

### PART 3

## IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST

### 3.000 Scope of part.

This part prescribes policies and procedures for avoiding improper business practices and personal conflicts of interest and for dealing with their apparent or actual occurrence.

### SUBPART 3.1—SAFEGUARDS

#### 3.101 Standards of conduct.

##### 3.101-1 General.

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.

##### 3.101-2 Solicitation and acceptance of gratuities by Government personnel.

As a rule, no Government employee may solicit or accept, directly or indirectly, any gratuity, gift, favor, entertainment, loan, or anything of monetary value from anyone who (a) has or is seeking to obtain Government business with the employee's agency, (b) conducts activities that are regulated by the employee's agency, or (c) has interests that may be substantially affected by the performance or non-performance of the employee's official duties. Certain limited exceptions are authorized in agency regulations.

##### 3.101-3 Agency regulations.

(a) Agencies are required by Executive Order 11222 of May 8, 1965, and 5 CFR 735 to prescribe "Standards of Conduct." These agency standards contain—

(1) Agency-authorized exceptions to 3.101-2; and  
(2) Disciplinary measures for persons violating the standards of conduct.

(b) Requirements for employee financial disclosure and restrictions on private employment for former Government employees are in Office of Personnel Management and agency regulations implementing Public Law 95-521, which amended 18 U.S.C. 207.

#### 3.102 [Reserved]

#### 3.103 Independent pricing.

##### 3.103-1 Solicitation provision.

The contracting officer shall insert the provision at 52.203-2, Certificate of Independent Price Determination, in solicitations when a firm-fixed-price contract or fixed-price contract with economic price adjustment is contemplated, unless—

(a) The acquisition is to be made under the simplified acquisition procedures in Part 13;

(b) [Reserved]

(c) The solicitation is a request for technical proposals under two-step sealed bidding procedures; or

(d) The solicitation is for utility services for which rates are set by law or regulation.

##### 3.103-2 Evaluating the certification.

(a) *Evaluation guidelines.* (1) None of the following, in and of itself, constitutes "disclosure" as it is used in subparagraph (a)(2) of the Certificate of Independent Price Determination (hereafter, the certificate):

(i) The fact that a firm has published price lists, rates, or tariffs covering items being acquired by the Government.

(ii) The fact that a firm has informed prospective customers of proposed or pending publication of new or revised price lists for items being acquired by the Government.

(iii) The fact that a firm has sold the same items to commercial customers at the same prices being offered to the Government.

(2) For the purpose of subparagraph (b)(2) of the certificate, an individual may use a blanket authorization to act as an agent for the person(s) responsible for determining the offered prices if—

(i) The proposed contract to which the certificate applies is clearly within the scope of the authorization; and

(ii) The person giving the authorization is the person within the offeror's organization who is responsible for determining the prices being offered at the time the certification is made in the particular offer.

(3) If an offer is submitted jointly by two or more concerns, the certification provided by the representative of each concern applies only to the activities of that concern.

(b) *Rejection of offers suspected of being collusive.* (1) If the offeror deleted or modified subparagraph (a)(1) or (a)(3) or paragraph (b) of the certificate, the contracting officer shall reject the offeror's bid or proposal.

(2) If the offeror deleted or modified subparagraph (a)(2) of the certificate, the offeror must have furnished with its offer a signed statement of the circumstances of the disclosure of prices contained in the bid or proposal. The chief of the contracting office shall review the altered certificate and the statement and shall determine, in writing, whether the disclosure was made for the purpose or had the effect of restricting competition. If the determination is positive, the bid or proposal shall be rejected; if it is negative, the bid or proposal shall be considered for award.

(3) Whenever an offer is rejected under subparagraph (b)(1) or (b)(2) of this section, or the certificate is suspected of being false, the contracting officer shall report the situation to the Attorney General in accordance with 3.303.

(4) The determination made under subparagraph (b)(2) of this section shall not prevent or inhibit the prosecution of any criminal or civil actions involving the occurrences or transactions to which the certificate relates.

### 3.103-3 The need for further certifications.

A contractor that properly executed the certificate before award does not have to submit a separate certificate with each proposal to perform a work order or similar ordering instrument issued pursuant to the terms of the contract, where the Government's requirements cannot be met from another source.

### 3.104 Procurement integrity.

#### 3.104-1 General.

(a) Section 3.104 implements section 27 of the Office of Federal Procurement Policy Act (41 U.S.C. 423), as amended by section 814 of the FY 90/91 National Defense Authorization Act, Pub. L. 101-189, and section 815 of the 1991 National Defense Authorization Act, Pub. L. 101-510 (hereinafter, section 27 is referred to as "the Act" or "the law as amended"). Agency supplementation of 3.104 and any clauses required by 3.104 must be approved at a level not lower than the Senior Procurement Executive of the agency, unless a higher level of approval is required by law for that agency.

(b) Agency employees are reminded that much of the conduct prohibited by the Act is also prohibited by other statutes and regulations. For example—

(1) The offer or acceptance of a bribe or gratuity is prohibited by 18 U.S.C. 201, 10 U.S.C. 2207, 5 U.S.C. 7353, and 5 CFR Parts 735 and 2635;

(2) Employment discussions are covered by 18 U.S.C. 208 which precludes a Government employee from participating personally and substantially in any particular matter that would affect the financial interests of any person with whom the employee is negotiating for employment;

(3) Post-employment restrictions are covered by 18 U.S.C. 207 which prohibits certain activities by former Government employees, including representation of a contractor before the Government in relation to any contract on which the former employee worked while employed by the Government; and

(4) FAR Parts 14 and 15, which place restrictions on the release of information related to procurements and other contractor information which must be protected under 18 U.S.C. 1905. In addition, 5 CFR Part 735 protects non-public Government information.

#### 3.104-2 Applicability.

(a) *Conduct and procurement activities during the period July 16, 1989, through November 30, 1989—*(1) *Gratuities, employment discussions, and soliciting, obtaining, or disclosing proprietary or source selection information.* (i) Participation in a procurement during the period July 16, 1989, through November 30, 1989, whether as a procurement official, competing con-

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tractor or through access to information, subjects the participant, during that period, to the prohibitions contained in section 27 as originally enacted.

(ii) If a particular procurement which was begun during the period July 16, 1989, through November 30, 1989, has not been completed by November 30, 1990, then on or after December 1, 1990—

(A) Any person who was subject to the prohibitions on disclosing proprietary or source selection information contained in subsection 27(c) of the law as originally enacted is subject to the disclosure prohibitions of subsection 27(d) of the law as amended;

(B) Except as provided in subdivision (a)(1)(ii)(A) of this subsection, a procurement official who was subject to the prohibitions on gratuities, employment discussions, and disclosing proprietary or source selection information contained in subsection 27(b) of the law as originally enacted is subject to the prohibitions under subsection 27(b) of the law as amended, if the activities performed by the procurement official prior to December 1, 1989, would also make him or her a procurement official under subsection 27(b) of the law as amended; and

(C) Except as provided in subdivision (a)(1)(ii)(A) of this subsection, a competing contractor who was subject to the prohibitions on gratuities, employment discussions, and soliciting or obtaining proprietary or source selection information contained in subsection 27(a) of the law as originally enacted is subject to the prohibitions under subsection 27(a) of the law as amended if it is still a competing contractor for that procurement on or after December 1, 1990.

(2) *Post-employment restrictions.*

(i) Current and former Government employees who were procurement officials during the period July 16, 1989, through November 30, 1989, are subject, during that period, to the post-employment restrictions contained in section 27 as originally enacted.

(ii) On or after June 1, 1991, current and former Government employees who were procurement officials during the period July 16, 1989, through November 30, 1989, become subject to the post-employment restrictions contained in subsection 27(f) of the law as amended, if—

(A) The activities performed by the procurement official during the period July 16, 1989, through November 30, 1989, would also make him or her a procurement official under section 27, of the law as amended; and

(B) The 2-year period of any post-employment restriction that attached during the period July 16,

1989, through November 30, 1989, has not expired.

(b) *Conduct and procurement activities during the period December 1, 1989, through November 30, 1990.*

(1) *Gratuities, employment discussions, and soliciting, obtaining, or disclosing proprietary or source selection information.*

(i) The prohibitions on gratuities, employment discussions, and soliciting, obtaining, or disclosing proprietary or source selection information contained in section 27 were suspended during the period December 1, 1989, through November 30, 1990. Neither the prohibitions contained in section 27 as originally enacted nor as amended apply during the suspension period. Participation in a procurement solely during the suspension period does not subject any person to any of these prohibitions on or after December 1, 1990.

(2) *Post employment restrictions.*

(i) The post-employment restrictions contained in section 27 were suspended during the period December 1, 1989, through November 30, 1990. Neither the post-employment restrictions contained in section 27 as originally enacted nor as amended apply to any person during the suspension period. In addition, these post-employment restrictions do not apply on or after December 1, 1990, to any current or former Government employee whose only participation in a procurement occurred during the period from December 1, 1989, through November 30, 1990.

(ii) The suspension of the post-employment restrictions during the period December 1, 1989, through November 30, 1990, does not interrupt the running of the 2-year period of any post-employment restriction that attached to a Government employee who was a procurement official during the period July 16, 1989, through November 30, 1989.

(c) *Conduct and procurement activities on or after December 1, 1990.*

(1) *Gratuities, employment discussions, and soliciting, obtaining, or disclosing proprietary or source selection information.*

(i) The prohibitions contained in section 27, of the law as amended, apply on or after December 1, 1990, to persons who participate in a procurement on or after that date, whether as a procurement official, a competing contractor, or through access to information.

(ii) As provided in subdivision (a)(1)(ii) of this subsection, the prohibitions contained in section 27, of the law as amended, may also apply to procurement officials, competing contractors, and other persons who, during the period July 16, 1989, through November 30, 1989, were subject to the prohibitions of section 27 as originally enacted.

(2) *Post-employment restrictions.*

(i) Pub. L. 101-510 continues the suspension of the post-employment restrictions contained in subsection 27(f) of the law as amended through May 31, 1991. Government employees who perform procurement official activities solely during the period December 1, 1990, through May 31, 1991, do not become subject to the post-employment restrictions contained in subsection 27(f) of the law as amended either during or after the suspension period.

(ii) The post-employment restrictions of subsection 27(f) of the law as amended are effective June 1, 1991. Government employees who perform procurement official activities on or after June 1, 1991, are subject to those restrictions.

(iii) As provided in subdivision (a)(2)(ii) of this subsection, the post-employment restrictions contained in subsection 27(f) of the law as amended may also apply, on or after June 1, 1991, to current or former Government employees who were procurement officials during the period July 16, 1989, through November 30, 1989.

(iv) The continued suspension of the post-employment restrictions does not interrupt the running of the 2-year period of any post-employment restriction that attached to a procurement official during the period July 16, 1989, through November 30, 1989.

**3.104-3 Statutory prohibitions and restrictions.**

As provided in section 27 of the Act, the following conduct is prohibited:

(a) *Prohibited conduct by competing contractors (subsection 27(a) of the Act).* During the conduct of any Federal agency procurement of property or services, no competing contractor or any officer, employee, representative, agent, or consultant of any competing contractor shall knowingly—

(1) Make, directly or indirectly, any offer or promise of future employment or business opportunity to, or engage, directly or indirectly, in any discussion of future employment or business opportunity with, any procurement official of such agency, except as provided in 3.104-6(b);

(2) Offer, give, or promise to offer or give, directly or indirectly, any money, gratuity, or other thing of value to any procurement official of such agency; or

(3) Solicit or obtain, directly or indirectly, from any officer or employee of such agency, prior to the award of a contract any proprietary or source selection information regarding such procurement.

(b) *Prohibited conduct by procurement officials (subsection 27(b) of the Act).* During the conduct of any Federal agency procurement of property or services, no procurement official of such agency shall knowingly—

(1) Solicit or accept, directly or indirectly, any

promise of future employment or business opportunity from, or engage, directly or indirectly, in any discussion of future employment or business opportunity with, any officer, employee, representative, agent, or consultant of a competing contractor, except as provided in 3.104-6(a);

(2) Ask for, demand, exact, solicit, seek, accept, receive, or agree to receive, directly or indirectly, any money, gratuity, or other thing of value from any officer, employee, representative, agent, or consultant of any competing contractor for such procurement; or

(3) Disclose any proprietary or source selection information regarding such procurement directly or indirectly to any person other than a person authorized by the head of such agency or the contracting officer to receive such information.

