

WHAT EVERY GOVERNMENT EMPLOYEE SHOULD KNOW ABOUT POST-FEDERAL EMPLOYMENT RESTRICTIONS

Timothy Dakin

This paper discusses the three principal, yet conflicting, laws concerning the post-federal employment restrictions on Government employees at present, especially for those employees involved in the acquisition process.

Periodically, Congress has enacted legislation imposing various restrictions on the nature of work in which former federal employees may engage. This legislation and its implementing regulations has created a patchwork quilt of inconsistent requirements and uneven enforcement. Nor has the recent Federal Acquisition Streamlining Act (FASA) succeeded in bringing any real order or reason to the law. This paper reviews these laws as they presently exist and attempts to point out where reform is appropriate.

Three statutes, each applying to a different universe of former federal employees, will be discussed in detail. The most encompassing, applying to all former federal officers and employees, regardless of grade, is 18 United States Code §208, which provides for criminal sanctions against an offender. The second, 10 United States Code §2397b, often referred to as the Revolving

Door Statute, applies only to certain former Department of Defense (DoD) officers and employees, and then only in limited circumstances. It provides for administrative sanctions against the former employee and the company employing that person's services after leaving the government. The third statute, 41 United States Code §423, the Procurement Integrity Act, applies only to former federal employees who performed a procurement function, as defined in the law and its implementing regulation. However, this group could include persons not covered by either of the other two statutes. The Act contains civil, contractual, and administrative sanctions against both the former employee and the contractor aiding in the violation of its terms.

There are two other statutes imposing restrictions on retired military officers. FASA repealed one, 37 United States Code §801, the civil selling statute. It denied re-

Report Documentation Page

Form Approved
OMB No. 0704-0188

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1. REPORT DATE 1995		2. REPORT TYPE		3. DATES COVERED 00-00-1995 to 00-00-1995	
4. TITLE AND SUBTITLE What Every Government Employee Should Know About Post-Federal Employment Restrictions				5a. CONTRACT NUMBER	
				5b. GRANT NUMBER	
				5c. PROGRAM ELEMENT NUMBER	
6. AUTHOR(S)				5d. PROJECT NUMBER	
				5e. TASK NUMBER	
				5f. WORK UNIT NUMBER	
7. PERFORMING ORGANIZATION NAME(S) AND ADDRESS(ES) Air Force Institute of Technology, Wright Patterson AFB, OH, 45433				8. PERFORMING ORGANIZATION REPORT NUMBER	
9. SPONSORING/MONITORING AGENCY NAME(S) AND ADDRESS(ES)				10. SPONSOR/MONITOR'S ACRONYM(S)	
				11. SPONSOR/MONITOR'S REPORT NUMBER(S)	
12. DISTRIBUTION/AVAILABILITY STATEMENT Approved for public release; distribution unlimited					
13. SUPPLEMENTARY NOTES Acquisition Review Quarterly, Summer 1995					
14. ABSTRACT					
15. SUBJECT TERMS					
16. SECURITY CLASSIFICATION OF:			17. LIMITATION OF ABSTRACT Same as Report (SAR)	18. NUMBER OF PAGES 14	19a. NAME OF RESPONSIBLE PERSON
a. REPORT unclassified	b. ABSTRACT unclassified	c. THIS PAGE unclassified			

tired pay to retired *regular* officers engaging in selling supplies or war materials to any DoD agency, the Coast Guard, the National Oceanic and Atmospheric Administration, or the Public Health Service. Forfeiture of pay was limited, however, to the first three years following retirement. The second law, 18 United States Code §281, the criminal selling statute, imposed a two-year ban against any retired officer receiving any compensation for representing another in the sale of anything to the government through the department from which he or she retired. FASA suspended this statute until the end of 1996. Congress seems a trifle uncertain as to what to do with this legislation, having previously suspended it from December 1, 1989, until June 1, 1991. It's important, therefore, for that unique universe of retired officers affected by the law to be mindful that, as the end of the suspension period nears, Congress would breathe new life into it by doing nothing.

18 UNITED STATES CODE §207

This statute applies to all former federal officers and employees, regardless of rank or grade, and regardless of the nature of their former duties. While there are six substantive restrictions in the law, only three are truly relevant to the vast majority of federal employees having some association with the acquisition process. Two of these apply without regard to rank or grade, and the third pertains only to former senior-level employees.¹ The Office of Government Ethics (OGE) has issued regulations implementing the law, which are found in 5 Code of Federal Regulations at Parts 2637 and 2641.

