

# Part 3 - Improper Business Practices and Personal Conflicts of Interest

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### **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 must be conducted in a manner above reproach. Except as authorized by statute or regulation, business must be conducted with complete impartiality and without preferential treatment for anyone. Transactions involving public funds require the highest degree of public trust and impeccable standards of conduct. The general rule is to avoid any conflict of interest or even the appearance of a conflict of interest in Government-contractor relationships. Many Federal laws restrict Government personnel actions. Beyond these restrictions, official conduct must meet a standard where personnel would have no reluctance to fully disclose their actions to the public.

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

(a) As a rule, and as required by Executive Order 12731, no Government employee may solicit or accept, directly or indirectly, any gratuity, gift, favor, entertainment, loan, or anything of monetary value from anyone who-

- (1) Has or is seeking to obtain Government business with the employee's agency;
- (2) Conducts activities that are regulated by the employee's agency; or
- (3) Has interests that may be substantially affected by the performance or nonperformance of the employee's official duties.

(b) Certain limited exceptions are authorized in agency regulations.

#### **3.101-3 Agency regulations.**

(a) Agencies must prescribe *Standards of Conduct* as required by 5 CFR part 735. 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 contained 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 must include the provision at 52.203-2, Certificate of Independent Price Determination, in solicitations for firm-fixed-price contracts or fixed-price contracts with economic price adjustment, unless-

- (a) The purchase uses simplified acquisition procedures from part 13;
- (b) The solicitation only requests technical proposals under two-step sealed bidding; or
- (c) The solicitation is for utility services with rates established by law or regulation.

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

(a) *Evaluation guidelines.*

(1) The following activities are not considered "disclosure" as used in paragraph (a) (2) of the Certificate of Independent Price Determination (the certificate) :

- (i) A firm has published price lists, rates, or tariffs for items the Government is buying.
- (ii) A firm has told potential customers about upcoming new or revised price lists for items the Government is buying.
- (iii) A firm has sold the same items to commercial customers at the same prices offered to the Government.
- (iv) A firm participates in a reverse auction (explained in part 17).

(2) For paragraph (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 is clearly within the scope of the authorization; and
- (ii) The person giving the authorization is responsible for determining the offered prices at the time the certification is made for that offer.

(3) For joint offers from multiple companies, each company's certification applies only to its own activities.

*(b) Rejecting potentially collusive offers.*

(1) If an offeror removes or modifies paragraph (a) (1), (a) (3), or (b) of the certificate, the contracting officer must reject their bid or proposal.

(2) If an offeror deleted or modified paragraph (a) (2) of the certificate-

(i) The offeror must furnish with its offer a signed explanation about how prices were disclosed;

(ii) The chief of the contracting office must review both the changed certificate and explanation;

(iii) The chief must determine in writing if the disclosure was made for the purpose or had the effect of limiting competition;

(iv) If the determination finds the disclosure was made for the purpose or had the effect of limiting competition, the bid must be rejected; and

(v) If the determination finds no competition issues, the bid may be considered for award.

(3) When rejecting offers under paragraphs (b) (1) or (b) (2), or when suspecting false certification, the contracting officer must report the situation to the Attorney General in accordance with 3.303.

(4) The determination in paragraph (2) does not prevent prosecution of criminal or civil actions involving the transactions to which the certificate relates.

### **3.104 Procurement integrity.**

#### **3.104-1 Definitions.**

As used in this section—

*Agency ethics official* means the designated agency ethics official described in 5 CFR 2638.201 or other designated person, including—

(1) Deputy ethics officials described in 5 CFR 2638.204, to whom authority under 3.104-6 has been delegated by the designated agency ethics official; and

(2) Alternate designated agency ethics officials described in 5 CFR 2638.202(b).

*Compensation* means wages, salaries, honoraria, commissions, professional fees, and any other form of payment, provided directly or indirectly for services rendered. Compensation

is indirectly provided if it is paid to an entity other than the individual, specifically in exchange for services provided by the individual.

*Contractor bid or proposal information* means any of the following information submitted to a Federal agency as part of or in connection with a bid or proposal to enter into a Federal agency procurement contract, if that information has not been previously made available to the public or disclosed publicly:

(1) Cost or pricing data (as defined by [10 U.S.C. 3701\(1\)](#) with respect to procurements subject to that section, and 41 U.S.C. 3501(a) (1), with respect to procurements subject to that section.

(2) Indirect costs and direct labor rates.

(3) Proprietary information about manufacturing processes, operations, or techniques marked by the contractor in accordance with applicable law or regulation.

(4) Information marked by the contractor as "contractor bid or proposal information" in accordance with applicable law or regulation.

(5) Information marked in accordance with (e).

*Decision to award a subcontract or modification of subcontract* means a decision to designate award to a particular source.

*Federal agency procurement* means the acquisition (by using competitive procedures and awarding a contract) of goods or services (including construction) from non-Federal sources by a Federal agency using appropriated funds. For broad agency announcements and small business innovation research programs, each proposal received by an agency counts as a separate procurement for purposes of 41 U.S.C. chapter 21.

*In excess of \$10,000,000* means—

(1) The value, or estimated value, at the time of award, of the contract, including all options;

(2) The total estimated value at the time of award of all orders under an indefinite-delivery, indefinite-quantity, or requirements contract;

(3) Any multiple award schedule contract, unless the contracting officer documents a lower estimate;

(4) The value of a delivery order, task order, or an order under a Basic Ordering Agreement;

(5) The amount paid or to be paid in settlement of a claim; or

(6) The estimated monetary value of negotiated overhead or other rates when applied to the Government portion of the applicable allocation base.



*Official* means–

- (1) An officer, as defined in [5 U.S.C.2104](#);
- (2) An employee, as defined in [5 U.S.C.2105](#);
- (3) A member of the uniformed services, as defined in [5 U.S.C.2101\(3\)](#); or
- (4) A special Government employee, as defined in 18 U.S.C.202.

*Participating personally and substantially in a Federal agency procurement* means–

(1) Active and significant involvement of an official in any of the following activities directly related to that procurement:

(i) Drafting, reviewing, or approving the specification or statement of work for the procurement.:

(ii) Preparing or developing the solicitation.

(iii) Evaluating bids or proposals, or selecting a source.

(iv) Negotiating price or terms and conditions of the contract.

(v) Reviewing and approving the award of the contract.

(2) "Participating personally" means participating directly and includes the direct and active supervision of a subordinate's participation in the matter.

(3) "Participating substantially" means that the official's involvement is of significance to the matter. Substantial participation requires more than official responsibility, knowledge, perfunctory involvement, or involvement on an administrative or peripheral issue. Participation may be substantial even though it is not determinative of the outcome of a particular matter. 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. However, the review of procurement documents solely to determine compliance with regulatory, administrative, or budgetary procedures, does not constitute substantial participation in a procurement.

(4) Generally, an official will not be considered to have participated personally and substantially in a procurement solely by participating in the following activities:

(i) Agency-level boards, panels, or other advisory committees that review program milestones or evaluate and recommend alternative technologies or approaches for broad agency-level missions or objectives.

(ii) General technical, engineering, or scientific work with broad application not directly tied to a specific procurement, even if that work later becomes part of a procurement.

(iii) Clerical functions supporting a particular procurement.

(iv) For OMB Circular A-76 procurements, participation in management studies, preparation of in-house cost estimates, preparation of "most efficient organization" analyses, or providing data or technical support for others to develop performance standards, statements of work, or specifications.

*Source selection evaluation board* means any board, team, council, or other group that evaluates bids or proposals.

### **3.104-2 General.**

(a) This section implements 41 U.S.C. chapter 21, Restrictions on Obtaining and Disclosing Certain Information. The senior procurement executive of the agency must approve any agency changes to 3.104. This includes specific definitions identifying individuals who occupy positions specified in 3.104-3(d) (1) (ii), and any required clauses. A law may establish a higher level of approval for that agency.

(b) Agency officials need to remember that other statutes and regulations also address similar prohibited conduct, for example—

(1) The offer or acceptance of a bribe or gratuity is prohibited by 18 U.S.C. 201 and 10 U.S.C. 4651. The 5 U.S.C. 7353 and 5 CFR Part 2635 prohibit accepting certain gifts;

(2) Contact with an offeror during an acquisition may constitute "seeking employment" (see subpart F of 5 CFR part 2636 and 3.104-3(c) (2) ). Government employees cannot participate personally and substantially in any matter that would affect the financial interests of a person with whom they are seeking employment, as prohibited by 18 U.S.C. 208 and 5 CFR part 2635. An employee negotiating or seeking employment with an offeror or who has an arrangement concerning future employment with an offeror must follow the disqualification requirements in 5 CFR 2635.604 and 2635.606. The prohibition in 18 U.S.C. 208 may require employee disqualification from participation in the acquisition even if their duties are not considered "participating personally and substantially" as defined in 3.104-1;

(3) Post-employment restrictions under 18 U.S.C. 207 and 5 CFR parts 2637 and 2641 prohibit certain activities by former Government employees. This includes representing a contractor before the Government regarding any contract or other particular matter involving specific parties where the former employee participated personally and substantially while employed by the Government. Additional restrictions apply to certain senior Government employees and for matters under an employee's official responsibility;

(4) Parts 14 and 15 restrict the release of procurement information and other contractor information that must be protected under 18 U.S.C. 1905;

(5) The Privacy Act (5 U.S.C. 552a), the Trade Secrets Act (18 U.S.C. 1905), and other laws may prohibit releasing information both before and after award (see 3.104-4) ; and

(6) Using nonpublic information for an employee's private interest or another's benefit and engaging in financial transactions using nonpublic information are prohibited by 5 CFR 2635.703.

### **3.104-3 Statutory and related prohibitions, restrictions, and requirements.**

(a) Prohibition on disclosing procurement information (41 U.S.C. 2102).

(1) A person described in paragraph (a) (2) of this subsection must not knowingly disclose contractor bid or proposal information or source selection information before a Federal agency awards the procurement contract to which the information relates. This restriction applies except when disclosure is allowed by law. (See 3.104-4(a).)

(2) Paragraph (a) (1) of this subsection applies to any person who—

(i) Is a present or former official of the United States, or a person who is acting or has acted for or on behalf of, or who is advising or has advised the United States with respect to, a Federal agency procurement; and

(ii) By virtue of that office, employment, or relationship, has or had access to contractor bid or proposal information or source selection information.

(b) *Prohibition on obtaining procurement information ( 41 U.S.C. 2102).* A person must not knowingly obtain contractor bid or proposal information or source selection information before a Federal agency awards the procurement contract to which the information relates. This restriction applies except when obtaining such information is allowed by law.

(c) Actions required when an agency official contacts or is contacted by an offeror regarding non-Federal employment (41 U.S.C. 2103).

(1) An agency official who participates personally and substantially in a Federal agency procurement for a contract over the simplified acquisition threshold must take specific actions if they contact or are contacted by an offeror in that Federal agency procurement about possible non-Federal employment for that official. The official must—

(i) Promptly report the contact in writing to the official's supervisor and to the agency ethics official; and

(ii) Either reject the possibility of non-Federal employment or disqualify himself or herself from further personal and substantial participation in that Federal agency procurement (see 3.104-5). This disqualification remains until the agency authorizes the official to resume participation in that procurement, according to the requirements of 18 U.S.C. 208 and applicable agency regulations, because—

(A) The person is no longer an offeror in that Federal agency procurement; or

(B) All discussions with the offeror regarding possible non-Federal employment have ended without an agreement or arrangement for employment.

(2) A contact is any action included as "seeking employment" in 5 CFR 2635.603(b). Unsolicited communications from offerors regarding possible employment also count as contacts.

(3) Agencies must retain reports of employment contacts for 2 years from the date the report was submitted.

(4) Even if conduct complies with 41 U.S.C. 2103, other criminal statutes and the Standards of Ethical Conduct for Employees of the Executive Branch may prohibit it. See 3.104-2(b)(2).

(d) Prohibition on former official's acceptance of compensation from a contractor (41 U.S.C. 2104).

(1) A former official of a Federal agency must not accept compensation from a contractor as an employee, officer, director, or consultant for 1 year after the former official—

(i) Served, when the contractor was selected or awarded a contract, as the procuring contracting officer, the source selection authority, a member of a source selection evaluation board, or the chief of a financial or technical evaluation team in a procurement where that contractor received a contract in excess of \$10,000,000;

(ii) Served as the program manager, deputy program manager, or administrative contracting officer for a contract in excess of \$10,000,000 awarded to that contractor; or

(iii) Personally made for the Federal agency a decision to—

(A) Award a contract, subcontract, modification of a contract or subcontract, or a task order or delivery order in excess of \$10,000,000 to that contractor;

(B) Establish overhead or other rates for that contractor's contracts valued in excess of \$10,000,000;

(C) Approve issuing a contract payment or payments in excess of \$10,000,000 to that contractor; or

(D) Pay or settle a claim in excess of \$10,000,000 with that contractor.

