

(End of provision)

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

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

[FAR Case 96-314]

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: Proposed rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council are proposing to amend the Federal Acquisition Regulation (FAR) to implement Section 27 of the Office of Federal Procurement Policy (OFPP) Act, as amended by Section 4304 of the Fiscal Year 1996 National Defense Authorization Act, also known as the Federal Acquisition Reform Act. This regulatory action was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993. This is not a major rule under 5 U.S.C. 804.

DATES: Comments should be submitted on or before November 5, 1996 to be considered in the formulation of a final rule.

ADDRESSES: Interested parties should submit written comments to: General Services Administration, FAR Secretariat (MVR), 18th & F Streets, NW, Room 4040, Washington, DC 20405.

Please cite FAR case 96-314 in all correspondence related to this case.

FOR FURTHER INFORMATION CONTACT: Mr. Peter O'Such at (202) 501-1759 in reference to this FAR case. For general information, contact the FAR Secretariat, Room 4040, GS Building, Washington, DC 20405 (202) 501-4755. Please cite FAR case 96-314.

SUPPLEMENTARY INFORMATION:

A. Background

On September 6, 1990, an interim rule with request for public comments was

published in the Federal Register (55 FR 36782) under FAR case 89-023 to implement Section 27 of the OFPP Act. On November 30, 1990, as a result of amendments made by Section 815 of the FY 1991/1992 National Defense Authorization Act, Public Law 101-510, the interim rule was amended (55 FR 49852) and the time allowed for submission of public comments was extended. A total of 222 comments were received.

Section 4304 of the FY 1996 National Defense Authorization Act again amends Section 27 of the OFPP Act. As amended, Section 27 of the OFPP Act specifies restrictions in four areas: a prohibition on disclosing procurement information; a prohibition on obtaining procurement information; actions required of procurement officers when contacted by offerors regarding non-Federal employment; and a prohibition on former officials' acceptance of compensation from certain contractors.

The public comments received in response to the interim rule under FAR case 89-023 were considered in preparing this proposed rule, to the extent that the comments are relevant under the 1996 amendments to Section 27 of the OFPP Act.

B. Regulatory Flexibility Act

The proposed rule may have a significant beneficial 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 the rule eliminates the procurement integrity certifications and supporting information previously required to be submitted by every bidder and apparently successful offeror for a contract of over \$100,000, and every contractor seeking a contract modification valued at over \$100,000. An Initial Regulatory Flexibility Analysis (IRFA) has been prepared and submitted to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the IRFA may be obtained from the FAR Secretariat. Comments are invited. Comments from small entities concerning the affected FAR parts will be considered in accordance with Section 610 of the Act. Such comments must be submitted separately and cite FAR case 96-314 in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. 3501, *et seq.*) may apply because the proposed rule eliminates existing recordkeeping and information collection requirements approved by the Office of Management and Budget under OMB Control Number 9000-0103. A

paperwork burden of 43,333 hours would be 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: August 30, 1996.

Jeremy Olson,

Acting Director, Federal Acquisition Policy Division.

Therefore, it is proposed that 48 CFR Parts 1, 3, 4, 9, 12, 14, 15, 19, 33, 37, 43, 52, and 53 be 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. Section 1.106 is amended in the table by removing entries 3.104-9, 3.104-12(a)(12), 52.203-8, 52.203-9, and their respective OMB Control Numbers.

PART 3—IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST

3. Sections 3.104 through 3.104-9 are revised to read as set forth below and sections 3.104-10 through 3.104-12 are removed.

Sec.

3.104 Procurement integrity.

3.104-1 General.

3.104-2 Applicability.

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

3.104-4 Definitions.

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

3.104-6 Disqualification.

3.104-7 Ethics advisory opinions regarding prohibitions on former official's acceptance of compensation from contractors.

3.104-8 Contract clause.

3.104-9 Violations or possible violations.

3.104 Procurement integrity.

3.104-1 General.

(a) 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 FY 90/91 National Defense Authorization Act, Pub. L. 101-189, section 815 of the FY 91 National Defense Authorization Act, Pub. L. 101-510, and section 4304 of the FY 96 National Defense Authorization Act, Pub. L. 104-106 (hereinafter, section 27 is referred to as "the Act" or "the law

as amended"). Agency supplementation of 3.104 and any clauses required by 3.104 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 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) Employment discussions are covered by 18 U.S.C. 208, which precludes a Government employee from participating personally and substantially in any particular matter that would affect the financial interests of any person with whom the employee is negotiating for employment;

(3) Post-employment restrictions are covered by 18 U.S.C. 207, which prohibits 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; and

(4) FAR Parts 14 and 15, which place restrictions on the release of information related to procurements and other contractor information which must be protected under 18 U.S.C. 1905. In addition, 5 CFR Part 2635 protects non-public Government information.

