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**DENTONS GOVERNMENT  
CONTRACTS ACADEMY**  
VIRTUAL | 2021

# ETHICS IN GOVERNMENT CONTRACTING

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# Welcome

## Welcome to our Dentons Academy webinar series

We are excited to continue to bring our clients practical analysis of recent decisions, statutes, regulations, trends and other hot topics impacting the government contracting community.

## Summer Hiatus for Dentons Academy webinar

Two more webinars this year - August and October

# Agenda

- Model Rules of Professional Conduct
  - Confidentiality of Information
  - Conflicts of interest
- The Intersection of the Model Rules of Professional Conduct with Hiring Government Employees
  - Post Government Employment Restrictions
  - Prohibition on Former Officials Accepting Compensation
- The Intersection of the Model Rules of Professional Conduct with Organizational Conflicts of Interest (OCIs)
  - What are OCIs
  - Mitigation Strategies for OCIs
  - Consequences and trends of OCIs
- Question & Answer

# Model Rules of Professional Conduct related to Conflicts of Interest

# Model Rules of Professional Conduct

## Rule 1.6 - Confidentiality of Information

- The foundation for most of the conflicts of interest rules stem from the requirements to:
  - Not reveal information relating to the representation of a client unless the client gives informed consent
  - Make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client
- 7 Exceptions

# Model Rules of Professional Conduct

## Conflicts of Interest Rules

Rule	Subject
1.7	Conflict of Interest: Current Clients
1.8	Conflict of Interest: Current Clients: Specific Rules
1.9	Duties to Former Clients
1.10	Imputation of Conflicts of Interest: General Rule
1.11	Special Conflicts of Interest for Former and Current Government Officers and Employees

# Model Rules of Professional Conduct

## Rule 1.9 - Duties to Former Clients

- A lawyer may not:
  - Use information relating to the representation to the disadvantage of the former client except:
    - As these Rules would permit or require with respect to a client, or
    - When the information has become generally known;
  - Reveal information relating to the representation except as these Rules would permit or require with respect to a client

# Model Rules of Professional Conduct

## Rule 1.11 - Special Conflicts of Interest for Former and Current Government Officers and Employees

- A lawyer who has formerly served as a public officer or employee of the government:
  - Is subject to Rule 1.9
  - May not work on a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation
  - May not disclose “confidential government information” - information obtained under governmental authority and which the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public
- Mitigation requirement:
  - Timely screen the lawyer from any participation in the matter



# The Intersection of the Model Rules of Professional Conduct with Hiring Government Employees

# Hiring Government Employees

## Post Government Employment Restrictions

- Key federal statute is 18 U.S.C. 207, which provides for criminal sanctions resulting from noncompliance
- Aligns with the *Model Rules of Professional Conduct* discussed
  - *Rule 1.9 - duties are owed to the government, the lawyer's former client*
  - *Rule 1.11 - prohibition on matters are permanent and time-limited*
- 18 U.S.C. 207 prohibitions include:
  - “Lifetime Ban” - permanent prohibition against personal and substantial involvement in a particular matter involving specific parties
  - Two-Year Restriction - time-limited prohibition on representing to the government matters under official responsibility during your last year of service
  - One-Year “Cooling Off” Restriction - time-limited prohibition on knowingly making a communication or appearance before the home agency with the intent to influence

# Hiring Government Employees

## Post Government Employment Restrictions

- Key regulatory scheme is located at 5 C.F.R. Part 2641, Post Employment Conflict of Interest Restrictions
- Includes prohibitions from 18 U.S.C. 207, including:
  - a one-year restriction on any former senior employee's representations to former agency concerning any matter, regardless of prior involvement (5 C.F.R. § 2641.204);
  - a two-year restriction on any former very senior employee's representations to former agency or certain officials concerning any matter, regardless of prior involvement (5 CFR § 2641.205); and
  - a one-year restriction on any former senior or very senior employee's representations on behalf of, or aid or advice to, a foreign entity (5 CFR § 2641.206)
- Similar to 18 U.S.C. 207, the regulations provide for criminal/civil penalties, injunctive relief, and other forms of relief including voiding or rescinding contracts, transactions, and other obligations

# Hiring Government Employees

## Prohibition on Former Officials Accepting Compensation

- Pursuant to 41 U.S.C. 2104, a former government official may not accept compensation from a contractor within one (1) year of:
  - Serving when the contractor was selected or awarded a contract, as the procuring CO, the SSA, a member of the SSEB, or the chief of an evaluation team in a procurement in which that contractor was selected for award of a contract in excess of \$10M; or
  - Personally making, for the government agency, a decision to:
    - Award/modify/execute a contract or contract action of \$10M,
    - Establish rates on any contracts valued in excess of \$10M,
    - Approve any contract payments in excess of \$10M, or
    - Pay or settle a claim in excess of \$10M
- *Similar to the principles underlying Model Rule of Professional Conduct 1.8(a) on business transactions*
- Risk of criminal, civil, and/or administrative penalties for violation(s)

