

## **ETHICS OF CONTRACTORS IN THE WORKPLACE AND ON DEPLOYMENT**

### **I. REFERENCES**

- A. 5 C.F.R. § 2635.102 Definitions
- B. 5 C.F.R. § 2635 Subpart B: Gifts From Outside Sources
- C. 5 C.F.R. § 2635.203: Gift Definitions
- D. 5 C.F.R. § 2635.204: Gift Exceptions
- E. 5 C.F.R. § 2635.808: Fundraising Activities
- F. 5 C.F.R. § 2635.303: Gifts Between Employees Definitions
- G. DoD 1400.25-M: Department of Defense Civilian Personnel Manual (CPM)
- H. DoDI 1015.10: Programs for Military Morale, Welfare, and Recreation (MWR)
- I. 18 U.S.C. § 208: Acts Affecting a Personal Financial Interest
- J. 5 C.F.R. § 2635.401: Conflicting Financial Interests
- K. 5 C.F.R. § 2635.501: Impartiality in Performing Official Duties
- L. 5 C.F.R. § 2635.601: Seeking Other Employment
- M. 5 C.F.R. § 2640: Interpretation, Exemptions and Waiver Guidance Concerning 18 U.S.C. § 208
- N. 48 C.F.R. Ch. 1, Federal Acquisition Regulations (FAR) Subpart 3.6: Contracts with Government Employees or Organizations Owned or Controlled by Them
- O. OMB Circular No. A-76: Performance of Commercial Activities (Revised May 29, 2003)
- P. FAR Subpart 7.5: Inherently Governmental Functions
- Q. FAR Subpart 37: Personal Services Contracts
- R. 41 C.F.R. § 102-74.415: Posting and Distributing Materials
- S. Financial Management Regulation, DoD 7000.14-R
- T. FAR Subpart 16.4: Incentive Contracts
- U. FAR Subpart 45.101: Government Property, Definitions
- V. FAR 45.509-2: Use of Government Property
- W. DoD 4500.36-R: Management, Acquisition, and Use of Motor Vehicles
- X. 31 U.S.C. § 1353: Acceptance of Travel and Related Expenses From Non-Federal Sources
- Y. 5 U.S.C. § 4111: Acceptance of Contributions, Awards, and Other Payments
- Z. 5 C.F.R. § 2635.703: Use of Nonpublic Information
- AA. 5 C.F.R. § 2635.604: Disqualification While Seeking Employment
- BB. DoD 5500.7-R, Joint Ethics Regulation (JER) 2-204(c): Standard for Accomplishing Disqualification
- CC. 5 C.F.R. Part 950: Solicitation of Federal Civilian and Uniformed Service Personnel for Contributions to Private Voluntary Organizations
- DD. 18 U.S.C. § 1905: The Trade Secrets Act
- EE. 41 U.S.C. § 423: Procurement Integrity
- FF. 18 U.S.C. § 203: Compensation to Members of Congress, Officers, and Others in Matters Affecting the Government
- GG. 18 U.S.C. § 205: Activities of Officers and Employees in Claims Against and Other Matters Affecting the Government
- HH. 5 C.F.R. § 2635.801-803: Outside Activities
- II. FAR Subpart 37.114(c): Special Acquisition Requirements

## II. GOAL

The goal of this chapter is to provide a quick overview of the ethics issues that commonly arise in dealing with contractor employees in the Federal workplace during deployment into a combat zone. Frequently, the proper use of contractor support are matters for procurement regulations, although the growing use of contractor employees in the Federal workplace increases the frequency and the likelihood that ethics issues will arise. In these circumstances, it is best to use a combination of procurement and ethics guidance.

The following discussion provides guidance on the government-contractor relationship. For specific material, please see the pertinent chapters of this desk book and the Federal Acquisition Regulations.

Please note that the terms, “DOD personnel”, “Government personnel” and “Government employees” include military and civilian personnel. “Contractors,” “Contractor personnel” and “Contractor employees” include personnel employed as prime or sub-contractor under Federal Acquisition Regulations contract, gratuitous services agreement, or theatre-sponsored business program.

## III. INTRODUCTION

- A. Contractor employees are not government personnel and are not subject to the same laws and regulations, except in the deployed environment. Theatre General Orders apply to both government and contractor personnel. Government personnel are subject to Federal laws/regulations and DoD regulations. Contractor personnel are subject to Federal criminal laws (such as bribery), Military Extraterritorial Jurisdiction Act, the work rules of their particular employer, and any restrictions imposed by the contract.
- B. The Government establishes a relationship with the contractor, which is defined by the contract. Normally, government personnel do not exercise any of the following functions over contractor employees:
  - 1. Supervise or direct.
  - 2. Approve leave or other absences.
  - 3. Train or approve training. (Normally a contractor is expected to provide a trained workforce that is responsive to and meets the contract obligations.)
  - 4. Conduct performance appraisals or other evaluations.<sup>1</sup>
  - 5. Provide or approve awards and recognition.<sup>2</sup>

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<sup>1</sup> Performance standards establish the performance level required by the Government to meet the contract requirements. The standards shall be measurable and structured to permit an assessment of the contractor’s performance. The FAR provides Government authority to evaluate contract performance, but the authority does not extend to the performance of individual contractor employees. (FAR 37.603(a))

<sup>2</sup> Bonuses and incentive compensation are allowable for personal service contracts provided : (i) Awards are paid or accrued under an agreement entered into in good faith between the contractor and the employees before the services are rendered or pursuant to an established plan or policy followed by the contractor so consistently as to imply, in effect, an agreement to make such payment; and (ii) Basis for the award is supported. (FAR 31.205-6(f))

6. Tell or suggest to a contractor whom to hire or fire.
7. Discipline contractor employees.

C. Contractor employees may not exercise any of the following functions:

1. Supervise government personnel.
2. Supervise employees of other contractors.
3. Administer or supervise government procurement activities.
4. Perform inherently governmental functions.
5. Evaluate, discipline or reward government personnel

