

Contractors in the Workplace

Contractors are common in our Government work environment now - they may have offices in our building, work on our teams, and go on travel assignments. But they are contractors, not Government employees ñ and that creates some very practical differences in how we work and how we relate to these contractual partners.

Avoiding Personal Services Contracts

Some background information on “personal services” contracts may be helpful. In general, we can’t award contracts that, either by their terms or in the way they’re administered, make the contractor personnel appear to be, in effect, Government employees. In addition, we can’t award contracts for performing functions that are considered to be “inherently governmental.” When a contract is awarded, a review process has taken place through acquisition and legal channels to ensure that the contract is appropriate, but it’s still important to administer the contract in such a way that it doesn’t turn into a personal services contract . (If it does, the results for the agency as well as the employees involved can be unfavorable indeed.)

1. The normal employee-supervisor relationship doesn’t exist. Although there may be Government personnel and contractor personnel working side by side, the Government supervisor does not supervise the contractor personnel. (Nor should contractor personnel supervise Government people.) Work assignments and taskings should go from the Government’s point of contact - usually a contracting officer, or contracting officer’s representative in some instances - to the contractor’s point of contact, not from a Government supervisor.
2. The work is governed by the contract. All taskings to a contractor must be “within the scope” of the contract - that means that we cannot ask the contractor to do anything that is not provided for in the Statement of Work. Government personnel have to be very careful not to make additions or changes to the Statement of Work without involving the contracting officer, who will negotiate those changes with the contractor. (Not only can this result in claims and litigation, but in severe legal and/or disciplinary action against the Government employee.) And concerns about how the work is performed are contract matters, not supervisory matters -- we cannot impose discipline on a contractor employee.
3. Contractor employees are not covered by the same rules, regulations, or bargaining agreements as Government employees. This can create a lot of confusion and hostility, so it’s important to understand. Frequently, contractors are paid to complete tasks or projects, not by time - so they do not necessarily have to keep the same working hours as Government people, nor do they have to account for their time on a Government timesheet. Sometimes contractors are paid for a certain number of hours of effort; in that case, contractor employees account for their time to their boss, and they might work a tour of duty that is different from that of Government people.
In general, contractors and their employees have their own agreements and rules that govern their working relationship, not the bargaining agreements that Government people work under - for example, contractor employees may not be entitled to breaks when Government people are, or might be able to work flexitime or flexiplace in ways that Government people can’t. For the same reason, we should not ordinarily include contractor employees in office social functions or events (be sure to talk to your legal advisor first).

It's also important to understand that contractor employees aren't necessarily bound by DoD and Army regulations. For example, our Joint Ethics Regulation applies only to Government people, so we may need to have language in our contracts relating to conflicts of interest and gratuities, as circumstances dictate. Rules that prohibit the release of proprietary data only affect Government employees, so we either have to consider what data is available to contractors, or have provisions in their contracts relating to use and release of materials (more on this later).

On the other hand, some local installations have rules and regulations that apply to all people on the installation - such as traffic rules, or drug-free workplace rules, or zero-tolerance rules. In those situations, it's important that someone put the contractor on notice of all applicable regulations that will govern their behavior. (Remember, too, that some contracts provide that contractor personnel will visit other installations.)

Preventing Ethics Problems

Although Government ethics rules don't apply to contractor personnel, they still apply to the Government people who interface with them, so it's important to have a good understanding of ethics rules. Most ethics questions in this area deal with gratuities and gifts.

4. We can't accept gifts from contractor personnel. By definition, contractors are "prohibited sources" - that is, they are entities that do business with the Government - so the rules concerning acceptance of gratuities apply. Food and refreshments that are not a meal (e.g. coffee and donuts) may be accepted. You may also accept presentation items, such as a commemorative coin, or items worth less than \$20. The \$20 limitation may also permit you to accept an occasional gift of travel (for example, a ride to the airport). But you may not accept more than \$50 worth of gifts from any one source in a year. Consult your ethics counselor advisor when something other than a nominal gift is offered.

There is an exception to the gift restrictions when the gift is based upon a personal relationship. In order for that exception to apply, that relationship should pre-exist the contract, and be outside the workplace context. If the relationship developed out of the contract relationship and responsibilities related to the contract, then the prohibition on gifts still applies. Nor does reciprocity justify the acceptance of a gift that is otherwise prohibited!

5. We can't solicit gifts from contractor personnel. The ethics rules permit Government employees to solicit contributions among themselves and give gifts to official superiors on special, infrequent occasions, like retirement. (Even here there are restrictions -- we can't solicit more than \$10 per employee, contributions must be entirely voluntary, and the value of the gift generally should not exceed \$300.) But we cannot solicit from contractor employees.

