

## Be Careful What You Wish For: Government Contracting & the Unwary Contractor – Current Ethics Issues & Obligations, Part II

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As discussed in our more detailed articles (available online) and in Part I of this series, companies contracting with the federal government, either directly or indirectly through subcontracts, purchase orders or the like, must be extremely vigilant in their internal contracting and ethical procedures. While many commercial/private contracts implicate ethics-related issues, these usually pale in comparison to the ethics standards, obligations and contract clauses set forth in the Federal Acquisition Regulations (FARs) and the statutes and laws from which the FARs are derived.

In Part I of this series, we discussed the almost universally required Code of Government Contracts Ethics & Conduct, Whistleblower Protections, False Claims Act, Kickbacks and Gratuities Laws.

In Part II, we introduce a number of equally important ethical topics, including standards of conduct, pricing independence and procurement integrity, as well as protection of commercially sensitive proposal and source selection information.

In Part III, the final installment of this series, we will discuss some of the other key ethics- and integrity-related issues associated with government contracts. A more detailed article covering the topics set forth herein will be published in summary fashion on our website and issued to those on our mailing list. If you are interested in being added to Thompson Hine's Government Contracts mailing list, please email [Kathleen.Steiss@ThompsonHine.com](mailto:Kathleen.Steiss@ThompsonHine.com).

### Standards of Conduct: Government Personnel

As discussed in Part I, the FARs now impose a requirement that most (not all) contractors and subcontractors on government contracts prepare and enforce a code of ethics. While the FARs do not dictate precise wording, they impose high standards. For example, government business is required to be

“conducted in a manner above reproach ... with complete impartiality and with preferential treatment for none.” FAR 3.101-1. As the public coffers are tapped to pay for government contracts, contracting personnel are held to the highest degree of trust and standards, with the “general rule [being the avoidance] strictly of a conflict of interest in Government-contractor relationships.” *Id.*

As in the contractor/subcontractor realm, in the contractor/government-realm, “no Government employee may solicit or accept, directly or indirectly, any gratuity, gift, favor, entertainment alone, or anything of monetary value from anyone” seeking government business, who regularly conducts business with the employee's agency or who otherwise has any interests that may affect the employee's official duties. FAR 3.101-2.

The code of conduct therefore requires that parties doing business with the government “must conduct themselves with the highest degree of integrity and honesty.” FAR 3.1002. At a minimum, the FARs require the contractor's code of ethics to employ some kind of training program for employees and an internal control program that allows for timely discovery, disclosure and correction of any improper conduct in connection with government contracts. *Id.*

In addition to the FARs requirements, all agencies have their own standards of conduct that provide rules and disciplinary procedures for their employees.

### Pricing Independence

Tied to these internal codes of integrity and ethics, the government mandates that all pricing determinations be certified by the contractor and independently verified by the government to ensure that taxpayer money is not used to fund prices that are unreasonably high or unrealistically low. All contractors are required to submit

a “Certificate of Independent Price Determination,” which states in part that:

- The firm has utilized pricing, rates and lists for the items to be acquired by the government;
- The firm has notified its prospective clients/customers of a pending or revised price list for government-acquired items; and
- The items offered to the government are the same at the same price (or better) than those offered to commercial clientele. FAR 3.103.

This certificate is intended to verify that the government is getting commercially reasonable or better pricing and not being price-gouged, and that there is no collusion going on that impacts pricing. *Id.* If the agency’s contracting officer (CO) believes the certificate is false, or if it is rejected, the CO is required to report the situation to the U.S. Attorney General, which may result in criminal or civil ramifications for the contractor. *Id.* at 3.103-2.

### Procurement Integrity

Tied to the discussions above on conduct standards for government personnel is the mandate under the Procurement Integrity Act (PIA) that government contracting officials not disclose contracting/procurement information to the general public prior to award. 41 U.S.C. § 423 (a). For example, public officials may not, unless otherwise permitted by law, “knowingly disclose contractor bid or proposal information or source selection information before the award of a Federal agency procurement.” FAR 3.104-4. Likewise, all persons, whether government personnel, contractor personnel or other, are similarly barred from seeking and obtaining bid, proposal or source-selection information prior to contract award to the extent that information deals with such procurement. *Id.*

Other key PIA requirements are the limitations and reporting requirements regarding former government personnel taking on nonfederal employment after they conclude their federal service. 41 U.S.C. § 423 (c). The FARs also provide that former federal employees who retire or leave the government are precluded from

accepting employment from a private contractor that has been awarded a competitive or sole source contract within a period of one year after such former official ... [s]erved, at the time of selection of the contractor of the award of a contract to that contractor.<sup>1</sup> FAR 3.104-3 (d)(1).