The law in no way restricts for whom a former federal employee may work, but it does limit the nature of what that former federal employee may do on behalf of the new employer. Secondly, it is not limited to persons working as employees, but includes independent contractors as well. Additionally, it does not prohibit the former employee from representing himself in appearances before or communications with the government.

¹The statute only applies to former officers and employees; it does not apply to former enlisted personnel. The OGE regulation, of course, does not concern itself with the policy issue as to whether the Department of Defense should extend this coverage by regulation to enlisted personnel. However, the DoD supplement to the OGE regulation, DoD Directive 5500.7 (August 30, 1993), also known as the Joint Ethics Regulation (JER), stipulates that certain OGE regulations do apply to enlisted personnel. However, the regulations listed do not include 5 C.F.R. 2637. This is perhaps an oversight on the part of the DoD, because one of the included regulations is 5 C.F.R. 2641, implementing the third restriction in 18 U.S.C. 207, which by its terms only applies to senior officers in the grade of 0-7 and above and employees whose pay is equal to or greater than that for Level V of the Executive Schedule. This creates the interesting situation of certain legal restrictions being applicable to enlisted personnel and senior-level officers and DoD civilian employees, but not to all other officers or DoD civilian employees. Furthermore, it only seems reasonable that DoD, were it to attempt to extend the statutory coverage by regulation to one portion of 18 U.S.C. §207 (implemented by 5 C.F.R. 2641), would attempt to extend it to other portions of the same statute (as implemented by 5 C.F.R. 2637). Not doing so appears to be an oversight.

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The first of the three relevant prohibitions imposes a lifetime bar against a former federal officer or employee acting in a representational capacity, whether formally or informally, in communications with the federal government concerning a particular matter in which the former officer or employee participated personally and substantially while a federal employee. Representational activities would include appearing before or providing documentation to the government in connection with some claim or other proceeding; however, such activities also include correspondence or telephone calls.

The subject of the representation must be a particular matter and the former employee must have participated in this particular matter personally and substantially, rather than peripherally. Again, the key issues involved in determining questionable conduct are whether the ex-employee's prior participation was personal and substantial and involved a particular matter. The statute does not define these terms, but 5 C.F.R. §2637.201 does. It advises that a *particular* matter "typically involves a specific proceeding affecting the legal rights of the parties or an isolatable transaction or related set of transactions between identifiable parties." The regulation further states that rulemaking, legislating and forming general policy, standards or objectives do not entail particular matters. Clearly, a government contract, a specific matter affecting the legal rights of identifiable parties, would be a particular matter within the OGE definition.

The question is frequently posed as to whether a "follow on" contract, or the procurement of a defaulted contract, is the same particular matter as the original contract. There is no clear rule to be applied here. OGE advises that relevant questions include whether the same basic facts are involved, if the issues are related, if the same parties are involved, what time period

has elapsed, if the same confidential information is involved, and if an important federal interest continues to exist. It uses the example of the government's proposed award of a "follow on" contract to a new entity six years after original award, using new technology, as being a different matter. Unfortunately, this is not a particularly helpful illustration. The more common situation likely to generate concern would be that in which the "follow on" contract involved the same or similar technology, was to be awarded in a period less than six years following original award, or involved the same contracting parties.

In this regard two federal appellate court decisions are instructive. In *CACI-Federal v. United States* (1983), it was held that a contract for data processing services, though broader in scope, different in concept, and incorporating some services of the former contract, was not the same particular matter as the initial contract, even though characterized by the lower court as being "essentially a follow-on" to the type of service previously provided. Conversely, in *United States v. Medico* (1986), the modification of a supply contract for M49A3 60 mm artillery shells (simultaneously adding to the original an amount of artillery shells previously awarded to a defaulted contractor) was the same particular matter.