Access to information

Contractors frequently need information in order to perform their job, and we have to consider ahead of time what kind of information they will need. We must be concerned about both purposeful and accidental disclosure of information they should not have access to. With contractors in our midst, we have to be sensitive to the kind of information we leave on our desks, talk about within earshot of contractor personnel, and discuss in meetings. An improper disclosure may violate federal law, with severe consequences to the person who released the information. Even when a law is not violated, improper disclosure can result in reduced competition, unfair competition, the appearance that the

process lacks integrity, protests and litigation, and even disqualification of the contractor for further awards.

Typically, access to classified information will be determined and cleared ahead of time. Other types of protected information generally fit into three categories: proprietary information; procurement integrity information; and personal information.

6. Restrict access to proprietary data. Many of us are familiar with technical data that is subject to license restrictions or proprietary legends; there may be problems with providing this technical data to contractors. We need to look at the agreement that the Government entered into when we acquired the proprietary TDP from the company that created it. For example, if the TDP was created by XYZ Corporation and is still proprietary to them, then XYZ is only allowing us to use it. If there are restrictions on viewing the data, then we must honor those restrictions. Even if we have the right to show the data to people outside the Government, we need to ensure that the contractor and its employees have signed nondisclosure agreements that will prevent them from passing that information to anyone else.

Technical data is not the only kind of information that can be proprietary. In general, we cannot give a support contractor access to information relating to the trade secrets, processes, operations, style of work, subcontractors, or other confidential statistical or financial data of some other person or firm, where the person or firm providing the information did not agree to the disclosure.

7. Restrict access to procurement integrity information. In general, we cannot release information that is

**procurement sensitive (for example, how a source selection is done, who the Government's testers and evaluators are, how testing is performed and what the results are, how competitors were scored in evaluation, details about technical proposals, prices)

OR

**"pre-procurement" -- the kind of information which, if given in advance, could result in a competitive advantage to a competitor. (examples: specific information about future requirements, what quantities the Government is going to buy, what type of performance the Government is looking for, what prices are expected) Remember, "advantage" can accrue simply by knowing these facts earlier and having more time to prepare a proposal.

We can "release" information in many ways - by including contractors in meetings in which acquisition plans are discussed, by giving the contractors information to prepare visual aids or briefing charts, even by simply permitting access to the information by failing to protect it. Be sensitive to whether a specific meeting, an action, or release of information would give a competitive advantage to a contractor. All similarly situated contractors should receive equal treatment.

8. Restrict access to information covered by the Privacy Act. Consider carefully what kind of access contractors will need to material subject to the Privacy Act (such as social security numbers and personnel files). A contractor's need for this kind of information poses an interesting dilemma for the Army. Under Army regulations, we may not disclose information protected by the Privacy Act without the prior written consent of the subject, except in limited circumstances.

One of those exceptions is that disclosure may be made to "officers and employees of DOD who have a need for the record in the performance of their duties." However, as we've discussed, a contractor employee is not an "officer or employee" of the Army. We cannot rely on this exception to justify disclosure of protected information to a contractor, even if the contractor needs the information to perform the contracted tasks.

Another exception to the general rule is that disclosure may be made when permitted by a routine use published in the Federal Register. To apply this exception, first identify the system of records. Then, refer to the published routine use statement to see if it's broad enough to permit disclosure to the contractor under existing circumstances.

There are several other exceptions that may apply in limited situations. Your Privacy Act Coordinator or attorney will be able to assist you with this. As a last resort, remember that a Privacy Act violation can be avoided if you obtain prior written consent for the disclosure from the employee.

Identification of Contractor Personnel

In meetings at which Government business is discussed, the government people need to know who is speaking to them, so that they avoid release of restricted data. They also need to know who the contractor people are so that they can take into account any potential bias when assessing what is being said, and to prevent an organizational conflict of interest for the contractor. Be alert to the potential for such a conflict - is the contractor proposing something for which it could receive a contract? Participation in some decision-related discussions can result in disqualifying the contractor's company for later awards. This is an area that needs to be discussed with your legal advisor.

9. Always identify contractor personnel. To prevent any improper disclosure of information, you should get into the habit of asking who is in the room at the beginning of meetings when sensitive information is going to be discussed.

Conclusion

Contractors are frequently crucial to the accomplishment of our mission, and can be valuable partners. But if we use the contractor's employees as if they were our employees or direct them to do various tasks without regard to the actual scope of work, we run the risk of running afoul of the rule against personal services, and the contractor might well have valid claims against us for equitable adjustments or even breach of contract. We also have to ensure that our contracts, task orders, and contract administrators don't put contractor employees into positions of performing inherently governmental functions, and that we don't provide access to Government or private information they shouldn't have. Consult your legal advisor/ethics counselor when you have questions or concerns!

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