

(a), (b), and the introductory text of paragraph (c); and by removing from Alternates I and II "14.202-4(f)(1)" and adding "14.202-4(e)(1)" in its place. The revised text reads as follows:

52.214-20 Bid Samples.

As prescribed in 14.201-6(o)(1), insert the following provision:

Bid Samples (Apr 2002)

(a) *Bid sample* means a product sample required to be submitted by a bidder to show those characteristics of the offered products that cannot adequately be described by specifications, purchase descriptions, or the invitation for bid (e.g., balance, facility of use, or pattern).

(b) Bidders must furnish bid samples as part of the bid. The Government must receive the bid samples by the time specified in the invitation for bids. If the bidder fails to submit samples on time, the Government will reject the bid, except that the Contracting Officer will consider a late sample sent by mail under the Late Submissions, Modifications, and Withdrawals of Bids provision of this solicitation.

(c) The Government will test or evaluate bid samples to determine compliance with all the characteristics listed for examination in this solicitation. The Government will reject the bid when the sample fails to conform to the required characteristics. Products delivered under any resulting contract must conform to—

* * * * *

(End of provision)

* * * * *

17. Revise section 52.214-21 to read as follows:

52.214-21 Descriptive Literature.

As prescribed in 14.201-6(p)(1), insert the following provision:

Descriptive Literature (Apr 2002)

(a) *Descriptive literature*, as used in this provision, means information furnished by a bidder, such as cuts, illustrations, drawings, and brochures, that shows a product's characteristics or construction or explains its operation. The term includes only that information required to evaluate the acceptability of the product and excludes other information for operating or maintaining the product.

(b) Descriptive literature is required to establish, for the purpose of evaluation and award, details of the product offered that are specified elsewhere in the solicitation and pertain to significant elements such as—

- (1) Design;
- (2) Materials;
- (3) Components;
- (4) Performance characteristics; and
- (5) Methods of manufacture, assembly, construction, or operation.

(c) Descriptive literature, required elsewhere in this solicitation, shall be—

- (1) Identified to show the item(s) of the offer to which it applies; and
- (2) Received by the time specified in this solicitation.

(d) If the bidder fails to submit descriptive literature on time, the Government will reject the bid, except that late descriptive literature sent by mail may be considered under the Late Submissions, Modifications, and Withdrawals of Bids provision of this solicitation.

(e) If the descriptive literature fails to show that the product offered conforms to the requirements of the solicitation, the Government will reject the bid.

(End of provision)

Alternate I (Apr 2002). As prescribed in 14.201-6(p)(2), add the following paragraphs (f) and (g) to the basic provision:

(f) The Contracting Officer may waive the requirement for furnishing descriptive literature if the offeror has supplied a product that is the same as that required by this solicitation under a prior contract. A bidder that requests a waiver of this requirement shall provide the following information:

Prior contract number _____
Date of prior contract _____
Contract line item number of product supplied _____
Name and address of Government activity to which delivery was made _____
Date of final delivery product supplied _____

(g) Bidders shall submit bids on the basis of required descriptive literature or on the basis of a previously supplied product under paragraph (f) of this provision. A bidder submitting a bid on one of these two bases may not elect to have its bid considered on the alternative basis after the time specified for receipt of bids. The Government will disregard a bidder's request for a waiver under paragraph (f) if that bidder has submitted the descriptive literature requested under this solicitation.

[FR Doc. 02-5822 Filed 3-19-02; 8:45 am]

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 2, 3, 4, 9, 15, and 52

[FAC 2001-06; FAR Case 1998-024; Item IV]

RIN 9000-AI61

Federal Acquisition Regulation; Procurement Integrity Rewrite

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

(Councils) have agreed on a final rule amending the Federal Acquisition Regulation (FAR) to rewrite procurement integrity coverage in plain language.

DATES: *Effective Date:* April 4, 2002.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat, Room 4035, GS Building, Washington, DC 20405, (202) 501-4755, for information pertaining to status or publication schedules. For clarification of content, contact Mr. Ralph De Stefano, Procurement Analyst, at (202) 501-1758. Please cite FAC 2001-06, FAR case 1998-024.

SUPPLEMENTARY INFORMATION:

A. Background

Section 27 of the Office of Federal Procurement Policy Act (41 U.S.C. 423) is more commonly referred to as the Procurement Integrity Act (hereinafter referred to as the Act). FAR 3.104 implements prohibitions, restrictions, and other requirements of the Act that are placed on certain agency officials that participate in Federal agency procurements.

