

CHAPTER 2

ETHICAL CONDUCT

Introduction

As a participant in the acquisition process, you must constantly keep yourself “on-guard” to improper actions or those that can be construed as such. Understand, beware, and act within the guidelines.

As agents of the government, CORs and QAEs must at all times earn the public trusts as well as maintains appropriate ethical standards. The Acquisition Ethics Program is the primary guideline for the actions and activities of those representing the government in either military uniform or civilian attire. Topics of discussion include favors, gratuities, and consideration for services, conflicts of interest, and use of official position without the authority of the U.S. Government. The Defense Acquisition Ethics Program stresses adherence to Executive Order 11222, Section 201 by setting fundamental ethical principles:

- Integrity: People with integrity are principled, honorable, and upright. They are consistent in their moral behavior and do not adopt an “end-justifies the means” philosophy.
- Honesty: Honest people are truth, sincere, and candid. They do not mislead, act deviously, or misuse or disclose information learned in confidence.
- Fairness: Fair people show a commitment to justice, equal treatment, and tolerance. They are unbiased, open-minded, and where appropriate, willing to change their positions.

Ethics vs. Compliance

Ethics is what you should do; *compliance* is what you must do. Because the COR and QAE are also the Government’s representative or liaison with contractors it is important that their actions, actual and perceived, are a good reflection on Government procurement. Merely doing what the law requires may not be sufficient to leave an impression of honest and fair conduct. Sensitivity toward the ethics of a given situation is an especially useful tool for the COR/QAE.

Standards of Conduct

In order to maintain the public confidence in the federal procurement process, it is necessary that government and contractor employees follow exemplary standards of conduct. There are numerous statutory and regulatory provisions giving guidance on the standards, which are expected to be followed, and prescribing stringent penalties for noncompliance.

Thus, the government has by a statute and regulations prohibited activity, which would improperly, influence decision making or would appear to do so. Following are areas of concern:

- Bribery: A criminal offense to offer or give a bribe to a government official or for a government official to solicit or receive a bribe. To constitute a bribe, the statute requires that something “of value” is given, offered, promised, solicited, or received.
- Gratuities: A crime when offered or given to a government official or when a government official solicits or receives a gratuity.

The Gratuities Clause

Nearly every contract above the simplified acquisition threshold includes the Gratuities clause even if by reference. This clause gives the government the right to terminate for default a contractor who offers or gives a gratuity (entertainment or gift) to an officer, official, or employee of the government intending to thereby obtaining a contract or favorable treatment.

Basic Obligation of Government Service

Public service is a public trust. Each employee has a responsibility to the United States Government and its citizens to place loyalty to the Constitution, the laws and ethical principles above private gain.

Prohibition on gifts from prohibited sources

No Government employee shall solicit or accept any gift or other item of monetary value from any person or entity doing business with the Government or seeking to do business with the Government (among those identified in the regulation as a prohibited source). Yes, there are exceptions such as gifts of \$20 or less and gifts based on a personal friendship; however, it is better to seek advice from your own legal counsel on specific gifts rather than to rely on a textbook. A rule of thumb for appearance sake is, if it is a gift you would want, don't ask for it or accept it.

Conflict of interest

Government employees shall not hold financial interests that conflict with the conscientious performance of duty. If you suspect a conflict of interest notify the Contracting Officer and offer to disqualify yourself.

An employee is prohibited by criminal statute from participating personally and substantially in an official capacity in any particular matter in which to his knowledge, he, or any person whose interests are imputed to him under this statute (e.g., a family member), has a financial interest, if the particular matter will have a direct and predictable effect on that interest. (Although it is more likely to apply to you as a member of a source selection evaluation board than as a COR/QAE is once again, you are safer getting legal counsel on the details.)

Impartiality in performing official duties

Government employees shall act impartially and not give preferential treatment to any private organization or individual. The same process of notification to disqualify him may be used here if a COR/QAE feels that because of prior business or personal relationships he could not act impartially.

FAR policy on standards of conduct

FAR 3.101-1, states Government business shall be conducted in a manner above reproach and, except as authorized by statute or regulation, with complete impartiality and with preferential treatment for none.

Transactions relating to the expenditure of public funds require the highest degree of public trust and an impeccable standard of conduct. The general rule is to avoid strictly any conflict of interest or even the appearance of a conflict of interest in Government-contractor relationships.

While many Federal laws and regulations place restrictions on the actions of Government personnel, their official conduct must, in addition, be such that they would have no reluctance to make a full public disclosure of their actions.

