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Federal Communications Commission.

**Marlene H. Dortch,**

Secretary.

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## DEPARTMENT OF DEFENSE

### GENERAL SERVICES ADMINISTRATION

### NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

#### 48 CFR Parts 3, 12, and 52

[FAR Case 2005-035; Docket 2006-0020; Sequence 8]

RIN: 9000-AD76

#### Federal Acquisition Regulation; FAR Case 2005-035, Changes to Lobbying Restrictions

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

**ACTION:** Proposed rule.

**SUMMARY:** The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) are proposing to amend the Federal Acquisition Regulation (FAR) to be consistent with the Lobbying Disclosure Act of 1995 and the OMB Interim Final Guidance, and to improve clarity of the regulation through improved use of plain language and compliance with FAR drafting conventions.

**DATES:** Interested parties should submit written comments to the FAR Secretariat on or before November 13, 2006 to be considered in the formulation of a final rule.

**ADDRESSES:** Submit comments identified by FAR case 2005-035 by any of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Search for this document at the "Federal Acquisition Regulation" agency and review the "Document Title" column; click on the Document ID number. Click on "Add Comments".

You may also search for any document using the "Advanced search/"

document search" tab, selecting from the agency field "Federal Acquisition Regulation", and typing the FAR case number in the keyword field.

- Fax: 202-501-4067.
- Mail: General Services

Administration, Regulatory Secretariat (VIR), 1800 F Street, NW., Room 4035, ATTN: Laurieann Duarte, Washington, DC 20405.

**Instructions:** Please submit comments only and cite FAR case 2005-035 in all correspondence related to this case. All comments received will be posted without change to <http://www.regulations.gov>, including any personal and/or business confidential information provided.

**FOR FURTHER INFORMATION CONTACT** For clarification of content, contact Mr. Ernest Woodson, Procurement Analyst, at (202) 501-3775. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501-4755. Please cite FAR case 2005-035.

#### SUPPLEMENTARY INFORMATION:

##### A. Background

The Byrd Amendment was enacted as section 319 of the Department of Interior and Related Agencies Appropriations Act (Pub. L. 101-121), which added a new section 1352 to title 31, United States Code, entitled "Limitation on use of appropriated funds to influence certain Federal contracting and financial transactions". Section 1352 prohibits the recipient of a Federal contract from using appropriated funds to pay any person for influencing or attempting to influence an officer or employee of the executive or legislative branches in connection with the awarding of any Federal contract, the making of any Federal grant or loan, the entering into of any cooperative agreement, or the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement. It required OMB to issue guidance for agency implementation.

- On December 18, 1989, OMB's published interim final guidance.
- On January 30, 1990, OMB's interim final guidance was implemented in the FAR as an interim rule in FAC 84-55. FAC 84-55 added FAR Subpart 3.8, the provision at FAR 52.203-11, Certification and Disclosure Regarding Payments to Influence Certain Federal Transactions, and the clause at FAR 52.203-12, Limitation on Payments to Influence Certain Federal Transactions.
- On June 12, 1990, the Administrator for Federal Procurement Policy and the Acting Assistant Director for Financial

Management issued clarifications of the interim guidance. This clarification was subsequently published as a notice in the **Federal Register** at 55 FR 24540, June 15, 1990.

- On December 19, 1995, Congress enacted the Lobbying Disclosure Act of 1995 (Pub. L. 104-65).

• On January 19, 1996, OMB issued interim final amendments to its Governmentwide guidance (61 FR 1412).

The Lobbying Disclosure Act of 1995 provided rules on disclosure of lobbying activities to influence the Federal Government, codified at 2 U.S.C. 1601 *et seq.*, and also simplified the disclosure and reporting requirements of 31 U.S.C. 1352.

• Under the revised statute, the person must identify the name of any registrant under the Lobbying Disclosure Act of 1995 who has made lobbying contacts on behalf of the person, but need not provide information with regard to amounts paid or descriptions of services performed, including identification of who was contacted.

- Agency head semi-annual compilations to Congress and Inspector General (IG) annual reports to Congress were eliminated.

