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Is a Defense Contractor Knocking on Your Door?

Best Practices for Engaging with Existing and Potential Defense Contractors

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This article provides a series of best practices that attorneys can use to ensure their government clients successfully balance robust communications with industry while avoiding the pitfall of oversharing information.

INTRODUCTION

The Department of Defense is turning to defense contractors to protect its industrial assets and to modernize key capabilities. Contractors are viewed as the best source of information as the Government develops acquisition strategies and tries to understand the marketplace. To facilitate this exchange of information, existing and potential defense contractors schedule "industry engagements" with government personnel to discuss their capabilities and to demonstrate their supplies and services. While it is helpful for government personnel to learn what industry has to offer as the Government defines requirements for supplies and services, there are risks of missteps. This article discusses the issues encountered during industry engagements, including post-government employment representation bans, impacts on ongoing acquisitions, and the penalties associated with disclosing proprietary information. This article goes on to provide a series of best practices that attorneys can use to ensure their government clients successfully balance robust communications with industry while avoiding the pitfall of oversharing information.

As part of the National Defense Strategy, the Department of Defense (DoD) is increasingly turning to industry, i.e., defense contractors, to protect its industrial assets and to

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modernize key capabilities. Defense contractors are seen as the best source of information as the Government develops acquisition strategies, seeks opportunities for small business, negotiates contract terms, and tries to understand the marketplace.[1] As a result, it is not unusual for existing and potential defense contractors to schedule "industry engagements" with senior leaders, program managers, or other government personnel who define the supplies and services the Government needs to discuss their capabilities and to demonstrate their latest products. While it is helpful for government personnel to learn what industry has to offer as the Government defines requirements for supplies and services, each engagement includes the risk of ethical missteps. The challenge becomes balancing robust communications with industry, while avoiding the pitfall of oversharing government information.

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Attorneys play a vital role in helping their clients ensure discussions with industry are productive and ethical. This article will discuss best practices that attorneys can follow to guarantee successful and ethical industry engagements.

SUCCESSFUL INDUSTRY ENGAGEMENTS BEGIN BEFORE THE MEETING IS SCHEDULED

Government personnel and the commands in which they work must lay the groundwork for a successful industry engagement well before the meeting is even scheduled.[2] For that reason, it is vital for commands to establish standard procedures that attorneys and contracting personnel can use to vet industry requests for meetings with government personnel. Both industry personnel who plan to attend the meeting and the issues to be discussed should be vetted to limit ethics issues.

COMMANDS MUST VET INDUSTRY ATTENDEES TO ENSURE THEY ARE NOT SUBJECT TO A REPRESENTATION BAN

Defense contractors frequently hire former government employees to work on defense contracts. Attorneys must ensure that the former government personnel who attend industry engagements are not subject to post-government employment representation bans. For example, former non-senior government employees[3] cannot represent a defense contractor before the Government regarding a particular matter on which they worked while in government service for the lifetime of the matter.[4] Similarly, former non-senior government employees cannot represent a defense contractor before the Government regarding a particular matter that was pending under their official responsibility during their last year of government service for two years from the end of their government service.[5] Moreover, military officers on terminal leave may not receive compensation to represent anyone before a federal agency or court on a matter in which the United States is a party or has a substantial interest.[6] For example, a Government contracting officer who drafted a solicitation to acquire computer hardware cannot go to work for a vendor competing for that contract and speak to the Government about that procurement.

Senior officials face similar representation bans. Former senior officials[7] may not represent a defense contractor, with the intent to influence, before their former agencies regarding any official action.[8] Moreover, departing flag and general officers and their civilian equivalents cannot engage in lobbying activities with respect to DoD before covered executive branch officials.[9] Similar to non-senior officials, former senior officials cannot represent a defense contractor to the Government regarding particular matters on which they worked while in government service for the lifetime of the matter and cannot represent a defense contractor back to the Government regarding a particular matter that was pending under their official responsibility during their last year of government service for two years.[10] For example, a Commanding General cannot represent the interests of a vendor competing for a contract for the command's computer hardware back to the command.

While former government employees under a representation ban cannot represent back to the Government, they can provide background assistance to a defense contractor if the assistance does not involve a communication to or an appearance before the Government.[11] Accordingly, attorneys must ensure that former government employees who are subject to a representation ban are excluded from all industry engagements on matters to which the ban applies even when those same individuals are providing background assistance on those matters. Violations of the post-government representation bans may result in penalties of up to five years in prison and fines.[12]

> The attorney can prepare an industry engagement memorandum for their client that outlines what can and cannot be discussed during the meeting.