(2) The 1-year prohibition begins on the date—

(i) Of contract award for positions described in paragraph (d) (1) (i) of this subsection, or the date of contractor selection if the official was not serving in the position on the date of award;

(ii) The official last served in one of the positions described in paragraph (d) (1) (ii) of this subsection; or

(iii) The official made one of the decisions described in paragraph (d) (1) (iii) of this subsection.

(3) The prohibition in paragraph (d) (1) of this subsection does not prevent a former official from accepting compensation from any division or affiliate of a contractor that does not produce the same or similar products or services than the entity responsible for the contract referred to in paragraph (d) (1).

### **3.104-4 Disclosure, protection, and marking of contractor bid or proposal information and source selection information.**

(a) No person or entity may disclose contractor bid or proposal information or source selection information to any person other than those authorized to receive that information, in accordance with applicable agency regulations or procedures, by the agency head or contracting officer. This restriction applies except as specifically provided in this subsection.

(b) Contractor bid or proposal information and source selection information must be protected from unauthorized disclosure according to 14.401, 15.207, applicable law, and agency regulations.

(c) Individuals who are unsure if specific information is source selection information, as defined in 2.101, should consult with agency officials. Individuals preparing material that may be source selection information as described in paragraph (10) of the "source selection information" definition in 2.101 must mark the cover page and each page they believe contains source selection information with this legend: "Source Selection Information—See FAR 2.101 and 3.104." Although information in paragraphs (1) through (9) of the definition in 2.101 counts as source selection information whether or not marked, all reasonable efforts must be made to mark such material with the same legend.

(d) The contracting officer must notify the contractor in writing if the contracting officer believes proprietary information, contractor bid or proposal information, or information marked under 52.215-1(e) has been inappropriately marked. The contractor who applied

the marking must be given an opportunity to justify the marking. This requirement does not apply to situations covered in paragraph (d) (3) of this subsection.

(1) If the contractor agrees the marking is not justified or does not respond within the time specified in the notice, the contracting officer may remove the marking and release the information.

(2) If, after reviewing the contractor's justification, the contracting officer determines the marking is not justified, the contracting officer must notify the contractor in writing before releasing the information.

(3) For technical data marked as proprietary by a contractor, the contracting officer must follow the procedures in part 27.

(e) This section does not restrict or prohibit—

(1) A contractor from disclosing its own bid or proposal information or the recipient from receiving that information. During reverse auctions, agencies may reveal offered price(s) to all offerors, but must not reveal any offeror's identity except for the awardee's identity after making an award resulting from the auction (see subpart 17.8) ;

(2) The disclosure or receipt of information, not otherwise protected, relating to a canceled Federal agency procurement before contract award, unless the Federal agency plans to resume the procurement;

(3) Individual meetings between a Federal agency official and an offeror or potential offeror for, or recipient of, a contract or subcontract under a Federal agency procurement, provided that unauthorized disclosure or receipt of contractor bid or proposal information or source selection information does not occur; or

(4) The Government's use of technical data in a manner consistent with the Government's rights in the data.

(f) This section does not authorize—

(1) Withholding any information from a proper request by Congress, any committee or subcommittee thereof, a Federal agency, the Comptroller General, or an Inspector General of a Federal agency, except as otherwise authorized by law or regulation. Any release containing contractor bid or proposal information or source selection information must clearly identify the information as contractor bid or proposal information or source selection information related to a Federal agency procurement. The release must also notify the recipient that disclosure of the information is restricted by 41 U.S.C. chapter 21;

(2) Withholding information from, or restricting its receipt by, the Comptroller General during a protest against the award or proposed award of a Federal agency procurement contract;

(3) Releasing information after award of a contract or cancellation of a procurement if such information is contractor bid or proposal information or source selection information that relates to another procurement; or

(4) Disclosing, soliciting, or receiving bid or proposal information or source selection information after award if such actions are prohibited by law. (See 3.104-2(b) (5) and part 24.)

### **3.104-5 Disqualification.**

(a) *Contacts through agents or other intermediaries.* Employment contacts between an employee and an offeror conducted through agents or other intermediaries may require disqualification under 3.104-3(c) (1). These contacts may also require disqualification under other statutes and regulations. (See 3.104-2(b) (2).)

(b) *Disqualification notice.* An agency official who must disqualify himself or herself under 3.104-3(c) (1) (ii) must submit the contact report required by 3.104-3(c) (1). The official must also promptly submit written notice of disqualification from further participation in the procurement to the contracting officer, the source selection authority (if different from the contracting officer), and the agency official's immediate supervisor. At a minimum, the notice must—

(1) Identify the procurement;

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

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

(c) *Resumption of participation in a procurement.*

The official must remain disqualified until the agency, at its sole and exclusive discretion, authorizes the official to resume participation in the procurement according to 3.104-3(c) (1) (ii).

(2) After the conditions of 3.104-3(c) (1) (ii) (A) or (B) have been met, the head of the contracting activity (HCA), after consultation with the agency ethics official, may authorize the disqualified official to resume participation in the procurement, or may determine that an additional disqualification period is necessary to protect the procurement process integrity. When determining the disqualification period, the HCA must consider any factors

that create an appearance that the disqualified official acted without complete impartiality. The HCA should document the reinstatement decision in writing.

(3) Government officers or employees must also comply with 18 U.S.C. 208 and 5 CFR part 2635 regarding resumed participation in procurement matters. A government officer or employee may not resume participating in a procurement matter affecting the financial interest of someone with whom they are seeking employment, unless the individual receives—

(i) A waiver pursuant to 18 U.S.C. 208(b) (1) or (b) (3) ; or

(ii) An authorization according to the requirements of subpart F of 5 CFR part 2635.

### **3.104-6 Ethics advisory opinions regarding prohibitions on a former official's acceptance of compensation from a contractor.**

(a) An official or former official of a Federal agency may request advice from the appropriate agency ethics official before accepting compensation from a contractor. This applies when the individual does not know whether 41 U.S.C. 2104 (see 3.104-3(d) ) prevents them from accepting such compensation.

(b) The request for an advisory opinion must be in writing, include all relevant information reasonably available to the official or former official, and be dated and signed. The request must include information about the—

(1) Procurement(s), or decision(s) on matters under 3.104-3(d) (1) (iii), involving the particular contractor. This includes contract or solicitation numbers, dates of solicitation or award, a description of the supplies or services procured or to be procured, and contract amount;

(2) Individual's participation in the procurement or decision, including the dates or time periods of that participation, and the nature of the individual's duties, responsibilities, or actions; and

(3) Contractor, including a description of the products or services produced by the division or affiliate of the contractor from whom the individual proposes to accept compensation.

(c) The agency ethics official should issue an opinion within 30 days after receiving a complete request, or as soon as practicable after that. The opinion should address whether the proposed conduct would violate 41 U.S.C. 2104.

(d)

(1) If the request does not include complete information, the agency ethics official may ask the requester to provide more information. The ethics official may also request information



from other persons, including the source selection authority, the contracting officer, or the requester's immediate supervisor.

(2) When issuing an opinion, the agency ethics official may rely on the accuracy of information provided by the requester or other agency sources. This applies unless the official has reason to believe the information is fraudulent, misleading, or otherwise incorrect.

(3) If the requester receives a written opinion from the agency ethics official stating they may accept compensation from a particular contractor and accepts such compensation in good faith reliance on that opinion, neither the requester nor the contractor will be found to have knowingly violated 41 U.S.C. 2104. However, if the requester or contractor has actual knowledge or reason to believe the opinion is based on fraudulent, misleading, or otherwise incorrect information, their reliance on the opinion will not be considered good faith.

### **3.104-7 Violations or possible violations.**

(a) A contracting officer who receives information about a violation or possible violation of procurement integrity laws (41 U.S.C. 2102, 2103, or 2104) must determine if this affects the pending award or contractor selection.

(1) If the contracting officer determines there is no impact on the procurement, the contracting officer must forward the information about the violation, including documentation supporting the "no impact" determination, and send these materials to the individual designated per agency procedures.

(i) If that individual agrees with the "no impact" assessment, the contracting officer may continue with the procurement.

(ii) If that individual disagrees, that person must promptly forward all information to the HCA and advise the contracting officer to withhold award.

(2) If the contracting officer determines the violation does impact the procurement, the contracting officer must promptly forward all information to the HCA.

(b) The HCA must review all available information and, following agency procedures, take appropriate action, such as-

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

(2) Begin an investigation;

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

(4) Conclude that a violation occurred; or

(5) Recommend that the agency head determine that the contractor, or someone acting for the contractor, has engaged in conduct constituting an offense punishable under 41 U.S.C. 2105, for the purpose of voiding or rescinding the contract.

(c) Before concluding that an offeror, contractor, or person has violated 41 U.S.C. chapter 21, the HCA may request information from appropriate parties regarding the violation or possible violation.

(d) If the HCA concludes that 41 U.S.C. chapter 21 has been violated, the HCA may direct the contracting officer to—

(1) If a contract has not been awarded—

(i) Cancel the procurement;

(ii) Disqualify an offeror; or

(iii) Take other appropriate actions to protect Government interests.

(2) If a contract has been awarded—

(i) Apply appropriate contractual remedies, including profit recapture under the clause at 52.203-10 (Price or Fee Adjustment for Illegal or Improper Activity), or, if the contract has been rescinded, recovery of the amount expended under the contract.

(ii) Void or rescind the contract when:

(A) The contractor or someone acting for the contractor has been convicted for an offense where the conduct constitutes a violation of 41 U.S.C. 2102 for the purpose of either-

(1) (1) Exchanging the information for anything of value; or

(2) (2) Obtaining or giving anyone a competitive advantage in the award of a Federal agency procurement contract; or

(B) The agency head has determined, based upon a preponderance of the evidence, that the contractor or someone acting for the contractor has engaged in conduct constituting an offense punishable under 41 U.S.C. 2105(a) ; or

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

(3) Refer the matter to the agency suspending and debarring official.

(e) The HCA should recommend or direct an administrative or contractual remedy that matches the severity and effect of the violation.

(f) If the HCA determines that urgent and compelling circumstances justify an award, or award is otherwise in the interests of the Government, the HCA, in accordance with agency

procedures, may authorize the contracting officer to award the contract or execute the contract modification after notifying the agency head.

(g) The HCA may delegate authority under this subsection to an individual at least one organizational level above the contracting officer and of General Officer, Flag, Senior Executive Service, or equivalent rank.

### **3.104-8 Criminal and civil penalties, and further administrative remedies.**

Criminal penalties, civil penalties, and administrative remedies may apply to conduct that violates procurement integrity laws in 41 U.S.C. chapter 21 (see 3.104-3). For a special rule about bid protests see 41 U.S.C. 2106. For administrative remedies related to contracts, see 3.104-7.

(a) An official who knowingly fails to follow the requirements of 3.104-3 is subject to penalties and administrative action described in 41 U.S.C. 2105.

(b) An offeror who engages in employment discussion with an official subject to the restrictions of part 3, knowing that the official has not complied with part 3, is subject to the criminal, civil, or administrative penalties set forth in 41 U.S.C. 2105.

(c) An official who refuses to terminate employment discussions (see 3.104-5) may be subject to agency administrative actions under 5 CFR 2635.604(d) if the official's disqualification from participation in a particular procurement interferes substantially with the individual's ability to perform assigned duties.

### **3.104-9 Contract clauses.**

In solicitations and contracts that exceed the simplified acquisition threshold, other than those for commercial products or commercial services, insert the clauses at—

52.203-8, Cancellation, Rescission, and Recovery of Funds for Illegal or Improper Activity;  
and

52.203-10, Price or Fee Adjustment for Illegal or Improper Activity.

## **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. 4651).

### **3.202 Contract clause.**

The contracting officer must 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 that do not obligate any funds appropriated to the Department of Defense.

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

Agency personnel must report suspected violations of the Gratuities clause to the contracting officer or other designated official in accordance with agency procedures. The agency reporting procedures must be published as an implementation of this section and must 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 action against a contractor, the agency head or designee must determine, after notice and hearing under agency procedures, whether the contractor, its agent, or representative, under a contract containing the Gratuities clause:

- (1) Offered or gave a gratuity (such as entertainment or a gift) to a Government officer, official, or employee; and
- (2) Intended to use this gratuity to obtain a contract or favorable treatment under a contract (this intent typically must be inferred from circumstances).

