

U.S. DEPARTMENT OF AGRICULTURE - OFFICE OF ETHICS

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1. Purpose

While the concept of competitive sourcing may appear to be a new concept, it has a lengthy Federal history. While Office of Management and Budget (OMB) Circular A-76 (Circular) was first published in 1966, it was based on earlier Bureau of the Budget memorandums encouraging Federal agencies to obtain commercial services from the private sector. However, several policy concerns are driving the current focus on competitive sourcing.

In 1993 Vice President Gore launched the National Performance Review (NPR) with the aim of making Government more responsive to the needs of the public and empowering Government employees to perform their jobs more efficiently. Subsequently, in December of 1994, President Clinton initiated Phase II of the NPR, calling for an overall downsizing of the Federal Government. In 1998, Congress passed the Federal Activities Inventory Reform Act of 1998 (FAIR Act), Public Law 105-270 (1998). FAIR Act requires executive agencies to prepare an inventory of commercial activities (i.e., activities that are not “inherently governmental”) performed by Federal employees, submit the list to OMB and then make a FAIR Act inventory publicly available. The FAIR Act also established an appeals process for “interested parties” within each agency and the private sector to challenge the contents of the FAIR Act inventory.

Enactment of the FAIR Act stimulated efforts to competitively source commercial functions through the A-76 process by providing a process for identifying commercial activities suitable for competition. Since the inception of the NPR and enactment of the

FAIR Act, departments and agencies have been generating a large variety of proposals for reducing Government operations. Some of these proposals simply involve terminating a particular service; others involve more elaborate methods for eliminating or reducing Federal involvement in a particular Government function, while ensuring that the function continues to be carried out, perhaps by a State or local government, by a quasi-government corporation, by a Government contractor, or even by an employee-owned corporation. Finally, on May 29, 2003, OMB promulgated the revised Circular to streamline competitive sourcing procedures as part of the Bush Administration's renewed emphasis on competitive sourcing of commercial activities.

Of course, all of these competitive sourcing proposals require implementation by employees who currently perform the functions and operations under review for possible competitive sourcing. Given this fact, questions concerning the applicability of the criminal conflict of interest and procurement integrity statutes naturally arise. Increasingly, agency ethics officials are being asked whether, and to what extent, employees may participate in competitive sourcing activities.

The first thing that employees involved in competitive sourcing of governmental functions need to understand is that the conflict of interest restrictions contained in title 18 of the United States Code and the procurement integrity provisions in U.S.C. title 41 may apply to their activities. Even though competitive sourcing initiatives may be a top priority, employees involved in implementing a proposal to competitively source a certain agency function must comply with the requirements of these provisions.

At the same time, competitive sourcing activities are part of the official duties of the United States Government. Therefore, in most cases, the various conflicts of interest restrictions will not obstruct competitive sourcing initiatives where (1) the activities in which the employees are engaged fall within their official duties as part of the competitive sourcing process under the Circular and (2) they are neither representing, nor seeking employment with, parties or entities outside their agency. However, agencies and employees must be aware of these restrictions in order to address circumstances that may arise that will require developing strategies for competitive sourcing and, where appropriate, may require the issuance of waivers, reassignment of certain employees or use of the expertise of persons outside of an affected office or agency.

Additionally, employees also must be aware of the firewalls erected by the Circular itself around certain groups of employees in order to avoid the development of an organizational conflict of interest that could affect the impartiality and basic fairness of an A-76 competition.

The following is a very basic outline of the A-76 process and a discussion of situations where ethical, procurement integrity, or conflict issues may arise. Of course, ethics officials should be aware that there may be any number of other cases where problems can develop and that questions concerning competitive sourcing or privatization necessarily must be examined on a case-by-case basis.

2. Controlling Statutes and Regulations

Federal Activities Inventory Reform Act of 1998, Public Law 105-270

18 U.S.C. § 203 -- Compensation to Members of Congress, officers, and others in matters affecting the Government.

18 U.S.C. § 205 -- Activities of officers and employees in claims against and other matters affecting the Government.

18 U.S.C. § 207 – Restrictions on former officers, employees, and elected officials of the executive and legislative branches.

18 U.S.C. § 208 -- Acts affecting a personal financial interest.

41 U.S.C. § 423 -- Procurement Integrity.

OMB Circular A-76 (revised 5/29/2003).

Federal Acquisition Regulations (FAR):

Subpart 3.1. Procurement Integrity (48 CFR subpart 3.1)

Subpart 7.5. Inherently Governmental Functions (48 CFR subpart 7.5)

Subpart 9.5. Organizational Conflicts of Interest (48 CFR subpart 9.5)

5 CFR part 2635. Standards of Conduct for Employees of the Executive Branch.

5 CFR parts 2637 and 2641. Regulations Concerning Post Employment Conflict of Interest, and Post-employment Conflict of Interest Restrictions, respectively.

5 CFR part 2640. Interpretation, Exemptions and Waiver Guidance Concerning 18 U.S.C. § 208 (Acts affecting a personal financial interest).

3. Key Definitions

3.1. Agency Tender – Agency management plan submitted in response to a solicitation for a standard competition. The agency tender includes a Most Efficient Organization (defined at 3.12), agency cost estimate, Most Efficient Organization (MEO) quality control plan, MEO phase-in plan, and copies of any MEO subcontracts. The agency tender is prepared in accordance with the Circular and the solicitation requirements.

3.2. Agency Tender Official (ATO) – An inherently governmental agency official with decision-making authority who is responsible for the agency tender and represents the agency tender during source selection.

