

## 1.102

FAR. The FAR System does not include internal agency guidance of the type described in 1.301(a)(2).

[48 FR 42103, Sept. 19, 1983, as amended at 51 FR 27116, July 29, 1986]

### **1.102 Statement of guiding principles for the federal acquisition system.**

(a) The vision for the Federal Acquisition System is to deliver on a timely basis the best value product or service to the customer, while maintaining the public's trust and fulfilling public policy objectives. Participants in the acquisition process should work together as a team and should be empowered to make decisions within their area of responsibility.

(b) The Federal Acquisition System will—

(1) Satisfy the customer in terms of cost, quality, and timeliness of the delivered product or service by, for example—

(i) Maximizing the use of commercial products and services;

(ii) Using contractors who have a track record of successful past performance or who demonstrate a current superior ability to perform; and

(iii) Promoting competition;

(2) Minimize administrative operating costs;

(3) Conduct business with integrity, fairness, and openness; and

(4) Fulfill public policy objectives.

(c) The Acquisition Team consists of all participants in Government acquisition including not only representatives of the technical, supply, and procurement communities but also the customers they serve, and the contractors who provide the products and services.

(d) The role of each member of the Acquisition Team is to exercise personal initiative and sound business judgment in providing the best value product or service to meet the customer's needs. In exercising initiative, Government members of the Acquisition Team may assume if a specific strategy, practice, policy or procedure is in the best interests of the Government and is not addressed in the FAR nor prohibited by law (statute or case law), Executive order or other regulation, that the strategy, practice, policy

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or procedure is a permissible exercise of authority.

[60 FR 34733, July 3, 1995]

### **1.102–1 Discussion.**

(a) *Introduction.* The statement of Guiding Principles for the Federal Acquisition System (System) represents a concise statement designed to be user-friendly for all participants in Government acquisition. The following discussion of the principles is provided in order to illuminate the meaning of the terms and phrases used. The framework for the System includes the Guiding Principles for the System and the supporting policies and procedures in the FAR.

(b) *Vision.* All participants in the System are responsible for making acquisition decisions that deliver the best value product or service to the customer. Best value must be viewed from a broad perspective and is achieved by balancing the many competing interests in the System. The result is a system which works better and costs less.

[60 FR 34733, July 3, 1995]

### **1.102–2 Performance standards.**

(a) *Satisfy the customer in terms of cost, quality, and timeliness of the delivered product or service.* (1) The principal customers for the product or service provided by the System are the users and line managers, acting on behalf of the American taxpayer.

(2) The System must be responsive and adaptive to customer needs, concerns, and feedback. Implementation of acquisition policies and procedures, as well as consideration of timeliness, quality and cost throughout the process, must take into account the perspective of the user of the product or service.

(3) When selecting contractors to provide products or perform services the Government will use contractors who have a track record of successful past performance or who demonstrate a current superior ability to perform.

(4) The Government must not hesitate to communicate with the commercial sector as early as possible in the

acquisition cycle to help the Government determine the capabilities available in the commercial marketplace. The Government will maximize its use of commercial products and services in meeting Government requirements.

(5) It is the policy of the System to promote competition in the acquisition process.

(6) The System must perform in a timely, high quality, and cost-effective manner.

(7) All members of the Team are required to employ planning as an integral part of the overall process of acquiring products or services. Although advance planning is required, each member of the Team must be flexible in order to accommodate changing or unforeseen mission needs. Planning is a tool for the accomplishment of tasks, and application of its discipline should be commensurate with the size and nature of a given task.

(b) *Minimize administrative operating costs.* (1) In order to ensure that maximum efficiency is obtained, rules, regulations, and policies should be promulgated only when their benefits clearly exceed the costs of their development, implementation, administration, and enforcement. This applies to internal administrative processes, including reviews, and to rules and procedures applied to the contractor community.

(2) The System must provide uniformity where it contributes to efficiency or where fairness or predictability is essential. The System should also, however, encourage innovation, and local adaptation where uniformity is not essential.

(c) *Conduct business with integrity, fairness, and openness.* (1) An essential consideration in every aspect of the System is maintaining the public's trust. Not only must the System have integrity, but the actions of each member of the Team must reflect integrity, fairness, and openness. The foundation of integrity within the System is a competent, experienced, and well-trained, professional workforce. Accordingly each member of the Team is responsible and accountable for the wise use of public resources as well as acting in a manner which maintains the public's trust. Fairness and open-

ness require open communication among team members, internal and external customers, and the public.

(2) To achieve efficient operations, the System must shift its focus from "risk avoidance" to one of "risk management." The cost to the taxpayer of attempting to eliminate all risk is prohibitive. The Executive Branch will accept and manage the risk associated with empowering local procurement officials to take independent action based on their professional judgment.

(d) *Fulfill public policy objectives.* The System must support the attainment of public policy goals adopted by the Congress and the President. In attaining these goals, and in its overall operations, the process shall ensure the efficient use of public resources.

[60 FR 34734, July 3, 1995]

#### **1.102-3 Acquisition team.**

The purpose of defining the Federal Acquisition Team (Team) in the Guiding Principles is to ensure that participants in the System are identified—beginning with the customer and ending with the contractor of the product or service. By identifying the team members in this manner, teamwork, unity of purpose, and open communication among the members of the Team in sharing the vision and achieving the goal of the System are encouraged. Individual team members will participate in the acquisition process at the appropriate time.

[60 FR 34734, July 3, 1995]

#### **1.102-4 Role of the acquisition team.**

(a) Government members of the Team must be empowered to make acquisition decisions within their areas of responsibility, including selection, negotiation, and administration of contracts consistent with the Guiding Principles. In particular, the contracting officer must have the authority to the maximum extent practicable and consistent with law, to determine the application of rules, regulations, and policies, on a specific contract.

(b) The authority to make decisions and the accountability for the decision made will be delegated to the lowest level within the System, consistent with law.

(c) The Team must be prepared to perform the functions and duties assigned. The Government is committed to provide training, professional development, and other resources necessary for maintaining and improving the knowledge, skills, and abilities for all Government participants on the Team, both with regard to their particular area of responsibility within the System, and their respective role as a team member. The contractor community is encouraged to do likewise.

(d) The System will foster cooperative relationships between the Government and its contractors consistent with its overriding responsibility to the taxpayers.

(e) The FAR outlines procurement policies and procedures that are used by members of the Acquisition Team. If a policy or procedure, or a particular strategy or practice, is in the best interest of the Government and is not specifically addressed in the FAR, nor prohibited by law (statute or case law), Executive order or other regulation, Government members of the Team should not assume it is prohibited. Rather, absence of direction should be interpreted as permitting the Team to innovative and use sound business judgment that is otherwise consistent with law and within the limits of their authority.

[60 FR 34734, July 3, 1995]

#### **1.103 Authority.**

(a) The development of the FAR System is in accordance with the requirements of the Office of Federal Procurement Policy (OFPP) Act of 1974 (Pub. L. 93–400), as amended by Pub. L. 96–83, and OFPP Policy Letter 85–1, Federal Acquisition Regulations System, dated August 19, 1985.

(b) The FAR is prepared, issued, and maintained, and the FAR System is prescribed, jointly by the Secretary of Defense, the Administrator of General Services, and the Administrator, National Aeronautics and Space Administration, under their several statutory authorities.

[48 FR 42103, Sept. 19, 1983, as amended at 51 FR 27116, July 29, 1986. Redesignated at 60 FR 34733, July 3, 1995]

#### **1.104 Applicability.**

The FAR applies to all acquisitions as defined in part 2 of the FAR, except where expressly excluded.

[48 FR 42103, Sept. 19, 1983. Redesignated at 60 FR 34733, July 3, 1995]

#### **1.105 Issuance.**

##### **1.105–1 Publication and code arrangement.**

(a) The FAR is published in (1) the daily issue of the Federal Register, (2) cumulated form in the Code of Federal Regulations (CFR), and (3) a separate loose-leaf edition.

(b) The FAR is issued as Chapter 1 of Title 48, CFR. Subsequent chapters are reserved for agency acquisition regulations that implement or supplement the FAR (see subpart 1.3). The CFR Staff will assign chapter numbers to requesting agencies.

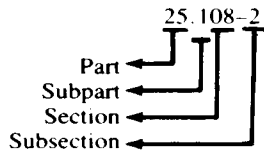
(c) Each numbered unit or segment (e.g., part, subpart, section, etc.) of an agency acquisition regulation that is codified in the CFR shall begin with the chapter number. However, the chapter number assigned to the FAR will not be included in the numbered units or segments of the FAR.

[48 FR 42103, Sept. 19, 1983. Redesignated at 60 FR 34733, July 3, 1995]

##### **1.105–2 Arrangement of regulations.**

(a) *General.* The FAR is divided into subchapters, parts (each of which deals with a separate aspect of acquisition), subparts, sections, and subsections.

(b) *Numbering.* (1) The numbering system permits the discrete identification of every FAR paragraph. The digits to the left of the decimal point represent the part number. The numbers to the right of the decimal point and to the left of the dash, represent, in order, the subpart (one or two digits), and the section (two digits). The number to the right of the dash represents the subsection. Subdivisions may be used at the section and subsection level to identify individual paragraphs. The following example illustrates the make-up of a FAR number citation (note that subchapters are not used with citations):



(2) Subdivisions below the section or subsection level shall consist of parenthetical alphanumeric reading from highest to lowest indenture as follows: lower case alphabet, Arabic numerals, lower case Roman numerals, and upper case alphabet. The following example is illustrative:

(a)(1)(i)(A)

Subdivisions, below the 4th level shall repeat the sequence.

(c) *References and citations.* (1) Unless otherwise stated, cross-references indicate parts, subparts, sections, subsections, paragraphs, subparagraphs, or subdivisions of this regulation.

(2) This regulation may be referred to as the Federal Acquisition Regulation or the FAR.

(3) Using the FAR coverage at 9.106-4(d) as a typical illustration, reference to the—

(i) Part would be “FAR Part 9” outside the FAR and “Part 9” within the FAR.

(ii) Subpart would be “FAR Subpart 9.1” outside the FAR and “Subpart 9.1” within the FAR.

(iii) Section would be “FAR 9.106” outside the FAR and “9.106” within the FAR.

(iv) Subsection would be “FAR 9.106-4” outside the FAR and “9.106-4” within the FAR.

(v) Paragraph would be “FAR 9.106-4(d)” outside the FAR and “9.106-4(d)” within the FAR.

(4) Citations of authority (e.g., statutes or executive orders) in the FAR shall follow the Federal Register form guides.

[48 FR 42103, Sept. 19, 1983. Redesignated at 60 FR 34733, July 3, 1995]

**1.105-3 Copies.**

Copies of the FAR in Federal Register, loose-leaf, and CFR form may be purchased from the Superintendent of

Documents, Government Printing Office (GPO), Washington, DC 20402.

[48 FR 42103, Sept. 19, 1983. Redesignated at 60 FR 34733, July 3, 1995]

**1.106 OMB approval under the Paperwork Reduction Act.**

The Paperwork Reduction Act of 1980 (Pub. L. 96-511) imposes a requirement on Federal agencies to obtain approval from the Office of Management and Budget (OMB) before collecting information from ten or more members of the public. The information collection and recordkeeping requirements contained in this regulation have been approved by the OMB. The following OMB control numbers apply:

FAR segment	OMB control No.
3.103 .....	9000-0018
3.104-9 .....	9000-0103
3.104-12(a)(12) .....	9000-0103
3.4 .....	9000-0003
4.102 .....	9000-0033
4.7 .....	9000-0034
4.9 .....	9000-0097
5.405 .....	9000-0036
7.2 .....	9000-0082
8.203-2 .....	9000-0017
8.5 .....	9000-0113
9.1 .....	9000-0011
9.2 .....	9000-0020
9.5 .....	9000-0111
14.201 .....	9000-0034
14.202-4 .....	9000-0040
14.202-5 .....	9000-0039
14.205 .....	9000-0002
14.205-4(c) .....	9000-0037
14.214 .....	9000-0105
14.407 .....	9000-0038
14.5 .....	9000-0041
15.106 .....	9000-0034
15.404 .....	9000-0037
15.7 .....	9000-0078
15.8 .....	9000-0013
15.804-8 .....	9000-0115
15.812-1(b) .....	9000-0080
15.813-1 .....	9000-0105
15.813-2 .....	9000-0105
15.813-3 .....	9000-0105
15.813-6 .....	9000-0105
19.7 .....	9000-0006
22.103 .....	9000-0065
22.606-2(b) .....	1215-0157
22.8 .....	1215-0072
22.11 .....	9000-0066
22.13 .....	1215-0072
22.14 .....	1215-0072
22.15 .....	9000-0127
23.602 .....	9000-0107
27.3 .....	9000-0095
27.4 .....	9000-0090
28.1 .....	9000-0045
28.106-1(b) .....	9000-0119
28.2 .....	9000-0045
29.304 .....	9000-0059
30 .....	9000-0093
30.6 .....	9000-0129

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31.205-2 .....	9000-0072	52.216-17 .....	9000-0067
31.205-46 .....	9000-0079	52.219-9 .....	9000-0006
31.205-46(a)(3) .....	9000-0088	52.219-10 .....	9000-0006
32 .....	9000-0035	52.219-19 .....	9000-0100
32.000 .....	9000-0138.	52.219-20 .....	9000-0100
32.1 .....	9000-0070	52.219-21 .....	9000-0100
	and 9000-	52.222-2 .....	9000-0065
	0138.	52.222-4 .....	1215-0119
32.2 .....	9000-0138.	52.222-6 .....	1215-0140
32.4 .....	9000-0073	52.222-8 .....	1215-0149
32.5 .....	9000-0010		and
	and 9000-	52.222-11 .....	1215-0017
	0138.	52.222-18 .....	9000-0014
32.7 .....	9000-0074	52.222-21 .....	9000-0127
32.9 .....	9000-0102	52.222-22 .....	1215-0072
32.10 .....	9000-0138.	52.222-23 .....	1215-0072
33 .....	9000-0035	52.222-25 .....	1215-0072
34.1 .....	9000-0132	52.222-26 .....	1215-0072
36.302 .....	9000-0037	52.222-27 .....	1215-0072
36.603 .....	9000-0004	52.222-35 .....	1215-0072
	and	52.222-36 .....	1215-0072
	9000-0005	52.222-41 .....	1215-0017
36.701 .....	9000-0037		and
41.004-2(c) .....	9000-0125		1215-0150
42.203 .....	9000-0026	52.222-46 .....	9000-0066
42.7 .....	9000-0013	52.223-1 .....	9000-0021
42.12 .....	9000-0076	52.223-6(b)(5) .....	9000-0101
42.13 .....	9000-0076	52.233-7 .....	9000-0117
42.14 .....	9000-0056	52.225-1 .....	9000-0024
45 .....	9000-0075	52.225-6 .....	9000-0023
46 .....	9000-0077	52.225-8 .....	9000-0025
47 .....	9000-0061	52.225-10 .....	9000-0022
48 .....	9000-0027	52.225-20 .....	9000-0130
49 .....	9000-0028	52.228-1 .....	9000-0045
50 .....	9000-0029	52.228-2 .....	9000-0045
51.1 .....	9000-0031	52.228-3 .....	9000-0045
51.2 .....	9000-0032	52.229-2 .....	9000-0059
52.203-2 .....	9000-0018	52.230-6 .....	9000-0129
52.203-7 .....	9000-0091	52.232-5 .....	9000-0070
52.203-8 .....	9000-0103	52.232-7 .....	9000-0070
52.203-9 .....	9000-0103	52.232-10 .....	9000-0070
52.204-3 .....	9000-0097	52.232-12 .....	9000-0073
52.207-3 .....	9000-0114	52.232-13 .....	9000-0010
52.208-1 .....	9000-0017	52.232-14 .....	9000-0010
52.214-14 .....	9000-0047	52.232-15 .....	9000-0010
52.214-15 .....	9000-0044	52.232-16 .....	9000-0010
52.214-16 .....	9000-0044	52.232-20 .....	9000-0074
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52.214-21 .....	9000-0039	52.232-22 .....	9000-0074
52.214-26 .....	9000-0034	52.232-27 .....	9000-0102
52.214-28 .....	9000-0013	52.232-29 .....	9000-0138.
52.215-2 .....	9000-0034	52.232-30 .....	9000-0138.
52.215-6 .....	9000-0046	52.232-31 .....	9000-0138.
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52.215-19 .....	9000-0044	52.233-1 .....	9000-0035
52.215-20 .....	9000-0047	52.234-1 .....	9000-0133
52.215-21 .....	9000-0078	52.236-5 .....	9000-0062
52.215-24 .....	9000-0013	52.236-13 .....	1220-0029
52.215-25 .....	9000-0013		and
52.215-26 .....	9000-0080		9000-0060
52.215-40 .....	9000-0015	52.236-15 .....	9000-0058
52.215-41 .....	9000-0013	52.236-19 .....	9000-0064
52.215-42 .....	9000-0013	52.241-2 .....	9000-0122
52.216-2 .....	9000-0068	52.241-6 .....	9000-0123
52.216-3 .....	9000-0068	52.241-11 .....	9000-0126
52.216-4 .....	9000-0068	52.241-13 .....	9000-0124
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52.216-10 .....	9000-0067	52.243-3 .....	9000-0026
52.216-13 .....	9000-0069	52.243-4 .....	9000-0026
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1.201-1

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52.243-7	9000-0026
52.245-2	9000-0075
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52.245-18	9000-0075
52.246-2	9000-0077
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52.246-4	9000-0077
52.246-5	9000-0077
52.246-6	9000-0077
52.246-7	9000-0077
52.246-8	9000-0077
52.246-10	9000-0077
52.246-12	9000-0077
52.246-15	9000-0077
52.247-2	9000-0053
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52.247-30	9000-0061
52.247-31	9000-0061
52.247-32	9000-0061
52.247-33	9000-0061
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52.247-51	9000-0057
52.247-53	9000-0055
52.247-57	9000-0061
52.247-63	9000-0054
52.247-64	9000-0027
52.248-1	9000-0027
52.248-2	9000-0027
52.248-3	9000-0027
52.249-2	9000-0028
52.249-3	9000-0028
52.249-5	9000-0028
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52.253-1	9000-0104
53.105	9000-0104
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SF 35	9000-0045
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SF 254	9000-0004
SF 255	9000-0005
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SF 1416	9000-0045
SF 1417	9000-0037
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SF 1423	9000-0015
SF 1424	9000-0015
SF 1426	9000-0015
SF 1427	9000-0015
SF 1428	9000-0015
SF 1429	9000-0015
SF 1430	9000-0015
SF 1431	9000-0015
SF 1432	9000-0015
SF 1433	9000-0015
SF 1434	9000-0015
SF 1435	9000-0012
SF 1436	9000-0012
SF 1437	9000-0012
SF 1438	9000-0012
SF 1439	9000-0012
SF 1440	9000-0012
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All other requirements	9000-0063

[59 FR 67065, Dec. 28, 1994. Redesignated at 60 FR 34733, 34736, July 3, 1995, as amended at 60 FR 42650, 42665, Aug. 16, 1995; 60 FR 48211, Sept. 18, 1995; 60 FR 49710, Sept. 26, 1995; 61 FR 18916, Apr. 29, 1996; 61 FR 39188, July 26, 1996]

**Subpart 1.2—Administration**

**1.201 Maintenance of the FAR.**

**1.201-1 The two councils.**

(a) Subject to the authorities discussed in 1.102, revisions to the FAR will be prepared and issued through the coordinated action of two councils, the Defense Acquisition Regulatory Council (DAR Council) and the Civilian Agency Acquisition Council (CAA Council). Members of these councils shall—

(1) Represent their agencies on a full-time basis;

(2) Be selected for their superior qualifications in terms of acquisition experience and demonstrated professional expertise; and

(3) Be funded by their respective agencies.