(b) Agency procedures must give 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, while maintaining 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 described in part 9; 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 [Reserved]**

### **3.302 Definitions.**

As used in this subpart-

*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).

### **3.303 Reporting suspected antitrust violations.**

(a) Agencies are required by 41 U.S.C. 3707 and 10 U.S.C. 3307 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 part 9.

(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) of this section 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 show violations of 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 where each competitor takes turns being the low bidder, or where 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 awarded 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 calculation or spelling errors in two or more competitive offers or the submission by one firm of offers for other firms; and
  - (9) Statements by current employees, former employees, or competitors that an agreement to restrain trade exists.
- (d) Contracting officers must report identical bids when the agency has reason to believe the bids resulted from collusion.
- (e) For offers from foreign contractors on contracts to be performed outside the United States and its outlying areas, contracting officers may refer suspected collusive offers to the relevant foreign government authorities for appropriate action.
- (f) Agency reports must be addressed to the Attorney General, U.S. Department of Justice, Washington, DC 20530, Attention: Assistant Attorney General, Antitrust Division, and must 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.

## **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. 3321(b) (1) and 41 U.S.C. 3901.

### **3.401 Definitions.**

As used in this subpart-

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

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

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

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

### **3.402 Statutory requirements.**

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

- (a) Require every negotiated contract to include 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 if a contractor breaches or violates this warranty, 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 must insert the clause at 52.203-5, Covenant Against Contingent Fees, in all solicitations and contracts exceeding the simplified acquisition threshold, other than those for commercial products or commercial services (see parts 2 and 12).

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

(a) Government personnel who suspect or have evidence of any of the following must report the matter promptly to the contracting officer or appropriate higher authority according to agency procedures:

- (1) Attempted or actual exercise of improper influence;
- (2) Misrepresentation of a contingent fee arrangement; or
- (3) Other violations of the Covenant Against Contingent Fees.

(b) When specific evidence or other reasonable basis exists to suspect one or more violations described in paragraph (a) of this section, the chief of the contracting office must review the facts and, if appropriate, take or direct one or more of the following 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 part 9.
- (4) Refer suspected fraudulent or criminal matters to the Department of Justice, as prescribed in agency regulations.

## **Subpart 3.5 - Other Improper Business Practices**

### **3.501 Buying-in.**

#### **3.501-1 Definition.**

*Buying-in*, as used in this section, means submitting an offer below anticipated costs, expecting to—

- (1) Increase the contract amount after award (e.g., through unnecessary or excessively priced change orders) ; or



(2) 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 part 17).

(c) Other safeguards are available to the contracting officer to preclude recovery of buying-in losses (e.g., amortization of nonrecurring costs (see 15.408, Table 15-2, paragraph A, column (2) under “Formats for Submission of Line Item Summaries”) and treatment of unreasonable price quotations (see part 15).

### **3.502 Subcontractor kickbacks.**

#### **3.502-1 Definitions.**

As used in this section—

*Kickback* means any money, fee, commission, credit, gift, gratuity, thing of value, or compensation of any kind which is provided 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* means a corporation, partnership, business association of any kind, trust, joint-stock company, or individual.

*Prime contract* 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* 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* 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*—

(1) 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

(2) 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 (now codified at 41 U.S.C. chapter 87, Kickbacks,) 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 Kickbacks statute—

(a) Prohibits any person from—

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

(2) Soliciting, accepting, or attempting to accept any kickbacks; 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 section.

(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 paragraph (d) (1) of this section; and

(3) An offset under paragraph (d) (1) or a direction under paragraph (d) (2) of this section is a claim by the Government for the purposes of 41 U.S.C. chapter 71, Contract Disputes.

(e) Authorizes contracting officers to order that sums withheld under paragraph (d) (2) of this section 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 paragraph (d) (2) of this section 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 Attorney General any possible violation of the Kickbacks statute when the prime contractor or subcontractor has reasonable grounds to believe such violation may have occurred.

(h) Provides that, for the purpose of determining whether there has been a violation of the Kickbacks statute on any prime contract, the Government Accountability Office and the inspector general of the contracting agency, or a representative of such contracting agency designated by the head of such agency if the agency does not have an inspector general, must have access to and may inspect the facilities and audit the books and records of any prime contractor or subcontractor under a prime contract awarded by the agency.

(i) Requires each contracting agency to include in each prime contract, other than for commercial products or commercial services, exceeding \$200,000, a requirement that the prime contractor must—

(1) Have in place and follow reasonable procedures designed to prevent and detect violations of the Kickbacks statute 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; 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 Kickbacks statute.

(j) Notwithstanding paragraph (i) of this section, a prime contractor must cooperate fully with any Federal Government agency investigating a violation of 41 U.S.C. 8702 (see 41 U.S.C. 8703(b)).

### **3.502-3 Contract clause.**

The contracting officer must insert the clause at 52.203-7, Anti-Kickback Procedures, in solicitations and contracts exceeding \$200,000, other than those for commercial products or commercial services (see part 12).

## **3.503 Unreasonable restrictions on subcontractor sales.**

### **3.503-1 Policy.**

10 U.S.C. 4655 and 41 U.S.C. 4704 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 must 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 products or commercial services, the contracting officer must 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 must 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 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 must 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 must comply with the requirements and guidance of the conflicts of interest subpart in part 9 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.**

This subpart prescribes Governmentwide policies and procedures for exercising discretionary authority to declare void and rescind contracts.

### **3.701 Purpose.**

This subpart provides—

(a) An administrative remedy with respect to contracts in relation to which there has been—

(1) A final conviction for bribery, conflict of interest, disclosure or receipt of contractor bid or proposal information or source selection information in exchange for a thing of value or to give anyone a competitive advantage in the award of a Federal agency procurement contract, or similar misconduct; or

(2) An agency head determination that contractor bid or proposal information or source selection information has been disclosed or received in exchange for a thing of value, or for the purpose of obtaining or giving anyone a competitive advantage in the award of a Federal agency procurement contract; and

(b) A method to 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, for which sentence has been imposed.

### **3.703 Authority.**

(a) Section 1(e) of Pub. L. 87-849, 18 U.S.C. 218 (*the Act*), gives the President or the heads of executive agencies acting under regulations prescribed by the President, the power to declare void and rescind contracts and other transactions listed in the Act. This applies when 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.

(b) 41 U.S.C. 2105(c) requires Federal agencies, upon receiving information that a contractor or person has violated 41 U.S.C. 2102, to consider rescinding a contract when-

(1) The contractor or someone acting for the contractor has been convicted of an offense punishable under 41 U.S.C. 2105(a) ; or

(2) The agency head, or designee, has determined, based on a preponderance of the evidence, that the contractor or someone acting for the contractor has engaged in conduct constituting such an offense.

### **3.704 Policy.**

(a) In cases with a final conviction for any violation of 18 U.S.C. 201-224 involving or relating to agency-awarded contracts, the agency head or designee must consider the

available facts. If appropriate, they must declare contracts void and rescind them, and recover the amounts spent and property transferred by the agency according to the policies and procedures in this subpart.

(b) A final conviction under 18 U.S.C. 201-224 relating to a contract may also indicate the party is not presently responsible. The agency should consider starting debarment proceedings according to part 9, if debarment has not already begun or is not in effect when the final conviction occurs.

(c) If there is a final conviction for an offense punishable under 41 U.S.C. 2105, or if the agency head or designee has determined, based on a preponderance of the evidence, that the contractor or someone acting for the contractor has engaged in such conduct, then the head of the contracting activity must consider, in addition to any other penalty prescribed by law or regulation—

(1) Declaring contracts void and rescinding them, as appropriate, and recovering the amounts spent under the contracts by using the procedures at 3.705 (see 3.104-7) ; and

(2) Recommending the initiation of suspension or debarment proceedings according to part 9.

### **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 must be reported promptly to the agency head or designee for consideration. The agency head or designee must promptly notify the Civil Division, Department of Justice, that an 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 must be as informal as is practicable, consistent with the principles of fundamental fairness. At a minimum, agencies must provide the following:

(1) A notice of the proposed action to declare void and rescind the contract must be made in writing.

(2) A thirty calendar day period after receipt of the notice, for the contractor to submit pertinent information before any final decision is made.

(3) Upon request made within the period for submission of pertinent information, an opportunity must be afforded for a hearing at which witnesses may be presented, and any

witness the agency presents may be confronted. However, no inquiry may be made regarding the validity of a conviction.

(4) If the agency head or designee decides to declare void and rescind the contracts involved, that official must 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 the proposed action, at a minimum must—

(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 offense or 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 must be held at which witnesses may be presented and any witness the agency presents may be confronted; and

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

(e) *Final agency decision.* The agency head or designee must base the final decision on all available information, and any relevant information submitted in writing or presented during a hearing. If the agency decision declares void and rescinds the contract, the final decision must 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 must be sent promptly by certified mail, return receipt requested. When contracts are rescinded under the Act's authority and the agency head demands recovery of amounts expended and property transferred, this is not considered a claim under 41 U.S.C. chapter 71, Contract Disputes or part 33. Therefore, the procedures



required by the statute and the FAR for the issuance of a final contracting officer decision are not applicable to final agency decisions under this subpart and must not be followed.

## **Subpart 3.8 - Limitations on the Payment of Funds to Influence Federal Transactions**

### **3.800 Scope of subpart.**

This subpart prescribes policies and procedures implementing 31 U.S.C. 1352, "Limitation on use of appropriated funds to influence certain Federal contracting and financial transactions."

### **3.801 Definitions.**

As used in this subpart-

*Agency* means executive agency as defined in 2.101.

*Covered Federal action* means any of the following actions:

- (1) Awarding any Federal contract.
- (2) Making any Federal grant.
- (3) Making any Federal loan.
- (4) Entering into any cooperative agreement.
- (5) Extending, continuing, renewing, amending, or modifying any Federal contract, grant, loan, or cooperative agreement.

*Indian tribe* and "tribal organization" 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* 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* 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* includes the following individuals who are employed by an agency:

- (1) An individual who is appointed to a position in the Government under Title 5, United States Code, including a position under a temporary appointment.
- (2) A member of the uniformed services, as defined in subsection 101(3), Title 37, United States Code.
- (3) A special Government employee, as defined in section 202, Title 18, United States Code.
- (4) An individual who is a member of a Federal advisory committee, as defined by the Federal Advisory Committee Act, Title 5, United States Code, appendix 2.

*Person* 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 eligible to receive Federal contracts, grants, cooperative agreements, or loans from an agency, but only with respect to expenditures by such tribe or organization that are made for purposes specified in paragraph 3.802(a) and are permitted by other Federal law.

*Reasonable compensation* 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* 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* includes the contractor and all subcontractors. This term excludes an Indian tribe, tribal organization, or any other Indian organization eligible to receive Federal contracts, grants, cooperative agreements, or loans from an agency, but only with respect to expenditures by such tribe or organization that are made for purposes specified in paragraph 3.802(a) and are permitted by other Federal law.

*Regularly employed* 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* means a State of the United States, the District of Columbia, an outlying area 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 Statutory prohibition and requirement.**

(a) 31 U.S.C. 1352 prohibits recipients of Federal contracts, grants, loans, or cooperative agreements from using appropriated funds to pay any person for influencing or attempting to influence an officer or employee of an agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress regarding covered Federal actions.

(1) For purposes of this subpart the term "appropriated funds" does not include profit or fee from a covered Federal action.

(2) If a person shows they have enough non-Federal appropriated funds, the Government must assume these other funds were used for any influencing activities that would be unallowable if paid for with Federal appropriated funds.

(b) 31 U.S.C. 1352 also requires offerors to submit a declaration that includes both certification and disclosure, with regular updates of the disclosure after contract award. These requirements appear 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.

### **3.803 Exceptions.**

(a) The prohibition of paragraph 3.802(a) does not apply under the following conditions:

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

(i) Payment of reasonable compensation made to an officer or employee of a person requesting or receiving a covered Federal action is permitted when the payment is for agency and legislative liaison activities not directly related to a covered Federal action. Providing any information specifically requested by an agency or Congress is permitted at any time.

(ii) Participating with an agency in discussions unrelated to a specific solicitation for any covered Federal action, is permitted when discussions concern-

(A) The qualities and characteristics (including demonstrations) of the person's products or services, sales terms, and service capabilities; or

(B) How the person's products or services might be adapted for agency use.

(iii) Providing information not specifically requested but necessary for an agency to make an informed decision about starting a covered Federal action is permitted before formal solicitation.

(iv) Participating in technical discussions about preparing an unsolicited proposal before its official submission is permitted.