Other statutes and regulations also govern the conduct of Government employees. In particular, the Office of Government Ethics regulations provide interpretive guidance on the prohibitions in 18 U.S.C. 207 and 208 that also apply to Government employees that participate in procurement activities during the conduct of a Federal agency procurement. While FAR 3.104 does not implement these other statutes and regulations, it is very important for agency employees to be aware, not only of the prohibitions and restrictions in the Act, but also those contained in other statutes and regulations that deal with the same or related prohibited conduct. Criminal and administrative penalties can result if an employee violates the restrictions or otherwise engages in prohibited conduct.

It became apparent that we could improve FAR 3.104 by reorganizing and simplifying the text. Moreover, we clarify 3.104 to alert agency officials that even if their participation does not meet the definition in FAR 3.104 of participating personally and substantially, they are precluded from participating in a Federal agency procurement if they engage in certain conduct otherwise prohibited by other statutes and regulations. We added this guidance in FAR 3.104-2(b), 3.104-3(c), and 3.104-5(a) to alert these agency officials that they should seek advice from agency ethics officials before engaging in certain activities that could have serious consequences, including

criminal prosecution. These revisions to FAR 3.104 do not change either the requirements of the Act or change, in any manner, who is covered by, or the activities covered in, Office of Government Ethics regulations interpreting conflict of interest statutes.

To avoid possible violations of 18 U.S.C. 208, agency employees need to be aware that while their participation in a Federal agency procurement may not be considered "participating personally and substantially in a Federal agency procurement" for purposes of certain requirements in the Act, nevertheless, there will be instances where the employee will be considered to be participating personally and substantially for purposes of 18 U.S.C. 208. We have added these revisions to FAR 3.104 to alert agency officials that, while participating in a Federal agency procurement, they must be aware of and comply with the applicable disqualification requirements of 5 CFR 2635.604 and 2635.606.

These revisions also may assist agency ethics officials in advising agency officials participating in a Federal agency procurement. Certain conduct by an agency official during the conduct of a Federal agency procurement requires the official's disqualification from participation irrespective of whether or not the official's participation meets the definition of participating personally and substantially for purposes of the Act.

A proposed rule was published in the **Federal Register** at 65 FR 16758, March 29, 2000. Seven sources submitted comments in response to the proposed rule. All comments were considered in the development of the final rule. A summary of the substantive comments is provided.

- *Comment:* Additional clarification should be added that merely signing appointment letters for source selection evaluation panels, boards is not "participating personally and substantially participation in a Federal agency procurement."

Response: Not accepted. The definition of "participating personally and substantially in a Federal agency procurement" is already quite detailed and more clarification is unnecessary.

- *Comment:* The standards identified in FAR 3.104-3(d) concerning prohibition on a former official's acceptance of compensation from a contractor that has been awarded a competitive or sole source contract, as an employee, officer, director, or consultant of the contractor should be made more restrictive.

Response: Not accepted. The regulatory coverage tracks the statutory language.

- *Comment:* A definition of "must" should be added.

Response: The definition of "must" was added to FAR 2.101 under another final rule and is currently in the FAR.

- *Comment:* Does the definition of "source selection information" include quotations in FAR Subpart 13.5, Test Program for Certain Commercial Items, that are over the simplified acquisition threshold, normally over \$100,000.

Response: No. Bids and proposals are addressed in the Act. Bids and proposals are terms of art to distinguish methods of contracting (bids under sealed bidding and proposals under negotiation). A quotation is not a bid or a proposal.

- *Comment:* The references to "procurement" in the rule should be changed to read "acquisition."

Response: Not accepted. The Act and its implementation in FAR 3.104 apply only to a "Federal agency procurement." The term "Federal agency procurement" is defined in both the Act and FAR 3.104. The definition is different from the definition of "acquisition" in FAR 2.101.

- *Comment:* Head of the contracting activity delegation restrictions in FAR 3.104-7(g) should be relaxed.

Response: Not accepted. The issues being addressed are very significant, i.e., violations or possible violations of the Act; therefore, relaxation of the restriction is not appropriate.

- *Comment:* Informing acquisition employees that some post-employment restrictions are not tied to "personal and substantial participation" should be added in the rule.

Response: Accepted. See discussion under Supplementary Information, Background, above.