(b) The chairperson of the CAA Council shall be the representative of the

Administrator of General Services. The other members of this council shall be one each representative from the (1) Departments of Agriculture, Commerce, Energy, Health and Human Services, Interior, Labor, State, Transportation, and Treasury, and (2) Environmental Protection Agency, Small Business Administration, and Department of Veterans Affairs.

(c) The Director of the DAR Council shall be the representative of the Secretary of Defense. The operation of the DAR Council will be as prescribed by the Secretary of Defense. Membership shall include representatives of the military Departments, the Defense Logistics Agency, and the National Aeronautics and Space Administration.

(d) Responsibility for processing revisions to the FAR is apportioned by the two councils so that each council has cognizance over specified parts or subparts.

(e) Each council shall be responsible for—

(1) Agreeing on all revisions with the other council;

(2) Submitting to the FAR Secretariat (see 1.201-2) the information required under paragraphs 1.501-2(b) and (e) for publication in the FEDERAL REGISTER of a notice soliciting comments on a proposed revision to the FAR;

(3) Considering all comments received in response to notice of proposed revisions;

(4) Arranging for public meetings;

(5) Preparing any final revision in the appropriate FAR format and language; and

(6) Submitting any final revision to the FAR Secretariat for publication in the FEDERAL REGISTER and printing for distribution.

[48 FR 42103, Sept. 19, 1983, as amended at 50 FR 2269, Jan. 15, 1985; 50 FR 26903, June 28, 1985; 51 FR 2649, Jan. 17, 1986; 54 FR 29280, July 11, 1989]

#### **1.201-2 FAR Secretariat.**

(a) The General Services Administration is responsible for establishing and operating the FAR Secretariat to print, publish, and distribute the FAR through the Code of Federal Regulations system (including a loose-leaf edition with periodic updates).

(b) Additionally, the FAR Secretariat shall provide the two councils with centralized services for—

(1) Keeping a synopsis of current FAR cases and their status;

(2) Assigning FAR case numbers;

(3) Maintaining official files;

(4) Assisting parties interested in reviewing the files on completed cases; and

(5) Performing miscellaneous administrative tasks pertaining to the maintenance of the FAR.

#### **1.202 Agency compliance with the FAR.**

Agency compliance with the FAR (see 1.304) is the responsibility of the Secretary of Defense (for the military departments and defense agencies), the Administrator of General Services (for civilian agencies other than NASA), and the Administrator of NASA (for NASA activities).

### **Subpart 1.3—Agency Acquisition Regulations**

#### **1.301 Policy.**

(a)(1) Subject to the authorities in paragraph (c) below and other statutory authority, an agency head may issue or authorize the issuance of agency acquisition regulations that implement or supplement the FAR and incorporate, together with the FAR, agency policies, procedures, contract clauses, solicitation provisions, and forms that govern the contracting process or otherwise control the relationship between the agency, including any of its suborganizations, and contractors or prospective contractors.

(2) Subject to the authorities in (c) below and other statutory authority, an agency head may issue or authorize the issuance of internal agency guidance at any organizational level (e.g., designations and delegations of authority, assignments of responsibilities, work-flow procedures, and internal reporting requirements).

(b) Agency heads shall establish procedures to ensure that agency acquisition regulations are published for comment in the FEDERAL REGISTER in conformance with the procedures in subpart 1.5 and as required by section 22 of

## Federal Acquisition Regulation

1.304

the Office of Federal Procurement Policy Act, as amended (41 U.S.C. 418b), and other applicable statutes, when they have a significant effect beyond the internal operating procedures of the agency or have a significant cost or administrative impact on contractors or offerors. However, publication is not required for issuances that merely implement or supplement higher level issuances that have previously undergone the public comment process, unless such implementation or supplementation results in an additional significant cost or administrative impact on contractors or offerors or effect beyond the internal operating procedures of the issuing organization. Issuances under 1.301(a)(2) need not be publicized for public comment.

(c) When adopting acquisition regulations, agencies shall ensure that they comply with the Paperwork Reduction Act (44 U.S.C. 3501, *et seq.*) as implemented in 5 CFR part 1320 (see 1.105) and the Regulatory Flexibility Act (5 U.S.C. 601, *et seq.*). Normally, when a law requires publication of a proposed regulation, the Regulatory Flexibility Act applies and agencies must prepare written analyses or certifications as provided in the law.

(d) Agency acquisition regulations implementing or supplementing the FAR are, for—

(1) The military departments and defense agencies, issued subject to the authority of the Secretary of Defense;

(2) NASA activities, issued subject to the authorities of the Administrator of NASA; and

(3) The civilian agencies other than NASA, issued by the heads of those agencies subject to the overall authority of the Administrator of General Services or independent authority the agency may have.

[48 FR 42103, Sept. 19, 1983, as amended at 50 FR 2269, Jan. 15, 1985; 54 FR 5054, Jan. 31, 1989]

### 1.302 Limitations.

Agency acquisition regulations shall be limited to—

(a) Those necessary to implement FAR policies and procedures within the agency; and

(b) Additional policies, procedures, solicitation provisions, or contract

clauses that supplement the FAR to satisfy the specific needs of the agency.

### 1.303 Publication and codification.

(a) Agency-wide acquisition regulations shall be published in the FEDERAL REGISTER as required by law, shall be codified under an assigned chapter in Title 48, Code of Federal Regulations, and shall parallel the FAR in format, arrangement, and numbering system (but see 1.104-1(c)). Coverage in an agency acquisition regulation that implements a specific part, subpart, section, or subsection of the FAR shall be numbered and titled to correspond to the appropriate FAR number and title. Supplementary material for which there is no counterpart in the FAR shall be codified using chapter, part, subpart, section, or subsection numbers of 70 and up (e.g., for the Department of Interior, whose assigned chapter number in Title 48 is 14, part 1470, subpart 1401.70, section 1401.370, or subsection 1401.301-70.)

(b) Issuances under 1.301(a)(2) need not be published in the FEDERAL REGISTER.

[48 FR 42103, Sept. 19, 1983, as amended at 50 FR 2269, Jan. 15, 1985]

### 1.304 Agency control and compliance procedures.

(a) Under the authorities of 1.301(c), agencies shall control and limit issuance of agency acquisition regulations and, in particular, local agency directives that restrain the flexibilities found in the FAR, and shall establish formal procedures for the review of these documents to assure compliance with this part 1.

(b) Agency acquisition regulations shall not—

(1) Unnecessarily repeat, paraphrase, or otherwise restate material contained in the FAR or higher-level agency acquisition regulations; or

(2) Except as required by law or as provided in subpart 1.4, conflict or be inconsistent with FAR content.

(c) Agencies shall evaluate all regulatory coverage in agency acquisition regulations to determine if it could apply to other agencies. Coverage that



is not peculiar to one agency shall be recommended for inclusion in the FAR.

[48 FR 42103, Sept. 19, 1983, as amended at 61 FR 39190, July 26, 1996]

### Subpart 1.4—Deviations from the FAR

#### 1.400 Scope of subpart.

This subpart prescribes the policies and procedures for authorizing deviations from the FAR. Exceptions pertaining to the use of forms prescribed by the FAR are covered in part 53 rather than in this subpart.

#### 1.401 Definition.

*Deviation* means any one or combination of the following:

(a) The issuance or use of a policy, procedure, solicitation provision (see definition in 52.101(a)), contract clause (see definition in 52.101(a)), method, or practice of conducting acquisition actions of any kind at any stage of the acquisition process that is inconsistent with the FAR.

(b) The omission of any solicitation provision or contract clause when its prescription requires its use.

(c) The use of any solicitation provision or contract clause with modified or alternate language that is not authorized by the FAR (see definitions of *modification* and *alternate* in 52.101(a)).

(d) The use of a solicitation provision or contract clause prescribed by the FAR on a *substantially as follows* or *substantially the same as* basis (see definitions in 52.101(a)), if such use is inconsistent with the intent, principle, or substance of the prescription or related coverage on the subject matter in the FAR.

(e) The authorization of lesser or greater limitations on the use of any solicitation provision, contract clause, policy, or procedure prescribed by the FAR.

(f) The issuance of policies or procedures that govern the contracting process or otherwise control contracting relationships that are not incorporated into agency acquisition regulations in accordance with 1.301(a).

#### 1.402 Policy.

Unless precluded by law, executive order, or regulation, deviations from the FAR may be granted as specified in this subpart when necessary to meet the specific needs and requirements of each agency. The development and testing of new techniques and methods of acquisition should not be stifled simply because such action would require a FAR deviation. The fact that deviation authority is required should not, of itself, deter agencies in their development and testing of new techniques and acquisition methods. Refer to 31.101 for instructions concerning deviations pertaining to the subject matter of part 31, Contract Cost Principles and Procedures. Deviations are not authorized with respect to part 30. Refer to 30.201–5 for instructions concerning waivers pertaining to Cost Accounting Standards.

[48 FR 42103, Sept. 19, 1983, as amended at 52 FR 35612, Sept. 22, 1987]

#### 1.403 Individual deviations.

Individual deviations affect only one contracting action, and, unless 1.405(e) is applicable, may be authorized by agency heads or their designees. The justification and agency approval shall be documented in the contract file and a copy of the approved deviation shall be furnished to the FAR Secretariat through a central agency control point.

#### 1.404 Class deviations.

Class deviations affect more than one contracting action. When it is known that a class deviation will be required on a permanent basis, an agency should propose an appropriate FAR revision to cover the matter. A copy of each approved class deviation shall be furnished to the FAR Secretariat.

(a) For civilian agencies except NASA, class deviations may be authorized by agency heads or their designees, unless 1.405(e) is applicable. Delegation of this authority shall not be made below the head of a contracting activity. Authorization of class deviations by agency officials is subject to the following limitations:

(1) An agency official who may authorize a class deviation, before doing so, shall consult with the chairperson

of the Civilian Agency Acquisition Council (CAA Council), unless that agency official determines that urgency precludes such consultation.

(2) Recommended revisions to the FAR shall be transmitted to the FAR Secretariat by agency heads or their designees for authorizing class deviations.

(b) For DOD, class deviations shall be controlled, processed, and approved in accordance with the Defense FAR Supplement.

(c) For NASA, class deviations shall be controlled and approved by the Associate Administrator for Procurement. Deviations shall be processed in accordance with agency regulations.

[48 FR 42103, Sept. 19, 1983, as amended at 56 FR 15148, Apr. 15, 1991; 59 FR 11387, March 10, 1994]

#### **1.405 Deviations pertaining to treaties and executive agreements.**

(a) *Executive agreements*, as used in this section, means Government-to-Government agreements, including agreements with international organizations, to which the United States is a party.

(b) Any deviation from the FAR required to comply with a treaty to which the United States is a party is authorized, unless the deviation would be inconsistent with FAR coverage based on a law enacted after the execution of the treaty.

(c) Any deviation from the FAR required to comply with an executive agreement is authorized unless the deviation would be inconsistent with FAR coverage based on law.

(d) A copy of the text of any deviation authorized under paragraphs (b) or (c) of this section shall be transmitted to the FAR Secretariat through a central agency control point.

(e) If a deviation required to comply with a treaty or an executive agreement is not authorized by paragraphs (b) or (c) of this section, then the request for deviation shall be processed through the FAR Secretariat to the appropriate council.

### **Subpart 1.5—Agency and Public Participation**

SOURCE: 50 FR 2269, Jan. 15, 1985, unless otherwise noted.

#### **1.501 Solicitation of agency and public views.**

##### **1.501-1 Definition.**

*Significant revisions*, as used in this subpart, means revisions that alter the substantive meaning of any coverage in the FAR System having a significant cost or administrative impact on contractors or offerors, or a significant effect beyond the internal operating procedures of the issuing agency. This expression, for example, does not include editorial, stylistic, or other revisions that have no impact on the basic meaning of the coverage being revised.

##### **1.501-2 Opportunity for public comments.**

(a) Views of agencies and nongovernmental parties or organizations will be considered in formulating acquisition policies and procedures.

(b) The opportunity to submit written comments on proposed significant revisions shall be provided by placing a notice in the FEDERAL REGISTER. Each of these notices shall include—

(1) The text of the revision or, if it is impracticable to publish the full text, a summary of the proposal;

(2) The address and telephone number of the individual from whom copies of the revision, in full text, can be requested and to whom comments thereon should be addressed; and

(3) When 1.501-3(b) is applicable, a statement that the revision is effective on a temporary basis pending completion of the public comment period.

(c) A minimum of 30 days and, normally, at least 60 days will be given for the receipt of comments.

##### **1.501-3 Exceptions.**

(a) Comments need not be solicited when the proposed coverage does not constitute a significant revision.

(b) Advance comments need not be solicited when urgent and compelling circumstances make solicitation of

comments impracticable prior to the effective date of the coverage, such as when a new statute must be implemented in a relatively short period of time. In such case, the coverage shall be issued on a temporary basis and shall provide for at least a 30 day public comment period.

**1.502 Unsolicited proposed revisions.**

Consideration shall also be given to unsolicited recommendations for revisions that have been submitted in writing with sufficient data and rationale to permit their evaluation.

**1.503 Public meetings.**

Public meetings may be appropriate when a decision to adopt, amend, or delete coverage is likely to benefit from significant additional views and discussion.

**Subpart 1.6—Career Development, Contracting Authority, and Responsibilities**

**1.601 General.**

(a) Unless specifically prohibited by another provision of law, authority and responsibility to contract for authorized supplies and services are vested in the agency head. The agency head may establish contracting activities and delegate broad authority to manage the agency's contracting functions to heads of such contracting activities. Contracts may be entered into and signed on behalf of the Government only by contracting officers. In some agencies, a relatively small number of high level officials are designated contracting officers solely by virtue of their positions. Contracting officers below the level of a head of a contracting activity shall be selected and appointed under 1.603.

(b) Agency heads may mutually agree to—

- (1) Assign contracting functions and responsibilities from one agency to another; and
- (2) Create joint or combined offices to exercise acquisition functions and responsibilities.

[60 FR 49721, Sept. 26, 1995]

**1.602 Contracting officers.**

**1.602–1 Authority.**

(a) Contracting officers have authority to enter into, administer, or terminate contracts and make related determinations and findings. Contracting officers may bind the Government only to the extent of the authority delegated to them. Contracting officers shall receive from the appointing authority (see 1.603-1) clear instructions in writing regarding the limits of their authority. Information on the limits of the contracting officers' authority shall be readily available to the public and agency personnel.

(b) No contract shall be entered into unless the contracting officer ensures that all requirements of law, executive orders, regulations, and all other applicable procedures, including clearances and approvals, have been met.

**1.602–2 Responsibilities.**

Contracting officers are responsible for ensuring performance of all necessary actions for effective contracting, ensuring compliance with the terms of the contract, and safeguarding the interests of the United States in its contractual relationships. In order to perform these responsibilities, contracting officers should be allowed wide latitude to exercise business judgment. Contracting officers shall—

(a) Ensure that the requirements of 1.602-1(b) have been met, and that sufficient funds are available for obligation;

(b) Ensure that contractors receive impartial, fair, and equitable treatment; and

(c) Request and consider the advice of specialists in audit, law, engineering, transportation, and other fields, as appropriate.