Regarding personal and substantial participation, note that these requirements are conjoined, implying that one's participation could be personal but not substantial, or vice versa, yet not violate the law. OGE advises that personal participation is direct, though it would include a subordinate's participation directed by the former employee. *Substantial* participation is significant to a par-

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ticular matter, or is perceived to be significant. It entails more than simply having official responsibility for a particular matter or mere involvement of an administrative nature. Reviewing a matter strictly for compliance with certain administrative controls or budgetary constraints is not substantial participation. One possible guide here is that the greater the degree of the former employee's discretionary authority concerning the particular matter, the greater the likelihood of substantial involvement.

Recent decisions of the General Services Board of Contract Appeals and the Comptroller General provide some insight into conduct permissible under the law. *CEXEX, Inc. v. Department of Energy* (1994) involved an agency computer specialist who may

...§207 imposes a two-year bar against former employees acting in a representational capacity...

have reviewed a requirements analysis and did assist in drafting a statement of work (SOW),

gathering budgetary information, and reviewing part of a "Request for Support Services" memorandum forwarding the SOW. He also provided limited assistance in drafting position descriptions for the solicitation package and preparing the initial Agency Procurement Request (APR), in which he was identified as the agency's "technical point of contact" (the APR was later amended, but he had no role in this revision). He also attempted to find two technical evaluators to replace members of the technical evaluation committee. Given all of this, the board found that his participation was not personal and substantial; rather it was limited to providing statistical data. His review efforts were confined to those matters in which, because of his position, he had some expertise. He did not draft or review any of the solicitation, had no role in developing the rating plan, evaluating proposals, or selecting the contractor.

In *Textron Marine Systems*, B-255580.3, 94-2 CPD ¶63, an alternate contracting officer's technical representative (COTR), participation in drafting a follow-on SOW was determined to be personal but not substantial. He reviewed the training and logistics portions of the original contract, updated it for current requirements, and assessed the number of training courses required. However, the SOW was substantially amended following his having left federal service, his suggestions were relatively minor, and the majority of those suggestions were not incorporated into the final version.

The second prohibition under §207 imposes a two-year bar against former employees acting in a representational capacity in communications with the government concerning a particular matter that was under their official responsibility in the final year of federal employment. This does not require personal and substantial involvement, although the representation must concern the same particular matter. This prohibition is directed at the supervisor of the employee covered by the first prohibition. The statute does not define the term "official responsibility." The implementing regulation, 5 C.F. R. 2637.202(b), interprets the term rather broadly, suggesting the position description and any delegations of authority as starting places in determining one's official responsibility. The regulation does state that all particular matters under consideration within an agency are under the "official responsibility" of the agency head, and each particular matter is under the responsibility of an intermediate (emphasis supplied) supervisor of an employee personally and substantially involved in that matter. The higher one is in the supervisory chain, then the greater the range of his or her "official responsibility," and therefore the greater the restriction on one's subsequent representational activities. However, the regulation carefully excludes those matters for which an agency has only ancillary

responsibility. For example, simply because a contract requires a funding commitment does not place that contract under the official responsibility of the head of the servicing accounting and finance office.

Under either prohibition there must be some official governmental interest in the particular matter. Obviously, the government has an interest in any contract already awarded or that it contemplates awarding. The difficulty is in attempting to determine when its interest has become something more than merely academic. The regulation requires the government's interest to be direct and substantial, but fails to provide any helpful guidance as to what is comprehended by that term.

There is also a general statutory exception for communications made solely to provide scientific or technological information. However, the statute specifically limits this to communications made pursuant to departmental procedures, entailing, *inter alia*, publication in the Federal Register that the particular former officer or employee may engage in such activities. There will be situations where one in good faith makes a scientific or technological communication without the governmental agency having first complied with the statutorily mandated procedures. However, because of these strict requirements, anyone arguing that the exception should nevertheless apply encounters a considerable burden of persuasion.

§207 contains no provision concerning how the former officer or employee might obtain guidance as to whether certain actions would violate the law, or the legal effect of such guidance. In rather general terms, 5 C.F.R. 2637.201(e) provides that "(D)esignated agency ethics officials should provide advice promptly to former Government employees who make inquiry on any matter arising under these regulations." It merely indicates the agency should provide prompt guidance, not requiring the

agency to do so; also, it does not indicate whether such guidance, if followed, would bar subsequent criminal or administrative action against the former employee. The DoD supplement to the OGE rule, called the Joint Ethics Regulation or JER, does not address this matter directly, although it does require each agency ethics counselor to provide advice and counseling to his DoD component command's employees on all ethics matters. Curiously, it does not specifically extend this responsibility to respond to former DoD officers or employees.

