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Chapter 1

Ethics, Fraud Indicators, Standards of Conduct, and Procurement Integrity



Key Points

- Ethics are vitally important, particularly in the contingency environment because of the cultural differences.
- You must strictly avoid any conflict of interest—or even the appearance of a conflict of interest.
- You must not forget that your duty is to the US government, DoD, and your customer.
- You may not accept any gift because of your official position, and you may not accept any gift from a contractor, potential contractor, or partnering contractor.
- There are very limited exceptions to the gift prohibition. You must document unavoidable violations and report them to counsel immediately.
- DoD will not tolerate any form of human trafficking or forced labor by any of its contractors or contractor personnel.
- If you are ever in doubt, contact your legal advisor, and notify your chain of command.

Introduction

The need to maintain high ethical standards and procurement integrity is always important for DoD contracting officers. However, this requirement can be even more challenging in a deployed environment where the expectations and business habits of local suppliers can be affected by varying cultural, political, and economic conditions.

1 Most of the information in this chapter was taken from Defense Acquisition University (DAU) CLC 114, Contingency Contracting Refresher Module, and DAU CLM 049, Procurement Fraud Indicators. Supplementary information was provided by the Office of Counsel for the Commandant of the Marine Corps and the Air Force Logistics Management Agency.

The pressures to meet mission requirements can be even more intense in a contingency contracting environment. If you are not vigilant, these pressures can cloud your judgment about the right way to conduct yourself and represent the US and DoD. Two of the biggest responsibilities of a contingency contracting officer (CCO) are as follows:

- Effectively communicate customer needs to the supplier.
- Establish a solid working relationship with the customer. Remember that CCOs and contractors can have competing interests. In some respects, the US government's interests may be directly opposed to the interests of the contractor. Therefore, as protectors of US government interests, you must remember that your duty is to the US government and DoD.

Most suppliers in the contingency environment, particularly in locations where US forces have an established presence, understand the ethics and integrity-related restrictions placed on DoD contracting officers. However, CCOs might be offered souvenirs to take home after their tours—or even a welcome gift when they arrive—in a possible attempt to gain favor. In these cases, CCOs must clearly understand the items that they can and cannot accept.

Tenets of Government Service

Executive Order 12731 establishes 14 basic tenets of government service, codified in 5 CFR 2635.101:

- You must place loyalty to the US Constitution and the law above your private gain.
- You shall not hold financial interests that conflict with your official duties.

- You shall not engage in financial transactions using nonpublic information and shall not permit the release of such information for any improper use.
- You shall not solicit or accept any gift from any person or entity seeking official action from, or doing business with, DoD or its elements.
- You must put forth honest efforts in the performance of your duties.
- You shall not knowingly make unauthorized commitments or promises that bind the government without authority.
- You shall not use public office for private gain.
- You shall act impartially and shall not give preferential treatment to any person or entity.
- You must protect and conserve government property, using it only for authorized purposes.
- You shall not seek outside employment or engage in outside activities that conflict with official duties.
- You shall disclose fraud, waste, abuse, and corruption to appropriate authorities.
- You must act in good faith in satisfying the obligations of citizenship, including paying just financial obligations and taxes.
- You shall adhere to all laws that provide equal opportunity for all Americans regardless of race, color, religion, sex, national origin, age, or disability.
- You shall endeavor to avoid any actions that create the appearance of unethical conduct from the perspective of a reasonable person.

Conflict of Interest

One of the most basic ethical and legal principles is that CCOs may not take official action on a matter that could affect their personal interests, as noted in Section 208 of Title 18 of the United States Code (*18 U.S.C. Section 208*). Thus, the ethics rule prohibits an employee from participating personally and substantially in an official capacity in any matter in which that employee—or any person whose interests are imputed (i.e. connected) to that employee—has a financial interest if that matter will have a direct and predictable effect on that interest. In other words, the ethics rule requires the following:

- If you are officially involved in a matter that could affect your own financial interests, or those of someone you are related to or associated with, you must not act on that matter in your official capacity.
- If your official involvement creates even the appearance of a conflict of interest to a reasonable person, you should remove yourself from considering that matter—or at a minimum seek legal advice.
- Conflicts of interest represent one of the very few areas of the law where you do not have to be guilty to find yourself in trouble—even the appearance of guilt can create problems, so appearances count.
- When conflicts of interest arise, the conventional ways of handling them, with advice from an ethics counselor, include (1) disqualification or recusal (i.e., stepping aside from decisions that could affect your financial interests); (2) waivers of disqualification (i.e., continuing your involvement, but only with full disclosure to, and permission from, agency officials); and (3) divestiture (i.e., removing the financial interest that creates the conflict, which often involves selling the financial interest at issue).

