

# Subpart 3.4 - Contingent Fees

**Parent topic:** [Part 3 - Improper Business Practices and Personal Conflicts of Interest](#)

## 3.400 Scope of subpart.

This subpart prescribes policies and procedures that restrict *contingent fee* arrangements for soliciting or obtaining Government contracts to those permitted by [10 U.S.C. 3321\(b\)\(1\)](#) and [41 U.S.C.3901](#).

## 3.401 Definitions.

As used in this subpart-

*Bona fide agency* means an established commercial or selling agency, maintained by a contractor for the purpose of securing business, that neither exerts nor proposes to exert *improper influence* to solicit or obtain Government contracts nor holds itself out as being able to obtain any Government contract or contracts through *improper influence*.

*Bona fide employee* means a person, employed by a contractor and subject to the contractor's supervision and control as to time, place, and manner of performance, who neither exerts nor proposes to exert *improper influence* to solicit or obtain Government contracts nor holds out as being able to obtain any Government contract or contracts through *improper influence*.

*Contingent fee* means any commission, percentage, brokerage, or other fee that is contingent upon the success that a person or concern has in securing a Government contract.

*Improper influence* means any influence that induces or tends to induce a Government employee or officer to give consideration or to act regarding a Government contract on any basis other than the merits of the matter.

## 3.402 Statutory requirements.

Contractors' arrangements to pay *contingent fees* for soliciting or obtaining Government contracts have long been considered contrary to public policy because such arrangements *may* lead to attempted or actual exercise of *improper influence*. In [10 U.S.C. 3321\(b\)](#) and [41 U.S.C.3901](#), Congress affirmed this public policy but permitted certain exceptions. These statutes-

- (a) Require in every negotiated contract a *warranty* by the contractor against *contingent fees*;
- (b) Permit, as an exception to the *warranty*, *contingent fee* arrangements between contractors and *bona fide employees* or *bona fide agencies*; and
- (c) Provide that, for breach or violation of the *warranty* by the contractor, the Government *may* annul the contract without liability or deduct from the contract price or consideration, or otherwise recover, the full amount of the *contingent fee*.

### **3.403 Applicability.**

This subpart applies to all contracts. Statutory requirements for negotiated contracts are, as a matter of policy, extended to sealed bid contracts.

### **3.404 Contract clause.**

The *contracting officer shall* insert the clause at 52.203-5, *Covenant Against Contingent Fees*, in all *solicitations* and contracts exceeding the *simplified acquisition threshold*, other than those for *commercial products* or *commercial services* (see parts 2 and 12).

### **3.405 Misrepresentations or violations of the Covenant Against Contingent Fees.**

(a) Government personnel who suspect or have evidence of attempted or actual exercise of *improper influence*, misrepresentation of a *contingent fee* arrangement, or other violation of the *Covenant Against Contingent Fees shall* report the matter promptly to the *contracting officer* or appropriate higher authority in accordance with agency procedures.

(b) When there is specific evidence or other reasonable basis to suspect one or more of the violations in paragraph (a) of this section, the chief of the *contracting office shall* review the facts and, if appropriate, take or direct one or more of the following, or other, actions:

(1) If before award, reject the bid or proposal.

(2) If after award, enforce the Government's right to annul the contract or to recover the fee.

(3) Initiate *suspension* or *debarment* action under subpart 9.4.

(4) Refer suspected fraudulent or criminal matters to the Department of Justice, as prescribed in agency regulations.

### **3.406 Records.**

For enforcement purposes, agencies *shall* preserve any specific evidence of one or more of the violations in 3.405(a), together with all other pertinent data, including a record of actions taken. *Contracting offices shall* not retire or destroy these records until it is certain that they are no longer needed for enforcement purposes. If the original record is maintained in a central file, a copy *must* be retained in the contract file.