



United States
Office of Government Ethics
1201 New York Avenue, NW., Suite 500
Washington, DC 20005-3917

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MEMORANDUM

TO: Designated Agency Ethics Officials

FROM: Robert I. Cusick
Director

SUBJECT: Ethics and Working with Contractors—Questions and Answers

Government contracting processes long have influenced Federal ethics law and policy. Concerns about conflicts of interest in Federal procurement not only have shaped many of our ethics laws, but have been a particular focus in the enforcement of those laws. In our latest annual Conflict of Interest Prosecution Survey, for example, 75% of the prosecutions involved contract-related misconduct. Office of Government Ethics (OGE) DAEOgram DO-06-022, http://www.usoge.gov/pages/laws_regs_fedreg_stats/lrfs_files/othr_gdnc/pros_srvy_05.html. Moreover, in recent years, the increasing use of contractors, particularly in the Federal work space, has raised questions about whether the ethics rules adequately protect the integrity of Government operations. OGE, Report to the President and Congressional Committees on the Conflict of Interest Laws Relating to Executive Branch Employment 38-39 (January 2006) at www.usoge.gov. At a minimum, the increased use of contractors has reinforced the need for Government employees to understand the ethical rules for interaction with contractors and their personnel.

This guidance is intended to provide agency ethics officials with basic information about some common issues that arise in the procurement context. We decided to present the information in a Question and Answer format, with illustrative examples. We hope this format will aid in your understanding of the ethical principles being discussed.

As will be apparent below, this guidance pertains not only to employees serving in formal "procurement" or "contracting" positions. Important ethical requirements—particularly the criminal conflict of interest laws and the OGE

standards of conduct regulations—apply also to a wide range of other employees who have input in contracting processes or work with contractors and their personnel. For example, the criminal conflict of interest laws, such as 18 U.S.C. §§ 207 and 208, can cover the conduct of high level officials who give instructions or recommendations to procurement officials. Similarly, these laws apply to program staff who do not have any formal contracting responsibilities but nevertheless provide significant input on programmatic or performance issues concerning a contract. Moreover, some of the issues discussed below, such as the gift questions, can affect employees who simply work alongside contractor personnel in a "mixed workplace."

Finally, some of the Q&As refer to provisions of law beyond the ethics statutes and regulations within OGE's primary area of responsibility. For example, several of the items below pertain to the Procurement Integrity Act, 41 U.S.C. § 423. These provisions are discussed mainly because they overlap with other legal requirements that are within OGE's jurisdiction, such as the criminal conflict of interest statutes in chapter 11 of title 18 of the United States Code, or the OGE standards of ethical conduct in chapter 2635 of title 5 of the Code of Federal Regulations. One purpose of this memorandum is to emphasize that compliance with provisions such as the Procurement Integrity Act does not necessarily equate to compliance with related, but different, provisions in the ethics laws and regulations.

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I. Revolving Door Questions

These Q&As begin with a discussion of several aspects of "the revolving door," i.e., the movement of personnel between the Government and Government contractors (and those who represent them). The revolving door in the contracting area has been the subject of a fair amount of attention, both historically and also more recently, for example, with the prosecutions arising from the Druyun matter involving Air Force procurement.

As set out below, the revolving door Questions are divided into three subgroups: current Government employees seeking future employment with contractors; former Government employees working for or on behalf of contractors; and former contractor employees now working in the Government.

A. Seeking Future Employment

Employees who work on contract matters or who have contact with contractor employees sometimes may consider the possibility of going to work for a contractor. There are several laws and rules that govern employees who seek future employment, or receive employment overtures from, contractors: 18 U.S.C. § 208, OGE implementing regulations at 5 C.F.R. §§ 2635.601 - 2635.606, and the Procurement Integrity Act. This is an area that has received considerable attention recently, not only from the media and Congress but also from Federal prosecutors. See OGE DAEOgram DO-04-029, available at http://www.usoge.gov/pages/daeograms/dgr_files/2004/do04029.pdf. Employees should be made aware of the seriousness of these issues and encouraged to seek timely advice from agency ethics officials about their own specific situations.

