

# ETHICS ISSUES INVOLVING CONTRACTORS IN THE FEDERAL WORKPLACE

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## I. REFERENCES

- A. 5 CFR 2635.102 Definitions
- B. 5 CFR 2635 Subpart B: Gifts From Outside Sources
- C. 5 CFR 2635.203: Gift Definitions
- D. 5 CFR 2635.204: Gift Exceptions
- E. 5 CFR 2635.808: Fundraising Activities
- F. 5 CFR 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 USC §208: Acts Affecting a Personal Financial Interest
- J. 5 CFR 2635.401: Conflicting Financial Interests
- K. 5 CFR 2635.501: Impartiality in Performing Official Duties
- L. 5 CFR 2635.601: Seeking Other Employment
- M. 5 CFR 2640: Interpretation, Exemptions and Waiver Guidance Concerning 18 USC 208
- N. 48 CFR 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
- P. FAR Subpart 7.5: Inherently Governmental Functions
- Q. FAR Subpart 37.1: Personal Services Contracts
- R. 41 CFR 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 USC 1353: Acceptance of Travel and Related Expenses From Non-Federal Sources
- Y. 5 USC 4111: Acceptance of Contributions, Awards, and Other Payments
- Z. 5 CFR 2635.703: Use of Nonpublic Information
- AA. 5 CFR 2635.604: Disqualification While Seeking Employment
- BB. DoD 5500.7-R, Joint Ethics Regulation (JER) 2-204(c): Standard for Accomplishing Disqualification
- CC. 5 CFR Part 950: Solicitation of Federal Civilian and Uniformed Service Personnel for Contributions to Private Voluntary Organizations
- DD. 18 USC 1905: The Trade Secrets Act
- EE. 41 USC 423: Procurement Integrity
- FF. 18 USC 203: Compensation to Members of Congress, Officers, and Others in Matters Affecting the Government
- GG. 18 USC 205: Activities of Officers and Employees in Claims Against and Other Matters Affecting the Government
- HH. 5 CFR 2635.801-803: Outside Activities

II. FAR Subpart 37.114(c): Special Acquisition Requirements

**II. INDEX**

I.	GOAL	2
II.	INTRODUCTION	2
III.	<b>INHERENTLY GOVERNMENTAL FUNCTIONS</b>	3
IV.	<b>GIFTS</b>	4
V.	<b>PARTIES AND OTHER UNOFFICIAL OUTINGS</b>	7
VI.	<b>TIME MANAGEMENT</b>	8
VII.	<b>CONFLICTS OF INTEREST</b>	9
VIII.	<b>POLITICAL ACTIVITIES</b>	10
IX.	<b>AWARDS</b>	11
X.	<b>USE OF GOVERNMENT RESOURCES</b>	12
XI.	<b>TRANSPORTATION</b>	13
XII.	<b>TRAINING</b>	14
XIII.	<b>MISUSE OF POSITION/ENDORSEMENT</b>	16
XIV.	<b>SWITCHING SIDES</b>	16
XV.	<b>NON-DISCLOSURE</b>	18
XVI.	<b>CHARITABLE FUNDRAISING</b>	19
XVII.	<b>OUTSIDE EMPLOYMENT</b>	20
XVIII.	<b>CONFUSION OF IDENTITY</b>	21

**I. 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. Although the growing use of contractor employees in the Federal workplace increases the frequency and the likelihood that ethics issues will arise, there are no regulations or policies that specifically address this unique situation. Consequently, this workplace development requires thoughtful and conscientious application of existing statutes and regulations.

Although the following discussion provides guidance, for in-depth specifics, please see the pertinent chapters of this deskbook.

Please note that the terms, “Government personnel” and “Government employees” include military and civilian personnel.

**II. INTRODUCTION**

- A. Contractor employees are not Government personnel and are not subject to the same laws and regulations. DoD personnel are subject to Federal laws and regulations, as well as DoD rules; and contractor personnel are subject to laws that apply to all

individuals (such as bribery), 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>
6. Tell or suggest to a contractor whom to hire.

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.

### **III. INHERENTLY GOVERNMENTAL FUNCTIONS**

An inherently governmental function is a function 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)

1. It is Government policy that contractor employees shall not be used to perform inherently governmental functions.<sup>3</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))

<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)).

- a. Contractors shall not control or direct Government personnel.
  - b. Contractors shall not administer contracts.
2. Attachment A of OMB Circular No. A-76 provides examples of commercial activities not normally considered inherently governmental.
  3. 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.
    - a. 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)).

#### IV. 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 interaction between the two. The Government gift rules fall into two categories: gifts from outside sources and gifts between employees. Contractor employees are not Government personnel. Consequently, gifts from them to a Government employee constitute gifts from outside sources, not gifts between employees.

