

**SUPPORTING STATEMENT
FOR INFORMATION COLLECTION SUBMISSION
9000-0091, ANTI-KICKBACK PROCEDURES**

A. Justification.

1. **Administrative requirements.** This is a request for extension of the information collection requirement currently approved under OMB Control Number 9000-0091 for Federal Acquisition Regulation (FAR) 3.502 and 52.203-7, Anti-Kickback Procedures.

This information collection is necessary to support ethical business practices through implementation of the requirements of the 41 U.S.C. chapter 87, Kickbacks, 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.

Anti-Kickback Procedures (52.203-7)

Applicability: The prescription at FAR 3.502-3 requires contracting officers to insert the clause at 52.203-7 in solicitations and contracts exceeding the simplified acquisition threshold, other than those for commercial items.

Subparagraph (c)(2) of the clause requires that whenever contractors have reasonable grounds to believe that a violation described in FAR 52.203-7(b) may have occurred, they are required to promptly report the possible violation in writing to the inspector general of the contracting agency, the head of the contracting agency if the agency does not have an inspector general, or the Department of Justice.

Under subparagraph (c)(5) of the clause, the contractor agrees to incorporate the substance of the clause at 52.203-7, including subparagraph (c)(5) but excepting subparagraph (c)(1) in all subcontracts under the contract which exceed \$150,000.

2. **Uses of information.** The information provided in accordance with the clause at FAR 52.203-7 is used to determine whether violations of 41 U.S.C. chapter 87, Kickbacks have occurred.

3. **Consideration of information technology.** We use improved information technology to the maximum extent practicable. Where both the Government agency and contractors are capable of electronic interchange, the contractors are encouraged to submit

this information collection requirement electronically. For example, many Inspector General Hotline Internet sites accept written allegations of waste, fraud, or abuse through online forms, e-mail, or by facsimile.

4. **Efforts to identify duplication.** The clause at FAR 52.203-7 implements the reporting requirements of 41 U.S.C. chapter 87, Kickbacks. There is no duplication of information.

5. **If the collection of information impacts small businesses or other entities, describe methods used to minimize burden.** The burden applied to small businesses is the minimum consistent with applicable laws, regulations, and prudent business practices. The clause at 52.203-7 applies to solicitations and contracts exceeding the simplified acquisition threshold, which is set-aside for small businesses.

6. **Describe consequence to Federal program or policy activities if the collection is not conducted or is conducted less frequently.** Collection of information on a basis other than solicitation-by-solicitation or contract-by-contract is not practical. Under the terms of the clause at FAR 52.203-7, contractors and subcontractor employees are required to report possible violations of 41 U.S.C. chapter 87, Kickbacks, observed in operations or direct business relationships.

7. **Special circumstances or collection.** Collection is consistent with guidelines in 5 CFR 1320.6.

8. **Efforts to consult with persons outside the agency.** A notice was published in the *Federal Register* at 77 FR 75164, on December 19, 2012. One respondent submitted public comments. The analysis of the public comments is summarized as follows:

a. Necessity of the information collection requirement.

Comment: The respondent states that President Obama has issued Executive orders and memoranda seeking to "get rid of absurd and unnecessary paperwork requirements that waste time and money." According to the respondent, agencies should be seeking to create savings by reducing or eliminating such requirements. However, the respondent also states that it is not challenging the propriety of this underlying information collection requirement.

Response: The Anti-Kickback clause at 52.203-7((c)(2) requires contractors and subcontractors to promptly report

possible violations of the Kickbacks statute to the Government. This requirement is neither absurd nor unnecessary. There are no aspects of this requirement that can be reduced or eliminated without negatively impacting the ability of the Government to assess contractor responsibility, investigate and address potential criminal actions, and protect the Government's interests in maintaining the integrity of the acquisition process.

b. Accuracy of data estimates.

