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Standards of Conduct Office

July 12, 2011

MEMORANDUM FOR MEMBERS OF THE DoD ETHICS COMMUNITY

**SUBJECT: Updated Guidance on Application of the Procurement Integrity Act and Regulation**

This memorandum updates and combines guidance previously provided through memoranda dated August 28, 1998, and August 10, 1999, on applying the restrictions found under Section 27 of the Office of Federal Procurement Policy Act, as amended,[1] commonly referred to as the Procurement Integrity Act (PIA or Act). The Act, which is implemented through section 3.104 of the Federal Acquisition Regulation (FAR), 48 C.F.R. § 3.104 (hereinafter FAR § 3.104), imposes various restrictions on Federal employees who have been involved in agency procurements. This memorandum addresses three restrictions, namely: (1) employment contacts with contract bidders and offerors; (2) release of and obtaining certain procurement-sensitive information; and (3) post-employment receipt of compensation from certain government contractors.

## I. Restrictions on Seeking Non-Federal Employment

### a. General Rule

Subsection 27(c) of the Act, as implemented at FAR § 3.104-4(c), imposes job-search restrictions on Federal employees who have been involved in agency procurements. The Act contains notification and disqualification requirements for employees who contact or are

[1] The PIA has been cited as 41 U.S.C. § 423. However, on January 4, 2011, 41 U.S.C. § 423 was repealed and subsequently replaced by 41 U.S.C.A. §§ 2101 – 2107. *See* Pub. L. No. 111-350, sec. 7(b), 124 Stat. 3855 (2011). In the codification of the Act, the post-employment restrictions set forth in subsection (d) of the Act were codified into a separate section. *Id.* (to be codified at 41 U.S.C. § 2104). *See* Office of Government Ethics (OGE) Legal Advisory 11-02 (March 8, 2011). http://www.usoge.gov/ethics_guidance/advisories/2011/la-11-02.pdf.

contacted by bidders or offerors regarding non-Federal employment, and prohibits disclosure of certain information relating to certain ongoing procurements. Specifically, the Act requires an employee who is "personally and substantially" participating in a "Federal agency procurement" in excess of the simplified acquisition threshold (currently **$100,000**), and who:

- Contacts; or
- Is contacted by, a bidder or offeror **in that procurement** regarding possible non-Federal employment

to do the following:

- **Report the contact** promptly in writing to the official's supervisor and to the agency Designated Agency Ethics Official (the DoD General Counsel) or designee (ethics counselor) **and either**:
- **Reject the possibility** of non-Federal employment; **or** to **disqualify** himself from further participation in the procurement.

**b. Definitions**

"***Contact***" must relate to seeking employment. To determine when a contact is made, the regulations at 5 C.F.R. § 2635.601, *et seq.*, should be consulted. There is no contact under the Act if the employee is not "seeking employment" under 5 C.F.R. § 2635.601, *et seq.* For example, under those regulations, requesting a job application is not considered "seeking employment," so there would be no contact with the recipient of the request for purposes of the PIA; however, if the employee then submits the application, he/she must then report the contact and disqualify himself/herself from further participation.

***"Participated personally and substantially,"*** as defined in FAR § 3.104-3, means active and significant involvement in activities directly related to the procurement, to include:

- drafting, reviewing, or approving the specification or statement of work for the procurement;

- preparing or developing the solicitation;
- evaluating bids or proposals, or selecting a source;
- negotiating price or terms and conditions of the contract; and
- reviewing and approving the award of the contract.

*"Participating personally"* means to participate directly, and includes the direct and active supervision of a subordinate's participation.

*"Participating substantially"* means that the employee's involvement is of significance to the matter. Substantial participation requires more than official responsibility, knowledge, perfunctory involvement, or involvement on an administrative or peripheral issue. Participation may be substantial even though it is not determinative of the outcome of a particular matter. A finding of substantiality should be based not only on the effort devoted to a matter, but on the importance of the effort. While a series of peripheral acts may be insubstantial, the single act of approving or participating in a critical step may be substantial. However, the review of procurement documents solely to determine compliance with regulatory, administrative, or budgetary procedures, does not constitute substantial participation in a procurement.

Generally, an individual will not be considered to have participated personally and substantially in a procurement solely by participating in:

- agency level boards, panels, or other advisory committees that review program milestones or evaluate and make recommendations regarding alternative technologies or approaches for satisfying broad agency level missions or objectives;
- the performance of general, technical, engineering, or scientific effort having broad application not directly associated with a particular procurement, notwithstanding that such general, technical, engineering, or scientific effort subsequently may be incorporated into a particular procurement;
- clerical functions supporting the conduct of a particular procurement; or
- for procurements to be conducted under the procedures of OMB Circular A-76, participation in management studies, preparation of in-house cost estimates,

preparation of "most efficient organization" analyses, and furnishing of data or technical support to be used by others in the development of performance standards, statements of work, or specifications.