The interim final amendments to OMB's Governmentwide Guidance on Lobbying made changes to the Standard Form (SF) LLL Disclosure of Lobbying Activities, changing "Name and Address of Lobbying Entity" to "Name and Address of Lobbying Registrant" in item 10a, removing the reference to a continuation sheet in block 10, and deleting blocks 12-15. The agency head and Inspector General reporting requirements were not included in the FAR, so no FAR change was necessary to implement their elimination. The interim final amendment did not provide any suggested rewording of the lobbying disclosure provision or clause.

A rule was published in the **Federal Register** at 70 FR 57455, September 30, 2005, under FAR case 1989-093 to finalize the interim rule that was published in the **Federal Register** at 55 FR 3190, January 30, 1990, to implement the Byrd Amendment. The final rule only made minor corrections to the interim rule, recognizing that a new case might be required to consider further changes to implement the OMB clarifications of 1990, the Lobbying Disclosure Act of 1995, OMB's Interim Final Amendments of 1996, and other clarifications.

In reviewing the need for further changes, the Councils reviewed the Lobbying Disclosure Act of 1995, OMB Guidance, comments on the prior case,

and prior agreements of the Councils as represented by a draft final rule that was presented to the FAR Council on November 2, 2001, but was not accepted by OFPP at that time. These changes represent a few changes to implement the law and OMB Guidance, but primarily consist of clarification, plain language changes, FAR drafting conventions, and editorial corrections. The Councils have incorporated in the proposed rule those changes that are necessary or beneficial, and identified the rationale for each proposed change.

1. **FAR 3.800, Scope of subpart.** This section is amended to cite the United States Code rather than the public law number. Although the Lobbying Disclosure Act of 1995 also added newly codified sections at 2 U.S.C. 1601, *et seq.*, the OMB Interim Final Amendments to OMB's Governmentwide Guidance on Lobbying does not cite 2 U.S.C. 1601, *et seq.* The FAR is still implementing 31 U.S.C. 1352, as amended.

2. **FAR 3.801, Definitions.**

- "Agency" and "Covered Federal action". This rule proposes strictly editorial changes to these definitions.

- "Indian tribe" and "tribal organization". This proposed rule corrects the cite from "25 U.S.C. 450B" to "25 U.S.C. 450b".

- "Person" and "recipient". The proposed rule revises these definitions to be strictly consistent with the statute.

3. **FAR 3.802, Prohibitions.** This section is retitled and reorganized into two sections for improved clarity.

- Only paragraph (a) of 3.802 is a prohibition. Paragraph (b) is a requirement for a declaration. Paragraph (c) contains exceptions. This rule proposes to retitle 3.802 as "Statutory prohibition and requirement" and add a new FAR 3.803 for the exceptions.

- **FAR 3.802(a).** Instead of adding a definition of appropriated funds, this rule proposes to add the OMB explanation that the term "appropriated funds" does not include profit or fee from a covered Federal action, and the clarification that to the extent a person can demonstrate that the person has sufficient monies other than Federal appropriated funds, the Government shall assume that these other monies were spent for any influencing activities unallowable with Federal appropriated funds.

- **FAR 3.802(b).** The text of the FAR is addressed to the contracting officer. Having referenced the provision and clause that set forth the declaration requirements for offerors and contractors, it is not necessary to repeat the details of the requirements in the text.

4. **FAR 3.803, Certification and disclosure.** The language in this section is deleted as duplicative of the provision at FAR 52.203-11 and clause at FAR 52.203-12. The text of the FAR is supposed to be addressed to the contracting officer. Requirements for contractors are set forth in provisions and clauses.

5. **FAR 3.803, Exceptions.** The exceptions have been revised and redesignated as the FAR 3.803 to eliminate unnecessary duplication within the text and also eliminate many of the current subdivision identifiers that detract from the readability of the regulation.

6. **FAR 3.804, Policy.** This section is revised to remove paragraph (b). Paragraph (b) was relevant when agencies were required to submit reports to the Congress. This requirement was eliminated by the Lobbying Disclosure Act.

7. **FAR 3.805, Exemption.** The proposed rule contains minor editorial corrections to change "section" to "subpart" and eliminate the word "such" in two places.

8. **FAR 3.806, Processing suspected violations.** Minor plain language improvements have put this requirement in active voice.

9. **FAR 3.808, Solicitation provision and contract clause.** The proposed rule restates the provision and clause prescriptions in active voice.

