



U.S. Department of Defense Standards of Conduct Office

CONTRACTORS IN THE WORKPLACE¹

Contractor employees often work alongside Government personnel in the Government workplace, a situation that can present unique challenges. No matter how long they have served in an office, contractor employees are not Government employees. Contractor employees are present in the Government workspace solely as representatives of their contractor employer, and their authority and duties are defined by contract. Contractor employees may be authorized to perform many duties in support of Government personnel, programs, or other activities; however, a contractor employee does not serve as a Government official.

This guidance was prepared in coordination with acquisition counsel within the DoD Office of General Counsel. It is intended to illustrate some common ethics and acquisition issues that may arise while working alongside contractor employees in the Government workplace. It is not a substitute for legal advice. The rules in this area are complex, and application of these rules depends on the specific facts of a situation. When these issues arise, please contact the appropriate ethics or acquisition official for specific guidance.²

ETHICS PRINCIPLES

I. DISCLOSURE OF NON-PUBLIC INFORMATION

Government personnel with access to nonpublic information may not disclose it without authorization. In this context, nonpublic information is any information gained by reason of Government employment that Government personnel know or reasonably should know has not

¹ This guidance does not address situations in which contractor employees are performing pursuant to a personal services contract, which is a contract pursuant to which contractor employees' function in effect as Government employees. Please contact the appropriate ethics or acquisition official if you have any concerns relating to a personal services contract.

² This document provides guidance on ethics issues that can arise when working alongside contractor employees in the Government workplace; however, a variety of acquisition issues can arise as well. Maintaining awareness of the distinction between contractor employees and Government personnel is key to avoid inadvertently undermining the government's contractual rights and obligations on an existing contract or otherwise interfering with a pending source selection decision or contract award. Please contact the appropriate contracting officer, contracting officer's representative, or local acquisition counsel if you have questions or concerns regarding a contractor's authority, scope of duties, information access limitations, or anything relating to performance under an existing contract.

been made available to the general public.³ In addition, more specific restrictions may apply to disclosure of certain types of nonpublic information. For example, the Procurement Integrity Act⁴ prohibits Government personnel and contractor employees from disclosing or obtaining contractor bid or proposal information or source selection information without authorization.

Government personnel must be mindful to avoid, even inadvertently, releasing nonpublic information to contractor employees who are not authorized to have access to that information. Sharing nonpublic information with contractor employees (unless they are cleared and authorized to receive such information) is the same as releasing it to the public. Therefore, Government personnel should take particular care when discussing nonpublic information in areas where contractor employees are often co-located, e.g., cubicles, elevators, break and rest rooms, cafeterias, and other public areas.

Contractor employees often require access to nonpublic information to perform their contractual duties. The contractor employee's authority to access that nonpublic information will be specified in the contract, along with any associated access restrictions, information protection requirements, etc. That said, no contract alone can permit the release of one company's proprietary information to another contractor. Proprietary information constitutes a more closely controlled subset of non-public information requiring attentive handling. If you have any questions about a contractor employee's authority to access certain nonpublic information, please contact the contracting officer or authorized contracting officer's representative prior to disclosure.

II. CONFLICTS OF INTEREST

Government personnel are prohibited by criminal conflict of interest statutes and implementing regulations from official participation in particular matters that will have a direct and predictable effect on their actual or imputed financial interests. Federal regulations require Government personnel to avoid even an appearance of loss of impartiality in performing their official duties.⁵ To identify and avoid conflicts of interest, certain covered Government personnel must annually submit a financial disclosure report containing certain financial and employment data. Contractor employees have no similar mandated requirement.

Government personnel are also prohibited from representing any non-Federal entity to other Government personnel in connection with a covered matter in which the United States is a party or has a direct and substantial interest. A covered matter includes any judicial proceeding, application, request for a ruling or other determination, contract, claim, controversy,

³ 5 C.F.R. § 2635.703

⁴ See 41 U.S.C. § 2102 and the associated implementing acquisition regulations at Federal Acquisition Regulation (FAR) 3.104, 48 C.F.R. § 3.104.

⁵ 18 U.S.C. § 208 and 5 C.F.R. § 2635.501, et seq.

investigation, or other particular matter.⁶ For instance, if there is a dispute concerning contract performance and an on-site contractor employee asks a DoD employee to intercede with the contracting officer on the contractor employee's behalf, the DoD employee could be subject to criminal sanctions if the DoD employee complies with the contractor employee's request, even if the DoD employee is not compensated by the contractor.