General Rule: Unless an exception applies, DoD personnel shall 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 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. (See Chapter B of this deskbook, or 5 CFR 2635.203)
2. If the item is not excluded, then Government personnel may accept a gift only if it fits an exception. (See Chapter B of this deskbook or 5 CFR 2635.204)

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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 CFR 2635.102 and 203)

- 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))  
Reminder: 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 completes a project, marking the delivery and successful completion of the contract. The contractor throws a party to celebrate, inviting the Government personnel who participated. 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. Further, 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).

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 this relationship must be substantial in order to rebut the presumption that friendships arising from interaction in the workplace do not qualify for this exception. 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))

Rule of Thumb: If the relationship did not exist prior to working together, it probably does not qualify for the personal relationship exception.

- c. If a contractor employee invites to his house a military member, the member may accept the invitation only if it falls under an exclusion or exception discussed above. While the Government rules on gifts between 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 or member receives a gift that may not be accepted, the employee or member must return the gift or pay the donor its market value. Warning: 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. (In DoD, 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 those 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. (5 CFR Subparts B and C).
    - a. Contractor employees from the same company may voluntarily pool their resources to provide a separate gift (not exceeding \$20) to a Government employee.
    - b. Contractor employees from different companies may pool their resources to provide a separate gift (not exceeding \$20) to a Government employee.

Example: Three different contractor employees who work for a Government agency wish to buy a 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. This is distinguishable from a trade show where Federal personnel may accept from each contractor a promotional item of under \$20; since at the trade show, the gifts were from separate sources.

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. The employee takes up an office collection for a wedding gift, suggesting that each employee donate up to \$5.00 (if they want to). The Government employee may not ask the contractor employee for \$5.00 – this would be soliciting a gift from a prohibited source. Further, the contractor employee could not give an *unsolicited* gift of \$5.00 toward the 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.

## **V. 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). Widely attended

gatherings must be open to a wide audience or represent a range of persons interested in the subject matter. Free attendance is a personal gift to Government personnel and therefore must occur on their own time.

3. Government personnel may attend events in which the per capita 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 many 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.

## **VI. 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 of their contract. For example, the Government 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 to a contractor employee. (For example, the agency may not grant “59 minute” early release to contractor employees.)

- D. Unless authorized in the contract, ask for help to set up an office or command event.
- E. Ask contractor employees to volunteer time to help set up an office or command event.

Therefore, a contractor employee must obtain permission from the contractor supervisor to participate in a Government office outing during official hours. Since the contractor employee's participation is not in furtherance of contract requirements, the contractor must determine whether to pay its employees for that time even though the Government will not reimburse it.

Example: What about an office party that cuts into duty hours? The Government usually may not reimburse a contractor for its employees' activities that are not included in the contract. The contractor has to decide whether to let its employees attend and whether it would pay its employees for that time, even though the Government would not reimburse it, or insist that they continue to work. The contractor does not have to pay its employees for that time. Consult the contracting officer and ethics counselor before inviting contractor employees to a function during their duty hours.

## **VII. 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 USC 208 and 5 CFR 2635.502, but remain subject to 18 USC 201 (Bribery), 41 U.S.C. 423 (Procurement Integrity), and certain other procurement-related statutes. 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 USC 201 and 371).

- B. Government personnel have guiding principles and established standards of ethical conduct. The rules require that Government personnel are appropriately aware of, and trained on, the criminal statutes and administrative regulations that implement

those statutes. Government personnel have a designated ethics official from whom to seek advice and counsel. Contractor employees generally have no Government-mandated training requirement for ethics. However, many contractors have ethics and business gratuity policies, as well as extensive training and reporting programs.

- C. Certain covered Government personnel must report annually their financial interests and outside activities. Contractor employees generally have no mandated requirement to reveal financial interests and participation in outside activities. 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.

Example: A contractor employee is responsible for testing products and providing the results of his tests to the Government to help in a contract selection being made by an evaluation board. The contractor employee owns stock in one of the companies participating in the tests. While the rules prohibit Government personnel from participating in a matter that affects their financial interests, without a disclosure requirement the Government would be unable to even discover that a potential conflict of interest for the contractor employee exists.

- 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. Specifically, 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)

## **VIII. 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), applicable to

GSA-owned and -controlled property, prohibits posting or affixing materials on bulletin boards or elsewhere on GSA-controlled property, except as authorized. This restriction does not apply to public areas. (41 CFR §102-74.415). Another example is Air Force JAG opinion OpJAGAF 1996/156, “Authority to Prohibit Certain Political Signs on Military Installations.”

2. Another possible solution is to ensure that the contract prohibits the contractor employees from engaging in political activities within the Government workplace.

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 his Government coworkers? Unless the agency has workplace rules that govern such display activities or the contract so provides, 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 Federal 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.

## **IX. 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.

- 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 go substantially beyond that specified or implied within the terms of the contract or if it is clearly in the public interest (DOD 1400.25-M, SC451.15.2.2). (Caveat: this limited authority is circumscribed by the fiscal and contracting restraints below.)

Recognition of a contractor employee may only take the form of honorary awards of little intrinsic value such as certificates. Use of appropriated funds outside the limits of the contract is not appropriate. Reminder: Officials may choose to use personally-funded Commander coins for such an occasion.