10. **FAR 12.504, Applicability of certain laws to subcontracts for the acquisition of commercial items.**

41 U.S.C. 430, List of laws inapplicable to procurements of commercial items in Federal Acquisition Regulations, requires in paragraph (b) that the FAR must include a list of laws inapplicable to commercial subcontracts. Covered laws shall be included on the list unless the FAR Council makes a written determination that it is not in the best interest of the Federal Government to exempt subcontracts from that provision. Covered laws include laws that set forth policies, procedures, requirements, or restrictions for the procurement of property or services by the Federal Government and that do not—

- Provide for criminal or civil penalties; or
- Specifically refer to 41 U.S.C. 430 and nevertheless make the law applicable to contracts for commercial items.

The current FAR 12.504, Applicability of certain laws to subcontracts for the acquisition of commercial items, includes 31 U.S.C. 1352 as a law inapplicable to commercial items. Because 31 U.S.C.

1352 provides for civil penalties, the Councils determined that its inclusion on such list is unauthorized and propose to remove it from the list.

11. **FAR 52.203-11, Certification and Disclosure Regarding Payments to Influence Certain Federal Transactions.**

- **Definitions.** This proposed rule adds a definition of "lobbying contact". This is the key term introduced by the Lobbying Disclosure Act of 1995. With regard to the other terms used in the provision that are defined in the clause, the proposed rule lists the specific terms that are used in the provision and defined in the clause.

- **Prohibitions.** In accordance with FAR drafting conventions, the first paragraph of a provision or clause should include any needed definitions. This rule separates into a separate paragraph the statement that was included with the definitions regarding prohibitions of the clause being incorporated in the provision by reference from the definitions paragraph to a separate paragraph (b).

- **Certification.** Paragraph (b) is redesignated paragraph (c). The proposed rule deletes the date of December 23, 1989, which is no longer relevant, and changes "his or her" to "its" (FAR drafting convention).

- **Disclosure.** Current paragraph (b)(2) is deleted and replaced by new paragraph (d) to implement the Lobbying Disclosure Act of 1995, which brings in the concept of registrants under the Act and lobbying contacts.

- **Flowdown.** The current paragraph (b)(3) has been deleted because flow down can only be required through a contract clause, not a solicitation provision.

- **Penalty.** Paragraph (c) has been redesignated as paragraph (e), and there are only minor editorial changes.

12. **FAR 52.203-12, Limitation on Payments to Influence Certain Federal Transactions.**

This clause is revised to make conforming changes to parallel the changes made to FAR Subpart 3.8. In addition—

- Paragraph (c)(2)(iii). The Councils propose to delete the long examples and discussion of advice and analysis that directly apply any professional or technical discipline, substituting a reference to FAR 3.803 where the examples are also found.

- Paragraph (d). The events that materially affect disclosure are no longer in accordance with the disclosure requirements. The only relevant change now is a change in the name and address of the lobbying registrant or the individuals performing the services.

• Paragraph (d)(2). The contractor shall file a declaration at the end of each calendar quarter in which a change occurs.

• *Agreement*. For consistency with previous changes to the FAR, the Councils have removed the requirement for “contractor agreement” and reworded the prohibition in paragraph (b) to state that “the Contractor shall”. This is the preferred method of imposing a requirement upon a contractor.

• Paragraph (g). The requirements regarding subcontractors and flowdown have been moved to the last paragraph of the clause, in accordance with FAR drafting conventions. The requirement for the subcontractors to pass the disclosure up the chain to the prime contractor is retained, even though the agency head and IG reporting requirements have been deleted. In order for the information to have any value, it must be passed to the Government.

13. **52.212–3(e), Certification Regarding Payments to Influence Federal Transactions (31 U.S.C. 1352)**. The Councils propose to add the new language on disclosure at paragraph (d) of the provision at 52.203–11 and to the certification requirement at 52.212–3(e). Since acquisitions of commercial items are subject to the requirements of 31 U.S.C. 1352, and there are civil penalties for failure to submit the required disclosure as well as the certification, it is important to include this requirement.

14. **OMB SF LLL and LLL-A**. SF LLL and SF LLL-A were developed as an interim measure to accommodate OMB’s interim guidance. These forms are illustrated in the FAR under “Forms Authorized for Local Reproduction”. The SF LLL-A must be removed to conform to OMB’s January 19, 1996, **Federal Register** Notice.

