

48 CFR Parts 1, 3, 4, 9, 12, 14, 15, 19, 33, 37, 43, 52, and 53

[FAC 90-45; FAR Case 96-314; Item I]

RIN 9000-AH19

Federal Acquisition Regulation; Procurement Integrity

AGENCIES: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council have agreed on a final rule to amend the Federal Acquisition Regulation (FAR) to implement Section 27 of the Office of Federal Procurement Policy (OFPP) Act (41 U.S.C. 423), as amended by Section 4304 of the Clinger-Cohen Act, part of the FY 96 National Defense Authorization Act. This regulatory action was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993, and is not a major rule under 5 U.S.C. 804.

EFFECTIVE DATE: January 1, 1997.

FOR FURTHER INFORMATION CONTACT: Mr. Paul Linfield at (202) 501-1757 in reference to this FAR case. For general information, contact the FAR Secretariat, Room 4035, GS Building, Washington, DC 20405 (202) 501-4755. Please cite FAC 90-45, FAR case 96-314. E-mail correspondence submitted over the Internet should be addressed to: 96-314@V.GSA.GOV.

SUPPLEMENTARY INFORMATION:**A. Background**

This final rule amends the FAR to implement the procurement integrity requirements in 41 U.S.C. 423 as amended by Section 4304 of the Clinger-Cohen Act of 1996 (Public Law 104-106). A proposed rule with request for public comments was published on September 6, 1996 (61 FR 47390). Sixty-nine comments were received from 10 respondents. These comments include three respondents' comments that were received after November 5, 1996, but which also were considered in drafting this final rule.

Section 4304 imposes restrictions on both the obtaining and disclosing of certain information obtained during the conduct of a procurement, except as provided by law. It requires certain agency officials involved in a procurement to take definite actions when contacting or contacted by offerors regarding non-Federal

employment. Also, it prohibits a former official's acceptance of compensation from a contractor if the former official either served in an identified position or made certain contract decisions involving more than \$10 million to that contractor. Unlike the previous statutory requirements, some of the post-employment restrictions apply to post-award activities.

The final rule eliminates all procurement integrity certifications previously required by the statute and revises the proposed rule published on September 6, 1996, in several significant ways. Subsection 3.104-2 was clarified to state that the post-Federal employment restrictions of the amended statute are applicable only to Federal service provided or decisions made after January 1, 1997. The text was reorganized and two new subsections added. In the redesignated 3.104-3, the terms "compensation", "contract", "decision to award a subcontract or modification of subcontract", "in excess of \$10,000,000", and "source selection evaluation board" were defined.

The final rule amplifies on the proposed rule in several areas addressed in the public comments received. For example, bid or proposal information marked in accordance with FAR 52.215-12 is contractor bid or proposal information that requires protection (see definition in 3.104-3 and 3.104-5). In 3.104-6, the final rule adds that contacts through an agent or other intermediary of an agency official or of a bidder or offeror may be considered a "contact" and require the agency official to disqualify himself or herself from the procurement. In the new 3.104-10, we added that the agency may take appropriate administrative action when an agency official's contact with a bidder or offeror regarding post-Federal employment interferes with the official's ability to perform assigned duties, and made specific reference to the criminal and civil penalties which may result from violations of the prohibitions and requirements of the Act.

B. Regulatory Flexibility Act

A Final Regulatory Flexibility Analysis (FRFA) has been performed. A copy of the FRFA may be obtained from the FAR Secretariat, Room 4035, GS Building, Washington, DC 20405 (202) 501-4755. The analysis is summarized as follows:

The objective of this rule is to advise present and certain former agency officials, bidders, offerors, and others involved in Federal agency procurements and contracts, of the revised requirements of 41 U.S.C. 423.

Section 4304 of the Clinger-Cohen Act of 1996 (Public Law 104-106) (1) restricts the disclosing and obtaining of procurement information during the conduct of a Federal agency procurement, (2) identifies actions procurement officers must take when contacted by a bidder or offeror regarding non-Federal employment, and (3) prohibits a former official's acceptance of compensation from a contractor if the former official either served in an identified position or made certain contact decisions involving more than \$10 million to that contractor.

