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**SESSION GUIDE**  
**SEASON 2023, EPISODE TWO**  
**January 25, 2023**  
**FAR PART 3:**  
**ETHICS IN GOVERNMENT CONTRACTING**

## **I. Introduction**

As the Federal Government in 2020 spent more than \$655 billion in annual contract expenditures, it's no surprise that contractors and the Government must follow the highest ethical standards. The Government takes a strong interest in protecting the expenditure of public funds from waste, fraud, and abuse. **FAR Part 3** lays out the specific ethical standards that both Government and contractor personnel must follow. It also prescribes rules and procedures for identifying and overcoming unethical business practices. Throughout this chapter, consider which underlying values from **1.102-2** justify the rules in **Part 3**. Also, as we learn about these issues, remember that the Government procurement system is sometimes very different from private commercial contracting. Some practices that are commonplace—and even encouraged! —in the private sector are expressly illegal in the public sector. So, if you frequently work in the private sector, you'll want to really keep an eye out for those differences.

It's also important to remember that like other parts of the FAR, **FAR Part 3** incorporates a number of other legal authorities. These include federal criminal statutes, executive orders, other agency supplemental acquisition regulations, and guidance promulgated by the Office of Government Ethics (OGE). Contractors and Government personnel should become familiar with and follow these additional rules. Because these other sources of authority are often referred to only by citation (e.g., **5 CFR 2635**, Standards of Ethical Conduct for Employees of the Executive Branch), it is critical to access them regularly and know the full context of these authorities when engaging under a federal procurement.

### **A. Ethics in Government Contracting: Improper Business Practices and Personal Conflicts of Interest**

Ethical business practices are fundamental to our procurement system. The FAR “prescribes policies and procedures for avoiding improper business practices and personal conflicts of interest and dealing with their apparent or actual occurrence.” **3.000**. The FAR sets the ethical bar high, stating, “Government business shall be conducted in a manner above reproach... with complete impartiality and with preferential treatment for none.” Consistent with this standard, the FAR prohibits the following conduct:

- Soliciting, giving, or receiving bribes or kickbacks
- Impermissibly limiting competition
- “Buying-In”
- Paying improper contingent fees
- Improperly restricting subcontractor participation in Government programs
- Improperly disclosing or obtaining sensitive Government information or proprietary contractor information

- Improperly recruiting or hiring former or current Government employees
- Using federal funds to influence federal transactions
- Whistleblower retaliation

To ensure that contractors and the Government meet ethical standards, the FAR requires proactive measures to avoid even the “appearance of impropriety”. When performing certain functions for the Government, contractors must sign certifications stating they are aware of special ethical requirements. They must also protect sensitive information that, if released, could prejudice the Government’s award decision. Further, they must establish “compliance programs” that ensure adherence to the FAR’s standards and other statutory requirements. Certain Government officials subject to post employment restrictions (**3.104**) may not participate in the procurement process, and all Government officials should regularly seek ethical guidance from Designated Agency Ethics Officials (DAEOs).

The FAR states that contractor and Government personnel should act in a manner such that they “would have no reluctance to make a full public disclosure of their actions.” **3.101-1**. In other words, it’s helpful to consider this simple question before acting: How would I feel if the Washington Post published a story about my action on the front page tomorrow morning? While this “Washington Post” test is not perfect, it provides a good guideline as to when you should consult with your organization’s ethics or legal advisor. With that in mind, let’s look at a few “Thou Shalt Nots” of government contracting!

## **II. THOU SHALT NOT: GOVERNMENT & CONTRACTOR ETHICAL STANDARDS**

### **A. Thou Shalt Not Pay or Ask for Bribes or Gratuities**

According to **3.101-2**, a Government employee is prohibited from directly or indirectly soliciting or accepting a gift, favor, entertainment, gratuity, or anything of value from individuals or organizations who:

- Have sought or are seeking to obtain business from the government official’s agency,
- Conduct business that is regulated by the government official’s agency, or
- Have interests affected by the official’s activity at the agency

The scope of the prohibition is intentionally broad. It clearly provides a restriction far beyond the receipt of large amounts of cash, a high-priced dinner, or a trip abroad for a round of golf at an expensive golf resort. Note that those who offer or receive illegal gifts and gratuities may also be subject to criminal sanctions under **18 U.S.C. 201**, bribery of public officials and witnesses. The FAR notes that there are some limited exceptions to this broad rule. The author of these exceptions is the OGE, which we mentioned above. An explanation of each exception can be found at **5 CFR 2635.204**. Despite these exceptions, many contractors establish rules that categorically prohibit the giving or receiving of *any* gifts or gratuities during the solicitation or performance of a contract, since it’s often simpler to completely ban these practices instead of keep up with all the rules and exceptions. Some contractors also require preapproval for giving or receiving gifts or gratuities.

