

OFFICE OF GOVERNMENT ETHICS

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**Letter to a Federal Employee
dated January 7, 2004**

This is in response to your verbal request on December 19, 2003, for guidance concerning the executive branch's rules pertaining to gifts from outside sources. In particular, you wanted to know whether a senior procurement official for [your department] and his spouse may accept meals from a contractor that is competing for a Government contract following a solicitation of bids. More specifically, you asked whether exceptions to any general prohibition might permit the official to accept such meals if the purpose of the meetings at which the contractor pays for the meals is either: (1) to discuss the official's prospective employment with the contractor, or (2) to discuss the contractor's future business opportunities with [your department].

The Standards of Ethical Conduct for Executive Branch Employees (Standards of Conduct) at 5 C.F.R. part 2635 regulate the conduct of employees of the Federal executive branch. 5 C.F.R. § 2635.102(h). With regard to gifts from outside sources, the Standards of Conduct provide that an employee may not solicit or accept any gift that is given because of the employee's official position or that is given by a prohibited source. 5 C.F.R. §§ 2635.201, 2635.202. As defined in the Standards of Conduct, a gift is almost anything of monetary value, such as cash, meals, trips or services. 5 C.F.R. § 2635.203(b). The definition of a gift excludes certain items, such as modest items of food that are not part of a meal. 5 C.F.R. § 2635.203(b)(1). The gift prohibitions also apply to gifts given to an employee's spouse, with the employee's knowledge and acquiescence, because of the spouse's relationship to the employee. 5 C.F.R. § 2635.203(f)(1).

A meal that the procurement official or his spouse accepts from a contractor could be covered by this rule, depending on the facts. Prohibited sources include any person seeking official action by the agency, seeking to do business with the agency or actually doing business with the agency. 5 C.F.R. § 2635.203(d). A competing contractor is a prohibited source because it seeks to do business with the agency. Even a contractor that is not presently competing for new business with the agency is a prohibited source if it is actually doing business with the agency pursuant to existing arrangements. If the contractor were neither seeking to do business nor doing business with the agency, the rule would still apply if the procurement official is accepting the gift

because of his official position. A gift is "accepted because of the employee's official position if it is from a person other than an employee and would not have been solicited, offered, or given had the employee not held the status, authority or duties associated with his Federal position." 5 C.F.R. § 2635.203(e).

There are limited exceptions that permit acceptance of gifts under certain circumstances, notwithstanding the prohibitions discussed above. 5 C.F.R. § 2635.204. One exception does permit employees to accept gifts from a prospective employer in conjunction with bona fide employment discussions. 5 C.F.R. § 2635.204(e)(3). However, in addition to other limitations that 5 C.F.R. § 2635.202(c) imposes generally on all of the gift exceptions, this exception is subject to two specific limitations. The first limitation requires that any meals provided to the procurement official must be of a sort customarily provided to prospective employees.¹ The second limitation would require the procurement official to observe regulatory disqualification requirements if the contractor's financial interests could be affected by the performance or nonperformance of the procurement official's duties. Whenever this limitation is applicable, an executive branch employee must undertake the affirmative measures prescribed by 5 C.F.R. Part 2635, Subpart F, which describes the circumstances in which employees must recuse themselves from matters affecting the financial interests of persons with whom they are seeking employment.

The Standards of Conduct contain no regulatory exception for a meal provided at a meeting to discuss future business opportunities with the employee's agency. Despite the absence of any such exception, an employee may accept a gift, including a meal, that has a value of \$20 or less on a single occasion, provided that the aggregate value of all gifts from a given source does not exceed \$50 within a period of one year.² 5 C.F.R. § 2635.204(a). Because the source is deemed to be the entire organization, an employee may not exceed this limitation by accepting gifts from different employees or representatives of the same organization. 5 C.F.R. § 2635.102(k). Moreover, the gift may never be in the form of

¹ A distinct factual issue would also be whether meals are customarily provided to a spouse in such circumstances.

² Although this exception permits the acceptance of gifts of *de minimis* value, the Standards of Conduct remind employees that "it is never inappropriate and frequently prudent for an employee to decline a gift offered by a prohibited source or because of his official position." 5 C.F.R. § 2635.204.

cash, and the employee may not pay the difference for gifts exceeding the \$20 limit. 5 C.F.R. § 2635.204(a).

It bears emphasizing another important limitation on all of the exceptions for gifts from outside sources. During your conversation with a member of my staff, you mentioned the criminal prohibition at 18 U.S.C. § 201. The relationship between the criminal prohibition and the Standards of Conduct is such that the regulatory exceptions relate to only part of 18 U.S.C. § 201. 18 U.S.C. § 201 prohibits both illegal gratuities at section 201(c) and bribery at section 201(b). The exceptions in the Standards of Conduct relate only to the acceptance of gratuities addressed in 18 U.S.C. § 201(c).³ 5 C.F.R. § 2635.202(b). They do not relate to bribery addressed in 18 U.S.C. § 201(b). As explained in the body of the Standards of Conduct, an employee may not rely upon the regulatory exceptions when accepting a gift in return for being influenced in the performance of an official act, when soliciting or coercing a gift, or when accepting gifts from the same or different sources so frequently as to create the appearance of using public office for private gain. 5 C.F.R. § 2635.202(c). Therefore, conduct violating 18 U.S.C. § 201(b) will not qualify for any of the regulatory exceptions.

On a topic related to your inquiry, both the Standards of Conduct and a criminal statute prohibit an employee from participating personally and substantially in a particular matter in which any person or organization with whom the employee is negotiating concerning prospective employment has a financial interest.⁴ 5 C.F.R. §§ 2635.601-2635.606, 18 U.S.C. § 208(a)(1). If the procurement official is meeting with the contractor for the purpose of employment discussions, he must comply with applicable regulatory disqualification requirements or receive a waiver under 18 U.S.C. § 208(b). See 5 C.F.R. §§ 2635.604, 2635.605.

This discussion has focused on the Office of Government Ethics regulatory Standards of Ethical Conduct and related provisions in

³ Note that this discussion focuses specifically on the acceptance of a gratuity, rather than on the offer of one. This distinction is made because the Standards of Conduct, including the regulatory exceptions discussed herein, address only the conduct of covered employees and not that of any outside sources offering gifts.

⁴ The Standards of Conduct cover a broader range of activity than the criminal statute covers--including an employee's unilateral expression of interest in employment, under certain circumstances--but both cover negotiations concerning employment.

18 U.S.C. § 208. You may wish to consult the appropriate [department] officials with responsibility for procurement integrity to determine whether additional authorities are applicable to your inquiry.

Sincerely,

Marilyn L. Glynn
Acting Director