- 3.3. Commercial Activity** – A recurring service that could be performed by the private sector. This recurring service is an agency requirement that is funded and controlled through a contract, fee-for-service agreement, or performance by Government personnel. Commercial activities may be found within, or throughout, organizations that perform inherently governmental activities or classified work.
- 3.4. Competitive Sourcing** – The process by which agencies identify commercial activities and compete those activities with the private sector under the procedures provided in the Circular.
- 3.5. Competitive Sourcing Official (CSO)** – An inherently governmental agency official responsible for the implementation of the Circular within an executive agency. Within USDA, the Chief Financial Officer is designated the CSO.
- 3.6. Contracting Officer (CO)** – An inherently governmental agency official who participates on the Performance Work Statement (PWS) team, and is responsible for the issuance of the solicitation and the source selection evaluation methodology. The CO awards the contract and issues the MEO letter of obligation or fee-for-service agreement resulting from a streamlined or standard competition. The CO and the Source Selection Authority (defined at 3.17) may be the same individual.
- 3.7. Directly Affected Personnel** – Government personnel whose work is being competed in a streamlined or standard competition.
- 3.8. Directly Interested Party** – The following persons who may contest an agency decision in a standard competition as provided for in the Circular: the ATO who submitted the agency tender; a single individual appointed by a majority of directly affected employees as their agent; a private sector offeror; or the official who certifies the public reimbursable tender.
- 3.9. Employee Stock Option Plan (ESOP)** – A company created by employees to accept a contract for execution of a function previously performed by Federal personnel. An ESOP is NOT an MEO. A MEO remains a government entity whereas an ESOP is a private company. ESOP's most often are formed to take over agency activities that are the subject of privatization but potentially could be formed to bid as a commercial entity for an agency commercial activity that is subject to competitive sourcing under the Circular.
- 3.10. Human Resources Advisor (HRA)** – An inherently governmental agency official who is a human resource expert and is responsible for performing human resource-related actions to assist the ATO in developing the agency tender.
- 3.11. Inherently Governmental Activity** – An activity that is so intimately related to the public interest as to mandate performance by Federal employees.

- 3.12. Most Efficient Organization (MEO)** – The staffing plan of the agency offeror in an A-76 competition, developed to represent the agency’s most efficient and cost-effective organization.
- 3.13. Outsourcing** – The transfer of a function that had been performed by government employees either in the event of a direct conversion or through the loss of a competitive sourcing standard or streamlined study.
- 3.14. Performance Work Statement (PWS)** – The statement in the solicitation that identifies the technical, functional, and performance characteristics of the agency’s requirements. The PWS is performance-based and describes the agency’s needs (the “what”), not specific methods for meeting those needs (the “how”). The PWS identifies essential outcomes to be achieved, specifies the agency’s required performance standards, and specifies the location, units, quality and timeliness of the work.
- 3.15. Privatization** – Process whereby a Federal agency transfers a government-owned and government-operated commercial activity or enterprise to private sector control and ownership. This is a different concept than competitive sourcing. In competitive sourcing, a Federal agency competes agency commercial activities with commercial sources and awards the work either to the MEO, a commercial contractor, or a public reimbursable source after competition. The activities are still agency activities; however, they are performed on behalf of the agency either by an MEO, a commercial contractor or a public reimbursable source after competition. When privatizing, the agency eliminates associated assets and resources (manpower for and funding of the requirement). Since there is no government ownership and control, no service contract or fee-for-service agreement exists between the agency and the private sector after an agency privatizes a commercial activity or enterprise. Moving work from agency performance with government personnel to private sector performance where the agency still funds the activity is not privatization.
- 3.16. Public Reimbursable Source** – A service provider from a Federal agency that could perform a commercial activity for another Federal agency on a fee-for-service or reimbursable basis by using either civilian employees or Federal contracts with the private sector.
- 3.17. Source Selection Authority (SSA)** -- A competition official with decision-making authority who is responsible for source selection as required by the FAR and the Circular. The SSA and CO may be the same individual.
- 3.18. Source Selection Evaluation Board (SSEB)**. The team or board appointed by the SSA to assist in a negotiated acquisition.

4. Summary of the Competitive Sourcing Process

The revised Circular establishes two types of competitive procedures for competing commercial activities: a “streamlined competition” and a “standard competition.”

4.1. Streamlined Competitions

A streamlined competition is conducted if the commercial activity is performed, or is expected to be performed, with an aggregate of fewer than 65 full-time employees.¹ The agency prepares a cost estimate for each agency performance, private sector performance, and public reimbursable performance (optional) of the commercial activity. If the private sector is determined to be lowest cost, then the CO proceeds to award a contract pursuant to any applicable procurement method provided by the FAR. If a public reimbursable source cost estimate is lowest, the CO executes a fee-for-service agreement with the public reimbursable source. And if the agency estimate is lowest, the CO executes a letter of obligation with the agency official responsible for performing the commercial activity.

4.2. Standard Competitions

In a standard competition, there are three, defined separate groups working on the competition: the PWS team, the MEO team, and the SSEB. As its name implies, the PWS team prepares the performance work statement and assists the CO in the development of the solicitation for the commercial activity being competed. The MEO team assists the ATO in developing the MEO proposal to be tendered in the competition on behalf of the “directly affected government personnel” whose jobs are being competed. The SSEB, as in any other procurement, evaluates the proposals received and makes award recommendations to the Source Selection Authority or the CO.

4.3. Contests and Protests

A “directly interested party” may contest the following actions taken in connection with a standard competition following the procedures of FAR subpart 33.103, which are the agency protest procedures for non-A-76 procurements:

- The solicitation itself;
- The cancellation of a solicitation;
- A determination to exclude a tender or offer from a standard competition;

¹ This number may involve given Congressional tinkering with the process in each annual appropriation act. For example, in fiscal year 2004, the Forest Service is required to have an MEO for each competition involving 11 or more employees – thus, in effect leaving streamlined competition in place only for activities of 10 employees or less. Accordingly, the current status of the law must be evaluated each time a streamlined competition is contemplated.

