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3.1100 Scope of subpart.

3.1101 Definitions.

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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 nonperformance of the employee’s official duties. Certain limited exceptions are authorized in agency regulations.

3.101-3 Agency regulations.

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

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

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

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

3.102 [Reserved]

3.103 Independent pricing.

3.103-1 Solicitation provision.

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

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

(b) [Reserved]

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

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

3.103-2 Evaluating the certification.

(a) *Evaluation guidelines*.

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

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

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

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

(iv) Participating in a *reverse auction* (see subpart 17.8).

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

(i) The proposed contract 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 paragraph (a)(1) or (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 paragraph (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 paragraph (b)(1) or (2)of this section, or the certificate is suspected of being false, the *contracting officer shall* report the situation to the Attorney General in accordance with 3.303.

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

3.103-3 The need for further certifications.

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

3.104 Procurement integrity.

3.104-1 Definitions.

As used in this section—

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

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

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

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

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

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

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

(2) *Indirect costs* and direct labor rates.

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

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

(5) Information marked in accordance with 52.215-1(e).

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

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

In excess of $10,000,000 means–

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

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

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

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

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

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

Official means–

(1) An officer, as defined in 5 U.S.C.2104;

(2) An employee, as defined in 5 U.S.C.2105;

(3) A member of the uniformed services, as defined in 5 U.S.C.2101(3); or

(4) A special Government employee, as defined in 18 U.S.C.202.

Participating personally and substantially in a Federal agency procurement means–

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

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

(ii) Preparing or developing the *solicitation*.

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

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

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

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

(3) "Participating substantially" means that the *official*'s involvement is of significance to the matter. Substantial participation requires more than *official* responsibility, knowledge, perfunctory involvement, or involvement on an administrative or peripheral issue. Participation *may* be substantial even though it is not determinative of the outcome of a particular matter. A finding of substantiality *should* be based not only on the effort devoted to a matter, but on the importance of the effort. While a series of peripheral involvements *may* be insubstantial, the single act of approving or participating in a critical step *may* be substantial. However, the review of *procurement* documents solely to determine compliance with regulatory, administrative, or budgetary procedures, does not constitute substantial participation in a *procurement*.

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

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

(ii) 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*.

(iii) Clerical functions supporting the conduct of a particular *procurement*.

(iv) 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.

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

3.104-2 General.

(a) This section implements 41 U.S.C. chapter 21, Restrictions on Obtaining and Disclosing Certain Information. Agency supplementation of 3.104, including specific definitions to identify individuals who occupy positions specified in 3.104-3(d)(1)(ii), and any clauses required by 3.104 *must* be approved by the *senior procurement executive* of the agency, unless a law establishes a higher level of approval for that agency.

(b) Agency *officials* are reminded that there are other statutes and regulations that deal with the same or related prohibited conduct, for example-

(1) The *offer* or acceptance of a bribe or gratuity is prohibited by 18 U.S.C. 201 and 10 U.S.C. 4651. The acceptance of a gift, under certain circumstances, is prohibited by 5 U.S.C. 7353 and 5 CFR Part 2635;

(2) Contacts with an *offeror* during the conduct of an *acquisition may* constitute "seeking employment," (see Subpart F of 5 CFR Part 2636 and 3.104-3(c)(2)). Government officers and employees (employees) are prohibited by 18 U.S.C. 208 and 5 CFR Part 2635 from participating personally and substantially in any particular matter that would affect the financial interests of any person with whom the employee is seeking employment. An employee who engages in negotiations or is otherwise seeking employment with an *offeror* or who has an arrangement concerning future employment with an *offeror must* comply with the applicable disqualification requirements of 5 CFR 2635.604 and 2635.606. The statutory prohibition in 18 U.S.C. 208 also *may* require an employee's disqualification from participation in the *acquisition* even if the employee's duties *may* not be considered "participating personally and substantially," as this term is defined in 3.104-1;

(3) Post-employment restrictions are covered by 18 U.S.C. 207 and 5 CFR parts 2637 and 2641, that prohibit certain activities by former Government employees, including representation of a contractor before the Government in relation to any contract or other particular matter involving specific parties on which the former employee participated personally and substantially while employed by the Government. Additional restrictions apply to certain senior Government employees and for particular matters under an employee's *official* responsibility;

(4) parts 14 and 15 place restrictions on the release of information related to *procurements* and other contractor information that *must* be protected under 18 U.S.C. 1905;

(5) Release of information both before and after award (see 3.104-4) *may* be prohibited by the Privacy Act (5 U.S.C. 552a), the Trade Secrets Act (18 U.S.C. 1905), and other laws; and

(6) Using nonpublic information to further an employee's private interest or that of another and engaging in a financial transaction using nonpublic information are prohibited by 5 CFR 2635.703.

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

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

(1) A person described in paragraph (a)(2) of this subsection *must* not, other than as provided by law, knowingly disclose *contractor bid or proposal information* or *source selection information* before the award of a *Federal agency procurement* contract to which the information relates. (See

3.104-4(a).)

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

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

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

(b) *Prohibition on obtaining procurement information (* 41 U.S.C. 2102). A person *must* not, other than as provided by law, knowingly obtain *contractor bid or proposal information* or *source selection information* before the award of a *Federal agency procurement* contract to which the information relates.

