

# Client Alert

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## Revolving Door Risk: Failure to Follow Best Practices Can Have Severe Consequences

By Richard J. Vacura and Pablo A. Nichols

Not surprisingly, private industry frequently considers hiring current and former federal government employees for their experience, knowledge base, and skill sets. As a reaction to the continuing perception, however, that high-level federal employees jump from the government to private industry and take sensitive government information with them, Congress has reacted over the years with complex and often overlapping revolving door legislation that places post-government employment restrictions on certain employees. While many government employees successfully transition to the private sector, failing to observe the revolving door laws and regulations can result in severe consequences for both the contractor and the government employee. A recent example of what can go wrong for both is the case of Timothy Cannon and The Gallup Organization (“Gallup”).

### THE CANNON GUILTY PLEA

On April 9, 2013, Judge Jackson from the District Court for the District of Columbia sentenced Timothy W. Cannon, former Director of the Human Capital Division at the Federal Emergency Management Agency (FEMA) to two years of probation for conflict of interest violations.<sup>1</sup> According to Mr. Cannon's plea, he helped Gallup acquire a \$6 million contract while at the same time pursuing an employment position with the company. Gallup, as a result of its alleged employment discussions with Mr. Cannon and related conduct, faces potential liability for civil damages and penalties under the False Claims Act (FCA)<sup>2</sup> and Procurement Integrity Act,<sup>3</sup> including treble damages and disgorgement of all money received under the contract. Moreover, these types of cases always raise the risk of the contractor's suspension or debarment, which would preclude any new contract awards for up to three years. This case is a good reminder for private contractors that wish to hire a current or former government employee that they must have rigorous internal controls in place to ensure compliance with the post-government employment requirements.

### THE CANNON AND GALLUP RELATIONSHIP

Gallup performs a variety of services for federal agencies, including market research, tracking studies, polling and surveying, interviewing, and demographic analysis. Gallup has contracts and subcontracts with several agencies, including a GSA Multiple Award Schedule contract from which agencies can order specific services.

According to Mr. Cannon, Gallup employees met often and communicated with Mr. Cannon from 2007 to 2008 for the purpose of convincing FEMA to provide Gallup with a consulting services contract. Gallup allegedly sent Mr.

<sup>1</sup> Mr. Cannon, pled guilty to conflict of interest, 18 U.S.C. §§ 208(a) and 216(a)(2). Under the statute,

Mr. Cannon faced up to five years in prison. His guilty plea and fulsome cooperation during the investigation of his conduct resulted in a sentence of only probation. See *United States v. Cannon*, No. 1:13-cr-00001, ECF No. 7 (D.D.C.).

<sup>2</sup> 31 U.S.C. §§ 3729-3733.

<sup>3</sup> 41 U.S.C. §§ 2101-2105.

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Cannon multiple price proposals as well as a statement of work, which FEMA ultimately adopted almost verbatim. Mr. Cannon, for his part, allegedly pushed FEMA to enter into a five-year fixed price contract with Gallup valued at \$6 million called the BEST Workforce Initiative. As Director of the Human Capital Division, Mr. Cannon was head of the office that was responsible for overseeing the award and administration of the BEST Workforce Initiative. Gallup formally interviewed Mr. Cannon in January 2009 after FEMA awarded the contract and increased the contract value three times, and Gallup formally extended an offer of employment to Mr. Cannon on February 5, 2009.

Mr. Cannon retired five days later after receipt of his formal offer of employment, but he did not disclose the offer to FEMA. Only after some Gallup employees allegedly voiced concerns about the ethics of the hiring did Gallup request that Mr. Cannon obtain an ethics advisory opinion from FEMA. Mr. Cannon, however, failed to disclose his Gallup employment offer to the ethics office. On March 26, 2009, after FEMA employees learned of Mr. Cannon's prospective employment with Gallup and red flags arose within the agency, Gallup revoked its employment offer to Mr. Cannon.

## THE CONTRACTOR'S RESULTING EXPOSURE

On October 21, 2009, Michael Lindley, former Director of Client Services at Gallup, filed a *qui tam* complaint seeking damages under the FCA. Mr. Lindley's complaint alleged a host of FCA violations of contracts with multiple federal agencies, including knowingly submitting false estimates and inflated bills to the government, and engaging in unlawful employment discussions with Mr. Cannon, who, according to Mr. Lindley, "played a role" in the award of the FEMA subcontract. The U.S. Attorneys' Office conducted an investigation into Mr. Lindley's allegations, subsequently intervened in the civil FCA claim and filed criminal charges against Mr. Cannon.

According to the Government's complaint, Gallup knowingly pursued discussions with a federal employee who was "personally and substantially" involved in the award and administration of a contract to Gallup and its prime contractor partner. Gallup's discussions with Mr. Cannon allegedly violated the Procurement Integrity Act and the organizational conflict of interest requirements in FAR 9.505, and provided Gallup with an unfair competitive advantage in obtaining a subcontract from which it received an unreasonable 24 percent profit.