- *Comment:* Suggest retaining current FAR definition at FAR 3.104-1, "Participating personally and substantially in a Federal agency procurement," as applied to the OMB Circular A-76, paragraph (4). The proposed rule contains an expanded definition.

Response: Accepted. The 1996 amendments to the Act limit the application of the post-employment restrictions to designated positions; therefore, the participation of most personnel in these activities would not place them at risk of losing any right of first refusal. See paragraph (4)(iv) of FAR 3.104-1, "Participating substantially".

- *Comment:* Clarify what constitutes a "contact" under the Act. *Response:* An explanation of "contact" was added to

the rule at FAR 3.104-3(c)(2). The addition gives the suggested guidance.

- *Comment:* A clarification that employment contacts through agents are subject to disqualification needs to be added at FAR 3.104-5(a).

Response: Accepted. The added language makes a clear statement that an employment contact through agents is subject to disqualification under this final rule.

- *Comment:* The number of individuals required to receive the disqualification notice directly from the agency official disqualifying herself/himself should be reduced.

Response: Partially accepted. The requirement for a notice of disqualification to the head of the contracting activity was deleted, but the requirements for notice to the contracting officer, source selection official, and immediate supervisor were retained. In an attempt to reduce the number of officials required to be notified, it was determined that the head of the contracting activity could be deleted. The Act places an affirmative responsibility on the agency official to disqualify herself/himself.

- *Comment:* Clarify that satisfying the requirement of 18 U.S.C 208 does not automatically authorize the disqualified official to resume participation in the procurement.

Response: The wording of the first sentence of 3.104-5(c) was revised to clarify that the conditions for resumption of participation in 3.104-3(c)(1)(ii) are statutorily mandated and that reinstatement is not necessarily automatic after those conditions have been met.

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 Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this final rule will not 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 the clarification only applies to individuals that are Government officials.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose information collection requirements that require the

approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

List of Subjects in 48 CFR Parts 2, 3, 4, 9, 15, and 52

Government procurement.

Dated: March 6, 2002.

Al Matera,

Director, Acquisition Policy Division.

Therefore, DoD, GSA, and NASA amend 48 CFR parts 2, 3, 4, 9, 15, and 52 as set forth below:

1. The authority citation for 48 CFR parts 2, 3, 4, 9, 15, and 52 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 2—DEFINITIONS OF WORDS AND TERMS

2. Amend section 2.101 by adding, in alphabetical order, the definitions “Offeror” and “Source selection information” to read as follows:

2.101 Definitions.

* * * * *

Offeror means offeror or bidder.

* * * * *

Source selection information means any of the following information that is prepared for use by an agency for the purpose of evaluating a bid or proposal to enter into an 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 an agency invitation for bids, or lists of those bid prices before bid opening.
- (2) Proposed costs or prices submitted in response to an 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 2.101 and 3.104” based on a case-by-case determination by the head of the agency or the contracting officer, that its disclosure would jeopardize the integrity or successful completion of the

Federal agency procurement to which the information relates.

* * * * *

PART 3—IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST

3. Remove sections 3.104–10 and 3.104–11 and revise sections 3.104 through 3.104–9 to read as follows:

3.104 Procurement integrity.

3.104–1 Definitions.

As used in this section—

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

(1) Deputy ethics officials described in 5 CFR 2638.204, to whom authority under 3.104–6 has been delegated by the designated agency ethics official; and

(2) Alternate designated agency ethics officials described in 5 CFR 2638.202(b).

Compensation means wages, salaries, honoraria, commissions, professional fees, and any other form of compensation, provided directly or indirectly for services rendered. Compensation is indirectly provided if it is paid to an entity other than the individual, specifically in exchange for services provided by the individual.

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

(1) Cost or pricing data (as defined by 10 U.S.C. 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 52.215–1(e).

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

Federal agency procurement means the acquisition (by using competitive procedures and awarding a contract) of goods or services (including construction) from non-Federal sources by a Federal agency using appropriated funds. For broad agency announcements and small business innovative research programs, each proposal received by an agency constitutes 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); or

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

Participating personally and substantially in a Federal agency procurement means—

(1) Active and significant involvement of an official in any of the following activities directly related to that procurement:

(i) Drafting, reviewing, or approving the specification or statement of work for the procurement.

(ii) Preparing or developing the solicitation.

(iii) Evaluating bids or proposals, or selecting a source.

(iv) Negotiating price or terms and conditions of the contract.

(v) Reviewing and approving the award of the contract.

