Ethics and Government Contracts: New Rules and Avoiding Common Mistakes

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INTRODUCTION

- Government focus on contractor ethics/compliance
- Government employee gift restrictions
- Anti-Kickback Act/Alliance Agreement cases
- Procurement Integrity/Hiring Government Employees
- Organizational Conflicts of Interest (OCI)
- FAR Rule – Mandatory Contractor Ethics Program
- Successful Compliance Program Basics
WHAT IS A “GIFT”? 

- Standards of Conduct for Executive Branch, *5 CFR 2635*
  - Attachment A to Course Materials

- No “Bad Intent” required – strict liability standard

- Anything of monetary value, including:
  - Gratuities
  - Entertainment
  - Loans/Forgiveness of loans
  - Transportation, Meals and Lodging

- Subject to “exclusions” and “exceptions”
MUST BE GIVEN BY A “PROHIBITED SOURCE”

- 5 C.F.R. § 2635.203(d)

- “Prohibited source” is any “person” (company):
  - Seeking official action by the employee's agency
  - Doing or seeking business with the employee's agency
    - i.e., government contractor sales and project staff
  - Regulated by the employee's agency
GIFT MUST BE GIVEN DUE TO “OFFICIAL POSITION”

- 5 C.F.R. § 2635.203(e)

- Test: would the gift not have been offered “but for” the employee’s position as a Federal employee?

- Office of Government Ethics (OGE) example - opera tickets offered to senior government official

- http://www.usoge.gov/home.html
GIFT “EXCLUSIONS”

- 5 C.F.R. § 2635.203(b)(1)-(9)

- 9 exclusion scenarios where there is no “gift,” including:
  - Modest food and refreshment: soft drinks, coffee and donuts
  - Items with little intrinsic value: plaques, certificates, etc.
  - Rewards and prizes in contests open to the general public
  - Employee pays “market value”
    - Market value = retail cost to purchase the item
    - “Your cost” is not the correct test
    - The market value of a ticket is its face value
GIFT “EXCEPTIONS”

- 5 C.F.R. § 2635.204(a)-(l)

- 12 “Exceptions” where Government employee may accept gifts from a prohibited source

- Still a “gift” (contrast to “exclusions”)

- Common Gift “exceptions”:
  - Gifts of $20 or less
  - Gifts based on a personal relationship
  - Discounts and similar benefits
$20 / $50 RULE

- 5 C.F.R. § 2635.204(a)
- $20 or less per occasion and $50 per year from one person
- Never Cash or Investments
- “No Credit” Rule -- where the “market value” of a gift offered on any single occasion > $20, the employee may not pay the excess value
  - $55 piece of luggage, cannot apply $20 to the gift and pay $35
- Multiple Items – if aggregate value > $20, the employee may decline distinct and separate item and accept item worth $20
GIFTS BASED ON PERSONAL RELATIONSHIP

- 5 C.F.R. § 2635.204(b)

- Given because of family relationship or personal friendship, NOT the employee's Government position

- Relationships questionable if:
  - a family member works for a prohibited source
  - an employee develops a friendship with a prohibited source

- Consider:
  - history of the relationship
  - whether the contractor reimburses the family member or friend
DISCOUNTS AND SIMILAR BENEFITS

- 5 C.F.R. § 2635.204(c)

- Employees may accept benefits available to:
  - the public
  - all Government employees
  - all uniformed military personnel
  - members of a group or class in which membership is unrelated to Government employment (e.g., ABA)
GRATUITIES CLAUSE (FAR 3.2 AND 52.203-3)

- If agency head determines contractor:
  - Offered or gave a gratuity to an agency official
  - With the intent to obtain a contract or favorable treatment under a contract

- Agency may:
  - Terminate contract
  - Debar or suspend contractor
  - Assess exemplary damages if DoD funded
U.S. V. TYSON FOODS, INC.

- Former Agriculture Secretary Mike Espy
- Tickets to inaugural dinner: $6,000
- Airfare to Alaska for girlfriend: $830
- Lodging/entertainment at Tyson birthday party: $1,726
- Airfare to Dallas for girlfriend: $1,009
- Limousines in Dallas: $968
- Dallas Cowboys playoff game: $110
U.S. V. TYSON FOODS, INC.

- Total amount of gifts less than $12K
- Tyson pleaded guilty to making illegal gifts and paid:
  - $4,000,000 Fine
  - $2,000,000 For Independent Counsel expenses
KICKBACKS

- Anti-Kickback Act, 41 U.S.C. 51-58

- Broad definition: anything of value, given or received, directly or indirectly, for the purpose of improperly obtaining or rewarding favorable treatment in connection with the award or administration of a Federal contract or subcontract

- Kickbacks can occur when a prime contractor’s employee accepts something of value from a subcontractor to:
  - award or extend a subcontract
  - remove competitors from a list of suppliers
  - waive contract or bidding deadlines

- Bad intent is required – “improperly”
“ALLIANCE AGREEMENT” CASES

- Major information technology (IT) advisors to government agencies (HP, Sun, Accenture)
- Advisors viewed as having fiduciary responsibility to the agency
- “Alliance benefits” routinely paid by technology providers to reward “alliance partners” for influencing customer buying decisions
- Is an indisputably standard commercial practice “improper”?
- Allegation – “alliance benefits” given by technology providers to government advisors = kickbacks and undisclosed conflict
ALLIANCE AGREEMENT CONSIDERATIONS

- Does the “alliance partner” have a possible fiduciary role and duty to act as an independent advisor to the agency?

- Are any of these standard commercial arrangements involved:
  - Discounts
  - Concessions
  - Marketing agreements, teaming agreements
  - Bona fide agency

- Disclosure of alliance arrangement to government agency
  - Helpful but not guarantee

- Structure “alliance” agreements and benefits very carefully
PROCUREMENT INTEGRITY ACT

- Office of Federal Procurement Policy Act (the Procurement Integrity Act), 41 U.S.C. 423

- FAR 3.104, “Procurement Integrity”
  - Attachment B to Course Materials

- Agency-specific rules often prescribed in agency “supplements” to FAR 3.104
PROCUREMENT INTEGRITY

- Fair Play” is a cornerstone of public procurement. FAR 3.101-1

- Sensitive information protected from inappropriate use/disclosure
  - Contractor “bid or proposal information”
    - Proprietary information and costs, rates, etc.
  - Government “Source Selection Information”
    - Bid prices, source selection plans, rankings, etc.
    - Disclosure would jeopardize integrity or success of procurement

- Employment discussions and post-employment restrictions
PROCUREMENT SENSITIVE INFORMATION

- Prohibits knowingly obtaining contractor “bid or proposal information” or government “source selection information” before contract award
  - Debriefing rules in FAR 15.6 usually govern post-award procurement information disclosure rules
  - Does not apply to pre-solicitation “market research” contacts

- Applies to government employees and contractor personnel

- Common problem of pre-award disclosure of bid pricing
BARGAINING - FAR 15.306(d)

- Exchanges with offerors...may include bargaining

- “Bargaining” = persuasion, alteration of assumptions and positions, give-and-take, and may apply to price, schedule, technical requirements, etc.

- Limits on exchanges. Shall not reveal an offeror's price without that offeror's permission...but may inform offeror that Government considers price too high or too low

- “Fine line” between “bargaining” and disclosure of contractor “bid or proposal” information
PRACTICAL RULES FOR “BARGAINING”

- Never ask for competitor’s price
  - OK to ask about your price reasonableness

- Never submit a revised quote in response to Government disclosure of a competitor’s price
  - OK to reduce price in response to Government request, as long as no transmission of information about competitors’ pricing

- Internal reporting procedure where the Government reveals (orally or in writing) a competitor’s price
PROBLEMS WITH GOVERNMENT EMPLOYEE HIRING

- Darleen Druyun
  - 2003 - negotiating procurement contracts and employment with Boeing
  - Large Boeing contracts overturned

- GAO Report May 2008
  - Examines Government FY 2006
  - Widespread hiring of DoD procurement officials
  - Concerns over contractor hiring and monitoring of former government employee activities after being hired

- DoD agrees with GAO
  - Panel on Contractor Integrity
  - Examining need for additional safeguards
RESTRICTIONS ON EMPLOYMENT DISCUSSIONS

- If a Government employee participating “personally and substantially” in a procurement > SAT ($100k) has employment contacts with an offeror:
  - Must promptly report to supervisor and ethics officer
  - Reject offer or disqualify

- “Personally” = direct participation or active supervision of a subordinate’s participation

- “Substantially” = employee’s involvement is “of significance” to the outcome but need not be “outcome determinative”
RESTRICTIONS ON EMPLOYMENT DISCUSSIONS

- Employment “contact” (“seeking employment”) includes:
  - “Negotiations” - communications, either direct or through an intermediary re: non-Federal employment
  - An unsolicited communication made by employee to a prospective employer (other than requesting an application)
  - An unsolicited communication made by a prospective employer which the employee does not immediately reject

- Need not reach the level of negotiations or salary discussions

- Nor must contact occur at an office or worksite
POST-EMPLOYMENT RESTRICTIONS

- Restricts certain (former) “officials” from accepting compensation from contractors for one year

- Restriction applies if:
  - Contractor receives award > $10 million and “official” is PCO, SSA or evaluation team lead
  - Official is ACO or PM for contract > $10 million
  - Official personally awards contract, establishes contractor rates or approves payment of a contractor claim > $10 million

- “Section 847” of FY 2008 defense authorizations act
  - DoD officials must obtain ethics letter on post-employment restrictions
  - Contractors must determine employee sought and received for 2 years after DoD officials leave DoD
PROCEDURES FOR HIRING GOVERNMENT EMPLOYEES

- Mandatory Human Resources (HR) pre-screening question: “is the prospective hire a government employee?”

- Determine whether government employee/potential hire has a contract award or administration role
  - Assess possible employment contact restrictions and disclosure requirements
  - Assess possible post-employment restrictions

- Procedure requiring consultation with HR before initiating employment discussions with government employees

- Require agency ethics clearance letter from senior government employees and acquisition personnel
ORGANIZATIONAL CONFLICT OF INTEREST (OCI)

- FAR Subpart 9.5
  - Attachment C to Course Materials

- Different from “personal” conflict of interest – conflict relates to the “organization”

- Three general OCI categories
  - “Biased Ground Rules”
  - “Unfair Advantage”
  - “Unequal Access to Information”

- FAR 9.508 – common OCI “example” fact patterns
ORGANIZATIONAL CONFLICTS OF INTEREST (OCI)

- Contracting Officer duty to identify and address OCIs

- OCI frequently arises as a bid protest allegation by competing contractors

- OCI mitigation plan

- Look for RFP-specific OCI certifications:
  - SAIC - on-going civil False Claims Act prosecution

- Consider OCI impact when acquiring a company in the same or similar industry
MANDATORY CONTRACTOR ETHICS PROGRAM

- FAR Rule effective 12/24/2007
  - Attachment D to Course Material

- “Mandatory disclosure” and “full cooperation” removed

- Requirements include:
  - Code of ethics and business conduct (30 days from award)
  - Display of fraud hotline posters
  - Ethics training and internal compliance control system (90 days from award)
MANDATORY CONTRACTOR ETHICS PROGRAM

- Applies to contracts valued > $5 million with > 120 day period of performance

- Subcontractor flow down requirement
  - No prime contractor oversight duty

- Exception for “commercial item” contracts and subcontracts

- Small business exception to training and internal controls

- Congressional movement to eliminate exceptions to coverage

- Question: is reliance on exceptions a good idea?
SUCCESSFUL COMPLIANCE PROGRAM BASICS

- Code of Ethics and Business Conduct
  - “Roadmap” of the key compliance issues
  - Won’t answer every question but “flags” issues and provides clear avenues to obtain accurate answers

- Management commitment to ethical business practices

- Compliance Officer
  - Senior company employee
SUCCESSFUL COMPLIANCE PROGRAM BASICS

- Compliance or Fraud Reporting Hotline
  - Allow anonymous reporting
- Compliance awareness training
- Internal compliance reviews
- Prompt remedial action and discipline
- Plan updates and reporting to management
- *In Re Caremark Industries* and Federal Sentencing Guidelines
Attachment A
Office of Government Ethics

they need not be issued as part of an agency's supplemental agency regulations, those regulations or instructions may be promulgated separately from the agency's supplemental agency regulations.

(d) Employees of a State or local government or other organization who are serving on detail to an agency, pursuant to 5 U.S.C. 3371, et seq., are subject to any requirements in addition to those in this part, established by a supplemental agency regulation issued under this section to the extent that such regulation expressly provides.


§ 2635.106 Disciplinary and corrective action.

(a) Except as provided in §2635.107, a violation of this part or of supplemental agency regulations may be cause for appropriate corrective or disciplinary action to be taken under applicable Governmentwide regulations or agency procedures. Such action may be in addition to any action or penalty prescribed by law.

(b) It is the responsibility of the employing agency to initiate appropriate disciplinary or corrective action in individual cases. However, corrective action may be ordered or disciplinary action recommended by the Director of the Office of Government Ethics under the procedures at part 2638 of this chapter.

(c) A violation of this part or of supplemental agency regulations, as such, does not create any right or benefit, substantive or procedural, enforceable at law by any person against the United States, its agencies, its officers or employees, or any other person. Thus, for example, an individual who alleges that an employee has failed to adhere to laws and regulations that provide equal opportunity regardless of race, color, religion, sex, national origin, age, or handicap is required to follow applicable statutory and regulatory procedures, including those of the Equal Employment Opportunity Commission.

§ 2635.107 Ethics advice.

