

## GIFTS TO GOVERNMENT EMPLOYEES

**Introduction:** This is the third and final in a series of Special Government Contracts Updates on government ethics topics. The first dealt with the rules applicable to employment discussions with government officials, and the second discussed the restrictions that former government workers must follow after they leave government service. This Update addresses the restrictions that apply to gifts and gratuities to government workers.

**Background:** No reputable contractor would intentionally offer a gift or cash to a government official with whom she or he does business in an effort to influence the official. There are many situations, such as those discussed below, however, that can set the stage for an unintentional violation of the myriad of statutes and regulations that apply to gratuities to government employees. These situations include:

- Contractor marketing programs that routinely provide items such as free attendance at seminars, opportunities to attend social networking events, meals, and promotional items to all of their potential customers including, in some cases, government workers.
- Offers to cover transportation and travel expenses that enable government officials to meet to resolve issues that have arisen affecting a program.
- Interaction between contractor employees and government workers at work sites, including opportunities to exchange holiday and farewell/retirement gifts.

**Summary:** The following are some of the more significant statutes and regulations concerning gifts to government employees:

**Bribery and Illegal Gratuities.** Anyone who corruptly (i.e., with a specific intent to engage in a *quid pro quo*) gives or promises a public official, and any public official who corruptly seeks or receives anything of value in order to influence an official act is liable for bribery and faces criminal penalties of up to 15 years imprisonment and a fine of up to three times the value of the bribe (18 U.S.C. § 201(b)). Anyone who otherwise gives or promises a public official, and any public official who otherwise seeks or receives anything of value for or because of an official act is liable for the offense of illegal gratuity and faces penalties of up to two years imprisonment and fines (18 U.S.C. § 201(c)).

**Gifts to Government Officials from Outside Sources.** Even where there is no intention to influence or other nexus between the item being offered and the government worker's performance of his or her duties, government employees are prohibited from soliciting or accepting gifts that are from a "prohibited source" or that are offered because of the employee's official position. Government employees accepting such gifts face disciplinary action, including possible termination of employment, for violating the gift statute (5 U.S.C. § 7353) and Office of Government Ethics ("OGE") regulations (5 C.F.R. § 2635.101, *et seq.*). Under the OGE regulations:

- A "prohibited source" is defined broadly as any person or entity that is seeking official action by the employee's agency, does or seeks to do business with the employee's agency, or may be otherwise affected by the government employee's performance of her or his duties.
- Similarly, a "gift" is broadly defined as any gratuity, favor, entertainment, training, travel, meals, or other item having any monetary value, and gifts to a government employee's immediate family are imputed to the employee. A few items are specifically excluded from the definition of "gift," such as modest refreshments that are not part of a meal.

- There are a few exemptions that may permit a government worker to accept an otherwise prohibited gift. The exemptions include unsolicited gifts of items (other than cash) with a market value of less than \$20.
- There are other exclusions and exemptions which must be carefully analyzed before offering anything of value to a government official, regardless of the circumstances and purposes that underlie the potential gift.
- Under no circumstances may a government employee solicit or coerce a gift, accept a gift in return for performing an official act, or accept gifts from the same or different sources so often or on such a basis that a reasonable person would believe the employee was using her or his office for personal gain.

**Gifts Between Government Employees.** Additional OGE regulations govern and restrict gifts between subordinate and senior government officials and the solicitation of government employees to contribute to common gifts and for the costs of events such as holiday parties, departure/retirement lunches, and similar affairs. Although these rules do not apply directly to contractors, problems may arise because of the prevalence of contractor workers in the same offices and locations as government workers who may be viewed as part of the same work force for many purposes.

- Because a contractor employee is considered to be a "prohibited source" any "contribution" that a contractor employee may want to make to a gift or party fund is subject to the above rules concerning gifts from outside sources.
- Under no circumstances may government workers solicit contractor employees for contributions or other gifts.

**Payment of Travel and Related Expenses.** A government agency may, in some circumstances, lawfully accept a contractor's offer to pay travel expenses in order to permit a government employee to attend a meeting or similar function related to the employee's official duties, but the agency's acceptance is subject to strict procedural and reporting requirements (see 31 U.S.C. § 1353). Failure to comply with these requirements will subject the employee to disciplinary action. In addition, the employee may be required to repay an amount equal to the travel benefits accepted into the Treasury and to forfeit their entitlement to reimbursement for the travel.

**Practitioner Tips:** Contractors that have any dealings with the federal government must take appropriate measures to avoid violating any of the host of laws and regulations with respect to gifts to government officials. Problems can be avoided by:

- Ensuring that the contractor's Code of Conduct and other ethics policies mirror the federal statutes and regulations that prohibit or restrict gifts to government employees and training all workers on these rules, particularly those engaged in business development activities.
- Requiring that contractor employees who work at government offices are aware of the rules that apply to their interaction with government workers.

**Conclusion:** This Update provides only a brief summary of some of the more significant rules that apply to gifts to government employees. These rules can be extremely difficult to apply to particular situations, and contractors should consider seeking legal counsel as soon as a potential for problems is identified.

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