No comments were received in response to the Initial Regulatory Flexibility Analysis. The final rule's restrictions on disclosing or obtaining procurement information apply to all competitive Government procurements. The restrictions on employment discussions between Federal agency officials and bidders or offerors in Federal agency procurements apply to all competitive Government procurements above the simplified acquisition threshold. We estimate that there are approximately 40,000 small businesses per year that submit bids or proposals for contracts exceeding the simplified acquisition threshold.

The rule's prohibition on former Federal agency officials' acceptance of compensation from certain contractors applies to any contractor which is awarded a contract in excess of \$10 million, or which is affected by certain decisions made by a Federal agency official on matters in excess of \$10 million. We estimate that this provision of the rule will apply to approximately 60 small businesses per year.

The interim rule imposes no new information collection or recordkeeping requirements. The rule eliminates existing information collection and recordkeeping requirements that implemented 41 U.S.C. 423 prior to its amendment by Section 4304. The existing requirements that this rule eliminates applied to (1) large and small entities that are bidders or offerors in Federal agency procurements with a value of \$100,000 or more, (2) contractors negotiating contract modifications with a value of \$100,000 or more, and (3) contractors that wish to employ former Federal procurement officials.

There are no known alternatives which would further reduce the impact on small entities and accomplish the objectives of 41 U.S.C. 423, as amended by Section 4304 of Public Law 104-106.

C. Paperwork Reduction Act

The Paperwork Reduction Act (Public Law 96-511) is deemed to apply

because the final rule eliminates existing recordkeeping and information collection requirements approved by the Office of Management and Budget under OMB Number 9000-0103. A paperwork burden of 43,333 hours is eliminated.

List of Subjects in 48 CFR Parts 1, 3, 4, 9, 12, 14, 15, 19, 33, 37, 43, 52, and 53

Government procurement.

Dated: December 24, 1996.

Edward C. Loeb,
Director, Federal Acquisition Policy Division.

Therefore, 48 CFR Parts 1, 3, 4, 9, 12, 14, 15, 19, 33, 37, 43, 52, and 53 are amended as set forth below:

1. The authority citation for 48 CFR Parts 1, 3, 4, 9, 12, 14, 15, 19, 33, 37, 43, 52, and 53 continues to read as follows:

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

PART 1—FEDERAL ACQUISITION REGULATIONS SYSTEM

1.106 [Amended]

2. The table in section 1.106 is amended under the "FAR Segment" and "OMB Control Number" columns by removing the entries for "3.104-9", "3.104-12(a)(12)", "52.203-8", and "52.203-9".

PART 3—IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST

3. Sections 3.104 through 3.104-11 are revised and 3.104-12 is removed, to read as follows:

3.104 Procurement integrity.

3.104-1 General.

(a) This FAR section 3.104 implements section 27 of the Office of Federal Procurement Policy Act (41 U.S.C. 423), as amended by section 814 of the Fiscal Year 1990/1991 National Defense Authorization Act, Public Law 101-189, section 815 of the Fiscal Year 1991 National Defense Authorization Act, Public Law 101-510, and section 4304 of the Fiscal Year 1996 National Defense Authorization Act, Public Law 104-106 (hereinafter, the Office of Federal Procurement Policy Act, as amended, is referred to as "the Act"). Agencies may supplement 3.104 and any clauses required by 3.104, and may use agency specific definitions to identify individuals who occupy positions specified in 3.104-4(d)(1)(ii). Such supplementation and definitions must be approved at a level not lower than the senior procurement executive of the agency, unless a higher level of approval is required by law for that agency.