- A performance decision, including, but not limited to, compliance with the costing provisions of the Circular and other elements in the agency evaluation of tenders and offers; or
- A termination or cancellation of a contract or letter of obligation if the challenge contains an allegation that the termination or cancellation is based in whole or in part on improprieties concerning the performance decision.²

PART I: EMPLOYEE CONFLICTS OF INTEREST & ETHICAL CONCERNS

5. OFFICIAL PARTICIPATION IN THE COMPETITIVE SOURCING DECISION-MAKING PROCESS.

The first issue to be addressed is whether, and to what degree, an employee may participate in the process that leads to the agency decision whether or not to competitively source a current governmental function when the agency decision is likely to have a direct and predictable effect on an employee's financial interest, *i.e.*, to what extent may directly affected personnel participate. Generally speaking, aside from the firewall required to prevent organizational conflicts of interest, as discussed in section 9, participation of directly affected personnel in the competitive sourcing process as part of their official duties – whether as part of the PWS Team or the MEO Team – is not especially problematic. Directly affected personnel who follow the basic restrictions with respect to non-governmental parties involved in government procurement should experience no problems with their participation in the competitive sourcing process. Directly affected employees who form an ESOP to compete as a commercial entity (and NOT as part of the MEO), however, must pay closer attention to the conflict of interest and ethical restrictions discussed below because they are considered as acting in their personal, and not official, capacities. **NOTE: *Definitions of italicized phrases found in this Part can be found in Appendix A.***

5.1. Basic Restrictions Summarized. The following laws and regulations will impact whether and how a Federal employee can participate, in his or her official capacity, in competitive sourcing decisions that affect his or her Federal position:

5.1.1. 18 U.S.C. § 208 – Conflicting Financial Interests. A Federal employee is prohibited from *participating personally and substantially* in a *particular matter* in which the employee knows he or she has a *financial interest* if participation is

² This last basis for contest is ambiguous. We do not believe that it is, in essence, meant to become an alternative dispute resolution process for the entire length of a contract, letter of obligation, or fee-for-service agreement, but rather that it refers to a termination or cancellation that occurs immediately following award.

likely to have a *direct and predictable effect* upon that financial interest. See also, 5 C.F.R. part 2635, subpart D, and 5 C.F.R. part 2640. This is a criminal statute.

5.1.2. 5 C.F.R. § 2635.502 -- Loss of Impartiality. Even where a conflicting financial interest does not exist, a Federal employee also should not work on a matter if a reasonable person who is aware of the circumstances would question the employee's ability to be impartial in the matter. A loss of impartiality is *presumed* to exist where an employee:

- (1) participates personally and substantially in a *particular matter involving specific parties* and knows:
 - (a) That is likely to have a direct and predictable effect on the financial interest of a member of his or her household; or
 - (b) That a person with whom he or she has a *covered relationship* is or represents a party to such matter, **and**
- (2) determines that the circumstances would cause a reasonable person with knowledge of the relevant facts to question his or her impartiality in the matter.

This is not a criminal prohibition, but violation can result in disciplinary action up to, and including, removal.

5.1.3. 5 C.F.R. § 2635.702 –Use of Public Office for Private Gain. An employee also may not use his or her public office for his or her own private gain, or for the private gain of friends, relatives, or persons with whom the employee is affiliated in a nongovernmental capacity, including nonprofit organizations of which the employee is an officer or member. Thus, to the extent that the foregoing restrictions do not apply, this prohibition could (e.g., friends). Unlike the above restrictions, however, you are not prohibited from working on matters involving these parties so long as you do not participate in a manner that clearly is designed to benefit them. As with Loss of Impartiality (above) this is not a criminal prohibition, but could result in disciplinary action up to, and including, removal.

5.2. Specific Conflicting Interests.

5.2.1. Your Federal Position. Under most circumstances, your Federal salary is not considered to be a conflicting financial interest. Under an exemption found at 5 C.F.R. § 2640.203(d), an employee may participate in any particular matter where the disqualifying financial interest arises from Federal salary or benefits, except that an employee **may not make** determinations, requests, or recommendations, or otherwise participate personally and substantially in a manner that would individually or specifically affect:

- (1) His or her *own* Federal salary or benefits, or

(2) The Federal salary or benefits of any other person specified in 18 U.S.C. § 208. (See OGE 95x10).

Hence, the mere fact that you are involved in a competitive source effort that *could* affect your Federal position does not automatically preclude your official involvement in that effort.

Example 1: Preliminary Considerations. An employee may participate in preliminary discussions about competitively sourcing an agency function, such as a preliminary review of an agency function made with the intent of determining whether the function should continue to be conducted by the agency, should be eliminated altogether, transferred to another Federal agency, to a State or local government, or privatized in some way. The employee also could prepare or supply technical data to either a PWS or MEO, provided that the effort may affect him or her merely as part of an office or group. The employee must not make any determination that has a special or individual effect on his or her salary or benefits. As it is **speculative** whether or not: (1) the agency will go forward with competitive sourcing; (2) whether a bidder, other than the agency, will win; and (3) whether this will effect the employee's position, such participation does not have a direct and predictable affect upon the employee's personal financial interest. At the same time, such participation, if under circumstances where the effort is directed **solely** at the employee's position, clearly would have a direct and predictable effect, then the employee must not participate. See 5 C.F.R. § 2640.203(d), Example 7.

Example 2: Creating an ESOP. Absent an individual waiver under section 208(b)(1), however, an employee may not participate in the implementation of an agency plan to create an **ESOP** that would carry out agency functions under contract to the agency because implementing the plan would result not only in the elimination of the employee's Federal position, but also in the creation of a new position to which the employee would be transferred. See 5 C.F.R. § 2640.203(d), Example 8.

Impartiality and Misuse of Office Concerns: While the focus here has been on decisions that an employee makes that affect his or her own job and which could violate 18 U.S.C. § 208, remember that actions that the employee takes that directly and predictably implicate the Federal positions of other persons with whom the employee is involved or has a relationship outside of work can result in impartiality and misuse of position concerns. For example, if the decision relates to a proposal to eliminate the position held by a child who has reached majority but still lives at home (a member of the employee's household), or a cousin with whom the employee is close, it is presumed that the employee cannot be impartial in the matter irrespective of whether his or her actions benefit or hurt the child or cousin. The employee needs to receive prior clearance before participating in that decision. If, however, the decision affects the position of, say, a friend, there is

no prior clearance required, but the employee may be seen as misusing his or her position if the employee's actions favor the friend.

