



Contractor Personnel in the Federal Workplace: Confronting the Challenges

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Selected Topics

- Introduction
- Why Are Contractor Ethics Important Now?
- Personal Services Contracts
- Inherently Governmental Functions
- Organizational Conflicts of Interest (OCI)
- Contracting with Government Employees
- Identifying Contractor Personnel
- Gift Issues
- Protecting Information
- Personal Relationships

Introduction

- Generally, conflict of interest (COI) laws and Standards of Ethical Conduct (or DoD Joint Ethics Regulation) do not apply to contractor employees, even when;
 - Performing the same/similar work
 - Working side-by-side in the Federal workplace... or the contractor workplace... or on the battlefield...
- Different loyalties
- Result? Ethical issues and actual or apparent COIs

Introduction

Contractor Ethics “Rules” Include:

- Certain COI laws (e.g., bribery)
- False statement/false claims laws
- Procurement Integrity Act
- Federal Acquisition Regulations (FAR)
 - 3.104 Procurement Integrity
 - 3.2 Contractor gratuities to Government personnel
 - 9.1 Responsible Contractors
 - 9.4 Debarment, Suspension
 - 9.5 Organizational and Consultant COI
 - 37.104 Personal Services Contracts

Introduction

Contractor Ethics “Rules” Include:

- Agency Regulations and Practices
- Contract Provisions
- Corporate Compliance Programs
- Industry Best Practice Groups (e.g., DII)
- DOJ Charging Guidelines
- Organizational Sentencing Guidelines

Introduction

Are Existing Rules Enough?

- Enron, Global Crossing, WorldCom
- Misuse of Raytheon proprietary information by Boeing employees*
- DAR Council Transformation Task Force to identify changes to Defense Federal Acquisition Regulation Supplement (DFARS)
- Firms new to Federal contracting
- Lost Federal acquisition employees

* See GAO Report 03-324R, Jan. 27, 2003; *Washington Post*, Jan. 30, 2003, at A21.

Armageddon or Nirvana?

Some Different Perspectives

- Treat certain contractor personnel like Government employees
- Use contract clauses
- Identify and remedy conflicts/issues on a case-by-case basis
- Let contractors self-regulate and self-report

Why Are Contractor Ethics Important Now?

- **Many Federal Contractors**
 - 72,000 contracts worth over \$215B*
 - 5.6M contractor personnel worked on Federal contracts**
 - DoD approximately 60% contractor personnel

* GSA's Federal Procurement Data Center.

** Data from Paul C. Light, *The True Size of Government* (1999), as of 1996 .

Why Are Contractor Ethics Important Now?

- **The Competitive Sourcing Initiative**
 - Open up 425,000 federal “commercial” jobs to public–private competition
 - OMB told agencies to compete 15% of commercial jobs by October
 - DoD competing 30,000 commercial civilian positions*
 - Army plan would subject 200,000+ employees to competition (biggest privatization ever)
 - DOE’s 1,000-IT position competition (largest civilian competition ever)*

* Mark Everson, *The President’s Management Agenda: An Update*, The Journal of Public Inquiry, Fall/Winter 2002, at 6-7.

Why Are Contractor Ethics Important Now?

- **Proposed OMB Cir. A-76 Revisions**
 - **Public-private competition should be the rule for all commercial activities performed by Federal employees**
 - **Agencies must presume all activities are commercial unless justified as inherently governmental**

Contractors in the Federal Workplace

Matt Reres

Department of the Army

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Statutory Basis

- Applicable Statutes
 - 5 USC § 3109
 - 10 USC § 129b
 - 10 USC § 1091
- Regulations
 - FAR 37.101 – 37.104
 - DFARS 237.104 – 237.106
 - AFARS 5137.104



Contractors in the Workplace

- Number of contractor personnel in the federal workplace
- Total = unknown



Contractors in the Workplace



“The Cowbird”



Personal Services Contract

A contract that, by its express terms or as administered, makes the personnel appear, in effect, to be governmental employees



What Makes a Contract Personal?