(c) *Disclosure to unauthorized persons (subsection 27(d) of the Act).* During the conduct of any Federal agency procurement of property or services, no person who is given authorized or unauthorized access to proprietary or source selection information regarding such procurement, shall knowingly disclose such information, directly or indirectly, to any person other than a person authorized by the head of such agency or the contracting officer to receive such information.

(d) *Post-employment restrictions resulting from procurement activities of Government officers or employees who are or were procurement officials (subsection 27(f) of the Act; not effective until June 1, 1991).*

(1) No individual who, while serving as an officer or employee of the Government or member of the Armed Forces, was a procurement official with respect to a particular procurement may knowingly—

(i) Participate in any manner, as an officer, employee, agent, or representative of a competing contractor, in any negotiations leading to the award, modification, or extension of a contract for such procurement; or

(ii) Participate personally and substantially on behalf of the competing contractor in the performance of such contract.

The restrictions in subdivisions (d)(1)(i) and (d)(1)(ii) of this subsection apply during the period ending 2 years after the last date such individual participated personally and substantially in the conduct of such procurement or personally reviewed and approved the award, modification, or extension of any contract for such procurement.

(2) This subsection does not apply to any participation referred to in subdivisions (d)(1)(i) and (d)(1)(ii) of this subsection with respect to a subcontractor who is a competing contractor unless—

(i) The subcontractor is a first or second tier subcontractor and the subcontract is for an amount that is in excess of \$100,000; or

(ii) The subcontractor significantly assisted the

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prime contractor with respect to negotiation of the prime contract; or

(iii) The procurement official involved in the award, modification, or extension of the prime contract personally directed or recommended the particular subcontractor to the prime contractor as a source for the subcontract; or

(iv) The procurement official personally reviewed and approved the award, modification, or extension of the subcontract.

**3.104-4 Definitions.**

As used in this subsection—

(a) “Agency ethics official” means the designated agency ethics official described in 5 CFR 2638.201 and any other person, including deputy ethics officials described in 5 CFR 2638.204, to whom authority under 3.104-6(f) and 3.104-8(e) has been delegated by the designated agency ethics official.

(b)(1) “Competing contractor,” with respect to any procurement (including any procurement using procedures other than competitive procedures) of property or services means any entity (such as an individual, partnership, corporation, educational institution, nonprofit or not for profit organization, or business unit) legally capable of entering into a contract or subcontract in its own name that is, or is reasonably likely to become, a competitor for or recipient of a contract or subcontract under such procurement, and includes any other person acting on behalf of such an entity.

(2) The term “competing contractor” includes the incumbent contractor in the case of a contract modification.

(3) An entity shall not be considered a competing contractor whenever, by action of the Government or the entity, it is clear that the entity will not, or will no longer, participate in a particular procurement.

(4) For purposes of subsections 27(a) and 27(b) of the Act, the phrase “representative, agent, or consultant of a competing contractor” means any entity, other than an officer or employee of a competing contractor, acting on behalf of, or providing advice to, a competing contractor with regard to a particular Federal agency procurement.

(c)(1) “During the conduct of any Federal agency procurement of property or services” means, except for broad agency announcements, small business innovative research programs, and unsolicited proposals (see subparagraphs (c)(3) and (c)(4) of this subsection), the period beginning on the earliest date upon which an identifiable, specific action is taken for the particular procurement and concluding upon the award or modification of a contract or the cancellation of the procurement; provided, however, that in no event shall the conduct of the procurement be deemed to have begun prior to the decision

by an authorized agency official to satisfy a specific agency need or requirement by procurement. These actions are—

- (i) Drafting a specification or a statement of work;
- (ii) Review and approval of a specification;
- (iii) Requirements computation at an inventory control point;
- (iv) Development of procurement or purchase requests;
- (v) Preparation or issuance of a solicitation;
- (vi) Evaluation of bids or proposals;
- (vii) Selection of sources;
- (viii) Conduct of negotiations; or
- (ix) Review and approval of the award of a contract or contract modification.

(2) Each contract award and each contract modification constitutes a separate procurement action; i.e., a separate period to which the prohibitions and the requirements of the Act apply.

(3) For broad agency announcements and small business innovative research programs, each proposal received by an agency shall constitute a separate procurement for purposes of the Act. The conduct of each procurement shall be deemed to have begun upon the date a Commerce Business Daily announcement was made regarding the availability of the broad agency announcement or the date a solicitation was released for the small business innovative research program. The conduct of the procurement shall end upon the award of a contract or contract modification incident to each proposal or the written rejection of each specific proposal.

(4) Each unsolicited proposal shall be considered a separate procurement for purposes of the Act. For unsolicited proposals, the conduct of the procurement shall be deemed to have begun upon the publication date of a general statement of agency needs (see 15.503(d)), or if an agency does not publicize a general statement of agency needs, upon the provision of advance guidance related to agency needs (see 15.504(a)(1)) or the receipt of the unsolicited proposal, whichever is earlier. The conduct of the procurement shall end upon the award of a contract or contract modification or the rejection of the proposal.

(d) “Government officer or employee” means a person who is employed by a Federal agency (see Subpart 2.1) and who is in such status during the period July 16, 1989, through November 30, 1989, or on or after December 1, 1990. This includes—

- (1) A member of the uniformed services as defined in section 101(3) of title 37, United States Code;
- (2) A person who is appointed to a position in the Federal Government under title 5, United States Code, or any other title authorizing such appointments, including a person under a temporary appointment; and

(3) A special Government employee as defined in section 202 of title 18, United States Code.

(e) “Modification” means the addition of new work to a contract, or the extension of a contract, which requires a justification and approval (see Subpart 6.3). It does not include an option where all the terms of the option, including option prices, are set forth in the contract and all requirements for option exercise have been satisfied, change orders, administrative changes, or any other contract changes that are within the scope of the contract.

(f)(1) “Gratuity or other thing of value” includes any gift, favor, entertainment, or other item having monetary value. The phrase includes services, conference fees, vendor promotional training, transportation, lodgings and meals, as well as discounts not available to the general public and loans extended by anyone other than a bank or financial institution. The phrase does not include—

(i) Anything for which market value is paid by the procurement official, or on his behalf, by someone other than a competing contractor, or a representative, agent, or consultant of the competing contractor;

(ii) Anything which is paid for by the Government, secured under Government contract, or accepted by the Government under specific statutory authority;

(iii) Plaques or certificates having no intrinsic value; or

(iv) Any unsolicited item, other than money, having a market value of \$10 or less per event or presentation.

For these purposes, market value means the retail cost the procurement official would incur to purchase the item and, in the case of items such as tickets, refers to their face value. A thing of value given or received or otherwise offered or sought “directly or indirectly” includes a thing of value directed to a person other than a procurement official, such as a spouse or child, solely because of that person's relationship to the procurement official or on the basis of designation, recommendation, or suggestion by the procurement official.

(2) Promotional vendor training does not include training provided by a vendor when a vendor's products are furnished under contract to the Government and the training is to facilitate the use of those products.

(g) “Participated personally and substantially” means active and significant involvement of the individual in activities directly related to the procurement. To participate “personally” means directly, and includes the participation of a subordinate when actually directed by the supervisor in the matter. To participate “substantially” means that the employee's involvement must be of significance to the matter. For example, the review of procurement documents solely to determine compliance with applicable regulatory, administrative, or budgetary

requirements or procedures, does not constitute substantial participation in a procurement. It requires more than official responsibility, knowledge, perfunctory involvement, or involvement on an administrative or peripheral issue. A finding of substantiality should be based not only on the effort devoted to a matter, but on the importance of the effort. While a series of peripheral involvements may be insubstantial, the single act of approving or participating in a critical step may be substantial.

(h)(1) “Procurement official” means any civilian or military official or employee of an agency who has participated personally and substantially in any of the following activities for a particular procurement—

(i) Drafting a specification or a statement of work for that procurement;

(ii) Review and approval of a specification or statement of work developed for that procurement;

(iii) Preparation or development of procurement or purchase requests for that procurement;

(iv) The preparation or issuance of a solicitation for that procurement;

(v) Evaluation of bids or proposals for that procurement;

(vi) Selection of sources for that procurement;

(vii) Negotiations to establish the price or terms and conditions of a particular contract or contract modification; or

(viii) Review and approval of the award of a contract or contract modification.

(2) For purposes of 3.104-4(h), the term “employee of an agency” includes a contractor, subcontractor, consultant, expert, or advisor (other than a competing contractor) acting on behalf of, or providing advice to, the agency with respect to any phase of the agency procurement concerned.

(3) Generally, an individual will not become a procurement official solely by participating in the following activities—

(i) Federal advisory committees that are established and function in accordance with the Federal Advisory Committee Act, 5 U.S.C. App. 2, unless the Federal advisory committee is established or used for the purpose of performing a function listed in subparagraph (h)(1) of this subsection and the individual member's participation in that function is personal and substantial;

(ii) Agency level boards, panels, or other advisory committees that review program milestones or evaluate and make recommendations regarding alternative technologies or approaches for satisfying broad agency level missions or objectives;

(iii) The performance of general, technical, engineering, or scientific effort having broad application not directly associated with a particular procurement, notwithstanding that such general, tech-

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nical, engineering, or scientific effort subsequently may be incorporated into a particular procurement;

(iv) Clerical functions supporting the conduct of a particular procurement; and

(v) For procurements to be conducted under the procedures of OMB Circular A-76, participation in management studies, preparation of in-house cost estimates, preparation of “most efficient organization” analyses, and furnishing of data or technical support to be used by others in the development of performance standards, statements of work, or specifications.

(4) An employee of an agency does not become a procurement official for a particular procurement until the onset of the employee's personal and substantial participation in that particular procurement.

(5) For purposes of 3.104-4(h), the term “procurement official” does not include contracting officers or other individuals whose authority is limited to the micro-purchase threshold if the head of the contracting activity determines that it is unlikely that the individual will make purchases in a total amount greater than \$20,000 in any 12-month period.

(i) “Property” means supplies as defined in 2.101.

(j)(1) “Proprietary information” means information contained in a bid or proposal or otherwise submitted to the Government by a competing contractor in response to the conduct of a particular Federal agency procurement, or in an unsolicited proposal, that has been marked by the competing contractor as proprietary information in accordance with applicable law and regulation.

(2) Information shall be considered proprietary information, for purposes of section 27 of the Act, only when—

(i) An attached transmittal document, such as a cover page or the label of a magnetic media storage container, is clearly marked with a restrictive legend; and

(ii) The specific portions of the information whose disclosure the competing contractor desires to restrict are clearly and separately marked.

(3) Proprietary information does not include information—

(i) That is otherwise available without restrictions to the Government, another competing contractor, or the public;

(ii) Contained in bid documents following bid opening (but see 14.404-4); or

(iii) That the contracting officer determines to release in accordance with 3.104-5(d).

(k)(1) “Source selection information” is information, including information stored in electronic, magnetic, audio or video formats, which is prepared or developed for use by the Government to conduct a particular procurement and—

(i) The disclosure of which to a competing contractor would jeopardize the integrity or successful completion of the procurement concerned; and

(ii) Is required by statute, regulation, or order to

be secured in a source selection file or other facility to prevent disclosure.

(2) Source selection information is limited to—

(i) Bid prices submitted in response to a Federal agency solicitation for sealed bids, or lists of those bid prices prior to public bid opening;

(ii) Proposed costs or prices submitted in response to a Federal agency solicitation (for other than sealed bids), or lists of those proposed costs or prices;

(iii) Source selection plans;

(iv) Technical evaluation plans;

(v) Technical evaluations of proposals;

(vi) Cost or price evaluations of proposals;

(vii) Competitive range determinations which identify proposals that have a reasonable chance of being selected for award of a contract;

(viii) Rankings of bids, proposals, or competitors;

(ix) The reports and evaluations of source selection panels or boards or advisory councils; or

(x) Other information marked as “SOURCE SELECTION INFORMATION—SEE FAR 3.104” based upon a case-by-case determination by the Head of the Agency, his designee, or the contracting officer that the information meets the standards in subdivisions (k)(1)(i) and (ii) of this subsection.

(l) “Possible violation” means, for purposes of the certification requirements under 3.104-9, specifically identified or documented circumstances that provide a reasonable basis to believe that a violation of the Act may have occurred. Rumor and hearsay are not, by themselves, a reasonable basis to conclude that a possible violation exists.

### 3.104-5 Disclosure, protection, and marking of proprietary and source selection information.

(a) Except as specifically provided for in this subsection, no person or other entity may disclose proprietary or source selection information to any person other than a person authorized by the Head of the Agency to receive such information. A person or entity who does not know if information is proprietary or source selection information, or does not know if the person or entity may disclose or receive such information, shall make the inquiries prescribed at 3.104-8(d).

