

INFORMATION PAPER

March 15, 2007

SUBJECT: Support Contractor Employees Participation in FEMA Meetings

1. Purpose. To provide FEMA employees with information regarding the propriety of support contractor employees participating in high-level recurring FEMA meetings.

2. References:

- a. Office of Federal Procurement Policy (OFPP) Act, Policy Letter 92-1 to The Heads of Executive Agencies and Departments. Subject: Inherently Government Functions
- b. Federal Acquisition Regulation (FAR) Part 7 - Acquisition Planning
- c. 41 U.S.C. 423, Procurement Integrity Act (PIA); *Compliance Corp. v. United States*, 22 Cl. Ct. 193 (1990), *aff'd*, 960 F. 2d 152 (1992); and *NFK Engineering, Inc. v. United States*, 805 F. 2d 372 (Fed Cir. 1986).
- d. Standards of Ethical Conduct for Executive Branch Employees, 5 C.F.R. Part 2635.

3. Summary. Government contractor employees should not regularly participate in FEMA staff meetings where they could stand to gain an unfair competitive advantage from information received from such attendance. Unless the contractor is essential to helping FEMA staff make decisions on a contract action, they should not participate in meetings regarding their own contract or any proposed contract that they would be likely to submit a bid. If the FEMA staff does not restrict the attendance of such contract employees, such contractors and the FEMA staff members could subject themselves to criminal penalties, fines, adverse personnel actions and termination of the contract, among other sanctions. The offending contractor may not bid on any contract where they improperly receive inside or proprietary information, and if they do, the contracting officer may terminate the contract. The *appearance of impropriety* is enough for a contracting officer to take such action.

4. Background: Contractor employees in the Federal workplace present many ethical, fiscal, contractual and personnel issues. Keys to avoiding and resolving many of these issues are included in the Federal Acquisition Regulation (FAR), Clinger-Cohen Act, Procurement Integrity Act (PIA) and other laws and guidance. Contractor services are to be obtained and used in ways that ensures that the Government retains inherently government decision-making authority. Agencies may not adopt in whole or in part contractor advice, opinions, recommendations, ideas or conclusions without first exercising informed, independent judgment.

5. Certain actions and services that are not considered to be inherently governmental functions may approach being in that category because of the function, the manner in which the contractor performs the function or the manner in which the Government administers contractor performance. These functions include those activities that require either the exercise of discretion

in applying Government authority or the making of value judgments in making decisions for the Government.

6. Inclusion of contractor employees participating in meetings is not determinative that he or she is performing an inherently governmental function. However, agencies must exercise discretion in determining contractor involvement in recurring, planning activities, or contractors working in any situation that permits or might permit them to gain access to confidential business information and/or other sensitive information or give the incumbent contractor an unfair advantage in any future contract bid.

7. Agency officials must be circumspect of contractor employees and particularly vigilant when discussing sensitive matters in meetings. Care must be ensured in the use of proprietary (nonpublic) information, in-advertent disclosure of inside information, and protection of internal information of both the government and contractor. This requires that agency officials provide an enhanced degree of management controls and oversight of such meetings. It is not enough that contractor efforts are within scope of a contract. The contractor must have a need to know for certain information to be disclosed in their presence.

8. Inadvertent or intentional use of inside or proprietary information by a contractor to gain a competitive advantage can result in the contractor employee being subjected to up to five years of confinement and a fine, civil penalties of up to \$50,000 per individual and up to \$500,000 per contractor organization *plus* twice the amount of the compensation wrongfully received by the contractor. Upon discovery of wrongful use of inside information by a contractor, an agency may terminate any contract, suspend or debar the contractor, and recover the amounts paid the contractor. Furthermore, even where the contractor actions do not constitute a statutory (PIA) violation, but provide an appearance of impropriety, a contracting officer may disqualify the bidder.

9. Wrongful or intentional disclosure of inside or proprietary information by FEMA staff to a contractor employee can subject the FEMA employee to criminal penalties, civil penalties, and adverse personnel actions. Actions by FEMA employees that do not constitute a statutory PIA violation, but present an appearance of impropriety will subject the FEMA employee to adverse personnel actions, and OIG investigation.

10. Contractor personnel attending meetings, answering Government telephones, and working in other situations where their contractor status is not obvious to third parties or FEMA staff must be required to identify themselves as such to avoid creating an impression in the minds of FEMA staff, members of the public or the Congress that they are Government officials, unless in the judgment of the agency, no harm can come from failing to identify themselves. All documents or reports produced by contractors are to be suitably marked as contractor produced.

11. A certificate of non-disclosure should be signed by contractors in attendance of meetings where sensitive are proprietary information may be an issue. All contracts should have the FAR contract clauses FAR 52.203-8 and FAR 52.203-10, which warn contractors of the penalties of violating the Procurement Integrity Act.

Paul Conrad, Ethics Counsel
(202) 646-4025