



# Legal and Ethical Considerations in Evaluating Contractor Performance

A Mandatory Reference for ADS Chapter 302

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## **Legal and Ethical Considerations in Evaluating Contractor Performance**

"Public service is a public trust." These words are the bedrock of the Standards of Conduct Regulations, which apply to all Federal employees, including USAID direct-hires and PSCs.

Contracting office personnel and CTOs must very clearly understand that when they rate a contractor's performance (which can be a pivotal factor in future source selection actions) it is a violation of the Standards of Ethical Conduct, regulations found at 5 CFR 2635, to allow the rating to be affected by extraneous considerations. In particular, these standards would explicitly prohibit giving any consideration to the chilling effect that assigning a contractor a bad rating might have on one's future employment prospects with that contractor. Such behavior would subject an employee to disciplinary action that could include a letter of reprimand, suspension without pay, or even termination of employment. Whether couched as dereliction of duty, or failure to act impartially, or using public office for private gain, this behavior would be antithetical to what we expect of a USAID employee as a public servant.

Furthermore, all concerned must be aware that the process of rating contractor performance constitutes "personal and substantial involvement", subjecting an individual to a post-employment restriction on the representation of a contractor to the Federal government on a matter in which he/she had some official involvement, under 18 U.S.C. Section 207. Under that provision, a former Federal employee is permanently prohibited from representing non-governmental entities before the Federal government in matters in which he/she was personally and substantially involved as a Federal employee. Violation of this provision may result in criminal sanctions.

Please note that the above restriction only applies to representation. Therefore, this provision does not generally preclude an individual from merely working for a private entity, even on contracts, grants, and other matters in which he/she formerly participated or for which he/she had official responsibility as a Federal employee. Moreover, a former Federal employee can have conversations with and prepare internal work products for his/her non-Federal employer that are used as input in communications or appearances that others make before a Federal entity. "Representing" is defined as a communication or appearance with the intent to influence a Federal department, agency or court on a particular matter. Prohibited "communications" include telephone calls, letters, and meetings with Federal personnel.

In addition to the above, all must also bear in mind that the completed evaluation is intended to be used in future source selection actions. Consequently, it may constitute "source selection information", disclosure of which, directly or indirectly, is prohibited except as authorized by a USAID Contracting Officer. The Office of Federal Procurement Policy Act (41 U.S.C. 423) contains significant civil and criminal penalties for unauthorized disclosure of such information.

CTOs concerned about potential personal liability, i.e. being sued by a contractor, should be aware that the potential exists that one could be sued for doing something outside the scope of his/her employment. However, if a CTO is acting within the scope of his/her employment (e.g., preparing an unbiased assessment that gives a low rating to a contractor in accordance with FAR Subpart 42.15), the Federal Torts Claims Act will protect him/her from personal liability for common law torts. In those instances, if he/she were sued, upon certification by the Attorney General, he/she would be dismissed from the lawsuit and the United States would be substituted as the defendant. <sup>1</sup>

In that regard, please also note that the Contracting Officer is responsible for assigning the report to a CTO and resolving any disagreements with him/her on the evaluation in a timely manner. He/She is also responsible for duly considering the CTO's input into the report, but he/she may revise the information submitted by the CTO, and he/she is the responsible official for the report that is sent to the contractor, rather than the CTO. Additionally, if the contractor submits a rebuttal to the rating and the Contracting Officer does not accept the contractor's comments, the report is forwarded to the next level above the Contracting Officer in the contracting office. In such case, this "next level" official would be responsible for the final assignment of the rating and the content of the report.

This notice does not address every potential conflict of interest concern or every legal and ethical issue with respect to contractor performance evaluation, and the application of the above rules requires careful interpretation. GC/EA and Regional Legal Advisers overseas are available to counsel any employees who have questions about these issues, and they encourage anyone with concerns in these matters to contact them (Tel 202-712-5918). They also have handout materials, a new ethics Homepage, and annual training classes to address these concerns.

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<sup>1</sup> In addition to the Attorney General, the United States Attorney for the district where the civil action or proceeding is brought, or any Director of the Torts Branch, Civil Division, Department of Justice (DOJ), is authorized to make the statutory certification that the employee was acting within the scope of his/her office or employment with the Federal government at the time of the incident out of which the suit arose (Ref: 28 CFR 15.4). In the event that the Attorney General, or other authorized DOJ official, has refused to make the certification, the employee may at any time before trial petition the court to find and certify that he/she was acting within the scope of his/her office or employment. Upon such certification by the court, such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. (Ref: 28 U.S.C. 2679).