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

(1) If an agency *official*, *participating personally and substantially in a Federal agency procurement* for a contract in excess of the *simplified acquisition threshold*, contacts or is contacted by a person who is an *offeror* in that *Federal agency procurement* regarding possible non-Federal employment for that *official*, the *official must*-

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

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

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

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

(2) A contact is any of the actions included as "seeking employment" in 5 CFR 2635.603(b). In addition, unsolicited communications from *offerors* regarding possible employment are considered contacts.

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

(4) Conduct that complies with 41 U.S.C. 2104 *may* be prohibited by other criminal statutes and the Standards of Ethical Conduct for Employees of the Executive Branch. See 3.104-2(b)(2).

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

(1) A former *official* of a *Federal agency may* not accept *compensation* from a contractor that has been awarded a competitive or sole source contract, as an employee, officer, director, or consultant of the contractor within a period of 1 year after such former *official*-

(i) Served, at the time of selection of the contractor or the award of a contract to that contractor, as the procuring *contracting officer*, the source selection authority, a member of a *source selection evaluation board*, or the chief of a financial or technical evaluation team in a *procurement* in which that contractor was selected for award of a contract *in excess of $10,000,000*;

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

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

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

(B) Establish overhead or other rates applicable to a contract or contracts for that contractor that are valued *in excess of $10,000,000*;

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

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

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

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

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

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

(3) Nothing in paragraph (d)(1) of this subsection *may* be construed to prohibit a former *official* of a *Federal agency* from accepting *compensation* from any division or affiliate of a contractor that does not produce the same or similar *products* or services as the entity of the contractor that is responsible for the contract referred to in paragraph (d)(1) of this subsection.

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

(a) Except as specifically provided for in this subsection, no person or other entity *may* disclose *contractor bid or proposal information* or *source selection information* to any person other than a person authorized, in accordance with applicable agency regulations or procedures, by the *agency head* or the *contracting officer* to receive such information.

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

(c) Individuals unsure if particular information is *source selection information*, as defined in 2.101, *should* consult with agency *officials* as necessary. Individuals responsible for preparing material that *may* be *source selection information* as described at paragraph (10) of the "*source selection information*" definition in 2.101 *must* mark the cover page and each page that the individual believes contains *source selection information* with the legend "*Source Selection Information-See FAR* 2.101

and 3.104." Although the information in paragraphs (1) through (9) of the definition in 2.101 is considered to be *source selection information* whether or not marked, all reasonable efforts *must* be made to mark such material with the same legend.

(d) Except as provided in paragraph (d)(3) of this subsection, the *contracting officer must* notify the contractor *in writing* if the *contracting officer* believes that proprietary information, *contractor bid or proposal information*, or information marked in accordance with 52.215-1(e) has been inappropriately marked. The contractor that has affixed the marking *must* be given an opportunity to justify the marking.

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

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

(3) For *technical data* marked as proprietary by a contractor, the *contracting officer must* follow the procedures in 27.404-5.

(e) This section does not restrict or prohibit-

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

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

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

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

(f) This section does not authorize-

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

(2) The withholding of information from, or restricting its receipt by, the Comptroller General in the course of a protest against the award or proposed award of a *Federal agency procurement* contract;

(3) The release of information after award of a contract or cancellation of a *procurement* if such

information is *contractor bid or proposal information* or *source selection information* that pertains to another *procurement*; or

(4) The disclosure, *solicitation*, or receipt of bid or proposal information or *source selection information* after award if disclosure, *solicitation*, or receipt is prohibited by law. (See 3.104-2(b)(5) and subpart 24.2.)

3.104-5 Disqualification.

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

(b) *Disqualification notice*. In addition to submitting the contact report required by 3.104-3(c)(1), an agency *official* who *must* disqualify himself or herself pursuant to 3.104-3(c)(1)(ii) *must* promptly submit written notice of disqualification from further participation in the *procurement* to the *contracting officer*, the source selection authority if other than the *contracting officer*, and the agency *official*'s immediate supervisor. As a minimum, the notice *must*-

(1) Identify the *procurement*;

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

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

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

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

(2) After the conditions of 3.104-3(c)(1)(ii)(A) or (B) have been met, the *head of the contracting activity* (HCA), after consultation with the *agency ethics official*, *may* authorize the disqualified *official* to resume participation in the *procurement*, or *may* determine that an additional disqualification period is necessary to protect the integrity of the *procurement* process. In determining the disqualification period, the HCA *must* consider any factors that create an appearance that the disqualified *official* acted without complete impartiality in the *procurement*. The HCA's reinstatement decision *should* be *in writing*.

(3) Government officer or employee *must* also comply with the provisions of 18 U.S.C.208 and 5 CFR part 2635 regarding any resumed participation in a *procurement* matter. Government officer or employee *may* not be reinstated to participate in a *procurement* matter affecting the financial interest of someone with whom the individual is seeking employment, unless the individual receives-

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

(ii) An authorization in accordance with the requirements of subpart F of 5 CFR part 2635.

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

(a) An *official* or former *official* of a *Federal agency* who does not know whether he or she is or would be precluded by 41 U.S.C. 2104 (see 3.104-3(d)) from accepting *compensation* from a particular contractor *may* request advice from the appropriate *agency ethics official* before accepting such *compensation*.