5.2.2. Right of First Refusal. Under FAR 7.305(c), all solicitations that might result in a conversion from an in-house performance to a contract performance, require inclusion of the clause at FAR 52.207-3, Right of First Refusal of Employment (Right). The Right, by itself, does not create a conflict of interest, or loss of impartiality concern, prior to an offer of employment being extended. This is because participation in the competitive sourcing process does not have a direct and predictable impact on a right to employment. The Right is **speculative** in that the contractor is only required to offer employment openings to former government employees who are qualified for the positions created by the award of the contract. There is no guarantee of employment. It is only if the contractor wins the competition, needs to hire employees, and determines a former government employee to be qualified, that there might be an offer of employment.

NOTE: While an employee's performance of official duties may affect his or her practical ability to exercise a Right, there is no regulatory provision mandating circumstances in which an employee must forfeit the Right. The practical issues are two-fold: (1) negotiating for employment with a non-Federal bidder (see 5.2.4, below) and (2) post-employment restrictions. In terms of post-employment, the question to be addressed is whether the employee's participation in the competitive sourcing effort is of such nature as to either (1) trigger the one-year bar on post-employment compensation from the winning bidder under the Procurement Integrity Act (see 7.2.5, below), or (2) trigger one or more bars on post-employment representation under 18 U.S.C. § 207 (see 7.1, below).

5.2.3. Your Participation in an ESOP. This could present the potential for a conflict or loss of impartiality. An employee who is part of an association that is establishing an ESOP to secure a contract to perform a government service would have a disqualifying financial interest in the agency's decision to contract out the function. In such a case, the employee would have a financial interest in the new position to be established in the private sector. Absent a waiver, he or she cannot participate officially in the competitive sourcing effort.

5.2.4. Negotiations for Employment With a Non-Federal Bidder. Under 18 U.S.C. § 208(a), an employee is presumed to have a financial interest in any person or organization with whom the employee is *negotiating* [defined in Appendix A] or has any other arrangement concerning prospective employment. A conflict of interest would result where the participation is likely to have a direct and predictable effect upon that employer. ***This would be the case whether or not the employee's own position is involved in the competitive sourcing effort.***

Example: An employee who is participating in an A-76 competitive sourcing effort would face a conflicting financial interest were he or she to simultaneously be negotiating for employment with a company or person who has a financial interest in the outcome of the A-76 effort, is seeking to contract with the

Government, to purchase a franchise from the Government, or to establish any other relationship with the Government to perform a function that is being competitively sourced. The statute would bar the employee's participation in matters affecting the firm regardless of whether the employee's position would be eliminated or otherwise even affected by the competitive sourcing effort.

Special Reporting Rule: Procurements of More than \$100,000. Procurement Integrity Act, 41 U.S.C. § 423. Where an employee participates personally and substantially in a procurement for a contract for more than \$100,000 and contacts or is contacted by a bidder or offeror about possible employment, the employee **must report** the contact and either immediately and clearly reject the offer, or disqualify himself or herself, until the agency authorizes his or her participation (which cannot occur until the employee rejects the offer, or until the bidder or offeror are no longer participating in the procurement).

NOTE: By contrast, under 18 U.S.C. § 208, a non-procurement official employee involved in a similar activity would simply have to disqualify himself or herself from acting in official matters affecting the corporation. Also, while an employee would not be required to report employment contacts if the procurement is sole source, they would be disqualified from participating in the matter under section 208.

“Substantial.” The definition of “substantial” under this Act has a meaning separate and apart from that attached to 18 USC § 208. Under FAR 3.104-3, implementing the Act, the following activities are not considered “substantial” for this purpose:

- (1) Participation in Management Studies;
- (2) Preparation of the in-house cost estimate;
- (3) Preparation of the MEO analyses; or
- (4) Furnishing data or technical support to be used by others in the development of the PWS, statement of work, or specifications.

5.3. Resolving Conflicts. If a conflict or loss of impartiality appears likely, the employee must immediately either:

- (1) Disqualify himself or herself from the matter;
- (2) Dispose of the conflicting financial interest, meaning:
 - (a) Sell conflicting stock or financial holding;
 - (b) Cease participation in an ESOP; or

- (c) Terminate negotiations for non-Federal employment; or
- (3) Seek a regulatory exemption (see 5 CFR § 2640.203(d) for financial conflicts) or agency waiver (see 5 CFR § 2640.301 for impartiality issues).

NOTE: Waivers of financial conflicts are not likely to be granted; the agency has a bit more leeway where the waiver addresses an impartiality concern.

Example: You are asked to participate on the MEO Team in developing the agency tender. At the same time, you are contacted by a non-Federal bidder seeking to obtain a commitment from you concerning post-employment in the event that the non-Federal bidder wins the award. The resulting ethics considerations are as follows:

- Negotiating post-employment. You would not automatically lose your Right of First Refusal; however, you would face a choice of either (1) participating on the MEO Team (this differs from simple preparation of MEO analysis, see above) and clearly declining the opportunity of post-employment, or (2) declining service on the MEO Team. In either case, if the contract would be in excess of \$100,000, you **MUST** report the employment contact;
- Representation As a Current Employee. To the extent that the non-Federal bidder, with your knowledge, uses your commitment in order to persuade Federal officials to award a contract, you may well be subject to the representation bars under 18 U.S.C. § 205 (see 6.1.2, below); and
- Post-employment. You would not be subject to the one-year bar on compensation from the winning bidder under the Procurement Integrity Act (see 7.2.5, below), but would be subject to any applicable representation bars under 18 U.S.C. § 207 (see 7.1, below). You could work for the winning bidder on the contract behind-the-scenes.

