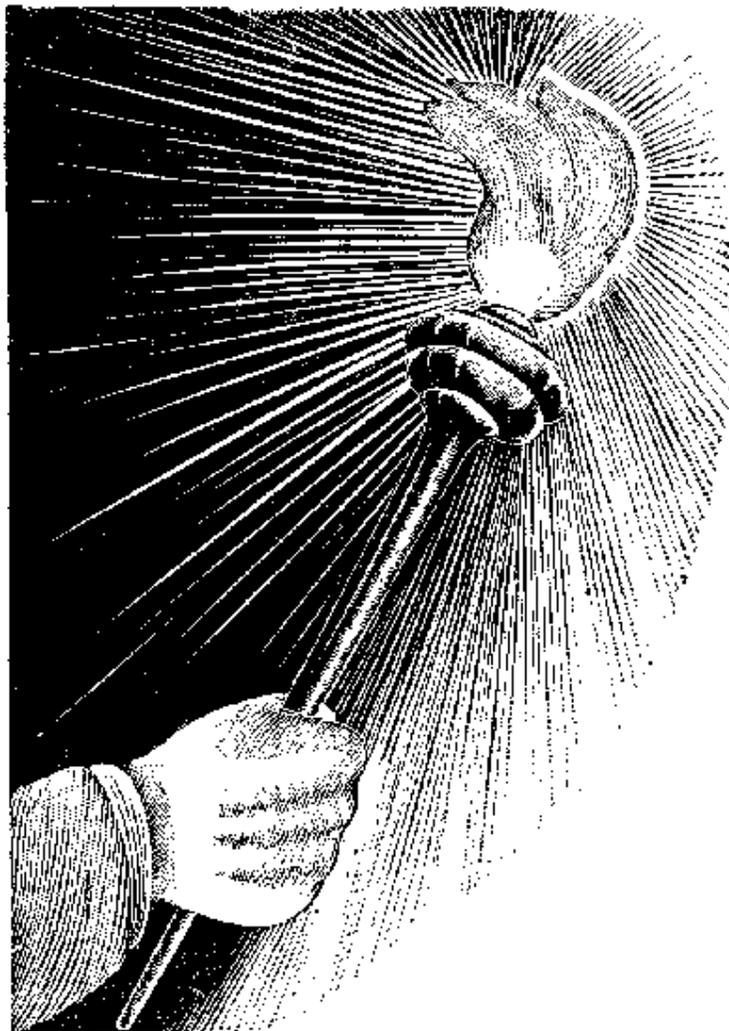


Chapter 17
**Ethics in
Government Contracting**



2014 Contract Attorneys Deskbook

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CHAPTER 17

ETHICS IN GOVERNMENT CONTRACTING

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CHAPTER 17

ETHICS IN GOVERNMENT CONTRACTING

*“Always do right. This will gratify some people and astonish the rest.”
Mark Twain*

I. REFERENCES

A. Statutes

1. 18 U.S.C. § 208, Acts Affecting A Personal Financial Interest.
2. 41 U.S.C. § 2101 et seq., The Procurement Integrity Act.
3. 18 U.S.C. § 207, Restrictions on Former Officers, Employers, and Elected Officials of the Executive and Legislative Branches.

B. Regulations

1. 5 C.F.R. Part 2635, Standards of Ethical Conduct for Employees of the Executive Branch.
2. 5 C.F.R. Part 2637, Regulations Concerning Post Employment Conflict of Interests. These regulations only apply to employees who left Federal service before 1 January 1991. The Office of Government Ethics (OGE), however, continues to rely on them for issuing guidance for employees who left Federal service after 1 January 1991.
3. 5 C.F.R. Part 2640, Interpretations, Exemptions and Waiver Guidance Concerning 18 U.S.C. § 208.
4. 5 C.F.R. Part 2641, Post-Employment Conflict of Interest Restrictions.
5. OGE Memorandum, Summary of Post-Employment Restriction of 18 U.S.C. § 207 (July 29, 2004).
6. Federal Acquisition Regulation (FAR) Part 3 (May 24, 1 2014).
7. Department of Defense (DoD) Defense Federal Acquisition Regulation Supplement (DFARS) Part 203 (July 1, 2011).
8. National Defense Authorization Act for Fiscal Year 2004 (PL 108-136), Section 1125.

C. Directives.

DoD Directive (DODI) 5500.07-R, Joint Ethics Regulation (JER), including changes 1-7 (Nov. 17, 2011).

II. FOCUS AREAS.

- A. The conflict of interest prohibitions of 18 U.S.C. § 208.
- B. The coverage of the Procurement Integrity Act.
- C. The procurement related restrictions on seeking and accepting employment when leaving government service.