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

(1) *Procurement*(s), or decision(s) on matters under 3.104-3(d)(1)(iii), involving the particular contractor, in which the individual was or is involved, including contract or *solicitation* numbers, dates of *solicitation* or award, a description of the *supplies* or services procured or to be procured, and contract amount;

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

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

(c) Within 30 days after receipt of a request containing complete information, or as soon thereafter as practicable, the *agency ethics official should* issue an opinion on whether the proposed conduct would violate 41 U.S.C. 2104.

(d)

(1) If complete information is not included in the request, the *agency ethics official may* ask the requester to provide more information or request information from other persons, including the source selection authority, the *contracting officer*, or the requester's immediate supervisor.

(2) 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 or she has reason to believe that the information is fraudulent, misleading, or otherwise incorrect.

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

3.104-7 Violations or possible violations.

(a) A *contracting officer* who receives or obtains information of a violation or possible violation of 41 U.S.C. 2102, 2103, or 2104 (see 3.104-3) *must* determine if the reported violation or possible violation has any impact on the pending award or selection of the contractor.

(1) If the *contracting officer* concludes that there is no impact on the *procurement*, the *contracting officer must* forward the information concerning the violation or possible violation and documentation supporting a determination that there is no impact on the *procurement* to an individual designated in accordance with agency procedures.

(i) If that individual concurs, the *contracting officer may* proceed with the *procurement*.

(ii) If that individual does not concur, the individual *must* promptly forward the information and documentation to the HCA and advise the *contracting officer* to withhold award.

(2) If the *contracting officer* concludes that the violation or possible violation impacts the *procurement*, the *contracting officer must* promptly forward the information to the HCA.

(b) The HCA *must* review all information available and, in accordance with agency procedures, take appropriate action, such as—

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

(2) Begin an investigation;

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

(4) Conclude that a violation occurred; or

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

(c) Before concluding that an *offeror*, contractor, or person has violated 41 U.S.C. chapter 21, the HCA *may* consider that the interests of the Government are best served by requesting information from appropriate parties regarding the violation or possible violation.

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

(1) If a contract has not been awarded–

(i) Cancel the *procurement*;

(ii) Disqualify an *offeror*; or

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

(2) If a contract has been awarded-

(i) Effect appropriate contractual remedies, including profit recapture under the clause at 52.203-10, Price or Fee Adjustment for Illegal or Improper Activity, or, if the contract has been rescinded under paragraph (d)(2)(ii) of this subsection, recovery of the amount expended under the contract;

(ii) Void or rescind the contract with respect to which–

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

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

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

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

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

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

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

(f) If the HCA determines that urgent and compelling circumstances justify an award, or award is otherwise in the interests of the Government, the HCA, in accordance with agency procedures, *may* authorize the *contracting officer* to award the contract or execute the *contract modification* after notifying the *agency head*.

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

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

Criminal and civil penalties, and administrative remedies, *may* apply to conduct that violates 41 U.S.C. chapter 21 (see 3.104-3). See 33.102(f) for special rules regarding bid protests. See 3.104-7 for administrative remedies relating to contracts.

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

(b) An *offeror* who engages in employment discussion with an *official* subject to the restrictions of 3.104-3, knowing that the *official* has not complied with 3.104-3(c)(1), is subject to the criminal, civil, or administrative penalties set forth in 41 U.S.C. 2105.

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

3.104-9 Contract clauses.

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

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

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

Subpart 3.2 - Contractor Gratuities to Government Personnel

3.201 Applicability.

This subpart applies to all *executive agencies*, except that coverage concerning exemplary damages applies only to the Department of Defense (10 U.S.C. 4651).

3.202 Contract clause.

The *contracting officer 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.

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.

3.302 Definitions.

As used in this subpart-

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

3.303 Reporting suspected antitrust violations.

(a) Agencies are required by 41 U.S.C.3707 and 10 U.S.C. 3307 to report to the Attorney General any bids or proposals that evidence a violation of the antitrust laws. These reports are in addition to those required by 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) of this section identifies behavior patterns that are often associated with antitrust violations. Activities meeting the descriptions in paragraph (c) are not necessarily improper, but they are sufficiently questionable to warrant notifying the appropriate authorities, in accordance with agency procedures.

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

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

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

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

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

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

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

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

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

(9) 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* and its *outlying areas*, *contracting officers may* refer suspected collusive *offers* to the authorities of the foreign government concerned for appropriate action.

(f) Agency reports *shall* be addressed to the-

Attorney General

U.S. Department of Justice

Washington DC 20530

Attention: Assistant Attorney General

Antitrust Division

and *shall* include-

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

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

for further information.

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

Subpart 3.4 - Contingent Fees

3.400 Scope of subpart.

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

3.401 Definitions.

As used in this subpart-

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

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

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

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

3.402 Statutory requirements.

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

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

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

(c) Provide that, for breach or violation of the *warranty* by the contractor, the Government *may*

annul the contract without liability or deduct from the contract price or consideration, or otherwise recover, the full amount of the *contingent fee*.

3.403 Applicability.

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

3.404 Contract clause.

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

3.405 Misrepresentations or violations of the Covenant Against Contingent Fees.

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

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

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

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

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

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

3.406 Records.

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

Subpart 3.5 - Other Improper Business Practices

3.501 Buying-in.

3.501-1 Definition.