Gift Prohibition

The overarching rule about accepting gifts from contractor employees is specified in Part 18 of the Federal Acquisition Regulation (FAR) (*FAR Part 18*) and *FAR 3.101-2*. CCOs must remember that “the general rule is to avoid strictly any conflict of interest or even the appearance of a conflict of interest in government-contractor relationships” (*FAR 3.101-1*).

Federal employees are prohibited from soliciting or accepting gifts offered because of the employee’s official position or gifts offered by a prohibited source. A gift or gratuity may be anything of monetary value, including things such as discounts, favors, entertainment, hospitality, and loans. (*5 C.F.R. 2635.203(b)* and *FAR 3.101-2*) A prohibited source can be a company doing business or seeking to do business with the federal government, including contractors, partnering contractors, prospective contractors, employees, agents, and representatives. (*5 C.F.R. 2635.203(d)*)

Several exceptions to these rules regarding gift acceptance are relevant to CCOs (other exceptions exist, but these are the most applicable).

First, you may accept gifts from a prohibited source with a face value up to a total of \$50 per calendar year, but any gifts on a single occasion must not exceed \$20 in value. Additional details and hypothetical scenarios are detailed in *5 C.F.R. 2635.204(a)*. Deployed commanders may implement additional restrictions.

Second, when in a foreign area you “may accept food, refreshments, or entertainment in the course of a breakfast, luncheon, dinner, or other meeting or event” if all of the following conditions are met (*5 C.F.R. 2635.204(i)(1)-(4)*):

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- The market value, converted to US dollars, does not exceed the per diem rate for the foreign area, as specified in the Department of State maximum per diem allowances for foreign areas, available at http://aoprals.state.gov/web920/per_diem.asp.
- Non-US citizens or representatives of foreign governments or other foreign entities participate in the meeting or event.
- Attendance at the meeting or event is part of the employee's official duties.
- The gift of meals, refreshments, or entertainment is from a person other than a foreign government.

The Anti-Kickback Act of 1986 “prohibits actual or attempted kickback payments or offers to provide kickbacks, which include any money, fees, commission, credit, gift, gratuity, thing of value, or compensation of any kind, to include obtaining or rewarding favorable treatment,” as specified in *41 U.S.C. Section 54 et seq.* Moreover, the U.S.C., Uniform Code of Military Justice (UCMJ), and US Department of Justice all specify, “Any person who knowingly and willfully engages in conduct prohibited [by the Anti-Kickback Act] shall be imprisoned for not more than 10 years or shall be subject to a fine ... or both.” (*41 U.S.C. Section 54; UCMJ Articles 92 and 134; US Department of Justice Criminal Resource Manual*)

CCOs must never solicit gifts of any type, regardless of their nature or dollar value. They must understand that a bribe occurs when someone “directly or indirectly gives, offers, or promises anything of value to any public official, former public official, or person selected to be a public official, for or because of any official act performed or to be performed by such public official.” Giving or accepting a bribe is a crime punishable by a fine, imprisonment, or both. (*18 U.S.C. Section 201; UCMJ Articles 92 and 134*)

Reporting of Gifts

If a gratuity is delivered to you (e.g., left on your desk or in your car), you must make every attempt to return it. If a contractor insists on giving a gratuity, you must do one of the following:

- Attempt to persuade the contractor to take back the gratuity. Explain to the contractor that you cannot accept gratuities as a US procurement official, and note the repercussions you could face for accepting the gratuity.
- Pay the fair market value of the item.
- As a last resort, if the contractor appears to be offended, accept the gratuity, contact legal counsel immediately, and take the following actions: (1) once it is accepted, safeguard the gratuity and, if necessary, notify the finance officer to put it in a safe and ask for a receipt from the finance officer; (2) turn the gratuity over to legal counsel; and (3) write a memorandum for the record (MFR) that includes the circumstances and approximate value of the item. In addition, mention in the MFR that legal advice was obtained.
- If the gratuity is perishable (e.g., food or flowers), give the gift to a charity, or share it within the office.