- Characterized by the employer-employee relationship created between government and the contractor's personnel
- Employer-employee relationship exists when the contractor personnel are subject to relatively continuous supervision and control of a government officer or employee



PSC - Purpose



- Authorize federal agencies to procure by contract:
 - Temporary services
 - Experts and consultants



Requirement

- Agencies shall *not* award PSC unless *specifically authorized by statute to do so*



Rationale

- Government is normally required by civil service laws to hire by direct hire or competitive appointments
- A PSC, unless authorized by statute, circumvents those laws



Is it a PSC?

Each contract arrangement must be judged in light of its own facts and circumstances



Key Questions

- Questions to determine whether the contract is personal in nature:
 - Is the performance on site?
 - Is all the necessary equipment required for the job furnished by the government?



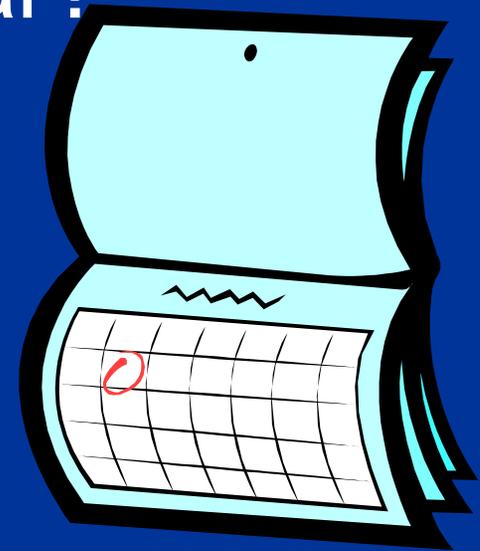
Key Questions

- Are services applied directly to the integral effort of agencies or an organizational subpart in furtherance of assigned functions or mission?
- Are comparable services performed in the same or similar agencies using government personnel?



Key Questions

- Will the need for the type of service reasonably be expected to last beyond one year?



Key Questions

- Will the inherent nature of the service or the manner in which it is provided reasonably require, directly or indirectly, government supervision of contractor employees in order to:
 - Adequately protect the government's interest;
 - Retain control of the function involved; or,
 - Retain full responsibility for the function supported in a duly authorized federal officer or employee



Term of PSC (DFARS 237.106)



- PSC must be:
 - Temporary, not to exceed one year; or,
 - Intermittent (not cumulatively more than 130 days in one year)



