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Refresher on Post-Government Employment Restrictions

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A recent decision published by the Court of Federal Claims (“COFC”) highlights the legal perils contractors may face by failing to properly evaluate the impact of post-government employment restrictions (i.e., “revolving door” laws).

In *CACI Inc.–Fed. (“CACI”) v. United States*, COFC upheld a contracting officer's decision to exclude CACI from competing on an \$8 billion Army IT follow-on procurement. In the months leading up to the issuance of the solicitation, CACI employed an independent consultant who previously oversaw the incumbent's performance of the preceding contract as an Army official. Following an investigation, the contracting officer specifically observed that the former Army official had “access to non-public, proprietary” information, which gave CACI an unfair competitive advantage. The contracting officer reached this conclusion despite CACI's attempts to mitigate the potential conflict resulting from its engagement with the independent consultant. The CACI decision emphasizes the importance of assessing post-government employment restrictions for prospective independent consultants in addition to employees.

In Part I of this two-part series, we summarize key revolving door laws enacted to protect the integrity of the federal procurement process by limiting the improper use of sensitive, non-public information gained during government service. Part II will provide tips and best practices for contractors to ensure they stay on the right side of the post-government employment ethics line.

Summary of Key “Revolving Door” Laws

“Lifetime Ban” on Representational Matters (18 U.S.C. § 207(a)(1), 5 C.F.R. § 1304.4605(a)(1))

1. **Application:** Applies to matters in which a government employee participated “personally and substantially” during his or her government service. This requires the involvement in a particular matter to be significant to the matter or form the basis for a reasonable appearance of such significance.
2. **Scope:** Prohibits a former government employee from knowingly communicating with or appearing before any agency of the government, with the intent to influence, during the representation of a person in connection with a matter described above.
3. **Duration:** The representational ban commences at the termination date of government service and applies indefinitely.

“Two-Year Ban” on Representational Matters (18 U.S.C. § 207(a)(2), 5 C.F.R. § 1304.4605(a)(2))

1. **Application:** Applies to matters “pending under [the] official responsibility” of a former government employee during his or her government service. This requires the government employee to have responsibility for the direct administration or authority of a particular matter within one year prior to the termination date of government service.
2. **Scope:** Prohibits a former government employee from knowingly communicating with or appearing before any agency of the government, with the intent to influence, during the representation of a person in connection with a matter described above.
3. **Duration:** The representational ban commences on the date when the employee's responsibility for a particular matter ended (which may not necessarily be the termination date of government service) and extends for two years.

One-Year “Cooling-Off” Period (18 U.S.C. § 207(c))

1. **Application:** Applies to former government employees who previously held a senior executive agency position (i.e., Executive Service, Senior Executive Service, military officers ranked O-7 and higher, etc.).
2. **Scope:** Prohibits a senior executive branch government employee from communicating with or appearing before the prior agency employer during the representation of a private party on any matter with the intent to influence. Unlike the “lifetime ban” and “two-year ban,” this prohibition applies regardless of the involvement in a particular matter.
3. **Duration:** The “cooling off” period commences from the termination date of government service and extends for one year.

Limitation on Employment Discussions under the Procurement Integrity Act (41 U.S.C. § 2103)

1. **Application:** Applies to any agency official “participating personally and substantially” in a federal government procurement action in excess of the simplified acquisition threshold defined in Federal Acquisition Regulation 2.101.
2. **Scope:** Requires an agency official employee in employment discussions with a contractor to provide written notice to his or her supervisor and designated ethics official, and either (a) reject the possibility of such employment or (b) disqualify himself or herself from further personal or substantial participation in the federal government procurement action.
3. **Duration:** This provision requires disqualification from personal or substantial participation in the federal government procurement action until (a) the prospective employer is no longer a bidder or offeror in the federal government procurement action or (b) all discussions with the bidder or offeror regarding possible employment have terminated without an offer of employment.

Compensation Ban under the Procurement Integrity Act (41 U.S.C. § 2104)

1. **Application:** Applies to any agency official who (a) served as the procuring contracting officer, the source selection authority, a member of the source selection evaluation board, or the chief of financial or technical evaluation team in a procurement 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, and (c) personally made certain final agency decisions (i.e., award contracts, establish overhead rates, or pay or settle claims) for a contract valued in excess of \$10,000,000.
2. **Scope:** Prohibits a covered agency official from accepting compensation from a contractor as an employee, officer, director, or consultant of the contractor. This provision does not prohibit accepting compensation from a division or affiliate of a contractor that “does not produce the same or similar products as the entity” for which the agency official supervised.
3. **Duration:** The compensation ban commences from the date the agency official performed any of the activities described above and extends for one year.

Written Post-Government Employment Opinion (Sec. 847 National Defense Authorization Act (“NDAA”) for FY 2008)

1. **Application:** Applies to current and former Department of Defense (“DoD”) officials, including (a) senior executive branch officials (i.e., Executive Service, Senior Executive Service, military officers ranked O-7 and higher, etc.), (b) agency officials who participated “personally and substantially” in an acquisition exceeding \$10,000,000, and (c) any agency official servicing as a program manager, procuring contracting officer, members of source selection evaluation board, and others for an acquisition exceeding \$10,000,000.
2. **Scope:** Requires covered DoD officials to obtain a written opinion from the appropriate DoD ethics official regarding post-government employment restrictions prior to accepting an offer of employment from a contractor. DoD ethics officials are required to provide the written opinion within 30 days of the request.
3. **Duration:** This provision's requirement requires covered DoD officials to obtain a post-government employment opinion for two years after the termination date of government service with DoD.

DoD Prohibition on Performing Lobbying Activities (Sec. 1045 of NDAA for FY 2018)

1. **Application:** Applies to former DoD officials, including military officers with grades O-7 through O-10, including “civilian equivalents” (i.e., Executive Services, Senior Executive Service, etc.).
2. **Scope:** Prohibits the covered DoD officials from engaging in “lobbying activities” or “lobbying contacts” (as defined in the

Lobbying Disclosure Act of 1995, 2 U.S.C. § 1602) directed at covered executive branch officials within the DoD. This provision applies to behind-the-scenes activity supporting lobbying contacts during the applicable period.

3. **Duration:** This provision's lobbying ban commences upon the termination date of government service with DoD and applies for (a) two years for military officers in grades O-9 and O-10 and "civilian equivalents" and (b) one year for military officers in grades O-7 and O-8 and "civilian equivalents."

Conclusion

We hope that this summary provides an informative roadmap of key post-government employment restrictions. We note, however, that this list is not intended to be exhaustive. Many of the revolving door laws require analysis on a case-by-case basis depending on the particular circumstances of a post-government employment.

Stay tuned for Part II in the coming week, which will provide helpful suggestions for steps contractors can take to avoid the pitfalls of post-government employment restrictions.

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