This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

## B. Regulatory Flexibility Act

The Councils do not expect this proposed rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because this proposed rule mainly implements improvements in clarity and consistency. The Federal Government awards approximately 90,000 contracts per year to approximately 18,000 small

entities. The disclosure requirements of the rule will only apply to small entities on whose behalf a registered lobbyist has made lobbying contacts with respect to a particular Federal contract. Based on OMB Control No. 0348–0046, Disclosure of Lobbying Activities for SF LLL, which is the standard disclosure form for lobbying paid for with non-Federal funds as required by the Byrd Amendment, 300 responses were received annually from states, local governments, non-profit organizations, individuals, and businesses. The number of such small entities is estimated to be near zero, based on the small number of lobbyists reported to have registered under the Byrd Amendment and the improbability that such lobbyists represent small entities. The rule does not impose new requirements that impose a burden on contractors.

An Initial Regulatory Flexibility Analysis has, therefore, not been performed. We invite comments from small businesses and other interested parties. The Councils will consider comments from small entities concerning the affected FAR Parts 3, 12, and 52 in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 601, *et seq.* (FAR case 2005–035), in correspondence.

## C. Paperwork Reduction Act

The Paperwork Reduction Act does apply. The reporting requirements are approved under OMB Control Number 0348–0046. OMB claimed a reduction in the information collection requirement upon issuance of the Interim Final Amendments to OMB’s Governmentwide Guidance on Lobbying in January 1996, due to the simplified SF LLL. This rule will not impact the reporting requirement.

### List of Subjects in 48 CFR Parts 3, 12, and 52

Government procurement.

Dated: September 6, 2006.

**Ralph De Stefano,**

*Director, Contract Policy Division.*

Therefore, DoD, GSA, and NASA propose amending 48 CFR parts 3, 12, and 52 as set forth below:

1. The authority citation for 48 CFR parts 3, 12, and 52 continues to read as follows:

**Authority:** 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

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

2. Revise section 3.800 to read as follows:

### 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. Amend section 3.801 by—  
a. Adding a new introductory paragraph;

b. Revising the definitions “Agency”, “Covered Federal action” and “Indian tribe” and “tribal organization”;

c. Removing from the definitions “Influencing or attempting to influence” and “Local government” “, as used in this section,”;

d. Removing from the definition “Officer or employee of an agency,” “, as used in this section”; and redesignating paragraphs (a), (b), (c), and (d) as (1), (2), (3), and (4), respectively;

e. Revising the definition “Person”;

f. Removing from the definitions “Reasonable compensation” and “Reasonable payment” “, as used in this section,”;

g. Revising the definition “Recipient”; and

h. Removing from the definitions “Regularly employed” and “State” “, as used in this section.”.

The added and revised text reads as follows:

### 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.

\* \* \* \* \*

*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 3.802(a) and are permitted by other Federal law.

\* \* \* \* \*

*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 3.802(a) and permitted by other Federal law.

\* \* \* \* \*

4. Revise sections 3.802 and 3.803 to read as follows:

**3.802 Statutory Prohibition and Requirement.**

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

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

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

(b) 31 U.S.C. 3152 also requires offerors to furnish a declaration consisting of both a certification and a disclosure, with periodic updates of the disclosure after contract award. These requirements are contained in the provision at 52.203–11, Certification and Disclosure Regarding Payments to Influence Certain Federal Transactions, and the clause at 52.203–12, Limitation on Payments to Influence Certain Federal Transactions.

**3.803 Exceptions.**

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

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

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

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

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

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

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

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

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

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

Federal action include consultants and trade associations.

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

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

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

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

**3.804 [Amended]**

5. Amend section 3.804 by removing the paragraph designation (a) and paragraph (b).

6. Revise sections 3.805 and 3.806 to read as follows:

**3.805 Exemption.**

The Secretary of Defense may exempt, on a case-by-case basis, a covered

Federal action from the prohibitions of this subpart whenever the Secretary determines, in writing, that such an exemption is in the national interest. The Secretary shall transmit a copy of the exemption to Congress immediately after making the determination.

### 3.806 Processing suspected violations.

The contracting officer shall report suspected violations of the requirements of 31 U.S.C. 1352 in accordance with agency procedures.

