

CONFLICT OF INTEREST ISSUES UNDER AN OMB CIRCULAR NO. A-76 STUDY

1. With the increased use of competitive sourcing, it is imperative that all employees be aware of the conflict of interest issues that may arise in the course of conducting an A-76 Study and the corresponding source selection. Moreover, a recent General Accounting Office (GAO) decision makes it clear that an inadequate appreciation for this area can be the death knell for an A-76 competitive sourcing effort.

2. The purpose of this memorandum is to provide guidance regarding potential conflicts of interest in the performance of Commercial Activities Studies. This guidance provides general information to be used to avoid conflicts of interest and the appearance of any conflicts of interest in the conducting of a Commercial Activities Study.

3. Authority

- a. Office of Federal Procurement Policy Act, 41 U.S.C. 423
- b. FAR Part 3 – Improper Business Practices and Personal Conflicts of Interest
- c. FAR Part 7 – Acquisition Planning
- d. FAR Part 9 – Contractor Qualifications
- e. OMB Circular No. A-76 – Revised Supplemental Handbook, dated March 1996
- f. Department of the Army (DA) Pamphlet 5-20

4. Regulatory Guidance on Conflicts of Interest

A. FAR provisions:

1. FAR 3.101-1 – “Government business shall be conducted in a manner above reproach and, except as authorized by statute or regulation, with complete impartiality and with preferential treatment for none. Transactions relating to the expenditure of public funds require the highest degree of public trust and an impeccable standard of conduct. The general rule is to avoid strictly any conflict of interest or even the appearance of a conflict of interest in Government-contractor relationships.” (Emphasis added)

2. FAR 3.104-4 – Statutory and related prohibitions, restrictions and requirements

This provision incorporates 41 U.S.C. 423, the Procurement Integrity Act, into the FAR. FAR 3.104-4 sets forth prohibitions on disclosing procurement information, actions required when a Federal employee is contacted by a bidder or offeror and prohibitions on former Government employees from acceptance of compensation, including job offers, from a contractor under certain circumstances.

3. FAR 9.504 – Contracting officer responsibilities

- (a)(1) Identify and evaluate potential organizational conflicts of interest as early in the acquisition process as possible; and
- (2) Avoid, neutralize, or mitigate significant potential conflicts before contract award.

4. FAR 7.304 – Procedures

This section of the FAR provides at subsection 9(c)(3) that “(p)ersonnel who have knowledge of the cost figures in the cost estimate for Government performance shall not participate in the offer-evaluation process unless the contract file is adequately documented to show that no other qualified personnel were available.”

B. DA Pamphlet 5-20

1. Restrictions relating to possible conflict of interest

a. Source Selection Evaluation Board (SSEB)

(1). Members of the SSEB are precluded from performing activities related to the Management Study or the in-house cost estimate (Section 2-3c(4)).

(2). Employees who may be directly affected by the cost comparison decision cannot be a member of the SSEB.

(3). Members of the Management Study Team, the preparer of the in-house cost estimate, the preparer of the Independent Government Estimate (IGE) and members of the functions being studied cannot be a member of the SSEB (Sections 4-8(c) and 6-20(c)).

(4). The DA Pamphlet states that the individuals listed in the preceding paragraph can serve on the Source Selection Advisory Council (SSAC) but recommends that representatives from the MACOM serve on the SSAC in lieu of the listed individuals. This recommendation is based on the fact that participation on the SSAC usually would be considered “personal and substantial” if the participation involves ranking proposals and would, therefore, fall within the restrictions and prohibitions of the Procurement Integrity Act.

Providing general technical information about a functional area to the SSEB, however, may not be considered “personal and substantial” involvement. This would have to be decided on a case by case basis (Section 6-20(e)).

b. Administrative Appeal Board (AAB)

(1). Anyone involved or who took part in the cost study under appeal or directly associated with the function that is the subject of the cost study under appeal cannot be a member of the AAB.

