



Whyte Hirschboeck Dudek S.C.



Challenging. Redefining. Advancing.

**SOCIETY OF AMERICAN MILITARY
ENGINEERS
MIDWEST SMALL BUSINESS
EXPO 2010**

CONTRACTOR ETHICS AND FOIA

Presented by
William E. Hughes

Whyte Hirschboeck Dudek S.C.
555 East Wells Street, Suite 1900
Milwaukee, WI 53202
(414) 978-5301
whughes@whdlaw.com

March 11, 2010



IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST

- Standards of Conduct
- Solicitation and acceptance of gratuities by Government personnel
 - Entertainment and gifts
 - *De minimis*: coffee, lunch?
- Independent pricing



IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST

- Procurement Integrity

- Protection of contractor bid or proposal information and source selection information
- Offers of employment
- Prohibitions on a former official's acceptance of compensation from a contractor
- Ethics Advisory Opinions



IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST

- Contingent Fees
 - Contingent fee arrangements in pursuing a contract award are prohibited
 - Exceptions:
 - Bona fide agency
 - Bona fide employee



IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST

- Other Improper Business Practices
 - Buying-in
 - Subcontractor kickbacks
 - Unreasonable restrictions on subcontractor sales



IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST

- Contracts with Government Employees or Organizations Owned or Controlled by Them
- Limitations on the Payment of Funds to Influence Federal Transactions
- Whistleblower Protection for Contractor Employees



Contractor Code of Ethics

- FAR Subpart 3.10
- FAR 3.1002 - Policy
 - Contractors must conduct themselves with highest degree of integrity and honesty
 - Contractors should have a written code of business ethics and conduct, a compliance training program and internal control system



Contractor Code of Ethics

- FAR 3.1003 – Requirements
- FAR Clauses
 - 52.203-13
 - 52.203-14



Code of Conduct

- Requirements
 - Contract value > \$5 million
 - Written Code of Business Ethics (30 days of award)
 - Provide a copy to each employee engaged in performance of contract (independent contractors, consultants, indirect functions)
 - Promote compliance



Code of Conduct

Additional requirements for other than small businesses

- Create Awareness Program and Internal Control System (90 days)
- Internal Control System shall:
 - Facilitate timely discovery of improper conduct in connection with Government contracts
 - Ensure corrective measures are promptly instituted and carried out



Code of Conduct

Internal Control System:

- Provide for periodic reviews of company business practices, procedures, policies, and internal controls for compliance
- Provide an internal reporting mechanism such as a hotline for reporting suspected instances of improper conduct
- Internal and/or external audits
- Disciplinary action for improper conduct



Code of Conduct

- Flowdowns

- Contract Clause FAR 52.203-13

- Must be flowed down in subcontracts > \$5 million (exceptions: (1) commercial item; or (2) performed entirely outside U.S.)

- Commercial Item subcontract (FAR 52.244-6)

- Prime responsibility to “check” subcontractor compliance



Freedom of Information Act

FOIA – Broad disclosure of public records

Historical Perspective

- Enacted in 1966
- Cold War – Reclassification of documents
- Clinton Era – Presumption of disclosure
- Post 9/11 – Presumption of protection

Openness Promotes Effectiveness in our National Government Act (OPEN Government Act)

- ADR as alternative to FOIA litigation
- Strict processing times
- Attorneys' fees and costs
- Employee discipline



FOIA Under Obama

- Presumption of Openness
- Use of FOIA by Competitors
 - Increased ability to obtain competitive information
 - Availability of past performance information
- Line item prices – still protected(?)
 - General Electric v. The Air Force
- Proactive posting of information
 - Sole service justifications
 - Contract actions



FOIA

- Contents of the request
 - “Pursuant to the Freedom of Information Act”
 - Descriptions of documents being requested
 - Purpose of intended use
 - Willingness to pay fees up to \$?
- Processing the request
- Appeals of a denial



FOIA

• Fees

- Depends on projected use (commercial, education, scientific, media)
- Types of fees: search review and duplication
- Generally
 - Search costs > 2 hours
 - Duplication costs for > 100 pages
- Search/Review \$8 to \$45/hour
- Copying \$.10 to \$.35/page
- No advance unless > \$250 or previous failure to pay



FOIA

- Exceptions
 - Natural Security Information
 - Confidential Business Information
 - Agency communications subject to the deliberative process



QUESTIONS



Whyte Hirschboeck Dudek S.C. is committed to challenging the conventional definition of what it means to be a leading law firm. WHD is continually setting new standards—moving the bar higher and higher—when it comes to professional expertise, client responsiveness and redefining how counsel can help clients anticipate challenges and capitalize on future opportunities.

