

Hold On A Minute: Gift Giving to Government Officials

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As the authors point out, government contractors should carefully consider applicable rules before they give presents.

Although most people associate gift giving with the holidays, it is important for government contractors to understand the restrictions placed on gift giving when spreading all kind of “good cheer.” In the wake of the recent procurement integrity scandals government contractors are under increased scrutiny.

A myriad of laws and regulations determine the who, what, and when of providing gifts to government officials. There are various definitions of what is a “gift” and who is a government “official,” as well as the intent leading to a violation. Some laws focus on the contractors’ actions, while others focus on the government official’s ability to accept gifts. It is important to note that although a gift may fit within the parameters of what a government official is allowed to accept, the contractor’s intent in providing the gift may still be in violation of the laws that govern a contractor’s ability to give gifts. Given the subtleties of these laws and regulations, company officials should consult their compliance and legal departments prior to providing gifts to anyone employed by the government.

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BRIBERY AND ILLEGAL GRATUITIES—A CONTRACTOR'S VIOLATION FOR GIFT GIVING

The Federal Bribery Statute¹ generally prohibits anyone from giving, offering or promising a public official, either directly or indirectly, anything of “value” with the “intent to influence” any official act or omission on the part of that official. But how does one define “value” or “intent to influence”? Is taking your favorite contracting officer, with whom you’ve known for years, to an expensive lunch an offense to the federal bribery statute? In the realm of federal procurement, it just may be.

In addition, who is considered a public official? A public official is defined as any officer or employee or person acting for, or on behalf of, the United States, or any department, agency or branch of government. To find the required intent, there must be an expectation of a favorable official act in return for the gift or favor. However, even if the true intent is simply to generate goodwill and spread “good cheer,” in the procurement arena there is a strong presumption of ill intent.

The Federal Gratuity Statute² is similar to the bribery statute, but requires a lesser degree of intent. Under the gratuity statute it is a crime to directly or indirectly give, offer, or promise anything of value to any public official, former public official or person selected to be a public official, for or because of any official act performed by that official. Thus, it is illegal to reward government officials, and former government officials, for any public acts that they performed. Violations of this statute can be as simple as sending a public official a gift, such as a fruit basket, for that individual’s favorable handling of a procurement action, even if the public official acted within the realm of the law. The act of providing an illegal gratuity is violated when there is a link between the thing of value conferred upon a public official and a specific “official act” for which it was given. And as before, while a gift given in an effort to build goodwill might not satisfy the necessary linkage to create a violation of this particular statute, if there is a procurement relationship with that official, such intent may be inferred.

GENERAL PROHIBITION AGAINST ACCEPTING GIFTS

The government's ethics rules and the Federal Acquisition Regulations (FAR) provide that federal personnel may not solicit or accept gifts offered because of their official positions or offered by a "prohibited source." The term "gift" includes any item having monetary value. A prohibited source is one who:

- ◆ Seeks official action by the employee's agency;
- ◆ Does business or seeks to do business with the employee's agency;
- ◆ Conducts activities regulated by the employee's agency;
- ◆ Has an interest that may be substantially affected by the employee's performance of duty; or
- ◆ Is in an organization composed of the members described above.³

Under these regulations, the intent of the prohibited source in giving the gift to the government employee is not a factor.

EXCEPTIONS TO ACCEPTING GOOD CHEER

However, like many laws, these laws provide exceptions, many of which can be confusing. According to the government ethics regulations, a "gift" does not include modest items of food, refreshments, greeting cards, items with "little intrinsic value" (i.e. plaques, certificates and trophies), and prizes in events open to the public.⁴ In addition, there are a number of exceptions when a gift can be accepted by a government employee. Three such exceptions, which should govern most circumstances are the: (i) the bona-fide personal relationship rule, (ii) the \$20/\$50 rule, and (iii) the widely-attended gathering exception.

- ◆ **Gifts Based on Bona-Fide Personal Relationships** – A key exception to the gift giving prohibitions is when a gift is based on family

relationships and personal friendships.⁵ A key factor in determining whether this exception applies includes the history of the relationship. Thus, the fact that you, as a government contractor, may have become friendly with a government employee does not convert a gift from you and your company to one based on friendship. In general, if your relationship with a government employee predated your business-related contacts, gifts will be subject to less scrutiny than if the friendship arose by virtue of the business dealings. In addition, it is safe to assume that if you claim or seek reimbursement for the gift as a business expense, the gift is not based on a personal friendship.

- ◆ **Gifts of \$20 or Less** – The \$20/\$50 rule is the most widely used exception to the gift rules.⁶ Under the \$20/\$50 rule, government employees can accept gifts on any one occasion worth \$20 or less in value. However, the total value of gifts given to a government employee from any single source cannot exceed \$50 per calendar year. In addition, where the market value of a gift exceeds \$20, the official may not pay the excess value over \$20 in order to accept the gift. This means that if a professional football ticket has a face value of \$100, offering it to your contracting officer for \$80 does not make the gift legal. Companies and organizations are considered a single source, thus gifts from company employees are aggregated. This gift exception does not apply to gifts of cash or of investment interest such as stock, bonds, or certificates of deposit, which are prohibited regardless of amount.

In addition, the gift rules still apply when the government employee or the contractor invite each other to their respective homes for parties. The contractor may not bring a gift worth more than \$20 to the home of the host/government employee. Similarly if the contractor is the host, the host/contractor must ensure that the cost per attendee for that food and service should not exceed \$20.

- ◆ **Parties and Widely Attended Gatherings** – Government employees may accept and attend invitations to widely attended gatherings, provided that other customers are invited free of charge.⁷ In addition, government employees may also attend a company’s annual party. However, each agency will need to determine whether its employees’ attendance at the “widely attended gathering” is in the agency’s interest. The term “widely attended” describes an event that is open to members from throughout a given industry or profession, or a diverse group that is interested in a given matter.

None of the exceptions shield a government employee who accepts a gift in return for performing an official action or because of an official act already performed. In those cases, in effect the “gift” becomes a bribe or an illegal gratuity.

The laws governing a government employee’s acceptance of a gift regulate only government employee’s acceptance of gifts, not the government contractor. However, companies implicated in a government employee’s violation of these rules can face public embarrassment, a tarnished reputation within the marketplace, and the possibility of suspension or debarment. In addition, violations of the government law regulating government ethics may also lead to government contractors being indicted for penalties under the bribery and illegal gratuities prohibitions.

The federal government is taking these and other ethical violations seriously. Contractors must also take these ethical violations seriously. Standard commercial practices can lead to stiff fines and penalties when dealing with the federal government. Care should be taken when spreading the cheer during the holidays . . . and throughout the year.

NOTES

- 1 18 U.S.C. § 201(b).
- 2 18 U.S.C. § 201(c).
- 3 See 48 C.F.R. 3.101-2; 5 C.F.R. Part 2635.
- 4 5 C.F.R. § 2635.203(b)(1).

5 5 C.F.R. § 2635.204(b).

6 5 C.F.R. § 2635.204(a).

7 5 C.F.R. § 2635.204(g).