**1.602–3 Ratification of unauthorized commitments.**

(a) *Definitions.*

*Ratification*, as used in this subsection, means the act of approving an unauthorized commitment by an official who has the authority to do so.

*Unauthorized commitment*, as used in this subsection, means an agreement that is not binding solely because the Government representative who made it lacked the authority to enter into

that agreement on behalf of the Government.

(b) *Policy.* (1) Agencies should take positive action to preclude, to the maximum extent possible, the need for ratification actions. Although procedures are provided in this section for use in those cases where the ratification of an unauthorized commitment is necessary, these procedures may not be used in a manner that encourages such commitments being made by Government personnel.

(2) Subject to the limitations in paragraph (c) of this subsection, the head of the contracting activity, unless a higher level official is designated by the agency, may ratify an unauthorized commitment.

(3) The ratification authority in subparagraph (b)(2) of this subsection may be delegated in accordance with agency procedures, but in no case shall the authority be delegated below the level of chief of the contracting office.

(4) Agencies should process unauthorized commitments using the ratification authority of this subsection instead of referring such actions to the General Accounting Office for resolution. (See 1.602-3(d).)

(5) Unauthorized commitments that would involve claims subject to resolution under the Contract Disputes Act of 1978 should be processed in accordance with subpart 33.2, Disputes and Appeals.

(c) *Limitations.* The authority in subparagraph (b)(2) of this subsection may be exercised only when—

(1) Supplies or services have been provided to and accepted by the Government, or the Government otherwise has obtained or will obtain a benefit resulting from performance of the unauthorized commitment;

(2) The ratifying official has the authority to enter into a contractual commitment;

(3) The resulting contract would otherwise have been proper if made by an appropriate contracting officer;

(4) The contracting officer reviewing the unauthorized commitment determines the price to be fair and reasonable;

(5) The contracting officer recommends payment and legal counsel concurs in the recommendation, unless

agency procedures expressly do not require such concurrence;

(6) Funds are available and were available at the time the unauthorized commitment was made; and

(7) The ratification is in accordance with any other limitations prescribed under agency procedures.

(d) *Nonratifiable commitments.* Cases that are not ratifiable under this subsection may be subject to resolution as recommended by the General Accounting Office under its claim procedure (GAO Policy and Procedures Manual for Guidance of Federal Agencies, Title 4, Chapter 2), or as authorized by FAR part 50. Legal advice should be obtained in these cases.

[53 FR 3689, Feb. 8, 1988, as amended at 60 FR 48225, Sept. 18, 1995]

### **1.603 Selection, appointment, and termination of appointment.**

#### **1.603-1 General.**

Subsection 414(4) of title 41, United States Code, requires agency heads to establish and maintain a procurement career management program and a system for the selection, appointment, and termination of appointment of contracting officers. Agency heads or their designees may select and appoint contracting officers and terminate their appointments. These selections and appointments shall be consistent with Office of Federal Procurement Policy's (OFPP) standards for skill-based training in performing contracting and purchasing duties as published in OFPP Policy Letter No. 92-3, Procurement Professionalism Program Policy—Training for Contracting Personnel, June 24, 1992.

[59 FR 67015, Dec. 28, 1994]

#### **1.603-2 Selection.**

In selecting contracting officers, the appointing official shall consider the complexity and dollar value of the acquisitions to be assigned and the candidate's experience, training, education, business acumen, judgment, character, and reputation. Examples of selection criteria include—

(a) Experience in Government contracting and administration, commercial purchasing, or related fields;

(b) Education or special training in business administration, law, accounting, engineering, or related fields;

(c) Knowledge of acquisition policies and procedures, including this and other applicable regulations;

(d) Specialized knowledge in the particular assigned field of contracting; and

(e) Satisfactory completion of acquisition training courses.

#### **1.603-3 Appointment.**

(a) Contracting officers shall be appointed in writing on an SF 1402, Certificate of Appointment, which shall state any limitations on the scope of authority to be exercised, other than limitations contained in applicable law or regulation. Appointing officials shall maintain files containing copies of all appointments that have not been terminated.

(b) Agency heads are encouraged to delegate micro-purchase authority to individuals who are employees of an executive agency or members of the Armed Forces of the United States who will be using the supplies or services being purchased. Individuals delegated this authority are not required to be appointed on an SF 1402, but shall be appointed in writing in accordance with agency procedures.

[61 FR 39190, July 26, 1996]

#### **1.603-4 Termination.**

Termination of a contracting officer appointment will be by letter, unless the Certificate of Appointment contains other provisions for automatic termination. Terminations may be for reasons such as reassignment, termination of employment, or unsatisfactory performance. No termination shall operate retroactively.

### **Subpart 1.7—Determinations and Findings**

SOURCE: 50 FR 1726, Jan. 11, 1985 (interim rule), and 50 FR 52429, Dec. 23, 1985 (final rule), unless otherwise noted.

#### **1.700 Scope of subpart.**

This subpart prescribes general policies and procedures for the use of determinations and findings (D&F's). Requirements for specific types of D&F's

can be found with the appropriate subject matter.

#### **1.701 Definition.**

*Determination and Findings* (D&F) means a special form of written approval by an authorized official that is required by statute or regulation as a prerequisite to taking certain contracting actions. The *determination* is a conclusion or decision supported by the *findings*. The findings are statements of fact or rationale essential to support the determination and must cover each requirement of the statute or regulation.

#### **1.702 General.**

(a) A D&F shall ordinarily be for an individual contract action. Unless otherwise prohibited, class D&F's may be executed for classes of contract action (see 1.703). The approval granted by a D&F is restricted to the proposed contract action(s) reasonably described in that D&F. D&F's may be provided for a reasonable degree of flexibility. Furthermore, in their application, reasonable variations in estimated quantities or prices are permitted, unless the D&F specifies otherwise.

(b) When an option is anticipated, the D&F shall state the approximate quantity to be awarded initially and the extent of the increase to be permitted by the option.

#### **1.703 Class determinations and findings.**

(a) A class D&F provides authority for a class of contracting actions. A class may consist of contracting actions for the same or related supplies or services or other contracting actions that require essentially identical justification.

(b) The findings in a class D&F shall fully support the proposed action either for the class as a whole or for each action. A class D&F shall be for a specified period, with the expiration date stated in the document.

(c) The contracting officer shall ensure that individual actions taken pursuant to the authority of a class D&F are within the scope of the D&F.

**1.704 Content.**

Each D&F shall set forth enough facts and circumstances to clearly and convincingly justify the specific determination made. As a minimum, each D&F shall include, in the prescribed agency format, the following information:

(a) Identification of the agency and of the contracting activity and specific identifications of the document as a *Determination and Findings*.

(b) Nature and/or description of the action being approved.

(c) Citation of the appropriate statute and/or regulation upon which the D&F is based.

(d) Findings that detail the particular circumstances, facts, or reasoning essential to support the determination. Necessary supporting documentation shall be obtained from appropriate requirements and technical personnel.

(e) A determination, based on the findings, that the proposed action is justified under the applicable statute or regulation.

(f) Expiration date of the D&F, if required (see 1.706(b)).

(g) The signature of the official authorized to sign the D&F (see 1.706) and the date signed.

**1.705 Supersession and modification.**

(a) If a D&F is superseded by another D&F, that action shall not render invalid any action taken under the original D&F prior to the date of its supersession.

(b) A modification of the D&F will not require cancellation of the solicitation if the D&F, as modified, supports the contracting action.

**1.706 Expiration.**

Expiration dates are required for class D&F's and are optional for individual D&F's. Authority to act under an individual D&F expires when it is exercised or on an expiration date specified in the document, whichever occurs first. Authority to act under a class D&F expires on the expiration date specified in the document. When a solicitation has been furnished to prospective offerors before the expiration date, the authority under the D&F will continue until award of the contract(s) resulting from that solicitation.

**1.707 Signatory authority.**

When a D&F is required, it shall be signed by the appropriate official in accordance with agency regulations. Authority to sign or delegate signature authority for the various D&F's is as shown in the applicable FAR part.

**PART 2—DEFINITIONS OF WORDS AND TERMS**

Sec.

2.000 Scope of part.

**Subpart 2.1—Definitions**

2.101 Definitions.

**Subpart 2.2—Definitions Clause**

2.201 Contract clause.

AUTHORITY: 40 U.S.C. 486(c); 10 U.S.C. Chapter 137; and 42 U.S.C. 2473(c).

SOURCE: 48 FR 42107, Sept. 19, 1983, unless otherwise noted.

**2.000 Scope of part.**

This part defines words and terms commonly used in this regulation. Other terms are defined in the part or subpart with which they are particularly associated (see the Index for locations).

**Subpart 2.1—Definitions****2.101 Definitions.**

As used throughout this regulation, the following words and terms are used as defined in this subpart unless (a) the context in which they are used clearly requires a different meaning or (b) a different definition is prescribed for a particular part or portion of a part.

*Acquisition* means the acquiring by contract with appropriated funds of supplies or services (including construction) by and for the use of the Federal Government through purchase or lease, whether the supplies or services are already in existence or must be created, developed, demonstrated, and evaluated. Acquisition begins at the point when agency needs are established and includes the description of requirements to satisfy agency needs, solicitation and selection of sources, award of contracts, contract financing,

contract performance, contract administration, and those technical and management functions directly related to the process of fulfilling agency needs by contract.

*Affiliates* means associated business concerns or individuals if, directly or indirectly, (a) either one controls or can control the other or (b) a third party controls or can control both.

*Agency head* (see *head of the agency*).

*Commercial component* means any component that is a commercial item.

*Commercial item* means—

(a) Any item, other than real property, that is of a type customarily used for nongovernmental purposes and that—

(1) Has been sold, leased, or licensed to the general public; or,

(2) Has been offered for sale, lease, or license to the general public;

(b) Any item that evolved from an item described in paragraph (a) of this definition through advances in technology or performance and that is not yet available in the commercial marketplace, but will be available in the commercial marketplace in time to satisfy the delivery requirements under a Government solicitation;

(c) Any item that would satisfy a criterion expressed in paragraphs (a) or (b) of this definition, but for—

(1) Modifications of a type customarily available in the commercial marketplace; or

(2) Minor modifications of a type not customarily available in the commercial marketplace made to meet Federal Government requirements. “Minor” modifications means modifications that do not significantly alter the nongovernmental function or essential physical characteristics of an item or component, or change the purpose of a process. Factors to be considered in determining whether a modification is minor include the value and size of the modification and the comparative value and size of the final product. Dollar values and percentages may be used as guideposts, but are not conclusive evidence that a modification is minor;

(d) Any combination of items meeting the requirements of paragraphs (a), (b), (c), or (e) of this definition that are of a type customarily combined and

sold in combination to the general public;

(e) Installation services, maintenance services, repair services, training services, and other services if such services are procured for support of an item referred to in paragraphs (a), (b), (c), or (d) of this definition, and if the source of such services—

(1) Offers such services to the general public and the Federal Government contemporaneously and under similar terms and conditions; and

(2) Offers to use the same work force for providing the Federal Government with such services as the source uses for providing such services to the general public;

(f) Services of a type offered and sold competitively in substantial quantities in the commercial marketplace based on established catalog or market prices for specific tasks performed under standard commercial terms and conditions. This does not include services that are sold based on hourly rates without an established catalog or market price for a specific service performed;

(g) Any item, combination of items, or service referred to in paragraphs (a) through (f), notwithstanding the fact that the item, combination of items, or service is transferred between or among separate divisions, subsidiaries, or affiliates of a contractor; or

(h) A nondevelopmental item, if the procuring agency determines the item was developed exclusively at private expense and sold in substantial quantities, on a competitive basis, to multiple State and local governments.

*Component* means any item supplied to the Federal Government as part of an end item or of another component.

*Contract* means a mutually binding legal relationship obligating the seller to furnish the supplies or services (including construction) and the buyer to pay for them. It includes all types of commitments that obligate the Government to an expenditure of appropriated funds and that, except as otherwise authorized, are in writing. In addition to bilateral instruments, contracts include (but are not limited to) awards and notices of awards; job orders or task letters issued under basic ordering agreements; letter contracts;

orders, such as purchase orders, under which the contract becomes effective by written acceptance or performance; and bilateral contract modifications. Contracts do not include grants and cooperative agreements covered by 31 U.S.C. 6301, *et seq.* For discussion of various types of contracts, see part 16.

*Contract administration office* means an office that performs (a) assigned postaward functions related to the administration of contracts and (b) assigned preaward functions.

*Contracting* means purchasing, renting, leasing, or otherwise obtaining supplies or services from nonfederal sources. Contracting includes description (but not determination) of supplies and services required, selection and solicitation of sources, preparation and award of contracts, and all phases of contract administration. It does not include making grants or cooperative agreements.

*Contracting activity* means an element of an agency designated by the agency head and delegated broad authority regarding acquisition functions.

*Contracting office* means an office that awards or executes a contract for supplies or services and performs postaward functions not assigned to a contract administration office.

*Contracting officer* means a person with the authority to enter into, administer, and/or terminate contracts and make related determinations and findings. The term includes certain authorized representatives of the contracting officer acting within the limits of their authority as delegated by the contracting officer. *Administrative contracting officer (ACO)* refers to a contracting officer who is administering contracts. *Termination contracting officer (TCO)* refers to a contracting officer who is settling terminated contracts. A single contracting officer may be responsible for duties in any or all of these areas. Reference in this regulation to administrative contracting officer or termination contracting officer does not (a) require that a duty be performed at a particular office or activity or (b) restrict in any way a contracting officer in the performance of any duty properly assigned.

*Day* means, unless otherwise specified, a calendar day.

*Delivery order* means an order for supplies placed against an established contract or with Government sources.

*Executive agency* means an executive department, a military department, or any independent establishment within the meaning of 5 U.S.C. 101, 102, and 104(1), respectively, and any wholly owned Government corporation within the meaning of 31 U.S.C. 9101.

*Facsimile* means electronic equipment that communicates and reproduces both printed and handwritten material. If used in conjunction with a reference to a document, e.g., facsimile bid, the term refers to a document (in the example given, a bid) that has been transmitted to and received by the Government via facsimile.

*Federal Acquisition Computer Network (FACNET) Architecture* means the Governmentwide Electronic Commerce/Electronic Data Interchange (EC/EDI) operational capability for the acquisition of supplies and services that provides for electronic data interchange of acquisition information between the Government and the private sector, employs nationally and internationally recognized data formats, and provides universal user access.

*Federal agency* means any executive agency or any independent establishment in the legislative or judicial branch of the Government (except the Senate, the House of Representatives, the Architect of the Capitol, and any activities under the Architect's direction).

*Full FACNET* means an agency has certified that it has implemented all of the FACNET functions outlined in 4.504, and more than 75 percent of eligible contracts (not otherwise exempted from FACNET) in amounts exceeding the micro-purchase threshold, but not exceeding the simplified acquisition threshold, were entered into by the agency during the preceding fiscal year using an interim FACNET certified electronic automated information system.

*Governmentwide FACNET* means that the Federal Government has certified its FACNET capability, and more than 75 percent of eligible contracts (not otherwise exempted from FACNET) in amounts exceeding the micro-purchase



threshold, but not exceeding the simplified acquisition threshold, entered into by the executive agencies during the preceding fiscal year were made through electronic automated information systems with full FACNET certification.

*Head of the agency* (also called *agency head*) means the Secretary, Attorney General, Administrator, Governor, Chairperson, or other chief official of an executive agency, unless otherwise indicated, including any deputy or assistant chief official of an executive agency; and the term *authorized representative* means any person, persons, or board (other than the contracting officer) authorized to act for the head of the agency or Secretary.

*Head of the contracting activity* includes the official who has overall responsibility for managing the contracting activity.

*Information technology* means any equipment, or interconnected system(s) or subsystem(s) of equipment, that is used in the automatic acquisition, storage, manipulation, management, movement, control, display, switching, interchange, transmission, or reception of data or information by the agency.

(a) For purposes of this definition, equipment is used by an agency if the equipment is used by the agency directly or is used by a contractor under a contract with the agency which—

(1) Requires the use of such equipment; or

(2) Requires the use, to a significant extent, of such equipment in the performance of a service or the furnishing of a product.

(b) The term *information technology* includes computers, ancillary equipment, software, firmware and similar procedures, services (including support services), and related resources.

(c) The term *information technology* does not include any equipment that is acquired by a contractor incidental to a contract.

*Interim FACNET* means a contracting office has been certified as having implemented the electronic automated information systems capability to provide widespread public notice of contracting opportunities, issue solicitations, and receive responses to solicita-

tions and associated requests for information. Such capability must allow the private sector to access notices of solicitations, access and review solicitations, and respond to solicitations.

*In writing* or *written* means any worded or numbered expression which can be read, reproduced, and later communicated, and includes electronically transmitted and stored information.

*Major system* means that combination of elements that will function together to produce the capabilities required to fulfill a mission need. The elements may include hardware, equipment, software, or any combination thereof, but exclude construction or other improvements to real property. A system shall be considered a major system if—

(a) The Department of Defense is responsible for the system and the total expenditures for research, development, test, and evaluation for the system are estimated to be more than \$75,000,000 (based on fiscal year 1980 constant dollars) or the eventual total expenditure for the acquisition exceeds \$300,000,000 (based on fiscal year 1980 constant dollars);

(b) A civilian agency is responsible for the system and total expenditures for the system are estimated to exceed \$750,000 (based on fiscal year 1980 constant dollars) or the dollar threshold for a “major system” established by the agency pursuant to Office of Management and Budget Circular A-109, entitled “Major System Acquisitions,” whichever is greater; or

(c) The system is designated a “major system” by the head of the agency responsible for the system.