# Hiring Government Employees

## Prohibition for Compensation to Former DoD Officials

- Prohibition is included in contracts via DFARS 252.203-7000
  - A contractor must not knowingly provide compensation to a covered DoD official within two years after the official leaves DoD service, without first determining that the official has sought and received, or has not received after 30 days of seeking, a written opinion from the DoD ethics counselor on the applicability of post-employment restrictions to the activities anticipated
- Liability also attaches to Solicitation phase in representation required under DFARS 252.203-7005
  - Offeror represents that all covered DoD officials are in compliance with all post-employment restrictions (i.e., 18 U.S.C.207, 41 U.S.C. 2101-2107, and 5 CFR parts 2637 and 2641, including FAR 3.104-2)
- *Analogous to principle underlying Model Rule of Professional Conduct 1.8(f) on accepting compensation for representing a client*
- Risk of contract recession, suspension, or debarment for failure to comply and/or for false certification(s)

# Hiring Government Employees

## Best Practices

- **Former government employees**

- Observe and comply with, among others, *Model Rules of Professional Conduct (Rule 1.9 and 1.11)* as well as all applicable post-employment restrictions
- Notify employer when a task, assignment, or activity might raise an ethics issue
- When in doubt, contact ethics advisor at former agency and seek a written ethics opinion (not a bar to liability, but good faith reliance is considered)

- **Contractor-Employers**

- Conduct in-depth screening for all former government employees, particularly former senior officials and former DoD officials
- Build a firewall for matters and transactions for which former government employees cannot and should not be involved
- Conduct compliance checks for certification made under DFARS 252.203-7005
- Ensure that policies, procedures, and practices align with Rules and restrictions

# The Intersection of the Model Rules of Professional Conduct with Organizational Conflicts of Interest (OCIs)

# What are OCIs?

## FAR Subpt. 9.5 and DFARS Subpt. 209.5

- Government policy not to award contracts to contractors with actual or apparent conflict of interest
  - *Turner Const. Co.*, 645 F.3d 13711 -- OCI required to be established by “hard facts” indicating “appearance” of OCI
- OCI regulation core objectives
  - Prevent conflicting roles that might bias contractor judgment
  - Prevent unfair competitive advantage
- Contracting Officers are required to analyze acquisitions in order to:
  - Identify and evaluate potential organizational conflicts of interest as early in the acquisition process as possible; and
  - Avoid, neutralize, or mitigate significant potential conflicts before contract award
- Different than Personal Conflicts of Interest



# What are OCIs?

## Generally Three Types

- Unequal access to information
  - Contractor access to nonpublic information (e.g., proprietary information or source selection information)
  - Incumbency does not create OCI
  - *Compliance with Model Rules of Professional Conduct (Rule 1.11) may mitigate harm for this type of OCI when hiring a former government lawyer*
- Impaired objectivity
  - Advice involving a company's own products or services or those of a competitor
  - Requires discretionary activity
- Biased ground rules
  - Contractor could skew government specifications, SOWs or other government requirements in its favor
  - Does not apply to developmental contracts (FAR 9.505-2)
- Not necessarily limited to these three, however

# What are OCIs?

## Common Scenarios

- Advising government on needs / future procurements
- Mergers and acquisitions
- Transfers of technical data - nondisclosure / teaming agreements
- Advisory, testing, evaluation, or other services relating to hardware provided by another division
- Hiring former government procurement / program professional
  - *Consider Rule 1.11 of Model Rules of Professional Conduct when hiring lawyers*
- Hiring former employee of competitor / consultants
  - *Consider Rule 1.9 of Model Rules of Professional Conduct when hiring lawyers*

# Consequences of OCIs?

- Breach of contract
- Present responsibility concerns
- Exclusion from competition (current or future)
- Bid protest
- Potential False Claims Act liability

*Consequences of violating Rules of Professional Conduct: Disciplinary action*

# OCI

## Mitigation Strategies

- Unequal access to information
  - Generally can be mitigated
  - Information controls / firewalls
  - Elements of an effective firewall:
    - Continuous education and training
    - Nondisclosure agreements
    - Document control strategies (IT)
    - Compliance audits
  - Government disclosure

*Consider firewall aspects in screening former government lawyer under Rule 1.11*

# OCI

## Mitigation Strategies

- Biased ground rules and impaired objectivity
  - Generally difficult to mitigate
    - Internal firewalls are inadequate because conflict imputed
  - Mitigation possible through subcontractor firewalls
  - Agency may be able to mitigate by maintaining oversight and control (recently some doubt)
  - Mitigation more effective when identified early and proactively managed

# OCI Trends

- Increasing OCI issues
  - Industry consolidation / divestitures
  - Government reliance on contractors for government functions
  - Complex requirements requiring teaming
- Increasing OCI protests and sustain rate
- Potential FCA liability
- Regulator focus on OCIs

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Questions?

# Thank you



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