As a result of its alleged improper discussions with Mr. Cannon, and its failure to disclose those discussions to FEMA, Gallup now faces potential liability and civil penalties under both the FCA and the Procurement Integrity Act. With respect to the FCA claim, the Government is asserting a fraud in the inducement theory on the basis that FEMA "was falsely and/or fraudulently induced to enter into" contracts and task orders that it "would not have agreed had it known the truth." Gallup's liability for fraud in the inducement under the FCA could be as high as *three times the total value of the contract*, in addition to an \$11,000 civil penalty for each of the tainted invoices.<sup>4</sup> For its alleged violation of the Procurement Integrity Act,<sup>5</sup> Gallup faces potential civil penalties of \$500,000 per violation plus twice the amount of compensation offered to the individual. Additionally, FEMA may rescind the contract *and recover the entire amount provided to the contractor under the contract*. Finally, and perhaps most alarming, FEMA may suspend or debar Gallup from all federal government business.

<sup>4</sup> Gallup allegedly submitted 268 separate invoices under the contract, collectively worth over \$12.96 million.

<sup>5</sup> A contractor violates the Procurement Integrity Act when it engages in employment discussions with a federal employee and knows that the federal employee has not notified his agency or recused himself from the procurement. 41 U.S.C. § 2103.

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## LESSONS LEARNED – BEST PRACTICES FOR COMPLYING WITH REVOLVING DOOR REQUIREMENTS

This case is a reminder to contractors that it is critical to have rigorous internal controls and compliance policies in place to help ensure that well-meaning contractor personnel follow best practices when engaging in post-government employment with federal workers. A well-documented process can go a long way in avoiding allegations of violations of the FCA, the Procurement Integrity Act, and conduct that could lead to suspension and debarment. Our recommended best practices include the following:

### **Develop rigorous written compliance policies covering post-government employment issues.**

- All government contractors are presumed to know the law and its implementation in the FAR, including the requirement to have a written code of business ethics and conduct that, in our view, should include restrictions on post-government employment.
- The post-government employment compliance policy should require that the potential government employee recuse himself or herself from any actual or potential contractual matters involving the contractor – the recusal must occur before engaging in any employment discussions. Failure of certain government employees to properly recuse themselves when required may result in the contractor being disqualified from bidding on pending contracts.
- A potential employee should obtain a written opinion from the government ethics office that approves the potential employment. As long as the potential employee discloses the relevant facts to the ethics official, the resulting ethics advisory opinion protects both the potential employee and the contractor.
- The contractor should have a standard questionnaire for the potential employee to fill out and sign regarding potential issues related to post-government employment restrictions, such as the scope of the employee's government work, particular projects which he or she was either responsible for or substantially and personally involved with, and dates of responsibility for particular projects.
- Understanding the facts early on will allow the contractor to assess whether the potential employee may be brought on the team with no limitations, whether the employee will have to be walled off from specific contractors or programs, or whether hiring the employee will raise too much risk.

### **Provide compliance training to current employees.**

- It is not unusual in cases alleging violations of the FCA and the Procurement Integrity Act that the contractor did not provide any compliance training to employees or training that was considered adequate by the government enforcement officials.
- A failure to provide adequate compliance training would likely be a factor in both assessing whether a contractor showed a "reckless disregard" for the truth under the FCA, and whether the contractor is presently responsible for purposes of the agency's decision to suspend or debar the contractor.
- Contractors should initiate and document formal government contracts compliance training programs for all employees, especially focusing on revolving door requirements for those employees who obtain or work on federal contracts. Training should not be a one-time event, but instead should be conducted on a periodic basis.

### **Disclose early and often.**

- If a contractor wishes to engage in employment discussions with a potential government employee, the potential employee should be required to disclose the intent to discuss employment to any relevant contracting officers. The contracting officers can then ensure appropriate recusal actions are taken if needed.

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- The failure to properly disclose will likely be a critical factor and weigh heavily on the decisions by the government enforcement officials whether to pursue any action against the contractor, including suspension and debarment.
- Contractors in turn should consider following up on the potential employee's disclosure and engage their contracting officers early and in writing regarding employment discussions with any current *or former* government employees. Involving the government throughout the process will go a long way to deflecting later FCA and Procurement Integrity Act violations, as well as suspension or debarment actions.

Contractors should seek legal counsel and make certain they understand the rules on post-government employment, and they should also implement proper internal controls and a compliance program before engaging in employment discussions with the current group of former government employees. With their experience, knowledge base, and skill sets, government employees can be invaluable additions to a contractor's work force, but this case demonstrates the pitfalls and risks that can occur when proper procedures are not followed.

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