COMMANDS MUST VET TOPICS TO BE DISCUSSED DURING AN INDUSTRY ENGAGEMENT

Commands must vet the topics to be discussed during the industry engagement with the same or greater level of scrutiny as the defense contractor employees who will attend the meeting. Accordingly, the command's standard procedures should examine whether the topics for discussion relate to ongoing source selections or contracts, claims, or requests for equitable adjustment, litigation, or acquisition integrity issues.

The easiest way for attorneys to learn the topics to be discussed during an industry engagement is for the defense contractor to provide that information in a format such as an agenda or a narrative included on a government intake form when requesting the meeting. In addition, the defense contractor should identify all current contracts and proposals pending before the contracting activity holding the meeting. Even if the defense contractor provides a robust list of topics, current contracts, and proposals, it is a best practice to query government personnel for a list of current contracts, source selections, litigation, and acquisition integrity issues to ensure the list is as complete as possible.

Once the command knows the topics to be discussed and the defense contractor's current contracts, proposals, litigation, and acquisition integrity issues, the attorney can prepare an industry engagement memorandum for their client that outlines what can and cannot be discussed during the meeting. For example, it is advisable for certain government personnel to avoid meeting with defense contractors who are competing for those requirements during the pendency of the acquisition in order to avoid derailing the acquisition.[13] For example, it may be unwise for a Wing Commander to meet with a defense contractor if that contractor is competing for contract award. Even if the government employee does not discuss the acquisition during an industry engagement with an offeror, the mere fact the meeting occurred is fodder for future protests if that offeror is the ultimate awardee.

Similarly, attorneys can use an industry engagement memorandum to provide information about ongoing litigation, fraud-related investigations, or other acquisition integrity issues so the client does not inadvertently wade into these areas and make any statements that would negatively impact the litigation or investigations. The industry engagement memorandum should also highlight ongoing contract performance issues so that the client can discuss the Government's expectations with respect to complying with contractual terms and conditions. Sometimes, focused government attention is all that is needed to put contractual performance back on track.

ATTORNEYS CAN HELP CLIENTS AVOID DISCUSSING PROHIBITED TOPICS DURING INDUSTRY ENGAGEMENTS

While industry engagements are a good opportunity for defense contractors and the Government to communicate about new products and services, there is a great deal of information that cannot be discussed during these meetings. Defense contractors should not provide proprietary data during the meeting. Similarly, government personnel cannot disclose source selection information, such as information

about cost proposals, technical proposals, source selection plans, competitive range determinations, ranking of proposals, evaluation reports, or any other information that would jeopardize the integrity of any ongoing procurements.[14] One way to ensure that government personnel do not inadvertently disclose protected information is for attorneys to attend the industry engagement with their client. Attending the industry engagement allows attorneys to stop conversations that veer into any of these prohibited areas. Attorneys can also meet with their client prior to the industry engagement to outline prohibited areas of discussion so the client knows what topics they should not discuss.

THE STRUCTURE OF INDUSTRY ENGAGEMENTS MATTERS

Industry engagements can take a variety of forms, so attorneys in commands should provide advice as to the structure of the meeting. Certainly, the tried-and-true "Industry Day" is one way for industry and the Government to communicate about a defense contractor's capabilities and the Government's requirements.[15] The Government can publicize Industry Days, which ensures openness and transparency. All defense contractors attending the Industry Day will hear the Government's presentation and its responses to industry questions at the same time.[16] That will ensure equal access to information. However, holding open discussions during an Industry Day may not be the best way to solicit information about an individual defense contractor's capability. A defense contractor is unlikely to discuss its proprietary approach to a new product in an open forum. Under those circumstances, a one-on-one meeting may be a better approach than holding an Industry Day, if any information that could directly affect proposal preparation is shared in a timely manner with all potential offerors to avoid providing an offeror with an unfair advantage.[17]

While one-on-one meetings between defense contractors and the Government are not discouraged, they do raise concerns that are not present in a group setting. For example, an appearance could exist that a defense contractor is receiving preferential treatment or unequal access to decisionmakers and information. This is especially true if the defense contractor's representatives are former government employees. Moreover, there may be organizational conflicts of interest, especially if the vendor is interested in competing for requirements about which it previously advised the Government. An additional problem is how to handle proprietary information that may be transmitted by the defense contractor during a one-on-one session. Proprietary information that is transmitted during one-on-one meetings do not receive contractual protection if the meeting is not related to contract administration issues. Similarly, the proprietary information would not be protected as source selection information because the information would not have been transmitted as part of a proposal or quotation.

