

# Contractors In The Workplace

US Army

Office of General Counsel

(Ethics & Fiscal)



# Overview

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- Personal Services – Inherently Governmental Functions
- Ethical Rules for Contractors
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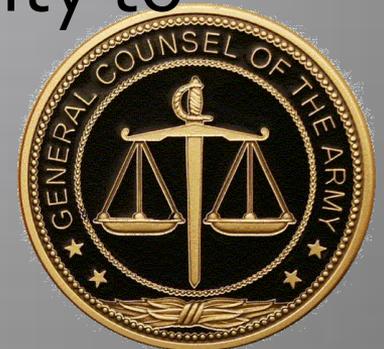


# Nature of Federal and Contract Employment

<b>Federal Employee Hiring Authority</b>	<b>Statutory, Regulatory</b>
<b>Contractor Hiring Authority</b>	<b>At will, contract, verbal</b>
Federal Employee Management	Statutory, Regulatory
Contractor Management	
<b>Federal Employee Operation Authority</b>	<b>Authorize Expense, Determine Claims, Adjust Obligations, Hire, Remove</b>
<b>Contractor Employee Operation Authority</b>	<b>Determined by the contract</b>

# Hiring Government Employees By Contract

- The Government acts through its agent- the Contracting Officer
- Contracts on behalf of the Government
- Contract with the U.S. Government must comply with the laws and regulations that permit the agreement and must be made by a Contracting Officer with actual authority to make the contract.



# Authorized Personal Services

- Expert and consultant services – 5 usc 3109 or 10 usc 129b
- Health services – 10 usc 1091
- Intelligence, counter intelligence or special operations command operations – 10 USC 129b and DFARS 237.104
- Personal Services Contracts 10 usc 129b and 5 usc 3109



# Personal Services

- FAR 37.104 -- Personal Services Contracts.
- A personal services contract is characterized by the employer-employee relationship it creates between the Government and the contractor's personnel. ... Obtaining personal services by contract, rather than by direct hire, circumvents those laws unless Congress has specifically authorized acquisition of the services by contract.
- Agencies shall not award personal services contracts unless specifically authorized by statute.



# FAR 37.104 Personal Service

- Personal services occur under a service contract when, as a result of (1) the contract's terms or (2) the manner of its administration, contractor personnel are subject to the relatively continuous supervision and control of a Government officer or employee.



# Personal Service Factors

- (1) Performance on site.
- (2) Principal tools and equipment furnished by the Government.
- (3) Services are applied directly to the integral function or mission.
- (4) Comparable services are performed using civil service personnel.
- (5) The need for the type of service provided can reasonably be expected to last beyond 1 year.
- (6) The inherent nature of the service reasonably requires Government direction in order to adequately protect the Government, retain control or personal responsibility.



# Inherently Governmental Functions

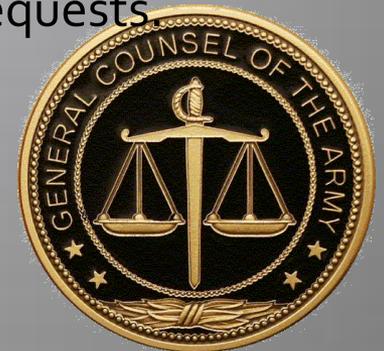
Contractors cannot:

- Control or direct Government personnel, administer contracts, or perform inherently government functions .
- Perform functions that require exercise of discretion in applying government authority, use of judgment in making decisions for the Government, and decisions regarding monetary transactions and entitlements.



# FAR 7.5 - Examples of IGF

- (1) The direct conduct of criminal investigations.
- (2) The control of prosecutions and performance of adjudicatory functions other than those relating to arbitration or other methods of alternative dispute resolution.
- (3) The command of military forces, especially the leadership of military personnel who are members of the combat, combat support, or combat service support role.
- (4) The conduct of foreign relations and the determination of foreign policy.
- (5) The determination of agency policy, such as determining the content and application of regulations, among other things.
- (6) The determination of Federal program priorities for budget requests.
- (7) The direction and control of Federal employees.
- (8) The direction and control of intelligence and counter-intelligence operations.



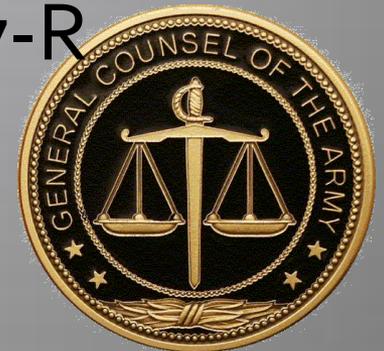
# FAR 7.5 – More Examples

- (9) The selection or non-selection of individuals for Federal Government employment, including the interviewing of individuals for employment.
- (10) The approval of position descriptions and performance standards for Federal employees.
- (11) The determination of what Government property is to be disposed of and on what terms (although an agency may give contractors authority to dispose of property at prices within specified ranges and subject to other reasonable conditions deemed appropriate by the agency).



