

Ethical Foundations of Government Contracting



Palmetier Law was founded to help small and medium-sized businesses navigate the maze of government contracting regulations. As a WOSB/SDVOSB, Karri understands the entrepreneurial spirit of a small business and appreciate the difficulties they face to enter the government contract market. With more than two decades of experience in the Air Force, major defense contractor and law firm, she brings a unique perspective as a trusted adviser to support companies.

My Primary Practice areas are:

- Small Business Requirements
- Data Rights and Patents
- Ethics Programs
- Contract Administration and Terms/Conditions
- Commercial Item Status
- Subcontract Management
- Non-FAR Contracts
- Compliance and Training

This presentation has been prepared for information purposes and general guidance only and does not constitute professional advice. You should not act upon the information contained in this publication without obtaining specific professional advice.

- Working with the Government
- Ethics for Government Employees
- Contractor Ethics
- Why Ethics Matter

- When working with Government employees, there are different interrelated laws governing what may be given and when and value.
- The laws fall into the categories of gifts, bribery, and anti-kickbacks.
- These laws apply to the U.S. Government employees too – so you are helping them

Gifts to Government

- Reference: 18 USC §§201 and 208; FAR 52.203-3, Gratuities
- Recognizes that contractor personnel may be embedded within a government team and work side by side. However, contractor personnel are not government employees and must be treated differently
- Government employees may not solicit or accept a gift and Contractors (including individual employees and agents) may not offer or give government personnel unless
 - Modest food and refreshment when not served as a meal
 - Greeting cards
 - Government employee pays full market price

- Exceptions (con't)
 - \$20/\$50. This exemption applies to the full market value of the gift at \$20 per occasion and \$50 annual aggregate. Applies to the entire source (ie company).
 - Companies must track all gifts
 - Relationship exists separate from government employment (e.g., family members)
 - Widely Attended Gathering – must be approved by agency lawyer, have become difficult
- May NEVER accept cash

- Reference: 18 U.S.C §201
- It's a crime to corruptly **give, offer or promise** anything of value directly or indirectly to a public official with the intent to influence
- It's a crime to corruptly **solicit or receive** anything of value as a public official to be influenced in the performance of an official act

- References: 41 U.S.C. Chapter 87; and FAR 52.203-7, Anti-Kickback Procedures
- Prohibits contractors from providing, attempting to provide, offering to provide, soliciting, accepting or attempting to accept Kickbacks
- Kickback means anything of value given for purposes of improperly obtaining or rewarding favorable treatment in relation to a government contract
 - Applies to subcontracts too

Ethics for Government Employees

- Government employees have additional ethics laws that contractors need to be aware of
 - Conflicts of Interest
 - Outside and Post-Government Employment
- These laws will apply even if you do not know or haven't met the government employee

- Personal Financial Conflicts, 18 U.S.C §208
 - Prohibits government employees from working on a particular matter if it will affect the financial interest of (nonexhaustive list):
 - The employee, spouse/domestic partner, minor children
 - A company with which the employee is employed
 - An organization in which the employee actively participates
 - A company with which the employee is seeking or negotiating employment
 - Seeking and Negotiating are interpreted broadly and include hints at “are jobs available”, “would you be interested in”, “give us a call”

- Personal Financial Conflicts, 18 U.S.C §208
 - Outside or Future Employment
 - Must either decline opportunity and request communications cease or recuse themselves from government work with approval of supervisor
 - If submitted an unsolicited application, then must wait 2 months
 - Technically, a waiver is possible but not generally granted
 - Additional rules apply if government employee files an OGE Form 278e or 450
 - May not own companies receiving a government contract. FAR 3.6

- Terminal Leave (applies to active duty)
 - Still a government employee and subject to the above laws and rules
 - May work with conditions if employer is a government contractor. 5 U.S.C. §5534a
 - Special programs (Skillbridge) have more flexibility
 - Requires agency approval if file OGE Form 278/450
 - May not
 - Hold a civil office
 - Act adverse to the government
 - Represent a third party's interest to the Government so must be behind the scenes

Outside Employment

- Outside Employment, 18 U.S.C. §§203 and 205
- Applies to active duty (including on terminal leave), civilian, special government employees.
 - Extended to Enlisted and Guardsmen by regulation
- May have second employment but may **not**
 - Represent any third party on any matter in which the U.S. Government is a party or has a direct and substantial interest
 - Representation includes participating in meetings, drafting reports for submission, preparing claims, or having their name on submissions
 - May work “behind the scenes”
- Active-duty military may not hold any other Federal position. JER 5-404