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

(3) *Participating substantially* means that the official's involvement is of significance to the matter. Substantial participation requires more than official responsibility, knowledge, perfunctory

involvement, or involvement on an administrative or peripheral issue. Participation may be substantial even though it is not determinative of the outcome of a particular matter. A finding of substantiality should be based not only on the effort devoted to a matter, but on the importance of the effort. While a series of peripheral involvements may be insubstantial, the single act of approving or participating in a critical step may be substantial. However, the review of procurement documents solely to determine compliance with regulatory, administrative, or budgetary procedures, does not constitute substantial participation in a procurement.

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

(i) Agency-level boards, panels, or other advisory committees that review program milestones or evaluate and make recommendations regarding 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.

(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.

3.104-2 General.

(a) This section implements section 27 of the Office of Federal Procurement Policy Act (the Procurement Integrity Act) (41 U.S.C. 423) referred to as "the Act"). Agency supplementation of 3.104, including specific definitions to identify individuals who occupy positions specified in 3.104-3(d)(1)(ii), and any clauses required by 3.104 must be approved by the senior procurement executive of the agency, unless a law

establishes a higher level of approval for that agency.

(b) Agency officials 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 and 10 U.S.C. 2207. The acceptance of a gift, under certain circumstances, is prohibited by 5 U.S.C. 7353 and 5 CFR part 2635;

(2) Contacts with an offeror during the conduct of an acquisition may constitute "seeking employment," (see subpart F of 5 CFR part 2636 and 3.104-3(c)(2)). Government officers and employees (employees) are prohibited by 18 U.S.C. 208 and 5 CFR part 2635 from participating personally and substantially in any particular matter that would affect the financial interests of any person with whom the employee is seeking employment. An employee who engages in negotiations or is otherwise seeking employment with an offeror or who has an arrangement concerning future employment with an offeror must comply with the applicable disqualification requirements of 5 CFR 2635.604 and 2635.606. The statutory prohibition in 18 U.S.C. 208 also may require an employee's disqualification from participation in the acquisition even if the employee's duties may not be considered "participating personally and substantially," as this term is defined in 3.104-1;

(3) Post-employment restrictions are covered by 18 U.S.C. 207 and 5 CFR parts 2637 and 2641, that 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. Additional restrictions apply to certain senior Government employees and for particular matters under an employee's official responsibility;

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

(5) Release of information both before and after award (see 3.104-4) may be prohibited by the Privacy Act (5 U.S.C. 552a), the Trade Secrets Act (18 U.S.C. 1905), and other laws; and

(6) Using nonpublic information to further an employee's private interest or that of another and engaging in a financial transaction using nonpublic

information are prohibited by 5 CFR 2635.703.

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

(a) *Prohibition on disclosing procurement information (subsection 27(a) of the Act).* (1) A person described in paragraph (a)(2) of this subsection must not, other than as provided by law, knowingly disclose contractor bid or proposal information or source selection information before the award of a Federal agency procurement contract to which the information relates. (See 3.104-4(a).)

(2) Paragraph (a)(1) of this subsection applies to any person who—

(i) Is a present or former official of the United States, or a person who is acting or has acted for or on behalf of, or who is advising or has advised the United States with respect to, a Federal agency procurement; and

(ii) By virtue of that office, employment, or relationship, has or had access to contractor bid or proposal information or source selection information.

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

(c) *Actions required when an agency official contacts or is contacted by an offeror regarding non-Federal employment (subsection 27(c) of the Act).* (1) If an agency official, participating personally and substantially in a Federal agency procurement for a contract in excess of the simplified acquisition threshold, contacts or is contacted by a person who is an offeror in that Federal agency procurement regarding possible non-Federal employment for that official, the official must—

(i) Promptly report the contact in writing to the official's supervisor and to the agency ethics official; and

(ii) Either reject the possibility of non-Federal employment or disqualify himself or herself from further personal and substantial participation in that Federal agency procurement (see 3.104-5) until such time as the agency authorizes the official to resume participation in that procurement, in accordance with the requirements of 18 U.S.C. 208 and applicable agency regulations, because—

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

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

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

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

(4) Conduct that complies with subsection 27(c) of the Act may be prohibited by other criminal statutes and the Standards of Ethical Conduct for Employees of the Executive Branch. See 3.104-2(b)(2).

