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Parent topic: ~~Federal Acquisition Regulation~~

3.000 Scope of part.

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

Subpart 3.1 - Safeguards

3.101 Standards of conduct.

3.101-1 General.

Government business ~~shall~~must be conducted in a manner above reproach~~and~~. Except as authorized by statute or regulation, business must be conducted with complete impartiality and ~~with~~without preferential treatment for ~~none~~anyone. Transactions ~~relating to the expenditure of~~involving public funds require the highest degree of public trust and ~~an~~ impeccable ~~standard~~standards 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~~restrict Government personnel; ~~their actions. Beyond these restrictions,~~ official conduct must~~, in addition, be such that they~~ meet a standard where personnel would have no reluctance to ~~make a full public disclosure of~~fully disclose their actions to the public.

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

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

(1) Has or is seeking to obtain Government business with the employee's agency; ~~(b)~~

(2) Conducts activities that are regulated by the employee's agency; ~~or (c)~~

(3) Has interests that may be substantially affected by the performance or nonperformance of the employee's official duties.

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

3.101-3 Agency regulations.

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

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

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

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

3.102 [Reserved]

3.103 Independent pricing.

3.103-1 Solicitation provision.

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

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

(b) ~~[Reserved]~~

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

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

3.103-2 Evaluating the certification.

(a) Evaluation guidelines-

~~(1)~~ ~~None of~~ The following, ~~in and of itself, constitutes~~ activities are not considered "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~~for items ~~being acquired by~~ the Government is buying.

(ii) ~~The fact that~~ A firm has ~~informed prospective~~told potential customers ~~of proposed or pending publication of~~about upcoming new or revised price lists for items ~~being acquired by~~ the Government is buying.

(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~~A firm participates in a reverse auction (~~see subpart explained in part 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~~ prices at the time the certification is made ~~in the particular~~ for that offer.

(3) ~~If an offer is submitted jointly by two or more concerns, the~~ For joint offers from multiple companies, each company's certification ~~provided by the representative of each concern~~ applies only to ~~the~~ its own activities ~~of that concern~~.

(b) ~~Rejection of offers suspected of being~~ Rejecting potentially collusive.

~~(offers. (1) If the~~ an offeror ~~deleted~~ removes or ~~modified~~ modifies paragraph (a)(1) ~~or (), (a)(3)),~~ or paragraph (b) of the certificate, the contracting officer ~~shall~~ must reject ~~the offeror's~~ their bid or proposal.

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

(i); The offeror must ~~have furnished~~ furnish with its offer a signed ~~statement of the circumstances of the disclosure of~~ explanation about how prices ~~contained in the bid or proposal were disclosed;~~

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

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

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

(v) If the determination ~~is positive~~ finds no competition issues, the bid ~~or proposal shall be rejected; if it is negative, the bid or proposal shall~~ may be considered for award.

(3) ~~Whenever an offer is rejected~~ When rejecting offers under ~~paragraph~~ paragraphs (b)(1) or (b)(2) ~~of this section, or the certificate is suspected of being), or when suspecting false certification,~~ the contracting officer ~~shall~~ must report the situation to the Attorney General in accordance with 3.303.

(4) The determination ~~made under~~ in paragraph (2) ~~of this section shall~~ does 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~~payment, provided directly or indirectly for services rendered.

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

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

- (1) Cost or pricing data (as defined by 10 U.S.C. 3701(1) with respect to procurements subject to that section, and 41 U.S.C. 3501(a)(1), with respect to procurements subject to that section.
- (2) Indirect costs and direct labor rates.
- (3) Proprietary information about manufacturing processes, operations, or techniques marked by the contractor in accordance with applicable law or regulation.
- (4) Information marked by the contractor as "contractor bid or proposal information" in accordance with applicable law or regulation.
- (5) Information marked in accordance with ~~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~~counts as a separate procurement for purposes of 41 U.S.C. chapter 21.