If ever in any doubt about what you should or should not accept, consult your organization's legal office or ethics advisor and your chain of command.

Combating Trafficking in Persons

CCOs might encounter situations in which local vendors are willing to supply escorts as a form of gratuity, kickback, bribery, or compensation. Human trafficking includes the act of recruiting, harboring, transporting, providing, or obtaining a person for labor

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services or commercial sex acts through force, fraud, or coercion, for the purpose of exploitation, involuntary servitude, peonage, debt bondage, or slavery. Sex trafficking is defined as “the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act.” (*FAR 22.1702; 10 U.S.C. Section 7104*)

There are specific implications for CCOs. *FAR 22.17*, 222.17 of the Defense Federal Acquisition Regulation Supplement (*DFARS 222.17*), and DFARS Procedures, Guidance, and Information (PGI) 222.17 (*DFARS PGI 222.17*) provide policy and guidance applicable to all contracts. If faced with a situation involving sex trafficking, CCOs should immediately inform the relevant chain of command and legal counsel. CCOs should take immediate action to impose suitable remedies (including termination) on contractors that support or promote trafficking or that fail to monitor the conduct of their employees and subcontractors with regard to trafficking in persons (TIP).

The US government does not tolerate any form of TIP or forced labor. As DoD *DFARS PGI 222.1703(ii)* states, “...trafficking includes involuntary servitude and debt bondage. These trafficking practices will not be tolerated in DoD contractor organizations or their subcontractors in supporting DoD operations.”

The contractor is responsible for knowing its employees’ activities and for complying with US policy on combating trafficking in persons (CTIP). *FAR clause 52.222-50*, “Combating Trafficking in Persons,” is a required provision in all solicitations and contracts. The CCO holds responsibility for maintaining surveillance over contractor compliance with TIP requirements. (*DFARS 242.302*) Violations can be reported online at <http://ctip.defense.gov/>.

Identification of Fraud Indicators²

Fraud is the misrepresentation of a material fact with the intent to deceive. Fraud includes the following:

- Deliberate omission of material facts
- False or misleading representations.

Fraud can be a single act or a combination of circumstances, can be the suppression of truth or the suggestion of what is false, or can occur by direct falsehood or through innuendo, speech, silence, word of mouth, or look or gesture.

Contracting officers play a vital role in the identification, prevention, and reporting of fraud. Contracting officers have an obligation to report any suspected violation or wrongdoing. Contracting officers should provide training on basic fraud awareness, identification, prevention, and reporting for contracting officer's representatives (CORs), quality assurance evaluators (QAEs), field ordering officers, and governmentwide commercial purchase card holders during their initial and refresher training classes. Training representatives on the front lines will increase the number of trained sensors to detect and prevent fraud.

Common Fraud Offenses

Common fraud offenses include the following:

- Bribery, kickbacks, and gratuities
- Making or use of a false statement
- False making or alteration of a document

² Content is taken from information produced by the Fraud Integrated Process Team and from the "DoD Fraud, Waste, and Abuse Hotline" trifold brochure.

- Making or presentation of a false claim
- Companies that conduct business under several names
- Collusive bidding (bid rigging)
- Conflicts of interest
- Conspiracy to defraud
- Disclosure of proprietary data or source selection sensitive information
- Insufficient delivery of contracted items
- Intentional failure to meet specifications (e.g., contractor use of one coat of paint instead of two, watered loads of concrete, inferior memory chips in computers, inferior automobile replacement parts), recognizing that not all failures to meet contract specifications constitute crimes and that a CCO therefore should seek legal counsel on any suspected contract fraud.