**c. Specific applications**

**(1) "Sole Source" contracts**

The restrictions under this provision of the Act apply to "Federal agency procurements" that are defined, in essence, as competitively awarded contracts. *See* FAR § 3.104-3. Accordingly, employees do not have to report contacts from "sole source" contractors under the Act. That said, employees contacted by "sole source" contractors still may be disqualified from any further participation in the procurement pursuant to the criminal provisions under 18 U.S.C. § 208 and 5 C.F.R. § 2635.604. Moreover, under section 2-204.c. of the Joint Ethics Regulation (JER), DoD 5500.07-R, employees must submit a written notice of disqualification. Further, employees are advised to inform their supervisor and seek the guidance of their Ethics Counselor as soon as possible. If a decision on the acquisition strategy hasn't been made, you should assume that the procurement is competitive and that a report would be required.

**(2) OMB Circular A-76 procurements**

In procurements conducted under OMB Circular A-76, the Federal Acquisition Regulation requires a clause in the solicitation and the contract that gives government employees who are adversely affected by the award of the contract a right of first refusal for employment under the contract. This right of first refusal, standing alone, is not an employment contact for the purposes of FAR § 3.104-4(c).

**d. Disqualification**

**(1) Procedures**

FAR § 3.104-5 sets forth disqualification procedures. An employee required to disqualify himself/herself from a procurement shall submit a written notice of disqualification

from further participation in the procurement to the Contracting officer, the Source Selection Authority, and the agency official's immediate supervisor. At a minimum, the notice shall:

- identify the procurement;
- describe the nature of the employee's involvement in the procurement and specify the approximate dates or time period of participation; and
- identify the bidder or offeror and describe its interest in the procurement.

The agency must disqualify the employee. It may not force the employee to terminate employment discussions.

**(2) Duration**

Disqualification lasts until such time as the agency, in its discretion, authorizes the official to resume participation in such procurement because the person is no longer a bidder or offeror in that Federal agency procurement, or all discussions with the bidder or offeror regarding possible non-Federal employment have terminated without an agreement or arrangement for employment.

**(3) Limitation on disqualification**

Under 5 C.F.R. § 2635.604(d), where an agency determines that a civilian employee's or military member's action in seeking employment will require disqualification from matters that are so central or critical to the performance of official duties that his or her ability to perform those duties would be "materially impaired," the agency may allow the individual to take annual leave or leave without pay while seeking employment. However, where this is not possible or feasible, the agency may take appropriate administrative action, which may include disciplinary or adverse action. For example, a contracting officer that has special expertise that results in working almost exclusively on the contracts of a certain contractor or on contracts in a certain specialized area, might find his or her ability to perform duties "materially impaired" where the individual is disqualified from acting with regard to that contractor or to contractors in the specialized area under circumstances where either: (1) there is no other employee or member

capable of effectively performing those duties; or (2) the disqualification would cover so significant a portion of the employee or member's duties as to preclude him or her from effectively carrying out the duties of that position. In such a case, actions taken by an employee that result in disqualification may be construed as a refusal to perform assigned duties and disciplinary action may include removal from the position.

Furthermore, under section 1-300.b. of the JER, this regulation is made applicable to enlisted members of the uniformed services.

The disqualification could also bring a procurement action under a cloud of suspicion. Accordingly, we recommend that Ethics Counselors frequently and strongly encourage their civilian employees and military service members to discuss their job seeking plans with their supervisors and Ethics Counselors prior to the start of their job hunting.

**e. Penalties.**

Pursuant to subsection (e) of the Act, an individual who violates the above employment restriction may be fined up to $50,000 plus twice the compensation received or offered for the prohibited conduct. Organizations that employ an individual in violation of the above restrictions may be fined up to $500,000 plus twice the compensation received or offered. In addition, individuals who divulge procurement information in violation of the Act may face prosecution and imprisonment up to 5 years. In addition, contractors are subject to other administrative actions such as cancellation of the procurement, rescission of the contract, and debarment proceedings.

## II. Divulging or Obtaining Protected Procurement Information Prior to the Award of a Federal Procurement

**a. General Rule**

The Act prohibits present and former U.S. officials, including members of the Armed Forces, from knowingly:

- disclosing contractor bid or proposal information or source selection information before the award of a Federal agency procurement contract; and
- other individuals from obtaining such information before the award of a Federal agency procurement contract.