*Question 1* – Government employees are allowed to accept certain “low-valued” gifts in certain circumstances. What are the specific dollar thresholds identified by the Office of Government Ethics that are used to determine whether a gift is permissible? [Hint: check out **5 CFR 2635.204**]

## **B. Thou Shalt Not Improperly Restrict Competition**

There are a lot of ways in which contractor and Government personnel can improperly restrict competition. In general, most improper restriction of competition will boil down to an antitrust violation. The two main improper restrictions that come into play are sharing of pricing information and impermissibly limiting competition. Sharing pricing information with competitors may violate federal antitrust law and the FAR specifically requires that contractors certify that pricing has *not* been shared with a competitor during most federal procurements. **52.203-2**. Other activities that may create an actual violation or appearance of an anti-trust violation include:

- Bid rotation (called “rotated low bids” in the FAR)
- Collusive bidding
- Follow-the-leader pricing
- Collusive price estimating systems
- “Sharing of the business”

Note that simply planning to engage in these activities – even if never put into action – may cause a violation to occur.

## **C. Thou Shalt Not Pay Improper Contingent Fees**

A “contingent fee” is a commission percentage, brokerage, or other fee that is contingent upon securing the award of a federal Government contract. The FAR prohibits these fees because they could improperly influence an award decision. However, the FAR allows payment of contingent fees (e.g., sales commissions) to “bona fide employees” or “bona fide agencies.” These terms are defined in **3.401**.

*Question 2* – What is an *improper influence* and how does it relate to *bona fide agencies*? [Hint: Check out **FAR 3.401**]

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#### **D. Thou Shalt Not Give or Receive Kickbacks**

A kickback is the provision of a thing of value between a subcontractor and prime contractor in exchange for favorable treatment on a prime or subcontract. The Anti-Kickback Act, from which the language in **3.502** draws, provides for criminal and civil sanctions upon a finding of a violation. (**41 U.S.C. §§ 8706 and 8707**). Like many of the other provisions of this section, the Anti-Kickback Clause is not required for procurements under the simplified acquisition threshold or for commercial items. That fact, however, does not relieve a contractor of liability in the event an illegal kickback is uncovered. Although not required by law, contractors should consider applying anti-kickback policies in both their commercial and government contract supply chain management policies.

*Question 3 – Prime Contractor NoCompass, Inc. invites the CEO and Director of Contracts of one of its major subcontractor to its annual holiday party. The per head price for this party is \$500. Is this invitation a prohibited kickback under the Anti-Kickback Act of 1986? Why or why not?*

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#### **E. Thou Shalt Not Improperly Disclose or Use Sensitive Government or Proprietary Contractor Information**

Contracting officers and other Government employees must protect certain types of information that, if released, could harm the procurement process. These rules, like the hiring restrictions addressed below, arose from an investigation in the 1980s, called “Operation Ill Wind.” They were implemented under what is known as the Procurement Integrity Act.

*Question 4 – Where in FAR Part 3 can you find the requirements for protecting contractor *proposals and source selection information*? What must the contractor do to ensure that its proposal information is properly protected in a FAR Part 15 procurement?*

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#### **F. Thou Shalt Not Improperly Recruit or Hire a Government Employee**

Contacts between the Government and contractors present opportunities for improper influence, including offers of future employment to Government personnel in exchange for preferential treatment. The Procurement Integrity Act requires that all “employment contacts” be strictly regulated during a federal acquisition. This part of the law is fully described in **3.104**.

There are a few steps contractors can take when hiring current or recent Government employees. Prior to hiring any current or recent Government employee, the contractor should find out if the Government employee has worked on a procurement valued in excess of \$10 million that involved its company. If he has, the contractor should request that, as a precondition of hire, the Government employee provide a written determination from his DAEO. The determination should state that the employee is eligible to be hired by the contractor organization, and explain whether any “representational restrictions” exist. Taking this action will inform all parties of any “personal conflict of interest” or representation restrictions. Note that criminal penalties may also apply to violations of the rules in **3.104**.