III. FINANCIAL CONFLICTS OF INTEREST.

An employee is prohibited from participating personally and substantially in his or her official capacity in any particular matter in which he or she has a financial interest, if the particular matter will have a direct and predictable effect on that interest. 18 U.S.C. § 208; 5 C.F.R. § 2635.402(a).

- A. **Applicability.** The financial conflict of interest prohibitions apply in three key situations. Generally, the employee may not work on an assignment that will affect the financial interests of:
 - 1. The employee or of the employee's spouse or minor child.
 - 2. A partner or organization where the employee serves as an officer, director, employee, general partner, or trustee.
 - 3. Someone with whom the employee either has an arrangement for employment or is negotiating for employment.
- B. Definitions.
 - 1. **Financial interests.** Defined as stocks, bonds, partnership interests, fee and leasehold interests, mineral and property rights, deeds of trust, liens, options, or commodity futures. 5 C.F.R. § 2635.403(c)(1). The statute specifically defines negotiating for employment as a financial interest. Thus, negotiating for employment is the same as owning stock in a company.
 - 2. **Personally.** Defined as direct participation, or direct and active supervision of a subordinate. 5 C.F.R. § 2635.402(b)(4).
 - 3. **Substantially.** Defined as an employee's involvement that is significant to the matter. 5 C.F.R. § 2635.402(b)(4).

4. **Particular matter.** Defined as a matter involving deliberation, decision, or action focused on the interests of specific persons, or an identifiable class of persons. However, matters of broad agency policy are not particular matters. 5 C.F.R. § 2635.402(b)(3).
5. **Direct and Predictable Effect.** Defined as a close, causal link between the official decision or action and its effect on the financial interest.
5 C.F.R. § 2635.402(b)(1).

C. Imputed Interests.

Under 5 C.F.R. § 2635.402(b)(2), the financial interests of the following persons are imputed to the employee:

1. The employee's spouse;
2. The employee's minor child;
3. The employee's general partner;
4. An organization or entity which the employee serves as an officer, director, trustee, general partner, or employee; and
5. A person with whom the employee is negotiating for employment or has an arrangement concerning prospective employment.

D. Enlisted Members.

18 U.S.C. § 208 does not apply to enlisted members, but the Joint Ethics Regulation (JER) subjects enlisted members to similar regulatory prohibitions. See JER, paras. 1-300.(1)(a) and 5-301. Regulatory implementation of 18 U.S.C. § 208 is found in chapters 2 and 5 of the JER and at 5 C.F.R. § 2640.

E. Options for employees with conflicting financial interests.

1. **Disqualification.** With written notice to, and the approval of, his or her supervisor, the employee must change duties to eliminate any contact or actions affecting that company. 5 C.F.R. § 2635.402(c), 5 C.F.R. § 2640.103(d); JER, para. 2-204.
2. **Waiver.** An employee otherwise disqualified by 18 U.S.C. § 208(a) may be permitted to participate personally and substantially in a particular matter if the disqualifying interest is the subject of a waiver. Waivers may be "individual" or "blanket." Waivers are appropriate if all other options are inadequate or inappropriate. 5 C.F.R. § 2635.402(d).

- a. Individual Waivers. The rules for individual waivers are at 5 C.F.R. § 2635.402(d)(2), 5 C.F.R. § 2640.301, and JER, para. 5-302. An agency may grant an individual waiver on a case-by-case basis after the employee fully discloses the financial interest to the agency. The criterion is whether the employee's conflicting financial interest is not so substantial as to affect the integrity of his or her service to the agency. 5 C.F.R. § 2635.402(d)(2)(ii); 5 C.F.R. § 2640.301(a).
- b. Blanket (or Regulatory) Waivers. The rules for blanket waivers are at 5 C.F.R. § 2640, Subpart B. Blanket waivers include the following:
 - (1) Diversified Mutual Funds. Diversified funds do not concentrate in any industry, business, or single country other than the United States. 5 C.F.R. § 2640.102(a). Owning a diversified mutual fund does not create a financial conflict of interest. 5 C.F.R. § 2640.201(a).
 - (2) Sector Funds. Sector funds are those funds that concentrate in an industry, business, or single country other than the United States. 5 C.F.R. § 2640.102(q).
 - (a) Owning a sector fund may create a conflict of interest, but there is a regulatory exemption if the holding that creates the conflict is not invested in the sector where the fund or funds are concentrated. 5 C.F.R. § 2640.201(b)(1).
 - (b) An employee may participate in a particular matter affecting one or more holdings of a sector mutual fund where the disqualifying financial interest in the matter arises because of ownership of an interest in the fund and the aggregate market value of interests in any sector fund or funds does not exceed \$50,000. 5 C.F.R. § 2640.201(b)(2).
 - (3) De Minimus. Regulations create a *de minimis* exception for ownership by the employee, spouse, or minor child in:
- c. Publicly traded securities, or long-term Federal government securities, or municipal securities; and
 - (1) The aggregate value of the holdings of the employee, spouse, or minor child does not exceed \$15,000. 5 C.F.R. § 2640.202(a).