#### **IV. INHERENTLY GOVERNMENTAL FUNCTIONS AND PERSONAL SERVICES**

An inherently governmental function is one that is so intimately related to the public interest as to mandate performance by government employees. 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. (OMB Circular No. A-76; FAR 7.5)

- A. It is government policy that contractor employees shall not be used to perform inherently governmental functions.<sup>3</sup> FAR 7.5 lists 20 functions considered to be Inherently Governmental. The list is attached to the end of this outline.
- B. Attachment A of OMB Circular No. A-76 provides examples of commercial activities not normally considered inherently governmental.
- C. Unless authorized by statute, the government cannot contract for personal services. (FAR 37.104(b)) A personal services contract is one that, by its terms, or as administered, makes the contractor employees appear to be, in effect, government employees.
  1. If you seek a personal services contract, and are authorized by statute, obtain the review and opinion of legal counsel specializing in government contracts (FAR 37.104 (e)).
  2. Statutory personal services contracts in DoD
    - (a) 10 U.S.C. § 129b
      - (i) Outside United states; or
      - (ii) Direct support of DoD intelligence component; or

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<sup>3</sup> Agencies shall not award a contract for the performance of an inherently governmental function (see Subpart 7.5 of FAR 37.102(c)). Further, Agency heads have an affirmative duty to ensure specific procedures are in place before contracting for services to ensure that inherently governmental functions are performed only by Government personnel (FAR 37.503(c)).

- (iii) Direct support of special operations command, DoD.
- (b) 10 U.S.C. § 1029. Health care responsibilities in medical treatment facilities.

## V. CONFLICTS OF INTEREST

Since Federal conflict of interest rules apply to government personnel, they must take care to avoid actual or apparent conflicts of interest with their official duties. The following provides a description of the differences between government personnel and contractor employees.

- A. Contractor employees are not subject to 18 U.S.C. § 208 and 5 CFR 2635.502, but remain subject to 18 U.S.C. § 201 (Bribery), 41 U.S.C. 423 (Procurement Integrity), and other procurement-related statutes. Contractors are also required to report criminal conduct committed by their employees, under the authority of FAR 3.10. Government personnel are subject to criminal statutes and regulations that restrict their official participation in particular matters that have an effect on their financial interests, and require them to avoid even an appearance of loss of impartiality in performing their official duties. (5 CFR 2635.401 and 501, and 5 CFR 2640)

Example: A contractor employee was a supply technician whose job was to complete requisition and invoice shipping documents to facilitate the award of government freight transportation contracts to freight forwarding companies. The contractor employee accepted from a sales representative of a local freight forwarding company items valued at approximately \$10,000. These included lunches and dinners, concert tickets, NASCAR tickets, weekend accommodations, spa days, alcoholic beverages, and various clothing and jewelry items. The contractor employee pled guilty to conspiracy to receive illegal gratuities (in violation of 18 U.S.C. § 201 and 371).

**Practice Tip:** It is important for contractor employees to remain within the scope of the contract and not perform personal or inherently governmental functions. At all times, the government should have visibility over the contractor tasks and deliverables. The government should question contractor recommendations that do not make sense or appear inappropriate.

- B. Government standards of ethical conduct rules require that government personnel to be appropriately aware of, and trained on criminal statutes and implementing administrative regulations. Government personnel have a designated ethics official from whom to seek advice and counsel. Contractor employees are required to maintain a program of business ethics, as well as extensive training and reporting programs.
- C. Certain covered Government personnel must annually report their financial interests, liabilities and outside activities. Contractor employees generally have no similar mandated requirement. However, since the Government has an interest in prohibiting anyone from working on official matters in which they have a conflict of interest, the contract may require disclosure and avoidance of potential conflicts. The contract may require disclosure of the financial interests of any contractor employee when disclosure would be required of a Government employee.

**Practice Tip:** Any documentation supporting financial disclosure should remain with the contractor. Otherwise, the documents will become subject to OMB Paperwork Reduction Act, Privacy Act and possibly Freedom of Information Act.

Example: A contractor employee is responsible for testing products and providing the results of his tests as a deliverable to assist the government technical evaluation board to award a contract. The contractor employee owns stock in one of the companies being evaluated. Statutes and regulations prohibit government personnel from participating in a matter that has a direct and predictable effect on their financial interests. Without a similar disclosure requirement, the government would be unable to discover that a potential contractor had employee conflict of interest.

- D. Government personnel should be particularly vigilant to avoid any actual or apparent conflicts of interests with their official duties.
- E. To avoid any conflict of interest between official duties and personal interests and to avoid the appearance of favoritism or preferential treatment, the government (absent a compelling need determination) may not award a contract to government personnel. Unless the head of the contracting activity makes a compelling need determination, a contracting officer may not award a contract to a government employee or to a business concern or other organization owned or substantially owned or controlled by one or more government employees. (FAR 3.601)

## **VI. CONTRACTOR BUSINESS ETHICS PROGRAMS**

- A. Contractors will have ethics and business gratuity policies and extensive training and reporting programs. FAR 3.10 requires --
  - 1. Contractor code of business ethics and conduct;
  - 2. Training and internal ethics control system that --
    - a. Are suitable to the size of the company and extent of its involvement in government contracting;
    - b. Facilitate timely discovery and disclosure of improper conduct in connection with government contracts; and
    - c. Ensure corrective measures are promptly instituted and carried out.
  - 2. Mandatory disclosure to the government of certain criminal law violations, False Claims Act violations, or evidence of significant overpayments.
- B. Requirements apply to contract and subcontracts greater than \$5.5 Million and performance period greater than 120 days. Small business and commercial items contracts are exempt from ethics training and internal control systems.
- C. Contractor may be suspended or debarred for a knowing violation by a principle to timely disclose to the government credible evidence of --

A violation of federal criminal law involving fraud, conflict of interest, bribery or gratuity violations in Title 18, United States Code, violation of False Claims Act, or significant overpayment occurring in connection with the award, performance, or close out of a government contract performed by a contractor or subcontractor. Knowing failure to timely disclose credible evidence of any of the above violations remains a cause for suspension and/or debarment until 3 years after final payment on a contract.