Another criminal conflicts of interest statute prohibits the acceptance of bribes or illegal gratuities at 18 U.S.C. § 201. This statute applies equally to Government personnel and contractor employees.

III. SWITCHING SIDES

Contractor Employees Transitioning to the Government

When a contractor employee who works in the Government workplace applies for a Government position in that same workplace, it is imperative that all of the appropriate hiring procedures are followed to avoid even an appearance that the contractor employee received preferential treatment. As new DoD employees, former contractor employees are subject to a two-year requirement to recuse themselves from personally and substantially participating in particular matters to which their former employer is, or represents, a party.⁷ Former contractor employees may also continue to hold financial interests in their former employer, such as stock.⁸ Such financial interests may also trigger certain recusal or divestiture requirements.

Government Personnel Transitioning to a Contractor

If a contractor, or its employee, makes an unsolicited overture to discuss employment opportunities with a current Government employee, unless the Government employee makes a clear and immediate rejection, the Government employee must recuse from participating in matters that affect the financial interests of the contractor.⁹ Depending on their duties, Government employees may also be required to notify their supervisor and the appropriate contracting and ethics officials of these contacts. Even if not required, such consultation is a best practice.

⁶ 18 U.S.C. §§ 203, 205

⁷ 5 C.F.R. § 2635.502; Section 1117 of the National Defense Authorization Act for Fiscal Year 2022.

⁸ 18 U.S.C. § 208.

⁹ 18 U.S.C. § 208, 5 C.F.R. § 2635.604

IV. GIFTS

Government personnel are prohibited from soliciting gifts from contractors, or their employees, and may only accept unsolicited gifts from a prohibited sources or gifts offered by reason of their official position if an exclusion or exception applies.¹⁰ In addition, even if the rules permit acceptance of a gift, Government personnel should decline the gift if acceptance would create an appearance of impropriety. Subject to certain rules permitting designation of separate “components,” contractors doing business with an agency or department are considered prohibited sources for Government personnel in that agency or department. Below are three common exclusions and exceptions to the general gift prohibition that are likely to apply to gifts offered in the workplace by a contractor employee to Government personnel:

- Modest items of food or non-alcoholic refreshments that are not part of a meal (such as candy, cookies, etc.).
- Gifts (other than cash) not exceeding \$20 per source, per occasion, as long as the total amount of gifts that the individual accepts from that source (the contractor and its employees combined) does not exceed \$50 for the calendar year.
- Gifts that are based on a bona fide personal relationship. Personal relationships are generally limited to family and close personal friendships arising outside the workplace. A key indicator of whether a gift is based on a personal relationship is whether the gift is paid for or reimbursed by the contractor employer. However, if the contractor employer gives a gift or invitation to its employee and the employee, without direction from the company, then re-gifts to or invites a Government employee based upon a family or close personal relationship, the personal relationship exception may still apply.¹¹

Although there are no Government ethics restrictions on Government personnel giving gifts to contractor employees, many companies have codes of ethics that are similar to Government rules which, therefore, may preclude the acceptance of gifts from Government personnel.

¹⁰ 5 C.F.R. § 2635.201, et seq.

¹¹ Contractor employees and Government personnel who have a close personal relationship should not be assigned to the same office if doing so means that the Government employee will interact in an official capacity with the contractor employee or otherwise task or receive contractor employee work product. This would likely violate the impartiality regulations at 5 C.F.R. § 2635.501, et seq.

GENERAL PRINCIPLES

I. OVERSIGHT

Government personnel may exercise oversight of contract performance, as a contracting officer (CO), or as an authorized contracting officer representative or technical representative (COR/COTR). Government personnel may not exercise any of the following functions in the course of performing their contractual oversight duties:

- Supervise or direct contractor employees.
- Approve leave or other absences of contractor employees.
- Train or approve training for contractor employees.
- Conduct performance appraisals or other evaluations of contractor employees.
- Provide or approve awards for and recognition of contractor employees.
- Tell or suggest to a contractor whom to hire.