(v) Making capability presentations before formal solicitation when seeking an award under the Small Business Act, as amended by Public Law 95-507 and later amendments, is permitted.

*(2) Professional and technical services.*

(i) Reasonable compensation to an officer or employee of a person requesting or receiving a covered Federal action is permitted when payment is for professional or technical services directly related to preparing, submitting, or negotiating bids, proposals, or applications for that Federal action, or for meeting requirements imposed by or pursuant to law as a condition for receiving that Federal action.

(ii) Reasonable payment to persons who are not officers or employees of a person requesting or receiving a covered Federal action is permitted when payment is for professional or technical services directly related to preparing, submitting, or negotiating bids, proposals, or applications for that Federal action, or for meeting requirements imposed by or pursuant to law as a condition for receiving that Federal Action. These persons may include consultants and trade associations.

(iii) In this section, "professional and technical services" means advice and analysis directly applying professional or technical expertise. 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 or a technical person 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.

(iv) Requirements imposed by or pursuant to law as a condition for receiving a covered Federal action includes those in laws, regulations, and the actual award documents.

(b) Only the communications and services specifically authorized in paragraph (a) are permitted.

(c) The disclosure requirements in paragraph 3.802(b) do not apply to reasonable compensation paid to regularly employed officers of a person.

### **3.804 Policy.**

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 \$200,000.

### **3.805 Exemption.**

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

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

The contracting officer must report suspected violations of the requirements of 31 U.S.C. 1352 in accordance with agency procedures.

### **3.807 Civil penalties.**

Agencies must impose and collect civil penalties according to the Program Fraud and Civil Remedies Act, 31 U.S.C. 3803 (except subsection (c) ), 3804-3808, and 3812. These penalties apply when the Act's provisions do not conflict with the requirements of this subpart.

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

(a) Insert the provision at 52.203-11, Certification and Disclosure Regarding Payments to Influence Certain Federal Transactions, in solicitations expected to exceed \$200,000.

(b) Insert the clause at 52.203-12, Limitation on Payments to Influence Certain Federal Transactions, in solicitations and contracts expected to exceed \$200,000.

# **Subpart 3.9 - Whistleblower Protections for Contractor Employees**

## **3.900 Scope of subpart.**

This subpart implements various statutory whistleblower programs. This subpart does not implement 10 U.S.C. 4701, which is applicable only to DoD, NASA, and the Coast Guard.

41 U.S.C. 4712 is implemented in 3.900 through 3.906. These sections do not apply to—

(1) DoD, NASA, and the Coast Guard; or

(2) Any element of the intelligence community, as defined in section 3(4) of the National Security Act of 1947 (50 U.S.C. 3003(4)). Sections 3.900 through 3.906 do not apply to any disclosure made by an employee of a contractor or subcontractor of an element of the intelligence community if such disclosure—

(i) Relates to an activity of an element of the intelligence community; or

(ii) Was discovered during contract or subcontract services provided to an element of the intelligence community.

(b) Section 743 of Division E, Title VII, of the Consolidated and Further Continuing Appropriations Act, 2015 (Pub. L. 113-235) and its successor provisions in subsequent appropriations acts (and as extended in continuing resolutions), is implemented in 3.909, which is applicable to all agencies.

## **3.901 Definitions.**

As used in this subpart-

*Abuse of authority* means an arbitrary and capricious exercise of authority that is inconsistent with the mission of the executive agency concerned or the successful performance of a contract of such agency.

*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 chapter 4 of title 5 of the United States Code and any Inspector General that receives funding from, or has oversight over contracts awarded for, or on behalf of, the executive agency concerned. This definition does not apply to 3.907.

*Internal confidentiality agreement or statement* means a confidentiality agreement or any other written statement that the contractor requires any of its employees or subcontractors

to sign regarding nondisclosure of contractor information, except that it does not include confidentiality agreements arising out of civil litigation or confidentiality agreements that contractor employees or subcontractors sign at the behest of a Federal agency.

*Subcontract* means any contract as defined in subpart 2.1 entered into by a subcontractor to furnish supplies or services for performance of a prime contract or a subcontract. It includes but is not limited to purchase orders, and changes and modifications to purchase orders.

*Subcontractor* means any supplier, distributor, vendor, or firm (including a consultant) that furnishes supplies or services to or for a prime contractor or another subcontractor.

### **3.902 Classified information.**

41 U.S.C. 4712 does not provide any right to disclose classified information not otherwise provided by law.

### **3.903 Policy.**

(a)

(1) Contractors and subcontractors are prohibited from discharging, demoting, or otherwise discriminating against an employee as a reprisal for disclosing, to any of the entities listed at paragraph (b) of this section, information that the employee reasonably believes is—

(i) Evidence of gross mismanagement of a Federal contract;

(ii) A gross waste of Federal funds;

(iii) An abuse of authority relating to a Federal contract;

(iv) A substantial and specific danger to public health or safety; or

(v) A violation of law, rule, or regulation related to a Federal contract (including the competition for or negotiation of a contract).

(2) A reprisal is prohibited even when requested by an executive branch official, unless the request takes the form of a non-discretionary directive and is within the authority of the executive branch official making the request.

(b) Disclosure may be made to the following entities:

(1) A Member of Congress or a representative of a committee of Congress.

(2) An Inspector General.

(3) The Government Accountability Office.

(4) A Federal employee responsible for contract oversight or management at the relevant agency.

(5) An authorized official of the Department of Justice or other law enforcement agency.

(6) A court or grand jury.

(7) A management official or other employee of the contractor or subcontractor who has the responsibility to investigate, discover, or address misconduct.

(c) An employee who initiates or provides evidence of contractor or subcontractor misconduct in any judicial or administrative proceeding relating to waste, fraud, or abuse on a Federal contract must be deemed to have made a disclosure.

### **3.904 Complaints.**

#### **3.904-1 Procedures for filing complaints.**

A contractor or subcontractor employee who believes that he or she has been discharged, demoted, or otherwise discriminated against contrary to the policy in 3.903 may submit a complaint with the Inspector General of the agency concerned. Procedures for submitting fraud, waste, abuse, and whistleblower complaints are generally accessible on agency Office of Inspector General hotline or whistleblower internet sites or the complainant may directly contact the cognizant Office of the Inspector General for submission instructions. A complaint under 41 U.S.C. 4712 must be filed within three years from the date on which the alleged reprisal occurred.

#### **3.904-2 Procedures for investigating complaints.**

(a) Investigation of complaints will be conducted according to 41 U.S.C. 4712(b).

(b) After the investigation is complete, the head of the agency must ensure the Inspector General provides the report of findings to-

(1) The head of the agency;

(2) The complainant and any person acting on the complainant's behalf; and

(3) The contractor and/or subcontractor alleged to have committed the violation.

(c) The complainant, contractor, and/or subcontractor must have the opportunity to submit a written response to the report of findings. This response must be submitted to the head of the agency and the Office of Inspector General within a timeframe set by the agency that allows the agency head to take action within 30 days after receiving the report, as required by 3.905-1(a).



## **3.905 Remedies and enforcement of orders.**

### **3.905-1 Remedies.**

(a) *Agency response to Inspector General report.* Not later than 30 days after receiving a report pursuant to 3.904-2, the head of the agency shall—

(1) Determine whether sufficient basis exists to conclude that the contractor or subcontractor has subjected the employee who submitted the complaint to a reprisal as prohibited by 3.903; and

(2) Either issue an order denying relief or take one or more of the following actions:

(i) Order the contractor or subcontractor to take affirmative action to abate the reprisal.

(ii) Order the contractor or subcontractor to reinstate the complainant employee to their previous position, with compensatory damages (including back pay), employment benefits, and other terms and conditions of employment that would apply if the reprisal had not occurred.

(iii) Order the contractor or subcontractor to pay the complainant employee an amount equal to all costs and expenses (including attorneys' fees and expert witnesses' fees) reasonably incurred by the complainant for, or in connection with, bringing the complaint regarding the reprisal, as determined by the head of the agency.

(iv) Consider disciplinary or corrective action against any executive agency official, if appropriate.

(b) *Complainant's right to go to court.*

(1) Paragraph (b) (2) of this section applies if-

(i) The head of the agency issues an order denying relief; or

(ii)

(A) The head of the agency has not issued an order-

(1) Within 210 days after the submission of the complaint; or

(2) Within 30 days after the expiration of an extension of time granted in accordance with 41 U.S.C. 4712(b) (2) (B) for the submission of the report to those stated in 3.904-2(b) ; and

(B) There is no showing that such delay is due to the bad faith of the complainant.

(2) If the conditions in either paragraph (b) (1) (i) or (ii) of this section are met:

(i) The complainant must be deemed to have exhausted all administrative remedies with respect to the complaint; and

(ii) The complainant may bring a *de novo* action at law or equity against the contractor or subcontractor to seek compensatory damages and other relief available under 41 U.S.C. 4712 in the appropriate U.S. district court, which has jurisdiction regardless of the amount in controversy.

(A) Such an action must, at the request of either party to the action, be tried by the court with a jury.

(B) An action under this authority may not be brought more than 2 years after the date on which remedies are deemed to have been exhausted.

(c) *Admissibility in evidence.* An Inspector General determination and an agency head order denying relief under this section must be admissible in evidence in any *de novo* action at law or equity brought pursuant to 41 U.S.C. 4712.

(d) *No waiver.* The rights and remedies provided for in 41 U.S.C. 4712 may not be waived by any agreement, policy, form, or condition of employment.

### **3.905-2 Enforcement of orders.**

(a) When a contractor or subcontractor fails to comply with an order issued under 3.905-1(a) (2), the head of the agency concerned must file an action to enforce the order in the U.S. district court for the district where the reprisal occurred. In any action brought under this authority, the court may grant appropriate relief, including injunctive relief, compensatory and exemplary damages, and attorney fees and costs. The complainant employee upon whose behalf an order was issued may also file such an action or join an action filed by the head of the agency.

(b) Any person adversely affected or aggrieved by an order issued under 3.905-1(a) (2) may seek review of the order's compliance with 41 U.S.C. 4712 and its implementing regulations in the U.S. court of appeals for the circuit where the reprisal is alleged to have occurred. The petition for review must be filed within 60 days after the head of the agency issues the order. Filing such an appeal does not stop enforcement of the agency head's order unless the court specifically grants a stay.

### **3.906 Contract clause.**

The contracting officer must insert the clause at 52.203-17, Contractor Employee Whistleblower Rights, in all solicitations and contracts, except solicitations and contracts of DoD, NASA, the Coast Guard, or applicable elements of the intelligence community (see 3.900(a) ).

### **3.907 [Reserved]**

### **3.908 [Reserved]**

## **3.909 Prohibition on providing funds to an entity that requires certain internal confidentiality agreements or statements.**

### **3.909-1 Prohibition.**

(a) The Government cannot use fiscal year 2015 and later fiscal year funds for contracts with entities that require employees or subcontractors to sign internal confidentiality agreements or statements that prohibit or restrict these employees or subcontractors from lawfully reporting waste, fraud, or abuse to a designated investigative or law enforcement representative of a Federal department or agency authorized to receive such information. This prohibition comes from section 743 of Division E, Title VII, of the Consolidated and Further Continuing Appropriations Act, 2015 (Pub. L. 113-235) and continues in subsequent appropriations acts (including continuing resolutions).

(b) The prohibition in paragraph (a) of this section does not conflict with requirements for Standard Form 312 (Classified Information Nondisclosure Agreement), Form 4414 (Sensitive Compartmented Information Nondisclosure Agreement), or any other Federal government form governing nondisclosure of classified information.

### **3.909-2 Representation by the offeror.**

(a) To be eligible for contract award, an offeror must represent that it will not require its employees or subcontractors to sign internal confidentiality agreements or statements that prohibit or restrict them from lawfully reporting waste, fraud, or abuse related to Government contract performance to authorized Federal investigators (such as agency Office of the Inspector General). Any offeror that does not make this representation is ineligible for contract award.

(b) The contracting officer may rely on an offeror's representation unless there is reason to question it.

### **3.909-3 Solicitation provision and contract clause.**

When using funding subject to the prohibitions in 3.909-1(a), the contracting officer must:

(a)

(1) Include provision 52.203-18, Prohibition on Contracting with Entities that Require Certain Internal Confidentiality Agreements or Statements—Representation, in all solicitations, except as provided in paragraph (a) (2) of this section; and

(2) Not insert the provision in solicitations for personal services contracts with individuals if the individual will perform all services personally (rather than through contractor or subcontractor employees).

