

POST-GOVERNMENT SERVICE EMPLOYMENT RESTRICTIONS

(RULES AFFECTING YOUR NEW JOB AFTER DoD)

For Military Personnel E-1 through O-6 and Civilian Personnel who are not members of the Senior Executive Service

IMPORTANT NOTICE: This information was prepared to assist Air Force personnel who receive their ethics support from WR-ALC/JAQ and who are planning to leave Government service.¹ It identifies statutes and regulations that restrict or otherwise affect activities of Government personnel after they leave Government service. Because restrictions are dependent on specific facts, and because this information is a summary of the rules, Robins personnel should contact Mr. Paul Davison, WR-ALC/JAQ, at (478) 222-0571 or by e-mail at paul.davison.1@us.af.mil to discuss their particular situations. Of course, if you want, you may also consult with private counsel.

Advice from ethics officials with respect to these matters is advisory only, and is provided in accordance with 5 C.F.R. § 2635.107, 41 U.S.C. § 423 (Procurement Integrity Act) and section 847 of the National Defense Authorization Act for Fiscal Year 2008 (Pub. L. 110-181). Ethics officials are acting on behalf of the United States, and not as your personal representative. There is no attorney-client relationship created by the consultation.

Part 1: Employment Restrictions After Leaving DoD

Personal Lifetime Ban

1.1 **SIMPLIFIED RULE:** After you leave Government service, you may not represent someone else to the Government regarding *particular matters* that you worked on while in Government service.

1.1.1 **RULE:** Former Government officers and employees may not knowingly make a communication or appearance on behalf of any other person, with the intent to influence, before any officer or employee of any Federal agency or court in connection with a *particular matter* in which the officer or employee *personally and substantially* participated, which involved a *specific party* at the time of the participation and representation, and in which the U.S. is a party or has a direct and substantial interest. (18 U.S.C. § 207(a) (1)) (Note: This rule does not apply to former enlisted personnel.)

¹ Personnel assigned to HQ AFRC should contact HQ AFRC/JA.

1.1.1.1 “Particular Matter”—matters that involve deliberation, decision, or action that is focused on the interests of specific persons or a discrete and identifiable class of persons. These matters may include a contract, claim, application, judicial, or other proceeding, request for a ruling or other determination, controversy, investigation, or charge. A *particular matter* could even include legislation or policy-making that is narrowly focused on the interests of a discrete and identifiable group of parties or organizations, *e.g.*, DoD policy affecting only military aircraft manufacturers. For this statute, particular matters must also involve “specific parties.” This means that identifiable parties exist. For example, a procurement may be a *particular matter*, but it may not become one involving *specific parties* until the first bid is received.

1.1.1.2 *Personal and substantial* participation—This means that you are directly participating in the matter or that one or more of your subordinates, whom you are directing, is participating. Also, the participation must be of significance to the matter, which may be based on the amount and importance of your effort. One act, such as approving a critical step, may be substantial. Likewise, if you have to review and approve a certain step, and work would stop if you didn’t approve, then your participation is substantial, even though it may have seemed like a paperwork exercise to you. On the other hand, an entire series of peripheral acts might not be substantial.

If you merely have knowledge of the matter, routine or superficial involvement, or involvement on a peripheral or administrative issue, you are not *substantially* involved. If you are not involved in the substantive merits, you may not be substantially involved, even though you put a lot of time into the matter. If you are merely responsible for reviewing the matter for compliance with administrative or budgetary considerations, you are also not substantially involved.

1.1.2 This ban remains for the lifetime of the *particular matter*.

Official Responsibility 2 Year Ban

1.2 **SIMPLIFIED RULE**: For 2 *years* after leaving Government service, you may not represent someone else to the Government regarding *particular matters* that you did not work on yourself, but were pending under your responsibility during your last year of Government service.

1.2.1 **RULE**: For a period of 2 years after termination of Government service, former Government officers and employees may not knowingly make a communication or appearance on behalf of any other person, with the intent to influence, before any officer or employee of any Federal agency or court, in connection with a particular matter which the employee reasonably should have known was actually pending under his or her *official responsibility* within 1 year before the employee left Government service, which involved a specific party at that time, and in which the U.S. is a party or has a direct and substantial interest. (18 U.S.C. § 207(a) (2)) (Note: This rule does not apply to former enlisted personnel.)

1.2.1.1 “Official responsibility”—direct administrative or operating authority to approve, disapprove, or otherwise determine, Government actions. It includes a supervisor at any level having responsibility for the actions of a subordinate employee who actually participates in a matter.

