Board of Ethics and
Government Accountability

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2016 Best Practices Report

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The Board of Ethics and Government Accountability (BEGA or Board) was established in 2012 to perform several important functions, including administering and enforcing the Code of Conduct.[1] The Code of Conduct is comprised of eight elements that, collectively, reflect laws and regulations governing the ethical conduct of District government employees and public officials.[2]

BEGA, however, is not just about enforcement; it performs several other core functions as well. For example, BEGA conducts general and specialized ethics training sessions for District government employees and public officials; it produces training materials, including, in particular, an Ethics Manual;[3] and it gives advice, both informally and in formal written advisory opinions.[4]

The experience gained from those efforts, coupled with insights gained from attending outside trainings, has again prepared BEGA well to meet another of its principal responsibilities – conducting an annual assessment of ethical standards for public employees and officials, including a review of national best practices of government ethics, and presenting recommendations for amending the Code of Conduct.[5]

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[1] *See* section 202(a)(1) of the Board of Ethics and Government Accountability Establishment and Comprehensive Ethics Reform Amendment Act of 2011 (Ethics Act), effective April 27, 2012 (D.C. Law 19-124; D.C. Official Code § 1-1162.02(a)(1)).

[2] The Code of Conduct is defined in section 101(7) of the Ethics Act (D.C. Official Code § 1-1161.01(7)).

[3] The Ethics Manual can be accessed at http://www.bega-dc.gov/documents/manualguide.

[4] Section 219 of the Ethics Act (D.C. Official Code § 1-1162.19) authorizes the Director of Government Ethics, who is appointed by the Board, to issue an advisory opinion to a District government employee or public official who requests advice, as well as to issue an advisory opinion, on his or her own initiative, "on any general question of law he or she considers of sufficient public importance concerning a provision of the Code of Conduct over which the Ethics Board has primary jurisdiction." All of these opinions can be accessed http://www.bega-dc.gov/documents/advisory-opinions.

[5] *See* section 202(b) of the Ethics Act (D.C. Official Code § 1-1162.02(b)).

The Comprehensive Code of Conduct

A number of BEGA's earlier recommendations – presented in what have come to be called Best Practices Reports – were reflected in the Comprehensive Code of Conduct and BEGA Amendment Act of 2014 (BEGA Amendment Act).[6] No result of those recommendations was more significant than the requirement that the Board "submit to the Council for its consideration proposed legislation … to establish a revised Code of Conduct."[7]

The Board submitted the proposed legislation in the form of Bill 21-250, the "Comprehensive Code of Conduct of the District of Columbia Establishment and BEGA Amendment Act of 2015," in June of last year.[8] As suggested by its title, the bill would establish the Comprehensive Code of Conduct of the District of Columbia, which would operate to further the Council's clear and continuing intent "to create an independent and unified ethics scheme"[9] in two significant ways – by consolidating the District's government ethics laws in one place and by standardizing practices across the legislative and executive branches.

Bill 21-250 was referred to the Committee on the Judiciary and was the subject of a public hearing on July 8, 2015.[10] Despite meetings and otherwise productive exchanges of information between BEGA and Committee members and staff, the Committee took no official action after the hearing, and, consequently, the bill

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[6] Effective July 15, 2014 (D.C. Law 20-122; 61 DCR 8246).

[7] *See* section 209(b)(1) of the Ethics Act (D.C. Official Code § 1-1162.09(b)(1)) (as amended by section 2(c) of the BEGA Amendment Act).

[8] A copy of the bill and an accompanying section-by-section analysis can be accessed at http://www.bega-dc.gov/legislation/comprehensive-code-conduct-establishment-act-2015.

[9] *See* Report of the Committee on Government Operations on Bill 20-412, the Comprehensive Code of Conduct and BEGA Amendment Act of 2014, at 4 (Council of the District of Columbia, March 25, 2014); *see also id*. at 4-5 ("The Ethics Act took great strides toward consolidating ethics statutes under a single heading within the Code; however, the complete Code of Conduct is still scattered between statutes, regulations, and the Council's Code of Official Conduct.").

[10] A video of the hearing is available at http://dc.granicus.com/MediaPlayer.php?view_id=34&clip_id=2800.

will lapse at the end of this Council Period.[11] However, the lapsing is without prejudice,[12] and the Board stands ready to reintroduce the bill early in the next Council Period, if a member of the Council does not do so first.

