



DEPARTMENT OF DEFENSE
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JUN - 2 2008

MEMORANDUM FOR GENERAL COUNSELS OF THE MILITARY DEPARTMENTS
GENERAL COUNSELS OF THE DEFENSE AGENCIES
GENERAL COUNSELS OF THE DOD FIELD ACTIVITIES

SUBJECT: Legal Representation in Public-Private Competitions Under Office of
Management and Budget Circular No. A-76 (Revised)

The attached memorandum establishes applicable standards of professional conduct for attorneys in the Office of the DoD General Counsel and Defense Legal Services Agency.

Please contact Steve Epstein at (703) 695-3422 or epsteins@dodgc.osd.mil, if you have any questions.

A handwritten signature in black ink, appearing to read "Daniel J. Dell'Orto".

Daniel J. Dell'Orto
Principal Deputy General Counsel

Attachment:
As Stated

cc:
DGC (P&HP)
Director, SOCO





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MEMORANDUM FOR DEPUTY GENERAL COUNSEL OF THE DEPARTMENT OF
DEFENSE (ACQUISITION & LOGISTICS)

SUBJECT: Legal Representation in Public-Private Competitions Under Office of
Management and Budget Circular No. A-76 (Revised)

In your capacity as Deputy General Counsel of the Department of Defense (Acquisition and Logistics), you requested, through a memorandum signed by an attorney in your office, an advisory opinion from the Department of Defense Professional Conduct Board regarding the propriety of Department of Defense attorneys providing legal representation to the agency tender official (ATO) and most-efficient organization (MEO) team in public-private competitions under Office of Management and Budget (OMB) Circular No. A-76 (Revised), Performance of Commercial Activities. Agencies and organizations that you advise asked about the extent to which attorneys in the Department of Defense may furnish such representation, consistent with section 205 of title 18, United States Code, and applicable standards of professional conduct. In response to OMB's revisions to the Circular, several attorneys in the Department's components have expressed reservations about representing the ATO and MEO team until these issues are resolved. For the reasons set forth below, we conclude that the Department's attorneys may represent the ATO and MEO team without violating section 205 or their professional obligations.

Background

OMB's revisions to Circular A-76, in May of 2003, established a new competitive process that underscores the importance of legal representation for the ATO and the MEO team. Representation by Government attorneys of both parties in such competitions raises questions concerning the attorneys' proper role in the process. Under the revised Circular, the ATO is responsible for submitting the agency tender, including, in most cases, the plan outlining the agency's MEO.¹ The agency tender is, in essence, the agency's offer. The ATO also is responsible for establishing the MEO team, which is to assist the ATO in developing the agency tender.² An agency is to consider all offers from the private sector and all tenders in one evaluation, generally in accordance with the Federal Acquisition Regulation (FAR).³ In keeping with that principle, the ATO may challenge an agency's conduct of a standard competition,⁴ pursuant to the provisions in the FAR for protests to the agency.⁵ The Circular refers to that challenge as a "contest." The Circular states that "[n]o party may contest any aspect of a streamlined competition."⁶

¹ OMB Circular No. A-76, Attachment B, ¶¶ A.8.a, D.4.a.

² *Id.*, Attachment B, ¶¶ A.8.a, D.2.b.

³ *Id.*, ¶ 4.d; Attachment B, ¶¶ C.1, C.3, D.5, D.6.

⁴ Circular A-76 outlines procedures for standard and streamlined competitions. An agency may elect to conduct a streamlined competition, which is somewhat less rigorous than a standard competition, with respect to a function performed by sixty-five or fewer full-time equivalents. OMB Circular No. A-76, Attachment B, ¶ A.5.

⁵ *Id.*, Attachment B, ¶ F.1.

⁶ *Id.*, Attachment B, ¶ F.2.



The ATO also may file a bid protest with the Government Accountability Office (GAO),⁷ either on his own initiative or at the request of a majority of the employees of the agency who are engaged in the performance of the activity or function that is subject to public-private competition.⁸

In the context of a public-private competition, the ATO and MEO team, like any offeror in the private sector, will have interests that diverge from those of the source selection authority (SSA) and contracting officer. As described above, the ATO and MEO team may, in fact, challenge the decisions of the SSA and contracting officer. This memorandum addresses the legal and practical implications of furnishing legal representation to the ATO and MEO team under these circumstances.