§207 contains no... guidance as to whether certain actions would violate the law...

The third relevant prohibition imposes a one-year ban on certain senior officers and employees engaging in representational activities with their former department or agency concerning any matter in which these persons are seeking official action by that department or agency. This restriction differs from the two previously discussed in several respects. It is limited to officers serving in the pay grade of 0-7 or above, or civilian employees whose basic pay equals that for Level V of the Executive Schedule. It is not limited to particular matters that these former officers or employees participated in or oversaw. However, it is limited to communications with one's former department or agency, and limits the term department or agency to one's former military department. A retired Army general, for example, would not violate this provision by acting in a representational capacity in discussions with the Navy.

5 C.F.R. §2637.212 establishes an administrative enforcement procedure which permits one's former agency, following the conduct of a hearing, to impose certain sanctions against the former employee for having violated the statute. Although the Ethics Reform Act (1989) repealed this authority, the regulation has

not been revised to reflect the change.

10 UNITED STATES CODE §2397B

This statute is commonly referred to as the Revolving Door Statute. It applies only to certain former military officers in the pay grade of 0-4 or above and former DoD civilian employees whose rate of pay is not less than the minimum rate of pay payable for grade GS-13 of the General Schedule. The rationale supporting this curiously worded limitation remains a mystery, but the law clearly applies to a former employee in the pay grade GS-12, Step 7. Another mystery is how the recently imposed geographical cost of living increases affect the law's reach. It does not speak in terms of the "basic rate" of pay for grade GS-13. The advent of geographical cost of living increases can result in extending the law's coverage. A GS-12, Step 6 in a high-cost area could earn more than a GS-13, Step 1 in a low-cost area. The law does not address this phenomenon. A second limitation is that a prohibited employer must be a contractor who in the preceding fiscal year received DoD contracts totaling \$10,000,000 or more. The law was suspended for the same period of time that 18 U.S.C. §281 was initially suspended.

Since it is not applicable to all former executive branch employees, OGE has not issued implementing regulations; instead, the JER does this. Certain former officers or employees, provided various other criteria are met, are specifically prohibited from receiving compensation from certain government contractors. A basic distinction

between this law and 18 U.S.C. §207 is that the former actually limits for whom the former employee may work whereas the latter merely limits the nature of the work one can perform for the employer. §2397b limits the scope of its coverage to activities conducted in the final two years of DoD service, ending with one's separation from service. The employment ban exists for a two-year period from the time one terminates federal service, although there is an available sanction, to be discussed later, which can extend this period.

Within the already limited group of DoD officers and employees there are three subgroups to which the act pertains. The last one described in the law is the most straightforward. That subgroup includes any person acting as the primary United States representative in negotiating a DoD contract exceeding \$10,000,000 or negotiating an unresolved contractor claim in an amount in excess of \$10,000,000.² No other limitations pertaining to the other two subgroups apply here. The employee is barred from receiving compensation from that contractor for two years after leaving DoD.

The other two categories concern otherwise qualifying former officers or employees who, on a majority of their working days in the final two years of DoD service, performed a procurement function. A procurement function is defined in the statute to include any function with respect to a contract relating to:

- (a) the negotiation, award, administration, or approval of the contract;
- (b) the selection of a contractor; (c) the approval of changes in the con-

²The statute specifies that the employee be the primary representative "in the negotiation of a settlement of an unresolved claim of the contractor in an amount in excess of \$10,000,000 under a Department of Defense contract." It is not clear whether the \$10,000,000 limitation applies to the settlement amount or the claim amount. It would seem as though Congress would have intended the limitation to be on the settlement amount, as that figure obligates the government. However, grammatically, the stronger argument appears to be otherwise.

tract; (d) quality assurance, operational and developmental testing, the approval of payment, or auditing under the contract; or (e) management of the procurement program.