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

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

(2) Section 208 of Title 18, United States Code, and 5 CFR part 2635 preclude a Government employee from participating personally and substantially in any particular matter that would affect the financial interests of any person from whom the employee is seeking employment;

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

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

(5) Other laws such as the Privacy Act (5 U.S.C. 552a) and the Trade Secrets Act (18 U.S.C. 1905) may preclude release of information both before and after award (see 3.104-5); and

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

3.104-2 Applicability.

(a) The restrictions at 3.104-4 (a) and (b) apply beginning January 1, 1997, to the conduct of every Federal agency procurement using competitive procedures for the acquisition of supplies or services from non-Federal sources using appropriated funds.

(b) The requirements of 3.104-4(c) apply beginning January 1, 1997, in connection with every Federal agency procurement using competitive procedures, for a contract expected to exceed the simplified acquisition threshold. Such requirements do not apply after the contract has been awarded or the procurement has been canceled.

(c) The post-employment restrictions at 3.104-4(d) apply to any former official of a Federal agency, for services provided or decisions made on or after January 1, 1997.

(d) Former officials of a Federal agency whose employment by a Federal agency ended before January 1, 1997, are subject to the restrictions imposed by 41 U.S.C. 423 as it existed before Public Law 104-106. Solely for the purpose of continuing those restrictions on those officials to the extent they were imposed prior to January 1, 1997, the provisions of 41 U.S.C. 423 as it existed before Public Law 104-106 apply through December 31, 1998.

3.104-3 Definitions.

As used in this section—

Agency ethics official means the designated agency ethics official described in 5 CFR 2638.201 and any other designated person, including—

(1) Deputy ethics officials described in 5 CFR 2638.204, to whom authority under 3.104-7 has been delegated by the designated agency ethics official; and
(2) Alternate designated agency ethics officials described in 5 CFR 2638.202(b).

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

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

Contract, for purposes of the post-employment restrictions at 3.104-4(d), includes both competitively awarded and non-competitively awarded contracts.

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. 2306a(h) with respect to procurements subject to that section, and section 304A(h) of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 254b(h)), 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 52.215-12.

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

Federal agency has the meaning provided such term in section 3 of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 472).

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 innovative research programs, each proposal received by an agency shall constitute a separate procurement for purposes of the Act.

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).

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

Participating personally and substantially in a Federal agency procurement is defined as follows:

(1) *Participating personally and substantially in a Federal agency procurement* means active and significant involvement of the individual 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 employee'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 individual will not be considered to have participated personally and substantially in a procurement solely by participating in the following activities:

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

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

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

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

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

Source selection information means any of the following information which

is prepared for use by a Federal agency for the purpose of evaluating 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) Bid prices submitted in response to a Federal agency invitation for bids, or lists of those bid prices before bid opening.

(2) Proposed costs or prices submitted in response to a Federal agency solicitation, or lists of those proposed costs or prices.

(3) Source selection plans.

(4) Technical evaluation plans.

(5) Technical evaluations of proposals.

(6) Cost or price evaluations of proposals.

(7) Competitive range determinations that identify proposals that have a reasonable chance of being selected for award of a contract.

(8) Rankings of bids, proposals, or competitors.

(9) Reports and evaluations of source selection panels, boards, or advisory councils.

(10) Other information marked as "SOURCE SELECTION INFORMATION—SEE FAR 3.104" based on a case-by-case determination by the head of the agency or designee, or the contracting officer, that its disclosure would jeopardize the integrity or successful completion of the Federal agency procurement to which the information relates.

3.104-4 Statutory and related prohibitions, restrictions, and requirements.

(a) *Prohibition on disclosing procurement information (subsection 27(a) of the Act).* (1) A person described in paragraph (a)(2) of this subsection shall 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 3.104-5(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 (subsection*

27(b) of the Act). A person shall not, other than as provided by law, knowingly obtain contractor bid or proposal information or source selection information before the award of a Federal agency procurement contract to which the information relates.