**b. Definitions**

FAR § 3.104-1 defines the phrase ***"contractor bid or proposal information"*** to include any of the following information submitted to a Federal agency as part of or in connection with a bid or proposal to enter into a Federal agency procurement contract, if that information has not been previously made available to the public or disclosed publicly:

- cost or pricing data (as defined by 10 U.S.C. § 2306a(h) with respect to procurements subject to that section, and section 304A(h) of 41 U.S.C. § 254b(h), with respect to procurements subject to that section);
- indirect costs and direct labor rates;
- proprietary information about manufacturing processes, operations, or techniques marked by the contractor in accordance with applicable law or regulation; or
- information marked by the contractor as "contractor bid or proposal information," in accordance with applicable law or regulation.

Further, the Act defines ***"source selection information"*** as any of the following information prepared for use by a Federal agency for the purpose of evaluating a bid or proposal to enter into a Federal agency procurement contract, if that information has not been previously made available to the public or disclosed publicly:

- bid prices submitted in response to a Federal agency solicitation for sealed bids, or lists of those bid prices before public bid opening;
- proposed costs or prices submitted in response to a Federal agency solicitation, or lists of those proposed costs or prices;
- source selection plans;
- technical evaluation plans;

- technical evaluations of proposals;
- cost or price evaluations of proposals;
- competitive range determinations that identify proposals that have a reasonable chance of being selected for award of a contract;
- rankings of bids, proposals, or competitors;
- the reports and evaluations of source selection panels, boards, or advisory councils; or
- other information marked as "source selection information" based on a case-by-case determination by the head of the agency, his designee, or the contracting officer that its disclosure would jeopardize the integrity or successful completion of the Federal agency procurement to which the information relates.

**c. Other Information Release Statutes**

Finally, release of information may also violate other statutes including, but not limited to, the Privacy Act, 5 U.S.C. § 552a, and the Trade Secrets Act, 18 U.S.C. § 1905.

**d. Penalties**

In addition to the civil and administrative penalties set out in I.e., above, violations of subsections (a) and (b) of the Act may result in criminal prosecution where conduct constituting a violation of either provision is for the purpose of either:

- exchanging the information covered by such subsection for anything of value; or
- obtaining or giving anyone a competitive advantage in the award of a Federal agency procurement contract.

Conviction can result in imprisonment for up to 5 years, or fined as provided under title 18, or both.

## III. Post-Employment Compensation Ban

### a. General Rule

Under subsection 27(d) of the Act, implemented at FAR § 3,104(d), a former Federal official is barred from accepting compensation from a contractor as an employee, officer, director, or consultant, for one year after he or she:

- served, at the time of selection or contract award, as procuring contracting officer (PCO), source selection authority (or source selection evaluation board member), or the chief of a financial or technical evaluation team in a procurement in which that contractor was selected for award of a contract in excess of **$10 million**;
- served as the program manager (PM), deputy program manager (DPM), or administrative contracting officer (ACO) for a contract in excess of **$10 million** involving that contractor; or
- personally made a decision to award a contract, subcontract, modification, or task or delivery order in excess of $10 million to that contractor; establish overhead or other rates applicable to a contract or contracts for that contractor in excess of $10 million; approve issuance of a contract or payments in excess of $10 million to that contractor; or pay or settle a claim in excess of **$10 million** for that contractor.

### b. Definitions

***"Compensation,"*** under FAR § 3.104-1, means wages, salaries, honoraria, commission, professional fees, and any other form of compensation provided directly or indirectly, for services rendered. Compensation is indirect if paid to an entity or person other than the individual specifically in exchange for services to be provided by the individual.

***"Contractor,"*** for purposes of the compensation ban provision, means:

(1) *Prime contractor.* The compensation ban extends only to the prime contractor. For example, a former Program Manager may work for a subcontractor on the same program, even

though he or she dealt with the subcontractor in the role of program manager. However, if a subcontract is a sham or a vehicle established to provide services by individuals for the prime contractor on the program, compensation would be considered "indirect compensation" from the prime, which is restricted by the regulation. *See* FAR § 3.104-1.

(2) *Division or Affiliate.* A division or affiliate should be presumed to be part of the contractor. An "affiliate," as defined at FAR § 2.101, means an associated business concern or individual if, directly or indirectly, either (a) one controls or can control the other, or (b) a 3rd party controls or can control both. However, under FAR § 3.104-3(d)(3), a former official is not prohibited from accepting compensation "from any division or affiliate of a contractor that does not produce the same or similar products or services as the entity of the contractor that is responsible for the contract." A determination as to what constitutes the ***"same or similar products or services"*** is fact dependent. It is recommended employees bear the burden of establishing that a product or service is "dissimilar enough."