BEGA's Future Role in Contracting and Procurement

Readers of last year's Best Practices Report will recall that the Board ended the report by looking ahead to a discussion this year of BEGA's future role in the area of contracting and procurement.[13] That role was impossible to forecast at the time because there were certain bills pending before the Council that had the potential to make significant changes in this area of the law. One of those bills, the Procurement Integrity, Transparency, and Accountability Amendment Act of 2016 (PITA Amendment Act), did pass and went into effect earlier this fall.[14] The purpose of the bill was, among other things, "to provide comprehensive updates based on the District's experience under the current [procurement] law."[15]

<u>The Symposium</u>

The updates in the PITA Amendment Act included amendments to section 205 (privatization contracts) of the Procurement Practices Reform Act of 2010

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[11] *See* Rule 418(a)(1), Rules of Organization and Procedure for the Council of the District of Columbia, Council Period 21.

[12] *Id.*

[13] BEGA's present role in that area is limited because the Code of Conduct does not apply to contractors and vendors, except to subject them to BEGA's enforcement authority for violating the prohibition in the Procurement Practices Reform Act of 2010 against contingent fees in government contracting. *See* section 101(7)(D) of the Ethics Act (D.C. Official Code § 1-1161.01(7)(D)).

[14] Effective October 8, 2016 (D.C. Law 21-158; 63 DCR 10752). The underlying bill included "certain provisions contained in Bill 21-397 [that had been introduced at the request of the Mayor], and a number of additional provisions created as a result of Executive comments and the hearing process." Report of the Committee of the Whole on Bill 21-334, the Procurement Integrity, Transparency, and Accountability Amendment Act of 2016, at 2 (Council of the District of Columbia, June 21, 2016) (PITA Amendment Act Committee Report).

[15] *Id.*

(PPRA).[16] The Board takes no position here on the amendments themselves or the reasons for them.[17] Rather, its interest stems from the ethics issues that arise when governments use privatization contracts. More to the point, as one source noted with respect to the federal government, for example, "a significant disparity currently exists between the ethical standards applicable to government employees, which are comprehensive and consist predominantly of specific rules, and those applicable to contractor employees, which are largely developed and applied on an ad hoc basis and involve significantly vaguer standards."[18] The District essentially faces the same problem,[19] a subject that figured into this year's Best Practices Symposium. The symposium, entitled *Ethics: Victim of an Outsourced Government?*, was held on October 20 at the University of the District of Columbia, David A. Clarke School of Law, and was moderated by Dean Katherine (Shelley) Broderick.[20] The panelists were Phil Mendelson, D.C. Council Chairman, Karl Racine, Attorney General for the District of Columbia, Betsy Cavendish, General Counsel to the Mayor, and Terry O'Connor, partner

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[16] Section 205 of the PPRA is codified at D.C. Official Code § 2-352.05. Section 104(47) of the PPRA (D.C. Official Code § 2-351.04(47)) defines a "privatization contract" as "a contract by which the District government enters into an agreement with a person who is not part of the District government to provide a good or service to or on behalf of the District government *that is being provided by a District government agency or instrumentality*." (Emphasis added.)

[17] *See* PITA Amendment Act Committee Report at 5-7 (discussing current law and requirements for future privatization contracts).

[18] Administrative Conference of the United States (ACUS), *Compliance Standards for Government Contractor Employees –Personal Conflicts of Interest and Use of Certain Non-Public Information*, at 5 (June 17, 2011) (available at https://www.acus.gov/sites/default/files/documents/Recommendation%202011-3%20%28Contractor%20Ethics%29.pdf); *see also* Collin D. Swan, Note, *Dead Letter Prohibitions and Policy Failures: Applying Government Ethics Standards to Personal Services Contractors*, 80 Geo. Wash. L. Rev. 668, 683-686 (2012) (discussing "disparate" ethics standards of contractors and federal employees).

[19] See discussion in footnote 13.

