

INFORMATION PAPER

COMMUNICATING WITH INDUSTRY

INTRODUCTION

Many ethical issues can arise from interactions with industry for DHA employees. Luckily, there are tried and true practices that help navigate these areas and prevent impartiality, conflicts of interest, and other ethical violations! Below are general guidance tips and advice to help avoid complications. Also attached is a handy reminder “[Top 11 Dos and Don’ts for Agency and Contractor Communications](#)” list for easy reference. As always, every scenario is unique, so the best guidance you can always follow, is to seek out an Ethics Official who can provide you safe harbor from discipline. Please reach out to your Ethics Official for advice or contact the DHA OGC Ethics Branch at DHAOGCEthicsOffice@health.mil.

GENERAL GUIDANCE

When considering meeting with members of industry, DHA employees should be sensitive to:

- How the meeting (or other communication) could result in the contractor or potential contractor obtaining an unfair advantage when it comes to competing for future DHA requirements; and,
- whether participating in the meeting could create an appearance of partiality or endorsement.

With those two principles in mind, DHA employees should always remember:

- You are required to use official time in an honest effort to perform official duties. Therefore, you are not permitted to meet with non-federal entities unless there is an appropriate official purpose for the meeting.
- Do not endorse any product, service, or company.
- Do not release non-public information, including any sensitive procurement information.
- Treat all industry representatives impartially and avoid any overt or implied favoritism, endorsement, or preferential treatment.
- Do not discuss any ongoing acquisitions/litigation with industry representatives.
- Do not make promises or suggest a defense contractor will receive future business -- remain in “receive mode.”
- Do not solicit nor accept a gift from a contractor or a gift that is given because of the employee’s official position.
- After a significant engagement with a member of industry, document the encounter with a memorandum for record or other appropriate writing.

COMMON ISSUES AND TIPS

Creating an Appearance of Favoritism: When one vendor has unique access to government officials or information, it can cause perceptions of favoritism. Ethical rules and the Competition in Contracting Act ([10 U.S.C. § 2304](#)), prohibit preferential treatment of one vendor over another. If you elect to meet with one contractor, you should be available to meet with other similarly situated contractors. No one company should have exclusive access to your time and information. If you plan to meet with one, be sure you have time to meet with all that seek access.

- **Allowed:** Meeting with suppliers of a particular product type to determine whether industry has the production capability to meet anticipated requirements but limiting the invitees to those with existing high volume production lines.
- **Not Recommended:** Meeting with only a single supplier in an industry where there are 3 or 4 suppliers of equivalent capability and experience to discuss that same production capability.
- **Prohibited:** Meeting only with the incumbent contractor, to discuss requirements for the follow-on contract.

Revealing Too Much Information about Existing Government Requirements. Only the government and government officials should decide what the government needs and how it's delivered; not a potential vendor. Deciding government needs is an inherently governmental function, which is defined as one that is so intimately related to the public interest as to mandate performance by government employees. These functions include activities that require the exercise of discretion in applying government authority, the use of judgment in making decisions for the government, and decisions regarding monetary transactions and entitlements ([OMB Circular No. A-76](#); [FAR 7.5](#)). By giving too much information about government requirements to a single vendor, it will give them an unfair competitive advantage over their competition. Once discovered, it will often end in a protest or allegations of lack of impartiality.

- When vendor interaction substantially involves potential contract terms or requirement, it is a good idea to include a contracting officer or an attorney.
- **Rule of Thumb:** If they are bringing their lawyer; bring your lawyers.

Unfair Access through Office Calls from “Friends” and Former Commanders. Industry often hires former commanders and organizational leaders to consult in a sector where they had previous experience. During a “friendly” visit, the conversation can lead to a discussion on how the new employer can better help DHA in some way.

- While many potential vendors are well intentioned, they are in the business of selling their products and services; not identifying government requirements and finding the most efficient use of command (taxpayer) funds.
- All contractors are competitors, and DHA employees must maintain a level playing field to avoid preferential treatment/access and the appearance of endorsement.
- You can retain friendships, but don't cross the line and give unfair access to information and DHA leadership.

Changes to Ongoing Contracts and Unauthorized Commitments. When organizational leaders speak with contract holders there is always a risk of contract holders believing they received direction to change their performance under a contract.

- Changes to government contracts should only be done by a contracting officer.
- Obligations created by other than designated contracting officers result in unauthorized commitments (UACs) that require a time-consuming ratification process and may result in administrative disciplinary action.
- **Solution:** Be in the information receive mode. Have another witness present.

COMMON SCENARIOS AND EXAMPLES

Scenario 1: At lunch, some of my coworkers were talking about developing some specifications for a project that DHA will soon be putting out for bids. A friend of mine works for a company that is in the

business, and it might help him if he knew about what's coming along. Can I tell him about the project, without discussing the specifications?