(a) As required by §§ 2638.201 and 2638.202(b) of this chapter, each agency has a designated agency ethics official who, on the agency's behalf, is responsible for coordinating and managing the agency's ethics program, as well as an alternate. The designated agency ethics official has authority under §2638.204 of this chapter to delegate certain responsibilities, including that of providing ethics counseling regarding the application of this part, to one or more deputy ethics officials.

(b) Employees who have questions about the application of this part or any supplemental agency regulations to particular situations should seek advice from an agency ethics official. Disciplinary action for violating this part or any supplemental agency regulations will not be taken against an employee who has engaged in conduct in good faith reliance upon the advice of an agency ethics official, provided that the employee, in seeking such advice, has made full disclosure of all relevant circumstances. Where the employee's conduct violates a criminal statute, reliance on the advice of an agency ethics official cannot ensure that the employee will not be prosecuted under that statute. However, good faith reliance on the advice of an agency ethics official is a factor that may be taken into account by the Department of Justice in the selection of cases for prosecution. Disclosures made by an employee to an agency ethics official are not protected by an attorney-client privilege. An agency ethics official is required by 28 U.S.C. 535 to report any information he receives relating to a violation of the criminal code, title 18 of the United States Code.

Subpart B—Gifts From Outside Sources

§ 2635.201 Overview.

This subpart contains standards that prohibit an employee from soliciting or accepting any gift from a prohibited source or given because of the employee's official position unless the item is excluded from the definition of a gift or falls within one of the exceptions set forth in this subpart.

§ 2635.202 General standards.

(a) General prohibitions. Except as provided in this subpart, an employee
shall not, directly or indirectly, solicit or accept a gift:

(1) From a prohibited source; or
(2) Given because of the employee's official position.

(b) Relationship to illegal gratuities statute. Unless accepted in violation of paragraph (c)(1) of this section, a gift accepted under the standards set forth in this subpart shall not constitute an illegal gratuity otherwise prohibited by 18 U.S.C. 201(c)(1)(B).

(c) Limitations on use of exceptions. Notwithstanding any exception provided in this subpart, other than §2635.204(j), an employee shall not:

(1) Accept a gift in return for being influenced in the performance of an official act;
(2) Solicit or coerce the offering of a gift;
(3) Accept gifts from the same or different sources on a basis so frequent that a reasonable person would be led to believe the employee is using his public office for private gain;

Example 1: A purchasing agent for a Veterans Administration hospital routinely deals with representatives of pharmaceutical manufacturers who provide information about new company products. Because of his crowded calendar, the purchasing agent has offered to meet with manufacturer representatives during his lunch hours Tuesdays through Thursdays and the representatives routinely arrive at the employee's office bringing a sandwich and a soft drink for the employee. Even though the market value of each of the lunches is less than $5 and the aggregate value from any one manufacturer does not exceed the $50 aggregate limitation in §2635.204(a) or de minimis gifts of $20 or less, the practice of accepting even these modest gifts on a recurring basis is improper.

(4) Accept a gift in violation of any statute. Relevant statutes applicable to all employees include:

(1) 18 U.S.C. 201(b), which prohibits a public official from seeking, accepting, or agreeing to receive or accept anything of value in return for being influenced in the performance of an official act or for being induced to take or omit to take any action in violation of his official duty. As used in 18 U.S.C. 201(b), the term “public official” is broadly construed and includes regular and special Government employees as well as all other Government officials; and

(2) 18 U.S.C. 203, which prohibits an employee, other than a special Government employee, from receiving any salary or any contribution to or supplementation of salary from any source other than the United States as compensation for services as a Government employee. The statute contains several specific exceptions to this general prohibition, including an exception for contributions made from the treasury of a State, county, or municipality; or

(5) Accept vendor promotional training contrary to applicable regulations, policies or guidance relating to the procurement of supplies and services for the Government, except pursuant to §2635.204(j).


§2635.203 Definitions.

For purposes of this subpart, the following definitions shall apply:

(a) Agency has the meaning set forth in §2635.102(a). However, for purposes of this subpart, an executive department, as defined in 5 U.S.C. 101, may, by supplemental agency regulation, designate as a separate agency any component of that department which the department determines exercises distinct and separate functions.

(b) Gift includes any gratuity, favor, discount, entertainment, hospitality, loan, forbearance, or other item having monetary value. It includes services as well as gifts of training, transportation, local travel, lodgings and meals, whether provided in-kind, by purchase of a ticket, payment in advance, or reimbursement after the expense has been incurred. It does not include:

(1) Modest items of food and refreshments, such as soft drinks, coffee and donuts, offered other than as part of a meal;
(2) Greeting cards and items with little intrinsic value, such as plaques, certificates, and trophies, which are intended solely for presentation;
(3) Loans from banks and other financial institutions on terms generally available to the public;
(4) Opportunities and benefits, including favorable rates and commercial discounts, available to the public or to a class consisting of all Government employees or all uniformed military personnel, whether or not restricted on the basis of geographic considerations;

(5) Rewards and prizes given to competitors in contests or events, including random drawings, open to the public unless the employee's entry into the contest or event is required as part of his official duties;

(6) Pension and other benefits resulting from continued participation in an employee welfare and benefits plan maintained by a former employer;

(7) Anything which is paid for by the Government or secured by the Government under Government contract;

Note: Some airlines encourage those purchasing tickets to join programs that award free flights and other benefits to frequent fliers. Any such benefit earned on the basis of Government-financed travel belongs to the agency rather than to the employee and may be accepted only insofar as provided under 41 CFR 201-53.

(8) Any gift accepted by the Government under specific statutory authority, including:

(i) Travel, subsistence, and related expenses accepted by an agency under the authority of 31 U.S.C. 1353 in connection with an employee's attendance at a meeting or similar function relating to his official duties which takes place away from his duty station. The agency's acceptance must be in accordance with the implementing regulations at 41 CFR part 304-1; and

(ii) Other gifts provided in-kind which have been accepted by an agency under its agency gift acceptance statute; or

(9) Anything for which market value is paid by the employee.

(c) Market value means the retail cost the employee would incur to purchase the gift. An employee who cannot ascertain the market value of a gift may estimate its market value by reference to the retail cost of similar items of like quality. The market value of a gift of a ticket entitling the holder to food, refreshments, entertainment, or any other benefit shall be the face value of the ticket.

Example 1: An employee who has been given an acrylic paperweight embedded with the corporate logo of a prohibited source may determine its market value based on her observation that a comparable acrylic paperweight, not embedded with a logo, generally sells for about $20.

Example 2: A prohibited source has offered an employee a ticket to a charitable event consisting of a cocktail reception to be followed by an event of chamber music. Even though the food, refreshments, and entertainment provided at the event may be worth only $20, the market value of the ticket is its $350 face value.

(d) Prohibited source means any person who:

(1) Is seeking official action by the employee's agency;

(2) Does business or seeks to do business with the employee's agency;

(3) Conducts activities regulated by the employee's agency;

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

(5) Is an organization a majority of whose members are described in paragraphs (d) (1) through (4) of this section.

(e) A gift is solicited or accepted because of the employee's official position if it is from a person other than an employee and would not have been solicited, offered, or given if the employee had not held the status, authority or duties associated with his Federal position.

Note: Gifts between employees are subject to the limitations set forth in subpart C of this part.

Example 1: Where free season tickets are offered by an opera guild to all members of the Cabinet, the gift is offered because of their official positions.

Example 2: Employees at a regional office of the Department of Justice (DOJ) work in Government-leased space at a private office building, along with various private business tenants. A major fire in the building during normal office hours causes a traumatic experience for all occupants of the building in making their escape, and it is the subject of widespread news coverage. A corporate hotel chain, which does not meet the definition of a prohibited source for DOJ, seize the moment and announce that it will give a free night's lodging to all building occupants and their families, as a public goodwill gesture. Employees of DOJ may accept, as this gift is not being given because of their Government positions. The donor's motivation for offering this gift is unrelated to the DOJ employees' status, authority or duties associated
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with their Federal position, but instead is based on their mere presence in the building as occupants at the time of the fire.

(f) A gift which is solicited or accepted indirectly includes a gift:

(1) Given with the employee's knowledge and acquiescence to his parent, sibling, spouse, child, or dependent relative because of that person's relationship to the employee, or

(2) Given to any other person, including any charitable organization, on the basis of designation, recommendation, or other specification by the employee, except as permitted for the disposition of perishable items by §2635.205(a)(2) or for payments made to charitable organizations in lieu of honoraria under §2636.204 of this chapter.

Example 1: An employee who must decline a gift of a personal computer pursuant to this subpart may not suggest that the gift be given instead to one of five charitable organizations whose names are provided by the employee.

(g) Vendor promotional training means training provided by any person for the purpose of promoting its products or services. It does not include training provided under a Government contract or by a contractor to facilitate use of products or services it furnishes under a Government contract.


§ 2635.204 Exceptions.

The prohibitions set forth in §2635.202(a) do not apply to a gift accepted under the circumstances described in paragraphs (a) through (l) of this section, and an employee's acceptance of a gift in accordance with one of those paragraphs will be deemed not to violate the principles set forth in §2635.101(c) and (d), including appearances. Even though acceptance of a gift may be permitted by one of the exceptions contained in paragraphs (a) through (l) of this section, it is never inappropriate and frequently prudent for an employee to decline a gift offered by a prohibited source or because of his official position.

(a) Gifts of $20 or less. An employee may accept unsolicited gifts having an aggregate market value of $20 or less per source per occasion, provided that the aggregate market value of individual gifts received from any one person under the authority of this paragraph shall not exceed $50 in a calendar year. This exception does not apply to gifts of cash or of investment interests such as stock, bonds, or certificates of deposit. Where the market value of a gift or the aggregate market value of gifts offered on any single occasion exceeds $20, the employee may not pay the excess value over $20 in order to accept that portion of the gift or those gifts worth $20. Where the aggregate value of tangible items offered on a single occasion exceeds $20, the employee may decline any distinct and separate item in order to accept those items aggregating $20 or less.

Example 1: An employee of the Securities and Exchange Commission and his spouse have been invited by a representative of a regulated entity to a Broadway play, tickets to which have a face value of $50 each. The aggregate market value of the gifts offered on this single occasion is $50. $10 more than the $20 amount that may be accepted for a single event or presentation. The employee may not accept the gift of the evening of entertainment. He and his spouse may attend the play only if he pays the full $50 value of the two tickets.

Example 2: An employee of the Defense Mapping Agency has been invited by an association of cartographers to speak about his agency's role in the evolution of missile technology. At the conclusion of his speech, the association presents the employee a framed map with a market value of $18 and a book about the history of cartography with a market value of $15. The employee may accept the map or the book, but not both, since the aggregate value of these two tangible items exceeds $30.

Example 3: On four occasions during the calendar year, an employee of the Defense Logistics Agency was given gifts worth $10 each by four employees of a corporation that is a DLA contractor. For purposes of applying the yearly $50 limitation on gifts of $20 or less from any one person, the four gifts must be aggregated because a person is defined at §2635.102(k) to mean not only the corporate entity, but its officers and employees as well. However, for purposes of applying the $50 aggregate limitation, the employee would not have to include the value of a birthday present received from his cousin, who is employed by the same corporation, if he can accept the birthday present under the exception at §2635.204(b) for gifts based on a personal relationship.
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Example 4: Under the authority of 31 U.S.C. 1353 for agencies to accept payments from non-Federal sources in connection with attendance at certain meetings or similar functions, the Environmental Protection Agency has accepted an association’s gift of travel expenses and conference fees for an employee of its Office of Radiation Programs to attend an international conference on “The Chernobyl Experience.” While at the conference, the employee may accept a gift of $20 or less from the association or from another person attending the conference even though it was not approved in advance by the EPA. Although 31 U.S.C. 1353 is the only authority under which an agency may accept gifts from certain non-Federal sources in connection with its employees’ attendance at such functions, a gift of $20 or less accepted under §2635.204(a) is a gift to the employee rather than to his employing agency.

Example 5: During off-duty time, an employee of the Department of Defense (DOD) attends a trade show involving companies that are DOD contractors. He is offered a $15 computer program disk at X Company’s booth, a $12 appointment calendar at Y Company’s booth, and a doll lunch worth $3 from Z Company. The employee may accept all three of these items because they do not exceed $30 per source, even though they total more than $30 at this single occasion.

(b) Gifts based on a personal relationship. An employee may accept a gift given under circumstances which make it clear that the gift is motivated by a family relationship or personal friendship rather than the position of the employee. Relevant factors in making such a determination include the history of the relationship and whether the family member or friend personally pays for the gift.

Example 1: An employee of the Federal Deposit Insurance Corporation has been dating a secretary employed by a member bank. For Secretary’s Week, the bank has given each secretary two tickets to an off-Broadway musical review and has urged each to invite a family member or friend to share the evening of entertainment. Under the circumstances, the FDIC employee may accept his girlfriend’s invitation to the theater. Even though the tickets were initially purchased by the member bank, they were given without reservation to the secretary to use as she wished, and her invitation to the employee was motivated by their personal friendship.

Example 2: Three partners in a law firm that handles corporate mergers have invited an employee of the Federal Trade Commission to join them in a golf tournament at a private club at the firm’s expense. The entry fee is $90 per foursome. The employee cannot accept the gift of one-quarter of the entry fee even though he and the three partners have developed an amicable relationship as a result of the firm’s dealings with the FTC. As evidenced in part by the fact that the fees are to be paid by the firm, it is not a personal friendship but a business relationship that is the motivation behind the partners’ gift.