- D. When the contracting officer is notified of possible contractor violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 USC or a violation of the civil False Claims Act, the contracting officer shall –
1. Coordinate the matter with the agency Office of the Inspector General; or
  2. Take action in accordance with agency procedures.

## VII. GIFTS

The gift rules may pose more difficulty in a workplace that emphasizes teamwork between government personnel and contractor employees. Although these groups may work side by side, each has a different set of rules that guides not only their individual behavior, but also official interaction. The government gift rules fall into two categories: (1) gifts from outside sources and (2) gifts between employees. Since contractor employees are not government personnel, gifts from contractors constitute gifts from outside sources, not gifts between employees.

**Practice Tip:** Government personnel should not, directly or indirectly, solicit or accept a gift from a DoD prohibited source (All DoD contractors and their employees are prohibited sources<sup>4</sup>) or a gift given because of the employee’s official position. (5 CFR 2635 Subpart B); DoD 5500.7-R, Joint Ethics Regulation (JER).

- A. Gifts From contractor employees to government personnel:
1. Some items are excluded from the definition of a gift, so they may be accepted. The most relevant exclusions are modest food and refreshments, greeting cards, and anything for which market value is paid by the government employee. (5 CFR 2635.203)
  2. If the item is not excluded, then government personnel may accept a gift only if it fits an exception. (5 CFR 2635.204)
    - a. \$20/\$50 exception - The most common exception is the \$20/\$50 rule. Government personnel may accept unsolicited gifts if they are not cash and are valued at or under \$20 per source, per occasion. The aggregate limit from a single source is \$50 per calendar year. (5 CFR 2635.204(a))

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<sup>4</sup> The term “prohibited source” is very inclusive and encompasses not only the corporate entity that enters a contract, but also any officer, employee, or agent of the entity. Therefore the term “prohibited source” in the gift definitions includes not only the contracting entity, but also each and every employee of the contractor. (5 C.F.R. 2635.102 and 203)

**Practice Tip:** The \$50 maximum applies to the contractor and aggregates all gifts from individual contractor employees who are employed by that contractor. Consequently, a government employee or member could not accept three \$20 lunches from three different contractor employees during the year if the three worked for the same contractor at the time of the gifts.

Example: A team made up of contractor employees and government personnel successfully complete a project, marking the delivery and successful completion of the contract. The contractor throws a party to celebrate, inviting the government personnel. May government personnel attend the party? Contract completion does not necessarily end the contractor's status as a prohibited source. If the contractor does business or seeks to continue to do business with the agency, then the contractor remains a prohibited source. Moreover, government personnel may not accept a gift from a contractor (invitations to a party) if the contractor offers the invitation based on the government employee's or member's position. Therefore, government personnel may only attend if the party falls within a gift exception (*e.g.* the \$20/\$50 exception). Even then, government personnel should remain mindful of a possible appearance of impropriety.

Example: Because they live in close proximity to one another, a contractor employee wishes to join a carpool with a government employee. Such an arrangement is allowed if each of the participants bears their fair proportion of the expense involved. A "gift" does not include anything for which market value is paid by the government employee.

- b. Personal relationship exception – Another exception permits government personnel to accept gifts clearly motivated by personal friendship. When using this exception, it must be clear that the motivation for giving the gift is a family or personal relationship, and that the contractor employee, not the contractor, is paying for the gift. Evidence of a qualifying personal relationship includes interactions that extend beyond the workplace over an extended period of time, and evidence of friendships that existed prior to the relationship in the workplace. (5 CFR 2635.204(b))

**Practice Tip:** Evidence of this relationship must be objective and substantial in order to rebut the presumption that friendships arising from interaction in the workplace do not qualify for this exception. If the relationship did not exist prior to working together and there is little evidence of interaction outside of the workplace it probably does not qualify for the personal relationship exception.

**Practice Tip:** If a contractor employee invites a government employee to his house, the employee may accept the invitation only if it falls under an exclusion or exception discussed above. While the government rules on gifts between government employees provide an exception for personal hospitality, the rules on gifts from outside sources do not.

3. Disposition of prohibited gifts: If a government employee receives a gift that may not be accepted, the employee must return the gift or pay the offeror its market value. Subsequent reciprocation by the government employee does not constitute payment for the gift. (5 CFR 2635.203(b)) Consequently, accepting lunch from a contractor employee with the intent to "pay next time" is not an acceptable means to eliminate the prohibited gift.

- B. Gifts to contractor employees from government personnel:
1. The government gift rules do not apply to contractor employees or to gifts from government personnel to those employees.
  2. Contractors may have adopted corporate ethics rules that determine if the contractor employees may accept such gifts.
- C. Group Gifts: For certain special occasions, such as retirements, marriages, births of children, or funerals:
1. Government personnel may pool their funds for a group gift if the recipient is not an official superior.
  2. Government personnel may pool their funds for a group gift to an official superior as long as the gifts are appropriate to the occasion and the contributions are voluntary. Such gifts are also subject to a \$300 limitation in JER 2-203(a)(2).
  3. Contractor employees may not contribute to a group gift for government personnel. Gifts from outside sources (contractor employees) are governed by 5 CFR 2635, subpart B. Gifts from government personnel are regulated by 5 CFR 2635, subpart C, which authorizes group gifts only from government personnel. Neither of the regulations provides authority to mix the contributions. Since there is no authority for contractor employees and government personnel to commingle donations for a group gift, such a practice is prohibited.

Example: Three different contractor employees who work for a government agency wish to buy a \$45 coffee table book for a departing government employee. Although each of the contractor employees contributes \$15 toward the gift, the government employee may not accept the gift because it is a single \$45 gift.

4. Government personnel may not solicit outside sources (including contractor employees) for contributions to group gifts. (5 CFR 2635.808(c)(1)(i))

Example: A government employee's supervisor is getting married. A lower level government employee takes up an office collection for a wedding gift, suggesting that each employee may voluntarily donate up to \$5.00. The government employee may not ask the contractor employee for \$5.00 – this would be soliciting a gift from a prohibited source. Moreover, the contractor employee could not give an *unsolicited* gift of \$5.00 towards the government employee office gift. However, the contractor employee could give his own gift subject to the \$20 limit from each contracting source.