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

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

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

3.501-2 General.

(a) *Buying-in may* decrease competition or result in poor contract performance. The *contracting officer must* take appropriate action to ensure *buying-in* losses are not recovered by the contractor through the *pricing* of-

(1) Change orders; or

(2) Follow-on contracts subject to cost analysis.

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

(1) Multiyear *contracting*, with a requirement in the *solicitation* that a price be submitted only for the total multi-year 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 15.408, Table 15-1, paragraph A, column (2) under "Formats for Submission of *Line Item* Summaries") and treatment of unreasonable price quotations (see 15.405).

3.502 Subcontractor kickbacks.

3.502-1 Definitions.

As used in this section—

Kickback means any money, fee, commission, credit, gift, gratuity, thing of value, or compensation of any kind which is provided to any *prime contractor*, *prime contractor employee*, *subcontractor*, or

subcontractor employee for the purpose of improperly obtaining or rewarding favorable treatment in connection with a *prime contract* or in connection with a *subcontract* relating to a *prime contract*.

Person means a corporation, partnership, business association of any kind, trust, joint-stock company, or individual.

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

Prime Contractor means a *person* who has entered into a *prime contract* with the *United States*.

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

Subcontract means a contract or contractual action entered into by a *prime contractor* or *subcontractor* for the purpose of obtaining *supplies*, materials, equipment, or services of any kind under a *prime contract*.

Subcontractor—

(1) Means any *person*, other than the *prime contractor*, who *offers* to furnish or furnishes any *supplies*, materials, equipment, or services of any kind under a *prime contract* or a *subcontract* entered into in connection with such *prime contract*; and

(2) Includes any *person* who *offers* to furnish or furnishes general *supplies* to the *prime contractor* or a higher tier *subcontractor*.

3.502-2 Subcontractor kickbacks.

The Anti-*Kickback* Act of 1986 (now codified at 41 U.S.C. chapter 87, *Kickbacks*,) was passed to deter *subcontractors* from making payments and contractors from accepting payments for the purpose of improperly obtaining or rewarding favorable treatment in connection with a *prime contract* or a *subcontract* relating to a *prime contract*. The *Kickbacks* statute-

(a) Prohibits any *person* from-

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

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

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

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

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

(d) Provides that-

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

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

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

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

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

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

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

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

(1) Have in place and follow reasonable procedures designed to prevent and detect violations of the *Kickbacks* statute in its own operations and direct business relationships (*e.g.,* company ethics rules prohibiting *kickbacks* by employees, agents, or *subcontractors*; education programs for new employees and *subcontractors*, explaining policies about *kickbacks*, related company procedures and the consequences of detection; *procurement* procedures to minimize the opportunity for *kickbacks;* audit procedures designed to detect *kickbacks*; periodic surveys of *subcontractors* to elicit information about *kickbacks*; procedures to report *kickbacks* to law enforcement officials; annual declarations by employees of gifts or gratuities received from *subcontractors*; annual employee declarations that they have violated no company ethics rules; personnel practices that document unethical or illegal behavior and make such information available to prospective employers); and

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

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

3.502-3 Contract clause.

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

3.503 Unreasonable restrictions on subcontractor sales.

3.503-1 Policy.

10 U.S.C. 4655 and 41 U.S.C. 4704 require that subcontractors not be unreasonably precluded from making direct sales to the Government of any *supplies* or services made or furnished under a contract. However, this does not preclude contractors from asserting rights that are otherwise authorized by law or regulation.

3.503-2 Contract clause.

The *contracting officer 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 products* or *commercial services*, the *contracting officer shall* use the clause with its *Alternate* I.

Subpart 3.6 - Contracts with Government Employees or Organizations Owned or Controlled by Them

3.601 Policy.

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

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

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

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

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

3.602 Exceptions.

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

3.603 Responsibilities of the contracting officer.

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

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

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

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

Subpart 3.7 - Voiding and Rescinding Contracts

3.700 Scope of subpart.

(a) This subpart prescribes Governmentwide policies and procedures for exercising discretionary authority to declare void and rescind contracts in relation to which-

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

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

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

3.701 Purpose.

This subpart provides-

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

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

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

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

3.702 Definition.

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

3.703 Authority.

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

(b) 41 U.S.C. 2105(c) requires a *Federal agency*, upon receiving information that a contractor or a person has violated 41 U.S.C. 2102, to consider rescission of a contract with respect to which-

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

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

3.704 Policy.

(a) In cases 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 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.

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

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

(2) Recommending the initiation of *suspension* or *debarment* proceedings in accordance with subpart 9.4.

3.705 Procedures.

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

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

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

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

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

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

(i) States that determination;

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

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

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

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

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

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

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

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

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

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

(e) *Final agency decision*. The final agency decision *shall* be based on the information available to the *agency head* or designee, including any pertinent information submitted or, if a hearing was held, presented at the hearing. If the agency decision declares void and rescinds the contract, the final decision *shall* specify the amounts due and property to be returned to the agency, and reflect consideration of the fair value of any tangible benefits received and retained by the agency. Notice of the decision *shall* be sent promptly by certified mail, return receipt requested. Rescission of contracts under the authority of the Act and demand for recovery of the amounts expended and property transferred therefor, is not a *claim* within the meaning of 41 U.S.C. chapter 71, Contract Disputes, or part 33. Therefore, the procedures required by the statute and the FAR for the issuance of a final *contracting officer* decision are not applicable to final agency decisions under this subpart, and *shall* not be followed.