- That depends on whether the project itself is currently public information. You cannot use (or allow someone else to use) non-public information to benefit yourself or another. If information about the project has not been made known to the public and is not authorized to be made known upon request, then it is nonpublic information and cannot be disclosed.
- It makes no difference that you heard about it at the lunch table and not as a result of your official duties.
- If the agency is going to pursue the project is public, you can inform your friend when the agency publishes or makes information about the project available.

Scenario 2: I'm just meeting with my old buddy "MG (ret.) Smith" who happens to work for a major defense contractor. Do I don't need to worry about ethics or procurement integrity issues?

- This one can cut both ways, and it's all about the details. Of course, you may meet with your old friends, even if they work for defense contractors. But, depending on your position/participation in relation to the work performed by the contractor, there may be appearance or impartiality issues. Obtaining information about the intent of the meeting beforehand is important. The first step is to consider whether the meeting is purely social. Find out:
 - What will you be discussing? If, for example, it's the kids and grandkids – no problem. If it's his company's contract or capabilities, then it's probably not a personal meeting.
 - Where are you meeting? If it's at the office on official time, probably not a personal meeting. If it's at a home or social establishment on personal time, then more likely a personal meeting.
 - If you are going out, who is paying? If his company is paying or reimbursing, then it's not personal.

Scenario 3: John, this is the Manager of ACME Company. Rember when we had a government and contractor luncheon three weeks ago and we discussed how the animal research would work better if we have three shifts of personnel versus two shifts personnel. I went ahead, as you directed, and started three shifts. Today, when we submitted out invoices and it got kicked back from the Contracting Officer. He said he never agreed to augment the contract. I think we should talk to the contracting officer together and tell the contracting officer that you asked us to augment the contract during that lunch meeting.

Scenario 4: Hey John, this is your boss, Susan. My old friend MG (ret.) Smith just dropped off this proposal. It looks pretty good to me, and it may just be what the Government needs. What do you think?

- Prohibited: This can lead to the unfair access, appearance of impartiality or endorsement.
- Prohibited: This is a misuse of position by the supervisor, as she is using her public office for the private gain of a friend. ([5 C.F.R. § 2635.702](#)).
- Allowed: Susan could tell her old friend to submit the proposal through the official DHA process.

CONCLUSION

The rules are complicated, and it is always a good idea to check with an Ethics Official before acting. You can find your Ethics Official by going to the Ethics Resources page on the [DHA OGC Ethics Office Resource Page](#) or by reaching out to DHA OGC Ethics Branch at: DHA-OGCEthicsOffice@health.mil.

TOP 11 “DOS AND DON’TS” FOR AGENCY AND CONTRACTOR COMMUNICATIONS

1. DO Recognize that Government Policy Encourages Federal Government Agencies to Communicate with Contractors – as long as No Contractor Receives Preferential Treatment.
2. DO Recognize that all Contractors are Competitors.
 - a. Maintain a level playing field and avoid preferential treatment or the appearance of endorsement (be careful of being photographed in uniform).
 - b. All similarly situated contractors should receive equal treatment. If you elect to meet with one contractor, you should be available to meet with other similarly situated contractors. Do not give preferential treatment to any private party.
 - c. Senior DoD Leaders, however, may restrict contact with contractors – generally deferring such meetings to their action officers and/or program managers.
3. DO Recognize that the Primary Purpose of a Meeting with a Contractor is to Receive Information.
 - a. While it is acceptable to ask informational or clarifying questions during a meeting, avoid asking contractors for follow-up information.
 - b. The meeting should not be the basis for further action and should not unintentionally solicit formal proposals.
 - c. Leverage your staff or designated program manager for any follow-up.
 - d. Use public forums such as Industry Days coordinated through the appropriate contracting office to “push” information out to contractors on DHA’s need and requirement. If you are uncertain, contact your legal advisor.
4. DO Set an Agenda Prior to Meeting with a Contractor.
 - a. After agreeing to meet with a contractor, have the contractor identify the topic(s) for discussion and whether there are any current contracts, competitions, or active proposals that it has pending with the DHA.
 - b. You may want to have the contracting officer’s representative (COR) and contracting officer (KO) attend if a particular contract action is involved.
 - c. You may want to have an IP/FDA/contract attorney attend.
 - d. You may want to consult the Ethics Official before the meeting.
5. DO Understand Restricted Contacts Rules applicable to Retired Government Personnel.
 - a. Personal Participation: Lifetime Representational Ban - After leaving Government service, a federal employee may not represent someone else to the Government (that is - anyone in the Government) regarding particular matters involving specific parties that he/she worked on personally and substantially while in Government service. This ban remains for the lifetime of that particular matter.
 - b. Official Responsibility: Two Year Representational Ban - For two years after leaving Government service, you may not represent someone else to the Government (that is - anyone in the Government) regarding particular matters involving specific parties that you did not work on yourself but were pending under your responsibility during your last year of Government service.
 - c. One-Year “Cooling Off” Restriction - Former senior DoD civilian employees and retired General Officers are prohibited from attempting to influence official actions in their former department or agency (department = all of DoD) for one year after their departure. (18 USC § 207(c) - Criminal).
 - d. Procurement Integrity Act Compensation Ban - For a period of one year after the applicable designated date, a former official may not accept compensation from a prime contractor that has been awarded a competitive or sole source contract in excess of \$10 million if the former official served or acted in certain capacities.