These rules seek to address what has been described as the “revolving door” problem and prevent situations in which there is even the appearance of an impropriety or quid pro quo; i.e., a government official providing favors or contracts to contractors in return for employment or other compensation. This issue has recurred over the years to the government’s dismay, with issues as far-reaching as a contracting official obtaining a private sector job for herself and her child.<sup>2</sup>

It is key to note that if there are improper contacts between procurement and contractor personnel, the very real possibility exists that the official may have to disqualify him/herself from further participation in the procurement. If not properly addressed by the contractor, these types of relationships could lead to the contractor being investigated for associated improprieties, which can have other adverse consequences such as suspension, debarment, or civil and

criminal liability.

**The code of conduct requires that parties doing business with the government “must conduct themselves with the highest degree of integrity and honesty.”**

<sup>1</sup> The prohibition applies whether the former government employee was that “procuring contracting officer, the source election authority, 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 \$10,000,000 ... the program manager, deputy program manager, or administrative contracting officer for [a contract exceeding \$10 million] or conducted certain other actions in contracts exceeding \$10 million in value, including settling claims on a contract exceeding that value.”

<sup>2</sup> See e.g., <http://www.washingtonpost.com/wp-dyn/articles/A24924-2005Feb14.html>; also <http://www.washingtonpost.com/wp-dyn/content/article/2006/05/22/AR2006052201457.html>

## Trade Secrets & Commercially Sensitive Information

The PIA also considers the fact that when a contractor submits a technical and cost procurement in response to a request for proposal or other contracting vehicle, its pricing, proposed method of performance from a technical standpoint and other aspects of its proposal are often replete with trade secrets and commercially sensitive information.

Generally speaking, this information is protected from disclosure under the Freedom of Information Act (one way a competitor might try to obtain such records) due to their trade secret status (see FOIA, 5 U.S.C. § 5529(b)(4)). That said, Congress and in turn the FAR Councils have seen fit to recognize that if certain information has not previously been disclosed or made available to the public, it is automatically protected from disclosure. The sorts of protected information include, without limitation:

- Cost and pricing data,
- Indirect costs and direct labor rates;
- Proprietary information relating to manufacturing techniques, processes and operation if marked by the contractor/bidder/offeror as confidential in accordance with applicable law or regulation; and
- Other information marked by the contractor as “Contractor Bid or Proposal Information,” again in accordance with appropriate regulation and law. See FAR 3.104.

Subject to certain exceptions, the PIA expressly bars disclosure of contractor bid, proposal information or source selection information. 41 U.S.C. § 423 (a). The PIA requires the agency to mark all procurement materials as source selection information and that contractors, to the extent they wish protection, mark their relevant data as commercially sensitive. To the extent there is any question whether that data is protected or protectable, the PIA requires the agency to contact the contractor and verify whether the information is or is not commercially sensitive. FAR 3.104-4(d).

It bears noting that the PIA and FARs do not preclude or restrict a contractor from self-disclosing its bid or proposal data, disclosure of such information where the procurement is canceled but before award, or via individual meetings between federal officials and the offeror/bidder.

## Conclusion

As one can readily see, procurement ethics and integrity rules apply equally to the contractor *and* government procurement personnel. They seek to achieve four basic goals:

- Separation and non-influence between the government and the contractor;
- Protection of proprietary and confidential bid information from competitors and the general public;
- Pricing independence; and
- General compliance with existing civil and criminal statutes and regulations governing ethical and honest behavior.

The trick is not necessarily being generally ethical or trustworthy, but understanding the nuances of what the regulations require in a given situation.

This article should not be construed as legal advice. For more information, contact [Lawrence M. Prosen](#), [Daniel P. Broderick](#) or [Christian F. Henel](#).