In excess of \$10,000,000 means—

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

- (3) Any multiple award schedule contract, unless the contracting officer documents a lower estimate;
- (4) The value of a delivery order, task order, or an order under a Basic Ordering Agreement;
- (5) The amount paid or to be paid in settlement of a claim; or
- (6) The estimated monetary value of negotiated overhead or other rates when applied to the Government portion of the applicable allocation base.

Official means—

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

Participating personally and substantially in a Federal agency procurement means—

- (1) Active and significant involvement of an official in any of the following activities directly related to that procurement:
 - (i) Drafting, reviewing, or approving the specification or statement of work for the procurement.:
 - (ii) Preparing or developing the solicitation.
 - (iii) Evaluating bids or proposals, or selecting a source.
 - (iv) Negotiating price or terms and conditions of the contract.
 - (v) Reviewing and approving the award of the contract.

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

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

of procurement documents solely to determine compliance with regulatory, administrative, or budgetary procedures, does not constitute substantial participation in a procurement.

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

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

(ii) ~~The performance of general,~~ General technical, engineering, or scientific ~~effort having work with~~ with broad application not directly ~~associated with~~ tied to a ~~particular~~ specific procurement, ~~notwithstanding even if that such general, technical, engineering, or scientific effort subsequently may be incorporated into~~ work later becomes part of 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 procurements, participation in management studies, preparation of in-house cost estimates, preparation of "most efficient organization" analyses, ~~and furnishing of~~ providing data or technical support ~~to be used by~~ for others ~~in the development of~~ to develop performance standards, statements of work, or specifications.

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

3.104-2 General.

(a) This section implements 41 U.S.C. chapter 21, Restrictions on Obtaining and Disclosing Certain Information. ~~Agency supplementation of~~ The senior procurement executive of the agency must approve any agency changes to 3.104, ~~including. This includes~~ specific definitions ~~to identify~~ identifying 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~~ clauses. A law ~~establishes~~ may establish a higher level of approval for that agency.

(b) Agency officials ~~are reminded~~ need to remember that ~~there are~~ other statutes and regulations ~~that deal with the same or related~~ also address similar prohibited conduct, for example—

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

(2) ~~Contacts~~ Contact 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~~ cannot participate personally and substantially in any ~~particular~~ matter that would affect the financial interests of ~~any~~ a person with whom ~~the employee is~~ they are seeking

employment, as prohibited by 18 U.S.C. 208 and 5 CFR part 2635. An employee ~~who engages in negotiations or is otherwise negotiating or~~ seeking employment with an offeror or who has an arrangement concerning future employment with an offeror must ~~comply with~~ follow the ~~applicable~~ disqualification requirements ~~of~~ in 5 CFR 2635.604 and 2635.606. The ~~statutory~~ prohibition in 18 U.S.C. 208 ~~also~~ may require ~~an employee's~~ employee disqualification from participation in the acquisition even if ~~the employee's~~ their duties ~~may~~ are not ~~be~~ considered "participating personally and substantially," ~~as this term is~~ defined in 3.104-1;

(3) Post-employment restrictions ~~are covered by~~ under 18 U.S.C. 207 and 5 CFR parts 2637 and 2641, ~~that~~ prohibit certain activities by former Government employees, ~~including representation of~~ This includes representing a contractor before the Government ~~in relation to~~ regarding any contract or other particular matter involving specific parties ~~on which~~ where 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~~ restrict the release of procurement 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; may prohibit releasing information both before and after award (see 3.104-4); and

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

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

(a) Prohibition on disclosing procurement information (41 U.S.C. 2102). (1) A person described in paragraph (a)(2) of this subsection must not knowingly disclose contractor bid or proposal information or source selection information before a Federal agency awards the procurement contract to which the information relates. This restriction applies except when disclosure is allowed by law. (See 3.104-4(a).) ~~(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 awards the procurement contract to which the information relates. This restriction applies except when obtaining such information is allowed by law.