Comment: The respondent commented that the agency did not accurately estimate the public burden, stating that the agency's methodology for calculating the burden is insufficient and inadequate and does not reflect the total burden. The respondent stated that—

- The actual number of respondents subject to the information collection is likely 25 to 50 times greater than the estimate of 100 respondents (i.e., 2500 to 5000);
- There is no basis provided for the estimate of 1 response per respondent; and
- The estimate of 1 hour per response is unreasonably low and unsubstantiated. The estimated burden hours should be modified in this instance for the same reasons that they were modified upward in FAR Case 2007-006, Contractor Business Ethics Compliance Program and Disclosure Requirements.

Response: It is important to distinguish between the total burden of compliance with a particular provision or clause, and the portion of that burden that constitutes an information collection requirement. This analysis addresses the latter. In this particular case, the information collection requirement is in paragraph (c)(2) of 52.203-7, which requires a report of possible violations to the Government. Establishing procedures within an organization to prevent and detect anti-kickback violations or cooperating with a Federal investigation do not constitute information collection requirements.

Therefore, the only contractors and subcontractors included in the estimate of respondents to the information collection

requirement are those contractors or subcontractors that are reporting a suspected violation of the Kickback statute in a given year. Based on discussions with subject matter experts with experience in an Office of the Inspector General, the estimate of 100 responses per year is actually somewhat high. It is also unlikely, that the same respondent would be reporting instances of kickback violations more than once in a year. However, since the number of respondents is calculated based on the estimated number of responses, if the calculation were revised to allow for more than one response per respondent, that would only impact the estimated number of respondents, not the total number of responses.

With regard to the estimated information collection burden hours, as stated in the Federal Register notice for FAR Case 2007-006, burden includes estimated hours only for those actions which a company would not undertake in the normal course of business. In the normal course of business, a company that is concerned about ethical behavior will take reasonable steps to determine the credibility of allegations of misconduct within the firm. It is left to the discretion of the company what these reasonable steps may entail. The Government has added the requirement to report in writing to the Government when the Contractor has reasonable grounds to believe that a violation of the Kickback statute has occurred, which would not necessarily otherwise occur. The estimated hours in the regulatory flexibility analysis and the Paperwork Reduction Act analysis are to cover the hours required for preparing and reviewing the report to the Government. However, upon further discussion with subject matter experts, we have revised upward the estimated hours to 20 hours per response, considering particularly the hours that would be required for review within the company, prior to release to the Government.

c. OMB approval to extend the approval of this information collection requirement.

Comment: The respondent commented that the extension of the information collection would violate the fundamental purposes of the Paperwork Reduction Act because the analysis significantly underestimates the paperwork burden imposed by this requirement and has therefore not provided sufficient justification for the requested extension.

The respondent further stated that the agency and OMB should assess the need to extend this information collection requirement in the context of assessing the total information collection

burden. The respondent further commented that the "collective burden of compliance" required of the Government acquisition community annually totals over 30 million hours. According to the respondent, the collective burden greatly exceeds the agency's estimates and outweighs any potential utility of the extension.

Response: The criteria for extension of an information collection requirement must be based primarily on the need and use for the required information. It is essential for contractors to report violations of the Kickback statute, regardless of whether there are 100 responses per year or 1000 responses per year. If the agencies have determined that the information is essential to comply with statute or to protect the interests of the Government, then the extension should be approved. If there are questions concerning the validity of the estimated burden hours, those can be reviewed and refined as necessary.

We cannot effectively address the broad allegations with regard to the accuracy and utility of the entire collective burden imposed on all Federal acquisitions. We can only effectively address each individual information collection requirement that is under consideration for OMB approval. As stated, the respondent has not pointed out any aspect of the Anti-Kickback clause that could be amended to reduce the information collection burden imposed by that clause. Further, the respondent specifically does not challenge the propriety of the underlying information collection requirement. We constantly review information collection requirements imposed by FAR regulations for ways to reduce the burdens and still achieve the objectives of the regulations, whether based on policy or statute. We would welcome any specific recommendations as to information collection requirements (other than those required by statute) in which the burden is perceived to outweigh the benefit, with specific recommendations as to how the burden should be reduced.

