

WORKING WITH THE U.S. GOVERNMENT

Risks and Compliance with Federal Ethics Rules in Government Contracting

Dani Irvine & Steve Epstein
SCCE Conference
September 18, 2019

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Goals for Today

- Identify compliance and ethics issues that arise when Federal employees are working side-by-side with contractor employees.
- Focus on situations that lend themselves to non-compliance.
- Describe best practices to mitigate such risks.
- Share the experiences and knowledge of the audience.
- Provide informational slides for future reference.

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Ground Rules

- Ask questions at any time
- Share your experiences (both positive and negative)
- Contribute your expertise
- Have no fear (non-attribution)

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Unique Situation/Challenge

- Strict limitations on relationships and interactions from:
 - Federal laws and regulations
 - Corporate ethics policies

However:

- Expect high performing teams with “Esprit de Corps”
 - “One-team” concept with shared common goals
 - Recognize each other as friends and colleagues
 - Blur “arms-length” legal relationship between Federal employees and contractors (“prohibited sources”)
- Business need for open communications

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Issues

- Gifts (Business Courtesies)
- Social Interaction
- Protecting Proprietary and Non-Public Data
- Transportation and Travel
- Solicitation
- Personal Activities
- Off-Duty Activities
- Personnel Exchanges
- Revolving (Employment) Door

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Gifts (Business Courtesies)

Governance:

- 18 USC § 201 (Bribery)
- 5 CFR § 2635 subpart B (Gifts from Outside Sources)
 - 202(a)(1) **No gifts** from a “prohibited source” or based on official position
 - 203(b)(1) May accept modest items of food and refreshment
 - 203(b)(2) May accept items of little intrinsic value for presentation
 - 204(a) May accept gifts (but not cash) of \$20 or less. (\$50/year from same source)
 - 204(b) May accept gifts based on a personal relationship
- E.O. 13770 (1/28/17) – Limits gifts to “political appointees” from lobbyists and lobbyist employers
- 31 U.S.C. §1353 – Gift of travel expenses to the Government
- Government agency gift acceptance regulations
- Company policies

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Ethical Guidance for Acceptance of Gifts

- 5 C.F.R. 2635.201 (b) *Considerations for declining otherwise permissible gifts.*
 - (1) Every employee has a fundamental responsibility to the United States and its citizens to place loyalty to the Constitution, laws, and ethical principles above private gain. An employee's actions should promote the public's trust that this responsibility is being met. For this reason, employees should consider declining otherwise permissible gifts if they believe that a reasonable person with knowledge of the relevant facts would question the employee's integrity or impartiality as a result of accepting the gift.
 - (2) An employee who is considering whether acceptance of a gift would lead a reasonable person with knowledge of the relevant facts to question his or her integrity or impartiality may consider, among other relevant factors, whether:
 - (i) The gift has a high market value;
 - (ii) The timing of the gift creates the appearance that the donor is seeking to influence an official action;
 - (iii) The gift was provided by a person who has interests that may be substantially affected by the performance or nonperformance of the employee's official duties; and
 - (iv) Acceptance of the gift would provide the donor with significantly disproportionate access.

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Gifts

- Common Scenarios:
 - Event Attendance:
 - Invitation to speak or present information
 - Widely Attended Gatherings (WAG)
 - Travel Reimbursement
 - Gift Giving Occasions:
 - “Special Infrequent Occasions” – retirements, deaths, marriages, etc.
 - “Traditional Gift Giving Occasions” – holidays, birthdays, etc.
 - Recognition & Awards

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Common Gift Scenarios: Event Attendance

- Invitations to speak or present information
 - Considerations – The 5 W's
 - The broader the audience the better – no “special access”
 - Free attendance on the day speaking is not a gift
- Widely Attended Gatherings (WAG)
 - Requires advance written approval
 - No “minimum” number, but requires diversity of attendees
 - Help ethics counselors get to “yes” – include required info on invitation
- Travel Reimbursement
 - Requires advance written approval
 - Official travel only

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Example: Attendance at Events (WAGs)

Bob, a government IT specialist, plans to attend IT EXPO, sponsored by a large IT company that is a government contractor.