Note how broadly the term is defined. In theory, someone assigned clerical duties in support of a source selection is performing a function under (b) above. The grade restrictions would probably eliminate such a person from the law's coverage, but this illustrates that this law does not require the personal and substantial involvement comprehended by 18 U.S.C. §207. The JER provides no helpful guidance as to what may or may not be a procurement function; it merely repeats the statutory definition. The JER is helpful, however, in limiting the term "working days" to those "actually worked, excluding holidays, weekends, sick days, and leave days of the two-year period in question." What remains is the question of whose responsibility is it to account for what the officer or employee does on those working days. Obviously, there would be no employee log available to establish this, or, should an employee maintain such, it would probably be unaccountably lost prior to an enforcement proceeding. The wording of the statute implies that one can be assigned responsibilities encompassing procurement functions and not necessarily be performing any of those functions on a daily basis. In other words, it cannot be presumed that one having procurement responsibilities performs a procurement function on any given working day. This is a decided shortcoming in the government's ability to enforce §2397b.

One of the two remaining subgroups include those performing a procurement function at a contractor owned or operated site or plant, which is the principal location of such person's performance of that procurement function. This appears to include persons assigned to the Defense Contract Man-

agement Command with a specific duty location physically on-site at a contractor plant and possibly persons, assigned to contract administration offices, whose primary responsibilities are carried out at a specific contractor plant or site. Since there can only be one principal location, in the latter case evidence of what that location was would seem to come from one's position description. If the position description did not state a specific contractor plant or site as the employee's principal location, either there would not be a principal location or, if so, it would be somewhere other than the contractor's plant. Periodic visits in a temporary duty status, regardless of how frequent, would not bring one within the coverage of this provision. At any rate, persons who do meet all these criteria may not accept compensation from the particular contractor at whose plant or site their procurement functions were performed. In addition, employment with that contractor is prohibited not only at that site or plant, but at any other site or plant owned or operated by that contractor, unless it is clearly not engaged in work on a DoD contract. The statute defines compensation as any payment or service exceeding a market value of \$250.

The final subgroup includes those DoD employees performing procurement functions relating to a major defense system. This seems to apply typically to persons working in a systems program office, but it certainly is not limited to that situation. There are five distinctions between this and the subgroup just described. Initially, and this may be attributable to an oversight in drafting the legislation, the former category speaks in terms of performing "a procurement function," whereas this category spe-

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cifically uses the term “procurement functions,” implying that one must be performing more than one procurement function per day to come within the statute’s prohibition. That Congress had such an intent is doubtful, but there is no explanation for the difference in the two provisions, one following directly after the other in the text of the law.

Second, this latter provision requires personal and substantial participation, something the former provision does not require.

It is obviously a limiting factor, but we are left totally in the dark as to how limiting.

Neither the statute nor the JER defines the term. The JER merely adopts the OGE definition in 5

C.F.R. §2635.402(b)(4). That Code of Federal Regulations section does not implement 18 U.S.C. §207, but rather 18 U.S.C. §208.³ Recall that 5 C.F.R. §2637.201(d) implements 18 U.S.C. §207 by defining the term “participate personally and substantially.” The 5 C.F.R. §2635.402 wording is very similar to, but not precisely the same as, that in 5 C.F.R. §2637.201(d). It seems more logical for the JER to have incorporated by reference the definition in 5 C.F.R. §2637.201(d). That would assure DoD officers and employees that the term “personal and substantial” had precisely the same meaning under both 18 U.S.C. §207 as it does under 10 U.S.C. §2397b.

A third distinction is that the anticipation must involve “decisionmaking responsibilities.” Unfortunately, neither the statute nor the JER provide any guidance as to what is meant by this term. It is obviously a limiting factor, but we are left totally in the dark as to how limiting. Certainly a system program manager and a contracting officer have decisionmaking responsibilities, and to some extent everyone assigned duties with

respect to a defense system makes decisions. Yet how far into the bowels of the system program office Congress intended this responsibility to descend is anybody’s guess. Can someone delegated authority by a contracting officer have decisionmaking responsibility? If so, does that responsibility depend on the nature and extent of the authority delegated? Do staff members involved in advising the decision maker have decisionmaking responsibilities? Can more than one person have decisionmaking responsibility for the same decision? Do all members of an award fee committee, for example, have decisionmaking responsibility? The guidance simply is unavailable to respond to these questions.