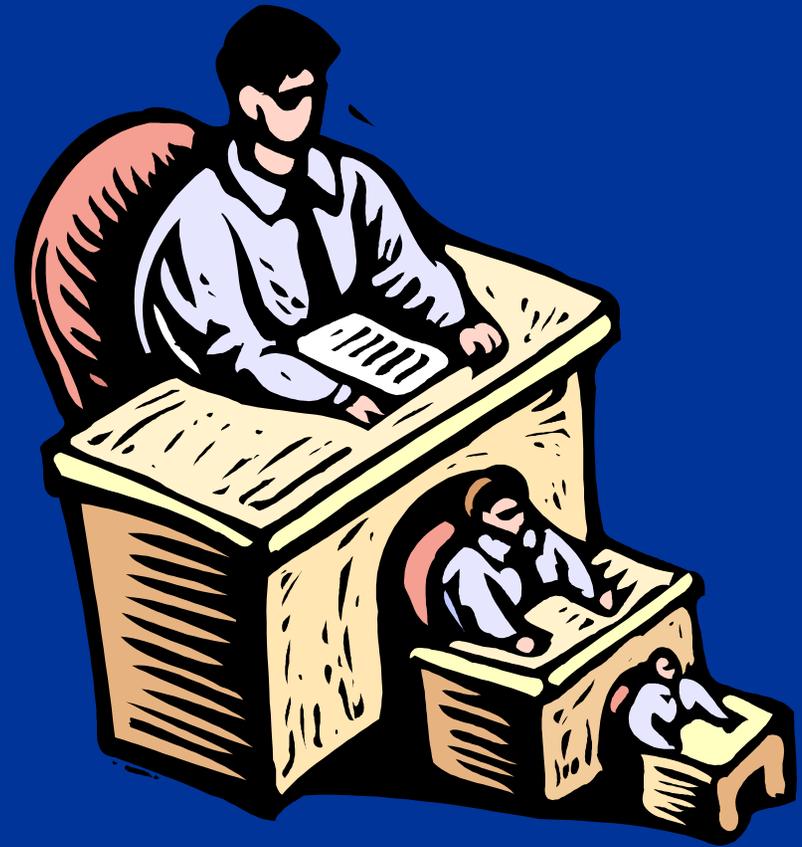
Limit on Funding

Shall not exceed highest rate fixed
by the Classification Act Schedules
for grade GS-15



Test of Federal Employment

- Performance of a federal function
- Appointment or employment by a federal officer
- Supervision or direction by a federal officer





Oath of Office “Defending the Constitution”

- Officers and Army Civilians
 - “I do solemnly swear/affirm that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office upon which I am about to enter. So help me God.”





Oath of Enlistment “Defending the Constitution”

- **Enlisted Members**
 - “I do solemnly swear/affirm that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that I will obey the orders of the President of the United States and the orders of the officers appointed over me, according to regulations and the Uniform Code of Military Justice. So help me God.”



The Contractor's Oath



“Inherently Governmental Function”

- OMB Circular A-76/OFPP Policy Letter 92-1
- A function which is so intimately related to the public interest as to mandate performance by government employees

Includes those activities that require either

– the exercise of discretion in applying government authority; or,



“Inherently Governmental Function”

- Involves, among other things, the interpretation and execution of the laws of the U.S. so as to:
 - bind the U.S. to take/not take some action
 - significantly affect life, liberty, or property of private persons
 - exert ultimate control over acquisition, use, or disposition of property, real or personal, tangible or intangible, of U.S., including collection, control, or disbursement or appropriated and other Federal funds



“Inherently Governmental Function”

- Not included in definition
 - Gathering information for or providing advice, opinions, recommendations, or ideas to government officials
 - Functions that are primarily ministerial and internal in nature, including:
 - building security
 - mail operations
 - facilities operations/maintenance



“Inherently Governmental Function”

- Normally falls within 2 categories
 - Act of governing
 - Criminal investigations
 - Prosecutions
 - Management of government programs requiring value judgments
 - Activities performed exclusively by military personnel who are subject to deployment in a combat, or combat service support role
 - Direction of federal employees



“Inherently Governmental Function”

- Normally fall within 2 categories
 - Monetary transactions and entitlements
 - Tax collection and revenue disbursements
 - Control of Treasury accounts and money supply
 - Administration of public trusts





Third Wave – Transformation

- Third wave of transformation process
- Initial number affected – 213,637
 - 154,910 – civilians
 - 58,727 – military
- Positions considered “non-core”



Army Core Competencies

- Essential and enduring capabilities of the Army
- Define our fundamental contributions to our nation's security
- 6 Core Competencies – each with
 - 1 objective
 - 4 to 6 associated tasks
 - 5 to 20 related capabilities



Army Core Competencies

- ***Prompt Response*** – land force that can respond rapidly to strategic requirements worldwide
- ***Forcible Entry Operations*** – land force that can access contested areas worldwide while countering an opponent's anti-access strategies



Army Core Competencies

- ***Sustained Land Dominance*** – an Army that can fight and win the Nation's wars
- ***Support Civil Authorities*** – an Army that can defend against and respond to natural or man-made disasters in the U.S. and worldwide, including terrorism



Army Core Competencies

- ***Shape the Security Environment*** – an international environment that is favorable to U.S. security interests
- ***Mobilize the Army*** – an Army that can expand quickly with seamless integration of reserve components when directed



What You Can Do

- Government & Contractor Can:
 - Understand and agree that the services to be delivered are non-personal services
 - Recognize and agree that no employer-employee relationship exists under the contract b/w the Government and the contractor's personnel



What You Cannot Do

- Contractor personnel cannot:
 - Be placed in a position where they are under supervision, direction, or evaluation of a government employee
 - Be placed in position of command, supervision, administration, or control over government personnel, or over personnel of other contractors, or become part of the government organization
 - Used in administration or supervision of government procurement activities



**Christine Poston
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Organizational Conflicts of Interest (OCI)

- What is an OCI?
- NSA approach to OCI
- Discussion of OCI cases, it's not just an "Acquisition" problem.

