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an organization of research universities

COUNCIL ON GOVERNMENTAL RELATIONS

1200 New York Avenue, N.W., Suite 750, Washington, D.C. 20005
(202) 289-6655/(202) 289-6698 (FAX)

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May 21, 2007

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Ernest Woodson
Procurement Analyst
General Services Administration
Regulatory Secretariat (VIR)
1800 F Street, NW
Room 4035
Washington DC 20405

Subject: FAR Case 2006-007
Contractor Code of Ethics and Business Conduct

Dear Mr. Woodson

The Council on Governmental Relations (COGR) is an association of more than 170 research universities and their affiliated academic medical centers and research institutes. COGR concerns itself with the influence of government regulations, policies, and practices on the performance of research conducted at its member institutions.

We support the objective of the proposed rule in assuring that government contractors conduct themselves with the highest degree of integrity and honesty. We also appreciate the goal of establishing clear and consistent policy across federal contracting with regard to requirements for contractor codes of ethics and business conduct. Currently three agencies delineate Contractor Responsibility to Avoid Improper Business Practices [VA Acquisition Regulations §803.70; EPA Acquisition Regulations §1503.5] and Contractor Standards of Conduct [DFAR §203.70), as discussed in the FAR Case.

The difference between the current regulatory requirements in DOD, EPA and VA acquisitions and the proposed FAR rule is the actual implementation. In each of the current regulations the policies state that contractors "should have standards of conduct and internal control systems" that reflect the size of the organization, promote the standards, facilitate timely discovery and ensure corrective measures. Each includes a requirement to display an agency hotline poster, but the thresholds for triggering the hotline requirement vary.

The proposed FAR rule outlines similar expectations but the approach appears more prescriptive. The policy at Subpart 3.1002 provides that contractors should have a written code of ethics and business conduct, with training and internal control systems that reflect the size of the organization, facilitate timely discovery and ensure corrective measures. However, the proposed FAR clause at 52.203-XX states that contractors shall have a written code of ethics and business conduct. It goes on to prescribe requirements for training and internal control systems, and for display of physical and electronic fraud hotline posters. These requirements exceed in a significant manner, the current DOD, EPA, and VA regulations.

The proposed FAR requirements apply to contracts exceeding \$5 million, performed in the United States with performance periods of 120 or more days. They also flow down to subcontracts that meet these criteria. We expect that universities will be impacted by these requirements, especially given the flowdown requirements for prime contracts.

While we support the intent, we note that there is no statutory requirement or authority for the proposed rule except the general provision for setting rules for the acquisition of goods and services. Moreover, the proposed rule raises issues of consistency with other federal initiatives. We recommend that research and development contracts issued to universities and other nonprofit organizations be exempted from the requirements.

It is important to note that research institutions uniformly have business codes of conduct and internal control mechanisms to enable the reporting of improper conduct, and disciplinary mechanisms to respond to improper conduct. OMB Circular A-110, Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations, requires “written standards of conduct governing the performance of its employees engaged in the award and administration of contracts” [A-110, C-42]. We conduct internal reviews of these controls and receive external audits each year as required by OMB Circular A-133. Compliance with these requirements also is an important component of agency Inspector General reviews and audits. The proposed FAR requirements appear unduly prescriptive for universities, and clearly were developed for companies, as referenced several times in the proposed rule.

In addition, the National Science and Technology Council’s Committee on Science is currently engaged in an inter-agency initiative to develop voluntary compliance guidelines for recipients of Federal research funding from all agencies across the Federal government. This effort is being pursued to help recipients address the prudent management and stewardship of research funds. The effort is housed within the NSTC to promote common policies and procedures among the agencies.

Because universities and other nonprofit organizations receive federal funding through the full range of mechanisms – grants, contracts, cooperative agreements, etc. – it is equally important to have common practices across mechanisms. A code of conduct and the internal controls necessary to discover and correct ethical violations would be a critical component of a broad-based compliance program.

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As a consequence, we believe that research and development contracts issued to universities and other nonprofit organizations should be exempt from this proposed FAR Subpart 3.10 in anticipation of the inter-agency initiative in compliance. As a minimum, implementation of the FAR rule should be deferred for such contracts pending completion of this initiative and review for consistency with the proposed rule.

We appreciate the opportunity to comment, and urge that you seriously consider our comments and provide an exemption as requested.

Sincerely,

Anthony P. DeCrappeo
President