

WHEN YOU LEAVE GOVERNMENT SERVICE

RULES AFFECTING YOUR NEW JOB AFTER DOD

This handout was prepared to assist Naval Air Warfare Center Weapons Division employees who are planning to work in the private sector after they leave Government service. It identifies statutes and regulations that may restrict or otherwise affect your activities on behalf of a private sector employer. Because restrictions are dependent on specific facts, and because this information is a summary of the rules, you may wish to request an opinion based upon your specific facts from the NAWCWD Ethics Counselor.

Advice from the NAWCWD Ethics Counselor with respect to these matters is advisory only, and is provided in accordance with 5 C.F.R. 2635.107 and 41 U.S.C. 2101-2107 (Procurement Integrity Act). Because the NAWCWD Ethics Counselor is acting on behalf of the United States, and not as your personal representative, no attorney-client relationship will be created by the consultation.

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Certain current or former DoD officials who, within two years of leaving DoD, expect to receive compensation from a defense contractor must request and receive a written opinion regarding the applicability of post-employment restrictions to activities that officials may undertake on behalf of a defense contractor before receiving pay. This requirement is in Section 847 of the National Defense Authorization Act for Fiscal Year 2008 (Pub. L. 110-181). It applies if you are a current or former DoD official who participated personally and substantially in an acquisition with a value in excess of \$10M while serving in: (1) an Executive Schedule position; (2) a Senior Executive Service position; (3) a general or flag officer position; or (4) in the position of program manager, deputy program manager, procuring contracting officer, administrative contracting officer, source selection authority, member of the source selection evaluation board, or chief of a financial or technical evaluation team.

Employment Restrictions under 41 U.S.C. 2101-2107 ***Procurement Integrity Act***

You may not accept compensation from a prime contractor as an employee, officer, director, or consultant for one year if you served in certain positions related to a contract, which was awarded in excess of \$10 million. These positions are:

- (1) Procuring Contracting Officer;
- (2) Source Selection Authority;
- (3) Member of Source Selection Evaluation Board;
- (4) Chief of a Technical or Financial Evaluation Team;
- (5) Program Manager;
- (6) Deputy Program Manager; or
- (7) Administrative Contracting Officer.

If you served in a position listed in (1)-(4) on the date of contractor selection but not on the date of award, the one-year restriction begins on the date of contractor selection. If you were serving in a position listed in (1)-(4) on the date of the award, the one-year restriction begins on the date of award. If you served in one of the positions listed in (5)-(7), the one-year restriction begins on the date that you last served in that capacity.

You may not accept compensation from a prime contractor as an employee, officer, director, or consultant for one year after the date of the decision if you personally made a decision to:

- (1) Award a contract, subcontract, modification, task order, or delivery order in excess of \$10 million;
- (2) Establish overhead or other rates valued in excess of \$10 million;
- (3) Approve issuance of a contract payment in excess of \$10 million; or
- (4) Pay or settle a claim in excess of \$10 million.

Definitions

“Compensation” - any form of compensation provided directly or indirectly for services rendered as an employee, director or consultant.

“In excess of \$10 million” - determined by the value or estimated value at the time of award of the contract including all options; the estimated value of all orders at the time of award for an indefinite-delivery/indefinite quantity or requirements contract; the value of the order under a Basic Ordering Agreement; the amount paid or to be paid in settlement of a claim; or the estimated monetary value, which applied to the Government portion of the allocation base for negotiated overhead or other rates.

Exception

You may accept compensation from any division or affiliate of the contractor that does not produce the *same or similar* products or services as the entity responsible for the contract. It is DoD guidance that a product or service must be “dissimilar enough” from that under the contract to warrant use of the exception. It is not sufficient that the product or service is produced by a division on the commercial, as opposed to the government, side of the contractor. Any amount of the “same or similar” product or service is sufficient to trigger the compensation ban.

Safe Harbor Opinion

If you are unsure about whether your employment with a prime contractor will violate the Procurement Integrity Act, you may request a “safe harbor” opinion from the NAWCWD Ethics Counselor. This opinion is often referred to as a “safe harbor” opinion because both the former employee and the contractor may have good faith reliance on the opinion so long as the information provided is accurate and complete. Because of the protection that the opinion will afford, often the contractor will require that a Government employee obtain an opinion before a job offer is made. The opinion must be issued within 30 days after receiving all the necessary information - a questionnaire is available to assist you in providing all the required information.

Employment Restrictions under 18 U.S.C. 207(a)

Assuming that the Procurement Integrity Act does not prevent you from working for a particular contractor, this law may limit some of the activities that you may perform on behalf of the contractor after you leave Government service. Although there are six separate provisions in the law, generally only two of the provisions are applicable to NAWCWD employees and will be discussed here. Since the other four provisions are not covered, if you are paid under the Executive Schedule or deal with trade or treaty negotiation, you should make an appointment with the NAWCWD Ethics Counselor.

