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The Ins and Outs of SIC Code Appeals

The designation of a particular Standard Industrial Classification [SIC] code is important for vendors competing for small business set-asides. The reason a SIC code designation is important is that different SIC codes, even in closely related industries, carry widely different size standards, size standards that dictate just who may be considered small for a particular acquisition.

STANDARDS FOR SIC CODE DESIGNATION

The standard for a SIC code designation in a particular acquisition is that announced in 13 C.F.R. § 121.402(b), regarding also the industry descriptions set out in the STANDARD INDUSTRIAL CLASSIFICATION MANUAL, Office of Management and Budget, 1987 edition, the industry descriptions and notes set out in 13 C.F.R. § 121.201 (reprinted, although not necessarily the current version, in Federal Acquisition Regulation (FAR) 19.102), and the decisions of the Small Business Administration's Office of Hearings and Appeals (OHA). West Group makes OHA decisions available both electronically, and on its GOVERNMENTS CONTRACTS CD-ROM service.

Here are the requirements of 13 C.F.R. § 121.402(b):

> The procuring agency contracting officer, or authorized representative, designates the proper SIC code and size standard in a solicitation, selecting the SIC code which best describes the principal purpose of the product or service being acquired. Primary consideration is given to the industry descriptions in the SIC Manual, the product or service description in the solicitation and any attach-

ments to it, the relative value and importance of the components of the procurement making up the end item being procured, and the function of the goods or services being purchased. Other factors considered include previous Government procurement classifications of the same or similar products or services, and the classification which would best serve the purposes of the Small Business Act. A procurement is usually classified according to the component which accounts for the greatest percentage of contract value.

APPEAL RIGHTS

Vendors adversely affected by a SIC code designation may appeal the SIC code designation to OHA. 13 C.F.R. § 121.402(e). SIC code appeals must be filed with OHA and served on the contracting officer within 10 calendar days "after the issuance of the initial invitation for bids or initial request for proposals or quotations." 13 C.F.R. § 134.304(a)(3). The solicitation document must clearly set out the SIC code designation before this timeliness requirement attaches. *SIC Appeal of Summit Research Corp.*, No. 4283 (1997). There is no requirement to first file objections with the procuring activity. *SIC Appeal of CMC Construction Co., Inc.*, No. 4154 (1996). SIC code appeals must be filed with OHA, not with the contracting officer. *SIC Appeal of Environmental Services, Inc.*, No. 3657 (1992). SIC code appeals will not be considered under timely filed size appeals. *Size Appeal of L. Freedman & Associates, P.C.*, No. 4247 (1997).

The right to appeal a SIC code designation arises only when a solicitation is issued, and not upon the publication of a *Commerce Business Daily* announcement. There must be a formally issued procurement containing a SIC code designation before the appeal right attaches. *SIC Appeal of Data Monitor Systems, Inc.*, No. 4292 (1998). If a solicitation omits a SIC code designation, and the Small Business Administration supplies the SIC code under its 13 C.F.R. § 121.402(d) authority, then a SIC code appeal may be filed within 10 calendar days after an adversely affected party receives written notice of the SIC code designation. *SIC Appeal of EER Systems Corp.*, No. 3797 (1993). Where a competition is limited to small disadvantaged businesses under the Small Business Administration's 8(a) program, only the Associate Administrator for Minority Enterprise Development may appeal a SIC code designation. 13 C.F.R. § 134.302(b); *SIC Appeal of Cabaco, Inc.*, No. 4228 (1996).

TIMELINESS/STANDING

Only vendors that have been, or could be, adversely affected may appeal a SIC code designation. A small business offeror has no standing to appeal a SIC code designation in a solicitation that is not restricted, i.e., that is not set aside, in whole or in part, for small business participation. *SIC Appeal of Engineering Design Corp.*, No. 4268 (1997); *SIC Appeal of Sonicraft, Inc.*, No. 3864 (1993).

A material amendment to a solicitation triggers appeal rights. Thus when a small business restricted solicitation is amended and assigned a new SIC code designation, a small business offeror may appeal the new SIC code designation. *SIC Appeal of Madison Services, Inc.*, No. 4223 (1996). Likewise when a previously unrestricted solicitation is set-aside for small business participation. *SIC Appeal of R.M. Vredenburg & Co.*, No. 4220 (1996). Finally, a solicitation amendment that materially changes the principal purpose of a restricted solicitation (recall that this is the *sine qua non* for SIC code designation) triggers a new appeal right. *SIC Appeal of Information Ventures, Inc.*, No. 4294 (1998).

Even where a designated SIC code would not preclude an offeror from participating in an acquisition, such an offeror may appeal from the SIC code designation to advocate a lower size standard/SIC code to restrict further the competitive advantage conferred by the set-aside. *SIC Appeal of Challenger Engineering, Inc.*, No. 3728 (1993); *SIC Appeal of Field Support Services, Inc.*, No. 3680 (1992).

