



United States General Accounting Office  
Washington, DC 20548

Office of the General Counsel

**Subject:** Letter to OGE Regarding Conflicts of Interest in A-76 Cost Comparisons

**File:** B-281224.8

**Date:** November 19, 1999



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The Honorable Stephen D. Potts  
Director  
Office of Government Ethics  
Suite 500  
1201 New York Ave., NW,  
Washington, DC 20005-3917

Dear Mr. Potts:

This is in regards to your letter to the Comptroller General dated September 9, 1999, in which you furnished a copy of Office of Government Ethics (OGE) Memorandum No. DO-99-035, dated September 9. That memorandum addresses our bid protest decision in DZS/Baker LLC; Morrison Knudsen Corp., B-281224 et al., Jan. 12, 1999, 99-1 CPD ¶ 19. In that decision, we concluded that where, in a cost comparison study pursuant to Office of Management and Budget (OMB) Circular A-76, 14 of 16 agency evaluators held positions under the study and thus subject to being contracted out, a conflict of interest was created that was inconsistent with the requirements of the Federal Acquisition Regulation (FAR) and could not be mitigated. As a result, we sustained protests challenging the evaluators' conclusion that all private-sector offers to perform base civil operations and maintenance services at Wright-Patterson Air Force Base, Ohio were unacceptable.

We have had a long and positive relationship with your Office, and appreciate your thoughts on any matters of common concern. In this case, we disagree with your views on the rules applicable to A-76 studies.

You take issue with our decision based on a regulatory exemption, 5 C.F.R. § 2640.203(d), from the general prohibition under 18 U.S.C. § 208(a) against an employee participating personally and substantially in a particular matter in which the employee or other specified person has a financial interest. Under 5 C.F.R. § 2640.203(d), an employee generally is permitted to participate in a particular matter where the otherwise disqualifying interest is in the form of a federal salary and benefits. Although you state that the exemption would not permit an employee to make a determination that will individually or specially affect his own salary and benefits, you state that, where a determination will affect a group of which the employee is a member, the employee generally is permitted to make that determination. It is your position that the exemption thus authorizes federal

employees holding positions under an A-76 study to act as evaluators of competing private-sector offers, and that our decision “appears to be contrary to advice that [OGE gives] executive branch employees.”

In our view, regulatory exemptions to the criminal statute, 18 U.S.C. § 208(a), do not call into question the rationale of our decision in the DZS/Baker case. While 18 U.S.C. § 208(a) provides criminal penalties for some behavior by federal employees, we view it as establishing only a minimum standard for acceptable conduct. As discussed in our decision, the conduct of federal officials in all procurement actions is also governed by the broad ethical standards set forth in the FAR. In this regard, FAR § 3.101-1 states:

Government business shall be conducted in a manner above reproach and, except as authorized by statute or regulation, with complete impartiality and with preferential treatment for none. Transactions relating to the expenditure of public funds require the highest degree of public trust and an impeccable standard of conduct. The general rule is to avoid strictly any conflict of interest or even the appearance of a conflict of interest in Government-contractor relationships. While many Federal laws and regulations place restrictions on the actions of Government personnel, their official conduct must, in addition, be such that they would have no reluctance to make a full public disclosure of their actions.

We think the plain language of this provision makes it clear that procurement officials are required to do more than merely refrain from violating a criminal statute; they are instructed by FAR § 3.101-1 to act “in a manner above reproach” and consistent with “an impeccable standard of conduct,” so as “to avoid strictly any conflict of interest or even the appearance of a conflict of interest.” The last sentence of FAR § 3.101-1, quoted above, further supports this conclusion.

It is particularly important that this standard be met in the context of a proposal evaluation in a public/private A-76 competition, where the government, in effect, is an offeror and government employees evaluate offers. An actual or apparent conflict of interest on the part of these proposal evaluators would taint more than the individual source selection; it would undermine the integrity of the A-76 process and the procurement system overall. It thus remains our view that appointing an evaluation panel in which 14 of 16 evaluators hold positions subject to being contracted out creates a conflict of interest in government-contractor relationships that is inconsistent with the standards mandated by FAR § 3.101-1.

You interpret the 5 C.F.R. § 2640.203(d) exemption from criminal prosecution as coming within the scope of the “except as authorized by statute or regulation” provision in FAR § 3.101-1; that is, you read the evaluators’ participation at issue here as being exempt from the standard established by FAR § 3.101-1, and thus permissible.

We believe this interpretation fails to accord FAR § 3.101-1 its full intended effect. As we read that section, the “except as authorized by statute or regulation” provision quoted above clearly serves to qualify the requirement that government business be conducted “with complete impartiality and with preferential treatment for none.” We have reviewed the workpapers documenting the history of FAR § 3.101-1 (which are maintained by the FAR Secretariat). These documents show that, at the request of the Department of Interior, the drafters of the provision added the phrase “except as authorized by statute or regulation” to the prior Defense Acquisition Regulation section when the FAR was promulgated, not to create an exception to otherwise required ethical conduct, but instead to recognize the fact that some statutory provisions do, indeed, provide preferential treatment for specific classes of persons and contractors (such as Indians, Indian organizations or Indian-owned enterprises). This historical background weighs against reading the language limiting the prohibition on preferential treatment into the separate requirement to avoid any conflict of interest in government-contractor relationships, particularly since the latter requirement is not in the same sentence as the limiting language.

We note that other agencies share our view that the general requirement to avoid conflicts of interest applies to evaluators and other source selection officials engaged in an A-76 public/private competition. For example, the Circular A-76 Revised Supplemental Handbook provides that, when source selection or negotiated procurement techniques are used for an A-76 cost comparison, “[a]s required by the FAR, the Government should establish a Source Selection Authority, including assurances that there are no potential conflicts of interest in the membership of the Authority.” Part I, Ch. 3, § H.3.b. Of particular relevance here is the guidance from two military departments which are responsible for handling many of the A-76 competitions. The Department of the Army’s Pamphlet 5-20, Commercial Activities Study Guide (July 31, 1998) (DA PAM 5-20), provides that the Source Selection Evaluation Board (SSEB) in a cost comparison “cannot include any members who may be directly affected by the cost comparison decision,” including members of the function under study; according to this guidance, in order to “avoid the appearance of impropriety,” these individuals may serve as advisors, but not as actual members of the SSEB. DA PAM 5-20, § 6-20(c).

In addition, as noted in our decision, in January 1996 Air Force commercial activities program managers were furnished with a background paper advising them that “[t]o ensure a clean and pure technical evaluation is conducted in negotiated acquisitions, have individuals from outside the function (from [Headquarters] and possibly other bases) sit on the evaluation team.” Supplemental Guidance for AFI [Air Force Instruction] 38-203, Commercial Activities Program, and AFP 26-12, Guidelines for Implementing the Air Force Commercial Activities Program, and Miscellaneous Background Information, Jan. 3 1996, Attachment 12, at 2. These provisions demonstrate the widespread recognition regarding the importance of avoiding conflicts of interest in the context of public/private competitions under Circular A-76.

In summary, we continue to believe that the fact that 14 of 16 evaluators held positions under the study, and thus subject to being contracted out, created a conflict of interest in government-contractor relationships that was inconsistent with ethical standards mandated by the FAR and could not be mitigated. I would be happy to discuss this issue further with you or your staff (202-512-5400).

Sincerely yours,

Robert P. Murphy  
General Counsel