(c) Actions required when an agency official contacts or is contacted by an offeror regarding non-Federal employment (41 U.S.C. 2103).~~.(1) An agency official who participates personally and substantially in a Federal agency procurement for a contract over the simplified acquisition threshold must take specific actions if they contact or are contacted by an offeror in that Federal agency procurement about possible non-Federal employment for that official. The official must—~~

~~(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).This disqualification remains until ~~such time as~~ the agency authorizes the official to resume participation in that procurement, ~~in accordance with~~according to the requirements of 18 U.S.C. 208 and applicable agency regulations, because—

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

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

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

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

(4) ~~Conduct that~~Even if conduct complies with 41 U.S.C. ~~2104 may be prohibited by~~2103, other criminal statutes and the Standards of Ethical Conduct for Employees of the Executive Branch may prohibit it. See 3.104-2(b)(2).

(d) Prohibition on former official's acceptance of compensation from a contractor (~~41 U.S.C. 2104~~).41 U.S.C. 2104.(1) A former official of a Federal agency must not accept compensation

from a contractor as an employee, officer, director, or consultant for 1 year after the former official—

~~(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, when the contractor was selected or awarded a contract—

~~(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~~where that contractor ~~was selected for award of~~received a contract in excess of \$10,000,000;

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

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

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

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

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

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

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

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

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

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

(3) ~~Nothing~~The prohibition in paragraph (d)(1) of this subsection ~~may be construed to prohibit~~does not prevent 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~~than 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~~ those authorized to receive that information, in accordance with applicable agency regulations or procedures, by the agency head or ~~the~~ contracting officer ~~to receive such information~~. This restriction applies except as specifically provided in this subsection.

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

(c) Individuals who are unsure if ~~particular~~ specific 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~~ in paragraph (10) of the "source selection information" definition in 2.101 must mark the cover page and each page ~~that the individual believes~~ they believe contains source selection information with ~~the~~ this 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~~ counts as 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,~~ (d) 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~~ under 52.215-1(e) has been inappropriately marked. The contractor ~~that has affixed~~ who applied the marking must be given an opportunity to justify the marking. This requirement does not apply to situations covered in paragraph (d)(3) of this subsection.

(1) If the contractor agrees ~~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 part ~~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 offered price(s) to all offerors ~~the offered price(s)~~, but ~~shall~~ must not reveal any offeror's identity except for the

awardee's identity ~~subsequent to~~ after making an award resulting from the auction (see subpart 17.8);

(2) The disclosure or receipt of information, not otherwise protected, relating to a canceled Federal agency procurement ~~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~~ Withholding any information ~~pursuant to~~ from a proper request ~~from the~~ by Congress, any committee or subcommittee thereof, a Federal agency, the Comptroller General, or an Inspector General of a Federal agency, except as otherwise authorized by law or regulation. Any release containing contractor bid or proposal information or source selection information must clearly identify the information as contractor bid or proposal information or source selection information related to ~~the conduct of~~ a Federal agency procurement ~~and~~. The release must also notify the recipient that ~~the~~ disclosure of the information is restricted by 41 U.S.C. chapter 21;

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

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

(4) ~~The disclosure, solicitation~~ Disclosing, soliciting, or ~~receipt of~~ receiving bid or proposal information or source selection information after award if ~~disclosure, solicitation, or receipt~~ is such actions are prohibited by law. (See 3.104-2(b)(5) and ~~subpart part~~ 24.2.)

3.104-5 Disqualification.

(a) Contacts through agents or other intermediaries. Employment contacts between ~~the~~ an employee and ~~the~~ an 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(e)(1),~~ An agency official who must disqualify himself or herself ~~pursuant to~~ under 3.104-3(c)(1)(ii)

must submit the contact report required by 3.104-3(c)(1). The official must also promptly submit written notice of disqualification from further participation in the procurement to the contracting officer, the source selection authority (~~if other than~~different from the contracting officer~~;~~), and the agency official's immediate supervisor. ~~As~~At a minimum, the notice must—

(1) Identify the procurement;

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

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

(c) Resumption of participation in a procurement.

~~(4)~~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~~according to 3.104-3(c)(1)(ii).

