



Working with Contractors

Assorted Issues

USAMRAA Stand Down

2009



Outline

- Background
- Procurement Integrity
- Enhanced Concerns
- Questions



Background

- **Changing Workplace**
 - 60% of workforce
 - “arms length” vs. “partners”
- **Unchanging Laws**

“The lines became too easy to cross, and no one was paying attention. I don’t even think most people know where the lines are anymore.”



Goals

- Recognize the lines
- Sensitize to the rules
- Promote proactive practices



Procurement Integrity Act

- 41 USC 423 – the current version went into effect on 1 Jan 97
- Implemented by FAR 3.104, DFARS Part 203 and AFARS Subpart 5103.1



Proscribed Activities

- Disclosing bid proposal or source selection information (for competitive procurements)
- Obtaining bid proposal or source selection information (for competitive procurements)
- Accepting compensation from certain contractors after leaving Federal employment
- Discussing non-Federal employment with certain bidders or offerors



Contractor Bid or Proposal Information

- Cost or price data, including indirect costs and direct labor rates
- Proprietary information about manufacturing process, operations, or techniques identified by the contractor
- Information identified/marked by any contractor as “contractor bid or proposal information” or IAW FAR 52.215.12 “restriction on disclosure and use data”



Source Selection Information (SSI)

- Bid prices
- Proposed costs or prices
- Source selection plans
- Technical evaluation plans
- Technical and cost or price evaluation proposals
- Competitive range determinations
- Rankings of bids, proposals, competitors
- Reports and evaluations of source selection panels, boards, or advisory councils
- Other, if would jeopardize the integrity of the procurement and it is marked “SSI”



Permitted Activities

- Information already disclosed publicly or made available to the public
- Information disclosed by contractors. They are not prohibited from disclosing their own CBPI
- SSI & CBPI information disclosed, pursuant to a proper request, to Congress, the Comptroller General, or the inspector general (provided the SSI or CBPI is highlighted and notice given that disclosure is restricted by PIA)



Penalties for Disclosing or Obtaining SSI or CBPI

- Criminal – up to 5 years in prison and/or fine
 - if disclosure in exchange for anything of value, or
 - if disclosure in order to obtain for oneself, or give to anyone else, a competitive advantage in the award of a Federal contract.
- Civil – administrative actions and
 - Up to \$50K per violation of any of the four provisions
 - Up to \$50K per violation plus twice the amount of compensation an individual received or offered for the prohibited conduct
 - Up to \$500K per violation plus twice the amount of compensation an organization received or offered for the prohibited conduct



Enhanced Concerns

- Bribery
- Gifts
- “time off”
- Misuse of contractor personnel
- Personal Services
- Traveling with contractors
- Recommendations and awards for contractor personnel
- Organizational Conflicts of Interest
- Inherently governmental functions



Bribery

Accepting a gift, even nominal in value, in return for being influenced in the performance of an official act is a bribe.

18 USC 201



Gifts

- Prohibited from accepting gifts from a prohibited source (Contractor employees are prohibited sources) except:
 - non-gifts
 - gifts up to \$20
 - gifts based on personal relationship
 - commercial discounts available to the public or to all government civilian or military personnel
- Watch out for bribery



“time off”

- Federal Personnel System rules and regulations are not applicable to contractor personnel
- Contractor personnel time is charged to the government pursuant to the contract
 - Contractor employees cannot modify
 - Only certain government personnel can modify
- Procurement and fiscal laws and regulations apply
- Contractors make “time off” decisions for their employees



Approach

Be proactive...

- Spell out in on-site service contracts
- Coordinate with contracting officer
- Ensure that contractor personnel are informed



Misuse of Contractor Personnel

Prohibited from directing contractor personnel to perform any task other than those in the contract, for example:

- picking up dry-cleaning, prescriptions, meals
- assisting with unofficial activities in support of non-federal entities



Personal Services

- Personal services are characterized by the employer-employee relationship
 - Relatively continuous supervision and control by government
 - By the contract's terms or as administered
- Obtaining personal services by contract, rather than by direct hire, circumvents the civil service laws



Traveling with Contractors

- When traveling in an official capacity watch out watch out for improper receipt of gifts to the Army
- When traveling in a personal capacity watch out for the improper receipt of gifts
- When offering official transportation to a contractor watch out for providing improper benefits.

It depends!



Recommendations & Awards for Contracting Personnel

- Need to act impartially and not give preferential treatment to any private organization or entity
- Evaluation of contractor performance is generally a matter handled within contracting channels



Awards

- Honorary awards – may be granted to private citizens, groups, or organizations that significantly assist or support DoD functions, services or operations, **but** persons or organizations having a commercial or profit-making relationship with DoD shall not be granted recognition
- Tangible awards (including coins) – no basis to use appropriated funds to purchase for contractor personnel



Organizational Conflicts of Interest

An “organizational conflict of interest” exists when a contractor is or may be unable or unwilling to provide the government with impartial or objective assistance or advice; and may result when factors create an actual or potential conflict of interest on a current contract or a potential future procurement.



OCI Underlying Principles

- Preventing the existence of conflicting roles that might bias a contractor's judgment
- Preventing unfair competitive advantage



How does OCI arise?

- Biased ground rules – contractor has opportunity to skew a competition in its favor
- Unequal access to information – access to non public information that would give an unfair competitive advantage
- Impaired objectivity – government contractor would be in a position to evaluate itself or a related entity



Inherently Governmental Functions

Procurement related activities

- Determining requirements
- Approving contractual documents, including incentive plans and evaluation criteria
- Participating as a voting member on any source selection board
- Awarding contracts



Inherently Governmental Functions

- Administering contracts, including ordering changes in contract performance or contract quantities, taking action based on evaluations of contractor performance and accepting or rejecting contractor products or services evaluation criteria
- Determining whether contract costs are reasonable, allocable, and allowable
- Performing the functions of a COR
- Terminating contracts



QUESTIONS?