1. What are the criminal restrictions that relate to looking for future employment with a contractor?

Under 18 U.S.C. § 208, an employee may not participate in any particular Government matter that would affect the financial interests of any contractor (or other person) with which the employee is negotiating, or has an arrangement, for future employment. Although it may be possible for an employee to receive a waiver of this prohibition, OGE gives heightened scrutiny to proposed waivers in this situation, and waivers for employment negotiations should be issued only in compelling circumstances. See DAEOgram DO-04-029, at 7-8.

It is important to remember that this criminal prohibition applies to all particular matters that would have a direct and predictable effect on the financial interest of the

prospective employer. In contrast, as discussed below, related provisions of the Procurement Integrity Act apply only to certain kinds of procurements and certain specific kinds of official activities in connection with those procurements. The restrictions in section 208 apply whether or not the Procurement Integrity Act applies, as long as the employee is participating in a particular matter.

It is also important to remember that the employee's level of participation in the particular matter need only be "personal and substantial" in order to violate section 208; the employee need not be the final decisionmaker on any contract matter and need not serve in any specifically designated role (such as contracting officer) or perform any specifically designated procurement function (such as preparing specifications and solicitations or evaluating bids). As discussed below, the Procurement Integrity Act uses similar language concerning personal and substantial participation, but that language has a narrower meaning than in section 208.

Example: A contractor provides engineering support services for an agency program. An agency employee involved in this program periodically provides information to the contracting officer concerning the quality of the contractor's performance. The employee begins discussing the possibility of going to work with the contractor. Under 18 U.S.C. § 208, he must immediately recuse himself from any further participation in the evaluation of this contractor's performance or any other issue arising under the contract.

2. Do the OGE implementing regulations add anything to the criminal restriction?

Yes. The OGE implementing regulations do not cover only employees who are actually negotiating or have an agreement to work for a prospective employer. They also require recusal by those who are merely "seeking" employment by making unsolicited contacts about possible employment, such as sending a resume to a firm on whose contract or bid the employee is working. Likewise, the OGE regulations require recusal if an employee makes any response other than rejection to a contractor's unsolicited overtures about possible employment.

Example: The employee in the previous example to Question 1 has not actually begun discussions with the contractor, but has simply submitted a resume with a cover letter indicating his interest in working for the company. Even though he has heard no response from the company, he has begun seeking employment under the OGE rule, and must recuse himself from working on matters arising under the contract. If two months elapse and the employee still has received no indication of interest on the part of the contractor, the employee no longer will be deemed to be seeking employment with the contractor. Likewise, if the contractor tells the employee that it is not interested and there

is no further discussion of possible employment, the employee no longer will be deemed to be seeking employment with that contractor.

3. Do the OGE regulations require employees to notify anyone that they have begun seeking employment or are recused from certain matters?

The OGE regulations do not require any particular notification. Employees comply with any recusal obligations under section 208 and the OGE regulations simply by avoiding participation in any particular matter in which the prospective employer has a financial interest. However, the regulations add that an employee "should" notify the person responsible for his assignment of the need to recuse from a particular matter; while this is not a mandatory notification duty, it does point employees in the direction of common sense. Moreover, an agency ethics official may require written documentation of a recusal, and such documentation also may be required as evidence of compliance with an ethics agreement. Note, furthermore, that the Procurement Integrity Act and the Federal Acquisition Regulation do impose certain mandatory notification procedures, as discussed in Question 4 below.

4. Beyond the criminal law and the OGE regulations, what additional requirements are there under the Procurement Integrity Act concerning employment contacts?

The Procurement Integrity Act imposes additional requirements on employees who are participating personally and substantially in a procurement (i.e., the acquisition of goods or services by using competitive procedures and awarding a contract) in excess of the simplified acquisition threshold. 41 U.S.C. § 423(c). For purposes of the Procurement Integrity Act, personal and substantial participation is limited to certain specific functions involving: the specification or statement of work; the solicitation; the evaluation of bids or proposals, or selecting a source; negotiation of price or terms and conditions of the contract; or the review or approval of the award of a contract. 48 C.F.R. § 3.104-1. Employees who are participating in these ways in a covered procurement have the following obligations if they contact, or are contacted by, a bidder or offeror regarding possible employment:

- Promptly report the employment contact, in writing, to both the employee's supervisor and the Designated Agency Ethics Official (or designee); and