*Market research* means collecting and analyzing information about capabilities within the market to satisfy agency needs.

*May* denotes the permissive. However, the words *no person may...* mean that no person is required, authorized, or permitted to do the act described.

*Micro-purchase* means an acquisition of supplies or services (except construction), the aggregate amount of which does not exceed \$2,500, except that in the case of construction, the limit is \$2,000.

*Micro-purchase threshold* means \$2,500.

*National defense* means any activity related to programs for military or

atomic energy production or construction, military assistance to any foreign nation, stockpiling, or space.

*Nondevelopmental item* means—

(a) Any previously developed item of supply used exclusively for governmental purposes by a Federal agency, a State or local government, or a foreign government with which the United States has a mutual defense cooperation agreement;

(b) Any item described in paragraph (a) of this definition that requires only minor modification or modifications of a type customarily available in the commercial marketplace in order to meet the requirements of the procuring department or agency; or

(c) Any item of supply being produced that does not meet the requirements of paragraph (a) or (b) solely because the item is not yet in use.

*Offer* means a response to a solicitation that, if accepted, would bind the offeror to perform the resultant contract. Responses to invitations for bids (sealed bidding) are offers called *bids* or sealed bids; responses to requests for proposals (negotiation) are offers called *proposals*; responses to requests for quotations (negotiation) are *not* offers and are called *quotes*. For unsolicited proposals, see subpart 15.5.

*Possessions* includes the Virgin Islands, Johnston Island, American Samoa, Guam, Wake Island, Midway Island, and the guano islands, but does not include Puerto Rico, leased bases, or trust territories.

*Senior procurement executive* means the individual appointed pursuant to section 16(3) of the Office of Federal Procurement Policy Act (41 U.S.C. 414(3)) who is responsible for management direction of the acquisition system of the executive agency, including implementation of the unique acquisition policies, regulations, and standards of the executive agency.

*Shall* denotes the imperative.

*Signature* or *signed* means the discrete, verifiable symbol of an individual which, when affixed to a writing with the knowledge and consent of the individual, indicates a present intention to authenticate the writing. This includes electronic systems.

*Simplified acquisition procedures* means the methods prescribed in part 13 for

making purchases of supplies or services.

*Simplified acquisition threshold* means \$100,000, except that in the case of any contract to be awarded and performed, or purchase to be made, outside the United States in support of a contingency operation as defined in 10 U.S.C. 101(a)(13), the term means \$200,000.

*Supplies* means all property except land or interest in land. It includes (but is not limited to) public works, buildings, and facilities; ships, floating equipment, and vessels of every character, type, and description, together with parts and accessories; aircraft and aircraft parts, accessories, and equipment; machine tools; and the alteration or installation of any of the foregoing.

*Task order* means an order for services placed against an established contract or with Government sources.

*United States*, when used in a geographic sense, means the 50 States and the District of Columbia.

[48 FR 42107, Sept. 19, 1983, as amended at 50 FR 1727, Jan. 11, 1985; 50 FR 4221, Jan. 30, 1985; 50 FR 26903, June 28, 1985; 50 FR 52429, Dec. 23, 1985; 51 FR 2649, Jan. 17, 1986; 52 FR 19802, May 27, 1987; 54 FR 48981, Nov. 28, 1989; 56 FR 41744, Aug. 22, 1991; 60 FR 34736, July 3, 1995; 60 FR 42653, Aug. 16, 1995; 60 FR 48235, Sept. 18, 1995; 61 FR 39190, July 26, 1996; 61 FR 41468, Aug. 8, 1996]

## Subpart 2.2—Definitions Clause

### 2.201 Contract clause.

The contracting officer shall insert the clause at 52.202-1, Definitions, in solicitations and contracts except when the contract is not expected to exceed the simplified acquisition threshold. If the contract is for personal services, construction, architect-engineer services, or dismantling, demolition, or removal of improvements, the contracting officer shall use the clause with its Alternate I. Additional definitions may be included, provided they are consistent with the clause and the FAR.

[60 FR 34744, July 3, 1995, as amended at 61 FR 39190, July 26, 1996]

**PART 3—IMPROPER BUSINESS  
PRACTICES AND PERSONAL  
CONFLICTS OF INTEREST**

Sec.

3.000 Scope of part.

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  - 3.101-1 General.
  - 3.101-2 Solicitation and acceptance of gratuities by Government personnel.
  - 3.101-3 Agency regulations.
- 3.102 [Reserved]
- 3.103 Independent pricing.
  - 3.103-1 Solicitation provision.
  - 3.103-2 Evaluating the certification.
  - 3.103-3 The need for further certifications.
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  - 3.104-1 General.
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  - 3.104-3 Statutory prohibitions and restrictions.
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  - 3.104-5 Disclosure, protection, and marking of proprietary and source selection information.
  - 3.104-6 Restrictions on employment or business opportunity discussions between competing contractors and procurement officials.
  - 3.104-7 Postemployment restrictions applicable to Government officers and employees serving as procurement officials and certifications required from procurement officials leaving Government service.
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- 3.802 Prohibitions.
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**Subpart 3.9—Whistleblower Protections for  
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- 3.900 Scope of subpart.
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- 3.902 Applicability.
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## Federal Acquisition Regulation

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3.905 Procedures for investigating complaints.

3.906 Remedies.

AUTHORITY: 40 U.S.C. 486(c); 10 U.S.C. Chapter 137; and 42 U.S.C. 2473(c).

SOURCE: 48 FR 42108, Sept. 19, 1983, unless otherwise noted.

### 3.000 Scope of part.

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

## Subpart 3.1—Safeguards

### 3.101 Standards of conduct.

#### 3.101-1 General.

Government business shall be conducted in a manner above reproach and, except as authorized by statute or regulation, with complete impartiality and with preferential treatment for none. Transactions relating to the expenditure of public funds require the highest degree of public trust and an impeccable standard of conduct. The general rule is to avoid strictly any conflict of interest or even the appearance of a conflict of interest in Government-contractor relationships. While many Federal laws and regulations place restrictions on the actions of Government personnel, their official conduct must, in addition, be such that they would have no reluctance to make a full public disclosure of their actions.

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

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

### 3.101-3 Agency regulations.

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

(1) Agency-authorized exceptions to 3.101-2; and

(2) Disciplinary measures for persons violating the standards of conduct.

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

### 3.102 [Reserved]

### 3.103 Independent pricing.

#### 3.103-1 Solicitation provision.

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

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

(b) [Reserved]

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

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

[48 FR 42108, Sept. 19, 1983, as amended at 50 FR 1727, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985; 55 FR 25526, June 21, 1990; 60 FR 34744, July 3, 1995]

#### 3.103-2 Evaluating the certification.

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

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

(ii) The fact that a firm has informed prospective customers of proposed or pending publication of new or revised

### 3.103-3

price lists for items being acquired by the Government.

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

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

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

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

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

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

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

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

(4) The determination made under subparagraph (2) above shall not prevent or inhibit the prosecution of any criminal or civil actions involving the

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occurrences or transactions to which the certificate relates.

[48 FR 42108, Sept. 19, 1983, as amended at 55 FR 25526, June 21, 1990]

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

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

#### **3.104 Procurement integrity.**

##### **3.104-1 General.**

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

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

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

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

(3) Post-employment restrictions are covered by 18 U.S.C. 207, which prohibits certain activities by former Government employees, including representation of a contractor before the

Government in relation to any contract on which the former employee worked while employed by the Government; and

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

[55 FR 36784, Sept. 6, 1990, as amended at 55 FR 49853, Nov. 30, 1990]

### 3.104-2 Applicability.

(a) *Conduct and procurement activities during the period July 16, 1989, through November 30, 1989*—(1) *Gratuities, employment discussions, and soliciting, obtaining, or disclosing proprietary or source selection information.* (i) Participation in a procurement during the period July 16, 1989, through November 30, 1989, whether as a procurement official, competing contractor or through access to information, subjects the participant, during that period, to the prohibitions contained in section 27 as originally enacted.

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

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

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

(C) Except as provided in subdivision (a)(1)(ii)(A) of this subsection, a competing contractor who was subject to

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

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

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

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

(B) The 2-year period of any post-employment restriction that attached during the period July 16, 1989, through November 30, 1989, has not expired.

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

(2) *Post-employment restrictions.* (i) The post-employment restrictions contained in section 27 were suspended during the period December 1, 1989,

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

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

(c) *Conduct and procurement activities on or after December 1, 1990—(1) Gratuities, employment discussions, and soliciting, obtaining, or disclosing proprietary or source selection information.* (i) The prohibitions contained in section 27, of the law as amended, apply on or after December 1, 1990, to persons who participate in a procurement on or after that date, whether as a procurement official, a competing contractor, or through access to information.

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

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

(ii) The post-employment restrictions of subsection 27(f) of the law as

amended are effective June 1, 1991. Government employees who perform procurement official activities on or after June 1, 1991, are subject to those restrictions.

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

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

[55 FR 49853, Nov. 30, 1990]

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

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

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

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

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

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

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

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

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

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

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

(d) *Post-employment Restrictions resulting from procurement activities of Government officers or employees who are or were procurement officials (subsection 27(f) of the Act; not effective until June 1, 1991).* (1) No individual who, while serving as an officer or employee of the Government or member of the Armed Forces, was a procurement official with respect to a particular procurement may knowingly—

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

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

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

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

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

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

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

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

[55 FR 36784, Sept. 6, 1990, as amended at 55 FR 49854, Nov. 30, 1990]

#### **3.104-4 Definitions.**

As used in this subsection—

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

(b)(1) *Competing contractor*, with respect to any procurement (including any procurement using procedures other than competitive procedures) of property or services means any entity (such as an individual, partnership, corporation, educational institution, nonprofit or not for profit organization, or business unit) legally capable of entering into a contract or subcontract in its own name that is, or is



reasonably likely to become, a competitor for or recipient of a contract or subcontract under such procurement, and includes any other person acting on behalf of such an entity.

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

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

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

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

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

(2) Each contract award and each contract modification constitutes a

separate procurement action, i.e., a separate period to which the prohibitions and the requirements of the Act apply.

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

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

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

(1) A member of the uniformed services as defined in section 101(3) of title 37 U.S.C.;

(2) A person who is appointed to a position in the Federal Government under title 5 U.S.C., or any other title authorizing such appointments, including a person under a temporary appointment; and

(3) A special Government employee as defined in section 202 of title 18 U.S.C.

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

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

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

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

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

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

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

(2) Promotional vendor training does not include training provided by a vendor when a vendor's products are furnished under contract to the Govern-

ment and the training is to facilitate the use of those products.

(g) *Participated personally and substantially* means active and significant involvement of the individual in activities directly related to the procurement. To participate *personally* means directly, and includes the participation of a subordinate when actually directed by the supervisor in the matter. To participate *substantially* means that the employee's involvement must be of significance to the matter. For example, the review of procurement documents solely to determine compliance with applicable regulatory, administrative, or budgetary requirements or procedures does not constitute substantial participation in a procurement. It requires more than official responsibility, knowledge, perfunctory involvement, or involvement on an administrative or peripheral issue. A finding of substantiality should be based not only on the effort devoted to a matter, but on the importance of the effort. While a series of peripheral involvements may be insubstantial, the single act of approving or participating in a critical step may be substantial.

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

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

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

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

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

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

(vi) Selection of sources for that procurement;

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

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

(2) For purposes of 3.104-4(h), the term *employee of an agency* includes a

contractor, subcontractor, consultant, expert, or advisor (other than a competing contractor) acting on behalf of, or providing advice to, the agency with respect to any phase of the agency procurement concerned.

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

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

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

(iii) The performance of general, technical, engineering, or scientific effort having broad application not directly associated with a particular procurement, notwithstanding that such general, technical, engineering, or scientific effort subsequently may be incorporated into a particular procurement;

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

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

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

(5) For purposes of 3.104-4(h), the term *procurement official* does not include contracting officers or other in-

dividuals whose authority is limited to the micro-purchase threshold if the head of the contracting activity determines that it is unlikely that the individual will make purchases in a total amount greater than \$20,000 in any 12-month period.

(i) *Property* means supplies as defined in 2.101.

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

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

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

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

(3) Proprietary information does not include information—

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

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

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

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

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

(ii) Is required by statute, regulation, or order to be secured in a source selection file or other facility to prevent disclosure.

(2) Source selection information is limited to—

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

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

(iii) Source selection plans;

(iv) Technical evaluation plans;

(v) Technical evaluations of proposals;

(vi) Cost or price evaluations of proposals;

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

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

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

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

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

[55 FR 36785, Sept. 6, 1990, as amended at 55 FR 49854, Nov. 30, 1990; 59 FR 64787, Dec. 15, 1994; 61 FR 39191, July 26, 1996]

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

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

proprietary or source selection information, or does not know if the person or entity may disclose or receive such information, shall make the inquiries prescribed at 3.104-8(d).

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

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

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

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

(2) For contracts and contract modifications in excess of \$100,000, the head of the agency, or his or her designee, shall establish procedures to assure that the names of all persons, identification of the classes of persons and, to the maximum extent practicable, the names of all individuals within a class of persons, authorized access to

proprietary or source selection information at the contracting activity are listed in the contract file.

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

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

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

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

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

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

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

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

Thereafter, the contracting officer may release the information.

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

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

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

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

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

[55 FR 36787, Sept. 6, 1990]

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

(a) *Applicability to procurement officials.* During the conduct of a Federal agency procurement, subsection

27(b)(1) of the Act prohibits an individual who has become a procurement official from knowingly, directly or indirectly, soliciting or accepting from or discussing with any officer, employee, representative, agent, or consultant of a competing contractor, future employment or business opportunity. Subsection 27(b)(1) of the Act also applies to individuals acting as procurement officials on behalf of the procuring agency who are, or are employed by, contractors, subcontractors, consultants, experts, or advisors (other than employees of a competing contractor). The prohibition in subsection 27(b)(1) does not apply to a procurement official—

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

(2) After the procurement official leaves Government service;

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

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

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

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

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

(b) *Applicability to competing contractors.* During the conduct of a Federal agency procurement, subsection 27(a)(1) of the Act prohibits a competing contractor from knowingly, directly or indirectly, offering or promising to, or discussing with, a procurement official any future business or

employment opportunity. The prohibition does not apply to—

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

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

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

(1) The evaluation of bids or proposals, the selection of sources, or the conduct of negotiations in connection with such solicitation or contract during the period beginning with the issuance of a procurement solicitation and ending with the award of a contract or cancellation of a procurement; or

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

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

(1) Identify the procurement involved;

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

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

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

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

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

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

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

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

(2) The HCA or his or her designee may request that any person, including the procurement official, the Source Selection Authority, the contracting officer or the procurement official's immediate supervisor, provide any additional information necessary to evaluate the recusal proposal.

(3) Any rejection of the recusal proposal shall be in writing and shall state

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

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

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

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

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

[55 FR 36788, Sept. 6, 1990]

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

(a) Subsection 27(e)(4) of the Act provides that if a procurement official

leaves the Government during the conduct of a procurement expected to result in a contract or modification in excess of \$100,000, such official shall certify to the contracting officer that he or she understands the continuing obligation, during the conduct of the procurement, not to disclose propriety or source selection information related to such agency procurement. This certification requirement also applies to individuals acting as procurement officials on behalf of the procuring activity who are, or are employed by, contractors, subcontractors, consultants, experts, or advisors other than employees of the competing contractor when such individuals, during the conduct of the procurement, cease to function as procurement officials for the procurement.

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

(c) Subsection 27(f)(1)(B) of the Act restricts a current or former Government officer or employee, as defined in 3.104-4(d), who was a procurement official with respect to a particular procurement, from knowingly participating personally and substantially on be-

half of the competing contractor in performance of the contract. To participate "personally and substantially" requires the presence of both direct and significant involvement in the performance of the specific contract. The performance of general engineering, scientific or technical work, or providing general budgetary or policy advice, shall not be considered personal and substantial participation on behalf of a competing contractor in the performance of the contract for which the Government officer or employee is or was a procurement official. Where participation is on behalf of a competing contractor who is a subcontractor, the significance of that participation will be determined in relation to the prime contract. This restriction lasts for 2 years from the date of the last personal and substantial participation in the Federal agency procurement. This restriction is not effective until June 1, 1991.

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

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

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

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

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

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

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

(iii) The procurement official involved in the award or modification of



the prime contract personally directed or recommended the particular subcontractor as a source for the subcontract; or

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

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

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

[55 FR 36789, Sept. 6, 1990, as amended at 55 FR 49854, Nov. 30, 1990]

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

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

(1) A competing contractor engages in specific conduct after having satisfied the duty to inquire under paragraphs (b), (c), and (d) of this subsection, or when the competing contractor engages in conduct based upon

good faith reliance on an agency ethics advisory opinion issued to a current or former procurement official under paragraph (e) of this subsection.

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

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

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

(b) *Duty to inquire—employment discussions.* (1) A contractor who wishes to

discuss employment opportunities with an individual whose duties and functions may make that individual a procurement official (see 3.104-4(h)) should ask if that individual is a procurement official for a procurement for which the contractor is a competing contractor or is likely to become a competing contractor before conducting any discussion related to employment. A competing contractor shall not be considered to have knowingly violated the prohibitions set forth in subsection 27(a)(1) of the Act (see 3.104-3(a)(1)) if the contractor has made an inquiry in good faith of the possible procurement official and has been advised that the individual is not a procurement official for any procurement for which the contractor is or is reasonably likely to become a competing contractor, or is advised that the procurement official has been recused from participation in the procurement in accordance with 3.104-6.