6. CURRENT FEDERAL EMPLOYEES REPRESENTING OTHERS BEFORE THE GOVERNMENT.

There are two criminal statutory prohibitions that restrict the ability of Federal employees, even if in their own time, from participating in the *representation* [definition found in Appendix and in 6.1.2, below] of the interests of another (e.g., a competing bidder or ESOP) before any Federal official with regard to an effort to obtain a contract, or to receive compensation for their work in support of such a representation. ***These prohibitions apply irrespective of whether the employee has any official duties or responsibility related to the competitive sourcing effort.***

6.1. Basic Restrictions Summarized.

6.1.1. 18 USC § 203 – Compensated Representational Services. Government employees may not seek, receive, accept, or agree to accept compensation for representation services (any efforts in support of another’s actual representation before the Federal Government) as an agent or attorney for another in relation to a ruling, determination, contract, claim or other particular matter. This is a criminal prohibition.

6.1.2. 18 USC § 205 – Representation. Government employees, other than in the proper discharge of official duties, and irrespective of whether for compensation, *generally* may not act as an agent or attorney in the prosecution of a claim against the United States, or represent another or before the executive or judicial branches of the Federal Government on any matter in which the United States is a party or has a direct or substantial interest. A “covered matter” includes applications, contracts, claims or other particular matters.

6.2. Specific Representation Issues.

6.2.1. Submitting an Agency Tender. An ATO’s representation of the agency tender, during either a source selection or any subsequent administrative or judicial proceeding, is consistent with statute and regulation. The prohibitions on representation under section 205 exclude such actions when taken by an employee in the performance of official duties. The ATO, in making such representations on behalf of the agency, would be acting consistently with his or her official duties. Likewise, an agency employee representing the ATO, such as counsel, also would be acting as part of their official duties. The same also would apply to a directly interested party who is a Federal employee appointed by a majority of directly affected employees as their agent to contest a standard competition as provided for under the Circular.

6.2.2. Submitting Bid Proposal on Behalf of Non-Federal Parties.

6.2.2.1. On Behalf of Another (including an ESOP). You could not submit a proposal for, or otherwise interact, by communication to or appearance before, a Federal agency or with a Federal court on behalf of a non-Federal entity. This would violate 18 U.S.C. § 205. Not only could you not submit the proposal, but you also could not call a Federal official to discuss the merits, or appear before such official, in support of such a representational effort. The restriction would apply whether or not (1) your position would be eliminated because the function was being privatized; or (2) the Federal agency was your own. Employees who wish to submit such a proposal would have to retain a non-employee to represent them in the matter. (See OGE 95 X 10).

6.2.2.2. On Your Own Behalf. It is possible, but not probable. The good news is that section 205 would not prohibit you from representing yourself before the Government in an attempt to obtain a contract to perform a Government function

that is being competitively sourced. Of course, this permission would not extend to allow you to represent your personal, incorporated business, or to represent a partnership. Now for the bad news:

FAR Implications. A provision in the FAR prohibits the Government from awarding a contract to a government employee except for compelling reasons. (See 48 C.F.R. § 3.601).

Regulatory Implications. Assuming that you are representing yourself and compelling reasons exist for the Government to contract with you, you also need to keep in mind the regulatory restrictions, found at 5 C.F.R. § 2635.702 concerning use of:

- (1) Non-public information about the competitive sourcing effort;
- (2) Your official title, position, or authority; or
- (3) official time, personnel, or equipment, in making the bid.

NOTE: It would be an unusual scenario in which an employee seeks to compete for a contract involving his or her own office where he or she does not violate (1) or (2).

6.2.3. Working Behind-the Scenes.

6.2.3.1.Preparing Bid Proposals and Documents Specifically Related to a Bid Proposal. You could do this ONLY if you were to receive no compensation for your work. Compensation is prohibited under 18 U.S.C. § 203, whether direct (salary or pay) or indirect (e.g., a future position), and whether paid immediately or deferred.

6.2.3.2.Preparing Studies and other Documents Not Specifically Related to a Bid Proposal. Whether you could work on such matters for compensation depends on the facts. To violate a criminal law, you must have knowledge that you are doing the acts that are prohibited by the statute. (Conversely, you do not need to know that you are, in fact, violating the law). Both of the statutes involved require that the alleged offender know that he or she is either (1) acting as an agent or attorney for someone on a matter involving the Federal Government, or (2) is seeking or receiving compensation for acts in support of such a representation. If you know, or have good reason to believe, that the company is to use your study to support a competitive sourcing bid, you may violate 18 U.S.C. § 203; if you do not know where your information is being used, or do not have reasonable basis to suspect, then you most likely will not violate that statute. In either case, at this point, it is a very good idea to call for ethics advice.

6.3. Exceptions. There are exceptions for representation for parents, spouse, children, and estates, except for matters within the employee’s official responsibilities or in which he or she participated in personally and substantially as an employee. There are also exceptions for non-compensated representation of persons subject to certain personnel administration boards or of voluntary non-profit groups comprised primarily of current government employees and their spouses and dependent children to the extent that the representation does not involve a claim, proceeding, grant or contract.

7. FORMER FEDERAL EMPLOYEES REPRESENTING OTHERS BEFORE THE GOVERNMENT.

Once a function is contracted out, former Government personnel may be subject to additional restrictions. Other than as set out at 7.1.4, below, nothing prohibits a former employee from working for a winning non-Federal bidder upon leaving the Federal Government. However, certain restrictions do limit a former employee’s ability to *represent* others before the Federal Government on competitive sourcing efforts.

7.1. Basic Pertinent Restrictions Summarized

7.1.1. 18 U.S.C. § 207(a)(1) – Lifetime Ban. A former Government employee may not represent any other person before **the Federal Government** in connection with a particular matter involving a specific party in which the former employee participated personally and substantially as a government employee and in which the United States has a direct and substantial interest. [*Definitions of italicized phrases found in Appendix A.*]

7.1.2. 18 U.S.C. § 207(a)(2) – Two-year Ban. For a period of two years from date of termination of Federal employment, a former Government employee may **not** represent any other person before the Federal Government in connection with a particular matter involving a specific party that was pending under the employee’s *official responsibility* during the one-year period of time prior to the employee’s separation from government employment.