(c) Discounts and similar benefits. In addition to those opportunities and benefits excluded from the definition of a gift by §2635.203(b)(4), an employee may accept:

1. Reduced membership or other fees for participation in organization activities offered to all Government employees or all uniformed military personnel by professional organizations if the only restrictions on membership relate to professional qualifications; and

2. Opportunities and benefits, including favorable rates and commercial discounts not precluded by paragraph (c)(3) of this section:

(i) Offered to members of a group or class in which membership is unrelated to Government employment;

(ii) Offered to members of an organization, such as an employees’ association or agency credit union, in which membership is related to Government employment if the same offer is broadly available to large segments of the public through organizations of similar size; or

(iii) Offered by a person who is not a prohibited source to any group or class that is not defined in a manner that specifically discriminates among Government employees on the basis of type of official responsibility or on a basis that favors those of higher rank or rate of pay; provided, however, that

3. An employee may not accept for personal use any benefit to which the Government is entitled as the result of an expenditure of Government funds.

Example 1: An employee of the Consumer Product Safety Commission may accept a discount of $50 on a microwave oven offered by the manufacturer to all members of the CPSC employees’ association. Even though the CPSC is currently conducting studies on the safety of microwave ovens, the $50 discount is a standard offer that the manufacturer has made broadly available through a
number of similar organizations to large segments of the public.

Example 2: An Assistant Secretary may not accept a local country club’s offer of membership to all members of Department Secretariat which includes a waiver of its $5,000 membership initiation fee. Even though the country club is not a prohibited source, the offer discriminates in favor of higher ranking officials.

Example 3: The administrative officer for a district office of the Immigration and Naturalization Service has signed an IN5 form in order to purchase 50 boxes of photocopier paper from a supplier whose literature advertises that it will give a free briefcase to anyone who purchases 50 or more boxes. Because the paper was purchased with IN5 funds, the administrative officer cannot keep the briefcase which, if claimed and received, is Government property.

(d) Awards and honorary degrees. (1) An employee may accept gifts, other than cash or an investment interest, with an aggregate market value of $500 or less if such gifts are bona fide awards or incident to a bona fide award that is given for meritorious public service or achievement by a person who does not have interests that may be substantially affected by the performance or nonperformance of the employee’s official duties or by an association or other organization the majority of whose members do not have such interests. Gifts with an aggregate market value in excess of $500 and awards of cash or investment interests offered by such persons as awards or incidents of awards that are given for these purposes may be accepted upon a written determination by an agency ethics official that the award is made as part of an established program of recognition:

(i) Under which awards have been made on a regular basis or which is funded, wholly or in part, to ensure its continuation on a regular basis; and

(ii) Under which selection of award recipients is made pursuant to written standards.

(2) An employee may accept an honorary degree from an institution of higher education as defined at 20 U.S.C. 1114(a) based on a written determination by an agency ethics official that the timing of the award of the degree would not cause a reasonable person to question the employee’s impartiality in a matter affecting the institution.

(3) An employee who may accept an award or honorary degree pursuant to paragraph (d)(1) or (2) of this section may also accept meals and entertainment given to him and to members of his family at the event at which the presentation takes place.

Example 1: Based on a determination by an agency ethics official that the prize meets the criteria set forth in § 2635.504(d)(2), an employee of the National Institutes of Health may accept the Nobel Prize for Medicine, including the cash award which accompanies the prize, even though the prize was conferred on the basis of laboratory work performed at NIH.

Example 2: Prestigious University wishes to give an honorary degree to the Secretary of Labor. The Secretary may accept the honorary degree only if an agency ethics official determines in writing that the timing of the award of the degree would not cause a reasonable person to question the Secretary’s impartiality in a matter affecting the university.

Example 3: An ambassador selected by a nonprofit organization as recipient of its annual award for distinguished service in the interest of world peace may, together with his wife, and children, attend the awards ceremony dinner and accept a crystal bowl worth $500 presented during the ceremony. However, where the organization has also offered airline tickets for the ambassador and his family to travel to the city where the awards ceremony is to be held, the aggregate value of the tickets and the crystal bowl exceeds $500 and he may accept only upon a written determination by the agency ethics official that the award is made as part of an established program of recognition.

(e) Gifts based on outside business or employment relationships. An employee may accept meals, lodgings, transportation and other benefits:

(1) Resulting from the business or employment activities of an employee’s spouse when it is clear that such benefits have not been offered or enhanced because of the employee’s official position;

Example 1: A Department of Agriculture employee whose husband is a computer programmer employed by an Agriculture Department contractor may attend the company’s annual retreat for all of its employees and their families held at a resort facility. However, under § 2635.502, the employee may be disqualified from performing official duties affecting her husband’s employer.

Example 2: Where the spouses of other clerical personnel have not been invited, an employee of the Defense Contract Audit Agency
whose wife is a clerical worker at a defense contractor may not attend the contractor’s annual retreat in Hawaii for corporate officers and members of the board of directors, even though his wife received a special invitation for herself and her spouse.

(2) Resulting from his outside business or employment activities when it is clear that such benefits have not been offered or enhanced because of his official status; or

Example 1: The members of an Army Corps of Engineers environmental advisory committee that meets 8 times per year are special Government employees. A member who has a consulting business may accept an invitation to a $50 dinner from her corporate client, an Army construction contractor, unless, for example, the invitation was extended in order to discuss the activities of the committee.

(3) Customarily provided by a prospective employer in connection with bona fide employment discussions. If the prospective employer has interests that could be affected by performance or nonperformance of the employee’s duties, acceptance is permitted only if the employee first has complied with the disqualification requirements of subpart F of this part applicable when seeking employment.

Example 1: An employee of the Federal Communications Commission with responsibility for drafting regulations affecting all cable television companies wishes to apply for a job opening with a cable television holding company. Once she has properly disqualified herself from further work on the regulations as required by subpart F of this part, she may enter into employment discussions with the company and may accept the company’s offer to pay for her airfare, hotel and meals in connection with an interview trip.

(4) For purposes of paragraphs (e)(1) through (3) of this section, employment shall have the meaning set forth in §2635.603(a).

(5) Gifts in connection with political activities permitted by the Hatch Act Reform Amendments. An employee who, in accordance with the Hatch Act Reform Amendments of 1995, at 5 U.S.C. 7322, may take an active part in political management or in political campaigns, may accept meals, lodgings, transportation and other benefits, including free attendance at events, when provided, in connection with such active participation, by a political organization described in 26 U.S.C. 527(e). Any other employee, such as a security officer, whose official duties require him to accompany an employee to a political event may accept meals, free attendance and entertainment provided at the event by such an organization.

Example 1: The Secretary of the Department of Health and Human Services may accept an airline ticket and hotel accommodations furnished by the campaign committee of a candidate for the United States Senate in order to give a speech in support of the candidate.

(g) Widely attended gatherings and other events—(1) Speaking and similar engagements. When an employee is assigned to participate as a speaker or panel participant or otherwise to present information on behalf of the agency at a conference or other event, his acceptance of an offer of free attendance at the event on the day of his presentation is permissible when provided by the sponsor of the event. The employee’s participation in the event on that day is viewed as a customary and necessary part of his performance of the assignment and does not involve a gift to him or to the agency.

(2) Widely attended gatherings. When there has been a determination that his attendance is in the interest of the agency because it will further agency programs and operations, an employee may accept an unsolicited gift of free attendance at all or appropriate parts of a widely attended gathering of mutual interest to a number of parties from the sponsor of the event or, if more than 100 persons are expected to attend the event and the gift of free attendance has a market value of $900 or less, from a person other than the sponsor of the event. A gathering is widely attended if it is expected that a large number of persons will attend and that persons with a diversity of views or interests will be present, for example, If it is open to members from throughout the interested industry or profession or if those in attendance represent a range of persons interested in a given matter. For employees subject to a leave system, attendance at the event shall be on the employee’s own time or, if authorized by the employee’s agency, on excused absence

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pursuant to applicable guidelines for granting such absence, or otherwise without charge to the employee’s leave account.

(3) Determination of agency interest.
The determination of agency interest required by paragraph (g)(2) of this section shall be made orally or in writing by the agency designee.

(i) If the person who has extended the invitation has interests that may be substantially affected by the performance or nonperformance of an employee’s official duties or is an association or organization the majority of whose members have such interests, the employee’s participation may be determined to be in the interest of the agency only where there is a written finding by the agency designee that the agency’s interest in the employee’s participation in the event outweighs the concern that acceptance of the gift of free attendance may or may appear to improperly influence the employee in the performance of his official duties. Relevant factors that should be considered by the agency designee include the importance of the event to the agency, the nature and sensitivity of any pending matter affecting the interests of the person who has extended the invitation, the significance of the employee’s role in any such matter, the purpose of the event, the identity of other expected participants and the market value of the gift of free attendance.

(ii) A blanket determination of agency interest may be issued to cover all or any category of invitees other than those as to whom the finding is required by paragraph (g)(3)(i) of this section. Where a finding under paragraph (g)(3)(i) of this section is required, a written determination of agency interest, including the necessary finding, may be issued to cover two or more employees whose duties similarly affect the interests of the person who has extended the invitation or, where that person is an association or organization, of its members.

(4) Free attendance. For purposes of paragraphs (g)(1) and (g)(2) of this section, free attendance may include waiver of all or part of a conference or other fee or the provision of food, refreshments, entertainment, instruction and materials furnished to all attendees as an integral part of the event. It does not include travel expenses, lodgings, entertainment collateral to the event, or meals taken other than in a group setting with all other attendees. Where the invitation has been extended to an accompanying spouse or other guest (see paragraph (g)(6) of this section), the market value of the gift of free attendance includes the market value of free attendance by the spouse or other guest as well as the market value of the employee’s own attendance.

NOTE: There are statutory authorities implemented other than by part 2635 under which an agency or an employee may be able to accept the free attendance of others not included in the definition of free attendance, such as travel expenses.

(5) Cost provided by sponsor of event.
The cost of the employee’s attendance for the event shall not be considered to be provided by the sponsor, and the invitation is not considered to be from the sponsor of the event, where a person other than the sponsor designates the employee to be invited and bears the cost of the employee’s attendance through a contribution or other payment intended to facilitate that employee’s attendance. Payment of dues or a similar assessment to a sponsoring organization does not constitute a payment intended to facilitate a particular employee’s attendance.

(6) Accompanying spouse or other guest.
When others in attendance will generally be accompanied by a spouse or other guest, and where the invitation is from the same person who has invited the employee, the agency designee may authorize an employee to accept an unsolicited invitation of free attendance to an accompanying spouse or to another accompanying guest to participate in all or a portion of the event at which the employee’s free attendance is permitted under paragraph (g)(1) or (g)(2) of this section. The authorization required by this paragraph may be provided orally or in writing.

Example 1: An aerospace industry association that is a prohibited source sponsors an industrywide, two-day seminar for which it charges a fee of $400 and anticipates attendance of approximately 400. An Air Force contractor pays $2,900 to the association so that
the association can extend free invitations to five Air Force officials designated by the contractor. The Air Force officials may not accept the gifts of free attendance. Because the contractor specified the invitees and bore the cost of their attendance, the gift of free attendance is considered to be provided by the company and not by the sponsoring association. Had the contractor paid $2,000 to the association in order that the association might invite any five Federal employees, an Air Force official to whom the sponsoring association extended one of the five invitations could attend if his participation were determined to be in the interest of the agency. The Air Force official could not in any case accept an invitation directly from the non-sponsoring contractor because the market value of the gift exceeds $300.

Example 2: An employee of the Department of Transportation is invited by a news organization to an annual press dinner sponsored by an association of press organizations. Tickets for the event cost $150 per person and attendance is limited to 400 representatives of press organizations and their guests. If the employee’s attendance is determined to be in the interest of the agency, she may accept the invitation from the news organization because more than 100 persons will attend and the cost of the ticket does not exceed $300. However, if the invitation were extended to the employee and an accompanying guest, her guest could not be authorized to attend for free since the market value of the gift of free attendance would be $300 and the invitation is from a person other than the sponsor of the event.

Example 3: An employee of the Department of Energy (DOE) and his wife have been invited by a major utility executive to a small dinner party. A few other officials of the utility and their spouses or other guests are also invited, as is a representative of a consumer group concerned with utility rates and her husband. The DOE official believes the dinner party will provide him an opportunity to socialize with and get to know those in attendance. The employee may not accept the free invitation under this exception, even if his attendance could be determined to be in the interest of the agency. The small dinner party is not a widely attended gathering. Nor could the employee be authorized to accept even if the event were instead a corporate banquet to which forty company officials and their spouses or other guests were invited. In this second case, notwithstanding the larger number of persons expected (as opposed to the small dinner party just noted) and despite the presence of the consumer group representative and her husband who are not officials of the utility, those in attendance would still not represent a diversity of views or interests. Thus, the company banquet would not qualify as a widely attended gathering under those circumstances either.

Example 4: An employee of the Department of the Treasury may participate in a panel discussion of economic issues as part of a one-day conference may accept the sponsor’s waiver of the conference fee. Under the separate authority of §2635.204(a), he may accept a token of appreciation for his speech having a market value of $30 or less.

Example 5: An Assistant U.S. Attorney is invited to attend a luncheon meeting of a local bar association to hear a distinguished judge lecture on cross-examining expert witnesses. Although members of the bar association are assessed a $15 fee for the meeting, the Assistant U.S. Attorney may accept the bar association’s offer to attend for free, even without a determination of agency interest. The gift can be accepted under the $10 de minimis exception at §2635.204(a).

Example 6: An employee of the Department of the Interior authorized to speak on the first day of a four-day conference on endangered species may accept the sponsor’s waiver of the conference fee for the first day of the conference. If the conference is widely attended, he may be authorized, based on a determination that his attendance is in the agency’s interest, to accept the sponsor’s offer to waive the attendance fee for the remainder of the conference.