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

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

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

(ii) Shall not, if the contractor represents that it is or is reasonably likely to become a competing contractor, enter into employment or business opportunity discussions with that contractor. If the procurement official is an eligible procurement official as de-

finied at 3.104-6(c), and desires to pursue discussions with that contractor, the procurement official must first seek and obtain written authorization for recusal in accordance with the procedures at 3.104-6 before entering into further discussions with that contractor.

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

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

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

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

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

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

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

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

(ii) The information is proprietary or source selection information and the individual to whom the procurement

official wishes to disclose the information has been authorized access to such information by the Head of the Agency or the contracting officer.

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

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

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

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

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

(ii) Items of information constitute proprietary or source selection information as defined in 3.104-4; or

(iii) Proprietary or source selection information may be disclosed.

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

resolved in accordance with subparagraph (c)(3) of this subsection.

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

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

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

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

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

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

(3) Within 30 days after the date a request containing complete information

is received, or as soon thereafter as practicable, the agency ethics official shall issue an opinion as to whether proposed conduct is proper or would violate section 27 of the Act.

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

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

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

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

(5) Where the requester engages in conduct in good faith reliance upon an ethics advisory opinion, or a competing contractor engages in conduct based upon good faith reliance on the requester's ethics advisory opinion, neither the requester nor the competing contractor shall be found to have knowingly violated the restriction in issue. Where the requester or the competing contractor has actual knowledge or reason to believe that the opinion is based upon fraudulent, misleading, or otherwise incorrect information provided by the requester, their reli-

ance upon the opinion will not be deemed to be in good faith.

[55 FR 36790, Sept. 6, 1990]

### 3.104-9 Certification requirements.

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

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

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

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

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

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

(B) Will report immediately to the officer or employee of the competing contractor responsible for the offer or bid for any contract or the modification of a contract, as the case may be,

any information concerning a violation or possible violation of subsections 27 (a), (b), or (f) of the Act (see 3.104-3), occurring on or after December 1, 1990, as implemented in the FAR.

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

(3) The signed certifications prescribed in 3.104-10 shall be submitted as follows:

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

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

(C) Failure of a bidder to submit the signed certificate with its bid render the bid nonresponsive.

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

(B) For letter contracts, other unpriced contracts, or unpriced contract modifications, whether or not the unpriced contract or modification con-

tains a maximum or not to exceed price, the signed certifications shall be submitted prior to the award of the letter contract, unpriced contract, or unpriced contract modification, and prior to the definitization of the letter contract or the establishment of the price of the unpriced contract or unpriced contract modification. The second certification shall apply only to the period between award of the letter contract and execution of the document definitizing the letter contract, or award of the unpriced contract or unpriced contract modification and execution of the document establishing the definitive price of such unpriced contract or unpriced contract modification.

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

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

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

(F) For purposes of contracts entered into under section 8(a) of the SBA, the business entity with whom the SBA contracts, and not the SBA, shall be required to comply with the certification requirements of subsection 27(e). The SBA shall obtain the signed certificate from the business entity, and forward the certificate to the contracting officer prior to the award of a contract to the SBA.

(G) Failure of an offeror to submit the signed certificate within the time prescribed by the contracting officer is

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a failure to comply with a material requirement of the solicitation and shall cause the offer to be rejected.

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

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

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

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

CONTRACTING OFFICER CERTIFICATE OF PROCUREMENT INTEGRITY

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

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

\_\_\_\_\_

(Signature of contracting officer and date)

\*Subsections 27 (a), (b), and (d), are effective on December 1, 1990. Subsection 27(f) is effective on June 1, 1991. THIS CERTIFICATION CONCERNS A MATTER WITHIN THE JURISDICTION OF AN AGENCY OF THE UNITED STATES AND THE MAKING

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

(End of certification)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(2) In an exceptional case, when the Head of the Agency concerned determines in writing that the certification requirement should be waived. This authority may not be delegated. The contracting officer shall submit the request for waiver in accordance with agency procedures. The request shall clearly identify the procurement or class of procurements and provide the rationale for the requested waiver. The

decision of the agency head shall state the reasons for approving or disapproving the waiver. The agency head shall promptly notify Congress in writing of each waiver approved. Procurements for which a waiver may be appropriate include—

(i) Where prices are set by law or regulation;

(ii) Where terms and conditions of a contract are specified by an agreement with a foreign government or governments;

(iii) Where supplies or services are provided by foreign nationals to United States facilities overseas for use outside the United States;

(iv) Where a foreign government specifies a particular U.S. contractor to satisfy its requirements (see 6.302-4(b)(1)).

[55 FR 36792, Sept. 6, 1990, as amended at 55 FR 49854, Nov. 30, 1990; 59 FR 11387, Mar. 10, 1994; 60 FR 37774, July 21, 1995]

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

(a) The contracting officer shall insert the provision at 52.203-8, Requirement for Certificate of Procurement Integrity, in all solicitations where the resultant contract award is expected to exceed \$100,000, unless, pursuant to 3.104-9(f), a certification is not required or a waiver has been granted. For procurements using other than sealed bidding procedures, the contracting officer shall substitute Alternate I for paragraph (c) of that provision.

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

(c) The contracting officer shall insert the clause at 52.203-10, Price or Fee Adjustment for Illegal for Improper Activity, in all solicitations where the resultant contract award is expected to exceed the simplified acquisition threshold and all contracts

and modifications to contracts exceeding that threshold which do not already contain the clause when the modification is expected to exceed that threshold.

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

[55 FR 36793, Sept. 6, 1990, as amended at 60 FR 34744, July 3, 1995; 61 FR 39191, July 26, 1996]

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

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

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

(2) If the individual reviewing the contracting officer's conclusion does not agree with that conclusion, he or she shall advise the contracting officer to withhold award and shall promptly

forward the information and documentation to the HCA or his or her designee.

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

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

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

(2) Causing an investigation to be conducted;

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

(4) Determining that a violation occurred.

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

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

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

(i) Cancel the procurement;

(ii) Disqualify an offeror; or

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

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

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

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



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

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

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

(f) If the HCA or his or her designee receiving information concerning a violation or possible violation determines that award is justified by urgent and compelling circumstances, or is otherwise in the interests of the Government, he or she may authorize the contracting officer to award the contract or execute the contract modification after notification to the Head of the Agency in accordance with agency procedures.

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

[55 FR 36794, Sept. 6, 1990]

### **3.104-12 Ethics program training requirements.**

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

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

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

(3) Certification made under section 27 as originally enacted and imple-

mented in the FAR do not satisfy the certification requirements of subparagraph (a)(2) of this subsection. Agencies may use Optional Form 333 at 53.302-333 to obtain the certifications required by subparagraph (a)(2) of this subsection.

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

[55 FR 36794, Sept. 6, 1990]

## **Subpart 3.2—Contractor Gratuities to Government Personnel**

### **3.201 Applicability.**

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

### **3.202 Contract clause.**

The contracting officer shall insert the clause at 52.203-3, Gratuities, in solicitations and contracts with a value exceeding the simplified acquisition threshold, except those for personal services and those between military departments or defense agencies and foreign governments that do not obligate any funds appropriated to the Department of Defense.

[61 FR 39200, July 26, 1996]

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

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

(a) What to report and how to report it; and

(b) The channels through which reports must pass, including the function

and authority of each official designated to review them.

#### **3.204 Treatment of violations.**

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

(1) Offered or gave a gratuity (e.g., an entertainment or gift) to an officer, official, or employee of the Government; and

(2) Intended by the gratuity to obtain a contract or favorable treatment under a contract (intent generally must be inferred).

(b) Agency procedures shall afford the contractor an opportunity to appear with counsel, submit documentary evidence, present witnesses, and confront any person the agency presents. The procedures should be as informal as practicable, consistent with principles of fundamental fairness.

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

(1) Terminate the contractor's right to proceed;

(2) Initiate debarment or suspension measures as set forth in subpart 9.4; and

(3) Assess exemplary damages, if the contract uses money appropriated to the Department of Defense.

### **Subpart 3.3—Reports of Suspected Antitrust Violations**

#### **3.301 General.**

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

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

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

[48 FR 42108, Sept. 19, 1983, as amended at 50 FR 1727, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985]

#### **3.302 Definitions.**

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

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

[49 FR 12974, Mar. 30, 1984]

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

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

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

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

(1) The existence of an *industry price list* or *price agreement* to which contractors refer in formulating their offers;

(2) A sudden change from competitive bidding to identical bidding;

### 3.400

(3) Simultaneous price increases or follow-the-leader pricing;

(4) Rotation of bids or proposals, so that each competitor takes a turn in sequence as low bidder, or so that certain competitors bid low only on some sizes of contracts and high on other sizes;

(5) Division of the market, so that certain competitors bid low only for contracts let by certain agencies, or for contracts in certain geographical areas, or on certain products, and bid high on all other jobs;

(6) Establishment by competitors of a collusive price estimating system;

(7) The filing of a joint bid by two or more competitors when at least one of the competitors has sufficient technical capability and productive capacity for contract performance;

(8) Any incidents suggesting direct collusion among competitors, such as the appearance of identical calculation or spelling errors in two or more competitive offers or the submission by one firm of offers for other firms; and

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

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

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

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

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

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

(g) Questions concerning this reporting requirement may be communicated by telephone directly to the Office of

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the Assistant Attorney General, Antitrust Division.

[48 FR 42108, Sept. 19, 1983, as amended at 49 FR 12974, Mar. 30, 1984; 50 FR 1727, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985; 55 FR 25526, June 21, 1990]

## Subpart 3.4—Contingent Fees

### 3.400 Scope of subpart.

This subpart prescribes policies and procedures that restrict contingent fee arrangements for soliciting or obtaining Government contracts to those permitted by 10 U.S.C. 2306(b) and 41 U.S.C. 254(a).

### 3.401 Definitions.

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

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

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

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

### 3.402 Statutory requirements.

Contractors' arrangements to pay contingent fees for soliciting or obtaining Government contracts have long been considered contrary to public policy because such arrangements may

lead to attempted or actual exercise of improper influence. In 10 U.S.C. 2306(b) and 41 U.S.C. 254(a), Congress affirmed this public policy but permitted certain exceptions. These statutes—

(a) Require in every negotiated contract a warranty by the contractor against contingent fees;

(b) Permit, as an exception to the warranty, contingent fee arrangements between contractors and bona fide employees or bona fide agencies; and

(c) Provide that, for breach or violation of the warranty by the contractor, the Government may annul the contract without liability or deduct from the contract price or consideration, or otherwise recover, the full amount of the contingent fee.

#### **3.403 Applicability.**

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

[48 FR 42108, Sept. 19, 1983, as amended at 50 FR 1727, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985]

#### **3.404 Contract clause.**

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

[61 FR 39188, July 26, 1996]

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

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

(b) When there is specific evidence or other reasonable basis to suspect one or more of the violations in paragraph (a) above, the chief of the contracting office shall review the facts and, if ap-

propriate, take or direct one or more of the following, or other, actions:

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

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

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

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

[48 FR 42108, Sept. 19, 1983. Redesignated at 61 FR 39188, July 26, 1996]

#### **3.406 Records.**

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

[48 FR 42108, Sept. 19, 1983. Redesignated and amended at 61 FR 39188, July 26, 1996]

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

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

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

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

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

(b) Receive follow-on contracts at artificially high prices to recover losses incurred on the buy-in contract.

##### **3.501-2 General.**

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

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

(1) Multiyear contracting, with a requirement in the solicitation that a price be submitted only for the total multiyear quantity; or

(2) Priced options for additional quantities that, together with the firm contract quantity, equal the program requirements (see subpart 17.2).

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

### 3.502 Subcontractor kickbacks.

#### 3.502-1 Definitions.

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

*Person*, as used in this section, means a corporation, partnership, business association of any kind, trust, joint-stock company, or individual.

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

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

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

*Subcontract*, as used in this section, means a contract or contractual action entered into by a prime contractor or subcontractor for the purpose of obtaining supplies, materials, equipment,

or service of any kind under a prime contract.

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

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

[52 FR 6121, Feb. 27, 1987, as amended at 53 FR 34226, Sept. 2, 1988]

#### 3.502-2 Subcontractor kickbacks.

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

(a) Prohibits any person from—

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

(2) Soliciting, accepting, or attempting to accept any 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 subsection.

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

(d) Provides that—

(1) The contracting officer may offset the amount of a kickback against monies owed by the United States to the

prime contractor under the prime contract to which such kickback relates;

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

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

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

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

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

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

(i) Requires each contracting agency to include in each prime contract exceeding \$100,000 for other than commer-

cial items (see part 12), a requirement that the prime contractor shall—

(1) Have in place and follow reasonable procedures designed to prevent and detect violations of the Act in its own operations and direct business relationships (e.g., company ethics rules prohibiting kickbacks by employees, agents, or subcontractors; education programs for new employees and subcontractors, explaining policies against kickbacks, related company procedures and the consequences of detection; procedures requiring subcontractors to certify they have not paid kickbacks; procurement procedures to minimize the opportunity for kickbacks; audit procedures designed to detect kickbacks; periodic surveys of subcontractors to elicit information about kickbacks; procedures to report kickbacks to law enforcement officials; annual declarations by employees of gifts or gratuities received from subcontractors; annual employee declarations that they have violated no company ethics rules; personnel practices that document unethical or illegal behavior and make such information available to prospective employers); and

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

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

[52 FR 6121, Feb. 27, 1987; 52 FR 9989, Mar. 27, 1987, as amended at 53 FR 34226, Sept. 2, 1988; 60 FR 48235, Sept. 18, 1995; 61 FR 39191, July 26, 1996]

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

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

[60 FR 48235, Sept. 18, 1995, as amended at 61 FR 39190, July 26, 1996]

**3.503 Unreasonable restrictions on subcontractor sales.****3.503-1 Policy.**

10 U.S.C. 2402 and 41 U.S.C. 253(g) 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.

[50 FR 35475, Aug. 30, 1985, and 51 FR 27116, July 29, 1986]

**3.503-2 Contract clause.**

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

[60 FR 48235, Sept. 18, 1995, as amended at 61 FR 39190, July 26, 1996]

**Subpart 3.6—Contracts With Government Employees or Organizations Owned or Controlled by Them****3.601 Policy.**

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

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

(1) The contract arises directly out of the individual's activity as a special Government employee;

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

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

[55 FR 34864, Aug. 24, 1990]

**3.602 Exceptions.**

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

**3.603 Responsibilities of the contracting officer.**

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

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

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

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

**Subpart 3.7—Voiding and Rescinding Contracts**

SOURCE: 51 FR 27116, July 29, 1986, unless otherwise noted.

**3.700 Scope of subpart.**

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

(b) This subpart does not prescribe policies or procedures for, or govern

## Federal Acquisition Regulation

3.705

the exercise of, any other remedy available to the Government with respect to such contracts, including but not limited to, the common law right of avoidance, rescission, or cancellation.

### 3.701 Purpose.

This subpart provides a means to—

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

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

### 3.702 Definition.

*Final conviction* means a conviction, whether entered on a verdict or plea, including a plea of *nolo contendere*, for which sentence has been imposed.

### 3.703 Authority.

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

### 3.704 Policy.

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

(b) Since a final conviction under 18 U.S.C. 201-224 relating to a contract also may justify the conclusion that

the party involved is not presently responsible, the agency should consider initiating debarment proceedings in accordance with FAR subpart 9.4, Debarment, Suspension, and Ineligibility, if debarment has not been initiated or is not in effect at the time the final conviction is entered.

### 3.705 Procedures.

(a) *Reporting.* The facts concerning any final conviction for any violation of 18 U.S.C. 201-224 involving or relating to agency contracts shall be reported promptly to the agency head or designee for that official's consideration. The agency head or designee shall promptly notify the Civil Division, Department of Justice, that 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 shall be as informal as is practicable, consistent with the principles of fundamental fairness. As a minimum, however, agencies shall provide the following:

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

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

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

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



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

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

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

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

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

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

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

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

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

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

(e) *Final agency decision.* The final agency decision shall be based on the information available to the agency head or designee, including any pertinent information submitted or, if a hearing was held, presented at the hearing. If the agency decision declares void and rescinds the contract, the final decision shall specify the amounts due and property to be returned to the agency, and reflect consideration of the fair value of any tangible benefits received and retained by the agency. Notice of the decision shall be sent promptly by certified mail, return receipt requested. Rescission of contracts under the authority of the Act and demand for recovery of the amounts expended and property trans-

ferred therefor, is not a claim within the meaning of the Contract Disputes Act of 1978 (CDA), 41 U.S.C. 601–613, or part 33. Therefore, the procedures required by the CDA and the FAR for the issuance of a final contracting officer decision are not applicable to final agency decisions under this subpart, and shall not be followed.

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

SOURCE: 55 FR 3190, Jan. 30, 1990, unless otherwise noted.

#### 3.800 Scope of subpart.

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

#### 3.801 Definitions.

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

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

(a) The awarding of any Federal contract.

(b) The making of any Federal grant.

(c) The making of any Federal loan.

(d) The entering into of any cooperative agreement.

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

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

*Influencing or attempting to influence*, as used in this section, means making, with the intent to influence, any communication to or appearance before an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a

Member of Congress in connection with any covered Federal action.