(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 that has been awarded a competitive or sole source contract, as an employee, officer, director, or consultant of the contractor within a period of 1 year after such former official—

(i) Served, 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 decision to—

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

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

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

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

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

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

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

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

(3) Nothing 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 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 agency head or the contracting officer to receive such information.

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

(c) Individuals unsure if particular information is source selection information, as defined in 2.101, should consult with agency officials as necessary. Individuals responsible for preparing material that may be source selection information as described at paragraph (10) of the "source selection information" definition in 2.101 must mark the cover page and each page that the individual believes contains source selection information with the legend "Source Selection Information—See FAR 2.101 and 3.104." Although the information in paragraphs (1) through (9) of the definition in 2.101 is considered to be source selection information whether or not marked, all reasonable efforts must be made to mark such material with the same legend.

(d) Except as provided in paragraph (d)(3) of this subsection, the contracting officer must notify the contractor in writing if the contracting officer believes that proprietary information, contractor bid or proposal information, or information marked in accordance with 52.215-1(e) has been inappropriately marked. The contractor that has affixed the marking must be 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 release the information.

(2) If, after reviewing the contractor's justification, the contracting officer determines that the marking is not justified, the contracting officer must notify the contractor in writing before releasing the information.

(3) For technical data marked as proprietary by a contractor, the contracting officer must follow the procedures in 27.404(h).

(e) This section does not restrict or prohibit—

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

(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) This section does not 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 release containing contractor bid or proposal information or source selection information must clearly identify the information as contractor bid or proposal information or source selection information related to the conduct of a Federal agency procurement and notify the recipient that the disclosure of the information is restricted by section 27 of the Act;

(2) The withholding of information from, or restricting its receipt by, the Comptroller General 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 that pertains to another procurement; or

(4) The disclosure, solicitation, or receipt of bid or proposal information or source selection information after award if disclosure, solicitation, or receipt is prohibited by law. (See 3.104–2(b)(5) and subpart 24.2.)

3.104–5 Disqualification.

(a) *Contacts through agents or other intermediaries.* Employment contacts between the employee and the offeror, that are conducted through agents, or other intermediaries, may require disqualification under 3.104–3(c)(1). These contacts may also require disqualification under other statutes and regulations. (See 3.104–2(b)(2).)

(b) *Disqualification notice.* In addition to submitting the contact report required by 3.104–3(c)(1), an agency official who must disqualify himself or herself pursuant to 3.104–3(c)(1)(ii) must promptly submit written notice of disqualification from further participation in the procurement to the contracting officer, the source selection authority if other than the contracting officer, and the agency official's immediate supervisor. As a minimum, the notice must—

- (1) Identify the procurement;
- (2) Describe the nature of the agency official's participation in the procurement and specify the approximate dates or time period of participation; and
- (3) Identify the offeror and describe its interest in the procurement.

(c) *Resumption of participation in a procurement.* (1) The official must remain disqualified until such time as the agency, at its sole and exclusive discretion, authorizes the official to resume participation in the procurement in accordance with 3.104–3(c)(1)(ii).

(2) After the conditions of 3.104–3(c)(1)(ii)(A) or (B) have been met, the head of the contracting activity (HCA), after consultation with the agency ethics official, may authorize the disqualified official to resume participation in the procurement, or may determine that an additional disqualification period is necessary to protect the integrity of the procurement process. In determining the disqualification period, the HCA must consider any factors that create an appearance that the disqualified official acted without complete impartiality in the procurement. The HCA's reinstatement decision should be in writing.

(3) Government officer or employee must also comply with the provisions of 18 U.S.C. 208 and 5 CFR part 2635 regarding any resumed participation in

a procurement matter. Government officer or employee may not be reinstated to participate in a procurement matter affecting the financial interest of someone with whom the individual is seeking employment, unless the individual receives—

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

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

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

(a) An official or former official of a Federal agency who does not know whether he or she is or would be precluded by subsection 27(d) of the Act (see 3.104–3(d)) from accepting compensation from a particular contractor may request advice from the appropriate agency ethics official before accepting such compensation.

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

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

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

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

(c) Within 30 days after receipt of a request containing complete information, or as soon thereafter as practicable, the agency ethics official should issue an opinion on whether the proposed conduct would violate subsection 27(d) of the Act.

(d)(1) If complete information is not included in the request, the agency ethics official may ask the requester to provide more information or request information 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 will 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.

3.104–7 Violations or possible violations.

(a) A contracting officer who receives or obtains information of a violation or possible violation of subsection 27(a), (b), (c), or (d) of the Act (see 3.104–3) must determine if the reported violation or possible violation has any impact on the pending award or selection of the contractor.