# Government Employee Ethics Rules

- Bribery - 18 USC 201
- Representation – 18 USC 203/205
- Post Government Employment – 18 USC 207
- Conflicts of Interest – 18 USC 208
- Supplementation of Salary – 18 USC 209
- Standards of Conduct - 5 CFR 2635
- Joint Ethics Regulation – DOD 5500.7-R



# Contractor Ethics Rules

## Federal Acquisition Regulation (FAR)

- 3.1 - Procurement integrity
- 3.2 - Contractor gratuities to Government personnel
- 3.10 - Contractor Ethics Programs
- 9.1 - Responsible contractors
- 9.4 - Debarment/Suspension
- 9.5 - Organizational and Consultant COI
- 37.104 - Personal Services Contracts

DFARS 203.70 Contractor Standards of Conduct



# What Conflict of Interest Laws Apply?

<b>Selected Laws and Regulations That Address Personal Conflicts of Interest</b>	<b>Applicable to federal employees?</b>	<b>Applicable to DOD KTR employees?</b>
Bribery, kickback, other graft	Yes	Yes
Participating in matter affecting personal financial interest	Yes	No
Avoiding appearance of partiality when performing duties	Yes	No
Disclosing financial interests	Yes	No
Accepting travel and gifts	Yes	No
Using nonpublic info for personal gain	Yes	No
Future employment contact	Yes	No
Misusing position to provide preferential treatment to a private interest	Yes	No



# Organizational Conflicts of Interest

Organizational conflict of interest arises because of other activities or relationships with other persons.

OCI occurs when a person is (potentially) unable to render impartial assistance or advice to the Government, a person's objectivity in performing the contract work is or might be otherwise impaired, or a person has an unfair competitive advantage.

FAR 9.504 requires Contracting Officers to analyze planned acquisitions in order to—

Identify and evaluate potential organizational conflicts of interest as early in the acquisition process as possible; and

Avoid, neutralize, or mitigate significant potential conflicts before contract award



# Contractor Ethics Programs – FAR

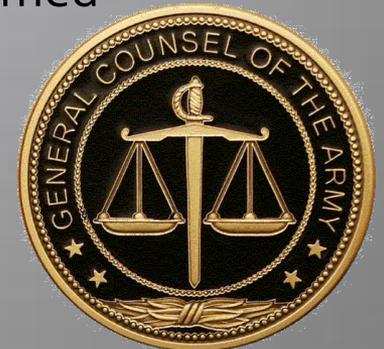
## 3.10

Mandatory requirements for contractor Codes of Conduct, ethics training and internal control systems.

Objectives: Program suitable to the size of the company and extent of its involvement in Government contracting; Facilitate timely discovery and disclosure of improper conduct in connection with Government contracts; Ensure corrective measures are promptly instituted and carried out.

Applicable to contracts over \$5 million and 120 days in duration

Not applicable to commercial-item contracts and contracts performed entirely overseas ... portions not applicable to small businesses



# Contractor Ethics Programs – FAR

## 3.10

### Contractor self-reporting requirements

To avoid suspension or debarment, all federal contractors must disclose credible evidence of:

- Violations of certain procurement-related criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code.
- False Claims Act violations.
- Significant contractor overpayments.

Suspension/debarment disclosure obligation creates an three-year examination requirement for all federal contractors.

- Effective date of December 12, 2008.
- Disclosure is required for three years after final contract payment. In order to comply, contractors must look now examine contracts closed in the last three years and examine currently closing contracts.



# Processing Notification

- *Notification of possible contractor violation.* If the contracting officer is notified of possible contractor violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 U.S.C.; or a violation of the civil False Claims Act, the contracting officer shall—
  - (1) Coordinate the matter with the agency Office of the Inspector General; or
  - (2) Take action in accordance with agency procedures



# Time Management

Contractor personnel not subject to Government time-keeping, leave or pass policies.

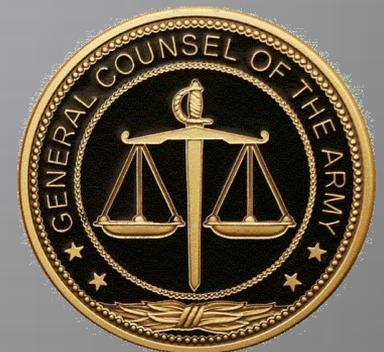
Government employees may not direct work, such as changing reporting times, working hours or overtime.

Contractor employees may participate in office events on their own time or on contractor time, not on time charged to the contract.