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

3.800 Scope of subpart.

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

3.801 Definitions.

As used in this subpart-

Agency means "*executive agency*" as defined in 2.101.

Covered Federal action means any of the following actions:

(1) Awarding any Federal contract.

(2) Making any Federal grant.

(3) Making any Federal loan.

(4) Entering into any cooperative agreement.

(5) Extending, continuing, renewing, amending, or modifying any Federal contract, grant, loan, or cooperative agreement.

Indian tribe and "tribal organization" have the meaning provided in section 4 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b) and include Alaskan Natives.

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

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

Officer or employee of an agency includes the following individuals who are employed by an agency:

(1) An individual who is appointed to a position in the Government under Title 5, *United States* Code, including a position under a temporary appointment.

(2) A member of the uniformed services, as defined in subsection 101(3), Title 37, *United States* Code.

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

(4) An individual who is a member of a Federal advisory committee, as defined by the Federal Advisory Committee Act, Title 5, *United States* Code, appendix 2.

Person means an individual, corporation, company, association, authority, firm, partnership, society, *State*, and *local government*, regardless of whether such entity is operated for profit or not for profit. This term excludes an *Indian tribe*, tribal organization, or any other Indian organization eligible to receive Federal contracts, grants, cooperative agreements, or loans from an agency, but only with respect to expenditures by such tribe or organization that are made for purposes specified in paragraph 3.802(a) and are permitted by other Federal law.

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

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

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

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

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

3.802 Statutory prohibition and requirement.

(a) 31 U.S.C.1352 prohibits a *recipient* of a Federal contract, grant, loan, or cooperative agreement from using appropriated funds to pay any *person* for *influencing or attempting to influence* an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with any *covered Federal actions*.

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

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

(b) 31 U.S.C.1352 also requires *offerors* to furnish a declaration consisting of both a certification and a disclosure, with periodic updates of the disclosure after contract award. 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.

3.803 Exceptions.

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

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

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

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

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

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

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

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

(v) Making capability presentations prior to formal *solicitation* of any *covered Federal action* when seeking an award from an agency pursuant to the provisions of the Small Business Act, as amended by Pub. L. 95-507, and subsequent amendments.

(2) Professional and technical services.

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

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

(iii) As used in paragraph (a)(2) of this section "professional and technical services" are 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 or a technical *person* are not allowable under this section unless they provide advice and analysis directly applying their professional or technical expertise and unless the advice or analysis is rendered directly and solely in the preparation, submission or negotiation of a *covered Federal action*. Thus, for example, communications with the intent to influence made by a lawyer that do not provide legal advice or analysis directly and solely related to the legal aspects of his or her client's proposal, but generally advocate one proposal over another, are not allowable under this section because the lawyer is not providing professional legal services. Similarly, communications with the intent to influence made by an engineer providing an engineering analysis prior to the preparation or submission of a bid or proposal are not allowable under this section since the engineer is providing technical services but not directly in the preparation, submission or negotiation of a *covered Federal action*.

(iv) Requirements imposed by or pursuant to law as a condition for receiving a covered Federal

award include those required by law or regulation and any other requirements in the actual award documents.

(b) Only those communications and services expressly authorized by paragraph (a) of this section are permitted.

(c) The disclosure requirements of paragraph 3.802(b) do not apply with respect to payments of *reasonable compensation* made to *regularly employed* officers or employees of a *person*.

3.804 Policy.

The *contracting officer shall* obtain certifications and disclosures as required by the provision at 52.203-11, Certification and Disclosure Regarding Payments to Influence Certain Federal Transactions, prior to the award of any contract exceeding $200,000.

3.805 Exemption.

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

3.806 Processing suspected violations.

The *contracting officer shall* report suspected violations of the requirements of 31 U.S.C.1352 in accordance with 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)), 3804-3808, and 3812, insofar as the provisions therein are not inconsistent with the requirements of this subpart.

3.808 Solicitation provision and contract clause.

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

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

Subpart 3.9 - Whistleblower Protections for Contractor Employees

3.900 Scope of subpart.

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

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

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

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

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

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

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

(c) Section 3.907 of this subpart implements section 1553 of the American Recovery and Reinvestment Act of 2009 (Pub. L. 111–5), and applies to all contracts funded in whole or in part by that Act.

3.901 Definitions.

As used in this subpart-

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

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

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

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

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

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

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

3.902 Classified information.

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

3.903 Policy.

(a)

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

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

(ii) A gross waste of Federal funds;

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

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

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

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

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

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

(2) An *Inspector General*.

(3) The Government Accountability Office.

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

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

(6) A court or grand jury.

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

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

3.904 Complaints.

3.904-1 Procedures for filing complaints.