(2) After the conditions of 3.104-3(c)(1)(ii)(A) or (B) have been met, the head of the contracting activity (HCA), after consultation with the agency ethics official, may authorize the disqualified official to resume participation in the procurement, or may determine that an additional disqualification period is necessary to protect the ~~integrity of the~~ procurement process. ~~In integrity. When~~ 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~~ HCA should document the reinstatement decision ~~should be~~ in writing.

(3) Government ~~officer~~officers or ~~employee~~employees 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.~~matters. A government officer or employee may not ~~be reinstated to participate~~resume participating in a procurement matter affecting the financial interest of someone with whom ~~the individual is~~they are seeking employment, unless the individual receives—

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

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

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

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

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

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

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

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

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

(d)

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

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

(3) If the requester ~~is advised in~~ receives a written opinion ~~by~~ from the agency ethics official ~~that the requester~~ stating they 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. However, 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~~ considered good faith.

3.104-7 Violations or possible violations.

(a) A contracting officer who receives ~~or obtains~~ information ~~of~~ about a violation or possible violation of procurement integrity laws (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~~ this affects the pending award or ~~selection of the~~ contractor selection.

(1) If the contracting officer ~~concludes that~~ determines there is no impact on the procurement, the contracting officer must forward the information ~~concerning about~~ the violation ~~or possible violation and~~ including documentation supporting ~~at the~~ "no impact" determination ~~that there is no impact on the procurement, and send these materials to an~~ the individual designated ~~in accordance with~~ per agency procedures.

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

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

(2) If the contracting officer ~~concludes that~~ determines the violation ~~or possible violation impacts~~ does impact the procurement, the contracting officer must promptly forward ~~the all~~ the information to the HCA.

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

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

(2) Begin an investigation;

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

(4) Conclude that a violation occurred; or

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

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

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

(1) If a contract has not been awarded ~~—~~ —

(i) Cancel the procurement;

(ii) Disqualify an offeror; or

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

(2) If a contract has been awarded—

(i) ~~Effect~~Apply appropriate contractual remedies, including profit recapture under the clause at 52.203-10, (Price or Fee Adjustment for Illegal or Improper Activity), or, if the contract has been rescinded ~~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~~ when:

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

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

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

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

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

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

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

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

(g) The HCA may delegate ~~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 penalties~~, civil penalties, and administrative remedies, may apply to conduct that violates procurement integrity laws in 41 U.S.C. chapter 21 (see 3.104-3). ~~See 33.102(f) for~~ For a special rule regarding rule about bid protests. ~~See 3.104-7~~ see 41 U.S.C. 2106. For administrative remedies ~~relating~~ related to contracts, see 3.104-7.

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

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

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

3.104-9 Contract clauses.

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

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

3.203 Reporting suspected violations of the Gratuities clause.

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

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

(b) The channels through which reports must pass, including the function and authority of each official designated to review them.

3.204 Treatment of violations.

(a) Before taking ~~any~~ action against a contractor, the agency head or ~~a~~ designee ~~shall~~must 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., as~~ such as entertainment or a gift) to ~~an~~ a Government officer, official, or employee ~~of the Government~~; and

(2) Intended ~~by the~~ to use this gratuity to obtain a contract or favorable treatment under a contract (this intent ~~generally~~ typically must be inferred from circumstances).

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

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

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

(2) Initiate debarment or suspension measures ~~as set forth~~ described in ~~subpart~~ part 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.~~ [Reserved]

~~(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~~ part 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 ~~evidences~~ show 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~~ where each competitor takes ~~a turn in sequence as~~ turns being the low bidder, or ~~so that~~ where certain competitors bid low only on some sizes of contracts and high on other sizes;

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

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

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

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

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

(d) Contracting officers must report identical bids ~~shall be reported under this section if~~ when the agency has ~~some~~ reason to believe ~~that~~ the bids resulted from collusion.