(b) Social invitations from persons other than prohibited sources. An employee may accept food, refreshments and entertainment, not including travel or lodgings, at a social event attended by several persons where:

(1) The invitation is from a person who is not a prohibited source; and

(2) No fee is charged to any person in attendance.

Example 1: Along with several other Government officials and a number of individuals from the private sector, the Administrator of the Environmental Protection Agency has been invited to the premier showing of a new adventure movie about industrial espionage. The producer is paying all costs of the showing. The Administrator may accept the invitation since the producer is not a prohibited source and no attendance fee is being charged to anyone who has been invited.

Example 2: An employee of the White House Press Office has been invited to a cocktail party given by a noted Washington hostess who is not a prohibited source. The employee may attend even though he has only recently been introduced to the hostess and suspects that he may have been invited because of his official position.
(i) Meals, refreshments and entertainment in foreign areas. An employee assigned to duty in, or on official travel to, a foreign area as defined in 41 CFR 301–7.3(c) may accept food, refreshments or entertainment in the course of a breakfast, luncheon, dinner or other meeting or event provided:

(1) The market value in the foreign area of the food, refreshments or entertainment provided at the meeting or event, as converted to U.S. dollars, does not exceed the per diem rate for the foreign area specified in the U.S. Department of State’s Maximum Per Diem Allowances for Foreign Areas, Per Diem Supplement Section 925 to the Standardized Regulations (GC,FA) available from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402;

(2) There is participation in the meeting or event by non-U.S. citizens or by representatives of foreign governments or other foreign entities;

(3) Attendance at the meeting or event is part of the employee’s official duties to obtain information, disseminate information, promote the export of U.S. goods and services, represent the United States or otherwise further programs or operations of the agency or the U.S. mission in the foreign area; and

(4) The gift of meals, refreshments or entertainment is from a person other than a foreign government as defined in 5 U.S.C. 7342(a)(2).

Example 1: A number of local businessmen in a developing country are anxious for a U.S. company to locate a manufacturing facility in their province. An official of the Overseas Private Investment Corporation may accompany the visiting vice president of the U.S. company to a dinner meeting hosted by the businessmen at a provincial restaurant where the market value of the food and refreshments does not exceed the per diem rate for that country.

(j) Gifts to the President or Vice President. Because of considerations relating to the conduct of their offices, including those of protocol and etiquette, the President or the Vice President may accept any gift on his own behalf or on behalf of any family member, provided that such acceptance does not violate §2635.202(c) (1) or (2), 18 U.S.C. 201(b) or 201(c)(3), or the Constitution of the United States.

(k) Gifts authorized by supplemental agency regulation. An employee may accept any gift the acceptance of which is specifically authorized by a supplemental agency regulation.

(1) Gifts accepted under specific statutory authority. The prohibitions on acceptance of gifts from outside sources contained in this subpart do not apply to any item, receipt of which is specifically authorized by statute. Gifts which may be received by an employee under the authority of specific statutes include, but are not limited to:

(1) Free attendance, course or meeting materials, transportation, lodgings, food and refreshments or reimbursements therefor incident to training or meetings when accepted by the employee under the authority of 5 U.S.C. 4111 from an organization with tax-exempt status under 26 U.S.C. 501(c)(3) or from a person to whom the prohibitions in 18 U.S.C. 209 do not apply. The employee’s acceptance must be approved by the agency in accordance with part 419 of this title; or

NOTE: 26 U.S.C. 501(c)(3) is authority for tax-exempt treatment of a limited class of nonprofit organizations, including those organized and operated for charitable, religious or educational purposes. Many nonprofit organizations are not exempt from taxation under this section.

(2) Gifts from a foreign government or international or multinational organization, or its representative, when accepted by the employee under the authority of the Foreign Gifts and Decorations Act, 5 U.S.C. 7342. As a condition of acceptance, an employee must comply with requirements imposed by the agency’s regulations or procedures implementing that Act.


§2635.205 Proper disposition of prohibited gifts.

(a) An employee who has received a gift that cannot be accepted under this
§ 2635.303

Subpart C—Gifts Between Employees

§ 2635.301 Overview.

This subpart contains standards that prohibit an employee from giving, donating to, or soliciting contributions for, a gift to an official superior and from accepting a gift from an employee receiving less pay than himself, unless the item is excluded from the definition of a gift or falls within one of the exceptions set forth in this subpart.

§ 2635.302 General standards.

(a) Gifts to superiors. Except as provided in this subpart, an employee may not:

(1) Directly or indirectly, give a gift to or make a donation toward a gift for an official superior; or

(2) Solicit a contribution from another employee for a gift to either his own or the other employee’s official superior.

(b) Gifts from employees receiving less pay. Except as provided in this subpart, an employee may not, directly or indirectly, accept a gift from an employee receiving less pay than himself unless:

(1) The two employees are not in a subordinate-official superior relationship; and

(2) There is a personal relationship between the two employees that would justify the gift.

(c) Limitation on use of exceptions. Notwithstanding any exception provided in this subpart, an official superior shall not coerce the offering of a gift from a subordinate.

§ 2635.303 Definitions.

For purposes of this subpart, the following definitions shall apply:

(a) Gift has the meaning set forth in § 2635.203(b). For purposes of that definition an employee will be deemed to
Attachment B
petition. If the determination is positive, the bid or proposal shall be rejected; if it is negative, the bid or proposal shall be considered for award.

(3) Whenever an offer is rejected under paragraph (b)(1) or (b)(2) of this section, or the certificate is suspected of being false, the contracting officer shall report the situation to the Attorney General in accordance with 3.301.

(4) The determination made under paragraph (b)(2) of this section shall not prevent or inhibit the prosecution of any criminal or civil actions involving the occurrences or transactions to which the certificate relates.

3.103-3 The need for further certification.

A contractor that properly executed the certificate before award does not have to submit a separate certificate with each proposal to perform a work order or similar ordering instrument issued pursuant to the terms of the contract where the Government’s requirements cannot be met from another source.

3.104 Procurement integrity.

3.104-1 Definitions.

As used in this section—

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

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

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

“Compensation” means wages, salaries, bonuses, 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. 2306(a)(i)) 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(a).

“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


“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. 433) referred to as "the Act"). Agency implementation 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 these are other statutes and regulations that deal with the same or related prohibited conduct, for example—


(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, 2655.804 and 2655.606. 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 prohibited clauses, restrictions, and requirements.

(a) Prohibition on disclosing procurement information (subsection 27(a) of the Act). 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 contract 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; or

(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
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3.104-5

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 52.215-3(e) has been inappropriately marked. The contractor that has affected 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 27.404-5.

(e) This section does not restrict or prohibit—

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

(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 right 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 under section 27 of the Act; and

(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)(3) and Subpart 34.2.)

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 be disqualifications 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 who becomes 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
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, date 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.

(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 offense, 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 constituting a violation of subsections 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(a)(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 discussions 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.
Attachment C
Subpart 9.5—Organizational and Consultant Conflicts of Interest

9.500 Scope of subpart.

This subpart—

(a) Prescribes responsibilities, general rules, and procedures for identifying, evaluating, and resolving organizational conflicts of interest;
(b) Provides examples to assist contracting officers in applying these rules and procedures to individual contracting situations; and

9.501 Definition.

"Marketing consultant," as used in this subpart, means an independent contractor who furnishes advice, information, direction, or assistance to an offeror or any other contractor in support of the preparation or submission of an offer for a Government contract by that offeror. An independent contractor not a marketing consultant when rendering—

(1) Services excluded in Subpart 27.2;
(2) Routine engineering and technical services (such as installation, operation, or maintenance of systems, equipment, software, components, or facilities);
(3) Routine legal, actuarial, auditing, and accounting services; and
(4) Training services.

9.502 Applicability.

(a) This subpart applies to contracts with either profit or nonprofit organizations, including nonprofit organizations created largely or wholly with Government funds.
(b) The applicability of this subpart is not limited to any particular kind of acquisition. However, organizational conflicts of interest are more likely to occur in contracts involving—

(1) Management support services;
(2) Consultant or other professional services;
(3) Contractor performance of or assistance in technical evaluations; or
(4) Systems engineering and technical direction work performed by a contractor that does not have overall contractual responsibility for development or production.

(c) An organizational conflict of interest may result when factors create an actual or potential conflict of interest on an instant contract, or when the nature of the work to be performed on the instant contract creates an actual or potential conflict of interest on a future acquisition. In the latter case, some restrictions on future activities of the contractor may be required.

(d) Acquisitions subject to unique agency organizational conflict of interest statutes are excluded from the requirements of this subpart.

9.503 Waiver.

The agency head or a designee may waive any general rule or procedure of this subpart by determining that its application in a particular situation would not be in the Government’s interest. Any request for waiver must be in writing, shall set forth the extent of the conflict, and requires approval by the agency head or designee. Agency heads shall not delegate waiver authority below the level of head of a contracting activity.

9.504 Contracting officer responsibilities.

(a) Using the general rules, procedures, and examples in this subpart, contracting officers shall analyze planned acquisitions in order to—

(1) Identify and evaluate potential organizational conflicts of interest as early in the acquisition process as possible; and
(2) Avoid, neutralize, or mitigate significant potential conflicts before contract award.

(b) Contracting officers should obtain the advice of counsel and the assistance of appropriate technical specialists in evaluating potential conflicts and in developing any necessary solicitation provisions and contract clauses (see 9.506).

(c) Before issuing a solicitation for a contract that may involve a significant potential conflict, the contracting officer shall recommend to the head of the contracting activity a course of action for resolving the conflict (see 9.506).

(d) In fulfilling their responsibilities for identifying and resolving potential conflicts, contracting officers should avoid creating unnecessary delays, burdensome information requirements, and excessive documentation. The contracting officer’s judgment need be formally documented only when a substantive issue concerning potential organizational conflict of interest exists.

(e) The contracting officer shall award the contract to the apparent successful offeror unless a conflict of interest is determined to exist that cannot be avoided or mitigated. Before determining to withhold award based on conflict of interest considerations, the contracting officer shall notify the contractor, provide the reasons therefor, and allow the contractor a reasonable opportunity to respond. If the contracting officer finds that it is in the best interest of the United States to award the contract notwithstanding a conflict of interest, a request for waiver shall be submitted in accordance with 9.503. The waiver request and decision shall be included in the contract file.
9.505 General rules.

The general rules in 9.505-1 through 9.505-4 prescribe limitations on contracting as the means of avoiding, accentuating, or mitigating organizational conflicts of interest that might otherwise exist in the stated situations. Some illustrative examples are provided in 9.508. Conflicts may arise in situations not expressly covered in this section 9.505 or in the examples in 9.508. Each individual contracting situation shall be examined on the basis of its particular facts and the nature of the proposed contract. The exercise of common sense, good judgment, and sound discretion is required in both the decision on whether a significant potential conflict exists and, if it does, the development of an appropriate means for resolving it. The two underlying principles are—

(a) Preventing the existence of conflicting roles that might bias a contractor's judgment; and

(b) Preventing unfair competitive advantage. In addition to the other situations described in this subpart, an unfair competitive advantage exists where a contractor competing for award of any Federal contract possesses—

(1) Proprietary information that was obtained from a Government official without proper authorization; or

(2) Source selection information (as defined in 2.101) that is relevant to the contract but is not available to all competitors, and such information would assist that contractor in obtaining the contract.

9.505-1 Providing systems engineering and technical direction.

(a) A contractor that provides systems engineering and technical direction for a system but does not have overall contractual responsibility for its development, its integration, assembly, and checkout, or its production shall not—

(1) Be awarded a contract to supply the system or any of its major components; or

(2) Be a subcontractor or consultant to a supplier of the system or any of its major components.

(b) Systems engineering includes a combination of substantially all of the following activities: determining specifications, identifying and resolving interface problems, developing test requirements, evaluating test data, and supervising design. Technical direction includes a combination of substantially all of the following activities: developing work statements, determining parameters, directing other contractors' operations, and resolving technical controversies. In performing these activities, a contractor occupies a highly influential and responsible position in determining a system's basic concepts and supervising their execution by other contractors. Therefore, this contractor should not be in a position to make decisions favoring its own products or capabilities.

9.505-2 Preparing specifications or work statements.

(a)(1) If a contractor prepares and furnishes complete specifications covering nondevelopmental items, to be used in a competitive acquisition, that contractor shall not be allowed to furnish these items, either as a prime contractor or as a subcontractor, for a reasonable period of time including, at least, the duration of the initial production contract. This rule shall not apply to—

(i) Contractors that furnish at Government request specifications or data regarding a product they provide, even though the specifications or data may have been paid for separately or in the price of the product, or

(ii) Situations in which contractors, acting as industry representatives, help Government agencies prepare, refine, or coordinate specifications, regardless of source, provided this assistance is supervised and controlled by Government representatives.

(2) If a single contractor drafts complete specifications for nondevelopmental equipment, it should be eliminated for a reasonable time from competition for production based on the specifications. This should be done in order to avoid a situation in which the contractor could draft specifications favoring its own products or capabilities. In this way the Government can be assured of getting unbiased advice as to the content of the specifications and can avoid allegations of favoritism in the award of production contracts.

(3) In development work, it is normal to select firms that have done the most advanced work in the field. These firms can be expected to design and develop around their own prior knowledge. Development contractors can frequently start production earlier and more knowledgeably than firms that did not participate in the development, and this can affect the time and quality of production, both of which are important to the Government. In many instances, the Government may have financed the development. Thus, while the development contractor has a competitive advantage, it is an unavoidable one that is not considered unfair, hence no prohibition should be imposed.