(2). Anyone working in the activity or anyone having a spouse, children, parents, siblings or household members working in the activity in the cost study under appeal cannot be a member of the AAB.

(3). Anyone working for the command or organization having direct jurisdiction or control over the activity, which is the subject of the cost study, cannot be a member of the AAB (Section 7-6).

5. Statute – Restrictions on Conflict of Interest

A. Office of Federal Procurement Policy Act, 41 U.S.C. 423 (hereinafter referred to as the “Procurement Integrity Act”)

1. 41 U.S.C. 423(a) and (b) prohibit Government employees from disclosing or obtaining contractor bid or proposal information or source selection information prior to award. This applies to all Government employees participating in the preparation of a Performance Work Statement (PWS) or the development of a Most Efficient Organization (MEO). This section of the statute is implemented at FAR 3.104-5.

2. 41 U.S.C. 423(c) provides that an agency official who is participating “personally and substantially” in a procurement action in excess of the simplified acquisition threshold (currently \$100,000) and is contacted by a bidder or offeror involved in that procurement action regarding possible employment must:

- a. Promptly report the contact in writing to the official’s supervisor, and
- b. Reject the possibility of employment, or
- c. Disqualify himself/herself from further involvement in the procurement

This section of the statute is implemented at FAR 3.104.

3. 41 U.S.C. 423(d) addresses prohibitions on former Government employees from accepting compensation, including post-award employment, from contractors and will be addressed below with regard to the Right of First Refusal. This section of the statute is implemented at FAR 3.104(d).

4. FAR 3.104-3 – Definitions

FAR 3.104-3 states at subparagraph (4)(iv) that an individual will not be considered to have participated “personally and substantially” in a procurement solely by participating in certain activities. Among the listed activities are procurements conducted under the procedures of OMB Circular A-76, participation in management studies, preparation of in-house cost estimates, preparation of the MEO analysis, and furnishing of data or technical support to be used by others in the development of performance standards, statements of work or specifications. Based on the FAR definitions, these individuals would not fall under the restrictions of 41 U.S.C. 423(c), however, they may fall under the restrictions of 41 U.S.C. 423(d) regarding post-award employment.

B. Other relevant statutes are 18 U.S.C. 201 and 5 CFR 2635, which preclude a Government employee from participating personally and substantially in any particular matter that would affect the financial interest of any person from whom the employee is seeking employment.

6. In addition to the limitations and restrictions set forth in the statute and regulations set forth above, a recent GAO decision, DZS/Baker LLC; Knudsen Corporation, B-281224; B-281224.2; B-281224.4; B-281224.5; B-28122.6, dated 12 January 1999, held that the evaluation process was fundamentally flawed in a cost comparison study because 14 of

the 16 evaluators occupied positions that were subject to the study. In so holding, the GAO found that the precautions taken by the Government to ensure the integrity of the evaluation process were not sufficient to eliminate the inherent conflict of interest.

7. Right of First Refusal – Post-Employment Restrictions

a. FAR 7.305(c) requires the inclusion of the clause at 52.207-3, Right of First Refusal of Employment, in all solicitations which may result in a conversion from in-house performance to contract performance.

b. 41 U.S.C. 423(c) requires that Government employees who are “personally and substantially” involved in a procurement and are contacted by an offeror regarding possible employment, to report the contact and either reject the offer or disqualify themselves from the procurement. This statute does not affect the employee’s Right of First Refusal under the A-76 procedures as that right arises only after the contract has been awarded.

c. 41 U.S.C. 423(d) sets forth post-employment restrictions for Government employees who participate in procurements in excess of \$10 million in the following positions:

1. Procuring Contracting Officer
2. Source Selection Authority
3. Member of the Source Selection Evaluation Board
4. Chief of a financial or technical evaluation team
5. Program Manager
6. Deputy Program Manager
7. Administrative Contracting Officer

The restrictions set forth in this statute also apply to Government employees who make the following decisions:

1. To award a contract over \$10 million
2. To award a subcontract over \$10 million
3. To award a modification of a contract or subcontract over \$10 million
4. To award a task order or delivery order over \$10 million
5. To establish overhead or other rates for a contract valued over \$10 million
6. To settle a contract claim over \$10 million

These individuals are precluded from accepting compensation from the winning contractor on that procurement for a period of one year after performing such duties. There is no exception to this one year bar under the A-76 procedures.