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

(f) Agency reports ~~shall~~must be addressed to the -

Attorney General, U.S. Department of Justice, Washington, DC 20530, Attention: Assistant Attorney General, Antitrust Division, and ~~shall~~must include—

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

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

~~(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 agency₂ 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 employee₂ 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 fee₂ 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 influence₂ 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 to include a warranty by the contractor against contingent fees;

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

(c) Provide that, ~~for breach if a contractor breaches~~ or ~~violation of the~~ violates this 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~~ must insert the clause at 52.203-5, Covenant Against Contingent Fees, in all solicitations and contracts exceeding the simplified acquisition threshold, other than those for commercial products or commercial services (see parts 2 and 12).

3.405 Misrepresentations or violations of the Covenant Against Contingent Fees.

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

(1) Attempted or actual exercise of improper influence~~;~~;

(2) Misrepresentation of a contingent fee arrangement~~;~~ or ~~other violation~~

(3) Other violations 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 exists to suspect one or more ~~of the~~ violations described in paragraph (a) of this section, the chief of the contracting office ~~shall~~ must 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~~ part 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~~ multiyear quantity; or

(2) Priced options for additional quantities that, together with the firm contract quantity, equal the program requirements (see ~~subpart-part~~ [part 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-~~12~~, paragraph A, ~~5~~, column (2) under "Formats for Submission of Line Item Summaries") and treatment of unreasonable price quotations (see [part 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~~ kickbacks; or

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

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

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

(d)Provides that—

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

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

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

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

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

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

(h)Provides that, for the purpose of ~~ascertaining~~determining whether there has been a violation of the Kickbacks statute ~~with respect to~~on any prime contract, the Government Accountability Office and the inspector general of the contracting agency, or a representative of such contracting agency designated by the head of ~~the~~such agency if the agency does not have an inspector general, ~~shall~~must 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~~the agency.

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

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

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

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

3.502-3 Contract clause.

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

3.503 Unreasonable restrictions on subcontractor sales.

3.503-1 Policy.

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

3.503-2 Contract clause.

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

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

3.601 Policy.

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

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

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

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

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

3.602 Exceptions.

The agency head, or a designee not below the level of the head of the contracting activity, may authorize an exception to the policy in 3.601 only if there is a ~~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~~must obtain an authorization under 3.602 if—

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

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

(b) The contracting officer ~~shall~~must comply with the requirements and guidance ~~in of the~~ conflicts of interest subpart in part 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~~ method to deter similar misconduct in the future by those who are involved in the award, performance, and administration of Government contracts.

3.702 Definition.

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

3.703 Authority.

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

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

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

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

3.704 Policy.

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

(b) ~~Since~~ A final conviction under 18 U.S.C. 201-224 relating to a contract may also ~~may justify the conclusion that~~ indicate the party ~~involved~~ is not presently responsible. The agency should consider ~~initiating~~ starting debarment proceedings ~~in accordance with subpart~~ according to part 9.4, Debarment, Suspension, and Ineligibility, if debarment has not ~~been initiated~~ already begun or is not in effect ~~at the time~~ when the final conviction ~~is entered~~ occurs.

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

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

(2) Recommending the initiation of suspension or debarment proceedings ~~in accordance with subpart~~ according to part 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~~ must be reported promptly to the agency head or designee for ~~that official's~~ consideration. The agency head or designee ~~shall~~ must promptly notify the Civil Division, Department of Justice, that ~~the~~ an action is being considered under this subpart.

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

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

(1) A notice of the proposed action to declare void and rescind the contract ~~shall~~ must 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~~must be afforded for a hearing at which witnesses may be presented, and any witness the agency presents may be confronted. However, no inquiry ~~shall~~may be made regarding the validity of a conviction.

