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THE REVOLVING DOOR RULES

**Certifying Compliance with
DOD's Requirements for Hiring
Current or Former DOD Officials**

Since there is no official **DOD** guidance on compliance with the new *DFARS* revolving door rules, this article offers a 10-item list for **DOD** contractors to develop a revolving door compliance program.

BY
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Department of Defense (DOD) contractors have traditionally had stringent, but limited responsibilities when hiring current or former DOD officials. These responsibilities include “revolving door” requirements, which restrict former federal employees’ activities after they enter the private sector.

For example, contractors are prohibited from knowingly providing compensation to a covered DOD official within two years after the official leaves DOD service, without first determining that the official has sought and received (or has not received after 30 days of seeking) a written opinion from the appropriate DOD ethics counselor regarding the applicability of post-employment restrictions.¹ Government contractors are also expected to comply with post-employment laws and regulations under the general business ethics and conduct requirements.² However, within the last year, DOD instituted stricter rules around the revolving door requirements in the *Defense Federal Acquisition Regulation Supplement (DFARS)*,³ effective November 18, 2011. The new *DFARS* revolving door rules require DOD contractors who bid on DOD contracts, including task and delivery orders and commercial item acquisitions, to actually certify compliance with the federal revolving door laws and regulations.

Revolving Door Requirements on DOD Contractors

The “revolving door” laws and regulations include the following:

- Restrictions that limit former officers, employees, and elected officials of the executive and legislative branches appearing before their former agencies or working on matters that were under their “official responsibility” while employed by the U.S. government for a defined “cooling off” period⁴;
- Restrictions on former officials’ acceptance of compensation from contractors, as previously mentioned⁵;
- Regulations concerning post-employment conflict of interest restrictions,⁶ which include administrative enforcement provisions; and
- *Federal Acquisition Regulation (FAR)* 3.104-2, which provides a summary of relevant procurement integrity statutes and regulations, including the post-employment restrictions.

The new revolving door certification requires DOD contractors to sign a representation for each proposal submitted that states:

By submission of this offer, the offeror represents, to the best of its knowledge and belief, that all *covered DOD officials* employed by or otherwise receiving compensation from the offeror, and who are expected to undertake activities on behalf of the offeror for any resulting contract, are presently in compliance with all post-employment restrictions covered by 18 U.S.C. 207, 41 U.S.C. 2101-2107, and 5 C.F.R. parts 2637 and 2641, including *Federal Acquisition Regulation* 3.104.2.⁷

What Does this Mean for DOD Contractors?

The good news is this applies to a subset of DOD officials; specifically, those officials who left DOD on or after January 28, 2008, and either 1) participated personally and substantially in an acquisition with a value in excess of \$10 million and who served in specifically highlighted positions (Executive Schedule, Senior Executive Service, or general or flag officer position); or 2) who served within DOD as a program manager, deputy program manager, procuring contracting officer, administrative contracting officer, source selection authority, member of the source selection evaluation board, or as a chief of a financial or technical evaluation team for a contract in an amount in excess of \$10 million.

How Should Government Contractors Comply?

The *DFARS* revolving door rules provide little guidance on how to comply with the new requirements. It is left up to the DOD contractors to figure it all out. Historically, government contractors have conducted some type of informal review as part of their due diligence when interviewing current or former federal employees for positions with their companies. The new rules seem to require DOD contractors to go one step fur-

ther—to not only perform some type of due diligence in-house to validate compliance, but to also have some way to document their compliance in some fashion to ensure that their representations and certifications are supported by actual documented proof. In short, DOD contractors need to implement a more formal revolving door compliance program.

The following is a 10-item revolving door compliance list that DOD contractors should consider following in order to comply with the revolving door requirements.

1. Risk Assessment

Do a risk assessment of your current processes to see if you have all the information you need on your former DOD employees. As a suggestion, while you are doing this assessment, take a look at your current employee population and figure out how many of your employees are former federal employees. This way, when you implement a solution to capture the DOD requirement, you can decide whether it should include your entire former federal employee population or just the covered DOD employees.

2. Collection Point

Assess where and what your collection point is for this information. Review or draft a new employee candidate application form capturing information about a candidate's employment history, including all current or former federal employment. Make sure your employee candidate application form covers all of the applicable post-government restrictions. For your current employee population, put out a survey of sorts to capture this information if you don't already have this information.