Conversely, contractor employees may not perform any of the following functions:

- Supervise Government personnel.
- Supervise employees of other contractors.
- Administer or supervise Government procurement activities.
- Perform inherently governmental functions.¹²

An inherently governmental function is a function that is so intimately related to the public interest as to mandate performance by Government personnel. These functions include those activities that require the exercise of discretion in applying government authority, the use of judgment in making decisions for the Government, and decisions regarding monetary transactions and entitlements.¹³

II. TIME MANAGEMENT

Each contractor is responsible for supervising its employees. The contractor employee's supervisor controls the time management of the contractor employee. Government personnel may not circumvent, or step in the shoes of, the contractor's supervisor. Time billed to the Government must be in furtherance of and in performance of the contract, and Government personnel may not ask or direct contractor employees to perform work that is outside the scope of their contract. For example, Government personnel may not:

¹² See 48 C.F.R. Subpart 7.5.

¹³ Id.

- Authorize compensatory time for contractor employees.
- Authorize contractor employees to attend activities unrelated to the performance of their contract (e.g., sports days, team-building exercises, retirement ceremonies, office social events, etc.).
- Grant an early release to a contractor employee. For example, the agency may not grant “59 minute” early release to contractor employees.
- Unless authorized in the contract, ask for help to set up an office or command event.

Challenges can arise in connection with participation of contractor employees in Government office social events or outings during official hours. Such events or outings are ordinarily out of scope of the contract, in which case that time may not be billed to the Government. The contractor, however, may choose to authorize its employees to participate in the event. The contractor employee is responsible for obtaining such permission from his or her employer. Government personnel should contact the contracting officer or contracting officer’s representative with any questions about contractor employee attendance at a particular event or activity.

III. CONFUSION OF IDENTITY

Due to different roles, responsibilities, authority, and restrictions, the identities of Government personnel and contractor employees should be clearly recognizable to avoid creating an impression that contractor employees are Government personnel. Specifically, agencies must ensure that contractor employees performing certain types of governmental support functions are required to properly disclose their contractor status in situations where it may not be readily apparent.¹⁴ Agencies should also ensure, as appropriate, that all documents or reports produced by contractors are suitably marked as contractor products and that contractor participation is appropriately disclosed.

IV. CONTRACTOR AWARDS & RECOGNITION

In general, only the contracting officer or authorized designee can provide comments concerning a contractor’s performance under a contract. Providing an award or other accolade from Government personnel may constitute a prohibited endorsement of the contractor or could undermine any ongoing investigations or litigation relating to the same or another contract with that entity. DoD policy prohibits giving awards or other recognition to contractor employees for work done pursuant to their commercial relationship with DoD.¹⁵ The single exception is if the thing for which the contractor is to be recognized is unrelated to and completely outside any contractual relationship with DoD and the recognition is clearly in the public interest.¹⁶

¹⁴ 48 C.F.R. § 37.114

¹⁵ DoDI 1400.25, Volume 451 “DoD Civilian Personnel Management System: Awards,” Enclosure 3, Section 11b.

¹⁶ Id.

Similarly, contractor employees are not authorized to receive honorary awards, to include certificates of appreciation, or incentive awards pursuant to Administrative Instruction 29, “Incentive and Honorary Awards Program.”

There are also ethics concerns associated with providing awards, certificates, or letters of appreciation to contractor employees as Government personnel are prohibited from endorsing or showing favoritism toward any non-Federal entity.¹⁷ While in the Government workplace, contractor employees are not representing themselves in an individual capacity, but rather are representatives of their employer. Therefore, providing any kind of recognition or award would constitute an impermissible endorsement of a non-Federal entity in violation of Government ethics regulations.

Contractors have their own internal awards and bonus programs. If a particular contractor has performed well under the contract, the appropriate course of action is to notify the CO or COR/COTR. This ensures that the Government provides a unified assessment of a contractor's performance and protects the Government's interest.

SUMMARY

This guidance highlights common issues Government personnel may encounter while working along contractor employees in the Government workplace. It does not cover every situation. Some key take-aways are:

- Remember that contractor employees are not Government employees.
- Don't ask contractor employees to perform out-of-scope work, personal services, or inherently governmental functions.
- Ensure support contractor employees are properly identified so that they are not confused for Government personnel.
- Respect the employer-employee relationship between contractor employees and their employers.
- Safeguard non-public information.
- Beware of contractor employees bearing gifts!

For advice tailored to a specific circumstance, contact the appropriate legal or contracting office. For ethics questions, contact local ethics official(s) (for OSD personnel only contact the Standards of Conduct Office (SOCO) at (703) 695-3422 or by e-mail at OSD.SOCO@MAIL.MIL). For acquisition-related questions, contact the CO, COR/COTR.

¹⁷ 5 C.F.R. § 2635.702.