Organizational Conflicts of Interest

- Assisting acquisition personnel to prevent conflicts - what's the Ethics Counsel role, if any?
- Contracting with Government employees
- Tips for dealing with Federal employees who are contractors or consultants with the Government



U.S. AIR FORCE

“AIR FORCE EMPLOYEES AND CONTRACTORS WORKING TOGETHER”

**Melinda J. Loftin
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Identifying the worksite



- **Worksite may be a battlefield**
- **Clearly identify the contractor and their workspace**



Identifying the Contractor

- **Identify the Contractor Employee in e-mails, phone calls, meetings**
- **Ensure Federal Employees and the public can distinguish**
- **Avoid inadvertent unethical conduct and provide integrity in the procurement process**



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Gift Issues



- **Limitations on gifts from contractors (prohibited source)**
- **Contractor employees also a prohibited source**



- **Generally, no solicitation of a contractor for a gift retirement or birthday gift for a government employee**
- **Example: Retirement - Air Force employee may accept \$300 gift from Government employees**

Could not accept the same gift from contractor employees



- **Some items not a gift**
 - coffee and donuts
 - items of little intrinsic value
- **Exceptions**
 - Gifts up to \$20 per event/ \$50 per year
 - Gifts based on a personal relationship
 - Widely attended gathering
- **Example: Air Force employee may accept meals and entertainment in subordinate's home. May not be appropriate if contractor employee.**



- **Since 9-11 more gifts offered to the Air Force**
 - **use of conference rooms and travel**

- **Gift Acceptance Authority**
 - **31 USC 1353**
 - **10 USC 2601**



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Protecting Information



- **Must protect the improper release of information**



Protecting Information

- **Important to prevent illegal disclosures**
- **Maintain the integrity of the Procurement Process**
- **Preserve confidence in our commercial competitors**



Types of Information

- **Federal Information that the Federal Government needs to protect:**
 - Advance Procurement Information
 - Proprietary Information
 - Classified Information

- **This information is not public and would not be released**



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Third Parties' Proprietary Information

- **Protect if delivered under a contract**
- **Submitted for evaluation**
- **Developed under a Cooperative Research and Development Agreement**



Statutes and Regulations

- **Trade Secrets Act**
 - Federal Crime to disclose a person or firm's trade secrets or confidential data
- **Procurement Integrity**
 - Certain types of information submitted in connection with bids or proposals
- **Standards of Ethical Conduct prohibit the use of nonpublic information for private interests**



Steps to Protect Proprietary Information

- **Wear badges to identify status**
- **Protect sensitive conversations**
 - Identify contractor status during meetings and conversations
- **Separate contractor work areas**
- **Protect proprietary information**
 - Limit access to those with a need to know
 - Procedures to control distribution of information



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Personal Relationships



- **Be alert to appearances and impact of relationships on the working environment**



Personal Relationships

- **Varying degrees ranging from acquaintances to marriage**
- **Conflicts of Interest must be resolved**
- **Protection of sensitive and inside information**



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Conclusion



Any Questions?

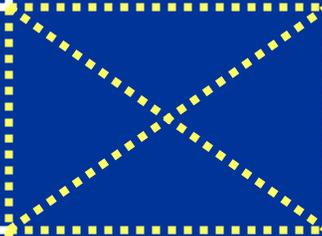
Conclusion: Where are We?

**Many
contractors**

**Many
ethics
issues**

**Complex
area
of law**

**Numerous
agency
practices**



Conclusion:

Looking Toward the Future

- Train Government employees to be ethical leaders
- Train contractor personnel
- Use contract clauses, non-disclosure agreements, self reporting, etc.
- Coordinate with procurement personnel, contracting officers, etc.
- Communicate with regulatory authorities (FAR Council, DARC, OFPP)
- Share best practices