(b)(1) Proprietary and source selection information shall be protected from unauthorized disclosure in accordance with 14.401, 15.411, 15.413, applicable law, and agency regulations.

(2) Information contained in a bid or proposal that bears the legend required by 3.104-4(j)(2) shall be considered to be proprietary information for purposes of the Act. However, information contained in a bid or proposal that does not bear that legend shall remain subject to the restrictions on disclosure contained in 15.413, 15.509, 24.202, or as otherwise required by law.

(c) In determining whether particular information is

source selection information under 3.104-4(k)(2)(x), the originator shall assure that the information meets the criteria in 3.104-4(k)(1) and consult with agency officials as appropriate. Individuals responsible for preparing material that may include information designated as source selection information in accordance with 3.104-4(k)(2)(x) shall mark the cover page and each page that contains source selection information with the legend “SOURCE SELECTION INFORMATION—SEE FAR 3.104.” Although the material described in 3.104-4(k)(2)(i) through (ix) is considered to be source selection information whether or not marked, all reasonable efforts shall be made to mark such material with this legend.

(d)(1) The head of the agency, or his or her designee, or the contracting officer, has the authority, in accordance with applicable agency regulations or procedures, to authorize persons, or classes of persons, to receive proprietary or source selection information when necessary to the conduct of the procurement.

(2) For contracts and contract modifications in excess of \$100,000, the head of the agency, or his or her designee, shall establish procedures to assure that the names of all persons, identification of the classes of persons and, to the maximum extent practicable, the names of all individuals within a class of persons, authorized access to proprietary or source selection information at the contracting activity are listed in the contract file.

(3) For contracts and contract modifications expected to exceed \$100,000, if proprietary or source selection information is authorized to be released to Government activities outside the contracting activity responsible for the conduct of the procurement, the head of the office receiving the information, or his or her designee, shall maintain a list of persons, a list of classes of persons and, to the maximum extent practicable, the names of all individuals within classes of persons, who have been authorized access to the proprietary or source selection information. The list shall be forwarded to the contracting office responsible for the conduct of the procurement to be included in the contract file.

(4) For release to other than Government employees, see 15.413-2. The names of those individuals shall also be listed in the contract file when the contract or contract modification is expected to exceed \$100,000.

(5) The lists prescribed by this subsection shall be forwarded to the contracting officer for inclusion in the contract file within the time specified by the contracting officer.

(e)(1) Except as provided in subparagraph (e)(4) of this subsection, if the contracting officer believes that information marked as proprietary (see 3.104-4(j)) is not proprietary, the competing contractor that has affixed the marking shall be notified in writing and given an opportunity to justify the proprietary marking. If the competing contractor agrees that the material is not proprietary information, or

does not respond within the time specified in the notice, the contracting officer may remove the proprietary marking and the information may be released.

(2) After reviewing any justification submitted by the competing contractor, if the contracting officer determines that the proprietary marking is not justified, the contracting officer shall so notify the competing contractor in writing.

(3) Information marked by the competing contractor as proprietary shall not be released until—

(i) The review of the contractor's justification has been completed; or

(ii) The period specified for the contractor's response has elapsed, whichever is earlier.

Thereafter, the contracting officer may release the information.

(4) With respect to technical data that are marked proprietary by a competing contractor, the contracting officer shall generally follow the procedures in 27.404(h).

(f) Nothing in 3.104 prohibits competing contractors from disclosing or authorizing the Government to disclose their company-specific proprietary information to any other person or entity where not otherwise prohibited by law.

(g) Proprietary markings under 3.104 do not limit the Government's use of technical data to which the Government has rights.

(h) Source selection or proprietary information that is properly in the possession of a competing contractor as a result of a prior disclosure that was not prohibited by the Act shall not be considered to have been solicited or obtained, directly or indirectly, in violation of the Act.

(i) Nothing in 3.104 shall be construed to authorize the withholding of any information pursuant to a proper request from the Congress, any committee or subcommittee thereof, a Federal agency, any board of contract appeals of a Federal agency, the Comptroller General, or an Inspector General of a Federal agency, except as otherwise authorized by law or regulation. Any such release which contains proprietary or source selection information shall clearly notify the recipient that the information or portions thereof are proprietary or source selection information related to the conduct of a Federal agency procurement whose disclosure is restricted by section 27 of the Act.

### **3.104-6 Restrictions on employment or business opportunity discussions between competing contractors and procurement officials.**

(a) *Applicability to procurement officials.* During the conduct of a Federal agency procurement, subsection 27(b)(1) of the Act prohibits an individual who has become a procurement official from knowingly, directly or indirectly, soliciting or accepting from or discussing with any officer, employee, representative, agent, or consultant of a competing contractor, future employment or business



opportunity. Subsection 27(b)(1) of the Act also applies to individuals acting as procurement officials on behalf of the procuring agency who are, or are employed by, contractors, subcontractors, consultants, experts, or advisors (other than employees of a competing contractor). The prohibition in subsection 27(b)(1) does not apply to a procurement official—

(1) After the contract has been awarded, the procurement canceled, or the contract modification has been executed;

(2) After the procurement official leaves Government service;

(3) Who is, or is employed by, a contractor, subcontractor, consultant, expert, or advisor, after such procurement official ceases to act on behalf of, or provide advice to, the procuring agency concerning the procurement;

(4) Described in paragraph (c) of this subsection who has received written authorization for recusal from further participation in a procurement, and who has in fact discontinued participation in the procurement.

(5) Whose only communication with a competing contractor is for the purpose of—

(i) Rejecting an unsolicited offer of employment or business opportunity; or

(ii) Advising the competing contractor that he or she must seek recusal in accordance with paragraph (d) of this subsection prior to any discussions regarding the unsolicited offer. A procurement official who wishes to conduct such discussions with the competing contractor shall promptly submit a recusal proposal.

(b) *Applicability to competing contractors.* During the conduct of a Federal agency procurement, subsection 27(a)(1) of the Act prohibits a competing contractor from knowingly, directly or indirectly, offering or promising to, or discussing with, a procurement official any future business or employment opportunity. The prohibition does not apply to—

(1) An initial contact for the sole purpose of determining whether an individual or other entity is able to engage in discussions concerning future employment or business opportunity either because the individual or entity has been recused or is not a procurement official.

(2) A contact or discussion with an individual or other entity who may engage in such contact or discussion under subparagraphs (a)(1) through (a)(4) of this subsection.

(c) *Eligibility for recusal.* An individual or other entity who is a procurement official may be eligible for recusal if the individual or entity has not participated personally and substantially in—

(1) The evaluation of bids or proposals, the selection of sources, or the conduct of negotiations in connection with such solicitation or contract during the period beginning with the issuance of a procurement solicita-

tion and ending with the award of a contract or cancellation of a procurement; or

(2) The evaluation of a proposed modification, or the conduct of negotiations during the period beginning with the negotiation of a modification of a contract and ending with an agreement to modify the contract or a decision not to modify the contract.

(d) *Recusal proposal.* An eligible procurement official who wishes to discuss future employment or business opportunities with a competing contractor during the conduct of a procurement shall submit to the Head of the Contracting Activity (HCA) or his or her designee, prior to initiating or engaging in such discussions, a written proposal of disqualification from further participation in the procurement which relates to that competing contractor. Concurrent copies of the written proposal shall be submitted to the contracting officer, the Source Selection Authority if the contracting officer is not the Source Selection Authority, and the procurement official's immediate supervisor. As a minimum, the proposal shall—

(1) Identify the procurement involved;

(2) Describe the nature of the procurement official's participation in the procurement and specify the approximate dates or time period of participation; and

(3) Identify the competing contractor and describe its interest in the procurement.

(e) *Suspension from participation in a procurement.* The contracting officer, or the Source Selection Authority if the contracting officer is not the Source Selection Authority, may suspend the individual's or entity's participation in the procurement pending evaluation of the recusal proposal. Notwithstanding submission of a recusal proposal or suspension from participation in a procurement, an individual or entity shall not solicit or engage in discussions of employment or business opportunity until authorized in writing by the HCA or his or her designee.

(f) *Evaluation of recusal proposal.* (1) If the HCA or his or her designee determines that the procurement official's further participation is not essential to the activity's conduct of the procurement and that recusal will not jeopardize the integrity of the procurement process, the HCA may, after consulting with the agency ethics official, grant written approval of the recusal proposal. In evaluating the recusal proposal, the HCA or his or her designee may consider any relevant factors, including—

(i) The importance of the procurement official's role to the completion of the procurement action;

(ii) The procurement official's prior participation in key procurement decisions and actions;

(iii) The timing of the proposal in relation to significant procurement milestones; and

(iv) Potential disruption to the procurement schedule as a result of the procurement official's recusal.

(2) The HCA or his or her designee may request that

any person, including the procurement official, the Source Selection Authority, the contracting officer or the procurement official's immediate supervisor, provide any additional information necessary to evaluate the recusal proposal.

(3) Any rejection of the recusal proposal shall be in writing and shall state the basis for rejection. A determination by the HCA or his or her designee to reject a recusal proposal shall be final. Rejection of a Government officer's or employee's recusal proposal shall not be deemed to be an adverse personnel action or be subject to agency or negotiated grievance procedures.

(g) *Duration of recusal.* A procurement official whose recusal proposal has been approved shall be disqualified—

(1) As a minimum, for any period during which future employment or business opportunities with the competing contractor have not been rejected by either the procurement official or the competing contractor; or

(2) For the period the procurement official and competing contractor have an employment or business relationship or an arrangement concerning future employment or business relationships.

(h) *Reinstatement to participation in a procurement.* Subsequent to a period of disqualification, if an agency wishes to reinstate the procurement official to participation in the procurement, the HCA or his or her designee may authorize immediate reinstatement or, in his or her discretion, may authorize reinstatement following whatever additional period of disqualification he or she determines is necessary to ensure the integrity of the procurement process. It is within the discretion of the HCA, or his or her designee, to determine that the procurement official shall not be reinstated to participation in the procurement. In determining that any additional period of disqualification is necessary, the HCA or his or her designee shall consider any factors that might give rise to an appearance that the procurement official acted without complete impartiality with respect to issues involved in the procurement.

### **3.104-7 Postemployment restrictions applicable to Government officers and employees serving as procurement officials and certifications required from procurement officials leaving Government service.**

(a) Subsection 27(e)(4) of the Act provides that if a procurement official leaves the Government during the conduct of a procurement expected to result in a contract or modification in excess of \$100,000, such official shall certify to the contracting officer that he or she understands the continuing obligation, during the conduct of the procurement, not to disclose propriety or source selection information related to such agency procurement. This certification requirement also applies to individuals acting as procurement officials on behalf of the procuring activity who are, or are employed by, contractors, subcontractors, consul-

tants, experts, or advisors other than employees of the competing contractor when such individuals, during the conduct of the procurement, cease to function as procurement officials for the procurement.

(b) Subsection 27(f)(1)(A) of the Act restricts a current or former Government officer or employee, as defined in 3.104-4(d), who was a procurement official with respect to a particular procurement, from knowingly participating in any manner in negotiations as an officer, employee, representative, agent, or consultant of a competing contractor leading to the award or modification of the contract for such procurement. This restriction not only includes representing the competing contractor in negotiations with the contracting activity, but also includes providing advice or information for the specific purpose of influencing negotiation strategies. For purposes of this restriction, "negotiation strategies" mean the contractor's approach to the preparation and presentation of its offer or the conduct of negotiations with the Government. This restriction does not apply to providing scientific, technical, or other advice that is unrelated to negotiation strategies. This restriction lasts for 2 years from the date of the individual's last personal and substantial participation in the Federal agency procurement. This restriction is not effective until June 1, 1991.

(c) Subsection 27(f)(1)(B) of the Act restricts a current or former Government officer or employee, as defined in 3.104-4(d), who was a procurement official with respect to a particular procurement, from knowingly participating personally and substantially on behalf of the competing contractor in performance of the contract. To participate "personally and substantially" requires the presence of both direct and significant involvement in the performance of the specific contract. The performance of general engineering, scientific or technical work, or providing general budgetary or policy advice, shall not be considered personal and substantial participation on behalf of a competing contractor in the performance of the contract for which the Government officer or employee is or was a procurement official. Where participation is on behalf of a competing contractor who is a subcontractor, the significance of that participation will be determined in relation to the prime contract. This restriction lasts for 2 years from the date of the last personal and substantial participation in the Federal agency procurement. This restriction is not effective until June 1, 1991.

(d) The restrictions in paragraphs (b) and (c) of this subsection do not apply to—

(1) Individuals acting as procurement officials on behalf of the procuring agency who are or were, or who are or were employed by, contractors, subcontractors, consultants, experts, or advisors and who are not Government officers or employees as defined in 3.104-4(d).