3. Divestiture. The employee may sell the conflicting financial interest to eliminate the conflict. 5 C.F.R. § 2640.103(e).

F. Negotiating for Employment.

1. The term “negotiating” is interpreted broadly. United States v. Schaltenbrand, 930 F.2d 1554 (11th Cir. 1991).
2. No special action is required. Any discussion regarding opportunities, however tentative, may be negotiating for employment. Something as simple as going to lunch to discuss future prospects could be the basis for a conflict of interest.
3. Negotiating for employment is the same as buying stock in a company. If an employee could own stock in a company without creating a conflict of interest with his official duties (e.g., the company does not do business with the government), then that person may negotiate for employment with that company.
4. Conflicts of interest are always analyzed in the present tense. If an employee interviews for a position and decides not to work for that company, then he or she is free to later work on matters affecting that company.

5. **Seeking Employment.**

- a. OGE regulations contain additional requirements for disqualification of employees who are “seeking employment.” 5 C.F.R. §§ 2635.601 - 2635.606. “Seeking employment” is a term broader than “negotiating for employment” found in 18 U.S.C. § 208.
- b. An employee begins “seeking employment” if he or she has directly or indirectly:
 - (1) Engaged in employment negotiations with any person. “Negotiations” means discussing or communicating with another person, or that person’s agent, with the goal of reaching an agreement for employment. This term is not limited to discussing specific terms and conditions of employment. 5 C.F.R. § 2635.603(b)(1)(i).
 - (2) Made an unsolicited communication to any person or that person’s agent, about possible employment. 5 C.F.R. § 2635.603(b)(1)(ii).

- (3) Made a response other than an immediate rejection to an unsolicited communication from any person or that person's agent about possible employment. 5 C.F.R. § 2635.603(b)(1)(iii).
 - c. An employee has not begun "seeking employment" if he or she makes an unsolicited communication for the following reasons:
 - (1) For the sole purpose of requesting a job application. 5 C.F.R. § 2635.603(b)(1)(ii)(A).
 - (2) For the sole purpose of submitting a résumé or employment proposal only as part of an industry or other discrete class. 5 C.F.R. § 2635.603(b)(1)(ii)(B).
 - d. An employee is no longer "seeking employment" under the following circumstances:
 - (1) The employee or prospective employer rejects the possibility of employment and all discussions have terminated. 5 C.F.R. § 2635.603(b)(2)(i). However, a statement by the employee that merely defers discussions until the foreseeable future does not reject or close employment discussions. 5 C.F.R. § 2635.603(b)(3).
 - (2) Two months have lapsed after the employee has submitted an unsolicited résumé or employment proposal with no response from the prospective employer. 5 C.F.R. § 2635.603(b)(2)(ii).
6. The Stop Trading on Congressional Knowledge Act.
 - a. During 2011, Congress faced increased scrutiny regarding the lack or restrictions imposed on legislators' trading activity. As a result, Congress passed the Stop Trading on Congressional Knowledge Act of 2012 (STOCK Act), Pub. L. No. 112-105, 126 Stat. 291 (2012)
 - b. The STOCK Act includes a provision that applies to OGE 278 filers who are negotiating, or have secured, future employment or compensation.
 - c. OGE 278 filers may not directly negotiate, or have any agreement of future employment or compensation, unless such individual, within 3 business days after the commencement of such negotiation or agreement of future employment or compensation, files with the individual's supervising ethics

office a statement, signed by such individual, regarding such negotiations or agreement, including the name of the private entity or entities involved in such negotiations or agreement, and the date such negotiations or agreement commenced.

- d. OGE 278 filers shall recuse themselves whenever there is a conflict of interest, or appearance of a conflict of interest, for such individual with respect to the subject matter of the required statement, and shall notify the individual's supervising ethics office of such recusal.

7. Disqualification and Waiver.

- a. With the approval of his or her supervisor, the employee must change duties to eliminate any contact or actions with the prospective employer. 5 C.F.R. § 2635.604(a)-(b). Written notice of the disqualification is required.
- b. An employee may participate personally and substantially in a particular matter having a direct and predictable impact on the financial interests of the prospective employer only after receiving a written waiver issued under the authority of 18 U.S.C. § 208(b)(1) or (b)(3). The waivers are described in 5 C.F.R. § 2635.402(d) and 5 C.F.R. Part 2640.

G. Penalties.

- 1. Violating 18 U.S.C. § 208 may result in imprisonment up to one year, or, if willful, five years.
- 2. In addition, a fine of \$5000 to \$250,000 is possible. See 18 U.S.C. § 3571.
- 3. FAR 3.1004(a) and 52.203-13 require contractor reporting of conflicts of interests that violate 18 U.S.C. § 208.