(b)(1) If a contractor prepares, or assists in preparing, a work statement to be used in competitively acquiring a system or services—or provides material leading directly, predictably, and without delay to such a work statement—that contractor may not supply the system, major components of the system, or the services unless—

(i) It is the sole source;

(ii) It has participated in the development and design work, or

(iii) More than one contractor has been involved in preparing the work statement.

(2) Agencies should normally prepare their own work statements. When contractor assistance is necessary, the contractor might often be in a position to favor its own products or capabilities. To overcome the possibility of bias, contrac-
tors are prohibited from supplying a system or services acquired on the basis of work statements growing out of their services, unless excepted in paragraph (b)(1) of this section.

(3) For the reasons given in 9.505-2(a)(3), no prohibitions are imposed on development and design contractors.

9.505-3 Providing evaluation services.

Contracts for the evaluation of offers for products or services shall not be awarded to a contractor that will evaluate its own offers for products or services, or those of a competitor, without proper safeguards to ensure objectivity to protect the Government’s interests.

9.505-4 Obtaining access to proprietary information.

(a) When a contractor requires proprietary information from others to perform a Government contract and can use the leverage of the contract to obtain it, the contractor may gain an unfair competitive advantage unless restrictions are imposed. These restrictions protect the information and encourage companies to provide it when necessary for contract performance. They are not intended to protect information—

(1) Furnished voluntarily without limitations on its use; or

(2) Available to the Government or contractor from other sources without restriction.

(b) A contractor that gains access to proprietary information of other companies in performing advisory and assistance services for the Government must agree with the other companies to protect their information from unauthorized use or disclosure for as long as it remains proprietary and refrain from using the information for any purpose other than that for which it was furnished. The contracting officer shall obtain copies of these agreements and ensure that they are properly executed.

(c) Contractors also obtain proprietary and source selection information by acquiring the services of marketing consultants which, if used in connection with an acquisition, may give the contractor an unfair competitive advantage. Contractors should make inquiries of marketing consultants to ensure that the marketing consultant has provided no unfair competitive advantage.

9.506 Procedures.

(a) If information concerning prospective contractors is necessary to identify and evaluate potential organizational conflicts of interest or to develop recommended actions, contracting officers first should seek the information from within the Government or from other readily available sources. Government sources include the files and the knowledge of personnel within the contracting office, other contracting offices, the cognizant contract administration and audit activities and offices concerned with contract financing. Non-Government sources include publications and commercial services, such as credit rating services, trade and financial journals, and business directories and registers.

(b) If the contracting officer decides that a particular acquisition involves a significant potential organizational conflict of interest, the contracting officer shall, before issuing the solicitation, submit for approval to the chief of the contracting office (unless a higher level official is designated by the agency)—

(1) A written analysis, including a recommended course of action for avoiding, neutralizing, or mitigating the conflict, based on the general rules in 9.505 or on another basis not expressly stated in that section;

(2) A draft solicitation provision (see 9.507-1); and

(3) If appropriate, a proposed contract clause (see 9.507-2).

(c) The approving official shall—

(1) Review the contracting officer’s analysis and recommended course of action, including the draft provision and any proposed clause;

(2) Consider the benefits and detriments to the Government and prospective contractors; and

(3) Approve, modify, or reject the recommendations in writing.

(d) The contracting officer shall—

(1) Include the approved provision(s) and any approved clause(s) in the solicitation or the contract, or both;

(2) Consider additional information provided by prospective contractors in response to the solicitation or during negotiations; and

(3) Before awarding the contract, resolve the conflict or the potential conflict in a manner consistent with the approval or other direction by the head of the contracting activity.

(e) If, during the effective period of any restriction (see 9.507), a contracting office transfers acquisition responsibility for the item or system involved, it shall notify the successor contracting office of the restriction, and send a copy of the contract under which the restriction was imposed.

9.507 Solicitation provisions and contract clause.

9.507-1 Solicitation provisions.

As indicated in the general rules in 9.505, significant potential organizational conflicts of interest are normally resolved by imposing some restraint, appropriate to the nature of the conflict, upon the contractor’s eligibility for future contracts or subcontracts. Therefore, affected solicitations shall contain a provision that—

(a) Invites offers’ attention to this subpart;

(b) States the nature of the potential conflict as seen by the contracting officer;

(c) States the nature of the proposed restraint upon future contractor activities; and

(a) If, as a condition of award, the contractor's eligibility for future prime contract or subcontract awards will be restricted or the contractor must agree to some other restraint, the solicitation shall contain a proposed clause that specifies both the nature and duration of the proposed restraint. The contracting officer shall include the clause in the contract first negotiating the clause's final terms with the successful offeror, if it is appropriate to do so (see 9.506(d) of this subsection).

(b) The restraint imposed by a clause shall be limited to a fixed term of reasonable duration, sufficient to avoid the circumstances of unfair competitive advantage or potential bias. This period varies; it might end, for example, when the first production contract using the contractor's specifications or work statement is awarded, or it might extend through the entire life of a system for which the contractor has performed systems engineering and technical direction. In every case, the restriction shall specify termination by a specific date or upon the occurrence of an identifiable event.

9.508 Examples.

The examples in paragraphs (a) through (i) following illustrate situations in which questions concerning organizational conflicts of interest may arise. They are not all inclusive, but are intended to help the contracting officer apply the general rules in 9.505 to individual contract situations.

(a) Company A agrees to provide systems engineering and technical direction for the Navy on the powerplant for a group of submarines (i.e., turbines, drive shafts, propellers, etc.). Company A should not be allowed to supply any powerplant components. Company A can, however, supply components of the submarine unrelated to the powerplant (e.g., fire control, navigation, etc.). In this example, the system is the powerplant, not the submarine, and the ban on supplying components is limited to those for the system only.

(b) Company A is the systems engineering and technical direction contractor for system X. After some progress, but before completion, the system is canceled. Later, system Y is developed to achieve the same purposes as system X, but in a fundamentally different fashion. Company B is the systems engineering and technical direction contractor for system Y. Company A may supply system Y or its components.

(c) Company A develops new electronic equipment and, as a result of this development, prepares specifications. Company A may supply the equipment.

(d) XYZ Tool Company and PQR Machinery Company, representing the American Tool Institute, work under Government supervision and control to refine specifications or to clarify the requirements of a specific acquisition. These companies may supply the item.

(e) Before an acquisition for information technology is conducted, Company A is awarded a contract to prepare data system specifications and equipment performance criteria to be used as the basis for the equipment competition. Since the specifications are the basis for selection of commercial hardware, a potential conflict of interest exists. Company A should be excluded from the initial follow-on information technology hardware acquisition.

(f) Company A receives a contract to define the detailed performance characteristics an agency will require for purchasing rocket fuels. Company A has not developed the particular fuels. When the definition contract is awarded, it is clear to both parties that the agency will use the performance characteristics arrived at to choose competitively a contractor to develop or produce the fuels. Company A may not be awarded this follow-on contract.

(g) Company A receives a contract to prepare a detailed plan for scientific and technical training of an agency's personnel. It suggests a curriculum that the agency endorses and incorporates in its request for proposals to institutions to establish and conduct the training. Company A may not be awarded a contract to conduct the training.

(h) Company A is selected to study the use of lasers in communications. The agency intends to ask that firms doing research in the field make proprietary information available to Company A. The contract must require Company A to—

(1) Enter into agreements with these firms to protect any proprietary information they provide; and

(2) Refrain from using the information in supplying lasers to the Government or for any purpose other than that for which it was intended.

(i) An agency that regulates an industry wishes to develop a system for evaluating and processing license applications. Contractor X helps develop the system and process the applications. Contractor X should be prohibited from acting as a consultant to any of the applicants during its period of performance and for a reasonable period thereafter.
Attachment D
(2) Facility design solicitations and contracts that include the specification of energy-consuming products must comply with the requirements at subpart 23.2.

* * * * *

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

10. Amend section 52.212–5 by revising the clause date to read “(DEC 2007)”; redesignating paragraphs (b)(26) through (b)(38) as paragraphs (b)(27) through (b)(39); and adding a new paragraph (b)(26) to read as follows:

52.212–5 Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items.

(b) * * *


* * * * *

11. Amend section 52.213–4 by revising the clause date to read “(DEC 2007)”; redesignating paragraphs (b)(1)(viii) through (b)(1)(xi) as paragraphs (b)(1)(ix) through (b)(1)(xii); and adding a new paragraph (b)(1)(viii) to read as follows:

52.213–4 Terms and Conditions—Simplified Acquisitions (Other Than Commercial Items).

(b) * * *

(26) FAR 52.223–15, Energy Efficiency in Energy-Consuming Products (DEC 2007) (42 U.S.C. 8259b) (Unless exempt pursuant to 23.204, applies to contracts when energy-consuming products listed in the ENERGY STAR® Program or Federal Energy Management Program (FEMP) will be—

(A) Delivered;

(B) Acquired by the Contractor for use in performing services at a Federally-controlled facility;

(C) Furnished by the Contractor for use by the Government; or

(D) Specified in the design of a building or work, or incorporated during its construction, renovation, or maintenance.)

* * * * *

12. Section 52.223–15 is added to read as follows:


As prescribed in 23.206, insert the following clause:

ENERGY EFFICIENCY IN ENERGY-CONSUMING PRODUCTS (DEC 2007)

(a) Definition. As used in this clause—

Energy-efficient product— (1) Means a product that—

(i) Meets Department of Energy and Environmental Protection Agency criteria for use of the Energy Star trademark label; or

(ii) Is in the upper 25 percent of efficiency for all similar products as designated by the Department of Energy’s Federal Energy Management Program.

(b) The term “product” does not include any energy-consuming product or system designed or procured for combat or combat-related missions (42 U.S.C. 8259b).

(b) The Contractor shall ensure that energy-consuming products are energy efficient products (i.e., ENERGY STAR® products or FEMP-designated products) at the time of contract award, for products that are—

(1) Delivered;

(2) Acquired by the Contractor for use in performing services at a Federally-controlled facility;

(3) Furnished by the Contractor for use by the Government; or

(4) Specified in the design of a building or work, or incorporated during its construction, renovation, or maintenance.

(c) The requirements of paragraph (b) apply to the Contractor (including any subcontractor) unless—

(1) The energy-consuming product is not listed in the ENERGY STAR® Program or FEMP; or

(2) Otherwise approved in writing by the Contracting Officer.

(d) Information about these products is available for—

(1) ENERGY STAR® at http://www.energystar.gov/products; and

(2) FEMP at http://www1.eere.energy.gov/femp/procurement/eep_requirements.html.

(End of clause)

48 CFR Parts 2, 3, and 52

[FAF 2005–22; FAR Case 2006–007; Item II; Docket 2007–0001; Sequence 1]

RIN 9000–AK67

Federal Acquisition Regulation; FAR Case 2006–007, Contractor Code of Business Ethics and Conduct

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 address the requirements for a contractor code of business ethics and conduct and the display of Federal agency Office of the Inspector General (OIG) Fraud Hotline Posters.

DATES: Effective Date: December 24, 2007

FURTHER INFORMATION CONTACT: Mr. Ernest Woodson, Procurement Analyst, at (202) 501–3775 for clarification of content. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501–4755. Please cite FAC 2005–22, FAR case 2006–007.

SUPPLEMENTARY INFORMATION:

A. Background

DoD, GSA, and NASA published a proposed rule in the Federal Register at 72 FR 7588, February 16, 2007, to address the requirements for a contractor code of business ethics and conduct and the display of Federal agency Office of the Inspector General (OIG) Fraud Hotline Posters. The original comment period closed on April 17, 2007, but on April 23, 2007, the comment period was reopened and extended to May 23, 2007. We received comments from 42 respondents plus an additional late comment from one of the initial respondents. However, 15 of the respondents were only requesting extension of the comment period. The remaining 27 public comments are addressed in the following analysis.

The most significant changes, which will be addressed, are—

• The clause requirement for a formal training program and internal control system has been made inapplicable to small businesses (see paragraph 5.c.v. and 11 of this section);

• The contracting officer has been given authority to increase the 30 day time period for preparation of a code of business ethics and conduct and the 90 day time period for establishment of an ethics awareness and compliance program and internal control system, upon request of the contractor (see paragraph 6.c. of this section);

• The requirements in the internal control system relating to “disclosure” and “full cooperation” have been deleted, and moved to FAR Case 2007–006 for further consideration (see paragraphs 2.e. and 6.d. of this section);

• The clause 52.203–XX with 3 alternates has been separated into 2 clauses, one to address the contractor code of business ethics and conduct, and one to address the requirements for hotline posters (see paragraphs 3.h. and 10.b. of this section); and

• A contractor does not need to display government fraud hotline posters if it has established a mechanism by which employees may
report suspected instances of improper conduct, and instructions that encourage employees to make such reports (see paragraph 7.a. of this section).

1. General support for the rule.
   Comments: The majority of respondents expressed general support for the rule. These included consultants, industry associations, a non-profit contractor, a construction contractor, inspectors general and interagency IG working groups, other Government agencies, and individuals. Many respondents were laudatory of the rule in general. For example, one respondent considered the proposed rule to be a “good attempt” and another considered it to be “an outstanding, well thought-out and needed policy change.” Others identified particular benefits of the proposed rule, such as—
   • Reduce contract fraud;
   • Reduce waste, fraud, abuse and mismanagement of taxpayers’ resources;
   • Enhance integrity in the procurement system by strengthening the requirements for corporate compliance systems; and
   • Promote clarity and Government-wide consistency in agency requirements.
   Response: None required.