(c) *Actions required of agency officials when contacted by offerors regarding non-Federal employment (subsection 27(c) of the Act).* If an agency official who is 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 a bidder or offeror in that Federal agency procurement regarding possible non-Federal employment for that official, the official shall—

(1) Promptly report the contact in writing to the official's supervisor and to the designated agency ethics official (or designee) of the agency in which the official is employed; and

(2)(i) Reject the possibility of non-Federal employment; or

(ii) Disqualify himself or herself from further personal and substantial participation in that Federal agency procurement (see 3.104–6) until such time as the agency has authorized the official to resume participation in such procurement, in accordance with the requirements of 18 U.S.C. 208 and applicable agency regulations, on the grounds that—

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

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

(d) *Prohibition on former official's acceptance of compensation from a contractor (subsection 27(d) of the Act).*

(1) A former official of a Federal agency may not accept compensation from a contractor as an employee, officer, director, or consultant of the contractor within a period of one year after such former official—

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

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

(iii) Personally made for the Federal agency—

(A) A decision to 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) A decision to establish overhead or other rates applicable to a contract or contracts for that contractor that are valued in excess of \$10,000,000;

(C) A decision to approve issuance of a contract payment or payments in excess of \$10,000,000 to that contractor; or

(D) A decision to pay or settle a claim in excess of \$10,000,000 with that contractor.

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

3.104–5 Disclosure, protection, and marking of contractor bid or proposal information and source selection information.

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

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

(c) In determining whether particular information is source selection information, see the definition in 3.104–3 and consult with agency officials as necessary. Individuals responsible for preparing material that may be source selection information under paragraph (10) of the definition shall mark the cover page and each page that the individual believes contains source selection information with the legend “SOURCE SELECTION INFORMATION—SEE FAR 3.104.” Although the information in paragraphs (1) through (9) of the definition in 3.104–3 is considered to be source selection information whether or not marked, all reasonable efforts shall be made to mark such material with the same legend.

(d) Except as provided in subparagraph (d)(4) of this subsection, if the contracting officer believes that information marked as proprietary is not proprietary, information otherwise marked as contractor bid or proposal information is not contractor bid or proposal information, or information marked in accordance with 52.215–12 is inappropriately marked, the contractor that has affixed the marking shall be notified in writing and given an opportunity to justify the marking.

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

(2) If, after reviewing any justification submitted by the contractor, the contracting officer determines that the marking is not justified, the contracting officer shall notify the contractor in writing.

(3) Information marked by the contractor as proprietary, otherwise marked as contractor bid or proposal information, or marked in accordance with 52.215–12, shall not be released until—

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

(ii) The period specified for the contractor's response has elapsed, whichever is earlier. Thereafter, the contracting officer may release the information.

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

(e) Nothing in this section restricts or prohibits—

(1) A contractor from disclosing its own bid or proposal information or the recipient from receiving that information;

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

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

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

(f) Nothing in this section shall be construed to authorize—

(1) The withholding of any information pursuant to a proper request from the Congress, any committee or subcommittee thereof, a Federal agency, the Comptroller General, or an Inspector General of a Federal agency, except as otherwise authorized by law or regulation. Any such release which contains contractor bid or proposal information or source selection information shall clearly notify the recipient that the information or portions thereof are contractor bid or proposal information or source selection information related to the conduct of a Federal agency procurement, the disclosure of which is restricted by section 27 of the Act;

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

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

(4) The disclosure, solicitation, or receipt of bid or proposal information or source selection information after award where such disclosure, solicitation, or receipt is prohibited by law. See 3.104-1(b)(5) and subpart 24.2.

3.104-6 Disqualification.

(a) *Contacts through agents.* Disqualification pursuant to 3.104-4(c)(2) may be required even where contacts are through an agent or other intermediary of the agency official or an agent or other intermediary of a bidder or offeror. See 18 U.S.C. 208 and 5 CFR 2635.603(c).