5. Group gifts to contractor employees:
  - a. There is no government prohibition on government personnel collecting among themselves for a group gift to a contractor employee.

- b. Contractors may have their own rules of ethics or business practices that guide appropriate behavior. Employees should take these rules into consideration before offering contractor employees gifts or opportunities that they may not be able to accept. Check with the contracting officer or the contractor supervisor.

## VIII. PARTIES AND OTHER UNOFFICIAL OUTINGS

These functions represent a subset of gifts, and therefore the gift rules apply. On occasion, government personnel participate in activities outside the government workplace. Especially during the holiday season, social gatherings are common. Whether for morale and welfare purposes or a simple social gathering, these unofficial endeavors can pose difficulties for contractor employees who may wish to participate. Parties, gift exchanges, and the like are often organized to celebrate the particular event or season. The gift rules apply to these situations as well. Pay particular attention to gift acceptance thresholds and the prohibition on solicitations of prohibited sources.

### A. Parties, Open-Houses, and Receptions:

1. Government personnel may attend social events sponsored by non-prohibited sources if no one is charged admission. (*e.g.*, most holiday receptions and open-houses) (5 CFR 2625.204(h)).
2. Widely Attending Gathering - The widely attended gathering exception allows government personnel in their personal capacity to accept free attendance at an event that meets the criteria set out in 5 CFR 2635.204(g)(2) and (3). Widely attended gatherings must be open to a wide audience or represent a range of persons interested in the subject matter. The agency must determine whether there is agency interest or conflict of interest with the offeror. Free attendance is a personal gift to government personnel. 5 CFR 2635.204(g)(1) authorizes government personnel to participate as a speaker, panel member, etc and accept free attendance on the day of their participation. Under this authority, free attendance on the day of participation is not a gift to the agency and is an exception to the general gift acceptance rule for the individual.
3. Government personnel may attend events in which the per-person cost is \$20 or less (and the individual has not exceeded the \$50 limit on gifts from that source for that calendar year.)

### B. Parties and gift exchanges that include contractor personnel:

1. Gifts from contractors or their employees, even during the holidays, may not exceed \$20, unless another exception applies. (5 CFR 2635.202)
2. Contributions to cover the cost of the event: Contractor personnel may pay their share of the fee to cover the actual cost of refreshments or may bring food to share if others are doing the same. These are not considered gifts, but rather the cost of their share of an unofficial office function or lunch.

3. Gifts to contractor employees: Check with the contractor, since contractors have codes of ethics that limit the acceptance of gifts.

Example: The office is celebrating the marriage of one of the government employees during the non-duty lunch hour or after work. Each person attending has been asked to pay \$10 to cover refreshments and to bring an entrée or dessert. The contractor employee may attend, pay \$10, and bring food because these contributions are not considered to be gifts, but a fair share contribution to the refreshments. However, the contractor employee should not be on contract time billed to the government.

## **IX. TIME MANAGEMENT**

The contract and contractor supervisor control the time management of the contractor employees. Government personnel may not circumvent the contractor supervisor. Time billed to the government must be in furtherance of and in performance of the contract. Government personnel may not ask contractor employees to work outside the scope or limitations of the contract. May not:

- A. Authorize compensatory time for contractor employees.
- B. Invite contractor employees away from their assigned workplace or otherwise authorize contractor employees to attend activities unrelated to the performance of their contract. (Examples include sports days, team-building exercises, retirement ceremonies, and office social events.)
- C. Grant an early release such as “59 minute” early release.
- D. Unless authorized in the contract, ask for help to set up an office or command event, decorate offices for holiday themes, etc.
- E. Ask contractor employees to volunteer personal time to help set up an office or command event.

## **X. POLITICAL ACTIVITIES**

### **A. Political Activities in the Workplace:**

The Hatch Act and DoD regulations prohibit Government personnel from conducting political activities in the workplace and limit their political activities elsewhere. These restrictions apply only to DoD personnel and do not apply to contractor employees. Therefore, there is no Federal prohibition on contractor employees engaging in political activity, such as displaying signs or actively campaigning, in the Government workplace.

1. To remove this incongruity, components should establish and apply site regulations to restrict political signs. For example, General Services Administration (GSA) Federal Management Regulation (FMR) prohibit posting or affixing materials on bulletin boards or elsewhere on GSA controlled property, except as authorized. This

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restriction does not apply to public areas. (41 CFR §102-74.415). Moreover, each service will have restrictions concerning political activity on installation. WHS has restrictions on political activity at the Pentagon Reservation.

2. Another possible solution is to capture political activity restriction in the contract/task order.

Example: A contractor employee is running for local political office as a partisan candidate. May the contractor employee place a campaign poster above his desk in the Federal worksite? May the contractor employee solicit campaign contributions from the government employees? Unless the agency has workplace rules that govern such display activities, the contract prohibits, or is a GSA owned or controlled building no existing government regulations on political activities currently prohibit such activity.

#### B. Use of Office to Influence an Election or Affect Political Activity:

The Hatch Act at 5 U.S.C. 7323 prohibits a Federal civilian employee from:

- Using “his official authority or influence for the purpose of interfering with or affecting the results of an election.”
- Soliciting or discouraging the participation in any political activity of another person who is seeking certain official actions by that office.

Among other things, this prevents government civilian employees from suggesting to members of the public who call a Federal office that they should vote for a particular candidate or contribute to a particular political party.

Contractor personnel, including those who may be dealing with the public, are not subject to these restrictions. Therefore, contractor personnel may attempt to use their relationship with the government to imply endorsement or approval of their political platform or agenda. Contracts, task orders and Installation policies on political activity should limit political activity by contractor personnel while performing the government contract.