Vendors that qualify under the SIC code designated, or under the SIC code advocated, have, prior to the date set for bid opening or receipt of initial competitive proposals, the right to appeal a SIC code designation. *SIC Appeal of America House*, No. 3659 (1992). However, after the date set for bid opening or receipt of initial competitive proposals, a vendor that has not submitted a bid or competitive proposal is no longer an interested party. *SIC Appeal of Challenger Engineering, Inc.*, No. 3719 (1992).

Note that there are no provisions precluding an acquisition from moving forward after a SIC code appeal has been filed. If the procuring agency awards the contract proposed by the solicitation while a SIC code appeal is pending, the SIC code appeal is mooted, and will be dismissed. *SIC Appeal of M.C. Dean, Inc.*, No. 4120 (1995); *SIC Appeal of Intown Properties, Inc.*, No. 3998 (1995).

BURDEN OF PROOF/STANDARD OF REVIEW

In a SIC code appeal, the vendor has the burden of proof and must show, by a preponderance of the evidence, a clear error of fact or law in the SIC code designation. *SIC Appeal of South Bay Sand Blasting and Tank Cleaning, Inc.*, No. 4272 (1997). Given that procurements are usually classified according to the component that accounts for the greatest percentage of contract value, OHA, in the absence of persuasive argument and evidence to the contrary, will defer to the contracting officer's allocation. *SIC Appeal of Jack Faucett Associates*, No. 4282 (1997). This said, OHA will not defer to contracting officer statements that are mere assertions, unsupported by analysis or documentation. *SIC Appeal of Hager Sharp, Inc.*, No. 4112 (1995).

PLEADINGS

An appeal petition must demonstrate just why the designated SIC code is inappropriate, and it should identify an alternative SIC code and state why the alternative SIC code is preferable. *SIC Appeal of Information Ventures, Inc.*, No. 4289 (1998). It is not enough to assert only that the vendor cannot understand the reasons for the contracting officer's classification. *SIC Appeal of The Business Office, Inc.*, No. 4256 (1997).

RULE OF DECISION

It is the product or service solicited that characterize the principal purpose of the procurement, and thus the correct SIC code, not the background or experience of potential offerors. *SIC Appeal of Resource Management International, Inc.*, No. 3857 (1993). While OHA will consider SIC code designations in previous procurements, these previous classifications are not, by themselves, dispositive. *SIC Appeal of Distributed Information Systems, Inc.*, No. 4189 (1996).

A DEMONSTRATION

It is worthwhile to see just how a SIC code appeal is presented and resolved. Let us consider, as a hypothetical, a solicitation that is issued with a SIC code designation of 8742, "Management Consulting Services." This SIC code carries a size standard of $5 million in averaged annual receipts. The solicitation is a total small business set aside. Further, let us assume that the solicitation proposes a contract consisting of four separate tasks: program management, security systems services, information security, and personnel security, and that not one of these four tasks amounts to 50 percent or more of the value of the proposed contract.

We begin by looking at the industry description in the STANDARD INDUSTRIAL CLASSIFICATION MANUAL, and here we find that the industry description for SIC code 8742 is "[e]stablishments primarily engaged in furnishing operating counsel and assistance to managements of private, nonprofit, and public organizations." Doesn't look like this fits all of the tasks in our hypothetical.

Now we review the published OHA decisions. We find more. SIC code 8742 is inappropriate because the solicitation includes four separate task areas that go beyond consulting and planning. *SIC Appeal of Jack Faucett Associates*, No. 4282 (1997). The solicitation is not primarily focused on "operating counsel and assistance" as set out in the industry description for SIC code 8742 in the STANDARD INDUSTRIAL CLASSIFICATION MANUAL. *SIC Appeal of Jack Faucett Associates*, No. 3848 (1993). Finally, the solicitation has no single central purpose as is required for an acquisition to be properly classified under SIC code 8742. *SIC Appeal of Resource Management International, Inc.*, No. 3857 (1993).

Now that we can show that SIC code 8742 is inappropriate, we need to find a proper alternative. As it turns out, we need to look beyond the STANDARD INDUSTRIAL CLASSIFICATION MANUAL to the industry descriptions and notes set out in 13 C.F.R. § 121.201. Here we find an exception, "Base Maintenance," under SIC code 8742 that carries a size standard of $20 million in averaged annual receipts. One of the notes, note 12, sets out an industry description for "Base Maintenance" as "the performance of three or more separate activities in the areas of service . . .," each of which must be in a separate SIC code, and none of which

accounts for 50 percent or more of the value of the proposed contract.

It turns out that the term "base" in SIC code 8744 does not limit designation of this SIC code to military installations. *SIC Appeal of Field Support Services, Inc.*, No. 3680 (1992). Rather, SIC code 8744 is also properly applied to service requirements at large federal installations. *SIC Appeal of E.L. Hamm and Associates*, No. 4277 (1997).