(b)

(1) Include clause 52.203-19, Prohibition on Requiring Certain Internal Confidentiality Agreements or Statements, in all solicitations and resulting contracts, other than personal services contracts with individuals.

(2) Modify existing contracts, other than personal services contracts with individuals, to include the clause before obligating FY 2015 or later funds that are subject to the same prohibition on internal confidentiality agreements or statements.

## **Subpart 3.10 - Contractor Code of Business Ethics and Conduct**

### **3.1000 Scope of subpart.**

This subpart—

(a) Implements 41 U.S.C. 3509, Notification of Violations of Federal Criminal Law or Overpayments; and

(b) Prescribes policies and procedures for the establishment of contractor codes of business ethics and conduct, and display of agency Office of Inspector General (OIG) fraud hotline posters.

### **3.1001 Definitions.**

As used in this subpart-

*Subcontract* means any contract entered into by a subcontractor to furnish supplies or services for performance of a prime contract or a subcontract.

*Subcontractor* means any supplier, distributor, vendor, or firm that furnished supplies or services to or for a prime contractor or another subcontractor.

*United States* means the 50 States, the District of Columbia, and outlying areas.

### **3.1002 Policy.**

(a) Government contractors must conduct themselves with the highest degree of integrity and honesty.

(b) Contractors should have a written code of business ethics and conduct. To promote compliance with such code of business ethics and conduct, contractors should have an employee business ethics and compliance training program and an internal control system that—

(1) Are suitable to the size of the company and extent of its involvement in Government contracting;

(2) Facilitate timely discovery and disclosure of improper conduct in connection with Government contracts; and

(3) Ensure corrective measures are promptly instituted and carried out.

### **3.1003 Requirements.**

(a) *Contractor requirements.*

(1) Although the policy at 3.1002 provides guidance for all Government contractors, the contract clauses at 52.203-13, Contractor Code of Business Ethics and Conduct, and 52.203-14, Display of Hotline Poster(s), become mandatory when contracts meet the conditions specified in 3.1004.

(2) A contractor may be suspended and/or debarred if a principal knowingly fails to promptly disclose to the Government credible evidence of Federal criminal law violations involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code, or Civil False Claims Act violations. This disclosure requirement applies whether or not clause 52.203-13 is applicable. Failure to timely disclose credible evidence of such violations remains grounds for suspension and/or debarment until 3 years after final contract payment (see part 9).

(3) The Payment clauses at FAR 52.212-4(i) (5), 52.232-25(d), 52.232-26(c), and 52.232-27(l) require contractors to return any contract financing or invoice overpayments they discover to the Government. A contractor may be suspended and/or debarred if a principal knowingly fails to timely disclose credible evidence of a significant overpayment, except for overpayments resulting from contract financing payments as defined in 32.001 (see part 9)

(b) *Notification of possible contractor violation.* If the contracting officer learns of a possible contractor violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 U.S.C., or a violation of the civil False Claims Act, the contracting officer must:

(1) Coordinate the matter with the agency Office of the Inspector General; or

(2) Take action according to agency procedures.

(c) *Fraud Hotline Poster.*

(1) Agency Offices of Inspector General (OIGs) determine the need for and content of their respective agency OIG fraud hotline poster(s).

(2) When requested by the Department of Homeland Security, agencies must ensure that contracts funded with disaster assistance funds require display of applicable fraud hotline posters. As established by the agency OIG, these posters may be displayed instead of, or in addition to, the agency's standard poster.

### **3.1004 Contract clauses.**

(a) Insert the clause at FAR 52.203-13, Contractor Code of Business Ethics and Conduct, in solicitations and contracts if the value of the contract is expected to exceed \$7.5 million and the performance period is 120 days or more.

(b)

(1) Unless the contract is for the acquisition of a commercial product or commercial service or will be performed entirely outside the United States, insert the clause at 52.203-14, Display of Hotline Poster(s), if—

(i) The contract exceeds \$7.5 million or a lesser amount established by the agency; and

(ii)

(A) The agency has a fraud hotline poster; or

(B) The contract is funded with disaster assistance funds.

(2) In paragraph (b) (3) of the clause, the contracting officer shall—

(i) Identify the applicable posters; and

(ii) Insert the website link(s) or other contact information for obtaining the agency and/or Department of Homeland Security poster.

(3) In paragraph (d) of the clause, if the agency has established policies and procedures for display of the OIG fraud hotline poster at a lesser amount, the contracting officer shall replace “\$7.5 million” with the lesser amount that the agency has established.

# **Subpart 3.11 - Preventing Personal Conflicts of Interest for Contractor Employees Performing Acquisition Functions**

## **3.1100 Scope of subpart.**

This subpart implements policy on personal conflicts of interest by employees of Government contractors as required by 41 U.S.C. 2303.

## **3.1101 Definitions.**

As used in this subpart-

*Acquisition function closely associated with inherently governmental functions* means supporting or providing advice or recommendations with regard to the following activities of a Federal agency:

- (1) Planning acquisitions.
  - (2) Determining what supplies or services are to be acquired by the Government, including developing statements of work.
  - (3) Developing or approving any contractual documents, to include documents defining requirements, incentive plans, and evaluation criteria.
  - (4) Evaluating contract proposals.
  - (5) Awarding Government contracts.
  - (6) Administering contracts (including ordering changes or giving technical direction in contract performance or contract quantities, evaluating contractor performance, and accepting or rejecting contractor products or services).
  - (7) Terminating contracts.
  - (8) Determining whether contract costs are reasonable, allocable, and allowable.
- (a) *Covered employee* means an individual who performs an acquisition function closely associated with inherently governmental functions and is-
- (1) An employee of the contractor; or
  - (2) A subcontractor that is a self-employed individual treated as a covered employee of the contractor because there is no employer to whom such an individual could submit the required disclosures.

*Personal conflict of interest* means a situation in which a covered employee has a financial interest, personal activity, or relationship that could impair the employee's ability to act impartially and in the best interest of the Government when performing under the contract. (A *de minimis* interest that would not "impair the employee's ability to act impartially and in the best interest of the Government" is not covered under this definition.)

(a)

(1) Among the sources of personal conflicts of interest are-

(i) Financial interests of the covered employee, of close family members, or of other members of the covered employee's household;

(ii) Other employment or financial relationships (including seeking or negotiating for prospective employment or business) ; and

(iii) Gifts, including travel.

(2) For example, financial interests referred to in paragraph (1) of this definition may arise from-

(i) Compensation, including wages, salaries, commissions, professional fees, or fees for business referrals;

(ii) Consulting relationships (including commercial and professional consulting and service arrangements, scientific and technical advisory board memberships, or serving as an expert witness in litigation) ;

(iii) Services provided in exchange for honorariums or travel expense reimbursements;

(iv) Research funding or other forms of research support;

(v) Investment in the form of stock or bond ownership or partnership interest (excluding diversified mutual fund investments) ;

(vi) Real estate investments;

(vii) Patents, copyrights, and other intellectual property interests; or

(viii) Business ownership and investment interests.

### **3.1102 Policy.**

The Government's policy is to require contractors to—

(a) Identify and prevent personal conflicts of interest of their covered employees; and



(b) Prohibit covered employees who have access to non-public information by reason of performance on a Government contract from using such information for personal gain.

### **3.1103 Procedures.**

(a) By use of the contract clause at 52.203-16, as prescribed at 3.1106, the contracting officer must require each contractor whose employees perform acquisition functions closely associated with inherently Government functions to—

(1) Have procedures in place to screen covered employees for potential personal conflicts of interest by—

(i) Obtaining and maintaining from each covered employee, when the employee is initially assigned to the task under the contract, a disclosure of interests that might be affected by the task to which the employee has been assigned, as follows:

(A) Financial interests of the covered employee, of close family members, or of other members of the covered employee's household.

(B) Other employment or financial relationships of the covered employee (including seeking or negotiating for prospective employment or business).

(C) Gifts, including travel; and

(ii) Requiring each covered employee to update the disclosure statement whenever the employee's personal or financial circumstances change in such a way that a new personal conflict of interest might occur because of the task the covered employee is performing.

(2) For each covered employee—

(i) Prevent personal conflicts of interest, including not assigning or allowing a covered employee to perform any task under the contract for which the Contractor has identified a personal conflict of interest that cannot be satisfactorily prevented or reduced in consultation with the contracting agency;

(ii) Prohibit use of non-public information (information not available to the public) accessed through Government contract work for personal gain; and

(iii) Obtain a signed non-disclosure agreement to prohibit disclosure of non-public information accessed through performance of a Government contract.

(3) Inform covered employees of their obligation—

(i) To disclose and prevent personal conflicts of interest;

(ii) Not to use non-public information accessed through performance of a Government contract for personal gain; and

- (iii) To avoid even the appearance of personal conflicts of interest;
- (4) Maintain effective oversight to verify compliance with personal conflict-of-interest safeguards;
- (5) Take appropriate disciplinary action when covered employees fail to comply with policies established pursuant to this section; and
- (6) Report any personal conflict-of-interest violation by a covered employee to the contracting officer as soon as identified. This report must include—
  - (i) A description of the violation;
  - (ii) The proposed actions the contractor will take in response to the violation; and
  - (iii) Follow-up reports of corrective actions taken, as necessary.
- (b) If a contractor reports a personal conflict-of-interest violation by a covered employee to the contracting officer according to paragraph (b) (6) of clause 52.203-16, Preventing Personal Conflicts of Interest, the contracting officer must—
  - (1) Review the actions taken by the contractor;
  - (2) Determine whether the contractor's actions have resolved the violation satisfactorily; and
  - (3) Take any appropriate action in consultation with agency legal counsel if the contracting officer determines that the contractor has not resolved the violation satisfactorily.

### **3.1104 Mitigation or waiver.**

- (a) In exceptional circumstances, if the contractor cannot satisfactorily prevent a personal conflict of interest as required by paragraph (b) (2) (i) of the clause at 52.203-16, Preventing Personal Conflicts of Interest, the contractor may submit a request, through the contracting officer asking the head of the contracting activity to—
  - (1) Agree to a plan to mitigate the personal conflict of interest; or
  - (2) Waive the requirement to prevent personal conflicts of interest.
- (b) If the head of the contracting activity determines in writing that such action is in the best interest of the Government, the head of the contracting activity may impose conditions that provide mitigation of a personal conflict of interest or grant a waiver.
- (c) This authority shall not be redelegated.

### **3.1105 Violations.**

If the contracting officer suspects violation by the contractor of a requirement of paragraph (b), (c) (3), or (d) of the clause at 52.203-16, Preventing Personal Conflicts of Interest, the contracting officer must contact the agency legal counsel for advice and/or recommendations on a course of action.

### **3.1106 Contract clause.**

(a) Insert the clause at 52.203-16, Preventing Personal Conflicts of Interest, in solicitations and contracts that—

(1) Exceed the simplified acquisition threshold; and

(2) Include a requirement for services by contractor employee(s) that involve performance of acquisition functions closely associated with inherently governmental functions for, or on behalf of, a Federal agency or department.

(b) If only a portion of a contract involves the performance of acquisition functions closely associated with inherently governmental functions, the contracting officer must still insert the clause but must limit the clause's applicability to only that portion of the contract that involves such services.

(c) Do not insert the clause in solicitations or contracts with a self-employed individual if the acquisition functions closely associated with inherently governmental functions are to be performed entirely by the self-employed individual, rather than an employee of the contractor.

# Part 52 - Solicitation Provisions and Contract Clauses

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## 52.203 [Reserved]

### 52.203-1 [Reserved]

### 52.203-2 Certificate of Independent Price Determination.

As prescribed in 3.103-1, insert the following provision. If the solicitation is a Request for Quotations, the terms "Quotation" and "Quoter" may be substituted for "Offer" and "Offeror."

Certificate of Independent Price Determination (Apr 1985)

(a) The offeror certifies that-

(1) The prices in this offer have been arrived at independently, without, for the purpose of restricting competition, any consultation, communication, or agreement with any other offeror or competitor relating to-

(i) Those prices;

(ii) The intention to submit an offer; or

(iii) The methods or factors used to calculate the prices offered.

(2) The prices in this offer have not been and will not be knowingly disclosed by the offeror, directly or indirectly, to any other offeror or competitor before bid opening (in the case of a sealed bid solicitation) or contract award (in the case of a negotiated solicitation) unless otherwise required by law; and

(3) No attempt has been made or will be made by the offeror to induce any other concern to submit or not to submit an offer for the purpose of restricting competition.