1.2.2 Although you may have been disqualified from personally acting on a particular matter when you were in Government service, this section of the statute will still apply to you. (Example: Because you owned stock in IBM while in Federal service, you were disqualified from reviewing a particular contract with IBM, which was reviewed by one of your subordinates. Under this statute, because the particular matter was under your responsibility during your last year of service, you are prohibited from representing others regarding that contract.)

Trade or Treaty 1 Year Ban

1.3 **SIMPLIFIED RULE**: For *1 year* after leaving Government service, you may not aid, advise, or represent someone else regarding trade or treaty negotiations that you worked on during your last year of Government service.

1.3.1 **RULE**: For a period of 1 year after leaving Government service, former employees or officers may not knowingly represent, aid, or advise someone else on the basis of *covered information*, concerning any ongoing *trade or treaty negotiation* in which the employee participated personally and substantially in his last year of Government service. (18 U.S.C. § 207(b)) (Note: This rule does not apply to former enlisted personnel.)

1.3.1.1 Trade negotiations are those undertaken pursuant to the Omnibus Trade and Competitiveness Act of 1988 (19 U.S.C. § 2902). Treaties are international agreements that require the advice and consent of the Senate.

1.3.1.2 “Covered information”—agency records accessible to the employee but exempt from disclosure under the Freedom of Information Act.

1.4 **EXCEPTIONS**: There are exceptions to the restrictions of 18 U.S.C. § 207, including acts pursuant to official Government duties; and aiding, advising, or representing certain international organizations with prior Secretary of State certification. Restrictions under 18 U.S.C. § 207(a) do not apply to communications that furnish scientific or technological information with prior, published certification by the Secretary of Defense. There are special rules regarding testimony under oath. Consult SOCO for specific guidance.

Part 2: Procurement Integrity Restrictions

Section 1: Restrictions *While Seeking Private Employment* (BEFORE You Leave DoD)

2.1 **SIMPLIFIED RULE**: Once you have started *seeking employment* with a bidder or offeror, you may not take any official action in a \$100,000+ DoD procurement.

2.1.1 **RULE**: An agency official may not *participate personally and substantially* in a \$100,000+ DoD procurement when *seeking employment* with a bidder or offeror in the procurement. (48 C.F.R. 3.104-3(c))

2.1.1.1 \$100,000+ DoD procurement—DoD acquisition, using competitive procedures and appropriated funds, for a contract in excess of the simplified acquisition threshold, for this purpose currently \$100,000.

2.1.1.2 *Personal and substantial* participation—You must be *personally and substantially* involved with the procurement to be disqualified. This means that you are directly participating or that one or more of your subordinates, whom you are actively and directly supervising, is participating. “Personal and substantial participation” means active and significant involvement in ANY of the following activities directly related to the procurement:

- drafting, reviewing, or approving the specification or statement of work;
- preparing or developing the solicitation;
- evaluating bids or proposals;
- selecting a source;
- negotiating price or terms and conditions; or
- reviewing and approving the award.

Participation solely in the following activities is NOT *personal and substantial* participation:

- Agency-level boards, panels, or advisory committees that review program milestones or evaluate and recommend alternate technologies or approaches for broad agency-level missions or objectives;
- General, technical, engineering, or scientific effort with broad application;
- Clerical functions;
- A-76 management studies, preparation of in-house cost estimates, preparation of *most efficient organization* analyses, and furnishing data or technical support to be used by others in developing performance standards, statements of work, or specifications; and
- Reviews conducted solely to determine compliance with regulatory, administrative, or budgetary procedures.

Personal and substantial participation for Procurement Integrity Act purposes may be more limited in breadth than *personal and substantial* participation as defined for 18 U.S.C. 208 and 207.

2.1.1.3 *Seeking employment*—If the above definitions apply to your situation, then you may not *seek* employment unless you first disqualify yourself. *Seeking employment* is contacting or being contacted by a bidder or offeror regarding possible non-Federal employment. For DoD purposes, there is an *employment contact* when you are *seeking employment*, as discussed in the SOCO synopsis of general employment restrictions. See 5 C.F.R. §§ 2635.601-2635.606.

2.1.2 Disqualification: Disqualification is simple. **Don't do ANY work on the task!** To help you accomplish this, you are required to submit a written notice to the contracting officer, source selection authority, and your immediate supervisor. The written disqualification must identify the procurement, describe the nature and specific dates of your participation in the procurement, and identify the bidder or offeror and describe its interest.