Common Fraud Schemes

Common fraud schemes include the following:

- Rigged specifications, such as the requesting organization tailoring specifications to meet the qualifications of one company, supplier, or product.
- Unvarying patterns in small purchases, such as a buyer awarding contracts to favored vendors without soliciting competitive offers from additional firms. The buyer also might be entering fictitious competitive quotations and consistently awarding to a favored vendor at inflated prices.

- Splitting of large requirements, such as contracting or requiring activity personnel dividing requirements into small purchase orders to avoid the scrutiny required for contracts with a larger dollar value.
- Duplicate payment, such as a vendor submitting the original voucher for payment while the purchaser, acting alone or in collusion with the vendor, collects for the same item from the cash fund.
- Overstatement of shipment weights, such as carriers defrauding the government by artificially inflating the weight of a shipment by using methods such as (1) fuel bumping, or getting the tare weight with less than a full tank of gas, but the gross weight with a full tank; (2) double billing on small shipments (500 to 3,000 pounds), or getting two tare-weight tickets for the truck, picking up the two small shipments, getting two gross-weight tickets for the combined weight of both shipments, and then submitting both tickets for payment; and (3) false weights, or either paying the weight master to provide a false weight ticket or maintaining a supply of blank tickets (usually with a subsequently handwritten rather than printed weight) or a stock of false weight tickets.
- Counterfeit parts rather than genuine parts (a wide variety of counterfeit parts have been known to infiltrate the DoD supply chain, from tools to electronics).
- Emotional bribery, such as a government contracting specialist and a vendor representative becoming friends and the vendor using this friendship to unduly influence the CCO.

Situations that Enable Fraud

Acts of fraud are enabled by many situations, such as the following:

- Failure to properly monitor contract performance

- No acquisition checks and balances, such as personnel who control both the ordering and receiving functions and can arrange for diversion of supplies or services for their own benefit
- Poorly defined specifications
- Poor physical security
- Receipt of items that cannot be traced to a valid requisition and thus could have been ordered for personal use or resale, with the resulting paperwork destroyed.

Common Fraud Indicators

Common indicators of fraud include the following:

- Frequent complaints by users of supplies or services
- Government estimates and contract award prices that are consistently very close
- Contractor complaints of late payment by the agency
- Abnormal increase in consumption of fuel or supply items
- Failure to deobligate cancelled purchase orders
- Excessive number of photocopies of invoices in file, such as (1) approved invoices altered with whiteout or similar correction fluid (which might indicate that the invoice had been copied and the original destroyed in an attempt to manipulate the audit trail or commit fraud via the alteration), which requires follow-up to secure external and internal copies for comparison; or (2) duplicate copies of supplier invoices, which could indicate the possibility of multiple payments of the same invoice and possibly diverted checks

- Less than adequate consideration, such as sale or transfer of assets for apparently less than adequate consideration, which might indicate a sham transaction that is not based in economic reality and thus should be questioned (because businesses exist to make a profit and should not contravene that goal).

The deployed office must have a list of contractors and vendors that have been identified as companies that CCOs should **not** do business with because of fraudulent behavior or performance discrepancies. CCOs must make an effort to update this list as needed.

CCOs have an obligation to report any suspected violation or wrongdoing to the appropriate chain of command and to the nearest investigative agency. Some of the lead investigators and contacts for reported fraud include the Air Force Office of Special Investigations (AFOSI); Naval Criminal Investigation Service (NCIS); US Army Criminal Investigation Command (CID), Major Procurement Fraud Unit (MPFU), 701st Military Police (MP) Brigade; Defense Contract Audit Agency (DCAA); Defense Contract Management Agency (DCMA); Defense Criminal Investigative Service (DCIS); and US Army Audit Agency. CCOs can contact these agencies as follows:

AFOSI: <http://www.osi.andrews.af.mil/units/>

NCIS: <http://www.ncis.navy.mil/>

CID: <http://www.cid.army.mil/>

DCAA: <http://www.dcaa.mil/>

DCMA: <http://www.dcmamail.com/>

DCIS: <http://www.dodig.mil/>

DoD Fraud, Waste, and Abuse Hotline:

Telephone: 800-424-9098

Email: hotline@dodig.mil

Web address: <http://www.dodig.mil/HOTLINE>

Interactions with Contractor Employees

A personal services contract is characterized by the employer-employee relationship it creates between the government and the contractor personnel. The government is normally required to obtain its employees by direct hire under competitive appointment or other procedures required by US Civil Service laws. Obtaining personal services by contract (rather than by direct hire) circumvents those laws unless Congress has specifically authorized acquisition of such services by contract.