Next, this prohibition applies to “a contract for that (weapon) system.” The acquisition of a major defense system entails a myriad of separate contracts entered into during the various phases of research and development, full-scale development, and production. The system itself encompasses all of its components, spare parts, and support equipment. Any contract to supply hardware or some technical service is a contract for that system. Yet the prohibition does not limit itself by its terms to the acquisition phase. Any support or maintenance contract for the already acquired system entails “procurement functions relating to a major defense system.” The contract with which the federal officer or employee may have been involved is not necessarily, for example, the airframe manufacturer. Instead, it could be a contract to support aerospace ground equipment purchased as part of the overall system, and it could be entered into fifteen years after receipt of the final airframe under the production contract.

Finally, the DoD officer’s or employee’s

³18 U.S.C. §208 concerns itself with conflicting financial interests of current federal employees, not the activities of former federal employees which may subsequently limit their representational capabilities.

conduct must involve “contact” with the contractor. The term “contact” suffers from all of the same difficulties associated with “decisionmaking responsibilities.” There simply is no guidance as to how extensive Congress intended it to be. Certainly, contact would seem to include any direct written or oral communication, but does it include, for example, such communication through others? Further, how much direct communication is enough to satisfy the statute’s prohibitions? Remember the “majority of the person’s working days” requirement. Is a single contact in the final two-year period sufficient to trigger a violation of the law, as long as some or all of the other elements occur on a majority of the person’s working days?

This then raises the question of whether all elements of the violation must occur on a majority of one’s working days, or is it enough simply to have evidence of one element per day. The most sensible approach seems to be to view these different elements as a general description of the officer’s or employee’s duties, no one of which has to be performed daily. It would be sufficient to show that the general nature of the person’s position entails these features, and that on a majority of that person’s working days, he or she performed work of this nature. And again, whose responsibility is it to account for all these factors occurring? Neither the statute nor its implementing regulation give any hint that this is what Congress intended.

Another shortcoming stems from the so-called 30-day letter provision. Subsection (e) of the statute provides that anyone may request a written opinion as to whether the employment restrictions apply in his or her case. The request, based upon a complete disclosure of all relevant information, may be submitted to the appropriate designated agency ethics official (DAEO) who is to respond within 30 days of receipt of the request. The significance of the response is

that a written opinion indicating the law is inapplicable to the submitter’s particular situation will serve as a bar to any subsequent enforcement action. Because someone violating this statute is subject to a civil penalty not to exceed \$250,000, and anyone offering or providing the compensation is subject to a \$500,000 civil penalty, having such a written opinion could be viewed as the *sine qua non* of post-DoD employment. Following the law having become effective in 1987, there were many reports of prospective employers not being willing even to discuss employment possibilities unless the individual had a DAEO opinion. The problem lies in the full disclosure requirement.

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Based on the 30-day time limitation, a DAEO has to accept the representations in the request at face value. If the requester has taken certain license with respect to what his or her duties were in the final two years of DoD service, this will not be reflected in the DAEO opinion. That opinion is only as valid as the representations upon which it is based. Further, the effectiveness of the bar is specifically conditioned on the submitter making full disclosure. Those 30-day letters based upon less than full disclosure serve as no bar whatsoever; instead, what they may create is some false sense of security for employee and employer. It is more than a mere speculation that there exist a considerable number of invalid 30-day letters, given a competitive job market and the natural inclination to make oneself as attractive as possible to a future employer.

41 UNITED STATES CODE §423

This statute, known as the Procurement Integrity Act, applies to all federal procure-

ment officials who solicited or accepted any promise of future employment from a competing contractor during the conduct of any agency procurement without having first obtained written permission to do so. It was suspended at the same time 18 U.S.C. §281 and 10 U.S.C. §2397b were also suspended. Unlike 18 U.S.C. §207, applying to all former employees, and 10 U.S.C. §2397b, applying only to certain DoD officers and employees performing specific functions, this statute applies, regardless of grade or rank, to persons because of their status as procurement officials, but only “during the course of any Federal agency procurement.” It is key, then, to understanding this law that one appreciate who procurement officials are and when an agency procurement is considered as being conducted.

A procurement official does not even have to be a federal agency employee, but could be a contractor, subcontractor, consultant, expert, or advisor acting on behalf of the agency during the relevant period. For example, contractor employees providing source selection evaluation support services could be procurement officials. As the statute defines the term, however, someone having what would generally be regarded

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as procurement duties may be a procurement official with respect to certain contractual actions, and yet not an official with respect to other contractual actions.