IV. THE PROCUREMENT INTEGRITY ACT (PIA) AS CHANGED BY THE CLINGER-COHEN ACT.

Pub. L. No. 104-106, §§ 4001-4402, 110 stat. 186, 659-665 (1996). Section 27, Office of Federal Procurement Policy Act (OFPPA) amendments of 1988, 41 U.S.C. § 423, has been completely rewritten by the Clinger-Cohen Act of 1996. Changes have been made to FAR, part 3, and to the DFARS.

A. Background of the Amended Procurement Integrity Act (PIA).

- 1. Effective date: January 1, 1997.

2. The basic provisions of the new statute are set forth in FAR 3.104-2.
 - a. Prohibitions on disclosing and obtaining procurement information apply beginning January 1, 1997 to:
 - (1) Every competitive federal procurement for supplies or services,
 - (2) From non-Federal sources,
 - (3) Using appropriated funds.
 - b. Requirement to report employment contacts applies beginning January 1, 1997 to competitive federal procurements above the simplified acquisition threshold (\$150,000).
 - c. Post-employment restrictions apply to former officials for services provided or decisions made on or after January 1, 1997.
 - d. Former officials who left government service before January 1, 1997 are subject to the restrictions of the PIA as it existed prior to its amendment.
3. Interference with duties. An official who refuses to cease employment discussions is subject to administrative actions in accordance with 5 C.F.R. § 2635.604(d) (annual leave, leave without pay, or other appropriate administrative action), if the disqualification interferes substantially with the official's ability to perform his or her assigned duties. FAR 3.104-11(c). See Smith v. Dep't of Interior, 6 M.S.P.R. 84 (1981) (employee who violated conflict of interest regulations by acting in official capacity in matters affecting his financial interests is subject to removal).
4. Coverage. Applies to "persons," "agency officials," and "former officials" as defined in the PIA. See GEO Group, Inc. v. United States, 100 Fed. Cl. 223 (2011) (finding that the PIA, as well as the organizational conflict of interest rules, do not cover situations in which a bidder directly obtains information from a competing bidder).
5. Section 27 of the PIA has been implemented through FAR 3.104-2. This provision of the FAR reminds employees that while their participation in a Federal agency procurement may not be considered "participating personally and substantially in a Federal agency procurement" for purposes of certain requirements in the PIA, nevertheless there will be instances where the employee will be considered to be participating personally and substantially for purposes of 18 USC 208. FAR 3.104-2(b).

6. Restrictions on Disclosing and Obtaining Contractor Bid or Proposal Information or Source Selection Information.
7. Restrictions on disclosure of information. 41 U.S.C. § 2102(a). The following persons are forbidden from knowingly disclosing contractor bid or proposal information or source selection information before the award of a contract:
 - a. Present or former federal officials;
 - b. Persons (such as contractor employees) who are currently advising the federal government with respect to a procurement;
 - c. Persons (such as contractor employees) who have advised the federal government with respect to a procurement, but are no longer doing so; and
 - d. Persons who have access to contractor bid or proposal information by virtue of their office, employment, or relationship.
8. Restrictions on obtaining information. 41 U.S.C. § 2102(b). Persons (other than as provided by law) are forbidden from knowingly obtaining contractor bid or proposal information or source selection information before the award of a Federal agency procurement contract to which the information relates.
9. Contractor bid or proposal information. 41 U.S.C. § 2101(2). Defined as any of the following that has not been disclosed publicly:
 - a. Cost or pricing data as defined in 10 U.S.C. § 2306a and 41 U.S.C. § 3501(a);
 - b. Indirect costs or labor rates;
 - c. Proprietary information marked in accordance with applicable law or regulation; and
 - d. Information marked by the contractor as “contractor bid or proposal information” in accordance with applicable law or regulation. If the contracting officer disagrees, he or she must give the contractor notice and an opportunity to respond prior to release of marked information. FAR 3.104-4. See *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979); *CNA Finance Corp. v. Donovan*, 830 F.2d 1132 (D.C. Cir. 1987), cert. den. 485 U.S. 917 (1988).

10. Source Selection Information. 41 U.S.C. § 2101(7). Defined as any of the following that has not been disclosed publicly:
 - a. Bid prices before bid opening;
 - b. Proposed costs or prices in negotiated procurement;
 - c. Source selection plans;
 - d. Technical evaluation plans;
 - e. Technical evaluations of proposals;
 - f. Cost or price evaluations of proposals;
 - g. Competitive range determinations that identify proposals that have a reasonable chance of being selected for award;
 - h. Rankings of bids, proposals, or competitors;
 - i. Reports and evaluations of source selection panels, boards, or advisory councils; and
 - j. Other information marked as “source selection information” if release would jeopardize the integrity of the competition.