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

(i) States that determination;

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

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

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

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

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

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

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

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

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

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

(e) Final agency decision. ~~The~~ The agency head or designee must base the final ~~agency~~ decision ~~shall be based on the information~~all available ~~to the agency head or designee, including information, and any pertinent~~relevant information submitted in writing or, ~~if a hearing was held,~~ presented ~~at the~~during a hearing. If the agency decision declares void and rescinds the contract, the final decision ~~shall~~must specify the amounts due and property to be returned to the agency;

and reflect consideration of the fair value of any tangible benefits received and retained by the agency. Notice of the decision ~~shall~~must be sent promptly by certified mail, return receipt requested. ~~Rescission of~~When contracts are rescinded under the Act's authority ~~of~~and the ~~Act and demand for agency head demands~~ recovery of ~~the~~ amounts expended and property transferred ~~therefor~~, this is not considered a claim ~~within the meaning of~~under 41 U.S.C. chapter 71, Contract Disputes, or part 33. Therefore, the procedures required by the statute and the FAR for the issuance of a final contracting officer decision are not applicable to final agency decisions under this subpart, and ~~shall~~must not be followed.

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

3.800 Scope of subpart.

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

3.801 Definitions.

As used in this subpart-

Agency means "executive agency" as defined in 2.101.

Covered Federal action means any of the following actions:

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

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

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

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

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

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

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

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

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

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

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

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

3.802 Statutory prohibition and requirement.

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

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

(2) ~~To the extent~~ If a person ~~can demonstrate that the person has sufficient monies, other than~~ shows they have enough non-Federal appropriated funds, the Government ~~shall~~ must assume ~~that~~ these other ~~monies~~ funds were ~~spent~~ used for any influencing activities that would be unallowable if paid for with Federal appropriated funds.

(b) 31 U.S.C. 1352 also requires offerors to ~~furnish~~ submit a declaration ~~consisting of~~ that includes both a certification and a disclosure, with ~~periodic~~ regular updates of the disclosure after contract award. These requirements ~~are contained~~ appear in the provision at 52.203-11, Certification and Disclosure Regarding Payments to Influence Certain Federal Transactions, and the clause at 52.203-12, Limitation on Payments to Influence Certain Federal Transactions.

3.803 Exceptions.

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

(1) Agency and legislative liaison by own employees-

~~(i)~~ (i) Payment of reasonable compensation made to an officer or employee of a person requesting or receiving a covered Federal action ~~if~~ is permitted when 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~~ unrelated to a specific solicitation for any covered Federal action, ~~but that~~ is permitted when discussions concern-

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

(B) ~~The application or adaptation of~~ How the person's products or services ~~might be adapted~~ for an agency's ~~agency~~ 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 starting~~ a covered Federal action is permitted before formal solicitation.

(iv) Participating in technical discussions ~~regarding the preparation of~~ about preparing an unsolicited proposal ~~prior to~~ before its official submission is permitted.

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

(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~~ is permitted when payment is for professional or technical services ~~rendered directly in the preparation, submission related to preparing, submitting, or negotiation of any bid, proposal negotiating bids, proposals, or application applications~~ 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~~ persons who are not officers or employee employees of a person requesting or receiving a covered Federal action, ~~if the is permitted when~~ payment is for professional or technical services ~~rendered directly in the preparation, submission related to preparing, submitting, or negotiation of any bid, proposal negotiating bids, proposals, or application applications~~ 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~~ These persons may include consultants and trade associations.

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

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

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

(c) The disclosure requirements ~~of~~ in paragraph 3.802(b) do not apply ~~with respect to payments of~~ reasonable compensation ~~made~~ paid 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~~ must report suspected violations of the requirements of 31 U.S.C. 1352 in accordance with agency procedures.

3.807 Civil penalties.

Agencies ~~shall~~ must impose and collect civil penalties ~~pursuant~~ according 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. These penalties apply when the Act's provisions therein are~~ do not ~~inconsistent~~ conflict with the requirements of this subpart.

3.808 Solicitation provision and contract clause.

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

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

Subpart 3.9 - Whistleblower Protections for Contractor Employees

3.900 Scope of subpart.

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

~~(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~~ when requested by an executive branch official, unless the request takes the form of a non-discretionary directive and is within the authority of the executive branch official making the request.

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

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

(2) An Inspector General.

(3) The Government Accountability Office.