(b) Each signature on the offer is considered to be a certification by the signatory that the signatory-

(1) Is the person in the offeror's organization responsible for determining the prices being offered in this bid or proposal, and that the signatory has not participated and will not participate in any action contrary to paragraphs (a)(1) through (a)(3) of this provision; or

(2) (i) Has been authorized, in writing, to act as agent for the following principals in certifying that those principals have not participated, and will not participate in any action contrary to paragraphs (a)(1) through (a)(3) of this provision *[insert full name of person(s) in the offeror's organization responsible for determining the prices offered in this bid or proposal, and the title of his or her position in the offeror's organization]*;

(ii) As an authorized agent, does certify that the principals named in subdivision (b)(2)(i) of this provision have not participated, and will not participate, in any action contrary to paragraphs (a)(1) through (a)(3) of this provision; and

(iii) As an agent, has not personally participated, and will not participate, in any action contrary to paragraphs (a)(1) through (a)(3) of this provision.

(c) If the offeror deletes or modifies subparagraph (a)(2) above, the offeror must furnish with its offer a signed statement setting forth in detail the circumstances of the disclosure.

(End of provision)

### **52.203-3 Gratuities.**

As prescribed in 3.202, insert the following clause:

Gratuities (Apr 1984)

(a) The right of the Contractor to proceed may be terminated by written notice if, after notice and hearing, the agency head or a designee determines that the Contractor, its agent, or another representative-

(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.

(b) The facts supporting this determination may be reviewed by any court having lawful jurisdiction.

(c) If this contract is terminated under paragraph (a) of this clause, the Government is entitled-

(1) To pursue the same remedies as in a breach of the contract; and

(2) In addition to any other damages provided by law, to exemplary damages of not less than 3 nor more than 10 times the cost incurred by the Contractor in giving gratuities to the person concerned, as determined by the agency head or a designee. (This paragraph (c)(2) is applicable only if this contract uses money appropriated to the Department of Defense.)

(d) The rights and remedies of the Government provided in this clause shall not be exclusive and are in addition to any other rights and remedies provided by law or under this contract.

(End of clause)

## **52.203-4 [Reserved]**

### **52.203-5 Covenant Against Contingent Fees.**

As prescribed in 3.404, insert the following clause:

Covenant Against Contingent Fees (May 2014)

(a) The Contractor warrants that no person or agency has been employed or retained to solicit or obtain this contract upon an agreement or understanding for a contingent fee, except a bona fide employee or agency. For breach or violation of this warranty, the Government shall have the right to annul this contract without liability or, to deduct from the contract price or consideration, or otherwise recover, the full amount of the contingent fee.

(b) "Bona fide agency," as used in this clause, 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 clause, 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 clause, 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 clause, 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.

(End of clause)

### **52.203-6 Restrictions on Subcontractor Sales to the Government.**

As prescribed in 3.503-2, insert the following clause:

## Restrictions on Subcontractor Sales to the Government (Jun 2020)

(a) Except as provided in (b) of this clause, the Contractor shall not enter into any agreement with an actual or prospective subcontractor, nor otherwise act in any manner, which has or may have the effect of restricting sales by such subcontractors directly to the Government of any item or process (including computer software) made or furnished by the subcontractor under this contract or under any follow-on production contract.

(b) The prohibition in (a) of this clause does not preclude the Contractor from asserting rights that are otherwise authorized by law or regulation.

(c) The Contractor agrees to incorporate the substance of this clause, including this paragraph (c), in all subcontracts under this contract which exceed the simplified acquisition threshold, as defined in Federal Acquisition Regulation 2.101 on the date of subcontract award.

(End of clause)

*Alternate I* (Nov 2021). As prescribed in 3.503-2, substitute the following paragraph in place of paragraph (b) of the basic clause:

(b) The prohibition in paragraph (a) of this clause does not preclude the Contractor from asserting rights that are otherwise authorized by law or regulation. For acquisitions of commercial products or commercial services, the prohibition in paragraph (a) applies only to the extent that any agreement restricting sales by subcontractors results in the Federal Government being treated differently from any other prospective purchaser for the sale of the commercial product(s) and commercial service(s).

## **52.203-7 Anti-Kickback Procedures.**

As prescribed in 3.502-3, insert the following clause:

### Anti-Kickback Procedures (Jun 2020)

(a) *Definitions.*

*Kickback*, as used in this clause, means any money, fee, commission, credit, gift, gratuity, thing of value, or compensation of any kind which is provided 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 clause, means a corporation, partnership, business association of any kind, trust, joint-stock company, or individual.

*Prime contract*, as used in this clause, 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 clause, means a person who has entered into a prime contract with the United States.

*Prime Contractor employee*, as used in this clause, means any officer, partner, employee, or agent of a prime Contractor.

*Subcontract*, as used in this clause, 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 clause, (1) 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 (2) includes any person who offers to furnish or furnishes general supplies to the prime Contractor or a higher tier subcontractor.

*Subcontractor employee*, as used in this clause, means any officer, partner, employee, or agent of a subcontractor.

(b) [41 U.S.C. chapter 87](#), Kickbacks, prohibits any person from-

- (1) Providing or 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 prime Contractor to the United States or in the contract price charged by a subcontractor to a prime Contractor or higher tier subcontractor.

(a) (1) The Contractor shall have in place and follow reasonable procedures designed to prevent and detect possible violations described in paragraph (b) of this clause in its own operations and direct business relationships.

(2) When the Contractor has reasonable grounds to believe that a violation described in paragraph (b) of this clause may have occurred, the Contractor shall promptly report in writing the possible violation. Such reports shall be made 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 Attorney General.

(3) The Contractor shall cooperate fully with any Federal agency investigating a possible violation described in paragraph (b) of this clause.



(4) The Contracting Officer may (i) offset the amount of the kickback against any monies owed by the United States under the prime contract and/or (ii) direct that the Prime Contractor withhold from sums owed a subcontractor under the prime contract the amount of the kickback. The Contracting Officer may order that monies withheld under subdivision (c)(4)(ii) of this clause be paid over to the Government

unless the Government has already offset those monies under subdivision (c)(4)(i) of this clause. In either case, the Prime Contractor shall notify the Contracting Officer when the monies are withheld.

(5) The Contractor agrees to incorporate the substance of this clause, including this paragraph (c)(5) but excepting paragraph (c)(1) of this clause, in all subcontracts under this contract that exceed the threshold specified in Federal Acquisition Regulation 3.502-2(i) on the date of subcontract award.

(End of clause)

## **52.203-8 Cancellation, Rescission, and Recovery of Funds for Illegal or Improper Activity.**

As prescribed in 3.104-9(a), insert the following clause:

Cancellation, Rescission, and Recovery of Funds for Illegal or Improper Activity (May 2014)

(a) If the Government receives information that a contractor or a person has violated [41 U.S.C. 2102-2104](#), Restrictions on Obtaining and Disclosing Certain Information, the Government may-

(1) Cancel the solicitation, if the contract has not yet been awarded or issued; or

(2) Rescind the contract with respect to which-

(i) The Contractor or someone acting for the Contractor has been convicted for an offense where the conduct violates [41 U.S.C.2102](#) for the purpose of either-

(A) Exchanging the information covered by such subsections for anything of value; or

(B) Obtaining or giving anyone a competitive advantage in the award of a Federal agency procurement contract; or

(ii) The head of the contracting activity has determined, based upon a preponderance of the evidence, that the Contractor or someone acting for the Contractor has engaged in conduct punishable under [41 U.S.C. 2105\(a\)](#).

(b) If the Government rescinds the contract under paragraph (a) of this clause, the Government is entitled to recover, in addition to any penalty prescribed by law, the amount expended under the contract.

(c) The rights and remedies of the Government specified herein are not exclusive, and are in addition to any other rights and remedies provided by law, regulation, or under this contract.

(End of clause)

## **52.203-9 [Reserved]**

### **52.203-10 Price or Fee Adjustment for Illegal or Improper Activity.**

As prescribed in 3.104-9(b), insert the following clause:

Price or Fee Adjustment for Illegal or Improper Activity (May 2014)

(a) The Government, at its election, may reduce the price of a fixed-price type contract and the total cost and fee under a cost-type contract by the amount of profit or fee determined as set forth in paragraph (b) of this clause if the head of the contracting activity or designee determines that there was a violation of [41 U.S.C.2102](#) or 2103, as implemented in section 3.104 of the Federal Acquisition Regulation.

(b) The price or fee reduction referred to in paragraph (a) of this clause shall be-

(1) For cost-plus-fixed-fee contracts, the amount of the fee specified in the contract at the time of award;

(2) For cost-plus-incentive-fee contracts, the target fee specified in the contract at the time of award, notwithstanding any minimum fee or "fee floor" specified in the contract;

(3) For cost-plus-award-fee contracts-

(i) The base fee established in the contract at the time of contract award;

(ii) If no base fee is specified in the contract, 30 percent of the amount of each award fee otherwise payable to the Contractor for each award fee evaluation period or at each award fee determination point.

(4) For fixed-price-incentive contracts, the Government may-

(i) Reduce the contract target price and contract target profit both by an amount equal to the initial target profit specified in the contract at the time of contract award; or

(ii) If an immediate adjustment to the contract target price and contract target profit would have a significant adverse impact on the incentive price revision relationship under

the contract, or adversely affect the contract financing provisions, the Contracting Officer may defer such adjustment until establishment of the total final price of the contract. The total final price established in accordance with the incentive price revision provisions of the contract shall be reduced by an amount equal to the initial target profit specified in the contract at the time of contract award and such reduced price shall be the total final contract price.

(5) For firm-fixed-price contracts, by 10 percent of the initial contract price or a profit amount determined by the Contracting Officer from records or documents in existence prior to the date of the contract award.

(a) The Government may, at its election, reduce a prime contractor's price or fee in accordance with the procedures of paragraph (b) of this clause for violations of the statute by its subcontractors by an amount not to exceed the amount of profit or fee reflected in the subcontract at the time the subcontract was first definitively priced.

(b) In addition to the remedies in paragraphs (a) and (c) of this clause, the Government may terminate this contract for default. The rights and remedies of the Government specified herein are not exclusive, and are in addition to any other rights and remedies provided by law or under this contract.

(End of clause)

## **52.203-11 Certification and Disclosure Regarding Payments to Influence Certain Federal Transactions.**

As prescribed in 3.808(a), insert the following provision:

Certification and Disclosure Regarding Payments to Influence Certain Federal Transactions  
(Sep  
2024)

(a) *Definitions.* As used in this provision-"Lobbying contact" has the meaning provided at [2 U.S.C. 1602\(8\)](#). The terms "agency," "influencing or attempting to influence," "officer or employee of an agency," "person," "reasonable compensation," and "regularly employed" are defined in the FAR clause of this solicitation entitled "Limitation on Payments to Influence Certain Federal Transactions" (52.203-12).

(b) *Prohibition.* The prohibition and exceptions contained in the FAR clause of this solicitation entitled "Limitation on Payments to Influence Certain Federal Transactions" (52.203-12) are hereby incorporated by reference in this provision.

(c) *Certification.* The offeror, by signing its offer, hereby certifies to the best of its knowledge and belief that no Federal appropriated funds 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 on its behalf in connection with the awarding of this contract.

(d) *Disclosure.* If any registrants under the Lobbying Disclosure Act of 1995 have made a lobbying contact on behalf of the offeror with respect to this contract, the offeror shall complete and submit, with its offer, OMB Standard Form LLL, Disclosure of Lobbying Activities, to provide the name of the registrants. The offeror need not report regularly employed officers or employees of the offeror to whom payments of reasonable compensation were made.

(e) *Penalty.* Submission of this certification and disclosure is a prerequisite for making or entering into this contract imposed by [31 U.S.C. 1352](#). Any person who makes an expenditure prohibited under this provision or who fails to file or amend the disclosure required to be filed or amended by this provision, shall be subject to civil penalties as provided in [31 U.S.C. 1352](#). An imposition of a civil penalty does not prevent the Government from seeking any other remedy that may be applicable.

(End of provision)

## **52.203-12 Limitation on Payments to Influence Certain Federal Transactions.**

As prescribed in 3.808(b), insert the following clause:

Limitation on Payments to Influence Certain Federal Transactions (Jun 2020)

(a) *Definitions.* As used in this clause-

*Agency* means "executive agency" as defined in Federal Acquisition Regulation (FAR) 2.101.

*Covered Federal action* means any of the following actions:

- (1) Awarding any Federal contract.
- (2) Making any Federal grant.
- (3) Making any Federal loan.
- (4) Entering into any cooperative agreement.
- (5) Extending, continuing, renewing, amending, or modifying any Federal contract, grant, loan, or cooperative agreement.