## **XI. AWARDS**

Commonly, government organizations assign teams to solve a particular problem. These teams often represent a mix of government personnel and contractor employees. Upon successful completion of the project, the organization may recognize members of the team. The government may award government personnel using a variety of methods, ranging from certificates of appreciation to time off and a monetary bonus. The government does not have the same authority to recognize contractor employees even if they are members of a team that includes government personnel.

- A. Contractors may have their own awards and bonus programs.
- B. Contracts may include incentives and awards for performance or work performed ahead of schedule (FAR 16.4).

- C. The DoD Civilian Personnel Manual offers very limited authority to recognize contractor employees for contributions that are deemed unrelated and completely outside the contractual relationship and recognition is clearly in the public interest (DOD 1400.25, V451, Enclosure 3, paragraph 11b).
- D. Recognition of a contractor employee may only take the form of a letter or certificate of appreciation signed at the lowest applicable level of the organization
- E. Use of appropriated fund “Commander’s Coins” are only to recognize special achievements of government employees and may not be given to contractor employees. Nor may commanders give contractor employees coins that they have purchased with personal funds.
- F. Before deciding to give a presentation, award, or recognition to a contractor employee, check with the contracting officer and servicing legal office, since any recognition may be used against the government in a dispute involving contract performance.

## **XII. USE OF GOVERNMENT RESOURCES**

- A. Contract: As a matter of policy, contractors are ordinarily required to furnish all property necessary to perform Government contracts. (FAR 45.102)
- B. Government furnished property: If the government determines that property is unique, it is cost effective or otherwise in the government’s best interest, the government may so provide in the contract. The contract must describe the property that will be furnished during performance and establish accountability and return procedures. System of property control must be in writing. When the government provides property and resources, contractor employees may only use the resources for purposes authorized to fulfill the requirements of the contract. (FAR 45.509-2)
- C. Government furnished services: Normally, government organizations include departments that provide services for some or all of its government personnel, including Employee Relations, Equal Employment Opportunity, Arbitration/Mediation, Chaplain, and Legal. Although such services are readily available at the work site, contractor employees may not use these resources unless otherwise provided for in the contract or otherwise qualified. For example, a contractor employee who is a retired military member does have some limited ability to use military-provided legal services. Contractors are responsible for providing employee related services (Employee Relations, EEO, and Mediation) to their employees.
- D. Government furnished training – see training section, *infra*.
- E. Personal use policy: While Agency Designees (supervisors) have the authority to determine appropriate personal use of government resources by government personnel, they do not exercise the same authority and control over contractor employees. Because the contractor employee is fulfilling the obligation of the contract, all use of government property must comply with the Federal Acquisition Regulations. Since the contractor is

responsible for meeting all deadlines and deliverables of the contract, it may further restrict personal use of resources that could have a detrimental impact on the cost, quality, and timeliness of the delivered product or service. The contractor may limit personal use provisions in the contract, but the contractor may not expand them.

- F. Use of Morale, Welfare, and Recreation (MWR)/NonAppropriated Funds Instrumentality (NAFI) programs and facilities: The installation commander has the discretion to allow contractor employees that work full-time on the installation limited use of military MWR activities, such as restaurants, gymnasiums, and golf courses. Commanders may open activities to these patrons based on local demand and capacity. Resale of food, state tax-free beverages, and tobacco products is restricted to amounts consumed on the premises, and to convenience merchandise incidental to daily participation. (DoDI 1015.10, Encl. 4) Reminder: while the Commander may approve participation by contractor employees, contractor employees may not take advantage of MWR/NAFI discounts unless otherwise qualified.

### **XIII. TRANSPORTATION**

The Government provides vehicles and shuttle service to promote efficiency in conducting Government business. Local area commanders have the discretion to determine if use is for official purposes.

- A. Contractor personnel may not be issued Invitational Travel Orders. All travel should be priced and included in the contract. See JTR Appendix E, Part I, D and FAR 31.205-46. Government contractors are not eligible under any circumstances for city pair airfares.
- B. Contractor employees may use government shuttle bus services when conducting official defense business. (DoD Directive 4500.36-R, 5-6)
- C. Government personnel may accept contractor-provided transportation to meetings or similar events for official business as a gift to the Government under 31 U.S.C. § 1353 and 41 C.F.R. § 304-1.2.
1. This authority may not be used to accept the offer of travel from a contractor to attend meetings that carry out the mission of the government employee, such as investigations, inspections, audits and site visits.
  2. This authority may not be used to accept travel to vendor promotional training or other meetings held for the primary purpose of marketing the products or services of a non-Federal entity.
  3. This authority may not be used if acceptance would cause a reasonable person with knowledge of the relevant facts to question the integrity of agency programs or operations.

4. Prior approval is required. Alternatively, a government employee may receive after the fact approval upon return and the travel gift does not exceed the original travel authorization or has not been previously disallowed.

Example: A contractor employee offers to drive a government employee to a professional conference to which they have both been invited that is 250 miles away. This is permissible, with advance approval, because 31 U.S.C. 1353 and 41 C.F.R. § 304-1.2 permit heads of government components to accept travel benefits from a non-Federal source in connection with attendance in an official capacity at a meeting or similar function. Such travel must be approved in advance by the travel acceptance authority and ethics counselor.

#### **XIV. TRAINING**

- A. Government-provided and “All Hands” training: When the government contracts for a service, the contractor is responsible for providing fully trained and prepared employees. A contract normally will require the contractor to provide “ready to work” contractor employees, meaning the contractor must ensure that its employees meet all skill, security, and other indoctrination requirements.
  1. Government personnel may not independently require or grant contractor employees the time to attend training. Remember that the contractor supervisor is responsible for time management, and that time away from the workplace puts the contractor at a disadvantage, and may impair the contractor’s ability to meet contract obligations or delivery dates.
  2. The Government may provide training to contractor employees if not required by the contract. If the government and contractor supervisor agree that contractor employee attendance at training is appropriate, and it does not otherwise create a conflict or give the appearance of favoring a contractor, then the government must determine whether the training is a necessary and reasonable expense under their appropriations.

Example: A government supervisor wants his entire division to attend EEO training; he wants to require the contractor employees supporting his division to attend as well. He may not do so unless the government and contractor supervisor have agreed on the training and time management, or the training is otherwise required under the contract.