NOTE: A recusal from participating officially in a matter, in order to avoid conflicting financial interest concerns, does not remove the matter from being under the employee’s official responsibilities.

7.1.3. 18 U.S.C. § 207(c) – One-year Ban on Former Senior Officials. Former Senior Officials (generally those serving in position paid at Senior Executive Service levels 5 and 6, as well as all officials in the Executive Schedule), for one year after leaving such position, may not represent any other person before an officer or employee of his or her **former agency** in connection with any matter in which the former agency is a party or has a substantial interest.

7.1.4. 41 U.S.C. § 423. One-year Compensation ban. For a period of one year, as set forth below, certain former government officials who were involved in relation to

a procurement worth more than \$10 million may not accept compensation from the winning bidder on that procurement.

(1) **Procuring COs, SSAs, SSEB members, or the chiefs of financial or technical evaluation teams** -- one year after serving during a source selection on the contract;

(2) **Program managers, deputy program managers, or administrative contracting officers** -- one year after the contract award; and

(3) **Anyone** who made decisions concerning claims, contract modifications, task orders, or issuance of a contract payment in excess of \$10 million -- one year after the date of the decision.

7.2. Specific Post-employment Issues.

7.2.1. Representing Your Employer on an Outsourced Matter that You Worked on before Leaving Government Employment. Whether you can represent the interests of your employer, be it through advocacy, written or telephonic communications, or by mere appearance at meetings, back to the Federal Government on an outsourced matter on which you worked during your Federal employment will depend upon the following:

(1) Whether you participated in the matter in a manner that was personal and substantial; and

(2) Whether, at the time that you participated in the matter, there were specific Non Federal parties identified as having a legal interest in the matter?

Example. Prior to leaving your Government position, you performed safety inspections of public utilities and were working on a specific safety inspection report concerning Company X. The agency has since contracted the responsibility for conducting the inspections to Company Y, your current company. Your company now wants you to represent its interests at a meeting with a different Federal agency concerning the accuracy of the report. You should not represent the company at that meeting, either through active participation or mere attendance. You also should not communicate with the agency orally or in writing on the report. Your involvement in the report is most likely personal and substantial participation and the report related to a particular matter (a safety inspection) involving a specific party (Company X). Your attendance and participation would be prohibited under 18 U.S.C. § 207(a)(1). That bar would be permanent.

Example. Same facts except that instead of working on a safety inspection report concerning Company X, you were working on a public regulation concerning the inspection of public utilities that would affect Company X, not individually, but as a member of an industry sector. Company Y has assigned you to work on the safety inspection report concerning Company X. (The report was being handled

by your former Federal office, but was worked on by another employee). You would be able to represent the company at a meeting with the Federal agency concerning either the regulation or the inspection report, or both.

Example. Your involvement in a competitive sourcing effort was limited to creating the PWS and to participating in the cost comparison under the old Circular A-76 or participating in the development of a cost estimate for a streamlined competition under the revised Circular A-76 in which no specific private sector sources were identified. *[For standard competitions under the revised Circular, the MEO proposal is competed directly against identified private sector offerors – see following example.]* Unless you are a former Senior Official, you could represent your employer before the Federal Government on that competitive source effort. While the competitive sourcing effort would be a particular matter at this point, normally specific parties are not identified to a competitive sourcing effort at this stage. The prohibitions under 18 USC § 207(a)(1) and (2) only apply to particular matters involving specific parties.

Example. You were involved in reviewing bid proposals submitted by Non-Federal bidders to a competitive sourcing effort. In contrast, to the previous example, you would be participating personally and substantially in a particular matter involving specific parties. Certainly, specific parties to a standard competition are identified when proposals are received or bids are opened. However, they also may be identified when the agency receives a request for a copy of the solicitation, or participates in a pre-solicitation conference.

7.2.2. Representation on Matters Worked on By Employees You Supervised.

Whether you can represent the interests of your employer, be it through advocacy, written or telephonic communications, or by mere appearance at meetings, back to the Federal Government, on an outsourced matter worked on by an employee that you supervised (and on which you personally did not work) will depend upon the following factors:

- (1) Whether the particular matter was pending under your official responsibilities during your last year of Federal employment; and
- (2) Whether, at the time that it was pending, there were specific parties identified that had a legal interest in the matter.

Example: Same facts as in the examples under 7.2.1, above, except that you supervised the employees who did the actual safety inspections and had no direct involvement in developing the report concerning Company X. Whether you could attend and participate depends upon whether the inspection report was pending under your official responsibilities during your last year of Federal employment. If it was pending (*e.g.*, sitting on your desk untouched, or sitting on a subordinate's desk untouched), you would not be able to attend or participate for a period of two years after your date of termination. If the matter was transferred from your responsibilities 366 days before your termination, or if the meeting

were being held more than two years after your termination from Federal service, you could attend and participate.

7.2.3. Representation by a Former Senior Official. Whether a former Senior Official can represent the interests of another back to the Federal Government on an outsourced matter will depend upon the following factors:

(1) Whether the official is otherwise prohibited from representation before the Federal Government under the prior statutes; and

(2) If (1) does not apply:

(a) Whether the matter is pending before the former Senior Official's former agency [for purposes of USDA officials, "agency" means USDA, not its component mission areas]; and

(b) Whether the prohibited representation is made, or occurs, within one year from when the former Senior Official left their Senior position with the agency.

Example: You just left Federal employment from a position as a Deputy Undersecretary for Food Safety where you were paid at level 5 of the Senior Executive Service. You have been hired to represent a company that is seeking to bid on competitive sourcing efforts both with the Food and Nutrition Service (FNS) and the Food and Drug Administration (FDA). Assuming that you had no personal or supervisor involvement in the matter during your Federal employment, you could immediately represent the company's interest in competitive sourcing before FDA; however, you could not represent the company's interests before FNS, or before any office, component, mission area, or employee of USDA on any matter pending before USDA or in which it has an official interest, for a period of one year after leaving the position as Deputy Undersecretary.

