

Federal Contracting and Gift Giving to Government Officials

Although gift giving may not seem wrong, and generally is not in the commercial market place-gifting has no place in the Federal Government when it comes to procurement.

A myriad of laws and regulations determine the *who, what, and when* of providing gifts to government officials. There are various definitions of what constitutes 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. Although a gift may fit within the parameters of what a government official is allowed to accept (by law), 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, and you need to know the rules.

You may remember the recent case of *Congressman Randy "Scott" Cunningham*, who was convicted on several counts for doing what we generally all know we should not do- bribery and acceptance of illegal gratuities, what he considered "under the table" gifts by a federal contractor. Instead of a congressman, it could be a CO or COTR, or someone else.

The **Federal Bribery Statute (18 USC 201 b)** 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"? So, is taking your favorite contracting officer, with whom you've known for years, to an expensive lunch an offense to the federal bribery statute? You bet it is (generally). In federal procurement, it usually will be 95% of the time. A CO or COTR should know to simply purchase his own lunch with his own funds and there would be no real issue.

Who is considered a public official? The definition is any officer or employee or person acting for, or on behalf of, the United States, or any department, agency or branch of government. This is people to take action, make decisions, issue findings, authorize deals (yeah, like a contract or modification to a contract). To find the required intent (making it criminal in nature), there must be an expectation of a favorable official act in return for the gift or favor. Such was the case with Congressman Cunningham. He knowingly received cash, gifts and loans totaling millions of dollars for the purpose of his authoring legislation (special bills), or voting to approve certain legislation that would favor a particular contractor. 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. In the case of good old Randy, when he got

catch all he could say was, "Forgive me God, for I have sinned against the good people of the United States." He is in jail for a long time. The hard thing to prove is "intent" but if enough people are involved and paper transactions take place there will always be a record of that action.

With the Federal Gratuity Statute (18 USC 201 c) 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. 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. It is best to never give nor receive a gift period

To play it safe you should know the government's ethics rules and the Federal Acquisition Regulations say that federal personnel shall NOT solicit or accept gifts offered because of their official positions or from a prohibited source. **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 members described above.

Under these regulations, the intent of the prohibited source in giving the gift to the government employee is not a factor. It is merely that the vendor is a prohibited source and you CANNOT accept anything from them as a federal employee.

The Exception: 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 \$25/\$75 rule, and
- (iii) the widely-attended gathering rule.

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. A key factor in determining whether this exception applies includes the history of the relationship. The fact that 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, then the gift is not based on a personal friendship. If your uncle is a contractor and gives you a gift on your birthday, and has always done so then it is probably all right as this can be documented and it is normal to receive a gift for your birthday.

The \$25/\$75 rule. This rule is the most widely used exception to the gift rules. Under the rule, government employees can accept gifts on any one occasion worth \$25 or less in value. However, the total value of gifts given to a government employee from any single source cannot exceed \$75 per calendar year. In addition, where the market value of a gift exceeds \$25, the official may not pay the excess value over \$25 in order to accept the gift. This means that if a professional tennis match tickets cost his \$100, offering it to your contracting officer for \$75 does not make the gift legal. And as a CO, you should have enough common sense not to accept the tickets anyway. 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. Acceptance of such cash, CDs and stock would be a clear nexus to wanting to have a government official perform something in return. This is what Randy Scott Cunningham did!

As for having holiday parties at one's home, well...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 \$25 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 \$25. Common sense would tell you not to attend the party at all.

However, if the party is a "widely" attended gathering federal employees certainly may accept and attend invitations to widely attended gatherings, provided that other customers are invited free of charge. In addition, government employees may also attend a company's annual Christmas 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.

Question: Wouldn't you think it difficult to avoid the appearance of a conflict when you are the COTR on a very small government contract and you and your boss are the only government employees invited to a firm's Christmas party? Sure you would, but employees still do it all the time.

Remember one thing, 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.