(b) *Disqualification notice.* In addition to submitting the contact report required by 3.104-4(c)(1), an agency official who must disqualify himself or herself pursuant to 3.104-4(c)(2)(ii) shall promptly submit to the head of the contracting activity (HCA), or designee, a written notice of disqualification from further participation in the procurement. Concurrent copies of the notice shall be submitted to the contracting officer, the source selection authority if the contracting officer is not the source selection authority, and the agency official's immediate supervisor. As a minimum, the notice shall—

(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 bidder or offeror and describe its interest in the procurement.

(c) *Resumption of participation in a procurement.* (1) The individual shall remain disqualified until such time as the agency has authorized the official to resume participation in the procurement in accordance with 3.104-4(c)(2)(ii).

(2) Subsequent to a period of disqualification, if an agency wishes to reinstate the agency official to participation in the procurement, the HCA or designee may authorize immediate reinstatement or may authorize reinstatement following whatever additional period of disqualification the HCA determines is necessary to ensure the integrity of the procurement process. In determining that any additional period of disqualification is necessary, the HCA or designee shall consider any factors that might give rise to an appearance that the agency official acted without complete impartiality with respect to issues involved in the procurement. The HCA or designee shall consult with the agency ethics official in making a determination to reinstate an official. Decisions to reinstate an employee should be in writing. It is within the discretion of the HCA, or designee, to determine that the agency official shall not be reinstated to participation in the procurement.

(3) An employee must comply with the provisions of 18 U.S.C. 208 and 5 CFR part 2635 regarding any resumed participation in a procurement matter. An employee may not be reinstated to participate in a procurement matter affecting the financial interest of someone with whom he or she is seeking employment, unless he or she receives a waiver pursuant to 18 U.S.C. 208(b)(1) or (b)(3) or an authorization in accordance with the requirements of 5 CFR part 2635, as appropriate.

3.104-7 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 subsection 27(d) of the Act (see 3.104-4(d)) from accepting compensation from a particular contractor may request advice from the appropriate agency ethics official prior to accepting such compensation.

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

(1) Information about the procurement(s), or decision(s) on matters under 3.104-4(d)(1)(iii), involving the particular contractor, in which the individual was or is involved, including contract or solicitation numbers, dates of solicitation or award, a description of the supplies or services procured or to be procured, and contract amount;

(2) Information about the 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) Information about the 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 the date a request containing complete information is received, or as soon thereafter as practicable, the agency ethics official shall issue an opinion as to whether the proposed conduct is proper or would violate subsection 27(d) of the Act.

(d)(1) Where complete information is not included in the request, the agency ethics official may ask the requester to provide any information reasonably available to the requester. Additional information may also be requested from other persons, including the source selection authority, the contracting officer, or the requester's immediate supervisor.

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

(3) If the requester is advised in a written opinion by the agency ethics official that the requester may accept compensation from a particular contractor, and accepts such compensation in good faith reliance on that advisory opinion, then neither the requester nor the contractor shall be found to have knowingly violated subsection 27(d) of the Act. If the requester or the contractor has actual knowledge or reason to believe that the opinion is based upon fraudulent, misleading, or otherwise incorrect information, their reliance upon the opinion will not be deemed to be in good faith.

3.104-8 Calculating the period of compensation prohibition.

The one-year prohibition on accepting compensation (see 3.104-4(d)(1)) begins to run as provided in this subsection:

(a) If the former official was serving in one of the positions specified in 3.104-4(d)(1)(i) on the date of the selection of the contractor, but not on the date of the award of the contract, the prohibition begins on the date of the selection of the contractor.

(b) If the former official was serving in one of the positions specified in 3.104-4(d)(1)(i) on the date of the award of the contract (whether or not they were serving on the date of the selection of the contractor), the prohibition begins on the date of the award of the contract.

(c) If the former official was serving in one of the positions specified in 3.104-4(d)(1)(ii), the prohibition begins on the last date the individual served in that position.

(d) If the former official personally made one of the decisions specified in 3.104-4(d)(1)(iii), the prohibition begins on the date the decision was made.

3.104-9 Contract clauses.