A contractor or *subcontractor* employee who believes that he or she has been discharged, demoted, or otherwise discriminated against contrary to the policy in 3.903 *may* submit a complaint with the *Inspector General* of the agency concerned. Procedures for submitting fraud, waste, abuse, and whistleblower complaints are generally accessible on agency Office of *Inspector General* hotline or whistleblower internet sites or the complainant *may* directly contact the cognizant Office of the *Inspector General* for submission instructions. A complaint by the employee *may* not be brought under 41 U.S.C. 4712 more than three years after the date on which the alleged reprisal took place.

3.904-2 Procedures for investigating complaints.

(a) Investigation of complaints will be in accordance with 41 U.S.C. 4712(b).

(b) Upon completion of the investigation, the *head of the agency shall* ensure that the report of findings has been provided by the *Inspector General* to the *head of the agency* and to—

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

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

(c) The complainant, contractor, and/or *subcontractor shall* be afforded the opportunity to submit a written response to the report of findings to the *head of the agency* and the Office of *Inspector General* in a time and manner that permits the *agency head* to take action not later than 30 days after receiving the report, as required by 3.905–1(a).

3.905 Remedies and enforcement of orders.

3.905-1 Remedies.

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

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

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

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

(ii) Order the contractor or *subcontractor* to reinstate the complainant employee to the position that the person held before the reprisal, together with compensatory damages (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.

(iii) Order the contractor or *subcontractor* to pay the complainant employee 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, as determined by the *head of the agency*.

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

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

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

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

(ii)

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

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

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

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

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

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

(ii) The complainant *may* bring a de novo action at law or equity against the contractor or *subcontractor* to seek compensatory damages and other relief available under 41 U.S.C. 4712 in the appropriate district court of the *United States*, which *shall* have jurisdiction over such an action without regard to the amount in controversy.

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

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

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

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

3.905-2 Enforcement of orders.

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

(b) Any person adversely affected or aggrieved by an order issued under 3.905–1(a)(2) *may* obtain review of the order's conformance with 41 U.S.C. 4712 and its implementing regulations, in the U.S. 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*. Filing such an appeal *shall* not act to stay the enforcement of the order of the head of an agency, unless a stay is specifically entered by the court.

3.906 Contract clause.

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

3.907 Whistleblower Protections Under the American Recovery and Reinvestment Act of 2009 (the Recovery Act).

3.907-1 Definitions.

As used in this section-

Board means the Recovery Accountability and Transparency *Board* established by Section 1521 of the Recovery Act.

Covered funds means any contract payment, grant payment, or other payment received by a contractor if-

(1) The Federal Government provides any portion of the money or property that is provided, requested, or demanded; and

(2) At least some of the funds are appropriated or otherwise made available by the Recovery Act.

Covered information means information that the employee reasonably believes is evidence of gross mismanagement of the contract or *subcontract* related to *covered funds*, gross waste of *covered funds*, a substantial and specific danger to public health or safety related to the implementation or use of *covered funds*, an abuse of authority related to the implementation or use of *covered funds*, or

a violation of law, rule, or regulation related to an agency contract (including the competition for or negotiation of a contract) awarded or issued relating to *covered funds*.

Inspector General means an *Inspector General* appointed under the *Inspector General* Act of 1978. 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*.

Non-Federal employer, as used in this section, means any employer that receives Recovery Act funds, including a contractor, *subcontractor*, or other recipient of funds pursuant to a contract or other agreement awarded and administered in accordance with the Federal *Acquisition* Regulation.

3.907-2 Policy.

Non-Federal employers are prohibited from discharging, demoting, or otherwise discriminating against an employee as a reprisal for disclosing *covered information* to any of the following entities or their representatives:

(1) The *Board*.

(2) An *Inspector General*.

(3) The Comptroller General.

(4) A member of Congress.

(5) A State or Federal regulatory or law enforcement agency.

(6) A person with supervisory authority over the employee or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct.

(7) A court or grand jury.

(8) The head of a *Federal agency*.

3.907-3 Procedures for filing complaints.

(a) An employee who believes that he or she has been subjected to reprisal prohibited by the Recovery Act, Section 1553 as set forth in 3.907-2, *may* submit a complaint regarding the reprisal to 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 *covered information* 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.

(c) A *contracting officer* who receives a complaint of reprisal of the type described in 3.907-2 *shall* forward it to the Office of *Inspector General* and to other designated officials in accordance with agency procedures (*e.g.*, agency legal counsel).

3.907-4 Procedures for investigating complaints.

Investigation of complaints will be in accordance with section 1553 of the Recovery Act.

3.907-5 Access to investigative file of Inspector General.

(a) The employee alleging reprisal under this section *shall* have access to the investigation file of the *Inspector General*, in accordance with the Privacy Act, 5 U.S.C. §552a. The investigation of the *Inspector General shall* be deemed closed for the purposes of disclosure under such section when an employee files an appeal to the *agency head* or a court of competent jurisdiction.

(b) In the event the employee alleging reprisal brings a civil action under section 1553(c)(3) of the Recovery Act, the employee alleging the reprisal and the *non-Federal employer shall* have access to the investigative file of the *Inspector General* in accordance with the Privacy Act.

(c) The *Inspector General may* exclude from disclosures made under 3.907-5(a) or (b)-

(1) Information protected from disclosure by a provision of law; and

(2) Any additional information the *Inspector General* determines disclosure of which would impede a continuing investigation, provided that such information is disclosed once such disclosure would no longer impede such investigation, unless the *Inspector General* determines that the disclosure of law enforcement techniques, procedures, or information could reasonably be expected to risk circumvention of the law or disclose the identity of a confidential source.