2.1.3 Resumption of Participation: The Head of the Contracting Authority has the discretion to authorize, in writing, your resumed participation at a future date only when one of two conditions has been met: the potential employer is no longer a bidder or offeror; or all employment discussions have terminated without an agreement. The HCA must consider all factors that might give rise to an appearance that you may act without complete impartiality and must consult with the ethics official. The HCA may decide not to authorize resumed participation.

2.2 **RULE:** An agency official must promptly report, in writing, to his or her supervisor and ethics official, an employment contact with a bidder or offeror in a \$100,000+ DoD procurement.

2.2.1. This requirement applies even when you promptly reject the employment contact.

Section 2: Employment Restrictions *after Leaving DoD*

2.3 **SIMPLIFIED RULE:** For 1 year after a *designated date*, you may not accept compensation from the concerned contractor on a \$10 million+ DoD contract on which you performed designated services.

2.3.1 **RULE:** For a period of 1 year after a *designated date*, former Government officials may not accept *compensation* from the concerned contractor on a *\$10 million+* DoD competitively awarded or non-competitively awarded contract if the former officials served or acted in any of the following capacities: (48 C.F.R. § 3.104-3(d))

A. Procuring contracting officers, source selection authorities, members of source selection evaluation boards, and chiefs of financial or technical evaluation teams

Designated date:

If you served on the date of selection, but not the date of award—Date of selection.

If you served on the date of award—Date of award of the contact.

- B. Program managers, deputy program managers, and administrative contracting officers
Designated date: Last date of service in those positions.

For DoD purposes, *concerned contractors* are prime contractors.

- C. Officials who personally made any of the following decisions:
- 1) to award contracts, subcontracts, or modifications of contracts or subcontracts, or task or delivery orders in excess of \$10,000,000,
 - 2) to establish overhead or other rates valued in excess of \$10,000,000,
 - 3) to approve issuance of a contract payment in excess of \$10,000,000, or
 - 4) to pay or settle a claim in excess of \$10,000,000.

Designated date—the date of decision.

2.3.1.2 *Compensation*—any form of compensation provided directly or indirectly for services rendered as an employee, director or consultant.

2.3.1.3 *\$10 million+*—determined by the following:

- Contract, including all options—value or estimated value at the time of award;
- Indefinite-delivery/indefinite quantity or requirements contract—total estimated value of all orders at the time of award;
- Any multiple award schedule contract, unless contracting officer documents a lower estimate;
- Basic Ordering Agreement—value of delivery order, task order or order;
- Claims—amount paid or to be paid in settlement;
- Negotiated overhead or other rates—estimated monetary value, when applied to the Government portion of the applicable allocation base.

2.3.2 EXCEPTION: You may accept compensation from any division or affiliate of the contractor that does not produce the *same or similar* products or services as the entity responsible for the contract.

2.3.2.1 *same or similar*—It is DoD guidance that a product or service must be *dissimilar enough* from that under the contract to warrant use of the exception. It is not sufficient that the product or service is produced by a division on the commercial, as opposed to the government, side of the contractor. Any amount of the *same or similar* product or service is sufficient to trigger the compensation ban.

2.3.3 If you do not know whether you may accept any compensation, you may make a written (signed and dated) request for advice, prior to accepting any compensation, from your agency ethics official. The ethics official must issue a written opinion within 30 days after receiving complete information as to whether the compensation would be proper or a violation. The ethics official may rely on that information, unless there is reason to believe that the information is fraudulent, misleading, or otherwise incorrect. You and the contractor may make good faith

reliance on that written opinion, *i.e.*, that neither you nor the contractor have actual knowledge or reason to believe that the opinion is based on fraudulent, misleading, or otherwise incorrect information.

2.3.4 NOTE: If you are leaving or left the Government after 28 Jan 08, expect to receive compensation from any DoD contractor within the two-year period from the date they left, and currently serve or served in the position of: program manager, deputy program manager, procuring contracting officer, administrative contracting officer source selection authority, member of the source selection evaluation board, or chief of a financial or technical evaluation team for a contract in excess of \$10,000,000

You **must** request the opinion. If you don't do so, the concerned contractor may not pay you compensation. Also, your request and the opinion will be maintained in a database for five years.