A procurement official must participate “personally and substantially” in one or more of the following activities concerning a particular contractual action: (a) draft the specification; (b) review and approve the specification; (c) prepare or issue the solicitation documents; (d) evaluate bids or proposals; (e) select sources; (f) conduct negotiations; (g) review and approve the award, modification, or contract extension;

or perform such other function as may be specified in any implementing regulation.

The Federal Acquisition Regulation (FAR), which implements the law, adds two types of activity: computing requirements at an inventory control entry point, and developing procurement or purchase requests. “Personally and substantially,” as defined in FAR §3.104-49(g), tracks almost precisely the definition in 5 C.F.R. §2637.201(d).

The conduct of a procurement, within the meaning of the law, concludes with contract award or modification or cancellation. It applies following contract award only when a modification of the contract is being contemplated and then only until execution of that modification. Since the law’s obvious emphasis is on the pre-award phase, this latter application to modifications can be easily overlooked. While the law specifies when the period ends, Congress was anything but clear about when it began, leaving that up to any implementing regulation. FAR §3.104-4(c) indicates the period begins on the earliest date “an identifiable, specific action is taken for the particular procurement,” but in no event can it predate an authorized agency official’s decision “to satisfy a specific agency need or requirement by procurement.” There are exceptions. For broad agency announcements (not further explained) the procurement begins with the Commerce Business Daily publication; for small business innovative (SBIR) programs, the procurement begins when a solicitation is released for that SBIR program; for unsolicited proposals, it begins when a general statement of agency needs is published, when the agency responds to an inquiry as to what its needs may be, or the date of receipt of an unsolicited proposal, whichever is the earliest.

Merely being a procurement official with respect to a particular contract action does not disqualify one from engaging in discussions concerning future employment. The law only applies to employment discussions

with competing contractors. This entails a certain degree of prognostication on the part of the federal employee and others, since typically we think of competitors as those entities submitting bids or proposals. Since the law applies to the period before bid opening or receipt of offers, it expands the traditional definition of a competitor to include entities reasonably likely to become competitors for either the prime contract, or a subcontract under that procurement. Determining whether or not an entity is a competing contractor really is a judgment call in the absence of some clear, unequivocal statement on its part that it has no intention of participating in a certain contracting action. The FAR imposes a duty on both the procurement official and the competing contractor to verify the other's status prior to discussing future employment. However, in the context of post-federal employment limitations, the law is only concerned with actual competitors.

Certain restrictions apply once one qualifies as a procurement official for an agency procurement. These restrictions differ from what either 18 U.S.C. 207 or 10 U.S.C. §2397b impose. Recall that the former does not limit for whom the former federal employee may work, only the nature of what he or she does as a representative of that employer. The latter actually prohibits the former federal employee from working for certain government contractors. The Procurement Integrity Act does not prevent the former procurement official from being employed by a competing contractor. Rather, it imposes two 2-year restrictions on the nature of what one can do for that competing contractor. It is important to understand, however, that the two-year period does not begin with the procurement official's separation from federal service, as in 18 U.S.C. §207, but two years from the last personal and substantial participation. From a practical standpoint, this is a less serious restriction than that in 18 U.S.C.

§207, but it creates a real problem in that it fails to provide the clear line of demarcation, creating thereby an enforcement problem. Presumably, in a civil action alleging a violation of the act, the government would have to establish when that last personal and substantial participation occurred. No enforcement action would impose this burden on the former procurement official. Just how the government might establish this date is anyone's guess. Congress would have been wiser to adopt the separation date to begin the two-year period.

The first two-year limitation prohibits the former employee from participating in any fashion, as a representative for a competing contractor, in "any negotiations leading to award, modification, or extension of the contract." This wording is in the statute itself. Negotiations leading to a modification or an extension can only occur between the government and the incumbent contractor. That part of the prohibition would seem to cause no problem. However, while negotiations between the government and the successful offeror lead to contract award, what about those negotiations between the government and an unsuccessful offeror? Are they negotiations also leading to award? Congress probably meant them to be such, but it is a little unclear whether Congress said that. Arguably, the former employee may not be violating the law by discussing employment with a losing competitor. From a practical standpoint, this sanction only applies to the contractor receiving the award.