### 3.808 [Amended]

7. Amend section 3.808 in paragraphs (a) and (b) by removing "The" and adding "Insert the" in its place; and by removing "shall be included".

## PART 12—ACQUISITION OF COMMERCIAL ITEMS

### 12.504 [Amended]

8. Amend section 12.504 by removing and reserving paragraph (a)(3).

## PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

9. Revise section 52.203–11 to read as follows:

### 52.203–11 Certification and Disclosure Regarding Payments to Influence Certain Federal Transactions.

As prescribed in 3.808(a), insert the following provision:

#### CERTIFICATION AND DISCLOSURE REGARDING PAYMENTS TO INFLUENCE CERTAIN FEDERAL TRANSACTIONS (DATE)

(a) *Definitions.* As used in this provision—

*Lobbying contact* has the meaning provided at 2 U.S.C. 1602(8). The terms "agency," "influencing or attempting to influence," "officer or employee of an agency," "person," "reasonable compensation," and "regularly employed" are defined in the FAR clause of this solicitation entitled, Limitation on Payments to Influence Certain Federal Transactions, (52.203–12).

(b) *Prohibition.* The prohibition and exceptions contained in the FAR clause of this solicitation entitled Limitation on Payments to Influence Certain Federal Transactions, (52.203–12), are hereby incorporated by reference in this provision.

(c) *Certification.* The offeror, by signing its offer, hereby certifies to the best of its knowledge and belief that no Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or

employee of Congress, or an employee of a Member of Congress on its behalf in connection with the awarding of this contract.

(d) *Disclosure.* If any registrants under the Lobbying Disclosure Act of 1995 have made a lobbying contact on behalf of the offeror with respect to this contract, the offeror shall complete and submit, with its offer, OMB Standard Form LLL, Disclosure of Lobbying Activities, to provide the name of the registrants. The offeror need not report regularly employed officers or employees of the offeror to whom payments of reasonable compensation were made.

(e) *Penalty.* Submission of this certification and disclosure is a prerequisite for making or entering into this contract imposed by 31 U.S.C. 1352. Any person who makes an expenditure prohibited under this provision or who fails to file or amend the disclosure required to be filed or amended by this provision, shall be subject to a civil penalty of not less than \$10,000, and not more than \$100,000, for each such failure.

(End of provision)

10. Amend section 52.203–12 by—

a. Revising the date of the clause;

b. Amending paragraph (a) by—

i. Revising the introductory text and the definitions "Agency", "Covered Federal action", and "Indian tribe" and "tribal organization";

ii. In the definitions "Influencing or attempting to influence", "Local government", and "Officer or employee of an agency," removing ", as used in this clause,";

iii. Revising the definition "Person"

iv. In the definitions "Reasonable compensation" and "Reasonable payment" removing ", as used in this clause,";

v. Revising the definition "Recipient"; and

vi. In the definitions "Regularly employed" and "State" removing ", as used in this clause,".

c. Revising paragraph (b);

d. Removing paragraph (d), redesignating paragraph (c) as paragraph (d), and revising the newly designated paragraph (d);

e. Adding a new paragraph (c);

f. Revising the first sentence of paragraph (e)(1); and

g. Adding a new paragraph (g).

The revised and added text reads as follows:

### 52.203–12 Limitations on Payments to Influence Certain Federal Transactions.

\* \* \* \* \*

#### LIMITATIONS ON PAYMENTS TO INFLUENCE CERTAIN FEDERAL TRANSACTIONS (DATE)

(a) *Definitions.* As used in this clause—

*Agency* means "executive agency" as defined in Federal Acquisition Regulation 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.

\* \* \* \* \*

*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 (b) of this clause and are permitted by other Federal law.

\* \* \* \* \*

*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 (b) of this clause and permitted by other Federal law.

\* \* \* \* \*

(b) *Prohibitions.* 31 U.S.C. 1352 prohibits a recipient of a Federal contract, grant, loan, or cooperative agreement from using appropriated funds to pay any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with covered Federal actions. In accordance with 31 U.S.C. 1352, the Contractor shall not use appropriated funds to pay any person for influencing or attempting to

influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the award of this contract or the extension, continuation, renewal, amendment, or modification of this contract.

(1) The term "appropriated funds" does not include profit or fee from a covered Federal action.