7.2.4. Representation on Your Own Behalf. You can do this. The provisions of 18 U.S.C. § 207 only preclude your representation of others. As with 18 U.S.C. § 205, above, this permission would not extend to allow you to represent your personal, incorporated business, or to represent a partnership. **NOTE:** While a current Federal employee would still be precluded under the FAR from representing himself or herself in seeking a Federal contract, the FAR prohibitions do not apply to former employees.

7.2.5. Working for the Winning Bidder. Unlike the foregoing post-employment statutes, which do not *per se* preclude you from working for anyone,³ the Procurement Integrity Act may limit your ability to work, even behind-the-scenes,

³ The criminal prohibitions discussed in 7.2.1 to 7.2.3 may preclude you from representing an employer back to or before the Federal Government, or, for former Senior Officials, to or before your former agency;

work to the extent that it involves disclosing protected procurement information (see Section 8, below). Additionally, the Procurement Integrity Act also precludes you from being compensated by the winning bidder for a period of one year as set forth in 7.1.4, above, but does not preclude you from volunteering your time.

Example 1: You served as Deputy Program Manager on a competitive sourcing effort resulting in a contract worth more than \$10 million. The Procurement Integrity Act would bar you from accepting compensation from the winning bidder for a period of one year after the contract award. If you retire from the Government one year after the award of that contract, you could work behind-the-scenes on that contract effort and would only be concerned with the application of the representation bans discussed above. [The answer would be the same for the CO and for members of the PWS Team and the SSEB].

Example 2: Same facts as in Example 1, above, except that you served merely as a member of a MEO Team. Under such circumstances, you would not be affected by the Procurement Integrity provisions, could work behind-the-scenes on the contract for the winning bidder, and would be subject only to the representation bans described above.

8. DISCLOSING OR OBTAINING PROCUREMENT INFORMATION.

41 U.S.C. § 423. Present and former Federal officials, and persons who advise the United States regarding a procurement are prohibited from knowingly disclosing contractor bid or proposal information or source selection information before the award of the contract. This prohibition includes not only releasing such information to bidders, or to other non-Federal parties, but even to other Federal employees who are not authorized to receive the information. The prohibition also applies whether the employee learns of the information intentionally, inadvertently, or through another person's improper disclosure. In an A-76 comparison, the government estimate ordinarily is source selection sensitive information that may not be disclosed. FAR 3.104-5.

All persons are prohibited, except as otherwise authorized by law, from knowingly obtaining contractor bid and proposal information or source selection information before the award of the contract. *This is a criminal prohibition*

PART II. ORGANIZATIONAL CONFLICTS OF INTEREST.

9. Basic Fairness.

but they do not prohibit you from working behind-the-scenes on any matter, whether or not you had worked on it as a Federal official

9.1. General. Aside from ethical concerns, contracting actions, especially those potentially impacting the positions of Federal employees, need to be fundamentally fair. FAR 9.501 defines “organizational conflict of interest” as a situation in which because of other activities or relationships, a person is also unable or potentially unable to render impartial assistance or advice to the Government, or the person’s objectivity is or might be impaired, or the person has an unfair advantage.

Example: A contractor consultant who has written a statement of work normally should not be permitted to bid on performance of that statement of work because of the risk that the statement of work may be designed to benefit the consultant’s business interests rather than the interests of the government.

9.2. Applicability to Federal Employees Participating in an A-76 Competition.

Under the prior version of the Circular, the GAO held that while no one may protest on the part of the agency, disappointed private offerors may protest a decision to keep the work in-house, i.e., in essence, an award to the agency.

9.2.1. Participation in Agency Proposal/Solicitation and Source Selection process.

GAO also has sustained protests where agency employees have participated substantially in both the development of the PWS, solicitation, and source selection, on the one hand, and in the preparation of the agency proposal on the other. GAO determined that such participation constitutes an organizational conflict of interest. DZS/Baker LLC; Morrison Knudsen Corp., B-281224, 1999 U.S. Comp Gen LEXIS 16 (January 12, 1999) (Having 14 of 16 proposal evaluators subject to losing their jobs in an A-76 cost comparison created an uncorrectable conflict of interest warranting re-evaluation by a neutral panel)

NOTE: While such involvement may not always result in a violation of the ethics statutes or the Standards, it may provide the basis for the Comptroller General correcting a flawed procurement where there is evidence that an injustice has occurred.¹ These allegations of conflicts of interest and bias in the cost comparison have been one of the growth industries in bid protests.

9.2.2. Development of PWS and In-house Management Plan for MEO. GAO, on May 29, 2002 (B-286194.7), reaffirmed its opinion in The Jones/Hill Joint Venture, B-286194.4 et al., December 5, 2001 (Jones). In Jones, Jones protested a Navy determination that it would be more economical to perform base operations and support services in-house at the Naval Air Station, Lemoore, California, than to contract for those services with Jones. GAO sustained Jones' protest on the

¹ OGE objected to the Comptroller General’s decision in DZS/Baker LLC; Morrison Knudsen Corp because the Comptroller General did not address the regulatory conflicts of interest exemption found in 5 CFR § 2640.203(d) – permitting government employees to participate in matters where their disqualifying interests arise from their Federal employment. OGE took the position that employees cannot be in violation of 18 USC § 208 when operating within the constraints of the exemption. The GAO responded on 19 November 1999, with a memorandum that noted that the regulatory exemption prevents a criminal violation of 18 USC § 208, but does not prevent the Comptroller General from correcting a flawed procurement where there is evidence that an injustice has occurred.

basis of multiple procurement flaws, including the Navy's failure to comply with the conflict of interest requirements of the FAR, subpart 3.1. Specifically, GAO concluded that the Navy's use of the same employee and consultants to develop both the PWS and the in-house management plan for performance by the Government's MEO was contrary to the FAR requirement that procuring agencies avoid strictly any conflict of interest or even the appearance of a conflict of interest. GAO reaffirmed its earlier decision after receiving a Navy request for reconsideration.