Our hypothetical solicitation is already divided into four separate task areas. If we can show that not one of these separate task areas accounts for 50 percent or more of the value of the proposed contract, and if we can show that each separate task area is in a separate SIC code, then the proper SIC code designation is SIC code 8744, "Base Maintenance." *SIC Appeal of Call Henry, Inc. and Baker Support Services, Inc.*, No. 3933 (1994); *SIC Appeal of All Star Maintenance, Inc.*, No. 3693 (1992); *SIC Appeal of All Star Maintenance, Inc.*, No. 3646 (1992). By doing so, we raise the bar for participation in our hypothetical solicitation from $5 million in averaged annual receipts to $20 million in averaged annual receipts.

Conclusion

SIC code designation, a seemingly trivial task, has important consequences for vendors and agencies. For vendors, the issue is who can compete, and how a particular competitive advantage may be protected or enhanced. For agencies, the issue is how to structure an acquisition to assure a proper SIC code/size standard that will ensure competition among qualified vendors. In addition to these considerations, picking an appropriate SIC code requires review of reference materials and resources beyond those set out in the FAR.

In this article, we've set out the rules, and the resources, that may be applied in arriving at a proper SIC code designation. Vendors and agencies need to pay close attention to the rules, and to make proper use of all of the resources.

— *Cy Phillips*

Why Use ADR Instead of Litigation?

Introduction

Over the last few years, the concept of Alternative Dispute Resolution (ADR) has been touted throughout the federal government. It all began in 1990, when problems of overburdened courts and exorbitant litigation costs inspired Congress to enact the Administrative Dispute Resolution Act of 1990 (ADR Act), enactment that prompted a lot of discussion, but not much action. In 1994, 26 federal agencies pledged to use ADR to resolve disputes. In 1996, Congress permanently restored the about-to-be sunsetted ADR Act of 1990 when it passed Public Law 104-320, or the ADR Act of 1996. Granted broad authority by the ADR Act to use ADR, the Department of Defense responded by directing its Military Departments, Joint Chiefs of Staff, and its Agencies and Field Activities to use ADR instead of litigation wherever appropriate. The GSA Administrator also directed his Heads of Services and Staff Offices and Regional Administrators to implement ADR on a wide basis. Yet, until just recently, many were still saying that ADR in government, despite this activity, is more rhetoric than reality. The nonbelievers are now taking notice. As this article is written, the United States Air Force is conducting a market survey to obtain information in support of a potential major procurement for ADR services. Other agencies are either soliciting proposals or have already awarded contracts for the provision of ADR services.

Litigation or ADR?

When parties choose litigation over ADR, it is not that they consciously desire to litigate. Parties are driven to that process by their mutual desire to "win the battle." Examples abound. So it went in the case of *McDonnell Douglas Corp./General Dynamics v. U.S.,* US Fed. Cl., No. 91-1204C, which involved a default termination of a contract to produce the Navy's A-12 attack aircraft. The parties spent almost three years in preparing for trial. More than $3 billion was at issue in the case. It has been estimated that the parties were spending $66 million a year in litigation expenses. After many years of trial preparation with both sides reviewing and processing liter-

ally thousands of documents and interviewing countless individuals, the United States Court of Federal Claims has decided the matter. Having decided in favor of the contractors, the court avoided a full-scale trial on the merits of the contractors' allegations of constructive changes and breach. Instead, the court required both sides to "share the pain" of the contract termination, by restricting the contractors' recovery to their incurred costs of performance, but excluding profits and amounts included in the contractors' requests for equitable adjustment.

The big question: if these parties could start over again, would they have chosen to pursue the ADR route that would have empowered them to arrive at a solution that would be equal to or better than the solution the court provided? The facts relied upon by the court were probably well known by the parties. Facts, of course, are everything in alternative dispute resolution. What kept the parties from utilizing this powerful tool to exploit them?

Putting aside the affect of congressional and high level executive branch interest in the A-12 matter, several general observations are worth noting. Perhaps, cases like these do not settle because of the enormous complexities, the high dollar amounts, the involvement and intertwining of numerous contractor and government-caused cost-generating events, legal and policy questions, and other confounding issues. All these factors, individually and collectively, prevent reaching mutual agreement easily. Complicate this by the fact that each side wants to win and offers little room for compromise. Negotiating parties are not likely to succeed without outside assistance.

Why Not ADR?

There is an important fact common to successfully negotiating settlement of a dispute, and it is that the amount of discovery taken to prepare for trial is usually far more than that needed for settlement. This is particularly significant to parties who have learned that discovery and pre-trial processes can become a "black hole" for time and cost. Another important fact is that many docketed cases settle before or during trial. Why? The parties learn more about each other's positions from pretrial motions, discovery, and preliminary hearings. The parties, due to deadlines set by a tribunal, are better able to understand the facts, appreciate the risks and assess the likelihood of success at trial. The cost, time, and anxiety of the trial itself cause the parties to take a good look at their respective positions. Thus, frequently the parties come to terms by "bargaining in the shadow of the law."