> *E.g.,* Advertising a particular product is the service, not advertising in general. Therefore, advertising for recruitment could be considered "dissimilar enough" from advertising the sale of used cars, so that former employees could accept compensation. It is not enough that a division is on the commercial, as opposed to government, side of the contractor's business.

There is no exception in the Act or regulation regarding the quantity of the service or product. Therefore, the fact that a particular division's workload is only 1% of the "same or similar product or service" is irrelevant. If that division produces any amount of the product, it would be included in the compensation ban.

***"In excess of $10 million,"*** as defined at FAR § 3.104-1, means:

- the value, or estimated value, at the time of award, of the contract, including all options;
- the total estimated value at the time of award of all orders under an indefinite -delivery, indefinite-quantity, or requirements contract;

- any multiple award schedule contract unless the contracting officer documents a lower estimate;
- the value of a delivery order, task order, or an order under a Basic Ordering Agreement;
- the amount paid or to be paid in settlement of a claim; or
- the estimated monetary value of negotiated overhead or other rates when applied to the Government portion of the applicable allocation base.

**c. Application**

**(1) Team Awards**

As discussed in the 1998 memorandum, the Procurement Integrity Tiger Team advised that application of the compensation ban to team awards depends on the legal structure of the team -- for example, whether the team is a prime/subcontractor arrangement or a joint venture. If a team award designates one prime contractor, with the others in the team as subcontractors or not addressed, the employment ban should extend only to the named prime contractor. If a joint venture is awarded the contract, every party to the venture should be deemed awarded the contract and the compensation ban would extend to each party of the joint venture. We believe that this still constitutes sound guidance.

**(2) Measuring the "One-year Ban" on Compensation.**

The "one-year ban" is different from every other post government employment restriction in that it does not necessarily begin to run on the date of retirement, separation or resignation. Rather, it begins to run as follows:

- If you were serving as the PCO, the SSA, a member of the SSEB, or the chief of a financial or technical evaluation team, on a contract over $10 million, the ban begins to run on the **date of contract award** (unless you were serving in one of these positions on the date of contractor selection but not on the date of contract award, in which case the ban begins to run on the date of contractor selection);

- If you served as the Program Manager, Deputy Program Manager, or Administrative Contracting Officer, on a contact over $10 million, the ban begins to run on the **last date you served in that position**.
- If you made one of the seven types of decisions listed above on a contract over $10 million, the ban begins to run on the **date the decision was made**. [FAR 3.104-3(d)]

Thus, if an employee was the Program Manager on a contract over $10 million, and he or she stopped serving in that position 14 months before retirement, the employee would be subject to the 1-year compensation ban, but the 1-year period would end before the employee retired. Likewise, if an employee makes one of the seven types of decisions listed above on a contract over $10 million, and does so six months before the employee retires, the employee will be subject to the 1-year ban, but the ban will end six months after the employee retires.

The potential for confusion and misinterpretation clearly exists concerning persons serving as the PCO, the SSA, a member of the SSEB, or the chief of a financial or technical evaluation team. Where an individual serves in dual capacities, such as PCO and SSA, the award date may also be the date of selection. Where it is anticipated that the selection and award decisions will coincide, SSEB member appointment documents should state that members serve until the date of award, thus eliminating the difficulty of trying to determine a separate date of selection for those employees who are still in Federal service on the date of award, but are no longer working in a covered position.

In other cases, there is a clear demarcation between the selection and award decisions -- for example, when the SSA records the selection decision in a decision memorandum and award is made later by the PCO. In addition, there may be a gap of several days or weeks between the selection and award decisions -- *e.g.*, due to the PCO waiting for receipt of funding for the contract or waiting for authorization from the Milestone Decision Authority for the overall program to proceed into the next program phase. In these cases, there should be no difficulty in determining the dates of the selection and award decisions. Moreover, in these cases, it may be considered unfair to extend the evaluation board members' service until the date of award and thereby delay the start of the 1 year compensation ban for them.

### (3) Employees on transition or annual leave prior to retirement

The prohibitions in FAR § 3.104-3(d) apply to former officials. Technically, the provisions do not apply to military members on transition leave, or civilian employees on annual leave prior to retirement. As a result, a member or employee in such status technically could accept compensation from an entity from which they could not accept compensation after retirement. Under the JER, sections 2-303 and 3-306.e., employees and military members who file a financial disclosure report, which should include everyone described in § 3.104-3(d), must obtain prior written approval from their Agency Designees before accepting compensated employment with a prohibited source while serving with the Department. We recommend that such designees withhold approval in this circumstance, as it would potentially detract from readiness. It is possible that bid protests or performance delays could result. This situation illustrates the need for members and employees to ask for advice prior to their seeking employment.

