

## **Office of Government Ethics**

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**Memorandum issued October 31, 1990,  
from Stephen D. Potts, Director, Office of  
Government Ethics  
and Alan V. Burman, Administrator,  
Office of Federal Procurement Policy  
to Designated Agency Ethics Officials,  
Procurement Executives, General Counsels  
and Inspectors General  
Regarding Procurement Integrity**

Following a one-year period of suspension, a number of the procurement integrity provisions contained in Section 27 of the Office of Federal Procurement Policy Act will again become effective on December 1, 1990. On the date this memorandum was signed, the Department of Defense Authorization Act for Fiscal Year 1991 had been passed by both houses of Congress but had not yet been signed by the President. Section 815 of that Act would further suspend the post-employment restrictions contained in Subsection 27(f) through May 31, 1991. It would also suspend 10 U.S.C. §§ 2397(a) and 2397(b), 18 U.S.C. § 281, and several provisions applicable to the Department of Energy through May 31, 1991.

Section 27 as amended in November 1989 by Public Law 101-189 can be found at Section 423 of the 1990 pocket part to Title 41 of the United States Code Annotated. The interim rule implementing Section 27 as amended was published in the Federal Register on September 6, 1990 (55 Fed. Reg. 36782) [48 C.F.R. 3.104)(FAR § 3-104)]. As a condition of serving as a procurement official on or after December 1, 1990, Subsection 27(l)(2) requires each individual to certify that he or she is familiar with Subsections 27(b), (c) and (e), will comply with those Subsections, and will report information concerning possible violations of Subsections 27(a), (b), (d) or (f) or their implementing regulations. Procurement official certifications executed before the law was suspended on December 1, 1989, were made under Section 27 in its original form. Those certifications were narrower in scope and are insufficient to permit service as a procurement official on or after December 1, 1990. New certifications will be required to comply with the expanded scope of amended Subsection 27(l).

The attached summary was prepared by the Office of Government Ethics, in coordination with the Office of Federal Procurement Policy, to assist agencies in obtaining procurement official certifications and to satisfy the minimum requirement of Subsection 27(l) for a procurement ethics program that furnishes a written explanation of pertinent provisions of the law. Distribution of the attached summary to those who will serve as procurement officials will satisfy this minimum requirement and provide sufficient information to enable individuals to make the necessary certification. We have attached to the summary the model certification form provided at section 53.302 of the interim regulations. In agencies that elect to retain these certifications in official personnel files, employees must also execute the Privacy Act notice prescribed by that section, as amended by FAC 90-1 (55 Fed. Reg. 42684). There is no requirement that agencies use either the attached summary or the model form; they are provided as a matter of convenience.

Please note that the summary is written on the assumption that it will be distributed after the Department of Defense Authorization has become law. If enactment is delayed, your agency will need to modify appropriately the background, post-employment and applicability portions to reflect that it is "anticipated" that Subsection 27(f) will be further suspended through May 31, 1991. Each agency will have to determine when it must begin to obtain new procurement official certifications to avoid disruption of its procurement operations on December 1, 1990.

## **PROCUREMENT INTEGRITY SUMMARY FOR PROCUREMENT OFFICIALS**

### **BACKGROUND**

The "Procurement Integrity" provisions contained in Section 27 of the Office of Federal Procurement Policy Act (41 U.S. Code 423) originally became law on July 16, 1989. They were amended in November of that year by Section 814 of Public Law 101-189 and later were suspended for the period from December 1, 1989, through November 30, 1990. The Department of Defense Authorization Act for Fiscal Year 1991 further suspended, through May 31, 1991, the subsection of the law that restricts certain post-employment activities of former Government employees who were procurement officials. The remainder of the law, as amended, will become effective on December 1, 1990.

## **CERTIFICATION REQUIREMENT**

This summary provides information concerning Section 27 that will enable procurement officials to sign the attached procurement integrity certification. It describes the relevant provisions of the law and highlights changes made when the law was amended in November 1989. The interim rule implementing the amended law was published in the Federal Register on September 6, 1990 (55 Fed. Reg. 36782), replacing section 3.104 of the Federal Acquisition Regulation.

Individuals who will serve the Government as procurement officials on or after December 1, 1990, must sign a certification stating that they are familiar with, and will not engage in conduct prohibited by, Subsections 27(b), (c) and (e), and that they will report any information concerning a violation or possible violation of Subsections 27(a), (b), (d) or (f). Because of the November 1989 amendments to the law, certifications signed prior to the suspension are insufficient to enable an individual to serve as a procurement official on or after December 1, 1990. A new certification is required from each procurement official.

## **"PROCUREMENT OFFICIALS" AND "COMPETING CONTRACTORS"**

Except for the prohibitions on unauthorized disclosure of proprietary and source selection information that apply to anyone, prohibitions in Section 27 apply to those who serve as procurement officials and to competing contractors.