(1) If the contracting officer concludes that there is no impact on the procurement, the contracting officer must forward the information concerning the violation or possible violation and documentation supporting a determination that there is no impact on the procurement to an individual designated in accordance with agency procedures.

(i) If that individual concurs, the contracting officer may proceed with the procurement.

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

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

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

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

(2) Begin an investigation;

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

(4) Conclude that a violation occurred; or

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

(c) Before concluding that an offeror, contractor, or person has violated the Act, the HCA may consider that the interests of the Government are best served by requesting information from appropriate parties regarding the violation or possible violation.

(d) If the HCA concludes that section 27 of the Act has been violated, the HCA may direct the contracting officer to—

(1) If a contract has not been awarded—

- (i) Cancel the procurement;
- (ii) Disqualify an offeror; or
- (iii) Take any other appropriate actions in the interests of the Government.

(2) If a contract has been awarded—

- (i) Effect appropriate contractual remedies, including profit recapture under the clause at 52.203–10, Price or Fee Adjustment for Illegal or Improper Activity, or, if the contract has been rescinded under paragraph(d)(2)(ii) of this subsection, recovery of the amount expended under the contract;
- (ii) Void or rescind the contract with respect to which—

(A) 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—

(1) Exchanging the information covered by the 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 agency head has determined, based upon a preponderance of the evidence, that the contractor or someone acting for the contractor has engaged in conduct constituting an offense punishable under 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 suspending or debarring official.

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

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

award the contract or execute the contract modification after notifying the agency head.

(g) The HCA may delegate his or her authority under this subsection to an individual at least one organizational level above the contracting officer and of General Officer, Flag, Senior Executive Service, or equivalent rank.

3.104–8 Criminal and civil penalties, and further administrative remedies.

Criminal and civil penalties, and administrative remedies, may apply to conduct that violates the Act (see 3.104–3). See 33.102(f) for special rules regarding bid protests. See 3.104–7 for administrative remedies relating to contracts.

(a) An official who knowingly fails to comply with the requirements of 3.104–3 is subject to the penalties and administrative action set forth in subsection 27(e) of the Act.

(b) An offeror who engages in employment discussion with an official subject to the restrictions of 3.104–3, knowing that the official has not complied with 3.104–3(c)(1), is 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 3.104–5) may be subject to agency administrative actions under 5 CFR 2635.604(d) if the official's disqualification from participation in a particular procurement interferes substantially with the individual's ability to perform assigned duties.

3.104–9 Contract clauses.

In solicitations and contracts for other than commercial items that exceed the simplified acquisition threshold, insert the clauses at—

(a) 52.203–8, Cancellation, Rescission, and Recovery of Funds for Illegal or Improper Activity; and

(b) 52.203–10, Price or Fee Adjustment for Illegal or Improper Activity.

3.704 [Amended]

4. Amend section 3.704 in paragraph (c)(1) by removing “3.104–10” and adding “3.104–7” in its place.

PART 4—ADMINISTRATIVE MATTERS

5. Amend section 4.802 in paragraphs (a)(1), (a)(2), and (a)(3) by removing “, which shall document” and adding “that documents” in their place; in the introductory text of paragraph (c) by removing “shall” the first time it appears and adding “must” in its place, and removing “shall” the second time it appears; in the first sentence of

paragraph (d) by removing “shall” and adding “must” in its place; and by revising paragraph (e) 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 2.101 must be protected from disclosure to unauthorized persons (see 3.104–4).

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PART 9—CONTRACTOR QUALIFICATIONS

9.105–3 [Amended]

6. Amend section 9.105–3 in paragraph (c) by removing “and/or” and adding “or” in its place, and by removing “3.104–3” and adding “3.104–4” in its place.

9.505 [Amended]

7. Amend section 9.505 in paragraph (b)(2) by removing “3.104–3” and adding “2.101” in its place.

PART 15—CONTRACTING BY NEGOTIATION

8. Amend section 15.404–2 by revising paragraph (a)(5) to read as follows:

15.404–2 Information to support proposal analysis.

(a) * * *

(5) Field pricing information and other reports may include proprietary or source selection information (see 2.101). This information must be appropriately identified and protected accordingly.

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PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

52.203–8 [Amended]

9. Amend section 52.203–8 in the introductory paragraph by removing “in solicitations and contracts”.

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