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

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

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

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

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

(d) An individual who is a member of a Federal advisory committee, as defined by the Federal Advisory Committee Act, title 5, United States Code, appendix 2.

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

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

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

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

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

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

### 3.802 Prohibitions.

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

(b) The Act also requires offerors to furnish a declaration consisting of both a certification and a disclosure. These

requirements are contained in the provision at 52.203-11, Certification and Disclosure Regarding Payments to Influence Certain Federal Transactions, and the clause at 52.203-12, Limitation on Payments to Influence Certain Federal Transactions.

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

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

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

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

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

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

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

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

(iv) The following agency and legislative liaison activities are permitted

where they are prior to formal solicitation of any covered Federal action:

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

(B) Technical discussions regarding the preparation of an unsolicited proposal prior to its official submission; and

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

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

(2) *Professional and technical services.*

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

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

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

(ii) For purposes of subdivision (c)(2)(i) of this section, "professional and technical services" shall be limited

to advice and analysis directly applying any professional or technical discipline. For example, drafting of a legal document accompanying a bid or proposal by a lawyer is allowable. Similarly, technical advice provided by an engineer on the performance or operational capability of a piece of equipment rendered directly in the negotiation of a contract is allowable. However, communications with the intent to influence made by a professional (such as a licensed lawyer) or a technical person (such as a licensed accountant) are not allowable under this section unless they provide advice and analysis directly applying their professional or technical expertise and unless the advice or analysis is rendered directly and solely in the preparation, submission or negotiation of a covered Federal action. Thus, for example, communications with the intent to influence made by a lawyer that do not provide legal advice or analysis directly and solely related to the legal aspects of his or her client's proposal, but generally advocate one proposal over another are not allowable under this section because the lawyer is not providing professional legal services. Similarly, communications with the intent to influence made by an engineer providing an engineering analysis prior to the preparation or submission of a bid or proposal are not allowable under this section since the engineer is providing technical services but not directly in the preparation, submission or negotiation of a covered Federal action.

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

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

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

### 3.803 Certification and disclosure.

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

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

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

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

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

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

(d) All subcontractor disclosure forms (but not certifications), shall be forwarded from tier to tier until received by the prime contractor. The prime contractor shall submit all disclosure forms to the contracting officer at the end of the calendar quarter in which the disclosure form is submitted by the subcontractor. Each subcontractor certification shall be retained in the subcontract file of the awarding contractor.

[55 FR 3190, Jan. 30, 1990, as amended at 55 FR 38516, Sept. 18, 1990]

**3.804 Policy.**

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

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

**3.805 Exemption.**

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

**3.806 Processing suspected violations.**

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

**3.807 Civil penalties.**

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

**3.808 Solicitation provision and contract clause.**

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

(b) The clause at 52.203-12, Limitation on Payments to Influence Certain Federal Transactions, shall be included

in solicitations and contracts expected to exceed \$100,000.

**Subpart 3.9—Whistleblower Protections for Contractor Employees**

SOURCE: 60 FR 37776, July 21, 1995, unless otherwise noted.

**3.900 Scope of subpart.**

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

**3.901 Definitions.**

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

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

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

**3.902 Applicability.**

This subpart applies to all Government contracts.

**3.903 Policy.**

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

**3.904 Procedures for filing complaints.**

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

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

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

**3.905 Procedures for investigating complaints.**

(a) Upon receipt of a complaint, the Inspector General shall conduct an initial inquiry. If the Inspector General determines that the complaint is frivolous or for other reasons does not merit further investigation, the Inspector General shall advise the complainant that no further action on the complaint will be taken.

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

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

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

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

be granted by the head of the agency or designee.

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

**3.906 Remedies.**

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

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

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

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

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

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

shall conform to Chapter 7 of Title 5, United States Code.

## PART 4—ADMINISTRATIVE MATTERS

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4.900 Scope of subpart.  
4.901 Definitions.  
4.902 Contract information.  
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4.904 Solicitation provision.

AUTHORITY: 40 U.S.C. 486(c); 10 U.S.C. Chapter 137; and 42 U.S.C. 2473(c).

SOURCE: 48 FR 42113, Sept. 19, 1983, unless otherwise noted.

#### 4.000 Scope of part.

This part prescribes policies and procedures relating to the administrative aspects of contract execution, contractor-submitted paper documents, distribution, reporting, retention, and files.

[60 FR 28493, May 31, 1995]

### Subpart 4.1—Contract Execution

#### 4.101 Contracting officer's signature.

Only contracting officers shall sign contracts on behalf of the United States. The contracting officer's name and official title shall be typed, stamped, or printed on the contract. The contracting officer normally signs the contract after it has been signed by the contractor. The contracting officer

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shall ensure that the signer(s) have authority to bind the contractor (see specific requirements in 4.102 of this subpart).

[60 FR 34736, July 3, 1995]

### 4.102 Contractor's signature.

(a) *Individuals.* A contract with an individual shall be signed by that individual. A contract with an individual doing business as a firm shall be signed by that individual, and the signature shall be followed by the individual's typed, stamped, or printed name and the words “, an individual doing business as .....” [*insert name of firm*].

(b) *Partnerships.* A contract with a partnership shall be signed in the partnership name. Before signing for the Government, the contracting officer shall obtain a list of all partners and ensure that the individual(s) signing for the partnership have authority to bind the partnership.

(c) *Corporations.* A contract with a corporation shall be signed in the corporate name, followed by the word “by” and the signature and title of the person authorized to sign. The contracting officer shall ensure that the person signing for the corporation has authority to bind the corporation.

(d) *Joint venturers.* A contract with joint venturers may involve any combination of individuals, partnerships, or corporations. The contract shall be signed by each participant in the joint venture in the manner prescribed in paragraphs (a) through (c) above for each type of participant. When a corporation is participating, the contracting officer shall obtain from the corporation secretary a certificate stating that the corporation is authorized to participate in the joint venture.

(e) *Agents.* When an agent is to sign the contract, other than as stated in paragraphs (a) through (d) above, the agent's authorization to bind the principal must be established by evidence satisfactory to the contracting officer.

### 4.103 Contract clause.

The contracting officer shall insert the clause at 52.204-1, Approval of Con-

tract, in solicitations and contracts if required by agency procedures.

[49 FR 26741, June 29, 1984]

## Subpart 4.2—Contract Distribution

### 4.201 Procedures.

Contracting officers shall distribute copies of contracts or modifications within 10 working days after execution by all parties. As a minimum, the contracting officer shall—

(a) Distribute simultaneously one signed copy or reproduction of the signed contract to the contractor and the paying office;

(b) When a contract is assigned to another office for contract administration (see subpart 42.2), provide to that office—

(1) One copy or reproduction of the signed contract and of each modification; and

(2) A copy of the contract distribution list, showing those offices that should receive copies of modifications, and any changes to the list as they occur;

(c) Distribute one copy to each accounting and finance office (funding office) whose funds are cited in the contract;

(d) When the contract is not assigned for administration but contains a Cost Accounting Standards clause, provide one copy of the contract to the cognizant administrative contracting officer and mark the copy “FOR COST ACCOUNTING STANDARDS ADMINISTRATION ONLY” (see 30.601(b));

(e) Provide one copy of each contract or modification that requires audit service to the appropriate field audit office listed in the “Directory of Federal Contract Audit Offices” (copies of this directory can be ordered from the U.S. Government Printing Office, Superintendent of Documents, Washington, DC 20402, referencing stock numbers 008-007-03189-9 and 008-007-03190-2 for Volumes I and II, respectively); and

(f) Provide copies of contracts and modifications to those organizations required to perform contract administration support functions (e.g., when



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manufacturing is performed at multiple sites, the contract administration office cognizant of each location).

[48 FR 42113, Sept. 19, 1983, as amended at 60 FR 34736, July 3, 1995]

#### **4.202 Agency distribution requirements.**

Agencies shall limit additional distribution requirements to the minimum necessary for proper performance of essential functions. When contracts are assigned for administration to a contract administration office located in an agency different from that of the contracting office (see part 42), the two agencies shall agree on any necessary distribution in addition to that prescribed in 4.201 above.

#### **4.203 Taxpayer identification number information.**

(a) If the contractor has furnished a taxpayer identification number (TIN) when completing the solicitation provision at 52.204-3, Taxpayer Identification, the contracting officer shall, unless otherwise provided in agency procedures, attach a copy of the completed solicitation provision as the last page of the copy of the contract sent to the paying office.

(b) If the TIN or corporate status is derived from a source other than the provision at 52.204-3, the last page of the contract forwarded to the paying office will be annotated to state the contractor's TIN and corporate status.

[54 FR 34752, Aug. 21, 1989, as amended at 55 FR 52788, Dec. 21, 1990]

### **Subpart 4.3—Paper Documents**

Source: At 60 FR 28493, May 31, 1995, unless otherwise noted.

#### **4.300 Scope of subpart.**

This subpart provides policies and procedures on contractor-submitted paper documents.

#### **4.301 Authority.**

The authority for this subpart is established in Executive Order 12873, Sections 402(d) and 504, October 20, 1993, as

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amended by Executive Order 12995, March 25, 1996.

[60 FR 28493, May 31, 1995, as amended at 61 FR 31616, June 20, 1996]

#### **4.302 Definition.**

*Printing/copying double-sided*, as used in this subpart, means printing or reproducing a document so that information is on both sides of a sheet of paper.

#### **4.303 Policy.**

It is the policy of the Government that a contractor submitting paper documents to the Government relating to an acquisition should, if possible, submit those documents printed/copied double-sided on recycled paper. If the contractor can only print/copy double-sided or use recycled paper, the contractor should accomplish whichever one the contractor has the ability to achieve.

#### **4.304 Contract clause.**

The contracting officer shall insert the clause at 52.204-4, Printing/Copying Double-Sided on Recycled Paper, in solicitations and contracts greater than the simplified acquisition threshold.

[60 FR 28494, May 31, 1995, as amended at 60 FR 34744, July 3, 1995]

### **Subpart 4.4—Safeguarding Classified Information Within Industry**

#### **4.401 Definitions.**

*Classified acquisition* means an acquisition that consists of one or more contracts in which offerors would be required to have access to classified information (Confidential, Secret, or Top Secret) to properly submit an offer or quotation, to understand the performance requirements of a classified contract under the acquisition, or to perform the contract.

*Classified contract* means any contract that requires, or will require, access to classified information (Confidential, Secret, or Top Secret) by the contractor or its employees in the performance of the contract. A contract may be a classified contract even though the contract document is not classified.

*Classified information* means any information or material, regardless of its

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physical form or characteristics, that is owned by, produced by or for, or under the control of the United States Government, and determined pursuant to Executive Order 12356, April 2, 1982 (47 FR 14874, April 6, 1982) or prior orders to require protection against unauthorized disclosure, and is so designated.

[48 FR 42113, Sept. 19, 1983, as amended at 51 FR 2649, Jan. 17, 1986]

### 4.402 General.

(a) Executive Order 12829, January 6, 1993 (58 FR 3479, January 8, 1993), entitled "National Industrial Security Program" (NISP), establishes a program to safeguard Federal Government classified information that is released to contractors, licensees, and grantees of the United States Government. Executive Order 12829 amends Executive Order 10865, February 20, 1960 (25 FR 1583, February 25, 1960), entitled "Safeguarding Classified Information Within Industry," as amended by Executive Order 10909, January 17, 1961 (26 FR 508, January 20, 1961).

(b) The National Industrial Security Program Operating Manual (NISPOM) incorporates the requirements of these Executive Orders. The Secretary of Defense, in consultation with all affected agencies and with the concurrence of the Secretary of Energy, the Chairman of the Nuclear Regulatory Commission, and the Director of Central Intelligence, is responsible for issuance and maintenance of this Manual. The following DOD publications implement the program:

(1) *National Industrial Security Program Operating Manual* (NISPOM) (DOD 5220.22-M).

(2) *Industrial Security Regulation* (ISR) (DOD 5220.22-R).

(c) Procedures for the protection of information relating to foreign classified contracts awarded to U.S. industry, and instructions for the protection of U.S. information relating to classified contracts awarded to foreign firms, are prescribed in Chapter 10 of the NISPOM.

(d) Part 27, Patents, Data, and Copyrights, contains policy and procedures

for safeguarding classified information in patent applications and patents.

[48 FR 42113, Sept. 19, 1983, as amended at 61 FR 31617, June 20, 1996]

### 4.403 Responsibilities of contracting officers.

(a) *Presolicitation phase.* Contracting officers shall review all proposed solicitations to determine whether access to classified information may be required by offerors, or by a contractor during contract performance.

(1) If access to classified information of another agency may be required, the contracting officer shall—

(i) Determine if the agency is covered by the NISP; and

(ii) Follow that agency's procedures for determining the security clearances of firms to be solicited.

(2) If the classified information required is from the contracting officer's agency, the contracting officer shall follow agency procedures.

(b) *Solicitation phase.* Contracting officers shall—

(1) Ensure that the classified acquisition is conducted as required by the NISP or agency procedures, as appropriate; and

(2) Include (i) an appropriate Security Requirements clause in the solicitation (see 4.404), and (ii) as appropriate, in solicitations and contracts when the contract may require access to classified information, a requirement for security safeguards in addition to those provided in the clause (52.204-2, Security Requirements).

(c) *Award phase.* Contracting officers shall inform contractors and subcontractors of the security classifications and requirements assigned to the various documents, materials, tasks, subcontracts, and components of the classified contract as follows:

(1) Agencies covered by the NISP shall use the Contract Security Classification Specification, DD Form 254. The contracting officer, or authorized representative, is the approving official for the form and shall ensure that it is prepared and distributed in accordance with the ISR.

(2) Contracting officers in agencies not covered by the NISP shall follow agency procedures.

[48 FR 42113, Sept. 19, 1983, as amended at 61 FR 31617, June 20, 1996]

#### 4.404 Contract clause.

(a) The contracting officer shall insert the clause at 52.204-2, Security Requirements, in solicitations and contracts when the contract may require access to classified information, unless the conditions specified in paragraph (d) below apply.

(b) If a cost contract (see 16.302) for research and development with an educational institution is contemplated, the contracting officer shall use the clause with its Alternate I.

(c) If a construction or architect-engineer contract where employee identification is required for security reasons is contemplated, the contracting officer shall use the clause with its Alternate II.

(d) If the contracting agency is not covered by the NISP and has prescribed a clause and alternates that are substantially the same as those at 52.204-2, the contracting officer shall use the agency-prescribed clause as required by agency procedures.

[48 FR 42113, Sept. 19, 1983, as amended at 61 FR 31617, June 20, 1996]

### Subpart 4.5—Electronic Commerce in Contracting

SOURCE: 60 FR 34744, July 3, 1995, unless otherwise noted.

#### 4.500 Scope of subpart.

This subpart provides policy and procedures for the establishment and use of the Federal Acquisition Computer Network (FACNET) as required by Section 30 of the Office of Federal Procurement Policy (OFPP) Act (41 U.S.C. 426).

#### 4.501 Definitions.

*ANSI X12*, as used in this subpart, means the designation assigned by the American National Standards Institute (ANSI) for the structure, format, and content of electronic business transactions conducted through Electronic Data Interchange (EDI). ANSI is the

coordinator and clearinghouse for national standards in the United States.

*Electronic commerce (EC)*, as used in this subpart, means a paperless process including electronic mail, electronic bulletin boards, electronic funds transfer, electronic data interchange, and similar techniques for accomplishing business transactions. The use of terms commonly associated with paper transactions (e.g., “copy”, “document”, “page”, “printed”, “sealed envelope” and “stamped”) shall not be interpreted to restrict the use of electronic commerce.

*Electronic data interchange (EDI)*, as used in this subpart, means a technique for electronically transferring and string formatted information between computers utilizing established and published formats and codes, as authorized by the applicable Federal Information Processing Standards.

*Implementation convention (IC)*, as used in this subpart, means the common practices and/or interpretations of the use of ANSI X12 standards. Conventions define how trading partners will use the standards for their mutual needs. The Federal IC will be used by organizational elements of the Federal community and by government organizations and by Trading Partners to exchange data with the Federal community.

*Trading partner*, as used in this subpart, means a business that has agreed to exchange business information electronically.

*Transaction set*, as used in this subpart, means the data that is exchanged to convey meaning between Trading Partners engaged in EC/EDI.

[60 FR 34744, July 3, 1995, as amended at 61 FR 39191, July 26, 1996]

#### 4.502 Policy.

(a) The Federal Government shall use FACNET whenever practicable or cost-effective. Contracting officers may supplement FACNET transactions by using other media to meet the requirements of any contract action governed by the FAR (e.g., transmit hard copy of drawings).

(b) Before using FACNET, or any other method of electronic data interchange, The agency head shall ensure that the electronic data interchange

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system is capable of ensuring authentication and confidentiality commensurate with the risk and magnitude of the harm from loss, misuse, or unauthorized access to or modification of the information.

[60 FR 34744, July 3, 1995, as amended at 61 FR 39191, July 26, 1996]

### 4.503 Contractor registration.

(a) In order for a contractor to conduct electronic commerce with the Federal Government, the contractor must provide registration information to the Central Contractor Registration (CCR). Phone (800) EDI-3414 for information regarding FACNET.

(b) The contractor will be required to submit trading partner profile information, including a Data Universal Numbering System (DUNS) number, in accordance with the Federal implementation conventions of the appropriate ANSI X12 transaction set for contractor registration.