B. Reporting Non-Federal Employment Contacts.

1. Mandatory Reporting Requirement. 41 U.S.C. § 2103(a). An agency official who is participating personally and substantially in an acquisition over the simplified acquisition threshold must report employment contacts with bidders or offerors. Reporting may be required even if the contact is through an agent or intermediary. FAR 3.104-5.
 - a. Report must be in writing.
 - b. Report must be made to supervisor and designated agency ethics official.
 - (1) Designated agency ethics official in accordance with 5 C.F.R. § 2638.201.
 - (2) Deputy agency ethics officials in accordance with 5 C.F.R. § 2638.204 if authorized to give ethics advisory opinions.

- (3) Alternate designated agency ethics officials in accordance with 5 C.F.R. § 2638.202(b).
See FAR 3.104-3.
- c. Additional requirements. The agency official must:
- (1) Promptly reject employment; or
 - (2) Disqualify him/herself from the procurement until authorized to resume participation in accordance with 18 U.S.C. § 208.
 - (a) Disqualification notice. Employees who disqualify themselves must submit a disqualification notice to the head of the contracting activity (HCA) or designee, with copies to the contracting officer, source selection authority, and immediate supervisor. FAR 3.104-5(b).
 - (b) Note: 18 U.S.C. § 208 (Financial Conflict of Interest) requires employee disqualification from participation in a particular matter if the employee has certain financial interests in addition to those which arise from employment contacts.
2. Both officials and bidders who engage in prohibited employment contacts are subject to criminal penalties and administrative actions.
3. Participating personally and substantially means active and significant involvement in:
- a. Drafting, reviewing, or approving a statement of work;
 - b. Preparing or developing the solicitation;
 - c. Evaluating bids or proposals, or selecting a source;
 - d. Negotiating price or terms and conditions of the contract; or
 - e. Reviewing and approving the award of the contract.
FAR 3.104-1.
4. The following activities are generally considered **not** to constitute personal and substantial participation:

- a. Certain agency level boards, panels, or advisory committees that make recommendations regarding approaches for satisfying broad agency-level missions or objectives;
- b. General, technical, engineering, or scientific effort of broad applicability and not directly associated with a particular procurement;
- c. Clerical functions in support of a particular procurement; and
- d. For OMB Circular A-76 cost comparisons: participating in management studies; preparing in-house cost estimates; preparing “most efficient organization” (MEO) analyses; and furnishing data or technical support **to be used by others** in the development of performance standards, statements of work, or specifications. FAR 3.104-1.

C. **Post-Government Employment Restriction.** See FAR 3.104-3(d).

- 1. **One-Year Ban.** 41 U.S.C. § 2104(a). A former official of a Federal agency may not accept compensation as an employee, officer, director, or consultant from a contractor that has been awarded a contract **in excess of \$10 million** (inclusive of options), within a **period of one-year** after such former official served, with respect to that contract, as:
 - a. Contracting officer (procuring or administrating CO),
 - b. Source Selection Authority (SSA),
 - c. Member of the Source Selection Evaluation Board (SSEB),
 - d. The chief of a financial or technical evaluation team, or
 - e. Program manager or deputy program manager.
 - f. This one-year ban also applies with to a government official that personally made a decision with respect to that contract to—
 - (1) Award a contract, subcontract, modification of a contract or subcontract, or issue a task order or delivery order in excess of \$10 million;
 - (2) Establish overhead or other rates valued in excess of \$10 million;
 - (3) Approve a contract payment or payments in excess of \$10 million; or

- (4) Pay or settle a claim in excess of \$10 million.
2. Start of the One-Year Ban Period.
 - a. If the former official was in a specified position (source selection type) on the date of contractor selection, but not on the date of award, the ban begins on the date of selection.
 - b. If the former official was in a specified position (source selection type) on the date of award, the ban begins on the date of award.
 - c. If the former official was in specified position (program manager, deputy program manager, administrative contracting officer), the ban begins on the last date of service in that position.
 - d. If the former official personally made certain decisions (award, establish overhead rates, approve payment, settle claim), the ban begins on date of decision. FAR 3.104-3.
3. In “excess of \$10 million” means:
 - a. The value or estimated value of the contract including options;
 - b. The total estimated value of all orders under an indefinite-delivery, indefinite-quantity contract, or a requirements contract;
 - c. Any multiple award schedule contract, unless the contracting officer documents a lower estimate;
 - d. The value of a delivery order, task order, or order under a Basic Ordering Agreement;
 - e. The amount paid, or to be paid, in a settlement of a claim; or
 - f. The estimated monetary value of negotiated overhead or other rates when applied to the Government portion of the applicable allocation base. See FAR 3.104-3.
4. The one-year ban does not prohibit an employee from working for any division or affiliate that does not produce the same or similar product or services. 41 U.S.C. § 423(d)(2).
5. Ethics Advisory Opinion. Agency officials and former agency officials may request an advisory opinion as to whether he or she is

precluded from accepting compensation from a particular contractor.
FAR 3.104-6.