Representation not barred by 18 U.S.C § 205

The restrictions in section 205 of title 18, United States Code, do not prohibit a Government attorney from counseling the ATO and members of the MEO team during the course of a public-private competition, or from representing the ATO in a contest before the agency or a bid protest to the GAO. Section 205 provides, in pertinent part, that:

“[w]hoever, being an officer or employee of the United States in the executive, legislative, or judicial branch of the Government or in any agency of the United States, other than in the proper discharge of his official duties – (1) acts as agent or attorney for prosecuting any claim against the United States, or receives any gratuity, or any share of or interest in any such claim, in consideration of assistance in the prosecution of such claim; or (2) acts as agent or attorney for anyone before any department, agency, court, court-martial, officer, or civil, military, or naval commission in connection with any covered matter in which the United States is a party or has a direct and substantial interest; shall be subject to the penalties set forth in section 216 of this title.”⁹

The term “covered matter” means “any judicial or other proceeding, application, request for ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter.”¹⁰ Representation of the ATO and MEO team, in furtherance either of the competitive process that OMB has outlined in the Circular, or the resolution of bid protests that arise from that process, falls within section 205’s exception for the performance of official duties.

⁷ Section 326 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, amended the Competition in Contracting Act (CICA), 31 U.S.C. §§ 3551, et seq., to extend that authority to the ATO.

⁸ 31 U.S.C. § 3552(b)(1). Congress amended CICA in response to the GAO’s decision in the Matter of Dan Duefrene, et al., B-293590.2, April 19, 2004, 2004 CPD ¶ 82, in which the GAO ruled that in-house entities lacked standing to protest.

⁹ 18 U.S.C. § 205(a).

¹⁰ 18 U.S.C. § 205(h).

The Office of Legal Counsel (OLC) of the Department of Justice, and the Office of Government Ethics (OGE), have construed the exception to include a broad range of activities undertaken in the course of an attorney's employment. OLC has observed that section 205 was "designed to prevent any 'conflict between the private interests of a Government employee and his duties as an official.'"¹¹ Accordingly, OLC has concluded that "nothing in the background or legislative history of [section 205] suggests that [Congress]...intended substantially to limit the uses federal agencies may make of their employees."¹² Similarly, OGE has stated that the exception will apply if "the activity is part of the employee's job."¹³ Activity undertaken within the scope of employment by an attorney for the Government, even in the absence of specific statutory authority, does not violate section 205. For example, OLC has endorsed the activities of Assistant United States Attorneys as members of the Attorney General's Advisory Committee, an organization established by regulation and devoted, among other things, to developing and modifying departmental policies, and improving relations between the Department's management and its attorneys.¹⁴ In that opinion, OLC distinguished between an attorney's professional obligations – including membership on the Attorney General's Advisory Committee – and activities on behalf of the National Association of Assistant U.S. Attorneys (NAAUSA), concluding that "an employee's decision to participate in or represent NAAUSA is not an obligation of his employment, and concomitantly, not an official duty."¹⁵

Because an attorney's responsibilities in connection with public-private competitions arise pursuant to OMB Circular A-76 and the Department of Defense's implementing regulations and policies, and are part of that attorney's job, the restrictions in section 205 do not apply. In fact, effective counsel and zealous legal representation for both the ATO and members of the MEO team contribute to a robust competitive process that is in keeping with the design of the Circular and in the Government's best interest.

Representation not barred by standards of professional conduct

We find no standard of professional conduct that would prohibit attorneys within the Department from representing the ATO or members of the MEO team in a public-private competition under Circular A-76.¹⁶ However, to avoid conflicts of interest and failure to protect the confidentiality of information, the cognizant General Counsels of the Department's components must establish safeguards to ensure the lawyer's own interests do not conflict with those of the client, and prevent the inappropriate transmission of information between the contracting officer or SSA, on the one hand, and the ATO or members of the MEO team on the other.