(a) The contracting officer shall insert the clause at 52.203-8, Cancellation, Rescission, and Recovery of Funds for Illegal or Improper Activity, in solicitations and contracts with a value exceeding the simplified acquisition threshold.

(b) The contracting officer shall insert the clause at 52.203-10, Price or Fee Adjustment for Illegal or Improper Activity, in solicitations and contracts with a value exceeding the simplified acquisition threshold.

3.104-10 Violations or possible violations.

(a) If the contracting officer receives or obtains information of a violation or possible violation of subsections 27 (a), (b), (c), or (d) of the Act (see 3.104-4), the contracting officer shall determine whether the reported violation or possible violation has any impact on the pending award or selection of the source therefor.

(1) If the contracting officer concludes that there is no impact on the procurement, the contracting officer shall forward the information concerning the violation or possible violation, accompanied by appropriate documentation supporting that conclusion, to an individual designated in accordance with agency procedures. With the concurrence of that individual, the contracting officer shall, without further approval, proceed with the procurement.

(2) If the individual reviewing the contracting officer's conclusion does not

agree with that conclusion, the individual shall advise the contracting officer to withhold award and shall promptly forward the information and documentation to the HCA or designee.

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

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

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

(2) Causing an investigation to be conducted;

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

(4) Concluding that a violation occurred; or

(5) Recommending an agency head determination that the contractor, or someone acting for the contractor, has engaged in conduct constituting an offense punishable under subsection 27(e) of the Act, for the purpose of voiding or rescinding the contract.

(c) Before concluding that a bidder, offeror, contractor, or person has violated the Act, the HCA or designee may request information from appropriate parties regarding the violation or possible violation when considered in the best interests of the Government.

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

(1) If a contract has not been awarded—

(i) Cancel the procurement;

(ii) Disqualify an offeror; or

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

(2) If a contract has been awarded—

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

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

(A) The contractor or someone acting for the contractor has been convicted for an offense where the conduct

constitutes a violation of subsections 27 (a) or (b) of the Act for the purpose of either—

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

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

(B) The head of the agency, or designee, has determined, based upon a preponderance of the evidence, that the contractor or someone acting for the contractor has engaged in conduct constituting an offense punishable under subsection 27(e)(1) of the Act; or

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

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

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

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

(g) The 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.

3.104-11 Criminal and civil penalties, and further administrative remedies.

Criminal and civil penalties, and administrative remedies, may apply to conduct which violates the Act (see 3.104-4). See 33.102(f) for special rules regarding bid protests. See 3.104-10 for administrative remedies relating to contracts.

(a) An official who knowingly fails to comply with the requirements of 3.104-4 shall be subject to the penalties and administrative action set forth in subsection 27(e) of the Act.

(b) A bidder or offeror who engages in employment discussion with an official subject to the restrictions of 3.104-4, knowing that the official has not complied with 3.104-4(c)(1), shall be subject to the criminal, civil or administrative penalties set forth in subsection 27(e) of the Act.

(c) An official who refuses to terminate employment discussions (see

3.104-6) 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.

4. Section 3.700(a) is revised to read as follows:

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.

* * * * *

5. Section 3.701 is revised to read as follows:

3.701 Purpose.

This subpart provides—

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

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

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

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

6. Section 3.703 is amended by redesignating the text as paragraph

“(a)”, and by adding paragraph (b) to read as follows:

3.703 Authority.

* * * * *

(b) Subsection 27(e)(3) of the Office of Federal Procurement Policy Act (41 U.S.C. 423) (the OFPP Act), as amended, requires a Federal agency, upon receiving information that a contractor or a person has engaged in conduct constituting a violation of subsection 27 (a) or (b) of the OFPP Act, to consider recission of a contract with respect to which—

(1) The contractor or someone acting for the contractor has been convicted for an offense punishable under subsection 27(e)(1) of the OFPP Act; or