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The easiest way to address the concerns inherent with one-on-one meetings with industry is to establish pre-scheduling procedures, as discussed earlier in this article. Knowing that an attorney has vetted the defense contractor employees who will attend the meeting and the topics to be discussed during the meeting will give government personnel confidence that they know what can be freely discussed and with whom. Similarly, having an attorney attend the meeting will give government clients confidence that the parties will stay on-topic and that their statements will not be construed as an unauthorized commitment or viewed as providing unequal access to information.

BENEFITS TO ATTORNEY PARTICIPATION IN INDUSTRY ENGAGEMENTS

Some government personnel may be resistant to attorney participation in industry engagements. They may believe that having counsel present will chill the conversation and will prevent the free flow of information. While the conversation may have a different tone with an attorney present, that

should not preclude attorney attendance at industry engagements. The penalties associated with government employees disclosing proprietary data or source selection information are severe. The **Trade Secrets Act** is a criminal statute that prohibits government employees from releasing proprietary data.[18] A violation of the Trade Secrets Act carries penalties of up to one year in jail, fines, or both as well as dismissal from government employment.[19] Similarly, the **Procurement Integrity Act** is a criminal statute that prohibits government employees from exchanging source selection information for anything of value or to give a person a competitive advantage in the award of a federal procurement contract.[20] A violation of the Procurement Integrity Act carries penalties of up to five years in jail, fines, or both.[21] The benefits of avoiding the penalties associated with the disclosure of protected information far outweigh any concerns about attorneys potentially chilling the conversation in order to avoid an inadvertent disclosure. Attorneys should educate their clients regarding the penalties associated with government employees disclosing proprietary data or source selection information, and discuss with clients the benefits of their presence at the industry engagement.

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OTHER ETHICAL ISSUES TO CONSIDER

In addition to vetting attendees and topics and advising on the structure of meetings, attorneys must advise their clients on a plethora of other ethics issues that may arise at industry engagements. The following is a list of ethics considerations attorneys should be prepared to advise their clients.

- **Impartially**
  Government personnel must act impartially and cannot give or appear to give a competitive advantage, special access, or other preferential treatment to a particular company or organization.[22] Accordingly, if government personnel meet with one non-federal entity, they must be prepared to meet with other such entities.

- **Endorsements**
  Government personnel cannot expressly or implicitly endorse a non-federal entity.[23] Thus, government personnel should not allow non-federal entities to take photographs or videos of them during industry engagement without consulting with their attorney and public affairs. The photographs and videos are not owned by DoD and can be used by non-federal entities in their promotional materials.

- **Awards**
  Government personnel cannot recognize or give awards to entities that have a commercial or profit-making relationship with DoD or one of its components, except under very limited circumstances.[24] Attorneys can advise their clients under what circumstances it may be appropriate to recognize non-federal entities.

- **Commitments**
  Government personnel cannot make any commitments that could bind the Government.[25] They can ask informational or clarifying questions during an industry engagement and can request follow-up information. However, it must be clear that they are not authorizing award of a new contract or authorizing changes to an existing one. Attorneys can ensure that appropriate disclaimers are made during industry engagements.

- **Gifts**
  Government personnel must follow applicable gift and post-government employment rules.[26] Attorneys should advise government personnel on whether they can accept a gift from a non-federal entity or whether they could be deemed to be seeking employment.

- **Financial Gain**
  Government personnel cannot participate personally and substantially in an official capacity in a particular matter that has a direct and predictable effect on their

financial interests or those inputted to them.[27] In addition to avoiding an actual conflict of interest, they must avoid the appearance of a conflict of interest. Attorneys can advise their clients on whether an official action would result in an actual conflict of interest or give rise to an appearance of a conflict.

- **Advice**

  Government personnel must comply with the Federal Advisory Committee Act (FACA) when seeking advice or recommendations from a group that includes individuals who are not active duty members or full-time or permanent part-time federal employees.[28] Attorneys can advise clients regarding FACA compliance prior to any group meetings or requests for recommendations or advice.