3.104-2 Applicability.

(a) The restrictions at 3.104-3 (a) through (c) apply after [insert date 30 days after publication of final rule or January 1, 1997, whichever is earlier] to the conduct of every Federal agency procurement using competitive procedures for the acquisition of goods or services from non-Federal sources using appropriated funds.

(b) The post-employment restrictions at 3.104-3(d) apply to any former official of a Federal agency whose employment by a Federal agency ended on or after January 1, 1997. 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 Pub. L. 104-106.

3.104-3 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.

(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).* (1) 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—

(i) 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

(ii)(A) Reject the possibility of non-Federal employment; or

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

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

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

(2) The requirements in subsection 27(c)(1) of the Act do not apply to an agency official after the contract has

been awarded or the procurement has been canceled.

(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 the 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.

3.104-4 Definitions.

As used in this section—

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

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.

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.

Official means the following:

(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).

Participated personally and substantially means active and significant involvement of the individual in activities directly related to the procurement.

(1) To participate "personally" means to participate directly, and includes the direct and active supervision of a subordinate's participation in the matter.

(2) To participate "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.

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

(i) Federal advisory committees that are established and function in accordance with the Federal Advisory Committee Act, 5 U.S.C. App. 2, unless the Federal advisory committee is established or used for the purpose of, and the individual member participates personally and substantially in, any of the following functions:

(A) Drafting, reviewing, or approving the specification or statement of work for the procurement;

(B) Preparing or developing the procurement request, purchase request, or solicitation;

(C) Evaluating bids or proposals, or selecting a source;

(D) Negotiating price or terms and conditions of the contract; or

(E) Review and approval of the award of the contract.

(ii) 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;

(iii) 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;

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

(v) 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 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.

3.104-5 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 3.104-4 and consult with agency officials as necessary. Individuals responsible for preparing material that may include information designated as source selection information in accordance with 3.104-4 shall mark the cover page and each page that contains source selection information with the legend "SOURCE SELECTION INFORMATION—SEE FAR 3.104." Although the material described

in 3.104-4 is considered to be source selection information whether or not marked, all reasonable efforts shall be made to mark such material with this legend.

(d) *Contested markings.* (1) Except as provided in subparagraph (d)(4) of this subsection, if the contracting officer believes that information marked as proprietary is not proprietary, or information otherwise marked as contractor bid or proposal information is not contractor bid or proposal information, the contractor that has affixed the marking shall be notified in writing and given an opportunity to justify the marking. 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) After reviewing any justification submitted by the contractor, if the contracting officer determines that the marking is not justified, the contracting officer shall so notify the contractor in writing.

(3) Information marked by the contractor as proprietary, or otherwise marked as contractor bid or proposal information, 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 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; or

(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.

(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; or

(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.

3.104-6 Disqualification.

(a) *Disqualification notice.* An agency official who is participating personally and substantially in a Federal agency procurement for a contract in excess of the simplified acquisition threshold, and who wishes to discuss possible non-Federal employment with a bidder or offeror in that Federal agency procurement, shall submit to the Head of the Contracting Activity (HCA) or designee, prior to initiating or engaging in such discussions, a written notice of disqualification from further participation in the procurement. This is in addition to the requirement at 3.104-3(c)(1)(i). 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.

(b) *Suspension from and resumption of participation in a procurement.* (1)

The contracting officer, or the Source Selection Authority if the contracting officer is not the Source Selection Authority, shall suspend the individual's participation in the procurement until such time as the agency has authorized the official to resume participation in such

procurement in accordance with 3.104-3(c)(1)(ii)(B).

(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. The agency cannot force an agency official to terminate employment discussions in order to reinstate the official. The agency may reinstate an agency official who is still conducting employment discussions if the agency, following 18 U.S.C. 208 procedures, determines that the interest is not so substantial as to be deemed likely to affect the integrity of the official's services. 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. 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.

3.104-7 Ethics advisory opinions regarding prohibitions on former official's acceptance of compensation from contractors.

(a) An official or former official of a Federal agency who does not know whether he is or would be precluded by subsection (d) of the Act (see 3.104-3(d)) from accepting compensation from a particular contractor may request advice from the appropriate designated agency ethics official (or designee) 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 3.104-3(d)(1)(iii), involving the particular contractor, in which the individual was or is involved, including contract or solicitation numbers, dates of solicitation or award, and a description of the goods or services procured or to be procured;

(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 who would be a party to the proposed conduct, 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 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 that person. 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.