¹¹ Application of 18 U.S.C. § 205 to Employees Serving on an Intergovernmental Personnel Act Assignment (IPA Assignment Opinion), January 11, 1999, at 2 (quoting Application of 18 U.S.C. §§ 203 and 205 to Federal Employees Detailed to State and Local Governments (Detail Opinion), 4B Op. O.L.C. 498, 504, and H.R. Rep. No. 87-748, 87th Cong., 1st Sess. 6, 21 (1961)).

¹² IPA Assignment Opinion at 2 (quoting Detail Opinion at 504).

¹³ OGE Informal Advisory Letter 94x8, February 23, 1994.

¹⁴ Application of 18 U.S.C. § 205 to Communications Between the National Association of Assistant United States Attorneys (NAAUSA) and the Department of Justice (NAAUSA Opinion), November 7, 1994, at 3.

¹⁵ Id.

¹⁶ We reviewed the American Bar Association's Model Rules of Professional Conduct, several state implementations of those rules, and the Services' standards of conduct for uniformed judge advocates.

The task of defining a Government attorney's professional obligations is challenging, because the various state bar associations, which govern the conduct of Government attorneys who are certified by those associations, have adopted rules which are not uniform. For purposes of this analysis, we have relied upon the American Bar Association's Model Rules of Professional Conduct (Model Rules).

The attorneys for the components who have raised questions about the ethical implications of representing the ATO and MEO team are concerned that such representation may violate rules against professional conflicts of interest. Rule 1.7 of the Model Rules provides that:

“...a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: (1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.”¹⁷

Under certain conditions, a client may consent to representation notwithstanding a conflict of interest, but under no circumstances may a lawyer represent opposing parties in litigation or another proceeding before a tribunal.¹⁸ Similar rules restrict a lawyer's representation of a person whose interests are adverse to those of a former client.¹⁹ To limit the risk of a conflict in such circumstances, a lawyer shall not accept compensation from someone other than the client unless the client consents, there is no interference with the lawyer's judgment or the lawyer-client relationship, and the lawyer protects the client's confidences.²⁰ Except as authorized by the Rules, a lawyer shall not use information relating to the representation of a client to the disadvantage of the client, unless the client gives informed consent.²¹ Further, a lawyer employed or retained by an organization represents the organization, acting through its duly authorized constituents.²² The lawyer may only represent officers or employees of the organization if the lawyer has satisfied the conditions in Rule 1.7 regarding conflicts of interest.²³

Even in the face of these restrictions on conflicts of interest, an attorney in one of the Department's components may represent the ATO and members of the MEO team because those officials are not clients with interests distinct from, and adverse to, the interests of the Department. The commentary accompanying the Model Rules acknowledges that the Rules are of limited value in identifying clients within the Government. In connection with Rule 1.13, above, the commentary provides that:

¹⁷ Model Rules of Professional Conduct Rule 1.7(a) (2004).

¹⁸ *Id.*, Rule 1.7(b).

¹⁹ *Id.*, Rule 1.9.

²⁰ *Id.*, Rule 1.8(f).

²¹ *Id.*, Rule 1.8(b).

²² *Id.*, Rule 1.13(a).

²³ *Id.*, Rule 1.13(g).

“[t]he duty defined in this Rule applies to governmental organizations. Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these Rules.”²⁴

Arguably, an attorney who advises the ATO or members of the MEO team directly, for purposes of the Model Rules, represents the Department as a whole, because it is in the Department’s interest that the ATO submit a sound and competitive agency tender. This status parallels the position of Government attorneys in more traditional “adversarial” roles like defense counsel (or public defender), legal assistance attorney, and inspector general positions. Each serves the greater Governmental interest by representing parties potentially in conflict with other portions of the institution. In this respect, the foregoing discussion of section 205 is instructive. The contributions that the attorney makes to a competitive process established in Circular A-76 through zealous representation, fully within the scope of the attorney’s employment and therefore beyond the reach of section 205, demonstrate that there is only one client – the Department of Defense – and thus no conflict of interest to resolve. The adversarial posture of various stakeholders under the Circular is of no significance, as a matter of professional ethics, as long as the stakeholders, including the ATO, MEO team, contracting officer, and SSA, receive effective legal counsel from different lawyers.