[20] The Board wishes to thank Dean Broderick and her staff for hosting the event.

and Director of Government Contracts at the law firm of Berenzweig Leonard, LLP. Members of the public also participated in the discussion.[21]
Dean Boderick began the evening by observing that, "as contractors become more involved in the District government workplace, often working side by side with government employees in support of the same agency mission, we have to consider what mechanisms are in place to ensure the integrity of government operations." The discussion that followed focused on that issue and concluded with the panelists making a number of recommendations. The balance of this report – after a brief mention of several threshold considerations – will highlight those of the panelists' recommendations, as well as others suggested in the literature or by practical experience, that the Board considers to be most deserving of attention from an ethics enforcement standpoint, as the District moves ahead with privatization contracts.

Initial Considerations

Privatization is not new in this country. One writer traces at least one form of it – the public-private partnership – back as far as 1819.[22] The District added policies and procedures regarding privatization contracts much more recently, beginning in 1994.[23] In any event, experience in this area, largely with respect to federal government service contracts, has led to the identification of two related factors that a District agency should consider before deciding on an ethics enforcement mechanism in any privatized contractual relationship.

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[21] Visit http://udclaw.mediasite.com/Mediasite/Play/fc8ffd334bc5440397bb7f85baa950171d for a video of the symposium.

[22] *See* Ellen Dannin, *Red Tape or Accountability: Privatization, Public-ization, and Public Values*, 15 Cornell J. L. & Pub. Pol'y 111, 112 (2005); *see also* Jody Freeman, *The Contracting State*, 28 Fla. St. U. L. Rev. 155, 161 (2000) ("Although privatization has developed into an ideological movement in the United States only in the last twenty years, relying on the private sector to perform 'public' functions as a practical matter has a long history.").

[23] *See* section 2(b) of the Privatization Procurement and Contract Practices Act of 1993, effective March 19, 1994 (D.C. Law 10-79; 40 DCR 8696) (adding predecessor provision to PPRA section 205).

First, given the very nature of a privatization contract, where contractors work for a private employer at the same time they are providing service to the government, government ethics rules should be applied to contractors with some carve-outs.[24] As one source has noted, "extending *all* government employee ethics rules to *all* contractor employees serving all agencies, without consideration of the specific ethical risks presented, would likely impose costs that are excessive in relation to the benefits received."[25] Indeed, for largely the same reasons, the Board has concluded that a wholesale application of government ethics rules to contractors would not be prudent, either by District agencies as part of their enforcement efforts or by the Council through legislation.

Second, one size does not fit all. In other words, because the variety of services that can be provided through privatization contracts is dictated, in large part, by the variety of agency missions, simply adopting another agency's ethics enforcement mechanism may prove to be unsuccessful.[26]

Of course, an agency may well consider other factors.[27] However, the two just discussed combine to suggest that an agency should consider its mission, the resources available to carry out that mission, and the ethical risks posed by the nature of the privatization contracts it seeks to secure, before adopting an ethics enforcement mechanism to meet those risks.

<u>Recommendations Going Forward</u>

[24] *See* Charles Borden, Daniel Holman, and Robert Rizzi, *Ethics Regulation of Government Contractors,* Risk & Regulation, Winter 2015, at 26.
[25] ACUS, footnote 18, at 6 n.18; *see also* Dannin, footnote 22, at 128 (cautioning that "contracting out often may create more costs, in the form of increased monitoring and negotiation, than it is likely to save").

[26] *See* Borden *et al.,* footnote 24, at 26.

[27] *See, e.g.,* Dannin, footnote 22 (providing multifaceted analysis of factors related to privatization).

The former General Counsel of the federal Office of Government Ethics (federal OGE) has, not surprisingly, noted that there is "no single remedy" for addressing the ethics issues that arise in the context of privatization contracts.[28] However, as suggested by the symposium panelists and others, a number of enforcement mechanisms are being used across all levels of government. The following represent those that the Board considers to be most deserving of consideration, either on their own merits or in combination with each other:[29]

Rulemaking

The Board commented favorably on rulemaking recently promulgated by the Office of Public-Private Partnerships (DC OP3).[30] Of particular note, section 4812 of the rules is premised on the commitment "to ensur[e] that all procurements for [public-private partnership] projects are conducted in a fair, competitive, and ethical manner without actual or apparent conflicts of interest."[31] In operational terms, that commitment is given teeth in the form of the authority of DC OP3 to enforce the Code of Conduct against District government employees and employees of private entities "through appropriate administrative, personnel, or contractual procedures."[32] That authority would complement the

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[28] Marilyn L. Glynn, *Public Integrity and the Multi-Sector Workforce*, 52 Wayne L. Rev. 1433, 1438 (2006).