In reaffirming the December 5, 2001 opinion, GAO added that with regard to an A-76 study in which, prior to public release of the December 5, 2001 opinion, an agency that had completed the PWS and invested substantial time and/or resources in preparing the MEO in-house plan, it will not consider a protest ground alleging a conflict of interest. GAO will only consider conflict of interest protests that are prospective of the December 5, 2001 opinion.

9.3. Impact of 5/29/2003 revision of OMB Circular A-76. The revision of the Circular essentially codifies the concepts of these GAO decisions, and imposes stringent requirements for separation of the roles of employees in the different phases of the process. For streamlined competitions, the only firewall required by the Circular is between the persons preparing the agency cost estimate and the persons preparing the private sector and public reimbursable cost estimates.

Directly affected personnel (and their representatives) are permitted to be a part of the PWS team or the MEO team, but they are not permitted to be a part of the SSEB. Members of the PWS team who are not directly affected personnel may participate on the SSEB. However, in order to avoid any appearance of a conflict of interest, the Circular requires a strict separation between the MEO team and the PWS team and the SSEB as follows:

- (1) Members of the PWS team (including, but not limited to, advisors and consultants) shall not be members of the MEO team;
- (2) Members of the MEO team (including but not limited to the ATO, HRA, advisors, and consultants) shall not be members of the PWS team;
- (3) Directly affected government personnel (and their representatives) and any individual (including, but not limited to, the ATO, HRA, MEO team members, advisors, and consultants) with knowledge of the agency tender (including the MEO and agency cost estimate) shall not participate in any manner on the SSEB (e.g., as members or advisors).

APPENDIX A CONFLICT-RELATED DEFINITIONS.

“Participating personally and substantially.”

“Participating” means involvement anywhere in the decision-making process (e.g., through recommendation, the rendering of advice, investigation, etc., not just through decision, approval, and disapproval.

“Participating personally” means involvement that is “direct” or the “direct and active” supervision of a subordinate’s participation.

“Participating substantially” means significant involvement. It is more than having official responsibility, or involvement on an administrative or peripheral issue. It is the quality of the involvement, not the quantity that is at issue.¹

“Particular matter” includes a broad array of identifiable matters and programmatic initiatives pending before an agency. It **would include** not only such matters as specific contracts and bids on contracts, but also rulemaking issues, such as an agency’s determination even to undertake a particular project or to open such a project to competitive bidding.

“Particular matter involving specific parties” is more narrow than “particular matter.” For purposes of determining an appearance of a loss of impartiality, this would cover matters that involve specific contracts and bids on contracts, but **would not include** rulemaking issues, or an agency’s determination to undertake a particular project or to open such a project to competitive bidding.

“Financial interest” means interests such as stocks, bonds, partnership interests, fee and leasehold interests, mineral and other property rights, deeds of trust, and liens, and rights to purchase interests such as stock options or commodity futures. It includes not only the employee’s own personal financial holdings, but also the financial interests of the following persons:

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

¹ **NOTE:** Do not use the definition of FAR 3.104-3 in an 18 U.S.C. § 208 or 207 context. This definition implemented an older version of the Procurement Integrity Act. It is not consistent guidance or applicable case law to an analysis under 18 U.S.C. §§ 208/207.

“Direct and predictable effect” means a close causal link between official participation in a “particular matter” and any expected effect of the matter on the employee’s financial interests. The effect need not be immediate, but the chain of causation must be direct, not attenuated or contingent upon the occurrence of events that are speculative, or independent of, and unrelated to, the matter.

A-76 Example: Preliminary discussions about competitively sourcing an agency function, while probably a “particular matter” may not have a direct and predictable effect on an employee's financial interests because the possible effect would be too speculative. For example, a preliminary review of an agency function made with the intent of determining whether the function should continue to be conducted by the agency or should be eliminated altogether, or transferred to another agency or to a State or local government, or privatized in some way is not likely to have a direct and predictable effect on an employee's financial interest. Thus, section 208 would not bar an employee's participation in the preliminary discussions.

“Covered relationships” – An appearance that an employee has lost impartiality in participating in a competitive sourcing issue would likely arise if identified parties to the matter included any of the following persons:

- (1) other than a prospective employers, anyone with whom the employee has or seeks a business, contractual or other financial relationship (e.g., an outside employer) that involves other than a routine consumer transaction;
- (2) members of the employee's household, or relatives with whom the employee has a close personal relationship;
- (3) for whom the employee's spouse, parent or dependent child is, to the employee's knowledge, serving or seeking to serve as an officer, director, trustee, general partner, agent, attorney, consultant, contractor or employee;
- (4) for whom the employee has, within the last year, served as officer, director, trustee, general partner, agent, attorney, consultant, contractor or employee; or
- (5) An organization (other than a political party) in which the employee is an active participant (e.g., an ESOP). Active participation would include, for example, service as an official, committee or subcommittee chairperson, spokesperson, participation in directing the organization, devotion of significant time to promoting specific programs of the organization (e.g., fundraising).

“Negotiating,” in the context of seeking non-Federal employment, includes seeking employment through sending an unsolicited resume to bidders or offerors, making unsolicited communications concerning possible employment, and failing to decline unsolicited offers to discuss employment by bidders and offerors, and deferring employment negotiations.

“Representing” means acting as an agent or attorney for, or otherwise making, with intent to influence, any communication to or appearance before any officer or employee of the Executive or Judicial Branches of the United States Government on behalf of any other person in connection with a particular matter in which the United States Government is a party or has a direct and substantial interest.

“Official responsibility” means “the direct administration or operating authority, whether intermediate or final, and either exercisable alone or with others, and either personally or through subordinates, to approve, disapprove, or otherwise to direct government action.”
18 U.S.C. § 202.

APPENDIX B SOURCES & ACKNOWLEDGMENTS

“Ethics Aspects of Outsourcing and Privatization,” Elizabeth F. Buchanan, 2 February 2001, revised 21 November 2001. This excellent memorandum was the primary source for much of the discussion of both the historical background of competitive sourcing and of “Basic Fairness.” Numerous examples were also used in the discussion of employee conflicts and ethical concerns, as well.

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