

# *Not So Fast!*

What Government  
Contractors Must Know  
Before Hiring Former  
DOD Officials

By Richard B. O’Keeffe Jr.  
and Jon W. Burd



BEST PRACTICES FOR  
COMPLIANCE WITH THE  
NEW INTERIM RULE  
THAT RETROACTIVELY  
AFFECTS DEPARTING  
DOD PERSONNEL  
ACCEPTING EMPLOYMENT,  
CONSULTING OFFERS, OR  
RECEIVING COMPENSATION  
FROM GOVERNMENT  
CONTRACTORS

*On January 15, 2009, the Department of Defense (DOD) issued an interim rule that will affect how DOD contractors may hire and compensate departing or former DOD officials. It is no longer simply a “good idea” or “best practice” for an outgoing or former-DOD official to seek guidance from an ethics counselor before accepting employment, consulting offers, or receiving compensation from DOD contractors—for some military flag-rank officers and senior DOD civilian officials, it is now a requirement. DOD contractors who recruit these officials, but failed to timely request an ethics counselor opinion letter, will be subject to adverse contractual or administrative actions, up to and including suspension or debarment. Moreover, the new rule is retroactive to January 28, 2008.*

The new rule, implemented in the *Defense Federal Acquisition Regulation Supplement (DFARS)*, pursuant to Sec. 847 of the National Defense Authorization Act for Fiscal Year 2008, applies to “covered DOD officials” only. This term encompasses DOD personnel who leave or left federal service on or after January 28, 2008, and who meet either of the following two service criteria:

1 | They served:

- In a position in Executive Schedule under Subchapter II of Chapter 53 of Title 5 of the U.S. Code (Presidential Appointees);
- In a position in Executive Schedule under Subchapter VIII of Chap-

ter 53 of Title 5 of the U.S. Code (Senior Executive Service); or

- In a general or flag officer position in the pay grade of O-7 or higher and they participated personally and substantially in an acquisition as defined in Title 41 of the U.S. Code with a value in excess of \$10 million, or they served in one of several specified positions, such as source selection authority; or
- 2 | They served in one of several specified positions, including program manager, contracting officer, source selection authority, or source selection evaluation board member, for a contract with a value in excess of \$10 million.

Pursuant to the new rule, if these covered DOD officials, within two years after leaving DOD service, expect to receive compensation from a DOD contractor, they must first request a written opinion from the appropriate DOD ethics counselor. The opinion letter must advise the covered DOD official of any post-employment restrictions on activities that the official may undertake on behalf of a contractor. DOD contractors, under a change to DFARS 252.203-7000, promulgated with this change, are charged with policing compliance with this new rule and must ensure that the covered DOD officials they recruit comply with this new provision. DOD contractors are prohibited from compensating a covered DOD official without first verifying that the official requested and

received a written opinion letter from the appropriate ethics counselor, or properly requested an opinion letter at least 30 days prior to receiving compensation. A knowing failure to do so is now specifically designated as a basis to subject the contractor to suspension or debarment. In addition, the contractor also risks rescission of a contract or cancellation of a procurement if the new clause is violated.

Because of the retroactive nature of the change, DOD contractors must quickly assess whether any recruitments in the last year may require immediate action to comply with the new regulation. The *Federal Register* notice announcing the change indicated that it “should involve minimal effort on the part of a contractor.” However, we advise against taking such a minimalist approach to this important new requirement. Rather, in assessing compliance with the change in regard to any specific hiring action, there are several best practices that DOD contractors should consider. These best practices are outlined as follows.

### Make sure the ethics opinion is prepared by an actual DOD ethics counselor.

Not all DOD lawyers are trained and officially designated to serve as ethics counselors and issue ethics opinions of this kind. Only lawyers appointed in writing by the departmental Designated Agency Ethics Official (DAEO) are entitled to issue ethics opinions on which employees and contractors may rely. An opinion issued by someone who is not an ethics counselor will not comply with the regulation, and will not protect the contractor or the former DOD official.

### Obtain the entire ethics opinion file.

Make sure that you have all of the documents related to the ethics opinion, including all documents and information submitted by the employee along with the request. This will make a timely, complete and reliable review of the opinion possible.

### Review, if feasible, the ethics opinion request before it goes in to the ethics counselor.

A properly documented and framed ethics opinion request can be answered much more quickly, and the ultimate opinion can be relied on more confidently. As the contractor has an important stake in the opinion, it is not unreasonable to seek involvement in the application process at an early stage.

### Review the substance of the ethics opinion and seek clarification where appropriate.

Contractors are entitled to rely on ethics opinions properly issued by DOD ethics counselors, and will be protected in most cases from adverse administrative actions if the ethics opinion ultimately turns out to be incorrect. That being said, however, it would be difficult to argue that the contractor reasonably relied on an ethics opinion that was obviously flawed or erroneous. For example, if the opinion is issued on the basis of material factual assertions that the contractor knew or should have known were inaccurate or incomplete, or if it is clear that the ethics counselor missed or misconstrued a material fact, reliance on that opinion letter may be unreasonable, and the contractor would likely not be protected. Contractor due diligence could also extend to a requirement that opinions that are ‘obviously’ erroneous, from a legal standpoint, be clarified before completing the hiring action. For these reasons, contractors should not simply take an ethics opinion at face value.

### Involve legal counsel early in the recruitment of any covered DOD official.

The ethics opinion process runs smoothly most of the time, but when it goes wrong the consequences can be catastrophic. Thus, for the relatively few important recruiting actions involving covered DOD officials, legal department involvement, throughout the process, is a must. DOD has materially increased the formal burden on contractors who recruit employees and consultants from among DOD ranks. In a time of considerable personnel churning within the Defense establishment,



the opportunities for misunderstanding, error, and (rarely) actual malfeasance in the hiring of senior DOD officials are many, and the chances of detection in the current ethical and compliance culture are high. Contractors who have or are considering such recruitments should check to make sure that their hiring processes are adequate to the new challenges posed by this significant change. **CM**

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#### ABOUT THE AUTHORS

**RICHARD B. O'KEEFFE JR.** is an attorney with Wiley Rein LLP's Government Contracts practice. He has more than 12 years of experience handling all aspects of federal procurement matters. He is well-versed in all stages of federal contract law and litigation, including terminations, procurement disputes, protests, procurement integrity, and suspensions and debarments. Mr. O'Keeffe can be reached at 202-719-7396 or at [rokeeffe@wileyrein.com](mailto:rokeeffe@wileyrein.com).

**JON W. BURD** is an attorney with Wiley Rein LLP's Government Contracts practice. He counsels and represents government contractors and subcontractors on a range of legal matters. He regularly litigates matters before the Government Accountability Office and federal courts, including bid protests and other commercial litigation. Mr. Burd can be reached at 202-719-7172 or at [jburd@wileyrein.com](mailto:jburd@wileyrein.com).

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Send comments about this article to [cm@ncmahq.org](mailto:cm@ncmahq.org).