[61 FR 39191, July 26, 1996]

### 4.504 FACNET functions.

(a) For agencies—

(1) Provide widespread public notice of contracting opportunities, and issue solicitations;

(2) Receive responses to solicitations and associated requests for information;

(3) Provide widespread public notice of contract awards and issuance of orders (including price);

(4) Receive questions regarding solicitations, if practicable;

(5) Issue contracts and orders, if practicable;

(6) Initiate payments to contractors, if practicable; and

(7) Archive data relating to each procurement action.

(b) For the private sector—

(1) Access notices of solicitation;

(2) Access and review solicitations;

(3) Respond to solicitations;

(4) Receive contracts and orders, if practicable;

(5) Access information on contract awards and issuance of orders; and

(6) Receive payment by purchase card, electronic funds transfer, or other automated means, if practicable.

[60 FR 34744, July 3, 1995, as amended at 61 FR 39191, July 26, 1996]

### 4.505 FACNET certification.

#### 4.505-1 Interim certification.

(a) A contracting office is considered to have implemented interim FACNET if—

(1) The contracting office—

(i) Has implemented the FACNET functions described in 4.504(a)(1) and (2), and (b)(1), (2), and (3); and

(ii) Issues notices of solicitations and receives responses to solicitations in a system having those functions;

(2) The contracting office can use FACNET for contracts, not otherwise exempted (see 4.506), that exceed the micro-purchase threshold but do not exceed the simplified acquisition threshold; and

(3) the senior procurement executive of the agency, or the Under Secretary of Defense for Acquisition and Technology for the military departments and defense agencies, has certified to the Administrator of OFPP that the contracting office has implemented interim FACNET.

(b) The senior procurement executive of the agency, or the Under Secretary of Defense for Acquisition and Technology for the military departments and defense agencies, shall notify the private sector via the Commerce Business Daily that a contracting office of the agency has certified interim FACNET. The notice shall establish a date after which it will be required that all responses to solicitations issued by the contracting office through FACNET, must be submitted through FACNET, unless otherwise authorized.

#### 4.505-2 Full certification.

(a) An agency is considered to have implemented full FACNET if—

(1) The agency has implemented all of the FACNET functions described in 4.504;

(2) During the entire preceding fiscal year, more than 75 percent of the agency's eligible contracts, not otherwise exempted (see 4.506), that exceeded the micro-purchase threshold but did not

exceed the simplified acquisition threshold, were entered into via FACNET; and.

(3) The head of the agency, with the concurrence of the Administrator of OFPP, has certified to the Congress that the agency has implemented full FACNET. For the Department of Defense, the certification shall be made by the Secretary of Defense for the Department as a whole.

(b) Eligible contracts do not include any class or classes of contracts that the Federal Acquisition Regulatory Council determines, after October 13, 1997, are not suitable for acquisition through FACNET.

#### **4.505-3 Governmentwide certification.**

The Federal Government is considered to have implemented Governmentwide FACNET if—

(a) During the preceding fiscal year, at least 75 percent of eligible contracts entered into by executive agencies, that exceeded the micro-purchase threshold but did not exceed the simplified acquisition threshold, were made via full FACNET; and

(b) the Administrator of OFPP has certified implementation of Governmentwide FACNET to the Congress.

#### **4.505-4 Contract actions excluded.**

For purposes of calculating the percentage of FACNET use referred to in 4.505-2 and 4.505-3, actions issued against established contracts, such as delivery orders, task orders, and in-scope modifications, shall not be included.

#### **4.506 Exemptions.**

The following are exempted from the use of FACNET as specified and shall not be considered when determining compliance with the requirements to implement FACNET:

(a) *Interim FACNET.* (1) Classes of procurements exempted by the head of the contracting activity after a written determination is made that FACNET processing of those procurements is not cost-effective or practicable; and specific purchases for which the contracting officer determines that it is not practicable or cost-effective to process via FACNET. Such determinations

shall be centrally maintained at the contracting office.

(2) Contracts that do not require notice under subpart 5.2.

(b) *Full FACNET.* Contracts awarded by a contracting office (or a portion of a contracting office), if the office is exempted from use of FACNET by the head of the agency, or the Secretary of Defense for the military departments and defense agencies. Any such exemption shall be based on a written determination that FACNET processing is not cost-effective or practicable for the contracting office, or portions thereof. Determinations shall be maintained in the office of the senior procurement executive, or the Under Secretary of Defense for Acquisition and Technology for the military departments and defense agencies.

### **Subpart 4.6—Contract Reporting**

#### **4.600 Scope of subpart.**

This subpart prescribes uniform reporting requirements for the Federal Procurement Data System (FPDS).

#### **4.601 Record requirements.**

(a) Each executive agency shall establish and maintain for a period of 5 years a computer file, by fiscal year, containing unclassified records of all procurements exceeding \$25,000.

(b) With respect to each procurement carried out using competitive procedures, agencies shall be able to access from the computer file, as a minimum, the following information:

(1) The date of contract award.

(2) Information identifying the source to whom the contract was awarded.

(3) The property or services obtained by the Government under the procurement.

(4) The total cost of the procurement.

(5) Those procurements which result in the submission of a single bid or proposal so that they can be separately categorized and designated non-competitive procurements using competitive procedures.

(c) In addition to paragraph (b) of this section with respect to each procurement carried out using procedures other than competitive procedures,

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agencies shall be able to access from the computer file—

(1) The reason under subpart 6.3 for the use of such procedures; and

(2) The identity of the organization or activity which conducted the procurement.

(d) In addition to the information described in paragraphs (b) and (c) of this section, for procurements in excess of \$25,000, agencies shall be able to access information on the following from the computer file:

(1) Awards to small disadvantaged businesses using either set-asides or full and open competition.

(2) Awards to business concerns owned and controlled by women.

(3) The number of offers received in response to a solicitation.

(4) Task or delivery order contracts.

(5) Contracts for the acquisition of commercial items.

(e) This information shall be transmitted to the Federal Procurement Data System in accordance with agency procedures.

[50 FR 52429, Dec. 23, 1985, as amended at 52 FR 19802, May 27, 1987; 60 FR 42653, Aug. 16, 1995]

### 4.602 Federal Procurement Data System.

(a) The FPDS provides a comprehensive mechanism for assembling, organizing, and presenting contract placement data for the Federal Government. Federal agencies report data to the Federal Procurement Data Center (FPDC), which collects, processes, and disseminates official statistical data on Federal contracting. The data provide (1) a basis for recurring and special reports to the President, the Congress, the General Accounting Office, Federal executive agencies, and the general public; (2) a means of measuring and assessing the impact of Federal contracting on the Nation's economy and the extent to which small, small disadvantaged and women-owned small business concerns are sharing in Federal contracts; and (3) data for other policy and management control purposes.

(b) The *FPDS Reporting Manual* provides a complete list of reporting and nonreporting agencies and organizations. This manual (available at no

charge from the General Services Administration, Federal Procurement Data Center, 7th & D Streets SW., room 5652, Washington, DC 20407, telephone (202) 401-1529, FTS 441-1529, FAX (202) 401-1546) provides the necessary instruction to the data collection point in each agency as to what data are required and how often to provide the data.

(c) Data collection points in each agency report data on SF 279, Federal Procurement Data System (FPDS) Individual Contract Action Report, and SF 281, Federal Procurement Data System (FPDS) Summary Contract Action Report (\$25,000 or Less), or computer-generated equivalent. Although the SF 279 and SF 281 are not mandatory for use by the agencies, they do provide the mandatory format for submitting data to the FPDS.

(d) The contracting officer shall obtain and report a Contractor Establishment Code for each awardee from information on file or available to the contracting office. The contracting office or other designated agency office shall request a code using the procedures in the FPDS Reporting Manual or in accordance with agency procedures. Requests for codes shall be made by Government offices and only for the apparent awardees.

[48 FR 42113, Sept. 19, 1983. Redesignated at 50 FR 52429, Dec. 23, 1985, and amended at 54 FR 29280, July 11, 1989; 53 FR 43388, Oct. 26, 1988; 55 FR 52788, Dec. 21, 1990; 56 FR 41744, Aug. 22, 1991; 57 FR 60572, Dec. 21, 1992; 60 FR 48259, Sept. 18, 1995]

### 4.603 Solicitation provision.

The contracting officer shall insert the provision at 52.204-5, Women-Owned Business, in all solicitations that are not set aside for small business concerns and that exceed the simplified acquisition threshold, when the contract is to be performed inside the United States, its territories or possessions, Puerto Rico, the Trust Territory of the Pacific Islands, or the District of Columbia.

[60 FR 48259, Sept. 18, 1995, as amended at 61 FR 39190, July 26, 1996]

### Subpart 4.7—Contractor Records Retention

#### 4.700 Scope of subpart.

This subpart provides policies and procedures for retention of records by contractors to meet the records review requirements of the Government. In this subpart, the terms “contracts” and “contractors” include “subcontracts” and “subcontractors.”

#### 4.701 Purpose.

The purpose of this subpart is to generally describe records retention requirements and to allow reductions in the retention period for specific classes of records under prescribed circumstances.

#### 4.702 Applicability.

(a) This subpart applies to records generated under contracts that contain one of the following clauses:

(1) Audit and Records—Sealed Bidding (52.214-26).

(2) Audit and Records—Negotiation (52.215-2).

(3) Audit—Commercial Items (52.215-43).

(b) This subpart is not mandatory on Department of Energy contracts for which the Comptroller General allows alternative records retention periods. Apart from this exception, this subpart applies to record retention periods under contracts that are subject to Chapter 137, Title 10, U.S.C., and the Federal Property and Administrative Services Act of 1949, as amended, 40 U.S.C. 471 et seq.

[48 FR 42113, Sept. 19, 1983, as amended at 50 FR 1727, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985; 60 FR 42650, Aug. 16, 1995; 60 FR 48211, Sept. 18, 1995]

#### 4.703 Policy.

(a) Except as stated in 4.703(b), contractors shall make available records, which includes books, documents, accounting procedures and practices, and other data, regardless of type and regardless of whether such items are in written form, in the form of computer data, or in any other form, and other supporting evidence to satisfy contract negotiation, administration, and audit requirements of the contracting agen-

cies and the Comptroller General for (1) 3 years after final payment or, for certain records, (2) the period specified in 4.705 through 4.705-3, whichever of these periods expires first.

(b) Contractors shall make available the foregoing records and supporting evidence for a longer period of time than is required in 4.703(a) if—

(1) A retention period longer than that cited in 4.703(a) is specified in any contract clause; or

(2) The contractor, for its own purposes, retains the foregoing records and supporting evidence for a longer period. Under this circumstance, the retention period shall be the period of the contractor's retention or 3 years after final payment, whichever period expires first.

(3) The contractor does not meet the original 90-day due date for submission of final indirect cost rate proposals specified in subparagraph (d)(2) of the clause at 52.216-7, Allowable Cost and Payment, and subparagraph (c)(2) of the clause at 52.216-13, Allowable Cost and Payment—Facilities. Under these circumstances, the retention periods in 4.705 shall be automatically extended one day for each day the proposal is not submitted after the original 90-day due date.

(c) Nothing in this section shall be construed to preclude a contractor from duplicating or storing original records in electronic form unless they contain significant information not shown on the record copy. Original records need not be maintained or produced in an audit if the contractor or subcontractor provides photographic or electronic images of the original records and meets the following requirements:

(1) The contractor or subcontractor has established procedures to ensure that the imaging process preserves accurate images of the original records, including signatures and other written or graphic images, and that the imaging process is reliable and secure so as to maintain the integrity of the records.

(2) The contractor or subcontractor maintains an effective indexing system to permit timely and convenient access to the imaged records.

(3) The contractor or subcontractor retains the original records for a minimum of one year after imaging to permit periodic validation of the imaging systems.

(d) If the information described in paragraph (a) of this section is maintained on a computer, contractors shall retain the computer data on a reliable medium for the time periods prescribed. Contractors may transfer computer data in machine readable form from one reliable computer medium to another. Contractors' computer data retention and transfer procedures shall maintain the integrity, reliability, and security of the original computer data. Contractors shall also retain an audit trail describing the data transfer. For the record retention time periods prescribed, contractors shall not destroy, discard, delete, or write over such computer data.

[48 FR 42113, Sept. 19, 1983, as amended at 51 FR 2649, Jan. 17, 1986; 53 FR 43388, Oct. 26, 1988; 54 FR 48982, Nov. 28, 1989; 59 FR 67015, Dec. 28, 1994; 60 FR 42650, Aug. 16, 1995]

#### **4.704 Calculation of retention periods.**

(a) The retention periods in 4.705 are calculated from the end of the contractor's fiscal year in which an entry is made charging or allocating a cost to a Government contract or subcontract. If a specific record contains a series of entries, the retention period is calculated from the end of the contractor's fiscal year in which the final entry is made. The contractor should cut off the records in annual blocks and retain them for block disposal under the prescribed retention periods.

(b) When records generated during a prior contract are relied upon by a contractor for cost or pricing data in negotiating a succeeding contract, the prescribed periods shall run from the date of the succeeding contract.

(c) If two or more of the record categories described in 4.705 are interfiled and screening for disposal is not practical, the contractor shall retain the entire record series for the longest period prescribed for any category of records.

#### **4.705 Specific retention periods.**

The contractor shall retain the records identified in 4.705-1 through

4.705-3 for the periods designated, provided retention is required under 4.702. Records are identified in this subpart in terms of their purpose or use and not by specific name or form number. Although the descriptive identifications may not conform to normal contractor usage or filing practices, these identifications apply to all contractor records that come within the description.

#### **4.705-1 Financial and cost accounting records.**

(a) Accounts receivable invoices, adjustments to the accounts, invoice registers, carrier freight bills, shipping orders, and other documents which detail the material or services billed on the related invoices: Retain 4 years.

(b) Material, work order, or service order files, consisting of purchase requisitions or purchase orders for material or services, or orders for transfer of material or supplies: Retain 4 years.

(c) Cash advance recapitulations, prepared as posting entries to accounts receivable ledgers for amounts of expense vouchers prepared for employees' travel and related expenses: Retain 4 years.

(d) Paid, canceled, and voided checks, other than those issued for the payment of salary and wages: Retain 4 years.

(e) Accounts payable records to support disbursements of funds for materials, equipment, supplies, and services, containing originals or copies of the following and related documents: remittance advices and statements, vendors' invoices, invoice audits and distribution slips, receiving and inspection reports or comparable certifications of receipt and inspection of material or services, and debit and credit memoranda: Retain 4 years.

(f) Labor cost distribution cards or equivalent documents: Retain 2 years.

(g) Petty cash records showing description of expenditures, to whom paid, name of person authorizing payment, and date, including copies of vouchers and other supporting documents: Retain 2 years.

#### **4.705-2 Pay administration records.**

(a) Payroll sheets, registers, or their equivalent, of salaries and wages paid



to individual employees for each payroll period; change slips; and tax withholding statements: Retain 4 years.

(b) Clock cards or other time and attendance cards: Retain 2 years.

(c) Paid checks, receipts for wages paid in cash, or other evidence of payments for services rendered by employees: Retain 2 years.

**4.705-3 Acquisition and supply records.**

(a) Store requisitions for materials, supplies, equipment, and services: Retain 2 years.

(b) Work orders for maintenance and other services: Retain 4 years.

(c) Equipment records, consisting of equipment usage and status reports and equipment repair orders: Retain 4 years.

(d) Expendable property records, reflecting accountability for the receipt and use of material in the performance of a contract: Retain 4 years.

(e) Receiving and inspection report records, consisting of reports reflecting receipt and inspection of supplies, equipment, and materials: Retain 4 years.

(f) Purchase order files for supplies, equipment, material, or services used in the performance of a contract; supporting documentation and backup files including, but not limited to, invoices, and memoranda; e.g., memoranda of negotiations showing the principal elements of subcontract price negotiations (see 52.244-1 and 52.244-2): Retain 4 years.

(g) Production records of quality control, reliability, and inspection: Retain 4 years.

**4.706 [Reserved]**

**Subpart 4.8—Government Contract Files**

**4.800 Scope of subpart.**

This subpart prescribes requirements for establishing, maintaining, and disposing of contract files for all contractual actions. The application of this subpart to contracts awarded using the simplified acquisition procedures covered by part 13 is optional. (See also

documentation requirements in 13.106-2(d).)

[60 FR 34746, July 3, 1995, as amended at 61 FR 39191, July 26, 1996]

**4.801 General.**

(a) The head of each office performing contracting, contract administration, or paying functions shall establish files containing the records of all contractual actions.

(b) The documentation in the files (see 4.803) shall be sufficient to constitute a complete history of the transaction for the purpose of—

(1) Providing a complete background as a basis for informed decisions at each step in the acquisition process;

(2) Supporting actions taken;

(3) Providing information for reviews and investigations; and

(4) Furnishing essential facts in the event of litigation or congressional inquiries.

(c) The files to be established include—

(1) A file for cancelled solicitations;

(2) A file for each contract; and

(3) A file such as a contractor general file, containing documents relating—for example—to (i) no specific contract, (ii) more than one contract, or (iii) the contractor in a general way (e.g., contractor's management systems, past performance, or capabilities).

**4.802 Contract files.**

(a) A contract file should generally consist of—

(1) The contracting office contract file, which shall document the basis for the acquisition and the award, the assignment of contract administration (including payment responsibilities), and any subsequent actions taken by the contracting office;

(2) The contract administration office contract file, which shall document actions reflecting the basis for and the performance of contract administration responsibilities; and

(3) The paying office contract file, which shall document actions prerequisite to, substantiating, and reflecting contract payments.

