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Ethical Issues Involving Government Contracts

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Although we are not surprised by news stories about unethical public servants or government contractors, we are still disappointed and disgusted. The stories we hear and read often seem egregious, and although the people or entities involved may have intentionally acted badly, sometimes it turns out that their actions actually seemed appropriate at the time. In fact, many public servants and government contractors get in trouble because they are unaware of the applicable laws and rules or because they fail to realize how their actions would appear to the general public. When it comes to ethics in government contracts, knowledge of the law is mandatory, and a keen awareness of public perception is crucial. This paper begins by distinguishing between ethical standards and legal standards, then highlights key sources of legal and ethical guidance applicable to government contracts, and concludes with a discussion of common ethical issues related to government contracts.

Ethics and the Law

As lawyers, it is our responsibility to advise our clients about how to act legally. But lawyers who work with government officials and government contractors must be aware that the general public expects government officials and government contractors to avoid even the appearance of improper action, and both ethics and the law affect how your clients' actions appear to the general public.

The difference between ethical action and legal action can be difficult to explain to non-lawyers to understand. However, your clients need to be aware that your responsibility is limited to legal advice; they will have to make their own decisions about what is ethical in a given situation.

The following scenario may be useful in explaining the distinction between laws and ethics to your clients: You're running with your friend Bill. Both of you have asthma, and Bill starts to have an asthma attack during your run. Your rescue inhaler (a prescription medicine taken to treat asthma attacks when they occur) is in your pocket, but—as clearly stated on the inhaler—it's against the law to give prescription medicine to someone else. You know (because you've run with Bill before) that Bill uses exactly the same medication that you do. You also know that the paramedics are at least 30 minutes away and Bill will be very uncomfortable if he has to wait that long before taking a rescue inhaler. Consider the following options:

- You could help Bill find his inhaler. That would be legal and ethical.
- Let's say you can't find Bill's inhaler, and you give him your inhaler instead. This would be illegal but ethical.
- Again, let's say you can't find Bill's inhaler, but you refuse to give him your inhaler. This would be legal but unethical.
- Let's say you do find Bill's inhaler, but you lie and say you can't find his inhaler, and you tell him to take yours instead. That would be illegal and unethical.

In other words, the law usually provides us with a baseline standard of behavior; we shouldn't steal from people, or injure people, and if we do, we'll run the risk of facing civil or criminal penalties, such as lawsuits, fines, or imprisonment. But ethics are about being good people; we

should be kind because it's the right thing to do, even if we won't face civil or criminal penalties for not being kind.

Sources of Ethical Guidance

There are four main sources of ethical guidance for government entities and government contractors include: laws and regulations, policies, professional codes of conduct, and personal morals. Note that each government entity—federal, state, and local—has a unique mix of public procurement laws, regulations, and policies, which means that attorneys who advise government contractors must be able to find and explain the laws, regulations, and policies that apply to each entity that their clients do business with (or intend to do business with).

Laws Applicable to Government Contracts

Because the law provides a good baseline standard of ethical behavior, it is the best starting point for any ethical inquiry. Several layers of laws and regulations apply to public servants: (1) the United States Constitution, (2) federal statutes, (3) federal regulations, (4) state constitutions, (5) state statutes, (6) state regulations, and (7) local rules. Only the first three apply to federal agencies; the first six apply to state governments, and all seven apply to local governments.

The United States Constitution

While the U.S. Constitution doesn't give us specific guidance on public procurement and ethics, it does give some clear direction about treating people fairly, regardless of where they live (*see* U.S. Const. art. IV, § 2 [the Privileges and Immunities Clause]) or what race they are (*see* U.S. Const. amend. XIV [the Equal Protection Clause]). The Constitution also says that only Congress has the power to regulate commerce between the States (*see* U.S. Const. art. I, § 8 [the Commerce Clause]), which is an issue that comes up from time to time in public procurement. For example, the Privileges and Immunities Clause, the Equal Protection Clause, and the Commerce Clause have all come up in cases discussing the constitutionality of local preferences.

Federal statutes

There are many federal statutes that apply to public procurement, but two federal acts should be of particular concern to lawyers advising government contractors on ethical issues: the Federal False Claims Act (FCA), 31 U.S.C. §§ 3729 - 3733, and the Federal Enforcement Recovery Act (FERA), which amended the FCA and a few other statutes. The False Claims Act, as amended by FERA, can cause serious problems for government employees, contractors, and subcontractors who make false claims on federal funds. Important to note: those "false claims" can include something as seemingly insignificant as seeking overpayment on grant-funded contracts. FERA also expanded the definition of the crime of "Major fraud against the United States" (18 U.S.C. § 1031), to include fraud in "any grant, contract, subcontract, subsidy, loan, guarantee, insurance, or other form of Federal assistance." In other words, if a contractor attempts to defraud a state or local government on a contract funded with some kind of federal assistance, that contractor has committed a federal crime. A detailed discussion of FERA and

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