Procurement Integrity Act

Introduction

As Section 27 of Public Law 100-679, the Procurement Integrity Act puts restrictions on

- Offers of employment for officials participating personally and substantially in a Federal agency procurement (see definition on next page)
 - post-employment opportunities for any Government employee who served on a source selection evaluation board (SSEB) for a contract in excess of \$10 million
 - release of source selection or proprietary information by anyone
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Participating personally and substantially in a Federal agency procurement

“Participating personally and substantially in a Federal agency procurement” means active and significant involvement of the individual in any of the following activities directly related to that procurement:

- Drafting, reviewing, or approving the specification or statement of work for the procurement
 - Preparing or developing the solicitation
 - Evaluating bids or proposals, or selecting a source
 - Negotiating price or terms and conditions of the contract
 - Reviewing and approving the award of the contract
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Restrictions on offers of employment

If an agency official who is participating personally and substantially in a Federal agency procurement for a contract in excess of the simplified acquisition threshold contacts or is contacted by a person who is a bidder or offeror in that Federal agency procurement regarding possible non-Federal employment for that official, the official shall -

- 1) Promptly report the contact in writing to his supervisor and to the designated agency ethics official (or designee) of his agency; and
 - 2) either reject the possibility of non-Federal employment; or, disqualify himself from further personal and substantial participation in that Federal agency procurement until such time as the agency has authorized him to resume participation in such procurement on the grounds that -
 - a) the contractor no longer is a bidder or offeror in that Federal agency procurement; or
 - b) all discussions with the bidder or offeror regarding possible non-Federal employment have been terminated without an agreement or arrangement for employment.
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Post-employment restrictions

Any former official of a Federal agency may not accept compensation from a contractor as an employee, officer, director, or consultant within a period of one year after such former official served (among other positions that a COR/QAE would not likely have held) as a member of a source selection evaluation board, or the chief of a financial or technical evaluation team in a procurement in which that contractor was selected for award of a contract in excess of \$10 million.

Release of source selection or proprietary information

The Act also prohibits any person who is given authorized or unauthorized access to proprietary or source selection information regarding a procurement from disclosing such information to any person other than one authorized by the head of an agency or contracting officer.

Ethics advisory opinions

Officials or former officials in doubt as to whether they may have violated the Procurement Integrity Act may request advice from the appropriate agency ethics official. The request for an advisory opinion should be in writing, signed and dated. It should contain specifics about the procurement at issue, the requestor's role in it and the contractor involved.

The ethics official will issue an opinion within 30 days or as soon thereafter as practicable and will rely on the information provided by the requestor unless she has reason to believe the information is fraudulent, misleading or otherwise incorrect.

Enforcement

Enforcement of the Act can be either through contractual action or by penalties of an administrative, civil and/or criminal nature as, for example:

- ◆ Criminal punishment of fines and five years in prison
 - ◆ Civil penalty of \$50,000 plus twice the amount of illegal compensation offered or received
 - ◆ Organizational penalty of \$500,000 plus twice the amount of the illegal compensation offered or received
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Financial Disclosure Reports**Who must file?**

The grade floor has been eliminated. The duties of the person, not the grade, determine who must file a financial disclosure report. If the duties are significant involving administration of a contract or procurement a confidential financial disclosure must be filed. The Secretary of the Army has issued a determination that individuals using the credit card for purchases less than \$25,000 per year do not necessarily have to file.

The employee's supervisor has the primary responsibility for determining whether the duties of the position require filing a report.

What must be reported on a SF 450?

Reports cover the entire preceding fiscal year; that is, they are not limited to assets as of the reporting date. Even if an asset has been sold, it must be reported.

Bank accounts, Certificates of Deposit, money market mutual funds, and U.S. Government bonds or securities do not have to be reported.

The idea is to show what financial holding could create a conflict of interest. This includes outside investments and employment of spouses and dependent children.

Interface with Contractors and Administrators

One of the key skills of the COR or QAE must be to master a good working relationship with the contractor and the contractor administrator. The COR/QAE must maintain a professional and objective attitude and still be human and cooperative. The following are a few suggestions for consideration:

1. Being friendly does not mean you have to be a friend. Courteous and upbeat when dealing with the contractor should be a consideration.

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2. Be professional and treat every contractor the same.
 3. Keep all parties informed; embarrassing either party when problems arise does not support good management practices.
 4. Keep your opinions to yourself; it is not to the advantage of the government to advise the contractor that you “think” something or other.

A list of “do’s” and “don’ts” are annotated at Exhibit 2.

Summary

The COR/QAE as a representative of the Government or liaison between the Government and the contractor needs to adhere to ethical principles in his conduct. Taking care to go beyond mere compliance may save the COR/QAE and the Government unpleasantness but the COR/QAE should also keep in mind that some of these principles are backed by rules the violation of which could be embarrassing at best and at worst grounds for criminal sanctions.

The main concerns for a COR/QAE in this area are:

- Treating contractors impartially
 - Not accepting gratuities
 - Not discussing employment opportunities
 - Avoiding conflicts of interest
 - Safeguarding source selection or proprietary information
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