When one considers that in 90% of cases docketed, the parties choose to settle either before or during the trial, the logic to use the less expensive ADR approach becomes even more compelling, i.e., before the expenses of fees, time, and the distractions of the litigation itself occur. If the parties are resolving approximately 90% of their disputes in litigation before a decision is handed down, it makes eminent sense for them to resolve disputes through ADR early on and thus avoid discovery and other pretrial expenses.

When the parties select ADR instead of litigation, arbitral-type proceedings being an exception, they substitute for a judge (who decides the case for the parties) a neutral (who helps the parties decide their own case). This is particularly attractive to businessmen who want to be in charge of their own destiny. The ADR neutral encourages parties to listen carefully to each other instead of arguing, exhorting, or game playing. Instead of procrastinating, the parties, encouraged by the ADR neutral's participation, are able to come to terms with the strengths and weaknesses of their respective cases so that they can decide what is best for them. ADR quickly clarifies the issues and helps the parties to appreciate what the likely outcome would be if they chose litigation.

Conclusion

Increasing numbers on both sides are seeking ADR training and are using or intending to use ADR more than in the past. The reasons are clear to those who have tried it. ADR is faster, better and less expensive than litigation. It is faster because it avoids discovery and the long litigation process. It is better because it provides a choice of remedies. And it is, for these reasons, less expensive. As we approach the year 2000 and beyond, there will continue to be an increasing demand for ADR by those in federal procurement who recognize it as a better way of avoiding, mitigating, and resolving disputes.

In our next issue, we will address selecting the best form of ADR and how to prepare for ADR.

— Robert J. Gomez

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Consider Cost Caps/Ceilings

Competition for a cost-reimbursement contract proceeds, per FAR 16.301-2, from a determination that "uncertainties involved in contract performance do not permit costs to be estimated with sufficient accuracy to use any type of fixed-price contract." As we shall see, through consideration of cost caps or cost ceilings in competitions for cost-reimbursement contracts, agencies can discharge their newly-enhanced duty to discuss questioned costs, and vendors may obtain a competitive advantage from previous cost experience or sophisticated estimating processes, passing this advantage along to agencies that otherwise lack a basis to make an accurate estimate.

Because cost-reimbursement types of contracts place the risk of cost overruns on agencies, competitions for cost-reimbursement contracts require a cost realism analysis as a part of the source selection process. FAR 15.305(a)(1); 15.404-1(d). The point of a cost realism analysis is to determine the most probable cost of contract performance, as well as to determine the vendor's understanding of the work, and the vendor's ability to perform. FAR 15.305(a)(1). Most probable cost determined by the cost realism analysis is used to make the selection decision. FAR 15.404-1(d)(2)(i).

A cost realism analysis capable of withstanding a protest is thorough and detailed:

> [T]he cost team familiarized itself with the structure and organization of each proposal; identified the respective roles of the prime and subcontractors; compared the offeror's BAFO with its CLIN structure; analyzed the cost work breakdown structure (CWBS); involved the Defense Contract Audit Agency to evaluate proposed rates for overhead, award fees, and escalation rates; compared each offeror's integrated master schedule with the CWBS; evaluated all CLINS; and performed analyses of the offerors' manufacturing data, clinical trials, surrogate efficacy models, animal costs, labor, and FDA licensure fee. The evaluators used the independent government cost estimate in those instances where the BAFO costs were determined to be insufficient or excessive. These analyses were combined to arrive at the MPC for each offer. The evaluators then involved the technical and management teams to evaluate the uncertainty of each CLIN based on knowledge, experience, and current data available for each technology proposed.

Battelle Memorial Institute, B-278673, Feb. 27, 1998, at 23.

Particularly so now that FAR 15.306(d)(3) requires agencies to discuss any aspect of a competitive proposal that "could, in the opinion of the contracting officer, be altered or explained to enhance the proposal's potential for award," agencies must discuss concerns about particular questioned proposed costs. GAO has in the past looked to FAR 31.109(a) and its admonition to negotiate advance agreements on questioned costs as a ground to require that agencies propose or accept cost caps or cost ceilings. *Serv-Air, Inc.*, B-258243, Dec. 28, 1994, 96-1 CPD ¶ 267, at 6. The proposal of a cost cap or a cost ceiling removes the necessity of a cost realism analysis, and any questions about proposed costs:

> As a general rule, the maxim that the Government bears the risk of cost overruns in the administration of a cost-reimbursement contract is reversed when a contractor agrees to a cap or ceiling on a reimbursement for a particular category or type of work [citations omitted]. As a result of shifting this risk, when offerors propose such caps, and no other issue

> calls into question the effectiveness of the cap, upward adjustments to capped costs are improper.