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

7. Section 3.704 is amended in paragraph (b) by removing “FAR” and by adding paragraph (c) to read as follows:

3.704 Policy.

* * * * *

(c) If there is a final conviction for an offense punishable under subsection 27(e) of the OFPP Act, or if the head of the agency, or designee, has determined, based upon a preponderance of the evidence, that the contractor or someone acting for the contractor has engaged in conduct constituting such an offense, then the head of the contracting activity shall consider, in addition to any other penalty prescribed by law or regulation—

(1) Declaring void and rescinding contracts, as appropriate, and recovering the amounts expended under the contracts by using the procedures at 3.705 (see 3.104-10); and

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

8. Section 3.705 is amended by revising the last sentence in paragraph (c)(3) and paragraph (d)(3) to read as follows:

3.705 Procedures.

* * * * *

(c) * * *

(3) * * * However, no inquiry shall be made regarding the validity of a conviction.

* * * * *

(d) * * *

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

* * * * *

PART 4—ADMINISTRATIVE MATTERS

9. Section 4.802(e) is revised to read as follows:

4.802 Contract files.

* * * * *

(e) Contents of contract files that are contractor bid or proposal information or source selection information as defined in 3.104-3 shall be protected from disclosure to unauthorized persons (see 3.104-5).

* * * * *

4.803 [Amended]

10. Section 4.803 is amended by removing paragraph (a)(42), and by redesignating paragraph (a)(43) as (a)(42).

PART 9—CONTRACTOR QUALIFICATIONS

9.105-3 [Amended]

11. Section 9.105-3(c) is amended by revising the parenthetical “(see 3.104-4 (j) and (k))” to read “(see 3.104-3)”.

9.106-3 [Amended]

12. Section 9.106-3 is amended in paragraph (a) by removing the paragraph designation “(a)”, and by removing paragraph (b).

9.505 [Amended]

13. Section 9.505 is amended in paragraph (b)(1) by removing “3.104-4(j)” and inserting “3.104-3” in its place, and in (b)(2) by removing “3.104-4(k)” and inserting “3.104-3” in its place.

PART 12—ACQUISITION OF COMMERCIAL ITEMS

12.503 [Amended]

14. Section 12.503 is amended by removing paragraph (b)(4), and by redesignating paragraphs (b) (5) and (6) as (b) (4) and (5), respectively.

12.504 [Amended]

15. Section 12.504 is amended by removing paragraph (b)(3), and by redesignating paragraph (b)(4) as (b)(3).

PART 14—SEALED BIDDING

14.404-2 [Amended]

16. Section 14.404-2 is amended by removing paragraph (m).

PART 15—CONTRACTING BY NEGOTIATION

17. Section 15.413 is revised to read as follows:

15.413 Disclosure and use of information before award.

See 3.104 for statutory and regulatory requirements related to the disclosure of contractor bid or proposal information and source selection information.

15.413-2 [Amended]

18. Section 15.413-2 is amended by removing paragraph (f)(6).

19. Section 15.509 is amended by revising paragraph (f)(4), and by removing (h)(3) to read as follows:

15.509 Limited use of data.

* * * * *

(f) * * *

(4) Require any non-government evaluator to give a written agreement stating that data in the proposal will not be disclosed to others outside the Government.

* * * * *

20. Section 15.805-5 is amended by revising paragraph (j) and by removing paragraph (k) to read as follows:

15.805-5 Field pricing support.

* * * * *

(j) Field pricing reports, including audit and technical reports, may contain proprietary and/or source selection information (see 3.104-3), and the cover page and all pages containing such information should be marked with the appropriate legend and protected accordingly.

PART 19—SMALL BUSINESS PROGRAMS**19.811-1 [Amended]**

21. Section 19.811-1 is amended by removing paragraph (d).

19.811-2 [Amended]

22. Section 19.811-2 is amended by removing paragraph (b) and by redesignating paragraph (c) as (b).

PART 33—PROTESTS, DISPUTES, AND APPEALS

23. Section 33.102 is amended by adding paragraph (f) to read as follows:

33.102 General.

* * * * *

(f) No person may file a protest at GAO for a procurement integrity violation unless that person reported to the contracting officer the information constituting evidence of the violation within 14 days after the person first discovered the possible violation (41 U.S.C. 423(g)).