- Compensation Bans under Procurement Integrity Act, FAR 3.104
 - Applies to all source selections in excess of \$10M (competitive or sole source) if government employee:
 - Served as: Procuring Contracting Officer (PCO); Source Selection Authority (SSA); Members of the Source Selection Evaluation Board (SSEB); Chief of a financial or technical evaluation team; Program Manager; Deputy Program Manager; or Administrative Contracting Officer (ACO)
 - Made the decision to: award a contract; award a subcontract; award a modification of a contract or subcontract; award a task order or delivery; establish overhead or other rates valued; approve issuing a payment or payments; or pay or settle a claim.
 - Rules differ slightly for subcontractors

Post Government Employment Restrictions

- Compensation Bans under Procurement Integrity Act, FAR 3.104
 - Prohibits receiving any compensation for one year after termination of employment or event
 - Compensation includes wages, salaries, honoraria, commissions, professional fees, or any other form
 - Technically doesn't apply to subcontractors but perceptions matter
 - Legal Opinions. Agency officials and former agency officials may request an advisory opinion as to whether he or she would be precluded from accepting compensation from a particular contractor
 - For DoD, prime contractors must ensure certain former senior officials (SES or above O-7) obtain a legal opinion. DFARS 252.203-7000, Requirements Relating to Compensation of Former DoD Officials
 - Good practice for companies to require and to obtain a copy

- Representation Bans, 18 U.S.C. §§207-208
 - Former military officers and employees involved in a particular matter must not represent a company on that matter to the Government
 - Representation means to appear before or communicate with a government person with an intent to influence
 - Can mean merely appearing, signing a document submitted to the Government, being referenced as an authority
 - Lifetime Ban
 - If participated personally and substantially
 - Non-Governmental parties involved
 - “Lifetime” means the matter

- Representation Bans, 18 U.S.C. §§207-208
 - 2 Year Ban
 - Under official responsibility during one-year prior to leaving federal service
 - Non-Governmental parties involved
 - Legal letters may be requested but government lawyers are not required to do (and don't like)
 - Not binding but can give idea of whether Government will care

Post Government Employment Restrictions

- Cooling Off Period for Senior Officials, 18 U.S.C. §207
 - Military in O-7 or above and Civilians with pay equals 86.5% of annual rate of Level II of Executive Schedule
 - One Year for O-7 and O-8 and 2 years for O-9 and O-10
 - Prohibits communication to or appearing before former agency with intent to influence a particular matter and engaging with other executive officials outside the DoD on matters relating to the DoD
 - Agency broken into following components: Services, Air Defense Logistics Agency; National Geospatial-Intelligence Agency; Defense Threat Reduction Agency; National Security Agency; and the National Reconnaissance Office
 - Political appointees cannot benefit from components
 - Foreign Entities. Additional restrictions apply to working for or representing foreign entities before any governmental entity. Foreign entities include foreign governments, foreign political parties, and groups exercising de facto political jurisdiction

- Military Retirees
 - No civilian employment within DoD for 6 months. 5 U.S.C. §3326
 - Retired military and reservists may not be employed by a foreign government unless Service Secretary and Secretary of State approve. 37 U.S.C. §908
 - May use military title in connection with a commercial enterprise as long retired status is clearly indicated, no implication of DoD endorsement, and DoD isn't discredited

• Practice Tips

- Do not engage in employment discussions with any government employee involved in a matter in which the company has an interest unless
 - Approved by a company executive
 - The individual has recused themselves in writing with appropriate office. Obtain a copy of the communications.
- Obtain a copy of the Legal Opinion letter

- As a government contractor, there are additional ethics laws that apply to the companies and its personnel
 - Personal Conflicts of Interest
 - Organizational Conflicts of Interest
 - Mandatory Disclosure Requirements
 - Procurement Integrity Act
 - Foreign Corrupt Practices Act
- These laws apply and some are incorporated into your contract terms. While based on the FAR, they may apply to other activities too

- Reference: FAR 52.203-16, Preventing Personal Conflicts of Interest
- Government extends many of the ethics obligations to contractor personnel
- Applies when contractor is providing acquisition services on behalf of the Government to include: acquisition planning, developing statements of work; developing requirements; evaluating proposals; or administering contracts
- Personal conflict of interest include financial interests, employment interests, and gifts

- Contractor must
 - Identify and prevent contractor employees (including close members of the family or household) and independent contractors
 - Inform employees and independent contractors of these obligations
 - Disclose and prevent personal conflicts of interest
 - Not use non-public information accessed through performance for personal gain; and
 - Avoid even the appearance of a personal conflict of interest
 - Report immediately any violations to the contracting officer

Organizational Conflicts of Interest (OCI)