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(2) Participation in the negotiation or performance of any other contract of the competing contractor.

(3) General scientific and technical work on an independent research and development project, unless such work involves the negotiation or performance of a specific contract that the individual worked on as a Government employee.

(4) Participation with respect to a subcontractor who is a competing contractor unless—

(i) The subcontractor is a first or second tier subcontractor and the subcontract is for an amount that is in excess of \$100,000; or

(ii) The subcontractor significantly assisted the prime contractor with respect to negotiation of the prime contract; or

(iii) The procurement official involved in the award or modification of the prime contract personally directed or recommended the particular subcontractor as a source for the subcontract; or

(iv) The procurement official personally reviewed and approved the award or modification of the subcontract. A contracting officer's consent, in accordance with Part 44, to the placement of a subcontract or, with respect to architect-engineer contracts, the substitution of a subcontractor, associate, or consultant, does not constitute approval of the subcontract, subcontractor, associate, or consultant. Similarly, approval of a contractor's purchasing system does not constitute approval of a particular subcontract or subcontractor.

(5) An individual who has been granted a waiver by the President in accordance with subsection 27(f)(3) of the Act. Waivers under that subsection may be granted only to a civilian officer or employee of the Executive branch other than an officer and employee in the Executive Office of the President who, after his or her Federal Government employment is terminated, is or will be engaged in activities at a Government owned, contractor-operated entity at which he or she served as an officer or employee immediately before his or her Federal Government employment began. Subsection 27(f)(3) is not effective until June 1, 1991.

(6) An individual whose only personal and substantial participation in the procurement occurred during the period December 1, 1989, through May 31, 1991.

**3.104-8 Knowing violations, duty to inquire, and ethics advisory opinions.**

(a) *Knowing violations.* Neither a procurement official nor a competing contractor violates the restrictions set forth in 3.104-3 unless the prohibited conduct is engaged in knowingly. For these purposes, conduct is not “knowing” when—

(1) A competing contractor engages in specific conduct after having satisfied the duty to inquire under

paragraphs (b), (c), and (d) of this subsection, or when the competing contractor engages in conduct based upon good faith reliance on an agency ethics advisory opinion issued to a current or former procurement official under paragraph (e) of this subsection.

(2) A procurement official engages in specific conduct after having satisfied the duty to inquire under paragraphs (b), (c), and (d) of this subsection or has acted in good faith reliance on an ethics advisory opinion obtained under paragraph (e) of this subsection.

(b) *Duty to inquire—general.*

(1) For some procurements, neither competing contractors nor all procurement officials will have knowledge as to when the conduct of a particular procurement has begun. However, certain conduct and activities that are prohibited by the Act would be inappropriate at any time. There are prohibitions on the receipt of gratuities from agency contractors that apply without regard to whether an employee is involved in the conduct of a particular procurement. Similarly, potential contractors should not solicit, and agency personnel should not offer, proprietary or source selection information at any time. However, potential contractors may offer, and Government employees may solicit, employment except as prohibited by law.

(2) Agency personnel shall be presumed to know the procurements for which they are procurement officials. Contractor personnel are presumed to know the procurements for which the organization they represent is reasonably likely to be competing. Individuals who do not know whether they are procurement officials, or whether the organization they represent is or is reasonably likely to become a competing contractor, should defer any discussions regarding employment until these questions are resolved by consulting appropriate parties within their respective organizations. Agency personnel who cannot ascertain, after discussions with the contracting officer or the Source Selection Authority if the contracting officer is not the Source Selection Authority, whether they are procurement officials may request an ethics advisory opinion under paragraph (e) of this subsection for purposes of determining their status.

(c) *Duty to inquire—employment discussions.*

(1) A contractor who wishes to discuss employment opportunities with an individual whose duties and functions may make that individual a procurement official (see 3.104-4(h)) should ask if that individual is a procurement official for a procurement for which the contractor is a competing contractor or is likely to become a competing contractor before conducting any discussion related to employment. A competing contractor shall not be considered to have knowingly violated the prohi-

bitions set forth in subsection 27(a)(1) of the Act (see 3.104-3(a)(1)) if the contractor has made an inquiry in good faith of the possible procurement official and has been advised that the individual is not a procurement official for any procurement for which the contractor is or is reasonably likely to become a competing contractor, or is advised that the procurement official has been recused from participation in the procurement in accordance with 3.104-6.

(2) A procurement official may not solicit or engage in employment or business opportunity discussions with a competing contractor or a contractor who is reasonably likely to become a competing contractor unless the procurement official has been recused from participation in the procurement in accordance with the procedures at 3.104-6.

(3) A procurement official who wishes to solicit employment from, or discuss employment with, a contractor and does not know if the contractor is or is reasonably likely to become a competing contractor should ask whether the contractor is or is reasonably likely to become a competing contractor on any procurement for which the individual is serving as a procurement official. The procurement official—

(i) May rely on the contractor's representation that it is not or is not likely to become a competing contractor, and enter into employment or business opportunity discussions with that contractor; or

(ii) Shall not, if the contractor represents that it is or is reasonably likely to become a competing contractor, enter into employment or business opportunity discussions with that contractor. If the procurement official is an eligible procurement official as defined at 3.104-6(c), and desires to pursue discussions with that contractor, the procurement official must first seek and obtain written authorization for recusal in accordance with the procedures at 3.104-6 before entering into further discussions with that contractor.

(4) A procurement official shall not be considered to have knowingly violated the prohibitions set forth in subsection 27(b)(1) of the Act (see 3.104-3(b)(1)) if—

(i) The procurement official has made inquiry in good faith of the potential contractor, and has been advised that the contractor is not or will not be a competing contractor on a procurement under the responsibility of the procurement official; or

(ii) The procurement official has been recused from participation in the procurement.

(d) *Duty to inquire—proprietary and source selection information.*

(1) A competing contractor shall not be considered to have knowingly violated the prohibitions in subsection 27(a)(3) of the Act (see 3.104-3(a)(3)) if, before proprietary or source selection information was solicited

or obtained, the contractor—

(i) Had made an inquiry in good faith of the contracting officer (or, if a contracting officer has not been appointed, the Head of the Agency or his or her designee) regarding whether information was proprietary or source selection information; and

(ii) Had been advised by such official that the information was not proprietary or source selection information.

(2) A procurement official shall not be considered to have knowingly violated the prohibitions in subsection 27(b)(3) of the Act (see 3.104-3(b)(3)) if, prior to disclosing information, the procurement official had made an inquiry in good faith of the contracting officer (or, if a contracting officer has not been appointed, the Head of the Agency or his or her designee) and had been advised that—

(i) The information was not proprietary or source selection information; or

(ii) The information is proprietary or source selection information and the individual to whom the procurement official wishes to disclose the information has been authorized access to such information by the Head of the Agency or the contracting officer.

(3) No person who is given authorized or unauthorized access to proprietary or source selection information shall be considered to have knowingly violated the prohibition in subsection 27(d) of the Act (see 3.104-3(c)) if, before disclosing such information, the person—

(i) Had made an inquiry in good faith of the contracting officer (or, if a contracting officer has not been appointed, the Head of the Agency or his or her designee) as to whether or not the individual to whom he seeks to disclose the proprietary or source selection information has been authorized access to such information by the Head of the Agency or the contracting officer; and

(ii) Had been advised by such official that such individual has been so authorized.

(e) *Ethics advisory opinions.* (1) An employee or former employee of an agency who is or was a procurement official may request an ethics advisory opinion from the agency ethics official as to whether specific conduct which has not yet occurred would violate section 27 of the Act. An individual who cannot determine, after discussions with the contracting officer (see subparagraph (b)(2) of this subsection), if he or she is or was a procurement official may request an ethics advisory opinion for the purpose of determining his or her status. Ethics advisory opinions may not be obtained, however, for the purpose of establishing whether—

(i) Prior to bid opening or receipt of proposals, a particular contractor is a competing contractor;

(ii) Items of information constitute proprietary or

source selection information as defined in 3.104-4; or  
 (iii) Proprietary or source selection information may be disclosed.

Questions regarding proprietary and source selection information shall be referred to the contracting officer or, if a contracting officer has not been appointed, the Head of the Agency or his or her designee (see subparagraphs (d)(1) through (d)(3) of this subsection). Questions regarding a contractor's status as a competing contractor shall be resolved in accordance with subparagraph (c)(3) of this subsection.

(2) The request for an advisory opinion shall be submitted in writing, shall be dated and signed, and shall include all information reasonably available to the procurement official or former procurement official that is relevant to the inquiry. As a minimum, the request shall include—

(i) Information about the procurement in which the individual was or is involved, including contract or solicitation numbers, dates of solicitation or award, and a description of the goods or services procured or to be procured;

(ii) Information about the individual's participation in the procurement, including the dates or time periods of that participation, and the nature of the individual's duties or responsibilities;

(iii) Information about the competing contractor who would be a party to the proposed conduct, and the nature of the competing contractor's interest in the procurement.

(iv) A description of the possible gratuity or other thing of value if the request concerns conduct that might violate the prohibition of subsection 27(b)(2) of the Act. It shall be the responsibility of the individual requesting an advisory opinion to furnish an appraisal or good faith estimate of market value where the value of an item is in question.

(v) Specific information about the particular duties to be performed on behalf of the competing contractor if the request concerns conduct that might violate either or both of the prohibitions of subsection 27(f) of the Act. Where the issue concerns whether employment with a subcontractor is permissible under subsection 27(f)(2), the request shall include information about the subcontract level and dollar amount, the subcontractor's role in assisting the prime contractor in negotiating the prime contract, and the individual's role in directing or recommending the subcontractor to the prime contractor as a source for the subcontract or reviewing and approving the award or modification of the subcontract.

(3) Within 30 days after the date a request containing complete information is received, or as soon thereafter as practicable, the agency ethics official shall issue an opinion as to whether proposed conduct is proper or would violate section 27 of the Act.

(i) Where complete information is not included in the request, the agency ethics official may ask the requester to provide any information reasonably available to that person, and the 30-day period will run from the date that additional information is received. Additional information may also be requested from other persons, including the Source Selection Authority, the contracting officer, or the requester's immediate supervisor.

(ii) Where the opinion cannot be issued within 30 days, the reason for the delay will be documented in the file. Acceptable reasons for delay include, but are not limited to, the necessity for the agency ethics official to independently develop information not reasonably available to the requester, or to verify questionable information furnished by the requester.

(iii) In issuing an opinion, the agency ethics official may rely upon the accuracy of information furnished by the requester or other agency sources, unless he has reason to believe that the information is fraudulent, misleading, or otherwise incorrect.

(4) A copy of the request and ethics advisory opinion shall be retained for a period of 6 years. Agencies shall not provide copies of the advisory opinions to any person other than the requester, except with the express authorization of the requester or where release is otherwise permitted by law.

(5) Where the requester engages in conduct in good faith reliance upon an ethics advisory opinion, or a competing contractor engages in conduct based upon good faith reliance on the requester's ethics advisory opinion, neither the requester nor the competing contractor shall be found to have knowingly violated the restriction in issue. Where the requester or the competing contractor has actual knowledge or reason to believe that the opinion is based upon fraudulent, misleading, or otherwise incorrect information provided by the requester, their reliance upon the opinion will not be deemed to be in good faith.

### 3.104-9 Certification requirements.

(a) *Applicability.* Subsection 27(e) of the Act requires certifications, prior to the award of a Federal agency contract or contract modification for property or services in excess of \$100,000 awarded or executed on or after December 1, 1990, by the officer or employee of the contractor responsible for the offer or bid for that particular contract or contract modification for property or services, and by the contracting officer for that procurement.

(b) *Competing contractor certification.* (1) Except as provided in 3.104-9(f), contracting officers shall require the competing contractor to—

(i) Certify in writing to the contracting officer responsible for the procurement that, to the best of his or her knowledge and belief, such officer or employee of the competing contractor has no infor-

mation concerning a violation or possible violation of subsections 27(a), (b), (d), or (f) of the Act (see 3.104-3) as implemented in the FAR; or

(ii) Disclose to such contracting officer any and all such information, and certify in writing to such contracting officer that any and all such information has been disclosed; and

(iii) Except in the case of a contract for the procurement of commercial items, certify in writing to such contracting officer that, to the best of his or her knowledge and belief, each officer, employee, agent, representative, and consultant of such competing contractor who, on or after December 1, 1990, has participated personally and substantially in the preparation or submission of such bid or offer, or in a modification of a contract, as the case may be, has certified in writing to such competing contractor that he or she—

(A) Is familiar with, and will comply with, the requirements of subsection 27(a) of the Act (see 3.104-3) as implemented in the FAR; and

(B) Will report immediately to the officer or employee of the competing contractor responsible for the offer or bid for any contract or the modification of a contract, as the case may be, any information concerning a violation or possible violation of subsections 27(a), (b), (d), or (f) of the Act (see 3.104-3), occurring on or after December 1, 1990, as implemented in the FAR.

