

*Ensuring Integrity in Governmental
Decision-Making
With a Blended Workforce*

Steve Epstein

Standards of Conduct Office
Office of the General Counsel
Department of Defense

Disclaimer

- These are my views.
- They do not necessarily reflect the views of the Department of Defense.
- I'm happy to discuss further:
 - Phone: 703-571-9451
 - Email: epsteins@dodgc.osd.mil

Thesis

- We have many measures to ensure integrity of governmental decision-making.
- Most measures apply only to Federal employees.
- Contractors are increasingly involved in governmental decision-making.
- How can we ensure integrity in light of contractor involvement?

Integrity of Governmental Decision-making

- Honesty
- No preferential treatment
- No self-interest
- No hidden agenda
- Level playing field

Measures to Promote Integrity in Decision-Making

- Avoidance of financial conflicts of interest
 - Prohibition on bribery. (18 U.S.C. 201)
 - Prohibition on conflicts of Interest.
 - 18 U.S.C. 208
 - 5 CFR Subpart D
 - 5 CFR 2635.502
 - Requirement to disclose financial interests.
 - 5 U.S.C. App. 4 (Ethics in Government Act)
 - 5 CFR 2634

Measures to Promote Integrity in Decision-Making (2)

- Avoidance of financial conflicts of interest
 - Prohibition on accepting compensation for performance of duties. (18 U.S.C. 209)
 - Prohibition on acceptance of illegal gratuities.
 - 5 U.S.C. 7353
 - 5 CFR 2635 subpart B

Measures to Promote Integrity in Decision-Making (3)

- Avoidance of employment conflicts of interest
 - Prohibition on post-employment activities
 - 18 U.S.C. 207
 - 41 U.S.C. 423 (Procurement Integrity Act)

Measures to Promote Integrity in Decision-Making (4)

- Avoidance of political conflicts of interest
 - Prohibition on political activities.
 - 5 U.S.C. Chapter 73 (Hatch Act)
 - Prohibition on using official authority or influence to affect results of election.
 - 5 U.S.C. 7323
 - Prohibition on soliciting or discouraging political activity by another person.
 - 5 U.S.C. 7323

Measures to Promote Integrity in Decision-Making (5)

- Avoidance of misuse of position
 - Misuse of position. (5 CFR 2635 subpart G)
 - Prohibition on representing others to Federal agencies or courts. (5 U.S.C. 205)

Measures to Protect Privileged Information

- Procurement Integrity Act (41 U.S.C. 423)
- Trade Secrets Act (18 U.S.C. 1905)
- Privacy Act (5 U.S.C. 552a)
- Freedom of Information Act (5 U.S.C. 552)
- Nonpublic information (5 CFR 2635.703(e))

Measures to Ensure Efficiency in the Federal Workplace

- Limitations on fundraising.
 - 5 CFR Part 950
- Prohibition on striking. (5 U.S.C. 7311)
- Prohibition on gifts to superiors.
 - 5 U.S.C. 7351
 - 5 CFR 2635 subpart C
- Prohibition on habitual and excessive drinking. (5 U.S.C. 7352)
- Many more such as EEO, sexual harassment, whistleblower protection, nepotism, etc.

What is “decision-making?”

- No common concept:
 - “roles traditionally carried out by civil servants”
 - “critical functions”
 - “inherently governmental functions”
 - “participation...through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise...”

What is “decision-making?”

- Possible answer:
 - Any action which is protected by statute or regulation.

What is “decision-making?”

- Process protections are broader than “inherently governmental functions” as defined in FAR 7.5
 - Contractors participating as technical advisors to source selection board or participating as members of source evaluation board are not performing inherently governmental functions.
 - Same action is prohibited by 18 U.S.C. 208 if employee has a conflicting financial interest.

Most Measures Apply Only to Federal Employees

■ Exceptions:

- Bribery prohibition (18 U.S.C. 201)
- Procurement Integrity Act (portions)
 - 41 U.S.C. 423

Source of Problem

- Measures taken to ensure the integrity of the process, are applied to personnel based upon their status (Federal employees).
 - This worked when only Federal employees were involved in the process.
 - Requires change to accommodate contractor personnel involvement in the process.

Possible Solutions

- Exclude contractor personnel from decision-making process
 - Premise of inherently governmental function analysis.
 - Problem: protected decision-making process is broader than inherently governmental functions.
 - Example: Contractor, who evaluated products for agency, convicted of receiving kickbacks from manufacturer of product.

Possible Solutions (2)

- Apply protective measures to all personnel, Federal and contractor, involved in the process.
 - Apply valid measures by legislation or regulation.
 - Apply measures through contract.
 - Require contractor enforcement.
 - Create temporary status such as IPA or ITEP (Information Technology Exchange Program).

Conclusion

- “In America, our unique commitment to the rule of law allows ordinary citizens to rely on and expect...honesty of government officials...” -- Attorney General Gonzales