*Indian tribe* and "tribal organization" 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* 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* 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* includes the following individuals who are employed by an agency:

- (1) An individual who is appointed to a position in the Government under Title 5, United States Code, including a position under a temporary appointment.
- (2) A member of the uniformed services, as defined in subsection 101(3), Title 37, United States Code.
- (3) A special Government employee, as defined in section 202, Title 18, United States Code.
- (4) An individual who is a member of a Federal advisory committee, as defined by the Federal Advisory Committee Act, Title 5, United States Code, appendix 2.

*Person* 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 eligible to receive Federal contracts, grants, cooperative agreements, or loans from an agency, but only with respect to expenditures by such tribe or organization that are made for purposes specified in paragraph (b) of this clause and are permitted by other Federal law.

*Reasonable compensation* 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* 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* includes the Contractor and all subcontractors. This term excludes an Indian tribe, tribal organization, or any other Indian organization eligible to receive Federal contracts,

grants, cooperative agreements, or loans from an agency, but only with respect to expenditures by such tribe or organization that are made for purposes specified in paragraph (b) of this clause and *are* permitted by other Federal law.

*Regularly employed* 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* means a State of the United States, the District of Columbia, or an outlying area of the United States, an agency or instrumentality of a State, and multi-State, regional, or interstate entity having governmental duties and powers.

(b) *Prohibition.* [31 U.S.C. 1352](#) 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 covered Federal actions. In accordance with [31 U.S.C. 1352](#) the Contractor shall not use 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 the award of this contract the extension, continuation, renewal, amendment, or modification of this contract.

(1) The term *appropriated funds* does not include profit or fee from a covered Federal action.

(2) To the extent the Contractor can demonstrate that the Contractor has sufficient monies, other than Federal appropriated funds, the Government will assume that these other monies were spent for any influencing activities that would be unallowable if paid for with Federal appropriated funds.

(c) *Exceptions.* The prohibition in paragraph (b) of this clause does not apply under the following conditions:

(1) *Agency and legislative liaison by Contractor employees.* (i) Payment of reasonable compensation made to an officer or employee of the Contractor if the payment is for agency and legislative liaison activities not directly related to this contract. For purposes of this

paragraph, providing any information specifically requested by an agency or Congress is permitted at any time.

(ii) Participating with an agency in discussions that are not related to a specific solicitation for any covered Federal action, but that concern-

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

(B) The application or adaptation of the person's products or services for an agency's use.

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

(iv) Participating in technical discussions regarding the preparation of an unsolicited proposal prior to its official submission; and

(v) Making capability presentations prior to formal solicitation of any covered Federal action 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.

(2) *Professional and technical services.* (i) 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.

(ii) Any reasonable payment to a person, other than 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 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.

(iii) As used in paragraph (c)(2) of this clause, "professional and technical services" are limited to advice and analysis directly applying any professional or technical discipline (for examples, see FAR 3.803(a)(2)(iii)).

(iv) 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.

(3) Only those communications and services expressly authorized by paragraphs (c)(1) and (2) of this clause are permitted.

(d) *Disclosure.* (1) If the Contractor did not submit OMB Standard Form LLL, Disclosure of Lobbying Activities, with its offer, but registrants under the Lobbying Disclosure Act of 1995 have subsequently made a lobbying contact on behalf of the Contractor with respect to this contract, the Contractor shall complete and submit OMB Standard Form LLL to provide the name of the lobbying registrants, including the individuals performing the services.

(2) If the Contractor did submit OMB Standard Form LLL disclosure pursuant to paragraph (d) of the provision at FAR 52.203-11, Certification and Disclosure Regarding Payments to Influence Certain Federal Transactions, and a change occurs that affects Block 10 of the OMB Standard Form LLL (name and address of lobbying registrant or individuals performing services), the Contractor shall, at the end of the calendar quarter in which the change occurs, submit to the Contracting Officer within 30 days an updated disclosure using OMB Standard Form LLL.

(e) *Penalties.* (1) Any person who makes an expenditure prohibited under paragraph (b) of this clause or who fails to file or amend the disclosure to be filed or amended by paragraph (d) of this clause shall be subject to civil penalties as provided for by [31 U.S.C. 1352](#). An imposition of a civil penalty does not prevent the Government from seeking any other remedy that may be applicable.

(2) Contractors may rely without liability on the representation made by their subcontractors in the certification and disclosure form.

(f) *Cost allowability.* Nothing in this clause makes allowable or reasonable any costs which would otherwise be unallowable or unreasonable. Conversely, costs made specifically unallowable by the requirements in this clause will not be made allowable under any other provision.

(g) *Subcontracts.* (1) The Contractor shall obtain a declaration, including the certification and disclosure in paragraphs (c) and (d) of the provision at 52.203-11, Certification and Disclosure Regarding Payments to Influence Certain Federal Transactions, from each person requesting or receiving a subcontract under this contract that exceeds the threshold specified in FAR 3.808 on the date of subcontract award. The Contractor or subcontractor that awards the subcontract shall retain the declaration.



(2) A copy of each subcontractor disclosure form (but not certifications) shall be forwarded from tier to tier until received by the prime Contractor. The prime Contractor shall, at the end of the calendar quarter in which the disclosure form is submitted by the subcontractor, submit to the Contracting Officer within 30 days a copy of all disclosures. Each subcontractor certification shall be retained in the subcontract file of the awarding Contractor.

(3) The Contractor shall include the substance of this clause, including this paragraph (g), in any subcontract that exceeds the threshold specified in FAR 3.808 on the date of subcontract award.

(End of clause)

## **52.203-13 Contractor Code of Business Ethics and Conduct.**

As prescribed in 3.1004(a), insert the following clause:

Contractor Code of Business Ethics and Conduct (Nov 2021)

*(a) Definitions. As used in this clause—*

*Agent* means any individual, including a director, an officer, an employee, or an independent Contractor, authorized to act on behalf of the organization.

*Full cooperation-*

(1) Means disclosure to the Government of the information sufficient for law enforcement to identify the nature and extent of the offense and the individuals responsible for the conduct. It includes providing timely and complete response to Government auditors' and investigators' request for documents and access to employees with information;

(2) Does not foreclose any Contractor rights arising in law, the FAR, or the terms of the contract. It does not require-

(i) A Contractor to waive its attorney-client privilege or the protections afforded by the attorney work product doctrine; or

(ii) Any officer, director, owner, or employee of the Contractor, including a sole proprietor, to waive his or her attorney client privilege or Fifth Amendment rights; and

(3) Does not restrict a Contractor from-

(i) Conducting an internal investigation; or

(ii) Defending a proceeding or dispute arising under the contract or related to a potential or disclosed violation.

*Principal* means an officer, director, owner, partner, or a person having primary management or supervisory responsibilities within a business entity (*e.g.*, general manager; plant manager; head of a division or business segment; and similar positions).

*Subcontract* means any contract entered into by a subcontractor to furnish supplies or services for performance of a prime contract or a subcontract.

*Subcontractor* means any supplier, distributor, vendor, or firm that furnished supplies or services to or for a prime contractor or another subcontractor.

*United States*, means the 50 States, the District of Columbia, and outlying areas.

(b) *Code of business ethics and conduct.* (1) Within 30 days after contract award, unless the Contracting Officer establishes a longer time period, the Contractor shall—

(i) Have a written code of business ethics and conduct; and

(ii) Make a copy of the code available to each employee engaged in performance of the contract.

(A) *The Contractor shall-*

(ii) Exercise due diligence to prevent and detect criminal conduct; and

(iii) Otherwise promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law.

(B) (i) The Contractor shall timely disclose, in writing, to the agency Office of the Inspector General (OIG), with a copy to the Contracting Officer, whenever, in connection with the award, performance, or closeout of this contract or any subcontract thereunder, the Contractor has credible evidence that a principal, employee, agent, or subcontractor of the Contractor has committed-

(C) A violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code; or

(D) A violation of the civil False Claims Act ([31 U.S.C. 3729-3733](#)).

(ii) The Government, to the extent permitted by law and regulation, will safeguard and treat information obtained pursuant to the Contractor's disclosure as confidential where the information has been marked "confidential" or "proprietary" by the company. To the extent permitted by law and regulation, such information will not be released by the Government to the public pursuant to a Freedom of Information Act request, [5 U.S.C. Section 552](#), without prior notification to the Contractor. The Government may transfer documents provided by the Contractor to any department or agency within the Executive Branch if the information relates to matters within the organization's jurisdiction.

(iii) If the violation relates to an order against a Governmentwide acquisition contract, a multi- agency contract, a multiple-award schedule contract such as the Federal Supply Schedule, or any other procurement instrument intended for use by multiple agencies, the Contractor shall notify the OIG of the ordering agency and the IG of the agency responsible for the basic contract.

(c) Business ethics awareness and compliance program and internal control system. This paragraph (c) does not apply if the Contractor has represented itself as a small business concern pursuant to the award of this contract or if this contract is for the acquisition of a commercial product or commercial service as defined at FAR 2.101. The Contractor shall establish the following within 90 days after contract award, unless the Contracting Officer establishes a longer time period:

(1) An ongoing business ethics awareness and compliance program.

(i) This program shall include reasonable steps to communicate periodically and in a practical manner the Contractor's standards and procedures and other aspects of the Contractor's business ethics awareness and compliance program and internal control system, by conducting effective training programs and otherwise disseminating information appropriate to an individual's respective roles and responsibilities.

(ii) The training conducted under this program shall be provided to the Contractor's principals and employees, and as appropriate, the Contractor's agents and subcontractors.

(2) An internal control system.

(i) The Contractor's internal control system shall—

(A) Establish standards and procedures to facilitate timely discovery of improper conduct in connection with Government contracts; and

(B) Ensure corrective measures are promptly instituted and carried out.

(ii) At a minimum, the Contractor's internal control system shall provide for the following:

(A) Assignment of responsibility at a sufficiently high level and adequate resources to ensure effectiveness of the business ethics awareness and compliance program and internal control system.

(B) Reasonable efforts not to include an individual as a principal, whom due diligence would have exposed as having engaged in conduct that is in conflict with the Contractor's code of business ethics and conduct.

(C) Periodic reviews of company business practices, procedures, policies, and internal controls for compliance with the Contractor's code of business ethics and conduct and the special requirements of Government contracting, including-

- (1) Monitoring and auditing to detect criminal conduct;*
  - (2) Periodic evaluation of the effectiveness of the business ethics awareness and compliance program and internal control system, especially if criminal conduct has been detected; and*
  - (3) Periodic assessment of the risk of criminal conduct, with appropriate steps to design, implement, or modify the business ethics awareness and compliance program and the internal control system as necessary to reduce the risk of criminal conduct identified through this process.*
- (A) An internal reporting mechanism, such as a hotline, which allows for anonymity or confidentiality, by which employees may report suspected instances of improper conduct, and instructions that encourage employees to make such reports.
- (B) Disciplinary action for improper conduct or for failing to take reasonable steps to prevent or detect improper conduct.
- (C) Timely disclosure, in writing, to the agency OIG, with a copy to the Contracting Officer, whenever, in connection with the award, performance, or closeout of any Government contract performed by the Contractor or a subcontract thereunder, the Contractor has credible evidence that a principal, employee, agent, or subcontractor of the Contractor has committed a violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 U.S.C. or a violation of the civil False Claims Act ([31 U.S.C. 3729-3733](#)).
- (1) If a violation relates to more than one Government contract, the Contractor may make the disclosure to the agency OIG and Contracting Officer responsible for the largest dollar value contract impacted by the violation.*
  - (2) If the violation relates to an order against a Governmentwide acquisition contract, a multi-agency contract, a multiple-award schedule contract such as the Federal Supply Schedule, or any other procurement instrument intended for use by multiple agencies, the contractor shall notify the OIG of the ordering agency and the IG of the agency responsible for the basic contract, and the respective agencies' contracting officers.*
  - (3) The disclosure requirement for an individual contract continues until at least 3 years after final payment on the contract.*
  - (4) The Government will safeguard such disclosures in accordance with paragraph (b)(3)(ii) of this clause.*
- (D) Full cooperation with any Government agencies responsible for audits, investigations, or corrective actions.

(d) *Subcontracts.* (1) The Contractor shall include the substance of this clause, including this paragraph (d), in subcontracts that exceed the threshold specified in FAR 3.1004(a) on the date of subcontract award and a performance period of more than 120 days.

(2) In altering this clause to identify the appropriate parties, all disclosures of violation of the civil False Claims Act or of Federal criminal law shall be directed to the agency Office of the Inspector General, with a copy to the Contracting Officer.