(d) An *Inspector General* investigating an alleged reprisal under this section *may* not respond to any inquiry or disclose any information from or about any person alleging such reprisal, except in accordance with 5 U.S.C. 552a or as required by any other applicable Federal law.

3.907-6 Remedies and enforcement authority.

(a) *Burden of Proof.*

(1) Disclosure as contributing factor in reprisal.

(i) An employee alleging a reprisal under this section *shall* be deemed to have affirmatively established the occurrence of the reprisal if the employee demonstrates that a disclosure described in section 3.907-2 was a contributing factor in the reprisal.

(ii) A disclosure *may* be demonstrated as a contributing factor in a reprisal for purposes of this paragraph by circumstantial evidence, including-

(A) Evidence that the official undertaking the reprisal knew of the disclosure; or

(B) Evidence that the reprisal occurred within a period of time after the disclosure such that a reasonable person could conclude that the disclosure was a contributing factor in the reprisal.

(2) *Opportunity for rebuttal*. The head of an agency *may* not find the occurrence of a reprisal with respect to a reprisal that is affirmatively established under section 3.907-6(a)(1) if the *non-Federal employer* demonstrates by clear and convincing evidence that the *non-Federal employer* would have taken the action constituting the reprisal in the absence of the disclosure.

(b) No later than 30 days after receiving an *Inspector General* report in accordance with section 1553 of the Recovery Act, the *head of the agency* concerned *shall* determine whether there is sufficient basis to conclude that the *non-Federal employer* has subjected the complainant to a reprisal prohibited by subsection 3.907-2 and *shall* either issue an order denying relief in whole or in part or *shall* take one or more of the following actions:

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

(2) Order the employer to reinstate the person to the position that the person held before the reprisal, together with the compensation (including back pay), compensatory damages, 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 employer 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.

(c)

(1) The complainant *shall* be deemed to have exhausted all administrative remedies with respect to the complaint, and the complainant *may* bring a de novo action at law or equity against the employer to seek compensatory damages and other relief available under this section in the appropriate district court of *United States*, which *shall* have jurisdiction over such an action without regard to the amount in controversy if-

(i) The head of an agency-

(A) Issues an order denying relief in whole or in part under paragraph (a) of this section;

(B) Has not issued an order within 210 days after the submission of a complaint in accordance with section 1553 of the Recovery Act, or in the case of an extension of time in accordance with section 1553 of the Recovery Act, within 30 days after the expiration of the extension of time; or

(C) Decides in accordance with section 1553 of the Recovery Act not to investigate or to discontinue an investigation; and

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

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

(d) Whenever an employer fails to comply with an order issued under this section, the *head of the agency 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, compensatory and exemplary damages, and attorneys fees and costs.

(e) Any person adversely affected or aggrieved by an order issued under paragraph (b) of this subsection *may* obtain review of the order's conformance with the law, and this section, 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*.

3.907-7 Contract clause.

Use the clause at 52.203-15, Whistleblower Protections Under the American Recovery and Reinvestment Act of 2009, in all *solicitations* and contracts funded in whole or in part with Recovery Act funds.

3.908 [Reserved]

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

3.909-1 Prohibition.

(a) The Government is prohibited from using fiscal year 2015 and subsequent fiscal year funds for a contract with an entity that requires employees or *subcontractors* of such entity seeking to report waste, fraud, or abuse to sign internal confidentiality agreements or statements prohibiting or otherwise restricting such employees or *subcontractors* from lawfully reporting such waste, fraud, or abuse to a designated investigative or law enforcement representative of a Federal department or agency authorized to receive such information. See section 743 of Division E, Title VII, of the Consolidated and Further Continuing Appropriations Act, 2015 (Pub. L. 113-235) and its successor provisions in subsequent appropriations acts (and as extended in continuing resolutions.)

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

3.909-2 Representation by the offeror.

(a) In order to be eligible for contract award, an *offeror must* represent that it will not require its employees or *subcontractors* to sign internal confidentiality agreements or statements prohibiting or otherwise restricting such employees or *subcontractors* from lawfully reporting waste, fraud, or abuse related to the performance of a Government contract to a designated investigative or law enforcement representative of a Federal department or agency authorized to receive such information (e.g., agency Office of the *Inspector General*). Any *offeror* that does not so represent is *ineligible* for award of a contract.

(b) The *contracting officer may* rely on an *offeror*'s representation unless the *contracting officer* has reason to question the representation.

3.909-3 Solicitation provision and contract clause.

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

(a)

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

(2) Do not insert the provision in *solicitations* for a *personal services contract* with an individual if the services are to be performed entirely by the individual, rather than by an employee of the contractor or a *subcontractor*.

(b)

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

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

Subpart 3.10 - Contractor Code of Business Ethics and Conduct

3.1000 Scope of subpart.

This subpart-

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

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

3.1001 Definitions.

As used in this subpart-

Subcontract means any contract entered into by a *subcontractor* to furnish *supplies* or services for

performance of a prime contract or a *subcontract*.