[29] For example, an agency could promulgate a rule that requires all its privatization contracts to include a contractor code of conduct. *See, e.g.,* Federal Acquisition Regulation § 3.1003(a)(1) (requiring federal contracts expected to exceed $5,000,000 in value and to take 120 days or more to perform to contain a clause setting out a Code of Business Ethics and Conduct).

[30] *See* 27 DCMR § 4800 *et seq*. The rulemaking became final on October 21, 2016, upon publication of the Notice of Final Rulemaking at 63 DCR 13119.

[31] Section 4812.1.

[32] Section 4812.3. *See also* section 4812.5(c) (providing that mitigation of reported conflicts of interest and Code of Conduct violations would, in addition to an employee's recusal or resignation, include "disqualifying a contractor at any point during a procurement; rescinding or terminating a contract subsequent to contract award; or cancelling a pending solicitation and initiating a new procurement").

Board's own authority to enforce the Code of Conduct through penalties available to it under the Ethics Act.[33]

Section 4812.5 of the DC OP3 rules would require employees associated with any public-private partnership procurement – both District government employees and those of private entities alike – to report actual or apparent conflicts of interest and credible violations of the Code of Conduct. District government employees in the executive branch are already required to make such reports.[34] However, extending the reporting requirement to private entity employees represents a regulatory first in this government, at least as far as the Board has been able to determine.

While the reporting requirement in section 4812 of the DC OP3 rules may be narrow in scope, it unquestionably represents an enforcement step in the right direction. That step can become a broader stride, for DC OP3 itself and other District agencies, by adapting the approach taken by several federal agencies. The Federal Deposit Insurance Corporation (FDIC), for example, regulates the ethics of all its service contractors' employees, and has adopted regulations addressing their financial conflicts, gifts, outside employment and activities, their use of government resources (including information), and activities after the end of the contract.[35] Furthermore, the decision by the various federal agencies to extend certain ethics standards applicable to government employees to contractor

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[33] *See* section 221 of the Ethics Act (D.C. Official Code § 1-1162.21) (penalties).

[34] *See* 6B DCMR § 1801.1 ("Employees shall immediately and directly report credible violations of the District Code of Conduct and violations of this chapter to the District of Columbia Office of Government Ethics, the District of Columbia Office of the Inspector General, or both."). There is no similar reporting requirement for Council employees in the Council's Code of Official Conduct.

[35] *See* 12 C.F.R. pt. 366; *see also* Kathleen Clark, *Ethics for an Outsourced Government*, 28-30 (2011) (available at https://www.acus.gov/sites/default/files/documents/K-Clark-Final-Report.pdf) (providing overview of some existing regulations imposing ethics standards on federal government contractor personnel).

employees "has not necessarily created excessive compliance or monitoring costs."[36]

Contractor Codes of Conduct

Contractor codes of conduct could be employed in one of two ways. The first would be for an agency to establish its own contractor code of conduct. The New York State Energy Research and Development Authority[37] and the Los Angeles Unified School District[38] have taken this approach, crafting their respective codes broadly to include conflict of interest provisions, as well as restrictions on gifts, employment of relatives, use of government property and other resources, and post-employment, for example. Both codes also contain enforcement mechanisms, including reporting and cooperation requirements and possible sanctions for violation.

The second way would be for an agency to require, by rulemaking, that its contractors develop an enforceable code that deals specifically with situations where their employees' interests conflict with the interests of the District.[39] This approach would, in a given case, leave enforcement in the hands of the contractor, but any misconduct by the contractor's employee would not automatically amount to a breach of contract, allowing the contractor to address employee misconduct without necessarily jeopardizing the contract itself.[40]

Contract Clauses

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[36] ACUS, footnote 18, at 6 n.18 (noting, in particular, FDIC's regulations).

[37] Visit https://www.nyserda.ny.gov/-/media/Files/About/Board-Governance/NYSERDA-Code-of-Conduct-Contractors.pdf.

[38] Visit http://ethics.lausd.net/default.asp?Page=portal2_contractorConsultantCode.