(2) Subcontractors are not required to submit the certificate required by subsection 27(e)(1) of the Act. However, nothing in 3.104 precludes a competing contractor from requesting certifications from its subcontractors.

(3) The signed certifications prescribed in 3.104-10 shall be submitted as follows: (i) *Procurements exceeding \$100,000 using sealed bidding procedures:*

(A) For procurements using sealed bidding procedures, the signed certifications shall be submitted by each bidder with the bid submission, except for procurements using two-step sealed bidding procedures (see Subpart 14.5). For those procurements, the certifications shall be submitted with submission of the step two sealed bids. A certificate is not required for indefinite delivery contracts (see Subpart 16.5) unless the total estimated value of all orders eventually to be placed under the contract is expected to exceed \$100,000.

(B) For contracts and contract modifications which include options, a certificate is required when the aggregate value of the contract or contract modification and all options (see 3.104-4(e)) exceeds \$100,000.

(C) Failure of a bidder to submit the signed

certificate with its bid shall render the bid nonresponsive.

(ii) *Procurements exceeding \$100,000 using other than sealed bidding procedures:* (A) For procurements, including contract modifications, made using procedures other than sealed bidding, the signed certifications shall be submitted by the successful offeror to the contracting officer within the time period specified by the contracting officer when requesting the certificates, except as provided in subdivisions (b)(3)(ii)(B) through (F) of this subsection. In no event shall the certificate be submitted subsequent to award of a contract or execution of a contract modification.

(B) For letter contracts, other unpriced contracts, or unpriced contract modifications, whether or not the unpriced contract or modification contains a maximum or not to exceed price, the signed certifications shall be submitted prior to the award of the letter contract, unpriced contract, or unpriced contract modification, and prior to the definitization of the letter contract or the establishment of the price of the unpriced contract or unpriced contract modification. The second certification shall apply only to the period between award of the letter contract and execution of the document definitizing the letter contract, or award of the unpriced contract or unpriced contract modification and execution of the document establishing the definitive price of such unpriced contract or unpriced contract modification.

(C) For basic ordering agreements, prior to the execution of a priced order; prior to the execution of an unpriced order, whether or not the unpriced order contains a maximum or not to exceed price; and prior to establishing the price of an unpriced order. The second certificate to be submitted for unpriced orders shall apply only to the period between award of the unpriced order and execution of the document establishing the definitive price for such order.

(D) A certificate is not required for indefinite delivery contracts (see Subpart 16.5) unless the total estimated value of all orders eventually to be placed under the contract is expected to exceed \$100,000.

(E) For contracts and contract modifications which include options, a certificate is required when the aggregate value of the contract or contract modification and all options exceeds \$100,000.

(F) For purposes of contracts entered into under section 8(a) of the SBA, the business entity with whom the SBA contracts, and not the SBA,

shall be required to comply with the certification requirements of subsection 27(e). The SBA shall obtain the signed certificate from the business entity, and forward the certificate to the contracting officer prior to the award of a contract to the SBA.

(G) Failure of an offeror to submit the signed certificate within the time prescribed by the contracting officer is a failure to comply with a material requirement of the solicitation and shall cause the offer to be rejected.

(c) *Contracting officer certifications.*

(1) In accordance with subsection 27(e)(2) of the Act, a Federal agency may not award a contract for the procurement of property or services, or agree to a modification of any contract, if the contract or contract modification exceeds \$100,000, unless the contracting officer responsible for such procurement—

(i) Certifies in writing to the head of such agency that, to the best of his or her knowledge and belief, the contracting officer has no information concerning a violation or possible violation of subsections 27(a), (b), (d), or (f) of the Act (see 3.104-3), as implemented in the FAR, pertaining to such procurement; or

(ii) Discloses to the head of such agency any and all such information and certifies in writing that any and all such information has been disclosed.

(2) Immediately prior to contract award or execution of a contract modification, the contracting officer shall execute the following certificate and maintain the completed certificate in the contract file:

CONTRACTING OFFICER CERTIFICATE OF  
PROCUREMENT INTEGRITY

1. I, [Name of contracting officer], hereby certify that, to the best of my knowledge and belief, with the exception of any information described in this certificate, I have no information concerning a violation or possible violation of subsections (a), (b), (d), or (f) of section 27 of the Office of Federal Procurement Policy Act\* (41 U.S.C. 423), as implemented in the FAR, occurring during the conduct of this procurement (*contract/modification number*).

2. Violations or possible violations: (*Continue on plain bond paper if necessary, and label Contracting Officer Certificate of Procurement Integrity (Continuation Sheet), ENTER NONE IF NONE EXISTS.*) \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

(Signature of contracting officer and date)

\* Subsections 27(a), (b), and (d), are effective on December 1, 1990. Subsection 27(f) is effective on June 1, 1991.

THIS CERTIFICATION CONCERNS A MATTER WITHIN THE JURISDICTION OF AN AGENCY OF THE

UNITED STATES AND THE MAKING OF A FALSE, FICTITIOUS, OR FRAUDULENT CERTIFICATION MAY RENDER THE MAKER SUBJECT TO PROSECUTION UNDER TITLE 18, UNITED STATES CODE, SECTION 1001.

(End of certification)

(d) *Additional certifications.*

(1) Subsection 27(e)(3) of the Act provides that the head of a Federal agency may require any procurement official or any competing contractor, at any time during the conduct of any Federal agency procurement of property or services—

(i) To certify in writing that, to the best of his or her knowledge and belief, such procurement official or the officer or employee of the competing contractor responsible for the offer or bid for a contract or the modification of a contract, has no information concerning a violation or possible violation of subsections 27(a), (b), (d), or (f) of the Act (see 3.104-3), as implemented in the FAR occurring during the procurement; or

(ii) To disclose any and all such information and to certify in writing that any and all such information has been disclosed.

(2) In addition to the Head of the Agency, additional certifications may be required only by the HCA or his or her designee, provided that the designee is an individual of General Officer, Flag, SES or equivalent rank and is at least one organizational level above the contracting officer.

(3) Any additional certifications shall be submitted to the contracting officer unless another person is specified by the individual requiring the additional certifications.

(4) Each procurement official or competing contractor shall be afforded a reasonable time to comply with the additional certification requirements.

(5) A competing contractor's failure to submit any additional certifications that may be required shall cause the competing contractor's offer to be rejected.

(e) *Recordkeeping requirements.*

(1) In accordance with subsections 27(e)(5)(A) and (B) and 27(e)(7)(A) of the Act, the contracting officer responsible for the award or modification of a contract in excess of \$100,000 shall maintain, as part of the contract file—

(i) All competing contractor, contracting officer, and procurement official certifications required by subsections 27(e)(1), (e)(2), and (e)(4) of the Act, and any additional certifications required by subsection 27(e)(3) of the Act for that particular procurement.

(ii) All certifications required by subsection 27(l) of the Act (see 3.104-12) from individuals acting as procurement officials on behalf of the procuring agency, who are, or are employed by, contractors,

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subcontractors, consultants, experts, or advisors (other than competing contractors).

(iii) A record of all persons who have been authorized by the Head of the Agency or the contracting officer to have access to proprietary or source selection information regarding the procurement. When classes of persons have been authorized, this record shall identify the class of persons so authorized and, to the maximum extent practicable, the names of the individuals within the class.

(2) Certifications obtained from Government officers or employees (see 3.104-4(d)) who are required to submit a certification under subsection 27(l) of the Act shall be maintained in accordance with agency procedures.

(3) Ethics advisory opinions shall be retained, in accordance with agency procedures, for a period of 6 years.

(f) *Exceptions to certification requirements.* Pursuant to subsection 27(e)(7)(B) of the Act, certification requirements set forth in 3.104-9 do not apply—

(1) To contracts with a foreign government or an international organization that are not required to be awarded using competitive procedures pursuant to section 303(c)(4) of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 253(c)(4), or section 2304(c)(4) of title 10, United States Code; or

(2) In an exceptional case, when the Head of the Agency concerned determines in writing that the certification requirement should be waived. This authority may not be delegated. The contracting officer shall submit the request for waiver in accordance with agency procedures. The request shall clearly identify the procurement or class of procurements and provide the rationale for the requested waiver. The decision of the agency head shall state the reasons for approving or disapproving the waiver. The agency head shall promptly notify Congress in writing of each waiver approved. Procurements for which a waiver may be appropriate include—

- (i) Where prices are set by law or regulation;
- (ii) Where terms and conditions of a contract are specified by an agreement with a foreign government or governments;
- (iii) Where supplies or services are provided by foreign nationals to United States facilities overseas for use outside the United States;
- (iv) Where a foreign government specifies a particular U.S. contractor to satisfy its requirements (see 6.302-4(b)(1)).

### 3.104-10 Solicitation provision and contract clauses.

(a) The contracting officer shall insert the provision at 52.203-8, Requirement for Certificate of Procurement Integrity, in all solicitations where the resultant contract

award is expected to exceed \$100,000, unless, pursuant to 3.104-9(f), a certification is not required or a waiver has been granted. For procurements using other than sealed bidding procedures, the contracting officer shall substitute Alternate I for paragraph (c) of that provision.

(b) The contracting officer shall insert the clause at 52.203-9, Requirement for Certificate of Procurement Integrity—Modification, in all solicitations where the resultant contract award is expected to exceed \$100,000, all contracts in excess of \$100,000, and modifications to contracts which do not already contain the clause when the modification is expected to exceed \$100,000, unless, pursuant to 3.104-9(f), a certificate is not required or a waiver has been granted.

(c) The contracting officer shall insert the clause at 52.203-10, Price or Fee Adjustment for Illegal or Improper Activity, in all solicitations where the resultant contract award is expected to exceed the simplified acquisition threshold and all contracts and modifications to contracts exceeding that threshold which do not already contain the clause when the modification is expected to exceed that threshold.

(d) The contracting officer shall insert the clause at 52.203-13, Procurement Integrity—Service Contracting, in all solicitations and contracts where the Government is procuring or may order the services of contractor employees to serve as procurement officials for another agency procurement. In addition, the contracting officer shall insert the provisions and clauses at 52.203-8, 52.203-9, and 52.203-10 in such solicitations and contracts as prescribed in this subsection.

### 3.104-11 Processing violations or possible violations.

(a) If the contracting officer makes or receives a disclosure of information pursuant to subsection 27(e) of the Act or otherwise receives or obtains information of a violation or possible violation of subsections 27(a), (b), (d), or (f) of the Act (see 3.104-3), the contracting officer shall determine whether the reported violation or possible violation has any impact on the pending award or selection of the source therefor.

(1) If the contracting officer concludes that there is no impact on the procurement, the contracting officer shall forward the information concerning the violation or possible violation, accompanied by appropriate documentation supporting that conclusion, to an individual designated in accordance with agency procedures. With the concurrence of that individual, the contracting officer shall, without further approval, proceed with the procurement. The individual concurring with that conclusion shall forward all information relating to the violation or possible violation to the HCA, or his or her designee, to satisfy the disclosure requirements of subsection 27(e)(2) of the Act.

(2) If the individual reviewing the contracting offi-



cer's conclusion does not agree with that conclusion, he or she shall advise the contracting officer to withhold award and shall promptly forward the information and documentation to the HCA or his or her designee.

(3) If the contracting officer determines that the violation or possible violation impacts the procurement, the contracting officer shall promptly forward the information to the HCA or his or her designee.

(b) The HCA or his or her designee receiving any information describing an actual or possible violation of subsections 27(a), (b), (d), or (f) of the Act, shall review all information available and take appropriate action in accordance with agency procedures, such as—

(1) Advising the contracting officer to continue with the procurement;

(2) Causing an investigation to be conducted;

(3) Referring the information disclosed to appropriate criminal investigative agencies; or

(4) Determining that a violation occurred.

(c) Prior to determining that a competing contractor (see 3.104-4(b)) has violated the Act, the HCA or his or her designee may request information from appropriate parties regarding the violation or possible violation when considered in the best interests of the Government.

(d) If the HCA or his or her designee determines that the prohibitions of section 27 of the Act have been violated, then the HCA or his or her designee may direct the contracting officer to—

(1) If a contract has not been awarded, or a contract modification has not been executed—

(i) Cancel the procurement;

(ii) Disqualify an offeror; or

(iii) Take any other appropriate actions in the interests of the Government.