- B. Contractor-provided training. If a contractor offers training to government personnel that is not required by the contract, the ethics official should analyze it under the gift acceptance rules. Exceptions to allow the acceptance of training from a contractor include:
  1. Government Acceptance Authority - Agencies have statutory authority to accept free attendance for training that is held away from an employee’s official duty station. Training does not have to be open to members throughout a given industry or profession, nor does it have to represent a range of persons interested in the subject matter to qualify for this exception. However, it must meet the requirements set out in 31 U.S.C. 1353.

2. Training from non-profit organizations or educational institutions - This authority applies to training that a civilian employee attends while on official duty or training that has been paid for in whole or in part by the government. This exemption only applies to benefits provided by tax-exempt organizations, such as non-profit institutions or universities. Records on the gift must be maintained by the agency. (5 U.S.C. 4111, 5 C.F.R. § 410.501-602).
3. Gifts to the Agency – Many agencies have statutory gift acceptance authority that may authorize them to accept gifts, including training. For DoD see 10 U.S.C. 2601 and 2608.
4. Widely Attending Gathering - The widely attended gathering exception allows government personnel in their personal capacity to accept free attendance at a training event that meets the criteria set out in 5 C.F.R. § 2635.204(g). Widely attended gatherings must be open to a wide audience or represent a range of persons interested in the subject matter. Attendance at the event is not a gift to the agency and is an exception to the general gift acceptance rule for the individual.

## **XV. MISUSE OF POSITION/ENDORSEMENT**

- A. Government personnel may not use their public office for their private gain, for the endorsement of any product, service or enterprise, or for the private gain of friends or other persons. Furthermore, government personnel may not use their position or authority in a manner that is intended to coerce or induce another to provide any benefit to family, friends, or associates with whom the government employee is affiliated in a nongovernmental capacity. (5 C.F.R. § 2635.702)

Example: A Government employee's best friend is looking for a job. She has heard from contractor employees with whom she is working that the contractor has several openings in her friend's area of expertise. She can pass on public information about this job opening to her friend, but she cannot ask the contractor to interview or hire her friend.

Example: A contractor employee with whom a government employee has worked on an official matter requests a letter of recommendation in support of her job application with a different private sector company. The military member may write the letter using his title and position because this recommendation is based on his official knowledge of the individual that he gained in the course of his government employment. The letter may not be amount to an endorsement of the contractor employer. Note: Due to the severe limits on contractor recognition, such a letter of appreciation would only be appropriate if the contract that the two individuals had worked together on had expired.

## **XVI. SWITCHING SIDES**

The opportunity for inadvertent violation of the post-employment statutes and rules increases when contractor employees and Government personnel are working side-by-side.

A. Contractor Employee Moving to the Government:

When a contractor employee applies for a government position, ensure all of the appropriate hiring procedures are followed, especially if the employee supports tasks within the hiring office.

1. A former contractor employee is disqualified for two years from working on particular matters in which his former employer is or represents a party if he received an extraordinary payment. An “extraordinary payment” is any item, including cash or investment interest, exceeding \$10,000 based on a determination made after it became known that the employee was being considered for or has accepted a government position, and other than pursuant to the former employer’s established compensation, partnership, or benefits program. A compensation, partnership, or benefits program will be deemed an established program if it is contained in bylaws, contract or other written form, or if there is a history of similar payments made to others not entering into Federal service. See 5 CFR § 2635.503.
2. A former contractor employee may also have conflict of interest limitations under 18 USC § 208 if the employee retains a financial interest in the former employer, such as a retirement or pension plans, deferred compensation, stock or profit distributions, or re-employment options.

B. Impartiality Requirements for Recently-Hired Government Personnel:

1. Reasonable people who are aware of the circumstances may question the ability of former contractor employees who are now working for the government to be impartial in a particular matter concerning their previous employer. Such personnel should consult with their supervisors and ethics counselors to assist them in resolving the perceived loss of impartiality regarding their former contractor employer. (5 C.F.R. § 2635.502)

Example: A former contractor employee has just started work as a government employee. When he left his private sector job, his former boss told him to let her know of any business opportunities that would increase the company’s market within the government. The government employee would like to help his former boss. The government employee can pass on public information, such as an announced solicitation, but he cannot pass on non-public information about agency programs, possible contracts, cost estimates or other potential business opportunities.

2. Recently hired former contractor employees sometimes continue to hold financial interests in their former employer, such as retirement benefits or stock. Such financial interests may require them to disqualify themselves from official matters affecting the financial interests of their former employer. (5 C.F.R. § 2640)

C. Government Personnel Moving to a Contractor: **(Note: The below situations illustrate only the common issues that arise when contractors work in the Federal workplace. Federal personnel who leave the government for private employment must comply with applicable restriction including 18 U.S.C 207 and the Procurement Integrity Act, 41 U.S.C. 423, Section 847 which are not fully discussed here. Please see the Post Government Employment Tab in the Deskbook.)**

1. Government personnel seeking or negotiating for employment with a contractor may not work on any particular matter affecting the financial interests of the prospective contractor employer. (18 U.S.C. § 208, 5 C.F.R. § 2635.604).
2. If a contractor employee offers to discuss employment opportunities (unsolicited) with a government employee, unless the government employee makes a clear and immediate rejection, he must disqualify himself from participating in matters that affect the financial interests of the contractor. (5 C.F.R. § 2635.604) Also, if the employee is covered by procurement integrity, 41 U.S.C. 423, the employee is also required to notify the head of the contracting activity, contracting officer, source selection authority, supervisor, and ethics counselor.

Example: A contractor employee approaches a government employee who is working on a matter that affects the contractor and starts employment discussions with the government employee. If the government employee does not immediately and clearly reject the possibility of employment, the employee must stop working on the matter. As indicated above, he may also have to report the contact to appropriate authorities.