In addition to issues arising under the PIA, employees and members above must be alert to avoid violating:

- **18 U.S.C. § 208**, by participating personally and substantially in any particular matter (which would involve not only contract negotiations, but also policy matters) that have a direct and predictable affect upon the financial interests of their future employer, or persons or entities with which they are negotiating or have arrangements for future non-Federal employment; and
- **18 U.S.C. §§ 203 and 205**, by representing others to the Federal Government. Federal employees may not represent anybody other than the United States to the Government on any particular matter involving the Government. The temptation for employees and members described above, is to start performing duties on behalf of the new employer. Simply being present in Government offices on behalf of a contractor inherently is a representation. Of course, members and employees may begin work with the contractor, but only "behind the scenes" at a contractor office or

otherwise away from the Government workplace. [Enlisted members are not subject to 18 USC §§ 203 or 205].

### c. Interaction With Other Post-employment Restrictions

Individuals subject to the compensation provisions of the Act also must be aware of, and their post-employment advice should reflect consideration of, the following:

- **18 U.S.C. § 207**. There are five prohibitions contained in this statute that apply to Executive Branch personnel [(a)(1), (a)(2), (b), (c), and (e)]. Prohibitions generally prohibit former employees from representing (and under certain provisions, aiding and assisting others in representing) anyone other than the United States to or before Federal agencies or courts under specific circumstances.
- **18 U.S.C. § 203**. To the extent that a former member or employee leaves the Federal Government to work for an employer that does representational work (e.g., law, public relations, lobbying firm) and the former member or employee draws his or her compensation through partnership shares, the former member or employee should seek advice as to the application of this statute to their non-Federal compensation.
- **37 U.S.C. § 908**. A former military member who intends to receive pay from a U.S. contractor or subcontractor for providing services to a foreign government, must obtain prior authorization from his or her Service Secretary and the Secretary of State before doing so. Failure to obtain authorization may result in the former member forfeiting his or her military pay during the time that he or she performs services for a foreign government. Retired personnel and reservists who violate this Constitutional proscription may forfeit pay equal in amount to their foreign pay.
- **Section 847 of the National Defense Authorization Act for Fiscal Year 2008 (Pub. L. 110-181)**. A DoD official who either: (1) is a general or flag officer, Executive level, or SES official who has participated personally and substantially in a DoD acquisition exceeding $10 million; or (2) has held a key acquisition position (a position listed in subsection 27(d) of the PIA, see III.a., above) with regard to a DoD contract exceeding $10 million, must obtain a written opinion from a DoD ethics

counselor regarding the activities that the official may undertake on behalf of a DoD contractor within two years after leaving DoD service. In addition, Section 847 prohibits a DoD contractor from providing compensation to such a DoD official without first determining that the official has received or appropriately requested a post-employment ethics opinion. Ethics officials are required to issue the written opinion letter within 30 days after receiving the request.

- **Penalties**

The penalties for violating the compensation ban provision are the administrative penalties set out in I.e., above.

**e. Advice**

An official or former official of a Federal agency who does not know whether acceptance of compensation from a competing bidder would violate the compensation ban, may request advice from an ethics counselor. Provided full disclosure of all relevant facts is made, a current or former official's good faith reliance on an ethics counselor's opinion will protect him against claims that he or she knowingly violated the Act. *See* FAR § 3-104.6(d). A request for an opinion should be in writing, dated and signed, and must include:

- all information reasonably available to the official or former official that is relevant to the inquiry (at a minimum, the request shall include information about relevant procurements in which the individual was involved, including contract or solicitation numbers, dates of solicitation or award, and a description of the goods or services procured or to be procured);
- information about the individual's participation in procurement decisions, including the dates or time periods of the participation, and the nature of the individual's duties, responsibilities, or actions; and
- information about the contractor who would be a party to the proposed conduct, including a description of the products or services produced by the contractor, or its division or affiliate from whom the individual proposes to accept compensation.

An ethics counselor may request additional information from the official, from other procurement officials, or the official's supervisor. Pursuant to FAR § 3-104.6(c), the ethics counselor is required to issue an opinion within 30 days or as soon thereafter as practicable (thus, the written opinion is colloquially known as a "30-day letter"). When the requester knows or should know that the opinion is based on fraudulent or misleading information, reliance on the opinion will not be deemed to be in good faith.

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