CONCLUSION

Industry engagements are an effective way for the Government and industry to improve the source selection process and for the Government to obtain improved and innovative solutions to its requirements. Attorneys play a vital role in establishing pre-meeting ground rules and in vetting engagement attendees and topics. Their efforts will ensure that these engagements are conducted in a fair, effective, and ethical manner.

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ENDNOTES

[1] Memorandum from Daniel I. Gordon, Adm'r for Fed. Procurement Policy to Chief Acquisition Officers, Senior Procurement Executives, and Chief Information Officers (Feb. 2, 2011) (hereinafter "Myth-Busting Memo") at 1 (on file at https://www.whitehouse.gov/wp-content/uploads/legacy_drupal_files/omb/procurement/memo/Myth-Busting.pdf).

[2] Myth-Busting Memo, *supra* note 1, at 2 (agencies should develop a high-level vendor communication plan to provide direction to the workforce and to clarify the nature and schedule of industry engagements).

[3] For purposes of the representation ban, the Department of Defense (DoD) Standards of Conduct Office (SOCO) defines non-senior personnel as Military Personnel in grades O-1 through O-6 and civilians whose rate of base pay is less than 86.5% of the rate for Executive Schedule Level II. Dep't of Def. Standards of Conduct Office, Non-Senior Employee Post-Government Employment Restrictions (2021), https://dodsoco.ogc.osd.mil/Portals/102/Documents/PGE%20and%20PI/Toolbox%20-%20PGE-PI/2021%20Post%20Gov%20Service%20Non%20Senior%20No%20Pledge.pdf. The representation ban does not apply to former enlisted military personnel. *Id.*

[4] 18 U.S.C. § 207(a)(1) (2021), 5 C.F.R. § 2641.201(c) (2021). A particular matter is one that involves deliberation, decision, or action that is focused on the interest of a specific person or a discrete and identifiable class of persons, such as a contract, claim, or investigation. 18 U.S.C. § 207(i)(3) (2021); 5 C.F.R. § 2641.201(h) (2021).

[5] 18 U.S.C. § 207(a)(2) (2021); 5 C.F.R. § 2641.202 (2021).

[6] 18 U.S.C. §§ 203, 205 (2021).

[7] DoD SOCO defines senior officials as civilian personnel whose rate of base pay is at or above 86.5% of the rate for Executive Schedule Level II; Flag and General Officers; and all Presidential Appointees confirmed with the advice and consent of the Senate (i.e., PAS officials). Dep't of Def. Standards of Conduct Office, Senior Employee Post-Government Employment Restrictions (2021) (hereinafter "Senior Employee Post-Government Employment Restrictions"), https://dodsoco.ogc.osd.mil/Portals/102/Documents/PGE%20and%20PI/Toolbox%20-%20PGE-PI/2021%20Post%20Gov%20Service%20Senior%20Biden%20Pledge.pdf.

[8] 18 U.S.C. § 207(c) (2021). The definition of "agency" varies depending on the position the former government employee held. For PAS officials, the representation ban applies to all the Department of Defense. Senior Employee Post-Government Employment Restrictions, *supra*, note 7. For other senior officials, the representation ban applies to the component in which they served one year before leaving their senior position. *Id.*

[9] Covered executive branch officials include Presidential Appointees confirmed with the advice and consent of the Senate (PAS) officials, military officers in grades O-7 and above, and non-career Senior Executive Service (SES) officials. National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, § 1045, 131 Stat. 1283, 1555-1556 (2017). Military officers in grades O-9 and O-10, career and non-career SES and Defense Intelligence SES at Tier three and above, and all PAS officials departing service after December 12, 2017, are prohibited from engaging in lobbying activities with respect to DoD for two years after their retirement or separation date. *Id.* at § 1045(a), 131 Stat. at 1555. Military officers in grades O-7 and O-8, and career and non-career SES and Defense Intelligence SES at Tiers one and two departing service after December 12, 2017, are prohibited from engaging in lobbying activities with respect to DoD for one year after their retirement or separation date. *Id.* at § 1045(b), 131 Stat. at 1555.

[10] 18 U.S.C. §§ 207(a)(1), (a)(2) (2021). The representation is not prohibited unless, at the time of the proposed industry engagement, the former government employee knows or reasonably should have known that the matter was pending under their official responsibility within the one-year prior to termination of government service. 5 C.F.R. § 2641.202(j)(7) (2021). Senior officials, who are military officers on terminal leave, may not receive compensation to represent anyone before a federal agency or court on a matter in which the United States is a party or has a substantial interest. 18 U.S.C. §§ 203, 205 (2021).