Therefore, these Government employees lose their Right of First Refusal provided for under the A-76 procedures. This section of the statute is set forth at FAR 3.104-4(d).

This statute also sets forth restrictions on the ability of a former Government employee to represent a contractor in any action before a Government entity concerning any matter pending under the former employee's official responsibility during the last year prior to leaving Government employment.

d. Individuals who participate on a cost comparison review resulting in the award of a contract in excess of \$10 million fall within the restrictions set forth in 41 U.S.C. 423(d) and are barred for a period of one year after performing such duties from accepting any offer of employment from the contractor. This prohibition includes employment opportunities pursuant to the Right of First Refusal under the A-76 procedures.

Participation on either a MEO Development Team or a PWS Development Team would not, therefore, by itself, fall within the post-Government employment restrictions of 41 USC 423(d) and would not affect an employee's Right of First Refusal under the A-76 procedures.

e. OMB Circular No. A-76 – Revised Supplemental Handbook

The OMB Circular states at Chapter 3 – Cost Comparisons, subparagraph B(3) – The Cost Comparison Team, that:

“Procurement restrictions prohibit Federal procurement officials from subsequently working for a contractor on a procurement in which the procurement official was involved. “Procurement Official” in this sense includes personnel in the commercial activity who are directly and substantially involved in preparing or approving the PWS, management plan, the in-house estimate, or supporting the source selection evaluation process. (See FAR 3.104-4(h)(3) and 41 USC 423)”

At subparagraph B(3)(a), the OMB Circular states that:

“Employees who participate or provide data to support the development of the various study elements, but do not review, approve or have direct knowledge of the final PWS, performance standards, MEO, or in-house or contract cost estimates are not considered “procurement officials” and are not affected by this restriction.”

According to OMB, at a minimum, the following personnel are considered to be “procurement officials”:

1. certifying officials for the PWS and Management Plan
2. the Independent Review Officer
3. the individual who signs the Cost Comparison form
4. the Administrative Appeal Authority

It should be noted that the reference in the OMB Circular to FAR 3.104-4(h)(3) cited above is incorrect, as there is no such section in the FAR. The prohibition against post-Government employment is set forth at FAR 3.104-4(d) and incorporates the restrictions in 41 U.S.C. 423(d). The restrictions on post-Government employment included in the OMB Circular are broader in scope than those set forth in the statute or the FAR. As discussed previously, the statute and FAR restrictions apply only to individuals, in certain specific positions, involved in procurements in excess of \$10 million. The OMB Circular extends these restrictions to “procurement officials” who are not involved in the procurement process such as the individuals who certify the PWS and Management Plan, the Independent Review Officer, the individual who signs the Cost Comparison form and the Administrative Appeal Authority. None of these individuals would be prohibited from post-Government employment under the statute or the FAR unless they became involved in the procurement. However, these individuals clearly fall within the conflict of interest restrictions discussed previously and their involvement, if any, in actions related to the PWS or Management Plan would be limited by those restrictions.

f. Post-employment restrictions are also addressed at 18 U.S.C. 207 and 5 CFR Parts 2637 and 2641. These provisions prohibit certain activities by former Government employees, including representation of a contractor before the Government in relation to any contract or other particular matter involving specific parties on which the former employee participated “personally and substantially” while employed by the Government.

8. The point of contact in the Legal Office for this subject is Mr. James V. Scuro, DSN 992-9801.

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