- Admission is free, but he must register to attend. Can he attend? What additional information might affect the answer?
- While at the EXPO, he discovers that several IT companies are offering receptions (providing food and drink) which are open to all EXPO attendees. Can he attend?
- For next year's EXPO, Bob has been asked to be a panel member and offer his expertise. Does that affect his ability to attend the event?

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Common Gift Scenarios: Gift Giving Occasions

- “Special Infrequent Occasions” – retirements, deaths, marriages, etc.
- “Traditional Gift Giving Occasions” – holidays, birthdays, etc.
- General rules:
 - Government personnel prohibited from accepting gifts from contractors
 - Over 30 exclusions and exceptions to the general prohibition. Most common:
 - Exception for gifts of \$20 or less / no more than \$50 per year
 - E.g., could not accept \$20 from three different employees of same contractor in one year.
 - Exception for personal relationships – must be true close personal relationship
 - Event attendance exceptions on previous slide (speaking/presenting, WAG)
 - Contractor policies may limit accepting or offering gifts.

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Example: Wedding of Gov’t Employee (Judy)

- Can Judy invite contractor co-workers to the wedding?
- Can contractor co-workers give Judy gifts over \$20 in value?
 - What information might impact the answer above?
 - Does it matter if Judy has a role in assessing contractor performance?
- Can contractor employees join with the rest of the office to purchase a group gift for Judy?
- If contractor employees may not give Judy a wedding gift, what should they do?
- If government rules permit contractor employees to give Judy a gift, do they need to consult company ethics rules?

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Example: Death of Government Employee's Parent

- Can contractor employees attend the funeral and following reception?
- Can contractor employees contribute to the office purchase of flowers for the funeral?
- If the government employee designates a charity in lieu of flowers, can contractor employees make donations? What if no specific charity is designated?
- If contractor employees may not contribute to the office gift, what can contractor employees do to express their sympathy?

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Gifts to the Government

- To commemorate completion of Phase I of the contract, the contractor plans a dinner for the entire office at a local restaurant. Cost \$100/person. May government employees accept?
- The contractor also offers the office a model of the device the office designed. The model costs \$2,000 and will be displayed in the center of the office. May the government accept the model?
- The contractor also plans to give each office member a framed picture of the model. May government employees accept?

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Common Gift Scenarios: Recognition & Awards

- Government Recognition for Contractor Employees
 - Prohibited by DoD issuances
 - Only contracting officer can assess performance
 - Exception – Extraordinary act outside of scope (e.g., act of heroism)
- Awards to Government Employees by Non-Federal Entities
 - These are considered “gifts,” acceptance only if an exception applies.
 - Common exceptions for awards:
 - Certificates and items of little intrinsic value intended for presentation
 - Items of \$20 or less in value
 - Many contractors limit recognition for non-employees

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Summary:

- Government personnel are generally prohibited from accepting gifts from contractors unless an exception applies, such as:
 - Gifts of \$20 or less /max of \$50 per year from the same individual or their company.
 - For group gifts between co-workers, if contractor contributes, group gift limited to \$20 value.
 - *Personal relationship* – must be family or long-term close personal friends.
- Donation to charity designated by Federal employee or in employee’s name IS a gift to the employee.
- Contractor rules may limit accepting or offering gifts.
- Federal employees may never accept cash or securities as gifts.
- Contractor and Federal personnel may pay their proportionate share of costs for events or parties.

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Social Interaction

- Governance:
 - Gift laws/rules/policies (See slide 6)
 - 5 CFR § 2635.101(b)(8)&(14) – Impartiality & appearance of impropriety
- Common Scenarios:
 - Participation in office social/morale-building events (holiday parties, team-building events)
 - Participation in contractor-sponsored conferences/events/training
 - Socialization (golf, dinners, sporting events)
 - Off-duty friendships
- Issues:
 - Charging time
 - Expenses (Who pays?)
 - Gift exchanges and “swag”
 - Appearance of favoritism/loss of impartiality

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Example: Office Holiday Party

- To purchase refreshments for the party, all employees who attend must pay \$15 each.
- To help celebrate, the contractor offers to provide the refreshments at no cost to the office employees. May government employees accept?
- Since the party is scheduled for the last two hours of the workday, how is the time accounted for?