Vitro Corporation, B-247734.3, Sept. 24, 1992, 92-2 CPD ¶ 202, at 7; *see also Barents Group, L.L.C.*, B-276082, May 9, 1997, 97-1 CPD ¶ 164, at 11. Neither GAO nor an agency may assume that an offeror will propose a cap in order to obtain an award, and then, after award, pursue a bad faith attempt to shift incurred costs from a capped indirect cost account to some other cost account so as to circumvent the cap and increase recoverability. *Robocom Systems, Inc.*, B-244974, Dec. 4, 1991, 91-2 CPD ¶ 513, at 5.

The scope of potential cost caps or cost ceilings is broad, as is demonstrated in this excerpt:

> To the extent that we view TRW's cost overrun sharing approach as analogous to a cap, we know of no requirement that a cap be established at a total fixed amount such as the Hughes cap here. Our Office has reviewed caps on overhead rates that are established as a percentage, see *MAR, Inc.*, B-255309.4; B-255309.5, June 8, 1994, 94-2 CPD ¶ 19; *Technical Resources, Inc.*, B-253506, Sept. 16, 1993, 93-2 CPD ¶ 176, caps on general and administrative expenses, also established as a percentage, see *Vitro Corp., supra*, and caps on precise cost components which include some costs but exclude others. *Halifax Technical Servs., Inc.*, B-246-236.6 *et al.*, Jan. 24, 1994, 94-1 CPD ¶ 30. While we will sustain a protest where the record shows that the agency does not understand the operation of a proposed cap, or has failed to adequately assure that the proposed cap will effectively shield the government from cost growth, see *Advanced Technology Sys., Inc.*, 64 Comp. Gen. 344 (1985), 85-1 CPD ¶ 315, *we generally view cost caps and ceilings as powerful and effective tools in the government's arsenal against cost overruns. See generally Technical Resources, Inc., supra.* In none of these cases, however, did our Office conclude that the challenged cap changed the solicited contract type, even where the agency was soliciting a CPAF contract, as NASA is here. *See id.*

Hughes Space and Communications Co., B-266-225.6, April 15, 1996, 96-1 CPD ¶ 199, at 8-12 (emphasis added).

Just as *Hughes* holds, acceptance of an offer of a cost cap or a cost ceiling does not amount to a change in offered terms and conditions that would require a solicitation amendment. *City & County of San Francisco v. United States*, 130 F.3d 873, 882 (9th Cir. 1997). If a solicitation expressly provides, *The Arora Group, Inc.*, B-277674, Nov. 10, 1997, at 7, concerns about cost realism and offered cost caps or cost ceilings may be considered in the technical evaluation. *See, e.g., Joint Threat Services*, B-278168, Jan. 5, 1998, at 10. Otherwise, an offer of a cost cap or cost ceiling limits any further inquiry to a question of responsibility, a question beyond the tradeoff process. *Halifax Technical Services, Inc. v. United States*, 848 F. Supp. 240, 242 (D.D.C. 1994).

Cost caps, cost ceilings, or both need to be in everyone's acquisition toolkit. For agencies, now that the duty to conduct discussions about questioned costs extends beyond identification of proposal weaknesses or deficiencies to discussions about proposal enhancements, cost caps or cost ceilings can be just the things to enhance the potential for award. For vendors, an offer of a cost cap or ceiling is an easy way to gain a competitive advantage.

Consider the situation in *The Arora Group, supra*. There an agency constructed its cost realism analysis of projected wage escalation on the 3 percent annual percentage increase projected in Federal Acquisition Circular 90-23, *Id.*, at 2. As it turned out, the offeror capped wage escalation because it had actual cost experience that showed a lower rate of wage escalation, and, in addition, the offeror set aside a part of its indirect expense pool to pay yearly bonuses. The agency miscalculated the pool, and imposed a cost realism adjustment. GAO granted the protest, holding that it was improper for the agency to ignore this approach to these questioned costs. *Id.*, at 5. And when cost caps or cost ceilings are proposed based on actual cost experience, even the need to review responsibility evaporates. *Vitro Corp., supra*, at 7.

— *Cy Phillips*

The Evolving Revolving Door

Every company that does business with the federal government is likely, at some point, to face the tangled web of restrictions surrounding the employment of current and former government officials. Recent changes in the law have eased these burdens somewhat, but some aspects are still confusing, and the overlap of prior restrictions injects a further level of uncertainty.

Regulated activities generally fall into one of three broad categories; (a) restrictions on employment discussions with current federal employees, (b) limits on hiring certain current or former employees, and (c) prohibitions affecting post-employment assignments. The first two are governed primarily by the Procurement Integrity Act, 41 U.S.C. § 423, as recently revised by the Federal Acquisition Reform Act of 1995 (FARA). Post-employment restrictions are largely governed by the Ethics Reform Act of 1989, 18 U.S.C. § 207.