D. Penalties and Sanctions. FAR 3.104-7 and 3.104-8.

1. Criminal Penalties. Violating the prohibition on disclosing or obtaining procurement information may result in confinement for up to five years and a fine if done in exchange for something of value, or to obtain or give a competitive advantage.
2. Civil Penalties.
 - a. The Attorney General may take civil action for wrongfully disclosing or obtaining procurement information, failing to report employment contacts, or accepting prohibited employment.
 - b. Civil penalty is up to \$50,000 (individuals) and up to \$500,000 (organizations) plus twice the amount of compensation received or offered.
3. If violations occur, the agency shall consider cancellation of the procurement, rescission of the contract, suspension or debarment, adverse personnel action, and recovery of amounts expended by the agency under the contract. A new contract clause advises contractors of the potential for cancellation or rescission of a contract, recovery of any penalty prescribed by law, and recovery of any amount expended under the contract. FAR 52.203-8. Another clause advises the contractor that the government may reduce contract payments by the amount of profit or fee for violations. FAR 52.203-10.
4. A contracting officer may disqualify a bidder from competition whose actions fall short of a statutory violation, but call into question the integrity of the contracting process. See Compliance Corp., B-239252, Aug. 15, 1990, 90-2 CPD ¶ 126, aff'd on recon., B-239252.3, Nov. 28, 1990, 90-2 CPD ¶ 435; Compliance Corp. v. United States, 22 Cl. Ct. 193 (1990), aff'd, 960 F.2d 157 (Fed. Cir. 1992) (contracting officer has discretion to disqualify from competition a bidder who obtained proprietary information through industrial espionage not amounting to a violation of the PIA); see also NKF Eng'g, Inc. v. United States, 805 F.2d 372 (Fed. Cir. 1986) (contracting officer has authority to disqualify a bidder based solely on appearance of impropriety when done to protect the integrity of the contracting process).
5. Limitation on protests. 41 U.S.C. § 2106. No person may file a protest, and GAO may not consider a protest, alleging a PIA violation unless the protester first reported the alleged violation to the agency

within 14 days of its discovery of the possible violation.
FAR 33.102(f); see also 41 U.S.C. §§ 2102 – 2104.

6. Contracting officer's duty to take action on possible violations.
 - a. Determine impact of violation on award or source selection.
 - b. If no impact, forward information to individual designated by agency. Proceed with procurement, subject to contrary instructions.
 - c. If impact on procurement, forward information to the HCA or designee. Take further action in accordance with HCA's instructions. FAR 3.104-7.

V. REPRESENTATIONAL PROHIBITIONS.

A. General Rule.

1. 18 U.S.C. § 207 and its implementing regulations bar certain acts by former employees that may reasonably give the appearance of making unfair use of their prior employment and affiliations.
2. A former employee involved in a particular matter while working for the government must not "switch sides" after leaving government service to represent another person on that matter. 5 C.F.R. § 2637.101.
3. 18 U.S.C. § 207 does not bar a former employee from working for any public or private employer after government service. The regulations state that the statute is not designed to discourage government employees from moving to and from private positions. Rather, such a "flow of skills" promotes efficiency and communication between the government and the private sector, and is essential to the success of many government programs. The statute bars only certain acts "detrimental to public confidence." 5 C.F.R. § 2637.101.

B. Lifetime Ban.

1. 18 U.S.C. § 207(a)(1) imposes a lifetime prohibition on the former employee against communicating or appearing with the intent to influence a particular matter, on behalf of anyone other than the government, when:
 - a. The government is a party, or has a direct and substantial interest in the matter;

- b. The former officer or employee participated personally and substantially in the matter while in his official capacity; and
- c. At the time of the participation, specific parties other than the government were involved.
- d. Note that when the term “lifetime” is used, it refers to the lifetime of the particular matter. To the extent the particular matter is of limited duration, so is the coverage of the statute. Further, it is important to distinguish among particular matters. The statute does not apply to a broad category of programs when the specific elements may be treated as severable.

C. Two-Year Ban.

- 1. 18 U.S.C. § 207(a)(1) prohibits, for two years after leaving federal service, a former employee from communicating or appearing with the intent to influence a particular matter, on behalf of anyone other than the government, when:
 - a. The government is a party, or has a direct and substantial interest in the matter; and
 - b. The former officer or employee knew or should have known that the matter was pending under his official responsibility during the one year period prior to leaving federal service.
 - c. At the time of participation, specific parties other than the government were involved.