The term "procurement official" refers to any officer or employee of an agency who has participated personally and substantially in any of the following with respect to a particular procurement:

- o Drafting, or reviewing and approving, a certification or statement of work;
- o Preparing or developing a procurement or purchase request;
- o Preparing or issuing a procurement solicitation;
- o Evaluating bids or proposals or selecting sources;

- o Negotiating to establish the price or terms and conditions of a contract or contract modification;
- o Reviewing and approving the award or modification of a contract.

This definition extends to contractors, subcontractors, consultants, experts and advisers acting on behalf of, or providing advice to, an agency with respect to a procurement. The interim regulations make it clear that one does not become a procurement official solely by performing clerical functions, by general technical, engineering or scientific efforts having broad application, or by reviewing procurement documents solely to determine compliance with regulatory, administrative and budgetary requirements and procedures. The regulations also exclude from the definition of a procurement official those who participate solely on Federal advisory committees, agency level boards and panels and in certain studies conducted under OMB Circular A-76 procedures.

A "competing contractor" is any entity that is or is reasonably likely to become a competitor for, or recipient of, a contract or subcontract under the procurement and includes any other person acting on behalf of such an entity.

## **PROHIBITIONS DURING THE CONDUCT OF A PROCUREMENT**

Subsection 27(b) (41 U.S. Code 423(b)) prohibits a procurement official, during the conduct of an agency procurement, from knowingly:

- o Soliciting, discussing or accepting future employment or business opportunity with or from a competing contractor;
- o Soliciting or accepting money, a gratuity or any other thing of value from a competing contractor; or
- o Disclosing proprietary or source selection information to any person not authorized to receive the information. Subsection 27(d) (41 U.S. Code 423(d)) has the effect of extending this particular prohibition to anyone who has access to proprietary or source selection information.

Subsection 27(a) (41 U.S. Code 423(a)) imposes corollary restrictions upon a competing contractor, forbidding it from giving gratuities to or discussing future employment or business opportunity with a procurement official, and from soliciting or obtaining proprietary or source selection information. There are civil fines for violating the three prohibitions and criminal penalties for willfully violating the third. Federal employees also may be subject to administrative sanctions.

These prohibitions apply "during the conduct of a procurement." The conduct of a procurement begins on the earliest date an authorized official directs that a specific action be taken to initiate a procurement. These actions are:

- o Drafting a specification or a statement of work;
- o Reviewing and approving a specification;
- o Computing requirements at an inventory control point;
- o Developing a procurement or purchase request;
- o Preparing or issuing a solicitation;
- o Evaluating bids or proposals;
- o Selecting sources;
- o Conducting negotiations; or
- o Reviewing and approving the award of a contract or contract modification.

The conduct of a procurement ends with award or modification of a contract or the cancellation of the procurement.

The phrase, "gratuity or other thing of value," is defined to include any gift, favor, entertainment, transportation, lodgings, meals, services, training, or other item having monetary value. It does not include: (1) any unsolicited item having a market value of \$10 or less per event or presentation; (2) customary loans from banks and financial institutions; (3) discounts available to the general public; (4) plaques and certificates having no intrinsic value; (5) anything paid for by the Government, secured under Government contract or accepted by the

Government under specific statutory authority; or (6) training to facilitate use of its products provided by a vendor whose products are furnished under Government contract. This definition reflects a change in the law.

### **RECUSAL IN ORDER TO DISCUSS EMPLOYMENT**

Subsection 27(c) (41 U.S. Code 423(c)) allows some procurement officials to obtain permission to withdraw from further participation in a procurement in order to discuss future employment with a competing contractor. This is a change in the law. An eligible procurement official may, in accordance with specific procedures in the interim regulations, request authorization to be recused from participation in the procurement. A procurement official is not eligible for recusal if, during the period beginning with the issuance of a procurement solicitation and ending with the award of a contract, he or she has participated personally and substantially in the evaluation of bids or proposals, the selection of sources, or the conduct of negotiations. An individual may not commence discussions with a competing contractor until he or she has received written approval of the recusal request. Rejection of a recusal request is not an adverse personnel action.

### **POST-EMPLOYMENT RESTRICTIONS**

Subsection 27(f) (41 U.S. Code 423(f)) imposes two basic restrictions on employees who leave Federal service. Since these restrictions remain suspended through May 31, 1991, the effect of the procurement official's certification regarding Subsection 27(f) is to promise to report information concerning violations or possible violations of that subsection that occur after it becomes effective.

Under Subsection 27(f), an individual who was a procurement official with respect to a particular procurement may not:

- o Participate in any manner on behalf of a competing contractor in any negotiations leading to the award or modification of a contract for such procurement; or
- o Participate personally and substantially on behalf of the competing contractor in the performance of such contract.