Restrictions on Employment Discussions

Prior to the FARA revisions, the Procurement Integrity Act (the Act) imposed special rules on "procurement officials" seeking employment. A procurement official was any agency employee who participated "personally and substantially" in procurement activities such as preparing specifications or evaluating offers for a contract award. The former Procurement Integrity Act prohibited a "competing contractor" from offering employment to or discussing future employment or business opportunities with any "procurement official" during the conduct of any federal procurement.

As revised, the Act does away with this blanket prohibition, shifting the emphasis to the federal employee's reporting of all employment "contacts." The revised Act requires any "agency official who is participating personally and substantially" in a procurement exceeding $100,000 (the simplified acquisition threshold) to "promptly report" any contacts by a "bidder or offeror" regarding possible employment, in writing, to a supervisor and the designated agency ethics official. 41 U.S.C. § 423(c)(1)(A). The contacted agency official must also either "reject the possibility" of employment with the contacting party else "disqualify himself or herself from further personal and substantial participation" in the particular procurement. 41 U.S.C. § 423(c)(1)(B). If the official chooses disqualification, such disqualification must remain in effect until "the person is no longer a bidder or offeror" in the particular procurement, or until "all discussions . . . regarding possible non-Federal employment have terminated without an agreement or arrangement for employment." *Id.*

Although the revised Act is fairly straightforward in this area, some critical details need to be mentioned. First, while the reporting procedures apply only to federal employees, anyone contacting an agency official runs the risk of the Act's sanctions if they do so "knowing that the official has not complied" with the Act's reporting requirements. 41 U.S.C. § 423(c)(4). Secondly, the Procurement Integrity Act is not the only law governing employment discussions. Even where the Act does not apply, the Disqualification Statute, 18 U.S.C. § 208, and the Standards of Conduct at 5 C.F.R. Part 2635 may require certain actions of an agency employee, and an employee's failure to heed these requirements may affect adversely a contractor seeking to hire that particular individual. Finally, it is noteworthy that the revised Act replaces the broad term "competing contractor," which included "any entity that is, or is reasonably likely to become" a competitor, with "bidder or offeror." While the Act does not define "bidder or offeror," it appears to narrow the scope somewhat.

Hiring Ban

Prior to engaging in employment discussions with an agency official, a contractor should assess whether the official may even be hired. The revised Procurement Integrity Act incorporates a one-year ban on the acceptance of compensation for service, in any capacity, from a contractor by certain former agency officials. Those affected are persons who:

> (A) served, at the time of selection of the contractor or the award of a contract to the contractor, as the procuring contracting officer, the source selection authority, a member of the source selection evaluation board, or the chief of a financial or technical evaluation team in a procurement in which that contractor was selected for award of a contract in excess of $10,000,000;

(B) served as the program manager, deputy program manager, or administrative contracting officer for a contract in excess of $10,000,000 awarded to that contractor, or

(C) personally made for the Federal agency–

(i) a decision to award a contract, subcontract, modification of a contract or subcontract, or a task order or delivery order in excess of $10,000,000 to that contractor;
(ii) a decision to establish overhead or other rates applicable to a contract or contracts for that contractor that are valued in excess of $10,000,000;
(iii) a decision to approve issuance of a contract payment or payments in excess of $10,000,000 to that contractor; or
(iv) a decision to pay or settle a claim in excess of $10,000,000 with that contractor.

41 U.S.C. § 423(d).

If an agency official falls within any of these provisions, he or she is precluded from working with the affected contractor(s) "as an employee, officer, director, or consultant" for one year after the contract award or other decision date. *See* FAR 3.104-8. While these may appear, at first blush, to be rather onerous restrictions, the statute contains a major exception that particularly favors large, diverse corporations. The statute specifically does not prohibit affected officials from accepting compensation "from any division or affiliate of a contractor that does not produce the same or similar products or services as the entity of the contractor that is responsible for the contract referred to in subparagraph (A), (B), or (C) (above)." 41 U.S.C. § 423(d)(2).

A second exception allows for good faith reliance on a written opinion from the designated agency ethics official. If this official renders a written opinion, based on accurate information, finding that an agency official's proposed employment would not violate the Act, "then neither the requester nor the contractor shall be found to have knowingly violated . . . the Act." FAR 3.104-7(d)(3).

One other important aspect of this section is that the one-year ban does not apply to agency officials who left their agency position before January 1, 1997. FAR 3.104-2(d). Such officials may be subject to a narrower two-year prohibition on "personal and substantial" participation on behalf of an affected contractor, discussed below. Although the prior version of the statute will expire after December 31, 1998, it must be considered in the meantime, as the associated penalties continue to apply.

Post-employment Restrictions

Post-employment restrictions are intended to prevent government employees from switching sides as representatives on matters formerly within their responsibility as government employees. Generally, they restrict the ability of a former government employee to represent a private employer in connection with particular matters in which the government has an interest for a one-year, two-year, or lifetime period, depending upon the employee's seniority and level of involvement in the particular matter while a public employee.

