

ALERT

DoD Issues Final Rule Amending DFARS to Require Contractors to Represent Former Officials' Compliance with Post-Employment Restrictions; Update: President Signs Legislation to Repeal Three Percent Withholding On Payments to Government Contractors

November 22, 2011

On November 18, 2011, the Department of Defense (DoD) issued a final rule requiring every contractor responding to a DoD solicitation to represent that former DoD officials employed by the contractor are in compliance with statutory and regulatory restrictions on post-employment activities. 76 Fed. Reg. 71,826 (Nov. 18, 2011). This final rule, effective November 18, 2011, substantially incorporates the text of a proposed rule previously published in the Federal Register on June 6, 2011.

The final rule amends the Defense Federal Acquisition Regulation Supplement (DFARS) to require that all DoD solicitations include a "Representation Relating to Compensation of Former DoD Officials" clause, DFARS 252.203-7005. 76 Fed. Reg. 71830. Under the final rule, any offeror that submits an offer containing the new DFARS clause must represent "to the best of its knowledge and belief" that "covered DoD officials" are in compliance with post-employment restrictions set forth in: (1) 18 U.S.C. § 207, which prohibits a former Government employee from communicating with, or appearing before, the Government with respect to certain matters; (2) related Office of Government Ethics guidance found at 5 C.F.R. Part 2641; and (3) the

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Procurement Integrity Act, codified at 41 U.S.C. § 2104 and implemented by FAR 3.104-2, which prohibits a former official from receiving compensation from a defense contractor for a one year period if the official performed certain procurement-related duties involving the contractor with respect to contract actions valued in excess of \$10 million.

Like the proposed rule and an earlier 2009 rule, the final rule applies only to "covered DoD officials." These include officials who leave or left federal service on or after January 28, 2008, and who (a) are former General or Flag officers, members of the Senior Executive Service, and Presidential Appointees who participated personally and substantially in an acquisition with a value in excess of \$10 million, or (b) previously served in one of several specified positions including program manager, contracting officer, source selection authority or source selection evaluation board member for a contract with a value in excess of \$10 million. See DFARS 252.203-7000.

The requirement that a contractor certify compliance "to the best of its knowledge and belief" remains undefined under the new rule. In response to a comment requesting clarification of that standard, DoD explained only that the "best of knowledge" phrase is "a recognized legal term of art" that should be familiar to contractors. 76 Fed. Reg. 71,827. In a similar context, the Court of Appeals for the D.C. Circuit has stated that the question whether such a certification is proper turns on "whether [the certifier] in fact believed his answer to be true and, if so, whether that belief can be reconciled with the facts within his knowledge." *Skinner v. Aetna Life & Cas.*, 804 F.2d 148, 151 (D.C. Cir. 1986) (holding that what the certifier believed to be true was the "determining factor in judging truth or falsity of his answer . . . but only so far as that belief was not clearly contradicted by factual knowledge on which it was based").

The final rule makes two noteworthy revisions to the proposed rule. First, the final rule limits the scope of the required representation to those "covered DoD officials" who are "expected to undertake activities on behalf of the offeror for any resulting contract." Thus, an offeror's representation under the new DFARS clause does not cover matters unrelated to the solicitation, such as matters related to the officials' other activities or employment. Second, the final rule clarifies that the clause, and consequently the representation of compliance, is required in all solicitations, including solicitations for task and delivery orders. 76 Fed. Reg. at 71830; DFARS 203.171-4(b).

The new representation requirement reinforces for contractors the need to ensure that their compliance programs include compliance by former Government officials with applicable restrictions on their post-employment activities. Wiley Rein routinely counsels government contractors on compliance programs, including the intricacies of compliance with these post-employment restrictions.

Update: President Signs Legislation to Repeal Three Percent Withholding On Payments to Government Contractors

On November 21, the President signed H.R.674, legislation that repeals the three percent withholding on payments to government contractors and provides tax incentives to businesses that hire unemployed veterans. The repeal measure, as amended by the Senate, had cleared Congress on November 17 after the House adopted the Senate version of the bill.