(e) Where the requester engages in conduct in good faith reliance upon an ethics advisory opinion, or a contractor engages in conduct based upon good faith reliance on the requester's ethics advisory opinion, neither the requester nor the contractor shall be found to have knowingly violated the restriction in issue. Where 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 Contract clause.

(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 (see Part 2).

(b) The contracting officer shall insert the clause at 52.203-10, Price or Fee Adjustment for Illegal or Improper Activity, in all solicitations and contracts with a value exceeding the simplified acquisition threshold (see Part 2).

3.104-9 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 3.104-3), 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) Prior to 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 3.104-9 to an individual at least one organizational level above the contracting officer and of General Officer, Flag, SES or equivalent rank.

(h) Criminal and civil penalties, and administrative remedies, as set forth in subsection (e) of the Act, may apply to

conduct which violates the Act (see 3.104-3; see also 33.102(f) for special rules regarding bid protests).

4. Section 3.700 is amended by revising paragraph (a) 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, disclosing or obtaining 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 obtained 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, disclosing or obtaining 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 obtained 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 designating the existing text as paragraph (a) and 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 rescission of a contract with respect to which—

(1) The contractor or someone acting for the contractor has been convicted for an offense punishable under 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 the acronym “FAR”; and 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 (41 U.S.C. 423), 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 HCA 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 3.104-9); and

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

3.705 [Amended]

8. Section 3.705 is amended in the second sentence of paragraph (c)(3) by removing the words “the conviction” and inserting “a conviction” in its place; in paragraph (d)(1) by removing the comma after the word “therefor”; and in paragraph (d)(3) by inserting the words “offense or” before the word “final”.

PART 4—ADMINISTRATIVE MATTERS

4.803 [Amended]

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

PART 9—CONTRACTOR QUALIFICATIONS

9.105-3 [Amended]

10. Section 9.105-3 is amended in paragraph (c) by revising the parenthetical to read “(see 3.104-4)”.

9.106-3 [Amended]

11. Section 9.106-3 is amended by removing the paragraph (a) designation and paragraph (b).

9.505 [Amended]

12. Section 9.505 is amended in paragraph (b)(1) by revising “3.104-4(j)” to read “3.104-4”; and in (b)(2) by revising “3.104-4(k)” to read “3.104-4”.

PART 12—ACQUISITION OF COMMERCIAL ITEMS

12.503 [Amended]

13. Section 12.503 is amended by removing paragraph (b)(4) and redesignating (b)(5) and (b)(6) as (b)(4) and (b)(5).

12.504 [Amended]

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

PART 14—SEALED BIDDING

14.404-2 [Amended]

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

PART 15—CONTRACTING BY NEGOTIATION

15.413 [Amended]

16. Section 15.413 is amended by removing the word “proprietary” and inserting “contractor bid or proposal information” in its place.

15.413-2 [Amended]

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

15.509 [Amended]

18. Section 15.509 is amended in paragraph (f)(4) by removing “, and to complete the certification required by 3.104-9”; and by removing paragraph (h)(3).

15.805-5 [Amended]

19. Section 15.805-5 is amended in paragraph (j) by revising the parenthetical to read “(see 3.104-4)”;

PART 19—SMALL BUSINESS PROGRAMS

19.811-1 [Amended]

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

19.811-2 [Amended]

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

PART 33—PROTESTS, DISPUTES, AND APPEALS

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

33.102 General.

* * * * *

(f) No person may file a protest 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. This implements 41 U.S.C. 423(g).

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

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

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

24. Section 43.106 is removed and reserved.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

25. 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 3.104-8, insert the following clause in solicitations and contracts:

Cancellation, Rescission and Recovery of Funds for Illegal or Improper Activity (Date)

(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 (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.

52.203-9 [Reserved]

26. Section 52.203-9 is removed and reserved.

27. Section 52.203-10 is amended by revising the heading and date of the clause and paragraphs (a) and (b)(5) to read as follows:

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

* * * * *

Price or Fee Adjustment for Illegal or Improper Activity (Date)

(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 the FAR.

* * * * *

(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.

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52.203-13 [Reserved]

28. Section 52.203-13 is removed and reserved.

52.212-3 [Amended]

29. Section 52.212-3 is amended by revising the date of the provision to read “(DATE)” and removing paragraph (i).

PART 53—FORMS**53.203 [Reserved]**

30. Section 53.203 is removed and reserved.

53.302-333 [Removed]

31. Section 53.302-333 is removed.

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