D. One-Year Ban.

- 1. 18 U.S.C. § 207(c) prohibits, for one year after leaving federal service, certain “senior employees” (determined by specified pay thresholds, typically general officer or SES-level) from communicating or appearing with the intent to influence a particular matter, on behalf of anyone other than the government, when:
 - a. The communication or appearance involves the department or agency the officer or employee served during his last year of federal service as a senior employee; and
 - b. The person represented by the former officer or employee seeks official action by the department or agency concerning the matter.
- 2. 18 U.S.C. § 207(h) permits DoD to be divided into components for purposes of restrictions imposed by § 207(c). Thus, a Navy Admiral is

prohibited from communicating, with the intent to influence official action, with Department of Navy officials. However, the officer may communicate with representatives of other services and OSD (unless he was assigned to a joint command during his last year of service).

- E. 18 U.S.C. § 207 does not prohibit an employee from working for any entity, but it does restrict how a former employee may work for the entity.
 - 1. The statute does not bar behind the scenes involvement. But see January 19, 2001 opinion from the Department of Justice to OGE suggesting that a former employee who is the sole proprietor of a business “working behind the scenes” may constitute “communication with the intent to influence” Government decisions.
<http://www.justice.gov/olc/207cfinal.htm>.
 - 2. A former employee may ask questions about the status of a particular matter, request publicly available documents, or communicate factual information unrelated to an adversarial proceeding.
- F. Military officers on terminal leave.
 - 1. Military officers on terminal leave are still on active duty. While they may begin a job with another employer during this time, their exclusive loyalty must remain with the government until their retirement or ETS pay date.
 - 2. Two restrictions apply to non-government employment during terminal leave:
 - a. All officers and employees are prohibited from representing anyone in any matter in a U.S. forum, or in any claim against the United States. 18 U.S.C. § 205.
 - b. Commissioned officers are prohibited from holding a state or local government office, or otherwise exercising sovereign authority. 10 U.S.C. § 973. This does not prohibit employment by a state or local government; it only prohibits the exercise of governmental authority. For example, a police officer or judge exercises governmental authority; a motor pool chief does not.

VI. SECTION 847 OF PUB. L. 110-181 - COVERED DOD EMPLOYEES

- A. On January 15, 2009, the Department of Defense (DoD) issued an interim rule enacting Section 847 of Pub. L. 110-181 and requiring certain “Covered DOD officials” to acquire an ethics opinion letter prior to going to work for a DoD contractor. DFARS 203.171-3

- B. The DFARS defines covered DoD officials as DoD personnel who leave or left federal service on or after January 28, 2008, and who meet either of the following two service criteria:
1. They served
 - a. As a Presidential Appointee;
 - b. In the Senior Executive Service; or
 - c. In a general or flag officer position in the pay grade of 0-7 or higher.
and
 - d. They participated personally and substantially in an acquisition as defined in Title 41 of the U.S. Code with a value in excess of \$10 million, or they served in one of several specified positions, such as a source selection authority; or,
 2. They served in one of several specified positions including:
 - a. program manager (or deputy),
 - b. contracting officer (administrative or procuring), or
 - c. source selection authority or source selection evaluation board member for a contract with a value in excess of \$10 million.
DFARS 252.203-7000.
- C. Pursuant to DFARS 203.171-3, if these covered DoD officials, within two years after leaving DoD service, expect to receive compensation from a DoD contractor, they must first request a written opinion from the appropriate DoD ethics counselor. This opinion letter must advise the covered DoD official of any post-employment restrictions on activities that the official may undertake on behalf of a contractor.
- D. This rule also applies to DoD contractors, who, under a change to DFARS clause 252.203-7000, are charged with policing compliance with this new rule and must ensure that the covered DoD officials they recruit comply with this new provision. Under this rule, DoD contractors are prohibited from compensating a covered DoD official without first verifying that the official requested and received a written opinion letter from the appropriate ethics counselor, or properly requested an opinion letter at least 30 days prior to receiving compensation. Knowing failure to do so is now specifically designated as a basis for suspension or debarment.

VII. DEALING WITH CONTRACTORS.

- A. General Rule. Government business shall be conducted in a manner that is above reproach, with complete impartiality, and with preferential treatment for none. FAR 3.101-1.
- B. Some pre-contract contacts with industry are permissible, and in fact are encouraged where the information exchange is beneficial (e.g., necessary to learn of industry's capabilities or to keep them informed of our future needs). FAR Part 5. Some examples are:
 - 1. Research and development. Agencies will inform industrial, educational, research, and non-profit organizations of current and future military RDT&E requirements. However, a contracting officer will supervise the release of the information. AR 70-38, para. 1-5.
 - 2. Unsolicited proposals. Companies are encouraged to make contacts with agencies before submitting proprietary data or spending extensive effort or money on these efforts. FAR 15.604.

