



United States
Office of Government Ethics
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February 8, 2005

Services Acquisition Reform Act Advisory Committee
c/o Ms. Laura Auletta
Designated Federal Officer
General Services Administration
1800 F Street, NW.
Room 4006
Washington, DC 20405

Dear Ms. Auletta:

The Office of Government Ethics (OGE) submits the following comments to the Services Acquisition Reform Act (SARA) Advisory Committee (Committee) concerning the Committee's review of Federal acquisition laws, regulations, and policies in accordance with Section 1423 of the National Defense Authorization Act for Fiscal Year 2004, P.L. 108-136, 117 Stat. 1392 (Nov. 24, 2003) (Act). As discussed below, OGE is requesting that the Committee's review include an evaluation of whether contractor employees should be subject to some type of ethics laws, rules or practices designed to prevent conflicts of interest and the appearance of conflicts of interest,¹ thereby protecting "the best interests of the Federal Government" and ensuring the "ethical integrity of acquisitions by the Federal Government."

OGE and the Executive Branch Ethics Program

As you may know, OGE is the Federal agency that oversees the executive branch ethics program. At the heart of this program are criminal conflict of interest laws and detailed ethics rules, which are designed to prevent and resolve conflicts of interest on the part of executive branch employees. Employees in the legislative and judicial branches of the Federal Government are subject to

¹We recognize that the Federal Acquisition Regulation (FAR) Subpart 9.5, "Organizational and Consultant Conflicts of Interest," provides procedures for identifying and preventing organizational conflicts of interest involving contractor entities. Our concerns relate to real or apparent personal **conflicts of interest on the part of individual contractor personnel** that may not otherwise be encompassed by the FAR.

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certain ethics rules, as well, implemented through independently-run ethics programs.

Contractors Generally Are Not Subject to Federal Ethics Rules

In recent years, executive branch ethics officials-- particularly those from Department of Defense agencies and certain civilian agencies -- have identified various issues and concerns that are a result of the growing presence of contractors in the Federal workplace. The issues predominantly relate to the fact that, unlike Government employees, contractor personnel are not subject to a comprehensive set of ethics rules, yet they are often performing some of the Government's most sensitive and critical work. This disparity is true even when contractor personnel are working side-by-side with Government employees in the Federal workplace or on the battlefield, and, for all practical purposes, may appear to the public to be employees. The problem is most likely to occur when contractors perform work that historically was considered a federal function, as well as when contractors perform functions closely associated with inherently governmental functions.

Thus, it has been suggested that current laws, regulations and practices may be inadequate to prevent certain kinds of conflicts and ethics issues on the part of contractors. For example, Government employees are subject to various "post-employment" restrictions that prevent them from switching sides and representing clients back to the Government on a matter that they worked on in the Government. In contrast, contractor personnel -- even those who performed the same or similar work as their Federal counterparts -- are not subject to similar restrictions after they complete work on a contract or obtain work with another contractor. In addition, contractor personnel are not uniformly subject to gift rules. For example, a contractor performing an agency's IT function could accept a free computer at a company-sponsored user conference or meeting, unless such conduct was prohibited by his company's internal policies.

OGE has engaged in efforts to explore these and other ethics issues involving Federal contractors in the Government workplace. For instance, OGE held several meetings with Federal ethics and procurement officials, including representatives of the Office of Federal Procurement Policy (OFPP), to talk about the changing nature of Federal contracting and to discuss whether contractors should be subject to some type of ethics rules. This topic was further explored in conversations between OGE's former Director, Amy Comstock, and former OFPP Administrator Angela Styles.

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Need for a Government-Wide Review

There are several reasons why we believe the Committee's Government-wide review should encompass the issue of whether contractor employees should be subject to some additional type of ethics rules. First, although significant progress has been made in improving the awareness of contractor ethics issues by many Government officials, agencies' missions and experience with contractors vary widely. Whereas some agencies have a great deal of experience in addressing ethics issues raised by contractors in the workplace, others might benefit from the Committee's Government-wide review and recommendations.

Additionally, the accusations of Iraqi prisoner mistreatment by both military and civilian contractor personnel have focused the public's attention on the blurring of lines between the Government and contractors. Media reports have questioned the legal and ethical framework governing contractors, and the integrity of the services being provided.

Depending on the circumstances, there are various options for remedying any perceived or actual weakness in the ethical integrity of Federal acquisitions. Some options include:

- (1) Amending the Federal Acquisition Regulation (FAR) to address ethics and personal conflicts of interest concerns raised by contractors;
- (2) Implementing any such FAR provision by mandating appropriate ethics provisions in solicitations and contracts;
- (3) Requiring solicitations to state that contractor employees will be bound by certain ethics standards, whether contractor-imposed (through corporate compliance policies, for example) or Government-imposed;
- (4) Encouraging agency personnel to consider including an ethics clause in solicitations and contracts that requires contractor personnel to receive training on the Government ethics rules, and that further provides that contractor personnel will not cause their Government counterparts to violate the conflict of interest laws and ethics rules; and

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(5) Continuing to identify and mitigate conflicts and ethics concerns involving contractor personnel on a case-by-case basis.

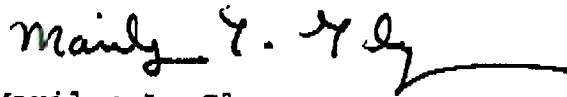
These are merely some of the possible responses that may be appropriate, given the variety of Federal contracts. Because of the varied nature of contractor services being performed for the Government, it is possible that there is no one-size-fits-all remedy. Accordingly, any modification to Federal acquisitions necessarily must balance the clarity and consistency afforded by Government-wide policies with the need for flexibility to address individual contract situations. We believe that the Committee is in a unique position to perform this vital role.

Conclusion

Given the issue's broad scope and inherent sensitivities, we recommend that the Committee's review encompasses the question of whether existing Federal acquisition laws, rules and practices need modification to ensure that contractors perform their vital role with the integrity that the public expects of its Government. We would welcome the opportunity to meet with your Committee to discuss how to best ensure that ethics matters are properly considered in Federal acquisitions.

If you have any questions or would like OGE to provide additional information or comments, please contact me at 202-482-9292, or Allison George at 202-482-9242.

Sincerely,



Marilyn L. Glynn
Acting Director

cc: Stuart Bender
Assistant General Counsel
Office of Management and Budget