You may not knowingly make a *communication or appearance* before any officer or employee of *any* Federal agency on behalf of any other person, with the *intent to influence*, in connection with a *particular matter* in which you either participated *personally and substantially* in your official capacity or which was under your *official responsibility* during the last year of your Government service.

Definitions

“Appearance” – can extend to mere physical presence if the presence will serve as an endorsement. It does not include purely social contacts, a request for publicly available documents, or a request for purely factual information or the supplying of such information.

“Communication” – can be made orally, in writing, or through electronic transmission. It does not include purely social contacts, a request for publicly available documents, or a request for purely factual information or the supplying of such information.

“Intent to Influence” – to seek a discretionary Government ruling, benefit, approval, or other actions, or an attempt to influence Government action in a matter involving an appreciable element of dispute.

“Particular Matter” - matters that involve deliberation, decision, or action that is focused on the interests of specific persons or a discrete and identifiable class of persons. These matters may include a contract, claim, application, judicial, or other proceeding, request for a ruling or other determination, controversy, investigation, or charge. A “particular matter” could even include legislation or policy-making that is narrowly focused on the interests of a discrete and identifiable group of parties or organizations, e.g., DoD policy affecting only military aircraft manufacturers. For this statute, particular matters must also involve "specific parties." This means that identifiable parties exist. For example, a procurement may be a “particular matter,” but it may not become one involving “specific parties” until the first bid is received.

Participate “Personally and Substantially” - This means that you are directly participating in the matter or that one or more of your subordinates, whom you are directing, is participating. Also, the participation must be of significance to the matter, which may be based on the amount and importance of your effort. One act, such as approving a critical step, may be substantial. Likewise, if you have to review and approve a certain step, and work would stop if you didn’t approve, then your participation is substantial, even though it may have seemed like a paperwork exercise to you. On the other hand, an entire series of peripheral acts might not be substantial.

If you merely have knowledge of the matter, routine or superficial involvement, or involvement on a peripheral or administrative issue, you are not “substantially” involved. If you are not involved in the substantive merits, you may not be substantially involved, even though you put a lot of time into the matter. If you are merely responsible for reviewing the matter for compliance with administrative or budgetary considerations, you are also not substantially involved.

“Official Responsibility” - direct administrative or operating authority to approve, disapprove, or otherwise determine, Government actions. It includes a supervisor at any level having responsibility for the actions of a subordinate employee who actually participates in a matter. Although you may have been disqualified from personally acting on a particular matter when you were in Government service, this section of the statute will still apply to you. (Example: Because you owned stock in IBM while in Federal service, you were disqualified from reviewing a particular contract with IBM, which was reviewed by one of your subordinates.

Under this statute, because the particular matter was under your responsibility during your last year of service, you are prohibited from representing others regarding that contract.)

Exceptions

Even if 18 U.S.C. 207(a) applies, you may still be able to make communications to furnish scientific or technological information if certain requirements are met. The Secretary of the Navy may authorize, in writing, such communications if he determines that you have outstanding scientific or technological qualifications that are otherwise unavailable and that the national interest of the United States would be served by your participation in the matter. To request such authorization, the involved command must submit the request, in writing, to the Secretary of the Navy providing the relevant information.

There is also an exception for giving factual testimony under oath or making a statement required under penalty of perjury. The exception does not, however, include expert opinion testimony. You should consult the NAWCWD Ethics Counselor for specific guidance.

Time of Restriction

If your participation in the matter was personal and substantial, the ban will remain for the lifetime of the “particular matter.” If the matter was only under your official responsibility, the ban is effective for a period of two years from the date that you leave Government service.

Compensation Ban on Representation by Others

After you leave Government service, you may not accept compensation for representational services, which were provided by anyone while you were a Government employee regarding particular matters in which the Government was a party or had a substantial interest. This prohibition applies even if the Federal agency involved was not the agency that employed you. This prohibition generally arises when you will share in the proceeds of the partnership or business for representational services that occurred before you terminated Federal service. (Examples: Lobbying, consulting, and law firms). (18 U.S.C. 203).

Administrative Reminders

FINANCIAL DISCLOSURE REPORT: DoD personnel who are required to file an Annual SF 278, "Public Financial Disclosure Report", must file a Termination report. It must be filed within 30 days *after* termination from the covered position. If you file more than 30 days late, you are subject to a \$200 late filing fee. In addition, if you knowingly and willfully fail to file this report, we must refer your name to the Attorney General, who may sue you in U.S. District Court and subject you to substantial civil penalties.

USE OF NONPUBLIC INFORMATION: Even when you have left Government service, you still may not use nonpublic information to further your own private interests, or those of another, including your subsequent employer. Nonpublic information includes classified information, source selection data, information protected by the Privacy Act, proprietary

information, and other information that has not been made available to the public and is exempt from disclosure.

VERA/VSIP: If you accepted a "buy-out" or separation payment, there are re-employment restrictions. Please contact your personnel office if you are unsure of those measures.

QUESTIONS: Even *after* you leave Government service, please call the NAWCWD Ethics Counselor if you have any questions about this subject.

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