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

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

3.1002 Policy.

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

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

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

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

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

3.1003 Requirements.

(a) *Contractor requirements.*

(1) Although the policy at 3.1002 applies as guidance to all Government contractors, the contractual requirements set forth in the clauses at 52.203-13, Contractor Code of Business Ethics and Conduct, and 52.203-14, Display of Hotline Poster(s), are mandatory if the contracts meet the conditions specified in the clause prescriptions at 3.1004.

(2) Whether or not the clause at 52.203-13 is applicable, a contractor *may* be suspended and/or debarred for knowing failure by a principal to timely disclose to the Government, in connection with the award, performance, or closeout of a Government contract performed by the contractor or a *subcontract* awarded thereunder, credible evidence of a violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the *United States* Code or a violation of the civil False *Claims* Act. Knowing failure to timely disclose credible evidence of any of the above violations remains a cause for *suspension* and/or *debarment* until 3 years after final payment on a contract (see 9.406-2(b)(1)(vi) and 9.407-2(a)(8)).

(3) The Payment clauses at FAR 52.212-4(i)(5), 52.232-25(d), 52.232-26(c), and 52.232-27(l) require that, if the contractor becomes aware that the Government has overpaid on a contract financing or *invoice* payment, the contractor *shall* remit the overpayment amount to the Government. A contractor *may* be suspended and/or debarred for knowing failure by a principal to timely disclose credible evidence of a significant overpayment, other than overpayments resulting from contract financing payments as defined in 32.001 (see 9.406-2(b)(1)(vi) and 9.407-2(a)(8)).

(b) *Notification of possible contractor violation.* If the *contracting officer* is notified of possible

contractor violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 U.S.C.; or a violation of the civil False *Claims* Act, the *contracting officer shall-*

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

(2) Take action in accordance with agency procedures.

(c) *Fraud Hotline Poster.*

(1) Agency OIGs are responsible for determining the need for, and content of, their respective agency OIG fraud hotline poster(s).

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

3.1004 Contract clauses.

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

(b)

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

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

(ii)

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

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

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

(i) Identify the applicable posters; and

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

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

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

3.1100 Scope of subpart.

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

3.1101 Definitions.

As used in this subpart-

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

(1) Planning *acquisitions*.

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

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

(4) Evaluating contract proposals.

(5) Awarding Government contracts.

(6) Administering contracts (including ordering changes or giving technical direction in contract performance or contract quantities, evaluating contractor performance, and accepting or rejecting contractor *products* or services).

(7) Terminating contracts.

(8) Determining whether contract costs are reasonable, allocable, and allowable.

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

(1) An employee of the contractor; or

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

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

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

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

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

(iii) Gifts, including travel.

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

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

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

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

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

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

(vi) Real estate investments;

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

(viii) Business ownership and investment interests.

3.1102 Policy.

The Government’s policy is to require contractors to-

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

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

3.1103 Procedures.

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

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

(i) Obtaining and maintaining from each *covered employee*, when the employee is initially assigned

to the task under the contract, a disclosure of interests that might be affected by the task to which the employee has been assigned, as follows:

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

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

(C) Gifts, including travel; and

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

(2) For each *covered employee*-

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

(ii) Prohibit use of non-public information accessed through performance of a Government contract for personal gain; and

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

(3) Inform *covered employees* of their obligation-

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

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

(iii) To avoid even the appearance of personal conflicts of interest;

(4) Maintain effective oversight to verify compliance with personal conflict-of-interest safeguards;

(5) Take appropriate disciplinary action in the case of *covered employees* who fail to comply with policies established pursuant to this section; and

(6) Report to the *contracting officer* any personal conflict-of-interest violation by a *covered employee* as soon as identified. This report *shall* include a description of the violation and the proposed actions to be taken by the contractor in response to the violation, with follow-up reports of corrective actions taken, as necessary.

(b) If a contractor reports a personal conflict-of-interest violation by a *covered employee* to the *contracting officer* in accordance with paragraph (b)(6) of the clause at 52.203-16, Preventing Personal Conflicts of Interest, the *contracting officer shall*-

(1) Review the actions taken by the contractor;

(2) Determine whether any action taken by the contractor has resolved the violation satisfactorily;

and

(3) If the *contracting officer* determines that the contractor has not resolved the violation satisfactorily, take any appropriate action in consultation with agency legal counsel.

3.1104 Mitigation or waiver.

(a) In exceptional circumstances, if the contractor cannot satisfactorily prevent a personal conflict of interest as required by paragraph (b)(2)(i) of the clause at 52.203-16, Preventing Personal Conflicts of Interest, the contractor *may* submit a request, through the *contracting officer*, for the *head of the contracting activity* to-

(1) Agree to a plan to mitigate the personal conflict of interest; or

(2) Waive the requirement to prevent personal conflicts of interest.

(b) If the *head of the contracting activity* determines *in writing* that such action is in the best interest of the Government, the *head of the contracting activity may* impose conditions that provide mitigation of a personal conflict of interest or grant a waiver.

(c) This authority *shall* not be redelegated.

3.1105 Violations.

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

3.1106 Contract clause.

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

(1) Exceed the *simplified acquisition threshold*; and

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

(b) If only a portion of a contract is for the performance of *acquisition* functions closely associated with *inherently governmental functions*, then the *contracting officer shall* still insert the clause, but *shall* limit applicability of the clause to that portion of the contract that is for the performance of such services.

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