Part 3: Compensation Ban on Representation by Others

3.1 **RULE: COMPENSATION FOR REPRESENTATION TO THE GOVERNMENT BY OTHERS:** After you leave Government service, you may not accept compensation for representational services, which were provided by anyone while you were a Government employee, before a Federal agency or court regarding particular matters in which the Government was a party or had a substantial interest. This prohibition may affect personnel who leave the Government and share in the proceeds of the partnership or business for representational services that occurred before the employee terminated Federal service. (Examples: Lobbying, consulting, and law firms). (18 U.S.C. § 203). (Note: This rule does not apply to former enlisted personnel.)

Part 4: Additional Restrictions for Retired Military Personnel And Reservists

4.1 **SIMPLIFIED RULE: FOREIGN EMPLOYMENT:** Unless you receive prior authorization from Secretary of the Air Force and the Secretary of State, you may forfeit your military pay during the time you perform services for a foreign government.

4.1.1 **RULE:** The U.S. Constitution prohibits retired military personnel and reservists from receiving pay from *foreign governments* without Congressional authorization. This can extend to receipt of pay from a U.S. contractor or subcontractor for providing services to a foreign government. In 37 U.S.C. § 908, Congress authorizes the Secretary of State and Secretary of the appropriate Military Department to approve such receipt of pay. The Air Force has issued AFI 36-2913 to implement this law. Retired personnel and reservists who violate this Constitutional proscription may forfeit pay equal in amount to their foreign pay.

4.1.1.1 "Foreign Governments" may include educational and commercial entities that are substantially owned or controlled by foreign governments.

4.2 **EMPLOYMENT BY DoD:** To avoid the appearance of favoritism, 5 U.S.C. § 3326 prohibits the appointment of retired military personnel to civil service positions (including a non-appropriated fund activity) in any DoD component for 6 months after retirement. (This restriction has been waived during the current national emergency following the attacks of 9/11).

4.3 **RULES: EMPLOYMENT DURING TERMINAL LEAVE:**

4.3.1 Holding a civil office in state or local government: While on active duty (including terminal leave) military *officers* are prohibited by 10 U.S.C. § 973(b) from holding a “civil office” with a state or local government.

4.3.2 Civilian position in the U.S. Government: Military personnel on terminal leave are authorized to accept a civilian position in the U.S. Government and receive the pay and allowances of that position as well as their military pay and allowances. (5 U.S.C. § 5534a)

4.3.3. Please remember that while on terminal leave, you are still an active-duty service member, and the restrictions that apply to you while on active duty still apply (for example, restrictions on political activities).

4.3.4 Outside employment: If you are currently required to obtain permission prior to engaging in outside employment, that requirement will most likely carry over to you during terminal leave. Check with your supervisor.

4.3.5 Restriction on representing others to the Federal Government: You may not represent anybody outside the Government to the Government on any particular matter involving the Government. Military officers and civilian employees working on terminal leave are prohibited by 18 U.S.C. § 205 and 18 U.S.C. § 203 from representing their new employer to the Government. In almost every case, this precludes a member from interacting or appearing in the Federal workplace as a contractor. Being present in Government offices on behalf of a contractor inherently is a representation. Of course, military officers on terminal leave may begin work with the contractor, but only “behind the scenes” at a contractor office or otherwise away from the Government workplace. (Note: enlisted members are not subject to 18 U.S.C. §§ 203 or 205.

4.3.6 Prohibition on working for a foreign principal: Over and above the restriction of receiving compensation from a foreign government, there is also a specific prohibition of a public official from being or acting as an agent of a foreign principal required to register under the Foreign Agents Registration Act of 1938 (expanding the restriction beyond foreign governments to include persons, partnerships, and corporations (18 U.S.C. § 219).

Part 5: Administrative Reminders

5.1 **USE OF NONPUBLIC INFORMATION:** Even though you have left Government service, you still may not use nonpublic information to further your own private

interests, or those of another, including your subsequent employer. Nonpublic information includes classified information, source selection data, information protected by the Privacy Act, proprietary information, information protected by the Trade Secrets Act, and other information that has not been made available to the public and is exempt from disclosure.

5.2 **IF YOU ACCEPTED A BUY-OUT:** If you accepted a “buy-out” or separation payment, you have re-employment restrictions. Please contact your personnel office if you are unsure of those measures.

5.3 **QUESTIONS? PLEASE CALL US:** If you have questions, even *after* you leave Government service, please call Mr. Davison at WR-ALC/JAQ: (478) 222-0571. E-mail: paul.davison.1@us.af.mil. We would much rather talk to you before you take action than read adverse reports about you (from the IG or in the media) after you have taken the action.

5.4 Thank you for your service to your country.