*Question 5 – Identify the types of government officials who may be subject to a 1 year hiring ban following the award of a \$10M contract? [Hint: check out **3.104-3**]*

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### **III. PROTECTING WHISTLEBLOWERS: Thou Shalt Not Retaliate Against Whistleblowers**

The Whistleblower Protection Act protects contractor employees who disclose a “substantial violation of law related to a contract” from retaliation. Employees who face retaliation should contact the appropriate agency Inspector General, *not* the CO. But what’s an Inspector General? In the Inspectors General Act of 1978, Congress required that each federal agency appoint an independent Inspector General (IG) to guard against waste, fraud, and abuse, including ensuring agency compliance with the FAR and other acquisition regulations and statutes.

*Question 6 – What remedies may the Government grant upon determining that a contractor has subjected one of its employees to a reprisal for providing information related to a federal procurement or contract to a Member of Congress, or an authorized official of an agency or of the Department of Justice? [Hint: Check out **FAR 3.906**]*

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### **IV. CODE OF BUSINESS CONDUCT AND ETHICS:**

#### **Thou *Shalt* (!) Establish Adequate Codes of Conduct and Compliance Programs**

All contractors performing contracts with a value in excess of \$6 million and with a performance period in excess of 120 days *should* have a written code of business ethics and conduct, per **3.1002** and **3.1004**. They must also implement an “adequate” compliance internal control system, per **52.203-13**. Even for contractors below the time or money threshold, it is a good practice to develop and widely disseminate a written code, and to take active steps to train personnel to comply with that code. In addition to

reducing the likelihood of bad behavior, taking such actions can help mitigate a company's legal and financial exposure in the event an employee decides to go rogue.

*Question 7* – A Contractor subject to the requirements of **FAR 52.203-13(c)** (Contractor Code of Business Ethics and Conduct) provides to its employees a copy of the company's Code of Business Conduct and Ethics on their first day of employment. Does this action alone provide sufficient proof that the contractor has established an adequate "business ethics awareness and compliance program."

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### Discussion Questions

1. Prime Contractor NoCompass, Inc. “promises to give” the contracting officer a large burlap sack full of fresh \$100 bills if they are awarded and receive a \$25,000,000 cost reimbursement contract. Which specific FAR contract clause prohibits this activity and, among other things, provides the Government the right to terminate the contract if, after a hearing, the facts above are shown to be true”? [Hint: Check out **FAR 3.202**]

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2. Urgently needing a profitable contract to recover their unreimbursed bribery expenses, NoCompass, Inc. intentionally submits an offer for IT services below cost. NoCompass’ strategy at the time of award was to recover the expected losses by increasing the contract amount through a series of excessively prices “change orders”. Is this business practice consistent with the FAR? Explain your answer. [Hint: Check out **FAR 3.5**]

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3. NoCompass, Inc. decides that they are not winning enough contracts, so they send a message to another government contracts -- MEGACORP -- seeking an agreement on bid prices for future government procurements issued by a common Government customer – the FDA. A NoCompass employee on the deal accidentally sends the email to an employee working for the FDA? What should the Government employee do with this information? [Hint: Check out **FAR 3.301**]

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4. An appointed official leaves the FDA. He waits three years and one day. Then, he begins a new job lobbying the FDA on behalf of a NoCompass, Inc. who assures them this behavior is permitted. Is this behavior permitted? Why? [Hint: See Resources generally, **Ethics Pledge**].

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5. Who has the authority to waive a “personal conflict of interest” as defined in FAR 3.11? [Hint: Check out **FAR 3.1104**]

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6. True or False? A government contractor is permitted to use profit or fee obtained under a federal government contract to pay any person for properly influencing or attempting to influence an officer or employee of an agency or Member of Congress. Explain your answer. [Hint: Check out **FAR 3.802**]

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## Answer Key

*Answer 1* – \$20 per gift. \$50 over a calendar year from an entire organization to an individual government employee.

*Answer 2* – It means any influence that induces or tends to induce a Government employee or officer to give consideration or to act regarding a Government contract on any basis other than the merits of the matter. Improper influence is specifically called out as something bona fide agencies do not exert.