CCOs or CORs who might interact daily with contractor employees must keep in mind that they are not government employees. The terms and conditions of the contract define the obligations of each party and the contractor's performance requirements. It is important to understand that federal and DoD standards of conduct do not apply to contractor employees, so CCOs must not do the following:

- Interfere in contractor-employee relations
- Allow work outside the scope of the performance work statement
- Permit work before the obligation of funding
- Establish specific hours of duty or grant and deny leave requests.

In addition, CCOs may *not* mandate any contractor personnel actions without specific contractual authority to do so, including the following:

- Tell contractors who to hire or promote
- Reassign contractor employees
- Discipline contractor employees.

However, *DFARS 237.104* (referencing *10 U.S.C. Section 129b*) provides limited authority to acquire the personal services of expert consultants if the following conditions are met and documented in a determination and finding document:

- The duties are of a temporary or intermittent nature.
- Acquisition of the services is advantageous to the national defense.
- DoD personnel with necessary skills are not available.
- Excepted appointment cannot be obtained.
- A nonpersonal services contract is not practicable.
- Statutory authority, *5 U.S.C. Section 3109*, and other legislation apply.
- Any other determination required by statute that has been made.

Professional friendships are not prohibited; however, you must act impartially and show no favoritism or preferential treatment. Although personal friendships are not prohibited, they may result in the *appearance* of a conflict of interest. Government employees cannot personally make recommendations or provide references for contractors except when furnishing past performance information to other agencies.

Chapter 6 addresses other ethical considerations relevant to contract administration.

Checks and Balances

It is of paramount importance that a system to ensure checks and balances is implemented in the daily routine to fulfill CCO obligations and prevent opportunities for fraudulent activity. To illustrate checks and balances that should be considered, CCOs should not be tasked to perform the following duties unless no other option is available:

- **Order and receipt of goods.** It is common practice for the person who orders goods to also receive the goods. This is not the ideal scenario, but it is common in deployed locations. You should take steps to ensure that documentation (including customer signatures and contact information) is obtained once you turn over possession of received goods, and you should immediately add this documentation to the contract file.
- **Paying agent duties.** In some situations, the CCO may be required to serve as both the CCO and the paying agent. In such a case, make sure that you logically track every cent spent (e.g., in a spreadsheet or log). Complete this tracking as soon as possible so that you do not have to rely on your memory of purchased items—and always file all receipts for transactions. You also must ensure that each day you reconcile the procurement instrument identification number (PIIN) log with the records of your finance organization counterpart to avoid discrepancies.
- **QAE and COR oversight.** You are responsible for many QAE and COR actions. It is important that a reporting system is in place to ensure fair and proper evaluation and that the contract representative provides direction.

Many other checks and balances could be discussed, but the preceding examples illustrate common-sense scenarios. You have an obligation to protect the taxpayer, the warfighters, and yourself. You protect the taxpayer by using sound judgment when spending taxpayer dollars. You protect the warfighters by providing goods, services, and awards that are sufficient to meet their needs. You protect yourself by preserving all the documentation necessary to back up your sound judgment and acquisitions.

Website and DVD Materials Related to Chapter 1

- [Chapter 1 PowerPoint Briefing](#)
- [Chapter 1 Test Questions](#)
- [Trainings Related to Chapter 1](#)
- [Scenarios Related to Chapter 1](#)
- [Additional Text Related to Chapter 1](#)
 - » [DoD Inspector General Report 2012-134 \(Sept. 2012\)](#)
- [Topical Index Webpages](#)
 - » [Conflicts of Interest](#)
 - » [Cultural Awareness](#)
 - » [Ethics](#)
 - » [Government Estimates](#)
 - » [Quality Assurance](#)
- [Publications and Regulations](#)
 - » [DoD 5500.07-R Joint Ethics Regulation](#)