[39] *See* Glynn, footnote 28, at 1439; *cf., e.g.,* Federal Acquisition Regulation § 3.1003(a)(1), discussed in footnote 29.

[40] *See* Glynn, footnote 28, at 1439.

Contract clauses can operate in much the same manner as contractor codes of conduct.[41] In the District, for example, the Office of Contracting and Procurement (OCP) has the following clause on retention and examination of records in its Standard Contract Provisions for Supplies and Services:

> The [Contracting Officer], the Inspector General and the District of Columbia Auditor, or any of their duly authorized representatives shall, until three years after final payment, have the right to examine any directly pertinent books, documents, papers and records of the Contractor involving transactions related to the contract.

The Board understands that OCP is in the process of updating the Standard Contract Provisions and will revise the above clause to include BEGA among those authorized to inspect a contractor's records.

Outside jurisdictions employ ethics-related contract clauses as well. The Port of Los Angeles, for one, has the following clause on conflicts of interest in its standard contract provisions:

> It is hereby understood and agreed that the parties to this Agreement have read and are aware of the provisions of Section 1090 et seq. and Section 87100 et seq. of the California Government Code relating to conflict of interest of public officers and employees, as well as the Los Angeles Municipal Code (LAMC) Municipal Ethics and Conflict of Interest provisions of Section 49.5.1 et seq. and the Conflict of Interest Codes of the City and Department. All parties hereto agree that they are unaware of

[41] *See* Glynn, footnote 28, at 1438 ("Another possible way to address contractor employee ethics issues is to use targeted contract clauses."); *Panel Discussion: Public Oversight of Public/Private Partnerships*, 28 Fordham Urb. L.J. 1357, 1373 (2001) (comments of Wayne Hawley, then Deputy Counsel to the New York City Conflicts of Interest Board) ("If not classic ethics regulation, what else? Contracts. Contracts with vendors, contracts sensibly drawn to produce the result desired, and not to hamper those people providing that service, might substitute."); *see also* Clark, footnote 35, at 27-28 (discussing several federal agencies that utilize conflict of interest or confidentiality clauses in their contracts).

> any financial or economic interest of any public officer or employee of City relating to this Agreement. Notwithstanding any other provision of this Agreement, it is further understood and agreed that if such financial interest does exist at the inception of this Agreement, City may immediately terminate this Agreement by giving written notice thereof.[42]

District agencies could easily adapt the above clause in their privatization contracts to reference – and make applicable to contractors and their employees – the section on conflicts of interest in the Ethics Act.[43] In the alternative, agencies could decide, in addition to the conflicts section, which elements of the Code of Conduct are most applicable to those contracts and, by reference, incorporate those elements for purposes of enforcement as well.

Training

While not an enforcement mechanism in the way a contract clause can operate, for example, training nevertheless should be part of all privatization contract relationships, for government and contractor employees alike. "Government contracting officers and program managers could be educated to focus on contractor employee ethics concerns, and contractors could conduct ethics training for their own employees."[44]

BEGA, as noted above, already conducts ethics training sessions for government employees as part of its efforts to administer and enforce the Code of Conduct. Contracting officers could be provided specialized training, for example, to recognize and address organizational conflicts of interest of the contractor in a contract calling for the performance of a function closely associated with an inherently governmental function.[45] Employees who are not directly involved in

[42] Visit https://www.portoflosangeles.org/forms/Standard_Contract_Provisions.pdf.

[43] Section 223 (D.C. Official Code § 1-1162.23) (conflicts of interest).

[44] Glynn, footnote 28, at 1439.

[45] Section 205a(b) of the PPRA (D.C. Official Code § 2-352.05a(b)) authorizes the District to "enter into a contract for the performance of a function closely associated with an inherently governmental function only if the head of an agency benefited by the performance of the contract[, among other things,] [a]ddresses any potential organizational conflicts of interest of the contractor

the procurement process could also benefit from specialized training, especially those supervising contractor employees.[46]

For their part, many contractors also have employee ethics training programs in place, provided, for example, in-house or by outside law firms. "These training programs could counsel contractor employees about the need to avoid conflicts not only with the contractor's interests, but also conflicts with the [District's] interests."[47]