# Use of Government Resources

Contractor employees may not use Government resources unless provided for in the contract. Use must be consistent with GFP clauses, including hours, duration and return. Installation commanders have discretion to allow contractor employees on the installation limited use of military MWR activities (restaurants, gym, golf course).



# Training

Government-provided Training is allowed if:

- Required by the contract or otherwise appropriate.

- Does not create appearance of favoring a contractor.

- Government determines whether training necessary and a reasonable expense under its appropriation.

Contractor-provided Training:

- Gift rules apply. Examine accepting as gift to agency or Widely Attended Gathering.



# Unofficial and NFE Events

Unofficial Events - Contractor employees may pay their share and participate on their own or company time – not charged to the contract.

## Widely Attended Gatherings

Government employees may attend for free if approved by Department designee.  
Considered a personal gift.

Government personnel can speak or participate .  
Considered neither a gift to agency or person.



# Charitable Fundraising

Contractor personnel cannot solicit  
Government personnel ... and vice versa!

Approved official fundraising consist of CFC  
and certain service-related, such as AER, Navy  
Mutual Aid, AFA, etc.

Contractor personnel can donate, but  
should not be solicited.



# Political Activities

Government personnel are prohibited from conducting political activities in the workplace and from engaging in some political activity.

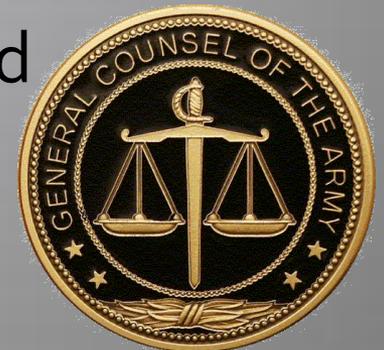
Contractor employees are not bound by same rules. Contracts should prohibit Contractor employee political activities in the workplace.

Government site regulations prohibit political posters, signs and activities.



# Awards

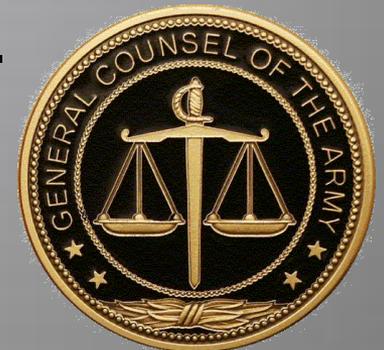
- Contractors have their own awards and bonus programs.
- Government may provide honorary awards to private citizens recognizing contributions to DoD mission.
- Contractors not eligible unless the contribution is substantially beyond that specified or implied within the terms of the contract establishing the relationship, or the recognition is clearly in the public interest – DoD 1400.25-M.
- Always coordinate proposed honorary award with contracting officer.



# Transportation – Government Vehicles

Contractor employees may use shuttle bus systems when conducting official defense business.

Contractor personnel may not be issued Invitational Travel Orders. All travel should be priced and included in the contract. See JTR Appendix E, Part I, D and FAR 31.205-46. Government contractors are not eligible under any circumstances for city pair airfares.



# Transportation – Contractor Vehicles

- Transportation in contractor vehicles is considered a gift to the person or to the agency
- 5 CFR 2635.204
- 31 USC 1353
- Rideshare
- Car/Van Pools



# Gifts - Contractors to Government Personnel

The Contractor is a prohibited source ... and so are contractor employees.

Government personnel may not accept gifts that are either (1) from prohibited sources, or (2) given because of their official position.

There are exceptions:

\$20/\$50 rule

Modest food/beverages

Personal Relationship



# Gifts- From Government Personnel to Contractors

Government personnel can give a gift to a Contractor employee. There is no statute or regulation prohibiting gifts.

Contractors are required to have their own ethics programs and training. These rules may (and usually do) prohibit gifts.

Ask contractor employees supervisor.



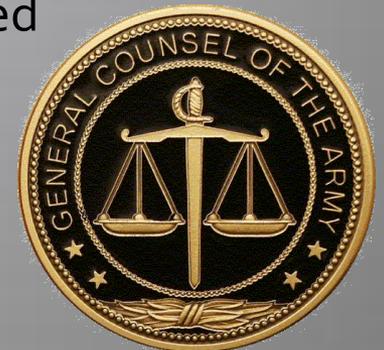
# Switching Sides - Contractor Personnel Moving to Government

No preferential treatment in hiring process

May be disqualified from working on some matters if :

- Received “extraordinary payment” or
- Hold financial interest (i.e., retirement benefits or stocks) with prior employer.

An “extraordinary payment” is any item, including cash or investment interest, exceeding \$10,000 based on a determination made after it became known that the employee was being considered for or has accepted a Government position, and other than pursuant to the former employer’s established compensation, partnership, or benefits program.



# That's It!

Questions??