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

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

(6) A court or grand jury.

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

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

3.904 Complaints.

3.904-1 Procedures for filing complaints.

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

3.904-2 Procedures for investigating complaints.

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

(b) ~~Upon completion of~~After the investigation is complete, the head of the agency ~~shall~~must ensure ~~that the Inspector General provides~~ the report of findings ~~has been provided by the Inspector General to~~to

(1) The head of the agency ~~and to~~;

(~~1~~)2) The complainant and any person acting on the complainant's behalf; and

(~~2~~)3) The contractor and/or subcontractor alleged to have committed the violation.

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

3.905 Remedies and enforcement of orders.

3.905-1 Remedies.

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

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

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

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

(ii) Order the contractor or subcontractor to reinstate the complainant employee to ~~the~~their previous 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~~occurred.

(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 official, if appropriate.

(b) Complainant's right to go to court:

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

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

(ii)

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

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

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

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

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

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

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

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

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

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

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

3.905-2 Enforcement of orders.

(a) ~~Whenever~~When a contractor or subcontractor fails to comply with an order issued under 3.905-1(a)(2), the head of the agency concerned ~~shall~~must file an action ~~for enforcement of~~to enforce the order in the U.S. district court for ~~a~~the district ~~in which~~where the reprisal ~~was found to have~~ occurred. In any action brought ~~pursuant to~~under this authority, the court may grant appropriate relief, including injunctive relief, compensatory and exemplary damages, and attorney fees and costs. The complainant employee upon whose behalf an order was issued may also file such an action or join ~~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~~seek review of the order's ~~conformance~~compliance with 41 U.S.C. 4712 and its implementing regulations; in the U.S. court of appeals for ~~a~~the circuit ~~in which~~where the reprisal is alleged ~~in the order~~ to have occurred. ~~No~~The petition ~~seeking such~~for review ~~may~~must be filed ~~more than~~within 60 days after ~~issuance of the order by~~ the head of the agency; ~~issues the order.~~ Filing such an appeal ~~shall~~does not ~~act to stay the~~stop enforcement of the ~~order of the head of an agency;~~ head's order unless ~~a stay is~~the court specifically ~~entered by the court~~grants a stay.

3.906 Contract clause.

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

~~3.907 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.~~

~~3.907 [Reserved]~~

~~(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~~cannot use fiscal year 2015 and ~~subsequent~~later fiscal year funds for ~~a contract~~contracts with ~~an entity~~entities that ~~requires~~require 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~~that prohibit or restrict these 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 This prohibition comes from section 743 of Division E, Title VII, of the Consolidated and Further Continuing Appropriations Act, 2015 (Pub. L. 113-

235) and ~~its successor provisions~~continues in subsequent appropriations acts (~~and as extended in~~including continuing resolutions~~)~~.

(b) The prohibition in paragraph (a) of this section does not ~~contravene~~conflict with requirements ~~applicable to~~for 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~~government form 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 that prohibit~~ or ~~otherwise restricting such employees or subcontractors~~restrict them from lawfully reporting waste, fraud, or abuse related to ~~the performance of a~~ Government contract performance to ~~a designated investigative or law enforcement representative of a Federal department or agency~~ authorized ~~to receive~~ Federal investigators (such ~~information~~ ~~(e.g., as~~ agency Office of the Inspector General). Any offeror that does not ~~so represent~~make this representation is ineligible for ~~award of a~~ contract award.

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

3.909-3 Solicitation provision and contract clause.

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

(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~~contracts with ~~an individual if the individual if the will perform all~~ services ~~are to be performed entirely by the individual, personally~~ (rather than ~~by an employee of the~~through contractor or ~~a~~ subcontractor ~~employees~~).