2. General disagreement with the rule as a whole.
   Although all respondents agree that contractors should conduct themselves with the highest degree of integrity and honesty, not all agree that the proposed rule is taking the right approach to achieve that goal.
   a. Ineffective.
      Comment: One respondent considers that this rule will not effectively correct the ethics and business conduct improprieties. Other respondents note that a written code of ethics does not ensure a commitment to compliance with its provisions.
      Response: There is no law, regulation, or ethics code that ensures compliance. Laws, regulations, and ethics codes provide a standard against which to measure actions, and identify consequences upon violation of the law, regulation, or ethics code.
   b. Unnecessary or duplicative, potentially conflicting.
      Comment: One respondent views the rule as unnecessary, because it adds “a further level of compliance and enforcement obligations where contractors already are or may be contractually or statutorily obliged to comply.” Another respondent comments that the rule is duplicative of other similar requirements. Furthermore, meeting multiple requirements for the same purpose can cause conflicts.
      Response: This rule is not duplicative of existing requirements known to the Councils. The rule requires basic codes of ethics and training for companies doing business with the Government. Although many companies have voluntarily adopted codes of business ethics, there is no current Government-wide regulatory requirement for such a code. For DoD contracts, the Defense Federal Acquisition Regulation Supplement (DFARS) recommends such a code, but does not make it mandatory. Legislation such as the Sarbanes-Oxley Act of 2002 (Pub. L. 107–204), cited by some of the respondents, applies only to accounting firms and publicly traded companies. Sarbanes-Oxley focuses on auditor independence, corporate governance, internal control assessment, and enhanced financial disclosure. Sarbanes-Oxley provides broad definition of a “code of ethics” but does not specify every detail that should be addressed. It only requires publicly-traded companies to either adopt a code of ethics or disclose why they have not done so.
      The respondents did not identify any specific points of conflict between this rule and other existing requirements. Since this requirement is broad and flexible, capturing the common essence of good ethics and standards of conduct, the Councils consider that it should reinforce or enhance any existing requirements rather than conflict with them.
   c. Negative effect on current compliance efforts.
      Comment: According to one respondent, the rule may have a “chilling effect” on current compliance efforts and may create a fragmented approach to standards of conduct.
      Response: As stated in the prior response, this rule should enhance current compliance efforts.
   d. Vague and too broad.
      Comment: Several respondents consider the rule too vague and broad, so that it is open to different interpretations.
      Response: The rule is intended to allow broad discretion. The specific requirements of the rule will be further addressed under paragraph 6. of this section.
   e. Change in role of Government.
      Comment: One respondent fears that the rule will “fundamentally change the Government’s role in the design and implementation of contractor codes and programs” because it moves from “the well-established principles of self-governance and voluntary disclosure” to “contractual prescriptions and potentially mandatory disclosure.” This respondent states that the proposed rule is not just a minor modification of existing policy. Rather, it “would change far more than the FAR Councils have acknowledged.”
      Response: This rule does constitute a change. The Councils are requiring that contractors establish minimum standards of conduct for themselves. However, the rule still allows for flexibility and, where appropriate, contractor discretion. The Councils have deleted any clause requirement relating to mandatory disclosure but it will be considered as part of the new FAR Case 2007–006 (72 FR 64019, November 14, 2007).
   f. Unduly burdensome and expensive for contractors.
      Comment: One respondent thinks that this rule imposes significant new requirements on contractors. Other respondents consider the requirement unduly burdensome for the contractors. They think the rule will be a disincentive to doing business with the Government.
      Response: Most companies already have some type of ethics code. The mandatory aspects of this rule do not apply to commercial items, either at the prime or subcontract level. The rule has been changed to lessen the impact on small businesses (see paragraph 11. of this section).
   g. Impact on small business.
      Comment: Several respondents note the impact on small businesses.
      Response: See detailed discussion of impact on small business at paragraph 11. of this section and changes to the rule to lessen that impact.
   h. Difficult to administer for Government.
      Comment: Several respondents consider the rule expensive and impractical to administer for the Government. One respondent comments on the further paperwork burdens on contracting officials, and that it cannot be effectively administered.
      Response: There are no particularly burdensome requirements imposed on the Government by this rule. Review of contractors’ compliance would be incorporated into normal contract administration. The Government will not be reviewing plans unless a problem arises.
   i. Rule should be withdrawn or issue 2nd proposed rule.
      Comment: One respondent requests that the rule be withdrawn. Several respondents recommend significant redrafting of the proposed rule and an opportunity to comment on a second proposed rule that makes important revisions.
Response: Although the Councils have made significant revisions to the proposed rule to address the concerns of the public, the revisions do not go beyond what could be anticipated from the text of the proposed rule and the preamble to the proposed rule. The changes are in response to the public comments. They do not rise to the level of needing republication under 41 U.S.C. 418b. However, the Councils published a new proposed rule on mandatory disclosure under FAR case 2007–006.

3. Broad recommendations.

a. Should not cover ethics.

Comment: One respondent recommends not using the term “ethics” throughout the rule. Contractors can and should develop and train employees on appropriate standards of business conduct and compliance for its officers, employees and others doing (or seeking to do) business with the Federal Government. However, contractors typically do not teach “ethics” to their employees.

Response: The term “ethics” is a term currently used throughout the FAR (reference FAR 3.104 and 9.104–1(d)) and is not considered to be an unfamiliar term to the professional and is not considered to be an
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Comments: Several respondents comment that the requirements of an internal control system should be like the United States Sentencing Commission 2005 Federal Sentencing Guidelines (Ch. 8 section 8B2.1), either by direct incorporation into the FAR or by reference. The proposed rule already included 6B2.1(b)(2) and (b)(3). One respondent is concerned that if they are not identical, businesses (especially small businesses) will believe they have met the compliance requirements of the U.S. Government by following the FAR; this will create a false sense of security. This respondent believes that the FAR requirements fall short when compared to the corporate sentencing guidelines. The respondent also points out that there are no clauses applying to smaller contracts, or to commercial item contracts, although companies with these contracts are still subject to the sentencing guidelines. Key requirements of the guidelines are omitted from the rule, such as knowledgeable leadership, exclusion of risky personnel, and individual responsibility for implementing compliance systems.

Several respondents ask for a specific reference to be made in the rule to the U.S. Sentencing Guidelines.

1. First, in this area of corporate compliance, it could be confusing if it appeared that the FAR was setting a different standard than the Sentencing Commission and the Federal courts, which implement the Guidelines.

2. Second, the Sentencing Guidelines are subject to routine reexamination and revision by both the Sentencing Commission after substantial study and public comment, and the Federal courts in specific cases, allowing for adjustments to this proposed rule without having to open a new FAR case. Therefore, the respondent believes that the Guidelines should serve as the baseline standard for a contractor’s code of ethics and business conduct. By referencing the Guidelines, we would be able to ensure that the Federal Government speaks with one voice on corporate compliance.

Response: The Initiators of the case asked that the FAR mirror the DFARS. The DFARS provisions are very similar to the Sentencing Guidelines and are adequate for this final rule. It would require public comment to include additional requirements from the Sentencing Guidelines as requirements in the FAR. The request to more closely mirror the Sentencing Guidelines is being considered as part of a separate case, FAR 2007–006.

3. Make pre-award requirement.

Comments: One respondent suggests making the rule a pre-award requirement, to ensure that only contracts are awarded to firms electing to conduct business in an ethical manner, consistent with FAR Part 9. The respondent believes that once contractors choose to implement the program with employees acknowledging the consequences of violations, it becomes a self-perpetuating program, requiring no additional actions by the contractor other than certification for new awards.

Response: FAR Part 9 (9.104–1(d)) already provides that a prospective contractor must have a satisfactory record in integrity and business ethics as a standard for determining a prospective contractor responsible as a pre-award requirement. The Councils believe that the respondent’s suggestion would encumber or circumvent new contract awards which the Government wishes to encourage. Therefore, no change to the rule has been made.

d. Hire certified management consultants (CMCs).

Comment: One respondent recommends that the rule be amended to encourage Government agencies that are hiring consultants to hire Certified Management Consultants or those who ascribe or commit to a code of ethics from an acceptable professional organization such as the Institute of Management Consultants for all Government contracts, including consulting and/or advisory services.

Response: It is the contractors’ responsibility to comply with the rule and establish a code of business ethics. The Government cannot endorse any particular business or organization as an appropriate contractor. Therefore, the Councils have not changed the rule in response to this comment.

e. Use quality assurance systems.

Comments: One respondent states that the rule does not lead to future improvements in compliance methods. The respondent recommends that, where possible, corporate compliance systems might be bolstered by drawing on and meshing compliance with existing quality assurance systems.

Response: The initiators of the case have left the rule unchanged in this regard but do not specifically request use of existing quality assurance systems.

f. Establish rewards rather than punishments.

Comments: One respondent states that the regulation offers an opportunity to establish a regulation that rewards contractors who behave appropriately, contradicting the Federal Government’s “. . . mindset to penalize the wrong doer rather than rewarding the desired behavior.”

Response: The Councils do not agree that this regulation should include a special “reward” for contractors who behave ethically. The Government “rewards” contractors who perform satisfactorily through payment of profit on the contract, favorable past performance evaluations, and the potential award of additional contracts.

g. Should not be mandatory - be more like the DFARS.

Comments: Several respondents expressed the view that the FAR rule should be modeled on the DFARS rule at Subpart 203.70, which is discretionary rather than mandatory. It states that contractors should have standards of conduct and internal
control systems. One of these respondents believes that the proposal to impose contractual mandates is misguided.

Response: The discretionary rule in the DFARS is no longer strong enough in view of the trend (U.S. Sentencing Guidelines and the Sarbanes-Oxley Act) to increase contractor compliance with ethical rules of conduct. According to the Army Suspension and Debarment Official, the majority of small businesses that he encounters in review of Army contractor misconduct, have not implemented contractor compliance programs, despite the discretionary DFARS rule.

However, with regard to the requirement for posters when the contractor has established an adequate internal reporting mechanism, see paragraph 7. of this section.

b. More logical sequence for procedures and clause, and delete opening paragraph of procedures.

Comment: One respondent recommends that the proposed changes at 3.1003 be rewritten in a logical sequence. This respondent also recommended that the clause paragraphs should be rewritten in logical sequence with the alternate versions sequentially deleting the last paragraphs instead of creating the delete and renumber provisions.

Another respondent recommends deletion of the opening paragraph at 3.1003 because following the procedures does not ensure that the policies are implemented.

Response: The procedures section has been completely rewritten to reduce redundancy and inconsistencies. The Councils have separated the clause into two clauses, which makes the second point about logical order in the clause moot. The opening paragraph at 3.1003 has been deleted.

4. Policy.

a. “Should” vs. “shall.”

Comment: At least four respondents comment on an inconsistency between “should” in the policy and “shall” elsewhere, Section 3.1002, Policy, states that contractors “should” have a written code of ethics, etc, while the Section 3.1003, Procedures, and the contract clause at 52.203-13 makes the programs mandatory unless the contract meets one of several exceptions.

Response: The inconsistency was deliberate. The policy applies to all contractors but the specific mandatory requirements of the clause apply only if the contract exceeds $5 million and meets certain other criteria. Section 3.1003 has been rewritten as “Mandatory requirements” to clearly distinguish it from the policy, which applies to all Government contractors.

b. “Suitable to” vs. “commensurate with.”

Comment: One respondent comments that the policy uses the phrase “suitable to” the size of the business whereas the clause uses the term “Commensurate with.”

Response: The phrase “commensurate with” has been deleted from the clause.

5. Exceptions—general.

Comments: Two respondents commented on the exceptions to the rule in general.

• The rule be revised to list exceptions separately.

• The key exceptions to the rule in subpart 3.1003(a) and 3.1004(a)(1) are not consistent. 3.1003(a) exempts contracts awarded under FAR Part 12 from the required employee ethics and compliance-training program and internal control system, or displaying the fraud poster, but it does not list the exemption from having a written code of business ethics. 3.1004(a)(1) clearly exempts contracts awarded under FAR Part 12 from all of the clause requirements.

Response: The Councils partially concur with the respondents’ recommendations. The Councils have revised the final rule to—

• Move the exceptions into the clause prescription; and

• Delete the conflicting wording in the proposed rule at 3.1003(a).

a. Commercial items.

i. Concur with exception for commercial items.

Comment: Two respondents agree that the rule should exclude contracts awarded under FAR Part 12. One respondent agrees with the intent of the rule concerning consistent standards of ethics and business conduct for Federal contracts, and the exclusion FAR 12. Another respondent agrees that all contractors should have written codes of conduct as a good business practice code of, but believes the FAR Part 12 exemption should be from the full coverage of the rule, including the written code of conduct requirement.

Response: The Councils note that the FAR Part 12 exemption does include exemption from the requirement for a written code of conduct (see introductory paragraph at beginning of this Section 5.)

ii. Disagree with exception for commercial items.

Comments: Three respondents comment on the exception for contracts to be performed outside the United States, mostly from a definitional perspective.

i. Supporting office in the U.S.

Comment: One respondent suggests that the meaning of “work currently performed outside the United States” needs to be better defined. The
The proposed rule is unclear whether offices in the United States supporting the foreign project would be required to comply:

Response: The term “performed outside the United States” is used throughout the FAR several dozen times. There is never any explanation regarding possible application to offices in the United States supporting the foreign project. If part of a contract is performed in the United States and part of it is performed outside the United States, then the part performed in the United States is subject to whatever conditions apply to work performed in the United States.

ii. Outlying areas.

Comments: One respondent specifically endorses the exception for contracts performed outside the United States. However, the respondent requests clarification of the term “outlying areas.”

Response: This term is defined in FAR 2.101.

i. Dollar threshold.

Eight respondents commented on the rule’s $5 million threshold.

Comments: One respondent does not support the requirement at the 3.1003(c) that authorizes agencies to establish policies and procedures for the display of the agency fraud hotline poster for contracts below $5 million.