## **XVII. NON-DISCLOSURE**

Government personnel with access to nonpublic information may not disclose it without authorization. Nonpublic information is any information gained by reason of government employment that government personnel know or reasonably should know has not been made available to the general public. (5 C.F.R. § 2635.703). Sharing nonpublic information with contractor employees (unless they are cleared and authorized to receive such information) is the same as releasing it outside the government. Therefore, ethics officials should caution government employees to take particular care when discussing nonpublic information in areas where contractor personnel are co-located: in elevators, break and rest rooms, cafeterias, and other public areas.

If the contractor employee needs access to nonpublic information to perform his duties under the contract, then the contract should stipulate the limits of the access and appropriate protection. Issues to consider when providing nonpublic information to contractor employees:

- A. Is the purpose of providing access to the nonpublic information within the scope of the contract?
- B. Is there a need to know or to have the access?
- C. Is permission required?
- D. Has contractor employee signed a non-disclosure agreement? No information should be provided contractor employees unless they have executed a non-disclosure agreement. (5 C.F.R. § 2635.703). Note: government employees do not sign non-disclosure agreements prepared by contractors to protect proprietary information.
- E. Have adequate precautions been taken to maintain the integrity of the procurement process and have steps been taken to ensure against providing unfair competitive advantage?

- F. While the Trade Secrets Act (18 U.S.C. 1905) does not apply to contractor employees, the Procurement Integrity Act (41 U.S.C. 423) and its prohibition against obtaining and disclosing proprietary information does apply to them.
- G. Privacy Act, 5 U.S.C. 552a
- H. Espionage Act, 18 U.S.C. 1831 – 1839
- I. Release of classified material? 18 U.S.C. 1905, FAR 14.211, Executive Order 12333

## **XVIII. CHARITABLE FUNDRAISING**

The Combined Federal Campaign (CFC) is a Government attempt to control the solicitation for contributions by private organizations of government personnel while in the government workplace. An exception allows organization heads to approve “by your own for your own” solicitations of government personnel. Reminder: The approval does not allow solicitation of individuals who are not government personnel.

- A. Government personnel, in their official or their personal capacities, may not solicit contractor employees either on or off duty. (5 C.F.R. § 2635.808(c)(1)(i)).
- B. Government personnel may engage in volunteer and personal charitable activities when not on duty, not at worksite, or otherwise not acting in an official capacity.
- C. Just like any charitable organization, contractor employees cannot solicit government personnel in the Federal workplace.

Example: A Government employee’s religious organization is sponsoring a night each month at a homeless shelter for members to cook, to help maintain the facility, and to provide counseling services to the residents. The Government employee knows that one of the contractor employees is part owner of a restaurant. She would like to ask for donations of excess food to use at the shelter. She cannot solicit contractor employees, either on or off duty, for contributions. Further, government personnel may not solicit or ask contractor employees to participate in group "runs" for charity, to sponsor an employee's participation in a charitable "walk" or "run," or to purchase cookies, gift wrap, candy bars or similar items in support of personal charitable activities. (Please note that only solicitation is prohibited. Contractor personnel are not prohibited from voluntarily contributing or purchasing items for sale.)

## **XIX. OUTSIDE EMPLOYMENT**

Government personnel are prohibited by [18 U.S.C. § 205](#) and [18 U.S.C. § 203](#) from representing an outside employer or third party to the government. This makes problematic the increasingly common practice of government personnel, who are moonlighting as contractor personnel, physically working in government offices. The criminal statutes preclude government personnel from representing their contractor employers to Federal personnel. Since an employee is

an agent for the contractor, it is extremely difficult for a moonlighting employee to interact with Federal personnel in a government workplace without making a prohibited representation. For that reason, it is more prudent for moonlighting government personnel to work for the contractor “behind the scenes” at a contractor office, non-governmental office, or otherwise away from the government workplace.

The old view that “merely performing a contract” is not a representation was overturned by OGE in their [opinion 99 x 19](#). OGE later advised that the logic in that opinion also applies to the application of 18 U.S.C. § 203 and 205. Hence, an Intelligence Analyst, preparing a report under an X Corp Government contract, represents X Corp to the Government when he submits his report. Regardless of whether the report is accurate, timely, useful, responsive, understandable, and comprehensive, it is the representation that is prohibited according to OGE.

Government personnel may not engage in outside activities that conflict with their official duties if such activities are prohibited by statute or regulation or would require employees’ disqualification from matters critical *to* their office. (5 C.F.R. § 2635.802)

- A. Government personnel may not represent others to agencies of the Government on any matter in which the United States is a party or has a direct and substantial interest. (18 U.S.C. § 203 and 205)
- B. These rules apply equally to officers in the military service that are employed during their terminal leave. If employed by a contractor, officers in the military service generally may not work in the Government workplace during this time. (18 U.S.C. § 203 & 205)
- C. Government personnel required to file financial disclosure statements must obtain prior written approval from their Agency Designee before working for a prohibited source. Permission shall be granted unless the outside activity involves conduct prohibited by statute or regulations (5 C.F.R. § 2635.803; JER 2-206 & 3-306)

**Bottom line:** It is almost impossible for Government personnel to work as contractor employees in the Federal workplace. Government personnel who wish to work for a contractor may be able to arrange to work in the contractor workplace. For military officers on terminal leave, if they can't work behind the scenes for the contractor, they may advance their retirement date and sell back their leave, or delay starting work until after they actually retire.

## **XX. CONFUSION OF IDENTITY**

Due to the different roles, responsibilities, authority, and restrictions, it is necessary that the identities of Federal personnel and contractor personnel be apparent. FAR 37.114(c) provides:

“All contractor personnel attending meetings, answering government telephones, and working in other situations where their contractor status is not obvious to third parties are required to identify themselves as such to avoid creating an impression in the minds of members of the public or Congress that they are government officials, unless, in the judgment of the agency, no harm can come from failing to identify themselves. They must also ensure that all documents or reports

produced by contractors are suitably marked as contractor products or that contractor participation is appropriately disclosed.”

## **XXI. CONTRACTOR CONDUCT AND OPERATIONS IN THEATRE**

A. Theatre Commanders may direct military and DOD civilian personnel. Except during threat to life and safety, Commanders may not supervise contractor personnel.