(2) If a contract has been awarded or a contract modification has been executed—

(i) Effect appropriate contractual remedies, including profit recapture as provided for in the clause at 52.203-10, Price or Fee Adjustment for Illegal or Improper Activity;

(ii) Void or rescind the contract, or contract modification; or

(iii) Take any other appropriate actions in the best interests of the Government.

(3) Refer the matter to the agency suspension and debarment official.

(e) The HCA or his or her designee shall, in his or her best judgment, recommend or direct an administrative or contractual remedy commensurate with the severity and effect of the violation.

(f) If the HCA or his or her designee receiving information concerning a violation or possible violation determines that award is justified by urgent and compelling circumstances, or is otherwise in the interests of the Government,

he or she may authorize the contracting officer to award the contract or execute the contract modification after notification to the Head of the Agency in accordance with agency procedures.

(g) The designee of the HCA referenced in paragraphs (a), (b), (c), (d), and (e) of this subsection must be an individual at least one organizational level above the contracting officer and be of General Officer, Flag, SES or equivalent rank.

### 3.104-12 Ethics program training requirements.

(a) Subsection 27(l) of the Act provides that the head of each Federal agency shall establish a procurement ethics training program for its procurement officials. The program shall, as a minimum—

(1) Provide for the distribution of a written explanation of subsections 27(a) through (f) of the Act to such procurement officials; and

(2) Require each such procurement official, as a condition of serving as a procurement official, to certify in writing that he or she is familiar with the provisions of subsections 27(b), (c), and (e) of the Act and will not engage in any conduct prohibited by such subsections, and will report immediately to the contracting officer any information concerning a violation or possible violation of subsections 27(a), (b), (d), or (f) of the Act as implemented in the FAR.

(3) Certifications made under section 27 as originally enacted and implemented in the FAR do not satisfy the certification requirements of subparagraph (a)(2) of this subsection. Agencies may use Optional Form 333 at 53.302-333 to obtain the certifications required by subparagraph (a)(2) of this subsection.

(b) Contractors, subcontractors, consultants, experts, or advisors (other than competing contractors) are responsible for establishing a procurement ethics training program for individuals in their employ who may serve as procurement officials on behalf of a Federal agency. The program shall, as a minimum, comply with subparagraphs (a)(1) and (a)(2) of this subsection.

## SUBPART 3.2—CONTRACTOR GRATUITIES TO GOVERNMENT PERSONNEL

### 3.201 Applicability.

This subpart applies to all executive agencies, except that coverage concerning exemplary damages applies only to the Department of Defense (10 U.S.C. 2207).

### 3.202 Contract clause.

The contracting officer shall insert the clause at 52.203-3, Gratuities, in solicitations and contracts with a value exceeding the simplified acquisition threshold, except those for personal services and those between military departments or defense agencies and foreign governments

## 3.203

that do not obligate any funds appropriated to the Department of Defense

### 3.203 Reporting suspected violations of the Gratuities clause.

Agency personnel shall report suspected violations of the Gratuities clause to the contracting officer or other designated official in accordance with agency procedures. The agency reporting procedures shall be published as an implementation of this section 3.203 and shall clearly specify—

- (a) What to report and how to report it; and
- (b) The channels through which reports must pass, including the function and authority of each official designated to review them.

### 3.204 Treatment of violations.

(a) Before taking any action against a contractor, the agency head or a designee shall determine, after notice and hearing under agency procedures, whether the contractor, its agent, or another representative, under a contract containing the Gratuities clause—

- (1) Offered or gave a gratuity (e.g., an entertainment or gift) to an officer, official, or employee of the Government; and
  - (2) Intended by the gratuity to obtain a contract or favorable treatment under a contract (intent generally must be inferred).
- (b) Agency procedures shall afford the contractor an opportunity to appear with counsel, submit documentary evidence, present witnesses, and confront any person the agency presents. The procedures should be as informal as practicable, consistent with principles of fundamental fairness.

(c) When the agency head or designee determines that a violation has occurred, the Government may—

- (1) Terminate the contractor's right to proceed;
- (2) Initiate debarment or suspension measures as set forth in Subpart 9.4; and
- (3) Assess exemplary damages, if the contract uses money appropriated to the Department of Defense.

## SUBPART 3.3—REPORTS OF SUSPECTED ANTITRUST VIOLATIONS

### 3.301 General.

(a) Practices that eliminate competition or restrain trade usually lead to excessive prices and may warrant criminal, civil, or administrative action against the participants. Examples of anticompetitive practices are collusive bidding, follow-the-leader pricing, rotated low bids, collusive price estimating systems, and sharing of the business.

(b) Contracting personnel are an important potential source of investigative leads for antitrust enforcement and should therefore be sensitive to indications of unlawful

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behavior by offerors and contractors. Agency personnel shall report, in accordance with agency regulations, evidence of suspected antitrust violations in acquisitions for possible referral to (1) the Attorney General under 3.303 and (2) the agency office responsible for contractor debarment and suspension under Subpart 9.4.

### 3.302 Definitions.

“Identical bids” means bids for the same line item that are determined to be identical as to unit price or total line item amount, with or without the application of evaluation factors (e.g., discount or transportation cost).

“Line item” means an item of supply or service, specified in an invitation for bids, for which the bidder must bid a separate price.

### 3.303 Reporting suspected antitrust violations.

(a) Agencies are required by 41 U.S.C. 253(B)(e) and 10 U.S.C. 2305(b)(5) to report to the Attorney General any bids or proposals that evidence a violation of the antitrust laws. These reports are in addition to those required by Subpart 9.4.

(b) The antitrust laws are intended to ensure that markets operate competitively. Any agreement or mutual understanding among competing firms that restrains the natural operation of market forces is suspect. Paragraph (c) below identifies behavior patterns that are often associated with antitrust violations. Activities meeting the descriptions in paragraph (c) are not necessarily improper, but they are sufficiently questionable to warrant notifying the appropriate authorities, in accordance with agency procedures.

(c) Practices or events that may evidence violations of the antitrust laws include—

- (1) The existence of an “industry price list” or “price agreement” to which contractors refer in formulating their offers;
- (2) A sudden change from competitive bidding to identical bidding;
- (3) Simultaneous price increases or follow-the-leader pricing;
- (4) Rotation of bids or proposals, so that each competitor takes a turn in sequence as low bidder, or so that certain competitors bid low only on some sizes of contracts and high on other sizes;
- (5) Division of the market, so that certain competitors bid low only for contracts let by certain agencies, or for contracts in certain geographical areas, or on certain products, and bid high on all other jobs;
- (6) Establishment by competitors of a collusive price estimating system;
- (7) The filing of a joint bid by two or more competitors when at least one of the competitors has sufficient technical capability and productive capacity for contract performance;
- (8) Any incidents suggesting direct collusion among competitors, such as the appearance of identical calcula-

tion or spelling errors in two or more competitive offers or the submission by one firm of offers for other firms; and

(9) Assertions by the employees, former employees, or competitors of offerors, that an agreement to restrain trade exists.

(d) Identical bids shall be reported under this section if the agency has some reason to believe that the bids resulted from collusion.

(e) For offers from foreign contractors for contracts to be performed outside the United States, contracting officers may refer suspected collusive offers to the authorities of the foreign government concerned for appropriate action.

(f) Agency reports shall be addressed to the Attorney General, U.S. Department of Justice, Washington, DC 20530, Attention: Assistant Attorney General, Antitrust Division, and shall include—

(1) A brief statement describing the suspected practice and the reason for the suspicion; and

(2) The name, address, and telephone number of an individual in the agency who can be contacted for further information.

(g) Questions concerning this reporting requirement may be communicated by telephone directly to the Office of the Assistant Attorney General, Antitrust Division.

### SUBPART 3.4—CONTINGENT FEES

#### 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. 2306(b) and 41 U.S.C. 254(a).

#### 3.401 Definitions.

“Bona fide agency,” as used in this subpart, 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,” as used in this subpart, 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,” as used in this subpart, 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,” as used in this subpart, 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. 2306(b) and 41 U.S.C. 254(a), 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 items (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) above, 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.

### **SUBPART 3.5—OTHER IMPROPER BUSINESS PRACTICES**

**3.501 Buying-in.****3.501-1 Definition.**

“Buying-in” means submitting an offer below anticipated costs, expecting to—

- (a) Increase the contract amount after award (e.g., through unnecessary or excessively priced change orders); or
- (b) Receive follow-on contracts at artificially high prices to recover losses incurred on the buy-in contract.

**3.501-2 General.**

(a) Buying-in may decrease competition or result in poor contract performance. The contracting officer must take appropriate action to ensure buying-in losses are not recovered by the contractor through the pricing of (1) change orders or (2) follow-on contracts subject to cost analysis.

(b) The Government should minimize the opportunity for buying-in by seeking a price commitment covering as much of the entire program concerned as is practical by using—

- (1) Multiyear contracting, with a requirement in the solicitation that a price be submitted only for the total multiyear quantity; or
- (2) Priced options for additional quantities that, together with the firm contract quantity, equal the program requirements (see Subpart 17.2).

(c) Other safeguards are available to the contracting officer to preclude recovery of buying-in losses (e.g., amortization of nonrecurring costs (see 15.804-6(f)) and treatment of unreasonable price quotations (see 15.803(d)).

**3.502 Subcontractor kickbacks.****3.502-1 Definitions.**

“Kickback,” as used in this section, means any money, fee, commission, credit, gift, gratuity, thing of value, or compensation of any kind which is provided, directly or indirectly, to any prime contractor, prime contractor employee, subcontractor, or subcontractor employee for the purpose of improperly obtaining or rewarding favorable treatment in connection with a prime contract or in connection with a subcontract relating to a prime contract.

“Person,” as used in this section, means a corporation,

partnership, business association of any kind, trust, joint-stock company, or individual.

“Prime contract,” as used in this section, means a contract or contractual action entered into by the United States for the purpose of obtaining supplies, materials, equipment, or services of any kind.

“Prime Contractor,” as used in this section, means a person who has entered into a prime contract with the United States.

“Prime Contractor employee,” as used in this section, means any officer, partner, employee, or agent of a prime contractor.

“Subcontract,” as used in this section, means a contract or contractual action entered into by a prime contractor or subcontractor for the purpose of obtaining supplies, materials, equipment, or services of any kind under a prime contract.

“Subcontractor,” as used in this section, (a) means any person, other than the prime contractor, who offers to furnish or furnishes any supplies, materials, equipment, or services of any kind under a prime contract or a subcontract entered into in connection with such prime contract; and (b) includes any person who offers to furnish or furnishes general supplies to the prime contractor or a higher tier subcontractor.

**3.502-2 Subcontractor kickbacks.**

The Anti-Kickback Act of 1986 (41 U.S.C. 51-58) was passed to deter subcontractors from making payments and contractors from accepting payments for the purpose of improperly obtaining or rewarding favorable treatment in connection with a prime contract or a subcontract relating to a prime contract. The Act—

(a) Prohibits any person from—

(1) Providing, attempting to provide, or offering to provide any kickback;

(2) Soliciting, accepting, or attempting to accept any kickback; or

(3) Including, directly or indirectly, the amount of any kickback in the contract price charged by a subcontractor to a prime contractor or a higher tier subcontractor or in the contract price charged by a prime contractor to the United States.

(b) Imposes criminal penalties on any person who knowingly and willfully engages in the prohibited conduct addressed in paragraph (a) of this subsection.

(c) Provides for the recovery of civil penalties by the United States from any person who knowingly engages in such prohibited conduct and from any person whose employee, subcontractor, or subcontractor employee provides, accepts, or charges a kickback.

(d) Provides that—

(1) The contracting officer may offset the amount of a kickback against monies owed by the United States to the prime contractor under the prime contract to which such kickback relates;

(2) The contracting officer may direct a prime contractor to withhold from any sums owed to a subcontractor under a subcontract of the prime contract the amount of any kickback which was or may be offset against the prime contractor under subparagraph (d)(1) of this subsection; and

(3) An offset under subparagraph (d)(1) or a direction under subparagraph (d)(2) of this subsection is a claim by the Government for the purposes of the Contract Disputes Act of 1978.

(e) Authorizes contracting officers to order that sums withheld under subparagraph (d)(2) of this subsection be paid to the contracting agency, or if the sum has already been offset against the prime contractor, that it be retained by the prime contractor.

(f) Requires the prime contractor to notify the contracting officer when the withholding under subparagraph (d)(2) of this subsection has been accomplished unless the amount withheld has been paid to the Government.