- D. Before deciding to give a presentation, award, or recognition to a contractor employee, check with the contracting officer, since any recognition may be used against the Government in a dispute involving contract performance.

## **X. USE OF GOVERNMENT RESOURCES**

Availability and use of Government property and resources impacts the competitiveness of the procurement process. If the Government were to provide, during the performance of a contract, property and resources that were not a consideration in the competitive process, it could affect the integrity of the procurement process and leave the Government susceptible to claims of unfair advantage.

- 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 so unique, cost effective, or otherwise in the Government's best interest, the Government may so provide in the contract. The contract must describe the property. Procedures to establish and maintain a system of 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 personnel – these can include Employee Relations, Equal Employment Opportunity, Mediation, Chaplain, and Legal. Although they 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, it is up to the contracting officer and contractor supervisor to determine whether personal use of Government resources by the contractor employee while on contract time is appropriate (even if it would be within the scope of what the Government determines is appropriate). The contractor is liable for meeting all deadlines and deliverables of the contract and 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.
- 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. 3) Reminder: while the Commander may approve participation by contractor employees, contractor employees may not take advantage of MWR/NAFI discounts unless otherwise qualified.

## **XI. 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. Under the travel regulations, contractor employees may be passengers in Government vehicles if the head of the Component command or organization has given prior approval.
- 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 USC 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. In most cases, prior approval is required.

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.

- D. The sharing of personal vehicles or contractor transportation services can pose a problem for Government personnel. Personal transportation provided by a contractor employee is a gift that should be analyzed under the gift rules. When the gift exceptions do not apply, personnel may pay fair market value for the personal transportation. Such sharing also may present appearances of preferential treatment and loss of the arms-length contractor relationship.

Example: A contractor employee offers to drive a Government employee to lunch at a restaurant ten miles off-base in his personal vehicle. The Government employee may accept the ride if it fits within the gift exception of 5 C.F.R. 2635.204(a) (the \$20 exception). There may be an appearance problem that requires discussion with an ethics counselor if, for example, this arrangement occurs frequently or the Government employee is making official decisions affecting the contractor.

More extensive guidance, particularly for Air Force personnel, is found in the Air Force Material Command Information Paper: “Information Paper on Air Force Employees and Contractor Employees Sharing Transportation” found at <http://afmcethics.wpafb.af.mil/updates/sharing%20transportation.doc>.

## **XII. TRAINING**

- A. Government-provided and “All Hands” training: When the Government contracts for a service, the contractor is responsible for providing trained 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 training, 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 the contract requires it. 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 its appropriation. (It becomes a fiscal issue).

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.
  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 CFR 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 is a personal gift to the personnel, and therefore may not occur on official time or as part of official duties.

### **XIII. 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 military member has worked on a Government matter in the past requests a letter of recommendation in support of her job application with a different private sector company. The military member may write the letter on agency letterhead and sign it using his title and position because this recommendation is based on his personal knowledge of the individual that he gained in the course of his Government employment. He should check with the contracting officer before sending the reference letter to ensure the letter will not affect the Government's business relationship with the contractor.

- B. Government personnel must act impartially and not give preferential treatment to any private organization or individual. (5 CFR 2635.101(b)(8))
  - 1. Because the requirement for impartiality applies only to Government personnel, similar obligations for contractor employees should be implemented as part of the contract or contractor's employee regulations.

Possible problem: A contractor employee working in the public affairs office screens requests for speakers. Since the contractor employee is very active in her political party, she only allows requests from that party to be forwarded.

Possible problem: A contractor employee who is a receptionist in a Federal office answers telephones and ends each of her conversations by reminding the caller to vote for a particular candidate.

### **XIV. 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:

1. When a contractor employee applies for a Government position, ensure all of the appropriate hiring procedures are followed. There is a risk that such a contractor, who is working in the workplace, may receive preferential treatment.
2. 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. (Payment 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.)

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 CFR 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 with 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, 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 CFR 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, which are not fully discussed here.)**

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 USC 208, 5 CFR 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 CFR 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 a discussion about the Government employee coming to work for the contractor. 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.

Example: A recent former *senior official* may contact a contractor employee working at his former agency to discuss the interests of his client regarding a matter. However, he may not ask the contractor employee to pass his discussions to the Government employee of his former agency and attribute the information to him, nor may the former senior official contact the Government employee sitting next to the contractor employee to discuss the same thing. (18 U.S.C. 207(c))

## **XV. 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) Government personnel must be alert to avoid inadvertently, or carelessly, releasing nonpublic information to contractor personnel.

Unless specifically authorized, information not releasable under the Freedom of Information Act (FOIA) may not be disclosed. 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)
- 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

## **XVI. 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 CFR 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 can’t 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.)

## **XVII. OUTSIDE EMPLOYMENT**

Government personnel are prohibited by [18 USC 205](#) and [18 USC 203](#) from representing an outside employer 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 USC 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 CFR 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 USC 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 USC 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 CFR 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.

### **XVIII 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.”