalf of the contractor.

Although the new requirement in DFARS § 252.203-7005 applies only to contractors seeking work from DoD, the government clearly interprets FAR Subpart 3.10 as imposing an affirmative compliance responsibility on all government contractors and subcontractors to ensure that their employees comply with any applicable post-government employment restrictions. Contractors should review their compliance procedures to see if they adequately identify those restrictions and ensure that employees are not assigned work in violation thereof.

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February 2012