(b) Normally, each file should be kept separately; however, if appropriate, any or all of the files may be combined;

e.g., if all functions or any combination of the functions are performed by the same office.

(c) Files shall be maintained at organizational levels that shall ensure—

(1) Effective documentation of contract actions;

(2) Ready accessibility to principal users;

(3) Minimal establishment of duplicate and working files;

(4) The safeguarding of classified documents; and

(5) Conformance with agency regulations for file location and maintenance.

(d) If the contract files or file segments are decentralized (e.g., by type or function) to various organizational elements or to other outside offices, responsibility for their maintenance shall be assigned. A central control and, if needed, a locator system should be established to ensure the ability to locate promptly any contract files.

(e) Contents of contract files that are proprietary or source selection information as defined in 3.104-4 shall be protected from disclosure to unauthorized persons (see 3.104-5).

(f) Agencies may retain contract files in any medium (paper, electronic, microfilm, etc.) or any combination of media, as long as the requirements of this subpart are satisfied.

[48 FR 42113, Sept. 19, 1983, as amended at 54 FR 20496, May 11, 1989; 55 FR 36794, Sept. 6, 1990; 59 FR 67016, Dec. 28, 1994]

#### 4.803 Contents of contract files.

The following are examples of the records normally contained, if applicable, in contract files:

(a) *Contracting office contract file.* (1) Purchase request, acquisition planning information, and other presolicitation documents.

(2) Justifications and approvals, determinations and findings, and associated documents.

(3) Evidence of availability of funds.

(4) Synopsis of proposed acquisition as published in the Commerce Business Daily or reference thereto.

(5) The list of sources solicited, and a list of any firms or persons whose requests for copies of the solicitation were denied, together with the reasons for denial.

(6) Set-aside decision.

(7) Government estimate of contract price.

(8) A copy of the solicitation and all amendments thereto.

(9) Security requirements and evidence of required clearances.

(10) A copy of each offer or quotation, the related abstract, and records of determinations concerning late offers or quotations. Unsuccessful offers or quotations may be maintained separately, if cross-referenced to the contract file. The only portions of the unsuccessful offer or quotation that need be retained are—

(i) Completed solicitation sections A, B, and K;

(ii) Technical and management proposals;

(iii) Cost/price proposals;

(iv) Any other pages of the solicitation that the offeror or quoter has altered or annotated.

(11) Contractor's certifications and representatives.

(12) Preaward survey reports or reference to previous preaward survey reports relied upon.

(13) Source selection documentation.

(14) Contracting officer's determination of the contractor's responsibility.

(15) Small Business Administration Certificate of Competency.

(16) Records of contractor's compliance with labor policies including equal employment opportunity policies.

(17) Cost or pricing data and Certificates of Current Cost or Pricing Data or a required justification for waiver, or information other than cost or pricing data.

(18) Packaging and transportation data.

(19) Cost or price analysis.

(20) Audit reports or reasons for waiver.

(21) Record of negotiation.

(22) Justification for type of contract.

(23) Authority for deviations from this regulation, statutory requirements, or other restrictions.

(24) Required approvals of award and evidence of legal review.

(25) Notice of award.

(26) The original of (i) the signed contract or award, (ii) all contract modifications, and (iii) documents supporting modifications executed by the contracting office.

(27) Synopsis of award or reference thereto.

(28) Notice to unsuccessful quoters or offerors and record of any debriefing.

(29) Acquisition management reports (see subpart 4.6).

(30) Bid, performance, payment, or other bond documents, or a reference thereto, and notices to sureties.

(31) Report of postaward conference.

(32) Notice to proceed, stop orders, and any overtime premium approvals granted at the time of award.

(33) Documents requesting and authorizing modification in the normal assignment of contract administration functions and responsibility.

(34) Approvals or disapprovals of requests for waivers or deviations from contract requirements.

(35) Rejected engineering change proposals. These proposals may be filed separately for early disposal (see 4.805(h)).

(36) Royalty, invention, and copyright reports (including invention disclosures) or reference thereto.

(37) Contract completion documents.

(38) Documentation regarding termination actions for which the contracting office is responsible.

(39) Cross-references to pertinent documents that are filed elsewhere.

(40) Any additional documents on which action was taken or that reflect actions by the contracting office pertinent to the contract.

(41) A current chronological list identifying the awarding and successor contracting officers, with inclusive dates of responsibility.

(42) All certifications required by 3.104-9(e)(1).

(43) For contracts and contract modifications in excess of \$100,000, a record of all persons or classes of persons authorized to have access to proprietary or source selection information and, to the maximum extent practicable, the names of all individuals within the class.

(b) *Contract administration office contract file.* (1) Copy of the contract and all modifications, together with offi-

cial record copies of supporting documents executed by the contract administration office.

(2) Any document modifying the normal assignment of contract administration functions and responsibility.

(3) Security requirements.

(4) Cost or pricing data, Certificates of Current Cost or Pricing Data, or information other than cost or pricing data; cost or price analysis; and other documentation supporting contractual actions executed by the contract administration office.

(5) Preaward survey information.

(6) Purchasing system information.

(7) Consent to subcontract or purchase.

(8) Performance and payment bonds and surety information.

(9) Postaward conference records.

(10) Orders issued under the contract.

(11) Notice to proceed and stop orders.

(12) Insurance policies or certificates of insurance or references to them.

(13) Documents supporting advance or progress payments.

(14) Progressing, expediting, and production surveillance records.

(15) Quality assurance records.

(16) Property administration records.

(17) Documentation regarding termination actions for which the contract administration office is responsible.

(18) Cross reference to other pertinent documents that are filed elsewhere.

(19) Any additional documents on which action was taken or that reflect actions by the contract administration office pertinent to the contract.

(20) Contract completion documents.

(c) *Paying office contract file.* (1) Copy of the contract and any modifications.

(2) Bills, invoices, vouchers, and supporting documents.

(3) Record of payments or receipts.

(4) Other pertinent documents.

[48 FR 42113, Sept. 19, 1983, as amended at 50 FR 1727, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985; 54 FR 5054, Jan. 31, 1989; 55 FR 36794, Sept. 6, 1990; 60 FR 48211, Sept. 18, 1995; 61 FR 39188, July 26, 1996]

**4.804 Closeout of contract files.****4.804-1 Closeout by the office administering the contract.**

(a) Except as provided in paragraph (c) below, time standards for closing out contract files are as follows:

(1) Files for contracts using simplified acquisition procedures should be considered closed when the contracting officer receives evidence of receipt of property and final payment, unless otherwise specified by agency regulations.

(2) Files for firm-fixed-price contracts, other than those using simplified acquisition procedures, should be closed within 6 months after the date on which the contracting officer receives evidence of physical completion.

(3) Files for contracts requiring settlement of indirect cost rates should be closed within 36 months of the month in which the contracting officer receives evidence of physical completion.

(4) Files for all other contracts should be closed within 20 months of the month in which the contracting officer receives evidence of physical completion.

(b) When closing out the contract files at 4.804-1(a)(2), (3), and (4), the contracting officer shall use the closeout procedures at 4.804-5. However, these closeout actions may be modified to reflect the extent of administration that has been performed. Quick closeout procedures (see 42.708) should be used, when appropriate, to reduce administrative costs and to enable deobligation of excess funds.

(c) A contract file shall not be closed if (1) the contract is in litigation or under appeal, or (2) in the case of a termination, all termination actions have not been completed.

[48 FR 42113, Sept. 19, 1983, as amended at 54 FR 34752, Aug. 21, 1989; 60 FR 34746, July 3, 1995]

**4.804-2 Closeout of the contracting office files if another office administers the contract.**

(a) Contract files for contracts using simplified acquisition procedures should be considered closed when the contracting officer receives evidence of receipt of property and final payment,

unless otherwise specified by agency regulation.

(b) All other contract files shall be closed as soon as practicable after the contracting officer receives a contract completion statement from the contract administration office. The contracting officer shall ensure that all contractual actions required have been completed and shall prepare a statement to that effect. This statement is authority to close the contract file and shall be made a part of the official contract file.

[48 FR 42113, Sept. 19, 1983, as amended at 60 FR 34746, July 3, 1995]

**4.804-3 Closeout of paying office contract files.**

The paying office shall close the contract file upon issuance of the final payment voucher.

**4.804-4 Physically completed contracts.**

(a) Except as provided in paragraph (b) below, a contract is considered to be physically completed when—

(1)(i) The contractor has completed the required deliveries and the Government has inspected and accepted the supplies;

(ii) The contractor has performed all services and the Government has accepted these services; and

(iii) All option provisions, if any, have expired; or

(2) The Government has given the contractor a notice of complete contract termination.

(b) Facilities contracts and rental, use, and storage agreements are considered to be physically completed when—

(1) The Government has given the contractor a notice of complete contract termination; or

(2) The contract period has expired.

**4.804-5 Detailed procedures for closing out contract files.**

(a) The office administering the contract is responsible for initiating (automated or manual) administrative closeout of the contract after receiving evidence of its physical completion. At the outset of this process, an initial contract funds status review shall be accomplished and, where appropriate,

excess funds identified to the contracting office. When complete, the administrative closeout procedures shall ensure that—

- (1) Disposition of classified material is completed;
  - (2) Final patent report is cleared;
  - (3) Final royalty report is cleared;
  - (4) There is no outstanding value engineering change proposal;
  - (5) Plant clearance report is received;
  - (6) Property clearance is received;
  - (7) All interim or disallowed costs are settled;
  - (8) Price revision is completed;
  - (9) Subcontracts are settled by the prime contractor;
  - (10) Prior year indirect cost rates are settled;
  - (11) Termination docket is completed;
  - (12) Contract audit is completed;
  - (13) Contractor's closing statement is completed;
  - (14) Contractor's final invoice has been submitted; and
  - (15) Contract funds review is completed and deobligation of any excess funds is recommended.
- (b) When the actions in paragraph (a) above have been verified, the contracting officer administering the contract shall ensure that a contract completion statement, containing the following information, is prepared:
- (1) Contract administration office name and address (if different from the contracting office).
  - (2) Contracting office name and address.
  - (3) Contract number.
  - (4) Last modification number.
  - (5) Last call or order number.
  - (6) Contractor name and address.
  - (7) Dollar amount of excess funds, if any.
  - (8) Voucher number and date, if final payment has been made.
  - (9) Invoice number and date, if the final approved invoice has been forwarded to a disbursing office of another agency or activity and the status of the payment is unknown.
  - (10) A statement that all required contract administration actions have been fully and satisfactorily accomplished.
  - (11) Name and signature of the contracting officer.

(12) Date.

(c) When the statement is completed, the contracting officer shall ensure that—

- (1) The signed original is placed in the contracting office contract file (or forwarded to the contracting office for placement in the files if the contract administration office is different from the contracting office); and
- (2) A signed copy is placed in the appropriate contract administration file if administration is performed by a contract administration office.

[48 FR 42113, Sept. 19, 1983, as amended at 54 FR 34752, Aug. 21, 1989]

**4.805 Storage, handling, and disposal of contract files.**

(a) Agencies shall prescribe procedures for the handling, storing, and disposing of contract files. Such procedures shall take into account documents held in other than paper format, such as microfilm and various electronic media. The original medium on which the document was created may be changed to facilitate storage as long as the requirements of part 4, law and other regulations are satisfied. The process used to create and store records must record and reproduce the original document, including signatures and other written and graphic images completely, accurately, and clearly. Data transfer, storage, and retrieval procedures shall protect the original data from alteration. Unless law or other regulations require signed originals to be kept, they may be destroyed after the record copies on alternate media and copies reproduced from the record copy are verified to be accurate, complete and clear representations of the originals. Agency procedures for contract file disposal shall include provisions that the documents specified in paragraph (b) of this section shall not be destroyed before the times indicated. When original documents have been converted to alternate media for storage, the requirements in paragraph (b) of this section shall apply to the record copies on the alternate media instead of the original documents.

(b) If administrative records are mixed with program records and cannot be economically segregated, the

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entire file should be kept for the period of time approved for the program records. Similarly, if documents, specified below, are part of a subject or case file which documents activities different from those specified below, they should be treated in the same manner as the files of which they are a part.

Document	Retention Period
(1) Records pertaining to exceptions or protests, claims for or against the United States, investigations, cases pending or in litigation, or similar matters.	Until final clearance or settlement, or until the retention period otherwise specified for the document in paragraphs (b)(2) through (13) below is completed, whichever is later.
(2) Signed originals of construction contracts over \$2,000 and all other contracts over \$25,000.	6 years and 3 months after initial payment.
(3) Signed originals of justifications and approvals and determinations and findings required by part 6, and copies of supporting documents and data.	6 years and 3 months after final payment.
(4) Signed originals of construction contracts of \$2,000 or less and all other contracts of \$25,000 or less.	3 years after final payment.
(5) Unsuccessful offers or quotations that pertain to contracts using simplified acquisition procedures.	Retain 1 year after date of award or until final payment, whichever is later; but if the contracting officer determines that the files have future value to the Government, retain as long as advisable.
(6) Contract status (progressing), expediting, and production surveillance records.	6 months after final payment.
(7) Rejected engineering change proposals.	6 months after final payment.
(8) Labor compliance records, including equal employment opportunity records.	3 years after final payment.
(9) Documents pertaining generally to the contractor as described at 4.801(c)(3).	Until superseded or obsolete.
(10) Records or documents other than those in paragraphs 4.805(b) (1)–(9) of this section pertaining to contracts using simplified acquisition procedures.	1 year after final payment.
(11) Records or documents other than those in paragraphs 4.805(b) (1)–(10) of this section pertaining to contracts not using simplified acquisition procedures.	6 years and 3 months after final payment.
(12) Files for cancelled solicitations (see 4.801(c)(1)).	5 years after cancellation.
(13) Solicited and unsolicited unsuccessful offers and quotations above the simplified acquisition threshold:	

Document	Retention Period
(i) When filed separately from contract case files.	Until contract completion date.
(ii) When filed with contract case files.	6 years and 3 months after final payment.

(c) Documents listed in paragraph (b)(1) under “Document” shall not be destroyed until final clearance or settlement.

[48 FR 42113, Sept. 19, 1983, as amended at 50 FR 1727, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985; 54 FR 5054, Jan. 31, 1989; 57 FR 60573, Dec. 21, 1992; 59 FR 67016, Dec. 28, 1994; 60 FR 34746, July 3, 1995; 61 FR 39190, July 26, 1996]

### Subpart 4.9—Information Reporting to the Internal Revenue Service

SOURCE: 57 FR 44260, Sept. 24, 1992, unless otherwise noted.

#### 4.900 Scope of subpart.

This subpart provides policies and procedures applicable to reporting contract and payment information to the Internal Revenue Service (IRS).

#### 4.901 Definitions.

*Common parent*, as used in this subpart, means that corporate entity that owns or controls an affiliated group of corporations that files its Federal income tax returns on a consolidated basis, and of which the offeror is a member.

*Corporate status*, as used in this subpart, means a designation as to whether the offeror is a corporate entity, an unincorporated entity (e.g., sole proprietorship or partnership), or a corporation providing medical and health care services.

*Taxpayer Identification Number (TIN)*, as used in this subpart, means the number required by the IRS to be used by the offeror in reporting income tax and other returns.

#### 4.902 Contract information.

(a) 26 U.S.C. 6050M, as implemented in 26 CFR, requires heads of Federal executive agencies to report certain information to the IRS.

(b)(1) The required information applies to contract modifications—

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(i) Increasing the amount of a contract awarded before January 1, 1989, by \$50,000 or more; and

(ii) Entered into on or after April 1, 1990.

(2) The reporting requirement also applies to certain contracts and modifications thereto in excess of \$25,000 entered into on or after January 1, 1989.

(c) The information to report is—

(1) Name, address, and the Taxpayer Identification Number (TIN) of contractor;

(2) Name and TIN of common parent (if any);

(3) Date of the contract action;

(4) Amount obligated on the contract action; and

(5) Estimated contract completion date.

(d) Transmit the information to the IRS through the Federal Procurement Data System (see subpart 4.6 and implementing instructions).

#### **4.903 Payment information.**

(a) 26 U.S.C. 6041 and 6041A, as implemented in 26 CFR, in part, require payors, including Federal Government agencies, to report to the IRS payments made to certain contractors.

(b) The following payments are exempt from this reporting requirement:

(1) Payments to corporations. However, payments to corporations providing medical and health care services or engaged in the billing and collecting of

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payments for such services are not exempted.

(2) Payments for bills for merchandise, telegrams, telephone, freight, storage, and similar charges.

(3) Payments of income required to be reported on an IRS Form W-2 (e.g., contracts for personal services).

(4) Payments to a hospital or extended care facility described in 26 CFR 501(c)(3) that is exempt from taxation under 26 CFR 501(a).

(5) Payments to a hospital or extended care facility owned and operated by the United States, a state, the District of Columbia, a possession of the United States, or a political subdivision, agency, or instrumentality of any of the foregoing.

(6) Payments for any contract with a state, the District of Columbia, a possession of the United States, or a political subdivision, agency, or instrumentality of any of the foregoing.

(c) The following information is required to provide reports to the IRS:

(1) Name, address, and TIN of contractor.

(2) Corporate status (see 4.901).

(d) Transmit to paying offices the information specified in 4.203.

#### **4.904 Solicitation provision.**

The contracting officer shall insert the provision at 52.204-3, Taxpayer Identification, in solicitations, unless the TIN of each offeror has previously been obtained and is known.