The Ethics Reform Act of 1989 (the Ethics Act), which restricts post-federal employment activities, does not impose any restrictions directly on contractors; the prohibitions and criminal sanctions are directed at the former government employees. As with the Procurement Integrity Act, however, contractors may nevertheless suffer consequences as a result of their employees' actions. A violation of the conflict of interest provisions can lead to cancellation or termination of a contract, as well as to criminal prosecution on conspiracy or other charges.

Defining "Representational Activities"

The post-employment restrictions cover only two very specific types of activities: the making, with an intent to influence the actions of the agency, of (i) an "appearance" before or (ii) any communication to government officers or employees. 18 U.S.C. § 207(a). We will refer to these as "representational activities." The first such activity, making an appearance, requires an actual, physical presence before some person or body. The second does not require a physical presence, since it includes all forms of communication with the intent to influence.

The representational activities governed by these restrictions encompass the activities of anyone who has been authorized to represent the private employer. A person is considered to be a representative of a contractor only if he has been given authority to make decisions on behalf of the contractor or has been held out as having such decision-making authority. Representational activities include all appearances or communications with an intent to influence made to or before employees of any executive branch agency or the courts. Communications to or appearances before Congress and legislative staffs are not covered.

An appearance or communication is representational only if it is made with an "intent to influence." This means that the contact must be made either: (i) with the purpose of seeking or influencing some discretionary governmental action, or (ii) in connection with a matter involving an appreciable element of dispute. Accordingly, there is no representational activity in routine contacts, such as in making requests for publicly available information or contacting government employees merely to deliver a proposal, since these contracts do not involve any potential for controversy or discretionary governmental action. In contrast, when there is a range of possible governmental action or some degree of adversariness, a person can be held to have engaged in representational activity even if he merely attends a meeting without speaking or addresses only non-controversial topics or issues unrelated to discretionary choices. *See United States v. Coleman*, 805 F.2d 474 (3d Cir. 1986) (appearance, even without speaking, so that the government official appreciates the connection with the client, found to be a violation of the Ethics Act); *but see United States v. Schaltenbrand*, 930 F.2d 1554 (11th Cir. 1991)(appearance at meeting, "in order to listen," with no evidence of authority to make binding decisions for the company, deemed allowable under the Ethics Act).

IDENTIFYING "PARTICULAR MATTERS"

To fall within the post-employment proscriptions, the representational activity must relate to a "particular matter." General areas of activity, such as developing program policy, engaging in general rulemaking, or formulating technical concepts are not particular matters. 5 C.F.R. § 2637.201(c). Rather, a particular matter means "a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties in which the United States is a party or has a direct and substantial interest." 5 C.F.R. § 2637.102(a)(7). A particular matter is some definable and isolatable transaction in which the government has a direct and substantial interest and which involves specific parties.

An employee is not barred from engaging in representational activity with respect to a particular matter unless the employee participated in that same matter while a government employee. Determining whether the matters are the same involves consideration of all relevant factors, and generally requires that the same subject matter and the same nucleus of operative facts be involved in both matters. *See United States v. Medico Industries, Inc.*, 784 F.2d 840, 843 (7th Cir. 1986). Thus, a former employee's personal and substantial participation in a contract will not preclude his representational activities with respect to a follow-on contract if there have been substantial changes in contract requirements. *CACI, Inc. - Federal v. United States*, 719 F.2d 1567 (Fed. Cir. 1983).

THE LIFETIME BAR

The most far-reaching restriction of the Ethics Act is the so-called "lifetime bar." All former government employees and military officers are forever prohibited from knowingly engaging in representational activities on behalf of any person (other than the United States) with respect to any particular matter in which they personally and substantially participated while in government service. 18 U.S.C. § 207(a)(1).

Personal participation in a matter means direct, hands-on involvement with the matter and includes involvement through the direction of subordinates. FAR 3.104-3. Substantial participation refers to a level of involvement that could fairly be characterized as significant and is something more than official (i.e., formal) responsibility, perfunctory involvement, or involvement on an administrative or peripheral issue. However, it should be noted that, "(w)hile a series of peripheral involvements may be insubstantial, the single act of approving or participating in a critical step may be substantial." *Id.*

THE TWO-YEAR BAR

All former government employees are prohibited from engaging in representational activities for two years after leaving government service with respect to matters that they know, or reasonably should know, were actually pending under their official responsibility during their final year of government service. Apart from its duration, this bar differs from the lifetime bar only with respect to the "official responsibility" element.

The Ethics Act defines "official responsibility" as "the direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and either personally or through subordinates, to approve, disapprove, or otherwise direct Government action." 18 U.S.C. § 202(b). In practical terms, a former employee's official responsibilities include all matters in which he or she had some meaningful degree of oversight or involvement and could have influenced or decided the outcome.