- e. Note: It is very important to get ethics advice, even after an employee leaves DHA, they can get advice. If you are interacting with someone who departed and may be violating the law, reach out for ethics guidance at: DHA-OGCEthicsOffice@health.mil.
- 6. DO NOT Meet with Contractors Regarding Ongoing Competitions or Ongoing Litigation.
 - a. Decline meetings with competing contractors once a solicitation has been released; instead, refer contractors to the designated contracting officer.
 - b. Avoid discussing or responding to questions on matters that are being litigated.
- 7. DO NOT Engage in Private One-on-One Discussions with Contractors.
 - a. Avoid private meetings or discussions with contractors regarding its business and relationship with the DHA.
 - b. Make it your practice to have at least one additional staff member attend discussions you are holding with contractors--preferably a representative from the contracting office.
- 8. DO NOT release "Inside Information" that is not otherwise available to the public (or the relevant community of DoD contractors).
 - a. DO NOT REVEAL too much information about existing research requirements, including changes to requirements.
 - b. DO NOT allow contractors to assist in developing requirements without proper firewalls in place.
 - c. DO NOT discussing ongoing competitions, including grants or cooperative agreements.
 - d. DO NOT provide selective release of advance procurement information, DHA requirements, or premature release of contract award decisions.
 - e. DO NOT discuss the performance of a contractor with another contractor.
 - f. DO NOT discuss information not available to the public under the Freedom of Information Act.
 - g. DO NOT discuss information protected under the Privacy Act, trade secrets, and classified material.
 - h. Report any incident of disclosure or improper inquiry immediately to the KO and appropriate legal advisor.
- 9. PROCEED WITH CAUTION on Gifts from Contractors.
 - a. Contractors are Prohibited Sources. Generally, employees cannot accept gifts from prohibited sources. You can always pay market value for or decline gifts.
 - b. There are a few exceptions to the gift prohibition that permit acceptance:
 - i. Unsolicited gifts or meals worth less than \$20 per instance (but not more than \$50 in total from any one contracting organization in a year). Note: You may not pay the excess amount over \$20 to accept the gift.
 - ii. Example: A contractor offers to pay for the Uber from work to a happy hour party, and also offers to pay for your drinks. You may accept gift up to \$20 in this instance, if you don't think a reasonable person would question your integrity. If you do; pay your way!
 - iii. Informational materials if less than \$100, educational or instructive, of interest to the agency or ties to your duties, and not solicited, (e.g., journal or book not for entertainment purposes).
 - iv. Note: There are other exceptions, so check with your Ethics Official if you receive a gift from a prohibited source.
 - c. Some things are not considered gifts:
 - i. Greeting cards and items with little intrinsic value such as plaques, certificates and trophies intended primarily for presentation are not considered gifts.
 - ii. Modest items of food and non-alcoholic refreshments such as soft drinks, coffee, and donuts offered other than as part of a meal.
- 10. DO NOT PARTICIPATE if you have a Financial Interest (unless there is a regulatory exemption).

- a. The fact that an employee is an honest person is not relevant.
 - b. The fact that an employee does not make the final decision is not relevant.
 - c. All that is required for a violation is that the employee participate personally and substantially in a particular matter and that the particular matter have a direct and predictable effect on his financial interest.
 - d. Example: You are reviewing a grant from a company and remember that your wife has stock holdings. You may need to recuse depending on the amount.
11. DO NOT Issue Contractor Letters, Star Notes, or Awards. DoD officials are prohibited from using their official position, title, or authority to endorse any person, product, service, or enterprise.
- a. This includes the use of official stationery and Star Notes. It is DOD policy not to recognize contractors with honorary awards or coins unless the contribution is unrelated and completely outside any DOD contractual relationship, and the recognition is clearly in the public interest – a very high standard.
 - b. Commander's coins purchased with appropriated funds or personal funds may not be presented to contractors.
 - c. Recognition of contractors must be coordinated with the cognizant contracting officer. Prior coordination is required because the contracting officer may be taking action related to contractor performance. Obtain legal counsel prior to any recognition action involving a contractor.