9. Explanation of any decision to provide any payment or gift to respondents, other than remuneration of contractors or guarantees. There will be no payment or gift to respondents, other than remuneration of contractors.

10. Describe assurance of confidentiality provided to respondents. This information is disclosed only to the extent consistent with law, regulation, and prudent business practices.

Under the American Recovery and Reinvestment Act of 2009 (ARRA), an employee of any non-Federal employer, such as a private company or a state or local government, who reports gross mismanagement, gross waste, substantial and specific danger to public health or safety, abuse of authority, or violation of law, rule, or regulation, relating to ARRA funds or contracts, may not be discharged, demoted or otherwise discriminated against because of his or her disclosure. ARRA provides protection from reprisal only to non-Federal employees who report waste, fraud or abuse connected to the use of ARRA funds.

11. Additional justification questions of a sensitive nature. Information of a sensitive nature may be disclosed in describing an alleged violation of 41 U.S.C. chapter 87, Kickbacks. Reports are reviewed by professional investigators to determine whether reasonable grounds exist to conclude that a violation of the Kickbacks statute has occurred.

12 & 13. Estimated total annual public hour and cost burden. There is no Governmentwide data collection process or system which identifies the number of alleged violations of 41 U.S.C. chapter 87, Kickbacks, that are reported annually to agency inspector generals, the heads of the contracting agency if an agency does not have an inspector general, or the Department of Justice. Time required to compile documents and prepare information is estimated at 1 hour per allegation reported.

Estimated respondents/yr.....	100
Responses annually.....x	<u>1</u>
Total annual responses.....	100
Estimated hrs/response.....x	<u>20</u>
Estimated total burden/hrs.....	2,000
Average wages (\$30.81 + 36%).....x	<u>\$42*</u>
Estimated cost to public.....	\$84,000

* We used a rate equivalent to a GS-12, Step 3 or \$30.81/hour (from the Office of Personnel Management (OPM) 2012 GS Salary Table - Hourly Rate), added overhead at 36.25 percent (rounded to 36%) and rounded the average wages and overhead to the nearest dollar, or \$42 an hour.

14. Estimated cost to the Government. Time required for Governmentwide review is estimated at 24 hours per response.

Annual Reporting Burden and Cost

Reviewing time/hr.....	24
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Responses/yr.....	x	<u>100</u>
Review time/yr.....		2,400
Average wages and overhead (\$30.81 + 36%).....	x	<u>\$42*</u>
Total Government cost.....		\$100,800

* We used a rate equivalent to a GS-12, Step 3 or \$30.81/hour (from the Office of Personnel Management (OPM) 2012 GS Salary Table - Hourly Rate), added overhead at 36.25 percent (rounded to 36%) and rounded the average wages and overhead to the nearest dollar, or \$42 an hour.

15. Explain reasons for program changes or adjustments reported in Item 12 or 14. This submission requests the extension of an existing information collection requirement in the FAR. The increase of the estimated burden on the public from 100 hours to 2000 hours in Item 12 is an adjustment based on re-evaluation of the average hours per response. To ensure greater accuracy in Item 12 and to adjust for inflation, adjustments have been made to the average wages category by increasing the hourly wage rate from \$24 to the more appropriate \$30.81, and reducing the 75% overhead rate to the standard 36 percent. Similarly, in Item 14, the average wages and overhead category has been adjusted from \$20 an hour and 100% overhead to the more appropriate hourly wage of \$30.81 and 36% overhead. The burden estimates for the Government are based on the assumption that 100 reports alleging violation of the 41 U.S.C. chapter 87, Kickbacks, are received each year. The Government reviews reports to determine if a violation of the Act has occurred and take appropriate action.

16. Outline plans for published results of information collections. Results of this information collection will not be published.

17. Approval not to display expiration date. Not applicable.

18. Explanation of exception to certification statement. Not applicable.

B. Collections of Information Employing Statistical Methods. Statistical methods are not used in this information collection.