Protective measures

Although the representation of these officials does not automatically give rise to a professional conflict of interest, it increases the potential for an actual or apparent conflict. Consequently, we recommend that the General Counsels of the components establish safeguards to prevent the inappropriate transmission of information between the ATO or members of the MEO team, on the one hand, and the contracting officer or SSA, on the other. Under the Model Rules, each attorney has a responsibility to act “with reasonable diligence...in representing a client,” “with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf.”²⁵ In this case, the Department’s fundamental interest, as client, is in competitive fairness. To that end, it is essential, as a matter of departmental policy, that each attorney respect the confidences of the various officials who participate in the competitive process. This is true even though those officials are not distinct clients and, therefore, the professional rules regarding confidentiality²⁶ do not compel an attorney to protect the confidences of each from the others. The components should assign one attorney or group of attorneys to represent the ATO and members of the MEO team, and another attorney or group of attorneys to represent the SSA and contracting officer. Attorneys within each group may exchange information freely, but the General Counsels of the components should establish firewalls and any other necessary procedural safeguards to prevent the passage of confidential information between the groups in a manner that would undermine public-private competition.

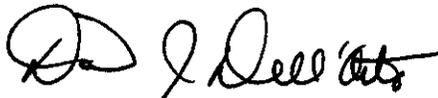
²⁴ Id., Rule 1.13, comment 9.

²⁵ Id., Rule 1.3 and comment 1.

²⁶ E.g., id., Preamble, Rule 1.6, Rule 1.8(b).

We also recommend that the components, at the outset of each competition, define precisely the terms of representation for the ATO and MEO team.²⁷ Specifically, attorneys should explain that representation extends only to the execution of the ATO's and MEO team's official responsibilities under the Circular.²⁸ These rules of engagement will address the risk that members of the MEO team may claim an attorney-client relationship distinct from that between the attorney and the ATO, in the event that members of the MEO team object to the ATO's decisions.

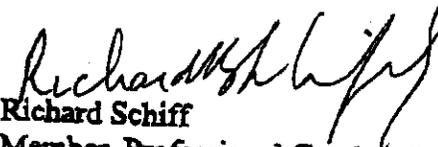
Finally, to ensure that the interests of the lawyers representing the ATO and MEO teams do not conflict with the constituents they represent, the cognizant component General Counsels should establish separate performance evaluation and rating chains so that counsel are not in a position to rate the performance of opposing counsel.



Daniel J. Bell'Orto
Chair, Professional Conduct Board



Paul S. Koffsky
Member, Professional Conduct Board



Richard Schiff
Member, Professional Conduct Board

²⁷ Section 1.2 of the Model Rules permits attorneys to limit the objectives of the representation if the client consents after consultation.

²⁸ The Army's implementation of Model Rule 1.3 is instructive on attorneys representing the organization, not individuals:

RULE 1.13 Army as Client

(a) Except when representing an individual client pursuant to (g) below, an Army lawyer represents the Department of the Army acting through its authorized officials. These officials include the heads of organizational elements within the Army, such as the commanders of armies, corps and divisions, and the heads of other Army agencies or activities. When an Army lawyer is assigned to such an organizational element and designated to provide legal services to the head of the organization, the lawyer-client relationship exists between the lawyer and the Army as represented by the head of the organization as to matters within the scope of the official business of the organization. The head of the organization may not invoke the lawyer-client privilege or the rule of confidentiality for the head of the organization's own benefit but may invoke either for the benefit of the Army. In so invoking either the lawyer-client privilege or lawyer-client confidentiality on behalf of the Army, the head of the organization is subject to being overruled by higher authority in the Army. The term Army as used in this and related Rules will be understood to mean the Department of the Army or the organizational element involved.

(b) An Army lawyer shall not form a client-lawyer relationship or represent a client other than the Army unless specifically assigned or authorized by competent authority. Unless so authorized, the Army lawyer will advise the individual that there is no lawyer-client relationship between them.

AR 27-26, Rules of Professional Conduct for Lawyers (1 May 1992).