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The second limitation pertains following award of the contract. The former employee may not participate personally and substantially in performing that contract. Proscribed conduct here differs from that under 18 U.S.C. §207 in that one can partici-

pate personally and substantially on behalf of a contractor without engaging in any type of representational activities. What is prohibited here is personal and substantial involvement on behalf of the contractor after having already participated personally and substantially in the conduct of the same contractual action on behalf of the government. Again, the sanction only has practical effect on the successful competing contractor.

The Procurement Integrity Act is a highly complex piece of legislation, various parts of which may be enforced by contractual penalties under subsection (g), administrative actions under subsection (h), civil penalties under subsection (i), and criminal penalties under subsection (j). Criminal

Congress' choice of words here is unfortunate.

penalties may be imposed only for disclosing proprietary data to a competing contractor, a matter

not relevant here. Contractual remedies available to the government, including denial of some or all profit under the awarded contract and termination for default, apply where the procurement official either solicits or accepts a gratuity from a competing contractor, engages in employment discussions with a competing contractor, or provides proprietary data to a competing contractor. These likewise do not apply to the situation in which the procurement official goes to work for a competing contractor.

Civil remedies are available against both the former federal procurement official and the competing contractor using his or her services. A civil penalty of no more than \$100,000 may be imposed on the individual, and no more than \$1,000,000 on the competing contractor. This is really the only sanction against the individual. It requires the government to establish, by a preponderance of the evidence, that the individual was (a) a procurement official, (b) whose last

personal and substantial activity as a procurement official occurred less than two years prior to the (c) allegedly improper personal and substantial conduct as an employee or representative of the competing contractor.

The available administrative remedies are also limited to actions against the competing contractor. The statute specifically authorizes the agency to initiate suspension and to consider debarment. Those actions are relatively straightforward. The statute also states that where a contract has not been awarded, the agency shall determine "whether to terminate the procurement." Congress' choice of words here is unfortunate. The word "terminate" in government contracting refers to certain remedies available to the government once a contract has already been awarded. It is a word of art. What Congress probably meant, in terms familiar to those engaged in government contracting, was to cancel the procurement or resolicit. The statute also indicates that voiding or rescinding the contract may be appropriate.

The law contains a "30-day Letter" authority similar to that in 10 U.S.C. §2397b, permitting a federal employee or former employee to obtain a written opinion, to be provided within 30 days of the request, from a DAEO concerning the law's applicability to the requester's circumstances. However, unlike the 10 U.S.C. §2397b written opinion, an opinion rendered pursuant to the Procurement Integrity Act does not serve as a bar to future government enforcement action. One has to wonder why the written opinion in the one case should have greater validity than in the other. The difference can only serve to mislead those affected by the Procurement Integrity Act into believing their written opinions have the same legal effect as those issued pursuant to the Revolving Door Statute. In all fairness the two provisions should be consistent, either barring or not barring subsequent enforcement action.

REFORM

The Section 800 Panel, commissioned by the FY91 National Defense Authorization Act, conducted an extensive review of the federal statutes governing conflicts of interest. It recommended that 10 U.S.C 2397b be repealed in its entirety, concluding the administrative burden on DoD far outweighed any benefit. The panel further recommended that 41 U.S.C. §423(f), imposing the post-federal employment restrictions, also be repealed. Instead, the panel proposed an amendment to 18 U.S.C. §207 restricting the former employee's use of nonpublic information. Specifically, the panel recommended that a former employee, meeting the personal and substantial test in the statute with respect to a procurement within the final year of his or her public service, and having had access to information concerning that procurement exempt from public disclosure under the Freedom of Information Act, could not rep-

resent, aid, or assist anyone other than the United States concerning that procurement for one-year after leaving federal service. 18 U.S.C. §207 does not presently prohibit such conduct, and the Revolving Door Statute and the Procurement Integrity Act only limit such conduct on the part of a small number of persons.

Many of the Section 800 panel recommendations were incorporated into S1387, known originally as the Federal Streamlining Act of 1993, introduced by Senator John Glenn (Ohio). However, FASA contains none of the three recommendations mentioned directly above. The Glenn Bill represented the best opportunity to take advantage of the Section 800 panel's work. Congress has indicated it will again consider conflicts of interest legislation during the present session. Yet, without the past momentum for reform, we seem destined to live with this mass of confusing, inconsistent legislation for some time to come.

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