(End of clause)

## **52.203-14 Display of Hotline Poster(s).**

As prescribed in 3.1004(b), insert the following clause:

Display of Hotline Poster(s) (Nov 2021)

*(a) Definition.*

*United States*, as used in this clause, means the 50 States, the District of Columbia, and outlying areas.

*(b) Display of fraud hotline poster(s).* Except as provided in paragraph (c)—

(1) During contract performance in the United States, the Contractor shall prominently display in common work areas within business segments performing work under this contract and at contract work sites-

(i) Any agency fraud hotline poster or Department of Homeland Security (DHS) fraud hotline poster identified in paragraph (b)(3) of this clause; and

(ii) Any DHS fraud hotline poster subsequently identified by the Contracting Officer.

(2) Additionally, if the Contractor maintains a company website as a method of providing information to employees, the Contractor shall display an electronic version of the poster(s) at the website.

(3) Any required posters may be obtained as follows:

<b><i>Poster(s)</i></b>	<b><i>Obtain from</i></b>

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(Contracting Officer shall insert—

(i) Appropriate agency name(s) and/or title of applicable Department of Homeland Security fraud hotline poster); and

(ii) The website(s) or other contact information for obtaining the poster(s).)

(a) If the Contractor has implemented a business ethics and conduct awareness program, including a reporting mechanism, such as a hotline poster, then the Contractor need not display any agency fraud hotline posters as required in paragraph (b) of this clause, other than any required DHS posters.

(b) *Subcontracts.* The Contractor shall include the substance of this clause, including this paragraph (d), in all subcontracts that exceed the threshold specified in Federal Acquisition Regulation 3.1004(b)(1) on the date of subcontract award, except when the subcontract—

(1) Is for the acquisition of a commercial product or commercial service; or

(2) Is performed entirely outside the United States.

(End of clause)

## **52.203-15 [Reserved]**

## **52.203-16 Preventing Personal Conflicts of Interest.**

As prescribed in 3.1106, insert the following clause:

Preventing Personal Conflicts of Interest (Jun 2020)

(a) *Definitions.* As used in this clause—

*Acquisition function closely associated with inherently governmental functions* means supporting or providing advice or recommendations with regard to the following activities of a Federal agency:

(1) Planning acquisitions.

(2) Determining what supplies or services are to be acquired by the Government, including developing statements of work.

(3) Developing or approving any contractual documents, to include documents defining requirements, incentive plans, and evaluation criteria.

- (4) Evaluating contract proposals.
- (5) Awarding Government contracts.
- (6) Administering contracts (including ordering changes or giving technical direction in contract performance or contract quantities, evaluating contractor performance, and accepting or rejecting contractor products or services).
- (7) Terminating contracts.
- (8) Determining whether contract costs are reasonable, allocable, and allowable.

*Covered employee* means an individual who performs an acquisition function closely associated with inherently governmental functions and is—

- (1) An employee of the contractor; or
- (2) A subcontractor that is a self-employed individual treated as a covered employee of the contractor because there is no employer to whom such an individual could submit the required disclosures.

*Non-public information* means any Government or third-party information that-

- (1) Is exempt from disclosure under the Freedom of Information Act ([5 U.S.C. 552](#)) or otherwise protected from disclosure by statute, Executive order, or regulation; or
- (2) Has not been disseminated to the general public and the Government has not yet determined whether the information can or will be made available to the public.

*Personal conflict of interest* means a situation in which a covered employee has a financial interest, personal activity, or relationship that could impair the employee's ability to act impartially and in the best interest of the Government when performing under the contract. (A de minimis interest that would not "impair the employee's ability to act impartially and in the best interest of the Government" is not covered under this definition.)

- (1) Among the sources of personal conflicts of interest are-
  - (i) Financial interests of the covered employee, of close family members, or of other members of the covered employee's household;
  - (ii) Other employment or financial relationships (including seeking or negotiating for prospective employment or business); and
  - (iii) Gifts, including travel.
- (2) For example, financial interests referred to in paragraph (1) of this definition may arise from-

- (i) Compensation, including wages, salaries, commissions, professional fees, or fees for business referrals;
- (ii) Consulting relationships (including commercial and professional consulting and service arrangements, scientific and technical advisory board memberships, or serving as an expert witness in litigation);
- (iii) Services provided in exchange for honorariums or travel expense reimbursements;
- (iv) Research funding or other forms of research support;
- (v) Investment in the form of stock or bond ownership or partnership interest (excluding diversified mutual fund investments);
- (vi) Real estate investments;
- (vii) Patents, copyrights, and other intellectual property interests; or
- (viii) Business ownership and investment interests.

(b) *Requirements.* The Contractor shall—

(1) Have procedures in place to screen covered employees for potential personal conflicts of interest, by-

(i) Obtaining and maintaining from each covered employee, when the employee is initially assigned to the task under the contract, a disclosure of interests that might be affected by the task to which the employee has been assigned, as follows:

(A) Financial interests of the covered employee, of close family members, or of other members of the covered employee's household.

(B) Other employment or financial relationships of the covered employee (including seeking or negotiating for prospective employment or business).

(C) Gifts, including travel; and

(ii) Requiring each covered employee to update the disclosure statement whenever the employee's personal or financial circumstances change in such a way that a new personal conflict of interest might occur because of the task the covered employee is performing.

(2) For each covered employee—

(i) Prevent personal conflicts of interest, including not assigning or allowing a covered employee to perform any task under the contract for which the Contractor has identified a personal conflict of interest for the employee that the Contractor or employee cannot satisfactorily prevent or mitigate in consultation with the contracting agency;



- (ii) Prohibit use of non-public information accessed through performance of a Government contract for personal gain; and
  - (iii) Obtain a signed non-disclosure agreement to prohibit disclosure of non-public information accessed through performance of a Government contract.
- (1) Inform covered employees of their obligation-
    - (i) To disclose and prevent personal conflicts of interest;
    - (ii) Not to use non-public information accessed through performance of a Government contract for personal gain; and
    - (iii) To avoid even the appearance of personal conflicts of interest;
  - (2) Maintain effective oversight to verify compliance with personal conflict-of-interest safeguards;
  - (3) Take appropriate disciplinary action in the case of covered employees who fail to comply with policies established pursuant to this clause; and
  - (4) Report to the Contracting Officer any personal conflict-of-interest violation by a covered employee as soon as it is identified. This report shall include a description of the violation and the proposed actions to be taken by the Contractor in response to the violation. Provide follow-up reports of corrective actions taken, as necessary. Personal conflict-of-interest violations include-
    - (i) Failure by a covered employee to disclose a personal conflict of interest;
    - (ii) Use by a covered employee of non-public information accessed through performance of a Government contract for personal gain; and
    - (iii) Failure of a covered employee to comply with the terms of a non-disclosure agreement.
- (a) Mitigation or waiver. (1) In exceptional circumstances, if the Contractor cannot satisfactorily prevent a personal conflict of interest as required by paragraph (b)(2)(i) of this clause, the Contractor may submit a request through the Contracting Officer to the Head of the Contracting Activity for-
- (i) Agreement to a plan to mitigate the personal conflict of interest; or
  - (ii) A waiver of the requirement.
- 1. The Contractor shall include in the request any proposed mitigation of the personal conflict of interest.
  - 2. The Contractor shall-

- (1) Comply, and require compliance by the covered employee, with any conditions imposed by the Government as necessary to mitigate the personal conflict of interest; or
- (ii) Remove the Contractor employee or subcontractor employee from performance of the contract or terminate the applicable subcontract.
- (d) *Subcontracts*. The Contractor shall include the substance of this clause, including this paragraph (d), in subcontracts—
- (2) That exceed the simplified acquisition threshold, as defined in Federal Acquisition Regulation 2.101 on the date of subcontract award; and
- (3) In which subcontractor employees will perform acquisition functions closely associated with inherently governmental functions (*i.e.*, instead of performance only by a self-employed individual).
- (End of clause)

## **52.203-17 Contractor Employee Whistleblower Rights.**

As prescribed in 3.906, insert the following clause:

Contractor Employee Whistleblower Rights (Nov 2023)

- (a) This contract and employees working on this contract will be subject to the whistleblower rights and remedies established at [41 U.S.C. 4712](#) and Federal Acquisition Regulation (FAR) 3.900 through 3.905.
- (b) The Contractor shall inform its employees in writing, in the predominant language of the workforce, of employee whistleblower rights and protections under [41 U.S.C. 4712](#), as described in FAR 3.900 through 3.905.
- (c) The Contractor shall insert the substance of this clause, including this paragraph (c), in all subcontracts. (End of clause)

## **52.203-18 Prohibition on Contracting with Entities that Require Certain Internal Confidentiality Agreements or Statements-Representation.**

As prescribed in 3.909-3(a), insert the following provision:

Prohibition on Contracting with Entities that Require Certain Internal Confidentiality Agreements or Statements-Representation (Jan 2017)

- (a) *Definition*. As used in this provision-

*Internal confidentiality agreement or statement, subcontract, and subcontractor*, are defined in the clause at 52.203-19, Prohibition on Requiring Certain Internal Confidentiality Agreements or Statements.

(b) In accordance with section 743 of Division E, Title VII, of the Consolidated and Further Continuing Appropriations Act, 2015 (Pub. L. 113-235) and its successor provisions in subsequent appropriations acts (and as extended in continuing resolutions), Government agencies are not permitted to use funds appropriated (or otherwise made available) for contracts with an entity that requires employees or subcontractors of such entity seeking to report waste, fraud, or abuse to sign internal confidentiality agreements or statements prohibiting or otherwise restricting such employees or subcontractors from lawfully reporting such waste, fraud, or abuse to a designated investigative or law enforcement representative of a Federal department or agency authorized to receive such information.

(c) The prohibition in paragraph (b) of this provision does not contravene requirements applicable to Standard Form 312, (Classified Information Nondisclosure Agreement), Form 4414 (Sensitive Compartmented Information Nondisclosure Agreement), or any other form issued by a Federal department or agency governing the nondisclosure of classified information.

(d) *Representation.* By submission of its offer, the Offeror represents that it will not require its employees or subcontractors to sign or comply with internal confidentiality agreements or statements prohibiting or otherwise restricting such employees or subcontractors from lawfully reporting waste, fraud, or abuse related to the performance of a Government contract to a designated investigative or law enforcement representative of a Federal department or agency authorized to receive such information (e.g., agency Office of the Inspector General).

(End of provision)

## **52.203-19 Prohibition on Requiring Certain Internal Confidentiality Agreements or Statements.**

As prescribed in 3.909-3(b), insert the following clause:

Prohibition on Requiring Certain Internal Confidentiality Agreements or Statements (Jan 2017)

(a) *Definitions.* As used in this clause-

*Internal confidentiality agreement or statement* means a confidentiality agreement or any other written statement that the contractor requires any of its employees or subcontractors to sign regarding nondisclosure of contractor information, except that it does not include

confidentiality agreements arising out of civil litigation or confidentiality agreements that contractor employees or subcontractors sign at the behest of a Federal agency.

*Subcontract* means any contract as defined in subpart 2.1 entered into by a subcontractor to furnish supplies or services for performance of a prime contract or a subcontract. It includes but is not limited to purchase orders, and changes and modifications to purchase orders.

*Subcontractor* means any supplier, distributor, vendor, or firm (including a consultant) that furnishes supplies or services to or for a prime contractor or another subcontractor.

(b) The Contractor shall not require its employees or subcontractors to sign or comply with internal confidentiality agreements or statements prohibiting or otherwise restricting such employees or subcontractors from lawfully reporting waste, fraud, or abuse related to the performance of a Government contract to a designated investigative or law enforcement representative of a Federal department or agency authorized to receive such information (*e.g.*, agency Office of the Inspector General).

(c) The Contractor shall notify current employees and subcontractors that prohibitions and restrictions of any preexisting internal confidentiality agreements or statements covered by this clause, to the extent that such prohibitions and restrictions are inconsistent with the prohibitions of this clause, are no longer in effect.

(d) The prohibition in paragraph (b) of this clause does not contravene requirements applicable to Standard Form 312 (Classified Information Nondisclosure Agreement), Form 4414 (Sensitive Compartmented Information Nondisclosure Agreement), or any other form issued by a Federal department or agency governing the nondisclosure of classified information.

(e) In accordance with section 743 of Division E, Title VII, of the Consolidated and Further Continuing Appropriations Act, 2015, (Pub. L. 113-235), and its successor provisions in subsequent appropriations acts (and as extended in continuing resolutions) use of funds appropriated (or otherwise made available) is prohibited, if the Government determines that the Contractor is not in compliance with the provisions of this clause.

(f) The Contractor shall include the substance of this clause, including this paragraph (f), in subcontracts under such contracts.

(End of clause)