*Answer 3* – No, the invitation is not a violation of the Anti-Kickback statute because the “gift/gratuity” was provided by a **prime contractor to a subcontractor**. As noted at FAR 3.5092-2(a), the answer might be different if the roles were reversed **AND** the subcontractor received some form of favorable treatment in connection with a federal government contract. Also note, that although not impermissible, the prime contractor here should be aware of the other’s corporate gift policies prior to offering the invitation to avoid any uncomfortable situations for the subcontractor personnel.

*Answer 4* – FAR 3.104-4. The contractor should properly mark its proposal documentation in accordance with 52.215-1(e).

*Answer 5* – Procuring contracting officer, the source selection authority, a member of a source selection evaluation board, the chief of a financial or technical evaluation, government, program manager, deputy program manager, or administrative contracting officer.

*Answer 6* – *If the head of the agency or designee determines that a contractor has subjected one of its employees to a reprisal for providing information to a Member of Congress, or an authorized official of an agency or of the Department of Justice, the head of the agency or designee may take one or more of the following actions:*

*(1) Order the contractor to take affirmative action to abate the reprisal.*

*(2) Order the contractor to reinstate the person to the position that the person held before the reprisal, together with the compensation (including back pay), employment benefits, and other terms and conditions of employment that would apply to the person in that position if the reprisal had not been taken.*

*(3) Order the contractor to pay the complainant an amount equal to the aggregate amount of all costs and expenses (including attorneys’ fees and expert witnesses’ fees) that were reasonably incurred by the complainant for, or in connection with, bringing the complaint regarding the reprisal.*

*Answer 7 – No.* The contractor must do more. According to FAR 52.203-13, the program must include (i) reasonable steps to communicate periodically and in a practical manner the Contractor's standards and procedures and other aspects of the Contractor's business ethics awareness and compliance program and internal control system, by conducting effective training programs and otherwise disseminating information appropriate to an individual's respective roles and responsibilities and (ii) The training conducted under this program shall be provided to the Contractor's principals and employees, and as appropriate, the Contractor's agents and subcontractors.

### **Discussion Questions Answer Key**

1. Contract clause 52.203-3 Gratuities (APR 1984)
2. This is “buying in” as described in 3.501-1(1). It is an improper business practice.
3. Agency personnel shall report, in accordance with agency regulations, evidence of suspected antitrust violations to the Attorney General’s Office and the agency office responsible for contractor debarment and suspension.
4. No. The Ethics pledge prohibits this behavior for 5 years after leaving.
5. The head of the contracting activity may impose conditions that provide mitigation of a personal conflict of interest or grant a waiver.
6. True. According to FAR 3.802(a)(1), the term federally appropriated funds does not include profit or fee from a cover Federal action.

## APPENDIX

All of the following materials are linked below to PCI's website or to an online link.

### [C2C Innovative Solutions, Inc. GAO Decision](#)

U.S. Government Accountability Office decision from July 30, 2018 regarding C2C Innovative Solutions, Inc. protest claiming that the agency failed to evaluate a potential impaired objectivity organizational conflict of interest and a potential unequal access to information organizational conflict of interest.

### [Ethics Pledge \(EO 13770\)](#)

A Government employee who is in an appointee position invested with public trust must commit themselves to the obligations stated and legally binding in the ethics pledge.

### [OGE Ethics Guidance](#)

Office of Government Ethics guidance concerning commonly asked questions and answers regarding ethics and working with contractors, issued August 2006 (and updated).

### [Sample Whistleblower Policy](#)

A sample of an organization or agency's whistleblower policy including provisions for reporting, no retaliation, compliance officer requirements, accounting and auditing matters, acting in good faith, handling violations, and confidentiality.

### [Standards of Ethical Conduct for Employees of the Executive Branch](#)

Final regulation issued by the Office of Government Ethics (OGE) regarding Executive Branch employees' ethics, codified in 5 C.F.R. Part 2635 and amended at 81 Fed. Reg. 81641 (January 2017).

### [FAR Part 3](#): Improper Business Practices and Personal Conflicts of Interest

### [FAR Part 52](#): Solicitation Provisions and Contract Clauses

**FUN WITH THE FAR**  
**Episode 2**  
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**B. Thou Shalt Nots (Government)**

- a. Gifts**
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