(2) To the extent the Contractor can demonstrate that the Contractor has sufficient monies, other than Federal appropriated funds, the Government shall assume that these other monies were spent for any influencing activities unallowable with Federal appropriated funds.

(c) *Exceptions.* The prohibition in paragraph (b) of this clause does not apply under the following conditions:

(1) *Agency and legislative liaison by Contractor employees.* (i) Payment of reasonable compensation made to an officer or employee of the Contractor if the payment is for agency and legislative liaison activities not directly related to this contract. For purposes of this paragraph, providing any information specifically requested by an agency or Congress is permitted at any time.

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

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

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

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

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

(v) Making capability presentations by persons seeking awards from an agency pursuant to the provisions of the Small Business Act, as amended by Pub. L. 95-507, and subsequent amendments.

(2) *Professional and technical services.* (i) A payment of reasonable compensation made to an officer or employee of a person requesting or receiving a covered Federal action, if payment is for professional or technical services rendered directly in the preparation, submission, or negotiation of any bid, proposal, or application for

that Federal action or for meeting requirements imposed by or pursuant to law as a condition for receiving that Federal action;

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

(iii) As used in paragraph (c)(2) of this clause, "professional and technical services" are limited to advice and analysis directly applying any professional or technical discipline (for example, See FAR 3.803(a)(2)(iii)).

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

(3) Only those communications and services expressly authorized by paragraphs (c)(1) and (2) of this clause are permitted.

(d) *Disclosure.* (1) If the Contractor did not submit OMB Standard Form LLL, Disclosure of Lobbying Activities, with its offer, but registrants under the Lobbying Disclosure Act of 1995 have subsequently made a lobbying contact on behalf of the Contractor with respect to this contract, the Contractor shall complete and submit OMB Standard Form LLL to provide the name of the lobbying registrants, including the individuals performing the services.

(2) If the Contractor did submit OMB Standard Form LLL disclosure pursuant to paragraph (c) of the provision at FAR 52.203-11, Certification and Disclosure Regarding Payments to Influence Certain Federal Transactions, and a change occurs that affects block 10 of the OMB Standard Form LLL (name and address of lobbying registrant or individuals performing services), the Contractor shall submit to the Contracting Officer an updated disclosure using OMB Standard Form LLL at the end of the calendar quarter, in which the change occurs.

(e) *Penalties.* (1) Any person who makes an expenditure prohibited under paragraph (b) of this clause or who fails

to file or amend the disclosure to be filed or amended by paragraph (d) of this clause shall be subject to civil penalties as provided for by 31 U.S.C. 1352. \* \* \*

\* \* \* \* \*

(g) *Subcontracts.* (1) The Contractor shall obtain a declaration, including the certification and disclosure in paragraphs (c) and (d) of the provision at FAR 52.203-11, Certification and Disclosure Regarding Payments to Influence Certain Federal Transactions, from each person requesting or receiving a subcontract exceeding \$100,000 under this contract. The Contractor or subcontractor that awards the subcontract shall retain the declaration.

(2) A copy of each subcontractor disclosure form (but not certifications) shall be forwarded from tier to tier until received by the prime Contractor. The prime Contractor shall submit a copy of all disclosures to the Contracting Officer at the end of the calendar quarter in which the disclosure form is submitted by the subcontractor. Each subcontractor certification shall be retained in the subcontract file of the awarding Contractor.

(3) The Contractor shall include the substance of this clause, including this paragraph (g), in any subcontract exceeding \$100,000.

(End of clause)

11. Amend section 52.212-3 by revising the date of the clause and adding two sentences at the end of paragraph (e) to read as follows:

**52.212-3 Offeror Representations and Certifications— Commercial Items.**

\* \* \* \* \*

OFFEROR REPRESENTATIONS AND CERTIFICATIONS-COMMERCIAL ITEMS (DATE)

\* \* \* \* \*

(e) \* \* \* If any registrants under the Lobbying Disclosure Act of 1995 have made a lobbying contact on behalf of the offeror with respect to this contract, the offeror shall complete and submit, with its offer, OMB Standard Form LLL, Disclosure of Lobbying Activities, to provide the name of the registrants. The offeror need not report regularly employed officers or employees of the offeror to whom payments of reasonable compensation were made.

\* \* \* \* \*

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