Both restrictions apply for a period of two years from the date of the individual's last personal and substantial participation in the procurement on behalf of the Government. Neither applies unless the individual was an officer or employee of the Government at the time he or she served as a procurement official.

These restrictions extend to post-employment activities on behalf of some subcontractors. They generally do not apply if the subcontract amount is less than \$100,000 or if participation is on behalf of a subcontractor below the second tier. However, the restrictions apply regardless of dollar value and at any tier if the particular subcontractor significantly assisted the prime contractor in negotiation of the prime contract or if the employee recommended the particular subcontractor to the prime contractor as a source. The exclusion for participation on behalf of some subcontractors is a change in the law.

#### **ADDITIONAL CERTIFICATION REQUIREMENTS**

Subsection 27(e) (41 U.S. Code 423(e)) imposes a number of additional certification requirements applicable to contracts and modifications in excess of \$100,000:

- o Any procurement official who leaves the Government during the conduct of a specific procurement must certify that he or she understands the continuing obligation not to disclose proprietary or source selection information;
- o Anyone participating personally and substantially in the preparation or submission of a competing contractor's offer must certify that he or she is familiar and will comply with Subsection 27(a) and will report any information concerning a violation or possible violation of Subsections 27(a), (b), (d) or (f) to the individual responsible for preparing the offer;
- o The officer or employee of a competing contractor responsible for its offer must certify that the certifications described directly above have been obtained and that he or she has no information concerning a violation or possible violation of Subsections 27(a), (b), (d) or (f) or has disclosed

such information to the contracting officer;

- o The contracting officer responsible for the procurement must certify prior to award that he or she has no information concerning a violation or possible violation of Subsections 27(a), (b), (d) or (f) or has disclosed all such information to the head of the agency; and
- o Any procurement official or competing contractor must make such additional certifications as to violations or possible violations of Subsections 27(a), (b), (d) or (f) as may be required by the head of the agency.

### **Applicability**

Section 27 originally became law on July 16, 1989. It was amended in November 1989 and suspended in its entirety for one year beginning December 1, 1989, and ending November 30, 1990. The suspension of the post-employment provisions of Subsection 27(f) was extended for an additional six-month period through May 31, 1991. Thus, except for the post-employment restrictions, the amended Section 27 will become effective December 1, 1990, and will apply to conduct occurring on or after that date. The post-employment restrictions of Subsection 27(f) will become effective June 1, 1991.

Participation in a procurement during the period from December 1, 1989, through November 30, 1990, does not make one a procurement official for any purpose. Most individuals will not become subject to any of the prohibitions or restrictions contained in Section 27 unless they participate personally and substantially in a procurement on or after December 1, 1990, and thereby become procurement officials. Participation in a procurement on or after December 1, 1990, will subject individuals to the prohibitions of Subsection 27(b) as of that date. As a result of the extended suspension of Subsection 27(f), individuals who become procurement officials on or after December 1, 1990, may become subject to the post-employment restrictions on June 1, 1991.

If, however, one was a procurement official during the original effective period of the law between July 16, 1989, and November 30, 1989, he or she may become subject to the prohibitions contained in Subsection 27(b) of the amended law beginning December 1, 1990, if his or her participation in a procurement during the original effective period meets the

current definition of "procurement official" and if that procurement has not concluded. For example, if an employee participated in a source selection on August 20, 1989, for a procurement that is still pending on December 1, 1990, he or she again becomes subject to the prohibitions on receipt of gratuities, employment discussions and disclosure of proprietary or source selection information even without participating in that procurement on or after December 1, 1990. The prohibitions continue to apply until the procurement is concluded by contract award or cancellation of the procurement. Because the post-employment restrictions run for two years from the date of last personal and substantial participation in the procurement, the employee will become subject to Subsection 27(f) of the amended law when those restrictions become effective on June 1, 1991. The suspension of Subsection 27(f) from December 1, 1989, through May 31, 1991, does not interrupt the running of the two-year period of any post-employment restriction that attached prior to December 1, 1989.

### **ETHICS ADVICE**

An employee or former employee who is uncertain whether specific conduct would violate the law may request a formal advisory opinion from his or her agency ethics official under procedures prescribed in the regulations. This is a change in law. Formal opinions may not be obtained for the purpose of determining whether certain information is proprietary or source selection information, whether such information may be disclosed, or whether, prior to bid opening or receipt of proposals, a particular entity is a competing contractor. Questions regarding the character and disclosure of information should be directed to the contracting officer. The regulations provide that a procurement official may, after making appropriate inquiry, rely upon representations made by an entity as to whether it is a competing contractor.