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Protecting Proprietary & Non-Public Data

- Governance:
 - Contract terms
 - Non-disclosure agreements
 - 5 CFR § 2635.703 – Use of Non-public Information
 - Trade Secrets Act, 18 USC 1905
 - Procurement Integrity Act, 41 USC 423, 48 CFR 3.104-4
 - Economic Espionage Act, 18 USC 1831 -1839
 - Privacy Act, 5 USC 552a
 - Freedom of Information Act, 5 USC 552
 - Company policies

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Protecting Proprietary & Non-Public Data

- **What is non-public information?**
 - Procurement sensitive/source selection information (48 CFR 2.101)
 - Contractor proprietary information
 - Privacy Act information
 - Classified information
 - Any other information not available to the public and not clearly releasable under FOIA

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Protecting Proprietary & Non-Public Data

- Common risks
 - Email:
 - “Reply to all” / Knowing who all recipients are
 - Including non-public information in attachments
 - Shared printers
 - Cubicles
 - Speaker phones / conference calls
 - Presenting non-public information to a group
 - Leaving non-public information on a desk or chair
- Solutions
 - Training, training, training
 - **Common sense**
 - Non-Disclosure agreements

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Transportation and Travel

- Governance:
 - Gift laws/rules/policies (see slide 6)
 - 5 CFR § 2635.101(b)(8)&(14) – Impartiality and appearance of impropriety
 - 31 USC 1353, 41 CFR 304 et seq. (Payment of Travel Expenses)
 - Contract terms
- When is it appropriate for contractor to provide transportation?
 - Government would pay either way: cost reimbursable or in scope of work
 - Only permissible means (e.g. –outside vehicles prohibited on a facility or beyond a certain point).
 - Meeting or similar event (if comply with 31 USC 1353)

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Transportation and Travel Situations

- Common Situations:
 - Sharing a ride to a local meeting
 - Government vehicle: if contractor rules permit
 - Contractor vehicle: if value is \$20 or less
 - Personal vehicle (receiving mileage from contractor or Government)
 - Taxi (or other ride service): pay fair share
 - Sharing rental cars when on official travel
 - Transportation entirely within contractor facility
 - Permitted since there is no other option

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Example: Transportation

To celebrate the new fiscal year, the office has lunch at a restaurant, four miles away. Everyone pays for their own lunch, and several co-workers volunteer to drive others.

- Can Federal employees accept a ride from contractor employees?
- Can contractor employees accept rides from Federal employees?
- Can contractor employees join another group sharing an Uber paid by a contractor employee?

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Travel

- A contractor asks for the office supervisor (Federal employee) to attend a meeting hosted at the company's headquarters to discuss current and future industry trends. The contractor offers to pay transportation, meals and lodging. Can the Federal employee accept?
- The same Federal employee is later asked by the contractor to make the same trip to negotiate a contract dispute between the government and the contractor. Can the employee accept?

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Solicitation

- Governance:
 - 5 CFR 2635.202(c) & 808(c)(1) Government personnel may not solicit gifts from prohibited sources.
 - 5 CFR § 2635.101(b)(8)&(14) – Impartiality and appearance of impropriety
 - 48 CFR 3.101-2 May not solicit from government contractor
 - 5 CFR 2635.502 (Personal and Business Relationships)
 - Company policies
- Common solicitations:
 - To provide services beyond scope of contract (e.g.: IT help)
 - To contribute to fundraisers (CFC, Girl Scouts, school benefits)
 - To provide personal assistance (fix my personal laptop?)
 - To help draft a statement of work
 - To provide a job for spouse, relative or friend