Response: Federal agency budgets and missions vary and are distinct. Some agencies already require display of the hotline posters below the $5 million threshold. For this reason, agencies that desire to have contractors display the hotline poster should be allowed to implement the program in a way that meets their needs. Therefore, the Councils have not made any change to the rule in response to this comment.

ii. Should not allow agencies to require posters below $5 million.

Comments: Five respondents suggested removing the $5 million threshold and requiring all contractors to comply with the rule.

Response: The Councils do not agree with removal of the threshold. Removing the $5 million dollar threshold and requiring all contractors to comply with the rule is not practical. At lower dollar thresholds, the costs may outweigh the benefits of enforcing a mandatory program. Nevertheless, the policy at 3.1002 applies to all contractors.

The Councils note with regard to the OIG audit report ED-OIG/A03F0022 of March 2007, that the contractor in question did not include the required conflict of interest clauses in its subcontracts and consulting agreements. This is the essence of the problem rather than the lack of a contractor code of ethics and compliance and internal control systems in contracts less than $5 million.

iii. How is application of the threshold determined?

Comment: One respondent is concerned that the rule fails to state how the $5 million threshold for the application of the clause is to be determined and questions if the threshold should apply to contracts with multi-years as the option years for such contracts may not be awarded, thereby impacting the total value of the contract award. The respondent recommends that the threshold apply to contracts with one term and only to the base year in contracts with options.

Response: FAR 1.108(c) provides uniform guidance for application of thresholds throughout the FAR.

iv. $5 million threshold is too low.

Comments: One respondent is concerned that many companies have not implemented programs that would adequately meet the rule and that the $5 million threshold is too low. It will therefore serve as a disincentive for many small and medium-sized companies who may not be willing or able to comply with the requirement to implement training and control systems.

Response: The $5 million threshold is consistent with the threshold established by the U.S. Department of Defense (DoD) for contractor ethics. DoD contracts with the largest number of Federal contractors. Therefore, the Councils have not made any change to the threshold for application of the clause. For revisions made to lessen the impact on small business see paragraph 11. of this section.

v. Alternate standards.

Comment: One respondent recommends that the rule focus on the size of the firm and its volume of Federal work over a more significant period of time, and that SBA size standards and some proportion of the work the contractor performs be used as determining factors.

Response: The Councils have revised the final rule to limit the requirement for formal awareness programs and internal control systems to large businesses while retaining the $5 million threshold for application of the clause. The clause needs to be included, because it might flow down from a small business to a large business, from whom full compliance would be required. Although the proposed rule allowed contractors to determine the simplicity or complexity and cost of their programs “suitable to the size of the company and extent of its involvement in Government contracting,” this left many respondents unsure as to what would be acceptable (see also paragraph 11. of this section).

Comment: One respondent is concerned that the rule does not adequately identify which contractors should be covered by the requirements and suggests that the kind of work and responsibilities of the contractor is a better indicator of the need for ethics rules than the size of the contract award.

Response: As a practical matter, all contractors doing business with the Government should have a satisfactory of integrity and business ethics, irrespective of the work the contractor is performing or the dollar amount of the contract. However, given the volume and complexities of work contractors perform for the Government, it is not practical to apply the rule on the basis of a contractor’s work or responsibilities. It is more realistic for the Government to establish monetary thresholds and/or size standards to ensure its widest impact and viability.

d. Performance period.

Comments: Five respondents commented on the 120-day performance period, considering that 120 days is too short, because it takes longer than that to implement a compliance program, including an internal control system. Even if the compliance programs can be implemented in the required timeframe, that leaves as little as 30 days between implementation of the program and completion of the contract. The 120-day performance period operates as a disincentive to small and medium size companies. Some respondents recommend using a minimum of one year for the period of performance.

Response: The Councils do not concur that 120 days is too short. Although on an initial contract it may take some time to get the program established, on follow-on contracts the program will already be in operation. Many contracts responding to emergency situations are of short duration, and are the very type of contract that needs to be covered. The contracting officer is given leeway in the final rule to expand the 90-day period (See paragraph 6.c. of this section).

e. Other exceptions.

Comment: Two respondents submitted comments suggesting an expansion to the list of exceptions.
One respondent recommends two additional exceptions to the language at 3.1003, to make it clear that the new subpart is only applicable for new, open market, contract awards or agreements. Additional exceptions would include “delivery or task orders placed against GSA Federal Supply Contracts, using Part 8 procedures,” and “orders placed against task order and delivery order contracts entered into pursuant to Subpart 16.5, Indefinite Delivery Contracts.”

Another respondent recommends that research and development contracts issued to universities and other nonprofit organizations be exempt from the rule. Research institutions uniformly have business codes of conduct and internal controls to enable the reporting of improper conduct as well as disciplinary mechanisms (reference OMB Circular A–110). In addition, the National Science and Technology Council’s Committee on Science is currently developing voluntary compliance guidelines for recipients of Federal research funding from all agencies across the Federal Government, to help recipients address the prudent management and stewardship of research funds and promote common policies and procedures among the agencies.

Response: The rule is not applicable to existing contracts. Therefore, an exception for delivery or task orders placed against GSA Federal Supply Contracts or issued under existing Indefinite Delivery Contracts is not necessary.

While universities and other nonprofit organizations may have existing guidelines, policies and procedures for business codes of conduct, there are many benefits of including a clause in new solicitations and contracts. The rule will strengthen the requirements for corporate compliance systems and will promote a policy that is consistent throughout the Government. Therefore, the Councils have not made any changes to the rule in this regard, although the burden on small businesses has been reduced (see 52.203–1(f)(3)).

6. Contractor program requirement.

a. Lack of specific guidelines.

Comments: Various respondents express the view that the rule should be more specific about the required programs.

• Some provided examples of what should be included.

• One was concerned that contractors have increased risk of False Claims Act violations because when seeking payments under fixed-price construction contracts, they would have to certify that they sought compensation “only for performance in accordance with the specifications, terms, and conditions of the contract”, including the new and highly subjective requirements in the proposed rule.

• One recommended that the FAR rule should be held until GAO finishes its study of contractor ethics at DoD.

• Another recommended that the Councils should establish a Government-industry panel to develop a minimum suggested code of ethics and business conduct based upon the best practices many contractors already employ.

Response: This rule gives businesses flexibility to design programs. Many sample codes of business ethics are available on-line. The specific issues that should be addressed may vary depending on the type of business. To provide more specific requirements would require public comment. The new FAR Case 2007–006 will propose the imposition of a set of mandatory standards for an internal control system. The Councils will welcome suggestions for further FAR revisions when the GAO finishes its study.

b. Compliance.

Comment: Several respondents questions how the contracting officer would verify compliance with the requirements. There is no requirement for submission to the Government. The internal control system states what should be included. Are these mandatory requirements or is it the judgment of the contracting officer?

Response: The contracting officer is not required to verify compliance, but may inquire at his or her discretion as part of contract administrative duties. Review of contractors’ compliance would be incorporated into normal contract administration. The Government will not be routinely reviewing plans unless a problem arises. The Government does not need the code of ethics as a deliverable. What is important is that the Contractor develops the code and promotes compliance of its employees.

“Should” provides guidance and examples, rather than a mandatory requirement. The contracting officer does not judge the internal control system, but only verifies its existence.

c. Time limits.

Various suggestions were made about the time allotted to develop a code of ethics.

• One respondent recommends 180 days for the code.

• Another recommended an extension to 60 days after contract award.

• One respondent states that it takes significantly longer than 30 days to put a written code of conduct in place. In order to be successful, the process should include an analysis of what should be in the code, drafting the code, stakeholder input, publication, and communication of the resulting code. This is difficult to accomplish in less than 6 months and usually requires at least a year to do well.

The same respondents also commented about whether 90 days is sufficient to develop a training program and internal control systems. For example, one respondent comments that compliance training programs must be well designed and relevant to be effective. Establishing an internal control system also takes significantly more than 90 days. According to the respondent, the rule would yield “cookie-cutter” compliance, devoid of any real commitment to ethics and compliance.

Response: Although the Councils consider that the specified time periods are generally adequate, the Councils have revised the clause so that companies needing more time can request an extension from the contracting officer. The Councils also note that an initial code and program can be subject to further development over time, as experience with it suggests areas for improvement.

d. Internal Control Systems—mandatory disclosure and full cooperation.

Comments: Six respondents consider the requirements for the internal control system regarding disclosure to the Government and full cooperation with the Government to be problematic. Reporting suspected violations of law is troubling and requested more information on the trigger to the requirement. One respondent expresses concern with possible violations of constitutional rights associated with the disclosures.

Other respondents are concerned that “full cooperation” can force companies to relinquish or waive the attorney-client privilege. One respondent requests that the preamble state that full cooperation does not waive attorney-client privilege or attorney work product immunity.

Another respondent recommends expansion of the full cooperation requirement to cover audits. Information received by the OIG may precipitate an audit, rather than a criminal investigation.

Response: The Councils note that the most controversial paragraphs (paragraphs (c)(2)(v) and (vi) in the proposed rule) were not mandatory, but were listed as examples of what a contractor internal control system should include. The mandatory
7. Display of posters.

i. Agency posters.

Government posters are unnecessary, if the contractor has internal reporting mechanisms.

Comments: Several respondents do not agree that Government hotline posters should need to be displayed if the contractor has its own code of ethics and business conduct policy and processes already in place to conform to the DFARS rule.

One respondent cites DFARS 203.7001(b), which recognizes and permits companies to post their own internal hotline poster, in lieu of an agency Inspector General (IG) hotline poster, for employees to have an outlet to raise any issues of concern. The respondent believes this coverage is adequate and there is no need to impose an additional requirement to display agency IG hotline posters.

Another respondent states that the rule that requires all Federal contractors to post agency hotlines would deny such contractors the opportunity to funnel problems through their internal control systems and frustrate at least much of the purpose of establishing such systems. One respondent states that companies want an opportunity to learn about internal matters first and to be in the best position to take corrective action.

Another states that while the agencies currently all mandate that their contractors display a fraud hotline, none mandate that their contractors display a Government hotline. DoD, Veterans Administration, and Environmental Protection Agency currently require their contractors to post their own internal hotlines unless they have “established a mechanism, such as a hotline, by which employees may report suspected instances of improper conduct, and instruction that encourage employees to make such reports.” Several other respondents recommend that the FAR Councils take the same approach.

Response: Although the proposed rule did not prevent contractors from posting their own hotline posters, the Councils have determined that it will fulfill the objective of the case to mirror DFARS 252.203–7002. Display of DoD Hotline Poster, i.e., display of the Government posters is not required if the contractor has established an internal reporting mechanism by which employees may report suspected instances of improper conduct along with instructions that encourage employees to make such reports.

ii. Too many posters are unnecessary and potentially confusing.

Comments: Several respondents believe that requiring all contractors to display the hotlines for all Federal agencies for which they are working—without regard to the number of such agencies, or the contractors’ own efforts to encourage their employees to report any evidence of improper conduct—would have several negative and unintended consequences. Rather than facilitate reporting, multiple postings could confuse employees. To which agency should they report a particular problem? Adding agency-specific requirements to existing compliance programs dilutes the impact and message of the existing program and will likely lead to confusion among professionals. A bulletin board with myriad compliance references will be confusing at best.

Response: Each agency’s IG may require specific requirements and information for posters. There is no central telephone number or website that serves as the hotline for all agency IGs. However, under the final rule, if the company has its own internal reporting mechanism by which employees may report suspected instances of improper conduct along with instructions that encourage employees to make such reports, there is no need to hang multiple agency posters.

iii. Responsibility for determining the need for displaying an agency IG Fraud Hotline Poster?

Comment: Several respondents note that the Inspector General Act of 1978 gives the agency’s IG (not the agency) the responsibility for determining the need for, and the contents of, the fraud hotline poster.

Response: The Councils agree that it is not the agency that decides the need for the poster, but the agency IG. The Councils have made the requested change at FAR 3.1003(b).


i. Only when requested by DHS?

Comment: One respondent states that in the Federal Register background and in the proposed language at 3.1003(d)(2) the guidance seems to imply that the display of the DHS poster is required for contractors with disaster assistance funds, when and only when so requested by DHS.

Response: This interpretation is correct. The final rule clarifies that it is the DHS Inspector General that requests use of the posters.

ii. Different poster for each event is not best approach.

Comment: One respondent believes that the contractor’s own hotline, if one exists, is better suited to providing a mechanism for employees to report concerns than a different poster for each event.

Response: DHS Inspector General must determine whether to use event-specific or broad posters to cover multiple events. However, the Councils have revised the final rule to permit use of the Contractor’s own hotline poster if the contractor has an adequate internal control system.

8. Remedies.

Comments: Four comments concerning proposed remedies were received. In general, two of the respondents questioned consistency in application, consistency, and due process, and two were generally opposed to the remedies.

• One respondent asks whether there “should be remedies for non-compliance when the contractor is not required to affirm or otherwise prove compliance, and when there is no adequate guidance for the CO regarding a determination of compliance?”

Without guidance, contracting officers in different agencies may make different assessments of the same contractor.

• One respondent “cannot find any rational relationship between the proposed “remedies” and any damages or other losses that the Government might suffer from any breach of the new contractual requirements ethics codes and compliance programs.” This respondent strongly recommends that the contractual remedies be limited to such equitable measures as may be necessary to bring the contractor into compliance with its contract obligations to implement certain procedures, and omit any monetary penalties.

• One respondent expressed a similar concern that the remedies “are improper, excessive and unwarranted.”

• One respondent requests provision of due process with a proposal to include the following text; “Prior to taking action as described in this clause, the Contracting Officer will notify the Contractor and offer an opportunity to respond.”