VIII. RELEASE OF ACQUISITION INFORMATION.

- A. The integrity of the acquisition process requires a high level of business security.
- B. Contracting officers may make available the maximum amount of information to the public except information (FAR 5.401(b)):
 - 1. On plans that would provide undue discriminatory advantage to private or personal interests.
 - 2. Received in confidence from offerors. 18 U.S.C. § 1905; FAR 15.506(e).
 - 3. Otherwise requiring protection under the Freedom of Information Act.
 - 4. Pertaining to internal agency communications (e.g., technical reviews).
- C. Information regarding unclassified long-range acquisition estimates is releasable as far in advance as practicable. FAR 5.404.
- D. General limitations on release of acquisition information. FAR 14.203-2; FAR 15.201.
 - 1. Agencies should furnish identical information to all prospective contractors.

2. Agencies should release information as nearly simultaneously as possible, and only through designated officials (i.e., the contracting officer).
3. Agencies should not give out advance information concerning future solicitations to anyone.

IX. FOREIGN GOVERNMENT EMPLOYMENT

- A. Retired military members must obtain a waiver to work for a foreign government.
 1. 37 U.S.C. § 908 allows foreign government employment with approval of the Service Secretary and the Secretary of State.
 2. This statutory requirement applies to employment by corporations owned or controlled by foreign governments, but does not apply to independent foreign companies. It does not preclude retired officers from working as an independent consultant to a foreign government, as long as they are careful to maintain their independence.
 3. When seeking employment outside of the DOD contractor community, a military retiree should always ask, “Is this company owned or controlled by a foreign government?”
- B. Retired officers who represent a foreign government or foreign entity may be required to register as a foreign agent. 22 U.S.C. § 611; 28 CFR § 5.2.

X. MISCELLANEOUS PROVISIONS.

- A. Use of title. Retirees may use military rank in private commercial or political activities as long as their retired status is clearly indicated, no appearance of DOD endorsement is created, and DOD is not otherwise discredited by the use. JER, para. 2-304.
- B. Wearing the uniform. Retirees may only wear their uniform for funerals, weddings, military events (such as parades or balls), and national or state holidays. They may wear medals on civilian clothing on patriotic, social, or ceremonial occasions. AR 670-1, para. 29-4.
- C. OGE 278s. Termination Public Financial Disclosure Reports must be filed within 30 days of retirement.
- D. Inside Information. All former officers and employees must protect “inside information,” trade secrets, classified information, and procurement sensitive information after leaving federal service. 18 U.S.C. § 794.

- E. Gifts from Foreign Governments. Military retirees and their immediate families may not retain gifts of more than “minimal value” (\$335 as of February 2011) from foreign governments. 5 U.S.C. § 7342.
- F. Travel, Meals & Reimbursements. Government employees may accept travel expenses to attend job interviews if such expenses are customarily paid to all similarly situated job applicants. These payments must be reported on Schedule B of the OGE 278. 5 C.F.R. § 2635.204(e)(3).
- G. On October 5, 2012, the President signed the Government Charge Card Abuse Prevention Act, Pub. L No. 112-194, into law. The Act amends 10 U.S.C. § 2784 to implement changes to government charge card policies, including:
 - 1. Card holders may not be approving official for their own purchases.
 - 2. Charges must be reconciled with receipts and supporting documentation.
 - 3. Agencies must have appropriate penalties for violations, up to and including dismissal from employment.
 - 4. New reporting requirements to OMB for certain violations.
 - 5. Credit checks and minimum credit score before travel cards can be issued.

XI. CONTRACTOR PERSONAL CONFLICTS OF INTEREST

- A. **Background.** In November 2011, DoD issued a final rule amending the FAR to include a new subpart (FAR 3.11) and new contract clause (52.203-16) addressing personal conflicts of interest of Federal contractor and subcontractor employees performing “acquisition functions closely associated with inherently governmental functions.” The new rule implements the Duncan Hunter National Defense Authorization Act, 41 U.S.C. § 2303.
- B. **Rule.** The new rule requires Federal government contractors and qualifying subcontractors to:
 - 1. Screen covered employees for personal conflicts of interest through the use of disclosure forms;
 - 2. Assign only employees without personal conflicts to perform certain tasks under government contracts;
 - 3. Ensure that employees do not use non-public information for personal gain;
 - 4. Report violations to their contracting officer.

- C. **Applicability.** The new FAR clause 52.203-16, Preventing Personal Conflicts of Interest, must be included in Federal contracts and task or delivery orders issued after December 2, 2011 that require contractor employees to perform tasks closely associated with “inherently governmental functions.” The new rule does not apply to commercial item contracts.
- D. **Definitions.** See new FAR Subpart 3.11.

XII. CONCLUSION.

- A. The ethical rules governing procurement officials are stricter than the general rules governing federal employees.
- B. You must be familiar with the various ethical rules stated in the PIA and other statutes governing employment of former Federal employees.