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Personal Activities

- Governance:
 - 5 CFR Part 773, 774 (Political Activities of Federal Employees)
 - 5 CFR 735.201 (No gambling by Federal employees)
 - 5 CFR 2635.502 (Personal and Business Relationships)
 - Company policies
- Common Scenarios:
 - Political speech (e.g., photos, campaign materials, e-mails)
 - Gambling (e.g., March Madness, fantasy football)
 - Conducting personal business (Real estate, jewelry sales, insurance sales, financial advice, tax preparation)

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Off-Duty Activities

- Governance:
 - 18 USC §§ 201, 203, 205, 208 (Bribery, gifts, conflicts of interest)
 - 5 CFR § 2635 Subpart H (Outside Activities)
 - 5 CFR § 2635.101(b)(8)&(14) – Impartiality and appearance of impropriety
 - 5 CFR 2635.502 (Personal and Business Relationships)
 - Company policies
- Common Scenarios:
 - Government employee has part-time work with contractor
 - Off-duty business partnerships (Government and contractor)
 - Government employee contracting with the Government (48 CFR 3.6)
- Considerations:
 - Use of Government or contractor resources
 - Required reviews and approvals
 - Conflicts of interest
 - Use of office and position for personal gain
 - Disclosure or exposure to non-public information

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Part-Time Employment

- When the contractor started to fall behind, he added a week-end shift composed of part-time employees. Ann, one of the Federal employees in the office, applied for one of the positions. Can she work for the contractor?
- Two co-workers (Federal and contractor) both sell real estate part-time. They realize they would be more effective if they formed a business partnership selling real estate. Can they?

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Revolving (Employment) Door

- Governance:
 - 18 USC § 208 (Conflicts of Interest)
 - 5 CFR § 2635 Subpart F (Seeking Employment) (Updated July 26, 2016, Federal Register)
 - National Defense Authorization Act for FY 2008 (Section 847)
 - 41 USC 423 (Procurement Integrity Act)
 - E.O. 13490 and 13770 (Ethics Pledges)
 - 126 Stat. 291 (STOCK Act)
 - Lobbying Activity Restrictions: P.L. 115-91, FY-18 NDAA section 1045
 - Company policies

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Revolving (Employment) Door

- Common Restrictions/Requirements:
 - Recusal necessary prior to seeking or discussing employment
 - STOCK Act Notice of negotiations
 - Agency ethics opinion on post-employment restrictions
 - Section 847 letter required for procurement officials
 - Lobbying activity restrictions for senior officials (Section 1045)

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Example: Revolving (Employment) Door

- Government employee, during the daily meeting with the contractor, mentions she plans to retire soon and asks if contractor has any openings. Any problems?
- Contractor employee announces he is moving away, and a government co-worker asks if he can apply for the contractor employee's position. Can the government employee seek this job?
- Contract is set to expire, so contractor employee applies for government position in the same office. Any problems?

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Remedies & Tools

- Provide training tailored to address blended workforce issues.
 - Include everyone in the workplace
 - Review contract requirements
 - Address risky situations before they occur
 - Review Government and contractor rules
- Recognize that contractors and contractor employees are prohibited sources
 - “Alliance” not “partnership”
 - Contractor under great pressure to say “yes”

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Remedies & Tools

- Set expectations
- Provide readily available sources of advice (ethics advisor or general counsel)
- Build relationship with your ethics or legal counterpart
- Establish agreed-upon procedures for handling and reporting improper disclosures of non-public data
- Involve ethics officials in planning of events
- OGE: “Working with Government Contractors” Booklet (www.oge.gov)

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Feedback

- What do you know now that you didn't know an hour ago?
- How will this presentation help you do your job?

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Questions?

- Dani Irvine
Senior Attorney
DoD Standards of Conduct Office (SOCO)
osd.soco@mail.mil
703-695-3422
- Steve Epstein
Former Chief Counsel, Ethics & Compliance
The Boeing Company
epigram2003@gmail.com
703-283-7845

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