B. General Orders (such as those prohibiting alcohol use in theatre) and instructions issued by theatre Commanders apply to contractors.

C. Command and control determined by the contract and task orders.

D. Contractor management personnel will be required to have supervisors on site to direct contract performance and coordinate safety measures.

E. May be required to possess and display theatre badges at all times. Similarly, contractors may be required to obtain CAC credentials and return CAC at the expiration of the contract or their service.

F. Personnel will have support determined by the contract, or as determined by relevant theatre instructions. For example, contractor personnel with CAC credentials may have access to dining facilities (DFACs), gyms, exercise and MWR facilities, exchange privileges, legal assistance privileges, and medical care. Contract language may be modified by theatre policies and may even conflict with the contract provisions.

G. Weapons are regulated by theatre General Orders and host nation agreements. The contract may contain clauses regarding self-defense weapons. Generally, no personal weapons of any type are authorized in theatre. If contractors are allowed to carry defensive weapons, they will be issued at the Individual Deployment Site or Contractor Deployment Processing Center. All personnel will be required to adhere to weapons training requirements and safety procedures. The contractor must ensure that employees are not prohibited under U.S. law to possess firearms (e.g., Lautenberg Amendment, 18 U.S.C. § 922(d)(9)).

H. Motor vehicle operation. Contractor personnel may be authorized to operate government vehicles in theatre, subject to theatre Commander orders, terms of the contract and host nation agreements. Contractor personnel may also be provided vehicles under the terms of the contract. Contractor personnel may be subject to host nation civil and criminal actions resulting from operations of motor vehicles, unless they enjoy special status.

I. Life Support Areas. Typically, contractor personnel will have their own Life Support Areas (LSA) separate from military and DOD civilian personnel, and separate from host nation or third country national personnel. Contractor may also be required to live in field conditions, often austere and communal, characterized by temporary structures and primitive facilities.

J. Military Extraterritorial Judicial Act (MEJA), 18 USC §3261, et. Seq. implemented by DoD Instruction 5525.11, dated 3 March 2005. This statute provides for Federal jurisdiction over crimes committed outside the United States to offenses that, if committed within the special maritime and territorial jurisdiction of the United States, are punishable by imprisonment for more than 1 year. This jurisdiction covers members of and persons employed by or accompanying the Armed Forces. Contractors in theatre will be subject to MEJA.

K. Contractor salary. Contractor personnel are not entitled to special pay or tax exempt status directly from DOD as a result of their service in theatre. All salaries are determined by the contract and by the employment relationship. All tax privileges are determined by the Internal Revenue Service.

L. Uniforms and organizational wear. Contractors are generally not authorized to wear a uniform or attire that resembles US DOD uniforms. Theatre Commanders may authorize contractors to wear uniforms in writing for operational reasons. The authorizations will be carried by contractor personnel at all times. The uniform will indicate civilian status.

FAR 7.5 – Inherently Governmental Functions:

- (1) The direct conduct of criminal investigations.
- (2) The control of prosecutions and performance of adjudicatory functions other than those relating to arbitration or other methods of alternative dispute resolution.
- (3) The command of military forces, especially the leadership of military personnel who are members of the combat, combat support, or combat service support role.
- (4) The conduct of foreign relations and the determination of foreign policy.
- (5) The determination of agency policy, such as determining the content and application of regulations, among other things.
- (6) The determination of Federal program priorities for budget requests.
- (7) The direction and control of Federal employees.
- (8) The direction and control of intelligence and counter-intelligence operations.
- (9) The selection or non-selection of individuals for Federal Government employment, including the interviewing of individuals for employment.
- (10) The approval of position descriptions and performance standards for Federal employees.
- (11) The determination of what Government property is to be disposed of and on what terms (although an agency may give contractors authority to dispose of property at prices within specified ranges and subject to other reasonable conditions deemed appropriate by the agency).
- (12) In Federal procurement activities with respect to prime contracts—
  - (i) Determining what supplies or services are to be acquired by the Government (although an agency may give contractors authority to acquire supplies at prices within specified ranges and subject to other reasonable conditions deemed appropriate by the agency);
  - (ii) Participating as a voting member on any source selection boards;
  - (iii) Approving any contractual documents, to include documents defining requirements, incentive plans, and evaluation criteria;
  - (iv) Awarding contracts;
  - (v) Administering contracts (including ordering changes in contract performance or contract quantities, taking action based on evaluations of contractor performance, and accepting or rejecting contractor products or services);
  - (vi) Terminating contracts;
  - (vii) Determining whether contract costs are reasonable, allocable, and allowable; and
  - (viii) Participating as a voting member on performance evaluation boards.
- (13) The approval of agency responses to Freedom of Information Act requests (other than routine responses that, because of statute, regulation, or agency policy, do not require the exercise of judgment in determining whether documents are to be released or withheld), and the approval of agency responses to the administrative appeals of denials of Freedom of Information Act requests.
- (14) The conduct of administrative hearings to determine the eligibility of any person for a security clearance, or involving actions that affect matters of personal reputation or eligibility to participate in Government programs.
- (15) The approval of Federal licensing actions and inspections.
- (16) The determination of budget policy, guidance, and strategy.
- (17) The collection, control, and disbursement of fees, royalties, duties, fines, taxes, and other public funds, unless authorized by statute, such as 31 U.S.C. 952 (relating to private collection contractors) and [31 U.S.C. 3718](#) (relating to private attorney collection services), but not including—
  - (i) Collection of fees, fines, penalties, costs, or other charges from visitors to or patrons of mess halls, post or base exchange concessions, national parks, and similar entities or activities, or from other persons, where the amount to be collected is easily calculated or predetermined and the funds collected can be easily controlled using standard case management techniques; and

- (ii) Routine voucher and invoice examination.
- (18) The control of the treasury accounts.
- (19) The administration of public trusts.
- (20) The drafting of Congressional testimony, responses to Congressional correspondence, or agency responses to audit reports from the Inspector General, the Government Accountability Office, or other Federal audit entity.