(g) Requires a prime contractor or subcontractor to report in writing to the inspector general of the contracting agency, the head of the contracting agency if the agency does not have an inspector general, or the Department of Justice any possible violation of the Act when the prime contractor or subcontractor has reasonable grounds to believe such violation may have occurred.

(h) Provides that, for the purpose of ascertaining whether there has been a violation of the Act with respect to any prime contract, the General Accounting Office and the inspector general of the contracting agency, or a representative of such contracting agency designated by the head of the agency if the agency does not have an inspector general, shall have access to and may inspect the facilities and audit the books and records, including any electronic data or records, of any prime contractor or subcontractor under a prime contract awarded by such agency.

(i) Requires each contracting agency to include in each prime contract exceeding \$100,000 for other than commercial items (see Part 12), a requirement that the prime contractor shall—

(1) Have in place and follow reasonable procedures designed to prevent and detect violations of the Act in its own operations and direct business relationships (e.g., company ethics rules prohibiting kickbacks by employees, agents, or subcontractors; education programs for new employees and subcontractors, explaining policies about kickbacks, related company procedures and the consequences of detection; procedures requiring subcontractors to certify they have not paid kickbacks; procurement procedures to minimize the opportunity for kickbacks; audit procedures designed to detect kickbacks; periodic surveys of subcontractors to elicit information about kickbacks; procedures to report kickbacks to law enforcement officials; annual declarations by employees of gifts or gratuities received from subcontractors; annual

employee declarations that they have violated no company ethics rules; personnel practices that document unethical or illegal behavior and make such information available to prospective employers); and

(2) Cooperate fully with any Federal agency investigating a possible violation of the Act.

(j) Notwithstanding paragraph (i) of this subsection, a prime contractor shall cooperate fully with any Federal government agency investigating a violation of Section 3 of the Anti-Kickback Act of 1986 (41 U.S.C. 51-58).

### 3.502-3 Contract clause.

The contracting officer shall insert the clause at 52.203-7, Anti-Kickback Procedures, in solicitations and contracts exceeding the simplified acquisition threshold, other than those for commercial items (see Part 12).

### 3.503 Unreasonable restrictions on subcontractor sales.

#### 3.503-1 Policy.

10 U.S.C. 2402 and 41 U.S.C. 253g require that subcontractors not be unreasonably precluded from making direct sales to the Government of any supplies or services made or furnished under a contract. However, this does not preclude contractors from asserting rights that are otherwise authorized by law or regulation.

#### 3.503-2 Contract clause.

The contracting officer shall insert the clause at 52.203-6, Restrictions on Subcontractor Sales to the Government, in solicitations and contracts exceeding the simplified acquisition threshold. For the acquisition of commercial items, the contracting officer shall use the clause with its Alternate I.

## SUBPART 3.6—CONTRACTS WITH GOVERNMENT EMPLOYEES OR ORGANIZATIONS OWNED OR CONTROLLED BY THEM

### 3.601 Policy.

(a) Except as specified in 3.602, a contracting officer shall not knowingly award a contract to a Government employee or to a business concern or other organization owned or substantially owned or controlled by one or more Government employees. This policy is intended to avoid any conflict of interest that might arise between the employees' interests and their Government duties, and to avoid the appearance of favoritism or preferential treatment by the Government toward its employees.

(b) For purposes of this subpart, special Government employees (as defined in 18 U.S.C. 202) performing services as experts, advisors, or consultants, or as members of advisory committees, are not considered Government employees unless—

(1) The contract arises directly out of the individual's

activity as a special Government employee;

(2) In the individual's capacity as a special Government employee, the individual is in a position to influence the award of the contract; or

(3) Another conflict of interest is determined to exist.

### **3.602 Exceptions.**

The agency head, or a designee not below the level of the head of the contracting activity, may authorize an exception to the policy in 3.601 only if there is a most compelling reason to do so, such as when the Government's needs cannot reasonably be otherwise met.

### **3.603 Responsibilities of the contracting officer.**

(a) Before awarding a contract, the contracting officer shall obtain an authorization under 3.602 if—

(1) The contracting officer knows, or has reason to believe, that a prospective contractor is one to which award is otherwise prohibited under 3.601; and

(2) There is a most compelling reason to make an award to that prospective contractor.

(b) The contracting officer shall comply with the requirements and guidance in Subpart 9.5 before awarding a contract to an organization owned or substantially owned or controlled by Government employees.

## **SUBPART 3.7—VOIDING AND RESCINDING CONTRACTS**

### **3.700 Scope of subpart.**

(a) This subpart prescribes Governmentwide policies and procedures for exercising discretionary authority to declare void and rescind contracts in relation to which there has been a final conviction for bribery, conflict of interest, or similar misconduct, and to recover the amounts expended and property transferred therefor.

(b) This subpart does not prescribe policies or procedures for, or govern the exercise of, any other remedy available to the Government with respect to such contracts, including but not limited to, the common law right of avoidance, rescission, or cancellation.

### **3.701 Purpose.**

This subpart provides a means to—

(a) Provide the Government with an administrative remedy with respect to contracts in relation to which there has been a final conviction for bribery, conflict of interest, or similar misconduct; and

(b) Deter similar misconduct in the future by those who are involved in the award, performance, and administration of Government contracts.

### **3.702 Definition.**

“Final conviction” means a conviction, whether entered on a verdict or plea, including a plea of *nolo contendere*, 3-22 (FAC 90-40)

for which a sentence has been imposed.

### **3.703 Authority.**

Section 1(e) of Public Law 87-849, 18 U.S.C. 218 (“the Act”), empowers the President or the heads of executive agencies acting under regulations prescribed by the President, to declare void and rescind contracts and other transactions enumerated in the Act, in relation to which there has been a final conviction for bribery, conflict of interest, or any other violation of Chapter 11 of Title 18 of the United States Code (18 U.S.C. 201-224). Executive Order 12448, November 4, 1983, delegates the President's authority under the Act to the heads of the executive agencies and military departments.

### **3.704 Policy.**

(a) In cases in which there is a final conviction for any violation of 18 U.S.C. 201-224 involving or relating to contracts awarded by an agency, the agency head or designee, shall consider the facts available and, if appropriate, may declare void and rescind contracts, and recover the amounts expended and property transferred by the agency in accordance with the policies and procedures of this subpart.

(b) Since a final conviction under 18 U.S.C. 201-224 relating to a contract also may justify the conclusion that the party involved is not presently responsible, the agency should consider initiating debarment proceedings in accordance with FAR Subpart 9.4, Debarment, Suspension, and Ineligibility, if debarment has not been initiated, or is not in effect at the time the final conviction is entered.

### **3.705 Procedures.**

(a) *Reporting.* The facts concerning any final conviction for any violation of 18 U.S.C. 201-224 involving or relating to agency contracts shall be reported promptly to the agency head or designee for that official's consideration. The agency head or designee shall promptly notify the Civil Division, Department of Justice, that the action is being considered under this subpart.

(b) *Decision.* Following an assessment of the facts, the agency head or designee may declare void and rescind contracts with respect to which a final conviction has been entered, and recover the amounts expended and the property transferred by the agency under the terms of the contracts involved.

(c) *Decision-Making Process.* Agency procedures governing the voiding and rescinding decision-making process shall be as informal as practicable, consistent with the principles of fundamental fairness. As a minimum, however, agencies shall provide the following:

(1) A notice of proposed action to declare void and rescind the contract shall be made in writing and sent by certified mail, return receipt requested.

(2) A thirty calendar day period after receipt of the notice, for the contractor to submit pertinent information

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before any final decision is made.

(3) Upon request made within the period for submission of pertinent information, an opportunity shall be afforded for a hearing at which witnesses may be presented, and any witness the agency presents may be confronted. However, no inquiry shall be made regarding the validity of the conviction.

(4) If the agency head or designee decides to declare void and rescind the contracts involved, that official shall issue a written decision which—

(i) States that determination;

(ii) Reflects consideration of the fair value of any tangible benefits received and retained by the agency; and

(iii) States the amount due and the property to be returned to the agency.

(d) *Notice of Proposed Action.* The notice of proposed action, as a minimum shall—

(1) Advise that consideration is being given to declaring void and rescinding contracts awarded by the agency, and recovering the amounts expended and property transferred therefor, under the provisions of 18 U.S.C. 218;

(2) Specifically identify the contracts affected by the action;

(3) Specifically identify the final conviction on which the action is based;

(4) State the amounts expended and property transferred under each of the contracts involved, and the money and the property demanded to be returned;

(5) Identify any tangible benefits received and retained by the agency under the contract, and the value of those benefits, as calculated by the agency;

(6) Advise that pertinent information may be submitted within 30 calendar days after receipt of the notice, and that, if requested within that time, a hearing shall be held at which witnesses may be presented and any witness the agency presents may be confronted; and

(7) Advise that action shall be taken only after the agency head or designee issues a final written decision on the proposed action.

(e) *Final Agency Decision.* The final agency decision shall be based on the information available to the agency head or designee, including any pertinent information submitted or, if a hearing was held, presented at the hearing. If the agency decision declares void and rescinds the contract, the final decision shall specify the amounts due and property to be returned to the agency, and reflect consideration of the fair value of any tangible benefits received and retained by the agency. Notice of the decision shall be sent promptly by certified mail, return receipt requested. Rescission of contracts under the authority of the Act and demand for recovery of the amounts expended and property transferred therefor, is not a claim within the meaning of the Contract Disputes Act of 1978 (CDA), 41 U.S.C. 801-813, or Part 32. Therefore, the procedures required by the CDA and the FAR for the issuance of a final

contracting officer decision are not applicable to final agency decisions under this subpart, and shall not be followed.

### SUBPART 3.8—LIMITATION ON THE PAYMENT OF FUNDS TO INFLUENCE FEDERAL TRANSACTIONS

#### 3.800 Scope of subpart.

This subpart prescribes policies and procedures implementing section 319 of the Department of Interior and Related Agencies Appropriations Act, Pub. L. 101-121, which added a new section 1352 to title 31, United States Code, entitled “Limitation on use of appropriated funds to influence certain Federal contracting and financial transactions” (the Act).

#### 3.801 Definitions.

“Agency,” as used in this section, means an executive agency as defined in 2.101.

“Covered Federal action,” as used in this section, means any of the following Federal actions:

(a) The awarding of any Federal contract.

(b) The making of any Federal grant.

(c) The making of any Federal loan.

(d) The entering into of any cooperative agreement.

(e) The extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

“Indian tribe” and “tribal organization,” as used in this section, have the meaning provided in section 4 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450B) and include Alaskan Natives.

“Influencing or attempting to influence,” as used in this section, means making, with the intent to influence, any communication to or appearance before an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with any covered Federal action.

“Local government,” as used in this section, means a unit of government in a State and, if chartered, established, or otherwise recognized by a State for the performance of a governmental duty, including a local public authority, a special district, an intrastate district, a council of governments, a sponsor group representative organization, and any other instrumentality of a local government.

“Officer or employee of an agency,” as used in this section, includes the following individuals who are employed by an agency:

(a) An individual who is appointed to a position in the Government under title 5, United States Code, including a position under a temporary appointment;

(b) A member of the uniformed services, as defined in subsection 101(3), title 37, United States Code;

(c) A special Government employee, as defined in section 202, title 18, United States Code; and

(d) An individual who is a member of a Federal advisory

ry committee, as defined by the Federal Advisory Committee Act, title 5, United States Code, appendix 2.

“Person,” as used in this section, means an individual, corporation, company, association, authority, firm, partnership, society, State, and local government, regardless of whether such entity is operated for profit or not for profit. This term excludes an Indian tribe, tribal organization, or any other Indian organization with respect to expenditures specifically permitted by other Federal law.

“Reasonable compensation,” as used in this section, means, with respect to a regularly employed officer or employee of any person, compensation that is consistent with the normal compensation for such officer or employee for work that is not furnished to, not funded by, or not furnished in cooperation with the Federal Government.

“Reasonable payment,” as used in this section, means, with respect to professional and other technical services, a payment in an amount that is consistent with the amount normally paid for such services in the private sector.

“Recipient,” as used in this section, includes the contractor and all subcontractors. This term excludes an Indian tribe, tribal organization, or any other Indian organization with respect to expenditures specifically permitted by other Federal law.

“Regularly employed,” as used in this section, means, with respect to an officer or employee of a person requesting or receiving a Federal contract, an officer or employee who is employed by such person for at least 130 working days within 1 year immediately preceding the date of the submission that initiates agency consideration of such person for receipt of such contract. An officer or employee who is employed by such person for less than 130 working days within 1 year immediately preceding the date of the submission that initiates agency consideration of such person shall be considered to be regularly employed as soon as he or she is employed by such person for 130 working days.