PART 37—SERVICE CONTRACTING**37.103 37.103 [Amended]**

24. Section 37.103 is amended by removing paragraph (c) and by redesignating paragraph (d) as (c).

PART 43—CONTRACT MODIFICATIONS**43.106 [Reserved]**

25. Section 43.106 is removed and reserved.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

26. Section 52.203-8 is revised to read as follows:

52.203-8 Cancellation, Rescission, and Recovery of Funds for Illegal or Improper Activity.

As prescribed in 3.104-9(a), insert the following clause in solicitations and contracts:

CANCELLATION, RESCISSION, AND RECOVERY OF FUNDS FOR ILLEGAL OR IMPROPER ACTIVITY (JAN 1997)

(a) If the Government receives information that a contractor or a person has engaged in conduct constituting a violation of subsection (a), (b), (c), or (d) of Section 27 of the Office of Federal Procurement Policy Act (41 U.S.C. 423) (the Act), as amended by section 4304 of the 1996 National Defense Authorization Act for Fiscal Year 1996 (Pub. L. 104-106), the Government may—

(1) Cancel the solicitation, if the contract has not yet been awarded or issued; or
(2) Rescind the contract with respect to which—

(i) The Contractor or someone acting for the Contractor has been convicted for an offense where the conduct constitutes a violation of subsection 27 (a) or (b) of the Act for the purpose of either—

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

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

(ii) The head of the contracting activity 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 subsections 27(e)(1) of the Act.

(b) If the Government rescinds the contract under paragraph (a) of this clause, the Government is entitled to recover, in addition to any penalty prescribed by law, the amount expended under the contract.

(c) The rights and remedies of the Government specified herein are not exclusive, and are in addition to any other rights and remedies provided by law, regulation, or under this contract.
(End of clause)

52.203-9 [Reserved]

27. Section 52.203-9 is removed and reserved.

28. Section 52.203-10 is amended by revising the introductory text, clause date, and paragraphs (a) and (b)(5) to read as follows:

52.203-10 Price or Fee Adjustment for Illegal or Improper Activity.

As prescribed in 3.104-9(b), insert the following clause:

PRICE OR FEE ADJUSTMENT FOR ILLEGAL OR IMPROPER ACTIVITY (JAN 1997)

(a) The Government, at its election, may reduce the price of a fixed-price type contract and the total cost and fee under a cost-type contract by the amount of profit or fee determined as set forth in paragraph (b) of this clause if the head of the contracting activity or designee determines that there was a violation of subsection 27 (a), (b), or (c) of the Office of Federal Procurement Policy Act, as amended (41 U.S.C. 423), as implemented in section 3.104 of the Federal Acquisition Regulation.

(b) * * *

(5) For firm-fixed-price contracts, by 10 percent of the initial contract price or a profit amount determined by the Contracting Officer from records or documents in existence prior to the date of the contract award.

* * * * *

(End of clause)

52.203-13 [Reserved]

29. Section 52.203-13 is removed and reserved.

52.212-3 [Amended]

30. Section 52.212-3 is amended by revising the clause date to read "(JAN 1997)" and by removing paragraph (i).

PART 53—FORMS**53.203 [Reserved]**

31. Section 53.203 is removed and reserved.

53.302-333 [Removed]

32. In section 53.302-333, Optional Form 333 is removed.

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48 CFR Parts 1, 3, 4, 6, 8, 9, 12, 14, 16, 19, 23, 27, 29, 31, 32, 36, 37, 42, 45, 47, 49, 52, and 53

[FAC 90-45; FAR Case 96-312; Item II]

RIN 9000-AH23

Federal Acquisition Regulation; Certification Requirements

AGENCIES: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense