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)).

Parent topic: 3.502 Subcontractor kickbacks.