For "procurement officials" who left government service prior to January 1, 1997, special post-employment restrictions may continue to apply until December 31, 1998. FAR 3.104-2(d). For two years after the end of his or her personal and substantial involvement with respect to a particular procurement, a procurement official may not participate in: (i) contract negotiations involving that procurement, (ii) the performance of the contract resulting from the procurement, or (iii) negotiations or performance of the same contract on behalf of subcontractors when the subcontract is in excess of $100,000 and the subcontractor was involved in the contract negotiations. *See* 41 U.S.C. § 423(f) (prior to FARA revisions).

ONE-YEAR BARS

TRADE NEGOTIATORS

Employees at any level who, during their last year of government service, participated personally and substantially in trade or treaty negotiations and who had access to non-public information concerning such negotiations, may not, for a period of one year, represent, aid or advise anyone concerning those trade or treaty negotiations. 18 U.S.C. § 207-(b). This is a broader restriction than the other post-employment restrictions, since it prohibits not only representational activity, but also behind-the-scenes help.

SENIOR EMPLOYEES

"Senior employees" are (1) civilians paid according to the Executive Schedule, (2) civilians paid at rates equivalent to Level V of the Executive Level or above, (3) certain Presidential and Vice Presidential appointees, and (4) uniformed service officers in pay grades O-7 and above. 18 U.S.C. § 207(c)(2).

Senior employees are subject to the lifetime and two-year bars applicable to all former employees. In addition, for a one-year period after they leave government service, senior employees are prohibited from engaging in any representational activities before their former agency. This one-year bar applies to all matters irrespective of the former senior employee's official responsibilities or the extent of the employee's personal and substantial participation in the matters. It also covers representational activities concerning any matter as to which the former senior employee seeks official action, without regard to whether it was a particular matter pending during the senior employee's government service.

VERY SENIOR EMPLOYEES

"Very senior employees" may not knowingly engage in any representational activities before any Executive Schedule employee or any employee from their former agencies for a period of one year after termination of very senior service. 18 U.S.C. § 207(d). Very senior employees are also subject to the lifetime and two-year bars applicable to all former employees. The term "very senior employees" is defined as meaning those employees at least at Level I of the Executive Schedule, employees of the Executive Office of the President paid at Level II of the Executive Schedule, the Vice President, and certain Presidential and Vice Presidential appointees.

This restriction is different from the one-year bar applicable to senior employees only insofar as it defines a different class of persons whom very senior employees may not contact. Former senior employees are barred from engaging in representational activities before officials of any agency in which they served in any capacity during the one-year period prior to termination of their senior service. In con-

trast, former very senior employees are restricted from engaging in representational activities only with respect to the agency in which they served as a very senior employee, although former very senior employees are also barred from representing another person before individuals in Executive Schedule positions even though they are not within the former very senior employee's agency. Very senior employees are not subject to the one-year bar applicable to senior employees.

Restrictions on Members of Congress And Legislative Employees

Members of Congress and legislative branch employees face a one-year bar against representational activities before the legislative branch. 18 U.S.C. § 207(e). Generally, members of Congress may not engage in representational services before any member, officer, or employee of either house of Congress for two years. Similar restrictions apply to congressional staffers.

Summary

The message to take away from a review of these restrictions is that the hiring of a current or former government employee is not a step to be undertaken without prior planning and thorough consideration of the specific circumstances. Here is a brief checklist of issues to consider when recruiting any federal employee:

Before entering into any employment discussions, determine the individual's grade level and seniority, and matters of interest to your company with which the individual had personal and substantial involvement. In the case of a management-level employee, you should also assess matters of interest for which the individual had official responsibility.

Throughout the recruitment and hiring process, create a thorough paper trail documenting the process, including the written notice of contact, and any written disqualifications, or documentation of any rejection by the employee.

If you believe the individual to have possibly been involved in procurement-related matters, require written certification that he or she has not served within the last year in any of the positions, specified above, that would be subject to the hiring ban.

If there is any uncertainty whatsoever regarding the applicability of the hiring ban, insist that the employee seek an ethics advisory opinion from the designated agency ethics official, and that he or she provide you a copy of the opinion.

Once hired, ensure that all former government employees, and their supervisors, are thoroughly aware of the post-employment restrictions applicable to them, and that all questionable contacts are avoided. Remember that a former military member on “terminal leave” may begin working for you but is still considered a government employee and as such may not represent you before any federal agency.

Incorporate regular training and monitoring programs to ensure affected employees understand and comply in all respects with the statutory post-federal employment restrictions.

Finally, remember that this paper is simply an overview, and other restrictions not presented herein may apply to a particular situation. Whenever you undertake to recruit or hire a federal employee, particularly a fairly senior individual, make sure you or your legal advisor review the potentially applicable statutes and regulations, and determine the risks involved.

— Chris Jensen

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