[11] 5 C.F.R. § 2641.201(d)(3) (2021).

[12] 18 U.S.C. §§ 216(a), (b) (2021).

[13] *See* Christian Davenport, *A NASA official asked Boeing if it would protest a major contract it lost. Instead, Boeing resubmitted its bid.*, Washington Post, Nov. 17, 2020, https://www.washingtonpost.com/technology/2020/11/17/nasa-boeing-lunar-lander-probe/. (Grand jury investigates conversation between NASA official and offeror after offeror submitted new proposal after being told that it would not win contract).

[14] Present or former federal employees cannot knowingly disclose contractor bid or proposal information or source selection information before the award of a federal procurement contract to which the information relates. 41 U.S.C. §§ 2102(a)(1), 2102(a)(3)(A)(i) (2021); *see also* 48 C.F.R. §§ 3.104-3(a), 3.104-4(a) (2021). This prohibition also applies to individuals who are acting for or on behalf of, or who are advising, the federal government with respect to a federal agency procurement and who had access to contractor bid or proposal information or source selection information. 41 U.S.C. § 2102(a)(3)(A)(ii) (2021).

[15] An Industry Day is a meeting at which the Government presents its requirements for supplies and services to industry representatives so industry better understands the Government's needs. *See, e.g.,* 48 C.F.R. § 10.002(b)(2)(viii).

[16] *See* Myth-Busting Memo, *supra* note 1, at 9. Industry days benefit the Government by providing a common understanding of the procurement requirements, the solicitation terms and conditions, and the evaluation criteria. *Id.* Moreover, industry input into government acquisition strategies and solicitation documents may result in improved solutions to the Government's requirements. Memorandum from Lesley A. Field, Acting Adm'r for Fed. Procurement Policy to Chief Acquisition Officers, Senior Procurement Executives, and Chief Information Officers (May 7, 2012) (hereinafter "Myth-Busting 2 Memo") at 8 (on file at https://obamawhitehouse.archives.gov/sites/default/files/omb/procurement/memo/myth-busting-2-addressing-misconceptions-and-further-improving-communication-during-the-acquisition-process.pdf). The events benefit industry by providing prime contractors and subcontractors with an opportunity to meet and develop teaming agreements that benefit contract performance. Myth Busting Memo, *supra* note 1, at 9.

[17] *See* 48 C.F.R. § 15.201; *see also* Myth-Busting Memo, *supra* note 1, at 5; Memorandum from Lesley A. Field, Acting Adm'r for Fed. Procurement Policy to Chief Acquisition Officers, Senior Procurement Executives, and Chief Information Officers (Apr. 30, 2019) (hereinafter Myth-Busting 4 Memo) at 9 (on file at https://www.whitehouse.gov/wp-content/uploads/2019/05/SIGNED-Myth-Busting-4-Strenthening-Engagement-with-Industry-Partners-through-Innovative-Business-Practices.pdf) (acquisition officials are encouraged to hold one-on-one discussions with industry to gain information that may not be shared in a more public setting and to capture industry feedback to improve acquisition planning and requirements definition).

[18] 18 U.S.C. § 1905 (2021); *see also* Myth-Busting 2 Memo, *supra* note 16 at 10 (outlining the Government's responsibility to protect information received from a defense contractor).

[19] 18 U.S.C. § 1905 (2021).

[20] 41 U.S.C. § 2105 (2021).

[21] 41 U.S.C. § 2105 (2021).

[22] 5 C.F.R. §§ 2635.101(b)(8), 2635.501-2635.503 (2021).

[23] 5 C.F.R. § 2635.702(c) (2021).

[24] Dep.'t of Def, Instruction 1400.25, DOD Civilian Personnel Management System: Performance Management and Appraisal Program, V451, ¶ 3.h; *see also Id.*, Enclosure 3, ¶ 11.b.

[25] 5 C.F.R. § 2635.101(b)(6) (2021).

[26] 5 C.F.R. §§ 2635.101(b)(4), 2635.201-2635.206 (gifts from outside sources), 2635.601-607 (seeking outside employment) (2021).

[27] 18 U.S.C. § 208(a) (2021); 5 C.F.R. §§ 2635.101(b)(2), 2635.402 (2021).

[28] 5 U.S.C. App. (2021).