- Reference: FAR 9.5
- OCIs occur when conflicts of interest in part of the company or held by one person are imputed to the rest of the company (e.g., evaluation of technical performance by one part of the company and a different part of the company is performing the technical work; drafting statements of work in a competitive proposal)
 - Impaired Objectivity
 - Biased Ground Rules
 - Unequal Access to Information
- OCIs most frequently occur contracts for management support service; consultant and professional services; technical evaluations; or systems engineering and technical direction
- Contracting officers must evaluate each new acquisition and avoid or neutralize any potential OCI
- Contracting officers may include a full text clause on identifying and managing OCIs to include OCI Mitigation Plans

Organizational Conflicts of Interest (OCI)

- Hiring former government employee may be grounds for “unfair competitive advantage” even if no OCI exists
 - Contractors may lose contracts if GAO/Courts find unfair competitive advantage
 - Even if no “actual” impropriety is found so long as there is a determination of an unfair competitive advantage
- Requires more than speculation but hard facts showing if contractor received non-public information, information was proprietary, and whether competitively useful
- Create firewalled proposal teams if incumbent crew has access to third party proprietary who may be competitor

Organizational Conflicts of Interest (OCI)

- Companies need to ensure it (and supply chain) don't have actual or potential conflicts that could create an OCI
 - Track and evaluate all active and potential contracts
- Monitor independent contractors
 - 1099s are not treated differently and can be more dangerous because they perform work to support multiple companies
 - Need to know all the other work they perform
- Assess subcontractors and require inclusion of OCI clause and certifications

Mandatory Disclosure Requirements

- Reference: FAR 52.203-13, Contractor Code of Business Ethics and Conduct
- Applies to contracts in excess of \$6M and 120 days
 - Small businesses are exempt from some of the requirements but must
 - have a written and published Code of Conduct,
 - promote ethical behaviors, and
 - have a means of preventing and detecting criminal conduct
- Must report violations by a principal, employee, agent, or subcontractor of certain laws relating to fraud, conflict of interest, bribery, gratuities, and false claims
 - Must report even if FAR 52.203-13 doesn't apply because failure to report is basis for suspension and debarment
- Must report overpayments as required by multiple payment clauses

- Reference: 41 U.S.C. §§2101-2107 and FAR 3.104-3
- Procurement Information
 - Prohibits disclosing, receiving, offering or soliciting government source selection and contractor proposal information
 - Source Selection: source selection plans, technical evaluation plans, technical evaluations of proposals, cost or price evaluations of proposals, competitive range determinations, rankings of bids, proposals, or competitors, reports and evaluations of source selection panels; and other information that could jeopardize the integrity of the competition
 - Contractor Proposal: cost or pricing data, indirect costs or labor rates, and other proprietary information

- Prohibition includes contractor employees are currently advising or have advised the Government on procurements or have access to the information by virtue of their position
- Must report potential violations
 - Can result in exclusion from competition
 - Report violations to company person who **is not involved** in proposal preparation

- Reference: 15 U.S.C. §§ 78dd-1
- Applies if interacting with any foreign government, foreign governmental official, or any foreign instrumentality including companies owned in whole or in part by foreign governments
- Prohibits giving of gifts to foreign officials to influence the foreign official in his or her official capacity, induce the foreign official to do or omit to do an act in violation of his or her lawful duty, or to secure any improper advantage in order to assist in obtaining or retaining business for or with, or directing business to, any person

Why Ethics Matter

- There are sound business reasons for ethical compliance – not just with the law but also with the spirit of the law
- There are consequences of noncompliance for companies and individuals

Ethics is Good for Business

- Honesty is the first chapter in the book of wisdom. **Thomas Jefferson**
- Globalization means that business strategy and business ethics cannot be separated from each other. **Ofra Strauss**
- The truth of the matter is that you always know the right thing to do. The hard part is doing it. **Gen. H. Norman Schwarzkopf**
- In looking for people to hire, you look for three qualities: integrity, intelligence, and energy. And if they don't have the first, the other two will kill you. **Warren Buffet**
- It takes 20 years to build a reputation and five minutes to ruin it. If you think about that, you'll do things differently. **Warren Buffett**
- If ethics are poor at the top, that behavior is copied down through the organization. **Robert Noyce**
- There's no such thing as business ethics; there's just ethics. And ethics makes no concessions for the real or imagined necessities of making a profit. **Michael Josephson**

Consequences of Noncompliance

- Individuals
 - May be disciplined or terminated
 - May be suspended or debarred
 - May be jailed
 - Develop a negative reputation for integrity
- Company
 - May be suspended or debarred
 - May have contract(s) terminated for default
 - Company officers and executives and those signing certifications can be found liable and face individual criminal charges
 - Develop a negative reputation for integrity
- Laws apply to government personnel
 - Help them by not putting them in difficult position

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