“State,” as used in this section, means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, a territory or possession of the United States, an agency or instrumentality of a State, and multi-State, regional, or interstate entity having governmental duties and powers.

### 3.802 Prohibitions.

(a) Section 1352 of title 31, United States Code, among other things, prohibits a recipient of a Federal contract, grant, loan, or cooperative agreement from using appropriated funds to pay any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with any of the following covered Federal actions: the awarding of any Federal contract; the making of any Federal grant; the making of any Federal loan; the entering into of any cooperative agreement; or, the modification of any Federal contract, grant, loan, or cooperative agreement.

cation of any Federal contract, grant, loan, or cooperative agreement.

(b) The Act also requires offerors to furnish a declaration consisting of both a certification and a disclosure. These requirements are contained in the provision at 52.203-11, Certification and Disclosure Regarding Payments to Influence Certain Federal Transactions, and the clause at 52.203-12, Limitation on Payments to Influence Certain Federal Transactions.

(1) By signing its offer, an offeror certifies that no appropriated funds have been paid or will be paid in violation of the prohibitions in 31 U.S.C. 1352.

(2) The disclosure shall identify if any funds other than Federal appropriated funds (including profit or fee received under a covered Federal action) have been paid, or will be paid, to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with a Federal contract, grant, loan, or cooperative agreement.

(c) The prohibitions of the Act do not apply under the following conditions:

(1) *Agency and legislative liaison by own employees.*

(i) The prohibition on the use of appropriated funds, in paragraph (a) of this section, does not apply in the case of a payment of reasonable compensation made to an officer or employee of a person requesting or receiving a covered Federal action if the payment is for agency and legislative liaison activities not directly related to a covered Federal action.

(ii) For purposes of subdivision (c)(1)(i) of this section, providing any information specifically requested by an agency or Congress is permitted at any time.

(iii) The following agency and legislative liaison activities are permitted at any time where they are not related to a specific solicitation for any covered Federal action:

(A) Discussing with an agency the qualities and characteristics (including individual demonstrations) of the person's products or services, conditions or terms of sale, and service capabilities;

(B) Technical discussions and other activities regarding the application or adaptation of the person's products or services for an agency's use.

(iv) The following agency and legislative liaison activities are permitted where they are prior to formal solicitation of any covered Federal action:

(A) Providing any information not specifically requested but necessary for an agency to make an informed decision about initiation of a covered Federal action;

(B) Technical discussions regarding the preparation of any Federal contract, grant, loan, or cooperative agreement.



ration of an unsolicited proposal prior to its official submission; and

(C) Capability presentations by persons seeking awards from an agency pursuant to the provisions of the Small Business Act, as amended by Pub. L. 95-507, and subsequent amendments.

(v) Only those activities expressly authorized by subparagraph (c)(1) of this section are permitted under this section.

(2) *Professional and technical services.*

(i) The prohibition on the use of appropriated funds, in paragraph (a) of this section, does not apply in the case of—

(A) Payment of reasonable compensation made to an officer or employee of a person requesting or receiving a covered Federal action or an extension, continuation, renewal, amendment, or modification of a covered Federal action, if payment is for professional or technical services rendered directly in the preparation, submission, or negotiation of any bid, proposal, or application for that Federal action or for meeting requirements imposed by or pursuant to law as a condition for receiving that Federal action;

(B) Any reasonable payment to a person, other than an officer or employee of a person requesting or receiving a covered Federal action, if the payment is for professional or technical services rendered directly in the preparation, submission, or negotiation of any bid, proposal, or application for that Federal action, or for meeting requirements imposed by or pursuant to law as a condition for receiving that Federal action. Persons other than officers or employees of a person requesting or receiving a covered Federal action include consultants and trade associations.

(ii) For purposes of subdivision (c)(2)(i) of this section, “professional and technical services” shall be limited to advice and analysis directly applying any professional or technical discipline. For example, drafting of a legal document accompanying a bid or proposal by a lawyer is allowable. Similarly, technical advice provided by an engineer on the performance or operational capability of a piece of equipment rendered directly in the negotiation of a contract is allowable. However, communications with the intent to influence made by a professional (such as a licensed lawyer) or a technical person (such as a licensed accountant) are not allowable under this section unless they provide advice and analysis directly applying their professional or technical expertise and unless the advice or analysis is rendered directly and solely in the preparation, submission or negotiation of a covered Federal action. Thus, for example, communications with the intent to influence made by a lawyer that do

not provide legal advice or analysis directly and solely related to the legal aspects of his or her client's proposal, but generally advocate one proposal over another are not allowable under this section because the lawyer is not providing professional legal services. Similarly, communications with the intent to influence made by an engineer providing an engineering analysis prior to the preparation or submission of a bid or proposal are not allowable under this section since the engineer is providing technical services but not directly in the preparation, submission or negotiation of a covered Federal action.

(iii) Requirements imposed by or pursuant to law as a condition for receiving a covered Federal award include those required by law or regulation and any other requirements in the actual award documents.

(iv) Only those services expressly authorized by subdivisions (c)(2)(i)(A) and (B) of this section are permitted under this section.

(v) The reporting requirements of 3.803(a) shall not apply with respect to payments of reasonable compensation made to regularly employed officers or employees of a person.

### 3.803 Certification and disclosure.

(a) Any contractor who requests or receives a Federal contract exceeding \$100,000 shall submit the certification and disclosures required by the provision at 52.203-11, Certification and Disclosure Regarding Payments to Influence Certain Federal Transactions, with its offer. Disclosures under this section shall be submitted to the contracting officer using OMB standard form LLL, Disclosure of Lobbying Activities.

(b) The contractor shall file a disclosure form at the end of each calendar quarter in which there occurs any event that materially affects the accuracy of the information contained in any disclosure form previously filed by such person under paragraph (a) of this section. An event that materially affects the accuracy of the information reported includes—

(1) A cumulative increase of \$25,000 or more in the amount paid or expected to be paid for influencing or attempting to influence a covered Federal action; or

(2) A change in the person(s) or individual(s) influencing or attempting to influence a covered Federal action; or

(3) A change in the officer(s), employee(s), or Member(s) of Congress contacted to influence or attempt to influence a covered Federal action.

(c) The contractor shall require the submittal of a certification, and if required, a disclosure form, by any person who requests or receives any subcontract exceeding \$100,000 under the Federal contract.

(d) All subcontractor disclosure forms (but not certifications), shall be forwarded from tier to tier until received by the prime contractor. The prime contractor shall sub-

mit all disclosure forms to the contracting officer at the end of the calendar quarter in which the disclosure form is submitted by the subcontractor. Each subcontractor certification shall be retained in the subcontract file of the awarding contractor.

### **3.804 Policy.**

(a) The contracting officer shall obtain certifications and disclosures as required by the provision at 52.203-11, Certification and Disclosure Regarding Payments to Influence Certain Federal Transactions, prior to the award of any contract exceeding \$100,000.

(b) The contracting officer shall forward a copy of all contractor disclosures furnished pursuant to the clause at 52.203-12, Limitation on Payments to Influence Certain Federal Transactions, to the official designated in accordance with agency procedures, for subsequent submission to Congress. The original of the disclosure shall be retained in the contract file.

### **3.805 Exemption.**

The Secretary of Defense may exempt, on a case-by-case basis, a covered Federal action from the prohibitions of this section whenever the Secretary determines, in writing, that such an exemption is in the national interest. The Secretary shall transmit a copy of such exemption to Congress immediately after making such a determination.

### **3.806 Processing suspected violations.**

Suspected violations of the requirements of the Act shall be referred to the official designated in agency procedures.

### **3.807 Civil penalties.**

Agencies shall impose and collect civil penalties pursuant to the provisions of the Program Fraud and Civil Remedies Act, 31 U.S.C. 3803 (except subsection (c)), 3804-3408, and 3812, insofar as the provisions therein are not inconsistent with the requirements of this subpart.

### **3.808 Solicitation provision and contract clause.**

(a) The provision at 52.203-11, Certification and Disclosure Regarding Payments to Influence Certain Federal Transactions, shall be included in solicitations expected to exceed \$100,000.

(b) The clause at 52.203-12, Limitation on Payments to Influence Certain Federal Transactions, shall be included in solicitations and contracts expected to exceed \$100,000.

## **SUBPART 3.9—WHISTLEBLOWER PROTECTIONS FOR CONTRACTOR EMPLOYEES**

### **3.900 Scope of subpart.**

This subpart implements 10 U.S.C. 2409 and 41 U.S.C. 251, *et seq.*, as amended by Sections 6005 and 6006 of the Federal Acquisition Streamlining Act of 1994 (Pub. L. 103-355).

### **3.901 Definitions.**

“Authorized official of an agency” means an officer or employee responsible for contracting, program management, audit, inspection, investigation, or enforcement of any law or regulation relating to Government procurement or the subject matter of the contract.

“Authorized official of the Department of Justice” means any person responsible for the investigation, enforcement, or prosecution of any law or regulation.

“Inspector General” means an Inspector General appointed under the Inspector General Act of 1978, as amended. In the Department of Defense that is the DOD Inspector General. In the case of an executive agency that does not have an Inspector General, the duties shall be performed by an official designated by the head of the executive agency.

### **3.902 Applicability.**

This subpart applies to all Government contracts.

### **3.903 Policy.**

Government contractors shall not discharge, demote or otherwise discriminate against an employee as a reprisal for disclosing information to a Member of Congress, or an authorized official of an agency or of the Department of Justice, relating to a substantial violation of law related to a contract (including the competition for or negotiation of a contract).

### **3.904 Procedures for filing complaints.**

(a) Any employee of a contractor who believes that he or she has been discharged, demoted, or otherwise discriminated against contrary to the policy in 3.903 may file a complaint with the Inspector General of the agency that awarded the contract.

(b) The complaint shall be signed and shall contain—

- (1) The name of the contractor;
- (2) The contract number, if known; if not, a description reasonably sufficient to identify the contract(s) involved;
- (3) The substantial violation of law giving rise to the disclosure;
- (4) The nature of the disclosure giving rise to the discriminatory act; and
- (5) The specific nature and date of the reprisal.

### **3.905 Procedures for investigating complaints.**

(a) Upon receipt of a complaint, the Inspector General shall conduct an initial inquiry. If the Inspector General determines that the complaint is frivolous or for other rea-

sons does not merit further investigation, the Inspector General shall advise the complainant that no further action on the complaint will be taken.

(b) If the Inspector General determines that the complaint merits further investigation, the Inspector General shall notify the complainant, contractor, and head of the contracting activity. The Inspector General shall conduct an investigation and provide a written report of findings to the head of the agency or designee.

(c) Upon completion of the investigation, the head of the agency or designee shall ensure that the Inspector General provides the report of findings to—

- (1) The complainant and any person acting on the complainant's behalf;
- (2) The contractor alleged to have committed the violation; and
- (3) The head of the contracting activity.

(d) The complainant and contractor shall be afforded the opportunity to submit a written response to the report of findings within 30 days to the head of the agency or designee. Extensions of time to file a written response may be granted by the head of the agency or designee.

(e) At any time, the head of the agency or designee may request additional investigative work be done on the complaint.

### **3.906 Remedies.**

(a) If the head of the agency or designee determines that a contractor has subjected one of its employees to a reprisal for providing information to a Member of Congress, or an authorized official of an agency or of the Department of Justice, the head of the agency or designee may take one or

more of the following actions:

(1) Order the contractor to take affirmative action to abate the reprisal.

(2) Order the contractor to reinstate the person to the position that the person held before the reprisal, together with the compensation (including back pay), employment benefits, and other terms and conditions of employment that would apply to the person in that position if the reprisal had not been taken.

(3) Order the contractor to pay the complainant an amount equal to the aggregate amount of all costs and expenses (including attorneys' fees and expert witnesses' fees) that were reasonably incurred by the complainant for, or in connection with, bringing the complaint regarding the reprisal.

(b) Whenever a contractor fails to comply with an order, the head of the agency or designee shall request the Department of Justice to file an action for enforcement of such order in the United States district court for a district in which the reprisal was found to have occurred. In any action brought under this section, the court may grant appropriate relief, including injunctive relief and compensatory and exemplary damages.

(c) Any person adversely affected or aggrieved by an order issued under this section may obtain review of the order's conformance with the law, and this subpart, in the United States Court of Appeals for a circuit in which the reprisal is alleged in the order to have occurred. No petition seeking such review may be filed more than 60 days after issuance of the order by the head of the agency or designee. Review shall conform to Chapter 7 of Title 5, United States Code.