(b)

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

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

Subpart 3.10 - Contractor Code of Business Ethics and Conduct

3.1000 Scope of subpart.

This subpart—

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

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

3.1001 Definitions.

As used in this subpart-

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

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

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

3.1002 Policy.

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

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

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

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

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

3.1003 Requirements.

(a) Contractor requirements-

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

~~(2) Whether or not the clause at 52.203-13 is applicable;~~ (2) A contractor may be suspended and/or debarred ~~for knowing failure by~~ if a principal knowingly fails to ~~timely~~promptly 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 violations 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 violations. This disclosure requirement applies whether or not clause 52.203-13 is applicable.~~ Failure to timely disclose credible evidence of ~~any of the above~~such violations remains ~~a cause~~grounds for suspension and/or debarment until 3 years after final ~~payment on a contract~~ payment (see ~~part 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~~contractors to return any contract financing or invoice ~~payment, the contractor shall remit the overpayment amount~~overpayments they discover to the Government. A contractor may be suspended and/or debarred ~~for knowing failure by~~ if a principal knowingly fails to timely disclose credible evidence of a significant overpayment, ~~other than~~except for overpayments resulting from contract financing payments as defined in 32.001 (see ~~9.406-2(b)(1)(vi) and 9.407-2(a)(8))~~part 9).

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

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

(2) Take action ~~in accordance with~~according to agency procedures.

(c) Fraud Hotline Poster:

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

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

3.1004 Contract clauses.

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

(b)

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

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

(ii)

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

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

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

(i) Identify the applicable posters; and

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

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

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

3.1100 Scope of subpart.

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

3.1101 Definitions.

As used in this subpart-

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

(1) Planning acquisitions.

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

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

(4) Evaluating contract proposals.

(5) Awarding Government contracts.

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

(7) Terminating contracts.

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

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

(1) An employee of the contractor; or

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

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

(a)

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

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

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

(iii) Gifts, including travel.

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

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

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

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

- (iv) Research funding or other forms of research support;
- (v) Investment in the form of stock or bond ownership or partnership interest (excluding diversified mutual fund investments);
- (vi) Real estate investments;
- (vii) Patents, copyrights, and other intellectual property interests; or
- (viii) Business ownership and investment interests.

3.1102 Policy.

The Government's policy is to require contractors to ~~—~~

- (a) Identify and prevent personal conflicts of interest of their covered employees; and
- (b) Prohibit covered employees who have access to ~~nonpublic~~non-public information by reason of performance on a Government contract from using such information for personal gain.

3.1103 Procedures.

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

- (1) Have procedures in place to screen covered employees for potential personal conflicts of interest by ~~—~~
 - (i) Obtaining and maintaining from each covered employee, when the employee is initially assigned to the task under the contract, a disclosure of interests that might be affected by the task to which the employee has been assigned, as follows:
 - (A) Financial interests of the covered employee, of close family members, or of other members of the covered employee's household.
 - (B) Other employment or financial relationships of the covered employee (including seeking or negotiating for prospective employment or business).
 - (C) Gifts, including travel; and
 - (ii) Requiring each covered employee to update the disclosure statement whenever the employee's personal or financial circumstances change in such a way that a new personal conflict of interest might occur because of the task the covered employee is performing.
- (2) For each covered employee ~~—~~

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

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

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

(3) Inform covered employees of their obligation—

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

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

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

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

(5) Take appropriate disciplinary action ~~in the case of~~when 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 to the contracting officer as soon as identified. This report ~~shall~~must include—

(i) A description of the violation;

~~(ii) and~~ The proposed actions ~~to be taken by~~ the contractor will take in response to the violation; ~~with; and~~

(iii) Follow-up reports of corrective actions taken, as necessary.

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

(1) Review the actions taken by the contractor;

(2) Determine whether ~~any action taken by the contractor has~~contractor's actions have resolved the violation satisfactorily; and

~~(3)~~(3) Take any appropriate action in consultation with agency legal counsel if the contracting officer determines that the contractor has not resolved the violation satisfactorily; ~~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 asking~~ the head of the contracting activity to ~~—~~

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

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

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

(c) This authority shall not be redelegated.

3.1105 Violations.

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

3.1106 Contract clause.

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

(1) Exceed the simplified acquisition threshold; and

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

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

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