Response: The Councils have decided that remedies should not be specified in the clause. The FAR already provides sufficient remedies for breach of contract requirements.

a. Objections to rule also apply to flowdown.

Naturally, those respondents that oppose the rule in general or in particular, will also oppose its flowdown in general or in particular. For example,

- **Comment:** One respondent recommends exempting this requirement for subcontracts less than one year in length, rather than 120 days.
  
  **Response:** See discussion in paragraph 5.d. of this section.

- **Comment:** Another respondent states that this requirement will negatively impact universities, especially given the flow-down requirements for prime contracts. This respondent recommends that research and development contracts issued to universities and other nonprofit organizations should be exempt from this proposed rule.
  
  **Response:** See discussion at paragraph 5.e. of this section.

- **Comment:** Another respondent states that the rule has not estimated the number of small business subcontractors that will be adversely impacted by this requirement.
  
  **Response:** See discussion at paragraph 11. of this section.

b. Rationale for the flowdown.

**Comment:** One respondent states that there is no rationale provided for this troubling and perplexing flowdown requirement and would like it to be deleted from the rule. None of the agencies currently require any flowdown to subcontractors.

**Response:** The same rationale that supports application of the rule to prime contractors, supports application to subcontractors. Meeting minimum ethical standards is a requirement of doing business with the Government, whether dealing directly or indirectly with the Government. The rule does not apply to contracts/subcontracts less than $5 million, exempts all commercial contracts/subcontracts, and the final rule reduces the burden on small business, whether prime or subcontractor.

c. Implementation.

**Comment:** One respondent has questions about the implementation of the flowdown. What is a subcontract—does it include purchase orders? The Government and the construction industry have a different concept of “subcontract.” They are concerned that the meaning of “subcontract” is therefore far from clear to general construction contractors and their subcontractors. Are prime contractors expected to distinguish subcontracts for commercial items from subcontracts for other goods and services?

**Response:** This issue is not specific to this case. Sometimes construction firms think that “subcontract” does not include purchase orders. The FAR does not make this distinction. The intent is that the flowdown applies to all subcontracts, including purchase orders. Prime contractors are expected to distinguish subcontracts for commercial items from subcontracts for other goods and services, not only for this rule but for many other FAR requirements (see FAR clause 52.244–6, Subcontracts for Commercial Items, which is included in all solicitation and contracts other than those for commercial items).

d. Enforcement.

**Comment:** Several respondents are concerned with how the flowdown requirement will be enforced. One respondent is concerned that prime contractors should not be responsible for subcontractors’ compliance with this requirement.

**Response:** The contractor is not required to judge or monitor the ethics awareness program and internal control systems of the subcontractors—just check for existence. The difficulty of a small business concern monitoring a large business subcontractor is true with regard to many contract requirements, not just this one. The Councils plan to further address the issue of disclosure by the subcontractor under the new FAR Case 2007–006.

10. **Clause prescriptions.**

a. **Extraneous phrase.**

**Comment:** Several respondents note that something is wrong with the following phrase in 3.1004(a)[1][i]: “…or to address Contractor Code of Ethics and Business Conduct and the display of Federal agency Office of the Inspector General (OIG) Fraud Hotline Poster”

**Response:** The extraneous phrase has been removed from the final rule.

b. **Alternates.**

**Comment:** One respondent says that what “triggers the insertion of Alternate I or II clause language is ambiguous in the text of the Policy and Procedures sections of the rule and the confusion is compounded when read with the language used in the clause.”

One respondent comments that if the contract period of performance is less than 120 days and the agency has not established a requirement for posting at a lower dollar level, there is no requirement to include the clause; in this case Alternate II is never invoked.

**Response:** The Councils have decided to use two separate clauses, rather than one clause with alternates. The conditions for use of the alternates are so diverse, that it was impossible to comply with the FAR drafting conventions that the prescription for the clause should include both the requirements for the basic clause and any alternates. Although the Councils do not agree with the respondent (because the conditions are connected by “or” rather than “and”), any ambiguity in the prescription for Alternate II has been eliminated by the use of two clauses. The language at 3.1004(c)(2)(now 3.1004(b)(3)(ii)) has been clarified.

11. **Regulatory Flexibility Analysis.**

a. **Impact on small business requires regulatory flexibility analysis.**

**Comment:** Several respondents note that the rule will have a substantial impact on small business. The SBA Chief Counsel for Advocacy commented that the Councils should therefore publish an Initial Regulatory Flexibility Analysis. The SBA Chief Counsel for Advocacy points out that the minimal set-up cost for the ethics program and internal control system would be $10,000, according to one established professional organization; there would be further costs for maintaining the system, periodic training, and other compliance costs.

Another respondent asks how the finding that “ethics programs and hotline posters are not standard commercial practice” squares with the claim that the proposed rule “will not have a significant impact on a substantial number of small entities”. The respondent notes the absence of any cost estimate, or impact on competition for contracts and subcontracts. Mid-sized and small construction contractors would find the cost and complexity of restructuring their internal systems, and continuously providing the necessary training to employees scattered across multiple sites, to be very substantial, and might well exceed benefits of pursuing Federal work. (Another respondent echoes this.) The respondent recommends the Councils undertake a fresh data-driven analysis of how severely such mandates are likely to impact small businesses, including the level of small business participation in Federal work.
Another respondent comments that the rule may have an unduly burdensome impact on Government contractors, particularly smaller contractors. It may deter small and minority owned businesses from entering the Federal marketplace and from competing for certain contracts.

b. Alternatives. Several alternatives were presented for small business compliance with the regulation.

• Since small business size standards for the construction industry are well over $5 million in annual revenue, the exclusion of contracts under $5 million is not likely to insulate small business from the cost of compliance. Federal construction contracts typically exceed $5 million, and small construction contractors regularly perform them. Instead of $5 million, the requirements should be linked to the size standards the SBA established, and some proportion of the work that the contractor performs for the Federal Government. The construction industry size standard for general contractors is $31 million in average annual revenue. The requirements should be imposed on only the firms that both exceed the standard and derive a large proportion of their revenue from Federal contracts.

• Delay the flow down requirement to small business subcontractors, pending review of data on impact on small business subcontractors (SBA Chief Counsel for Advocacy).

• Provide additional guidance for small businesses on a code of ethics commensurate with their size.

Response: Exclusion of commercial items. The original Regulatory Flexibility Act statement as published did not identify the rule’s exclusion for commercial items. The burdens of the clauses will not be imposed on Part 12 acquisitions of commercial items. This is of great benefit to small businesses.

Reduced burden for small businesses. The Councils acknowledge the difficulty and great expense for a small business to have a formal training program, and formal internal controls. The Councils also acknowledge that the public was confused about the proposed rule’s flexible language for small business: “Such program shall be suitable to the size of the company.”

The Councils have maintained the clause requirement for small businesses to have a business code of ethics and provide copies of this code to each employee. There are many available sources to obtain sample codes of ethics. However, the Councils have made the clause requirements for a formal training program and internal control system inapplicable to small businesses (see also paragraph 5.c.v. of this section).

Because the clause 52.203–13 is still included in the contract with small businesses, the requirements for formal training program and internal control systems will flow down to large business subcontractors, but not apply to small businesses.

The Councils note that if a small business subsequently finds itself in trouble ethically, the need for a training program and internal controls will likely be addressed by the Federal Government at that time, during a criminal or civil lawsuit or debarment or suspension.

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 rule does not require use of the clause requiring contractors to have a written code of business ethics and conduct if the contract is—

• Valued at $5 million or less;
• Has a performance period less than 120 days;
• Was awarded under Part 12; or
• Will be performed outside the United States.

Furthermore, after discussions with the Small Business Administration (SBA) Office of Advocacy, the Councils have made inapplicable to small businesses the clause requirement for a formal compliance awareness program and internal control system.

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, and 52

Government procurement.


Al Matera,
Director, Office of Acquisition Policy.

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

1. The authority citation for 48 CFR parts 2, 3, and 52 continues to read as follows:

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

PART 2—DEFINITIONS OF WORDS AND TERMS

2. Amend section 2.101 in paragraph (b), in the definition “United States” by redesignating paragraphs (1) through (7) as paragraphs (2) through (8), respectively, and adding a new paragraph (1) to read as follows:

2.101 Definitions.

(b) * * *

United States * * *

(1) For use in Subpart 3.10, see the definition at 3.1001.

* * * * * *

PART 3—IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST

3. Add Subpart 3.10 to read as follows:

Subpart 3.10—Contractor Code of Business Ethics and Conduct

3.1000 Scope of subpart.

3.1001 Definitions.

3.1002 Policy.

3.1003 Mandatory requirements.

3.1004 Contract clauses.

Subpart 3.10—Contractor Code of Business Ethics and Conduct

3.1000 Scope of subpart.

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

3.1001 Definitions.

United States, as used in this subpart, means the 50 States, the District of Columbia, and outlying areas.

3.1002 Policy.

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

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

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

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

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

3.1003 Mandatory requirements.

(a) Requirements. Although the policy in section 3.1002 applies as guidance to all Government contractors, the contractual requirements set forth in the clauses at 52.203–13, Code of Business Ethics and Conduct, and 52.203–14, Display of Hotline Poster(s), are mandatory if the contracts meet the conditions specified in the clause prescriptions at 3.1004.

(b) Fraud Hotline Poster. (1) Agency OIGs are responsible for determining the need for, and content of, their respective agency OIG fraud hotline poster(s).

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

3.1004 Contract clauses.

Unless the contract is for the acquisition of a commercial item under part 12 or will be performed entirely outside the United States—

(a) Insert the clause at FAR 52.203–13, Contractor Code of Business Ethics and Conduct, in solicitations and contracts if the value of the contract is expected to exceed $5,000,000 and the performance period is 120 days or more.

(b)(1) Insert the clause at FAR 52.203–14, Display of Hotline Poster(s), if—

(i) The contract exceeds $5,000,000 or a lesser amount established by the agency; and

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

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

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

(i) Identify the applicable posters; and

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

(3) In paragraph (d) of the clause, if the agency has established policies and procedures for display of the OIG fraud hotline poster at a lesser amount, the contracting officer shall replace “$5,000,000” with the lesser amount that the agency has established.

PART 52—Solicitation Provisions and Contract Clauses

4. Add sections 52.203–13 and 52.203–14 to read as follows:

52.203–13 Contractor Code of Business Ethics and Conduct.

As prescribed in 3.1004(a), insert the following clause:

CONTRACTOR CODE OF BUSINESS ETHICS AND CONDUCT (DEC 2007)

(a) Definition.

United States, as used in this clause, means the 50 States, the District of Columbia, and outlying areas.

(b) Code of business ethics and conduct. (1) Within 30 days after contract award, unless the Contracting Officer establishes a longer time period, the Contractor shall—

(i) Have a written code of business ethics and conduct; and

(ii) Provide a copy of the code to each employee engaged in performance of the contract.

(2) The Contractor shall maintain a system of business ethics and conduct.

(c) Awareness program and internal control system for other than small businesses. This paragraph (c) does not apply if the Contractor has represented itself as a small business concern pursuant to the award of this contract. The Contractor shall establish within 60 days after contract award, unless the Contracting Officer establishes a longer time period—

(1) An ongoing business ethics and conduct awareness program; and

(2) An internal control system.

(i) The Contractor’s internal control system shall—

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

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

(ii) For example, the Contractor’s internal control system should provide for—

(A) Periodic reviews of company business practices, procedures, policies, and internal controls for compliance with the Contractor’s code of business ethics and conduct and the special requirements of Government contracting;

(B) An internal reporting mechanism, such as a hotline, by which employees may report suspected instances of improper conduct, and instructions that encourage employees to make such reports;

(C) Internal and/or external audits, as appropriate; and

(D) Disciplinary action for improper conduct.

(d) Subcontracts. The Contractor shall include the substance of this clause, including this paragraph (d), in subcontracts that have a value in excess of $5,000,000 and a performance period of more than 120 days, except when the subcontract—

(1) Is for the acquisition of a commercial item; or

(2) Is performed entirely outside the United States.

(End of clause)

52.203–14 Display of Hotline Poster(s).

As prescribed in 3.1004(b), insert the following clause:

DISPLAY OF HOTLINE POSTER(S) [DEC 2007]

(a) Definition.

United States, as used in this clause, means the 50 States, the District of Columbia, and outlying areas.

(b) Display of fraud hotline poster(s).

Except as provided in paragraph (c)—

(1) During contract performance in the United States, the Contractor shall prominently display in common work areas within business segments performing work under this contract and at contract work sites—

(i) Any agency fraud hotline poster or Department of Homeland Security (DHS) fraud hotline poster identified in paragraph (b)(3) of this clause; and

(ii) Any DHS fraud hotline poster subsequently identified by the Contracting Officer.

(2) Additionally, if the Contractor maintains a company website as a method of providing information to employees, the Contractor shall display an electronic version of the poster(s) at the website.

(3) Any required posters may be obtained as follows:

Poster(s) Obtain from

Contracting Officer shall insert—

(i) Appropriate agency name(s) and/or title of applicable Department of Homeland Security fraud hotline poster; and

(ii) The website(s) or other contact information for obtaining the poster(s).

(c) If the Contractor has implemented a business ethics and conduct awareness program, including a reporting mechanism, such as a hotline poster, then the Contractor need not display any agency fraud hotline posters as required in paragraph (b) of this clause, other than any required DHS posters.

(d) Subcontracts. The Contractor shall include the substance of this clause, including this paragraph (d), in all subcontracts that exceed $5,000,000, except when the subcontract—

(1) Is for the acquisition of a commercial item; or

(2) Is performed entirely outside the United States.

(End of clause)