3. Policy or Procedure

Draft a policy or procedure regarding the hiring of former government employees. You should assign responsibility for vetting current or former federal employee candidates for

positions within your company. The individual responsible for vetting these candidates can be your head of human resources, your general counsel, or possibly a chief ethics and compliance officer.

4. Ensure Recusals

Before you interview a current federal employee candidate, make sure that he or she has done the necessary recusals with his or her respective government agency. In other words, current federal employees should recuse themselves from any matters involving your company (assuming they interact with your company in their official capacity) before meeting with you to discuss employment opportunities.

5. Specificity Letter

Before hiring a current or former federal employee, make sure that he or she provides you a copy of his or her ethics specificity letter. This is not the letter that says, "here are the rules, know them"; but rather, this is the letter that is issued by the designated agency ethics official (or designee) for the government agency where the current or former federal employee works. The letter specifically describes the government work the employee did, compares it to the work he or she anticipates doing for you, and provides a determination of sorts if a conflict exists (hence the term "specificity letter").

6. Technology

Utilize a technology solution that allows you to manage your employee information so that you are set at proposal time and your company can provide the necessary representations and certifications with the revolving door restrictions with some comfort. Ideally, you will have a technology system that can be customized for your needs and that tracks the revolving door information about your employees. Ensure that your proposal team can access this information to ensure that key personnel listed in a proposal or other employees identified to work on a

contract (if awarded) do not have any post-employment/revolving door conflicts that need to be disclosed to the government.

7. Training

Provide training to your human resources department (including your recruiters), senior management, business development, proposal team, and compliance team on the nuances of the revolving door laws and regulations. Also, provide training to your former federal employee workforce, reminding them of the various post-employment restrictions and the need for them to self-identify if there is an issue. Training on this topic should be covered annually, but does not need to be lengthy; rather, just a few slides slipped into a compliance and ethics training session or some type of communication to your employees refreshing them on the revolving door rules.

8. Do Your Math

Calculate all of the necessary "cooling off" periods for current and new hires to ensure compliance with these post-employment/revolving door requirements. If at all possible, track this information in a searchable database that can be referred to when completing a representation and certification to DOD regarding the revolving door.

9. Communicate

Provide information regarding the revolving door rules and the need for 100-percent company compliance in some type of employee communication message or in some type of compliance and ethics training.

10. Appoint "Ambassadors of Compliance"

You should appoint "ambassadors of compliance" in each of your business units and support services groups so employees have a point person to ask questions regarding the revolving door requirements. Your ambassadors of

compliance can also keep their ears to the ground regarding the revolving door issues or, for that matter, any other compliance or ethics issue. Remember, compliance is not just the responsibility of the chief ethics and compliance officer, chief executive officer, or senior management, but is the company's (including all employees') responsibility.

Conclusion

Government contractors need to understand that the representations and certifications required are not an option. Noncompliance has terrible consequences. The consequences can result in rejected invoices and cancelled contracts. Other possibilities include potential False Claims Act suits, bid protests, and suspension or debarment proceedings. As a DOD contractor, you should review the compliance list presented in this article, and see what you need to do to comply with the revolving door requirements.

Remember, what starts in the *DFARS* sometimes leads to full implementation in the *FAR*, so government contractors need to be prepared for the "FAR creep" and that this requirement will be a requirement for all government contracts, not just DOD. To err on the safe side, have all your former federal employees captured in your database, which will make sure that the *FAR* creep does not happen or, if it does, you won't need to go back and "reinvent the wheel" to capture the rest of your former federal employee population. **CM**

automating compliance challenges such as personal conflicts of interest, revolving door issues, and compliance management.

The views in this article are solely those of the author.

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ENDNOTES

1. As per *Defense Federal Acquisition Regulation Supplement (DFARS)* 252.203-7000.
2. See *Federal Acquisition Regulation (FAR)* 52.203-13.
3. *DFARS* 252.203-7005.
4. 18 U.S.C. 207.
5. As per the *Procurement Integrity Act*, now codified at 41 U.S.C. 2101-2107.
6. See the *Office of Government Ethics Regulations*, 5 C.F.R. 2637, 2641.
7. See note 3, emphasis added.

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