Summing Up

Even with the amendments to the District's procurement law that came with the passage of the PITA Amendment Act, BEGA's future role in the area of contracting and procurement is only slightly more clear than it was a year ago, especially in the context of privatization contracts. This continuing uncertainty is due, as a practical matter, to the time the District's agencies will need to take to "digest" the amendments to section 205 of the PPRA and then to decide which of the recommended enforcement mechanisms discussed above – or, perhaps, others

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in the performance of the functions closely associated with an inherently governmental function under the contract." An "organizational conflict of interest" is defined by 27 DCMR § 2299.1 as occurring "when the nature of the work to be performed under a proposed District contract might, without some restraint on future activities, result in an unfair competitive advantage to a contractor or impair a contractor's objectivity in performing contract work." *See also* 27 DCMR § 2220 (setting out provisions related to organizational conflict of interest that "shall apply to all procurements"); Clark, footnote 35, at 23-25 (distinguishing between organizational and personal conflicts of interest); Daniel I. Gordon, *Organizational Conflicts of Interest: A Growing Integrity Challenge*, 35 Pub. Cont. L.J. 25, 28-30 (2005). A discussion of functions closely associated with an inherently governmental function (defined in section 104(37B) of the PPRA (D.C. Official Code § 2-351.04(37B)) is beyond the scope of this report. However, the PITA Amendment Act Committee Report (at 7-10) contains useful background information.

[46] *See* Glenn J. Voelz, *Contractors in the Government Workplace: Managing the Blended Workforce, v* (Gov't Inst. Press 2010) ("As the government increasingly turns to commercial augmentation for an expanding variety of services, many closely supporting inherently governmental functions, it is critically important that supervisors understand the rules, expectations, and boundaries of the government-contractor relationship.").

[47] Glynn, footnote 28, at 1439.

not mentioned in this report – would best serve their mission. How BEGA can assist in these initial efforts, if at all, simply remains to be seen.

The uncertainty is also due to the lapsing of Bill 21-250. Until the District's government ethics law receives an update as well, in the form of the Comprehensive Code of Conduct, the recommendations discussed above cannot be given full measure. In other words, both BEGA and the agencies need to know the boundaries of the ethics law before they can work together in a meaningful way to develop and implement enforcement strategies. One telling example will serve to illustrate the point.

Bill 21-250 would have expanded the concept of conflict of interest to include non-financial considerations by defining the term "personal interest." The term reflects the fact that there are, as one government ethics commentator has observed, "many personal interests that create a conflict, even though no money is involved."[48] However, without such a change in a concept that is so central to government ethics law, the effectiveness of a privatization contract clause or a rule prohibiting contractor conflicts of interest becomes an open question at best.

All this said, the collective experience of other governments has demonstrated that, in practice, the recommendations made in this report can prove to be successful. Success often breeds success, and, in whatever form its role will take as the law evolves, BEGA stands ready to assist District agencies in developing and maintaining effective ethics enforcement mechanisms in their privatization contracts and, in the process, strive to make all those involved in the District's contracting and procurement process more accountable.

Some Final Words

While much of the foregoing discussion of ethics enforcement mechanisms focused on concerns about unethical contractor conduct, the fact remains that

[48] Robert Wechsler, *Personal, Non-Financial Interests* (Feb. 7, 2009, 3:56 PM) http://www.cityethics.org/node/635 (last visited December 17, 2016). *See also* Rule 202(a), Rules of Organization and Procedure for the Council of the District of Columbia, Council Period 21 (providing, in pertinent part, that "Councilmembers and staff shall strive to act solely in the public interest and not for any personal gain or take an official action on a matter as to which they have a conflict of interest created by a personal, family, client, or business interest, avoiding both actual and perceived conflicts of interest and preferential treatment.").

"privatization does not alter the governing ethical restrictions on *employee* behavior during privatization and subsequent interaction with private entities that perform [g]overnment-related functions."[49] In other words, for those employees and public officials subject to them, the District's government ethics laws remain *unchanged* by privatization.

[49] Federal OGE Informal Advisory Memorandum 99 x 10 at 3 (April 28, 1999) (emphasis added); *see also* federal OGE Informal Advisory Memorandum 06 x 7 (Aug. 9, 2006) ("This guidance is intended to provide agency ethics officials with basic information about some common issues that arise in the procurement context.").