ACC 2011 Annual Meeting

Session 400: Intro to Legal Issues in Government Contracts, Grants and Other Funding Agreements

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Session 400: Intro to Legal Issues in Government Contracts, Grants and Other Funding Agreements

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Small Business Size Standards

FAR 19.102, Size standards.

(a) The SBA establishes small business size standards on an industry-by-industry basis. (See 13 CFR Part 121.)

(b) Small business size standards are applied by—

(1) Classifying the product or service being acquired in the industry whose definition, as found in the North American Industry Classification System (NAICS) Manual (available via the Internet at http://www.census.gov/epcd/www/naics.html), best describes the principal nature of the product or service being acquired;

(2) Identifying the size standard SBA established for that industry; and

(3) Specifying the size standard in the solicitation so that offerors can appropriately represent themselves as small or large.

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Procurement Integrity

41 U.S.C. § 423; FAR 3.104 implements the Act and has four basic elements:

1. A ban on obtaining procurement information
2. A ban on disclosing procurement information
3. A requirement for government employees participating personally and substantially in a procurement to report employment contacts by or with a potential offeror
4. A 1-year ban for certain former government employees from accepting compensation from the contractor

4

Post-Government Employment - Revolving Door

18 U.S.C. § 208, Acts affecting a personal financial interest.

Except as permitted by subsection (b) hereof, whoever, being an officer or employee of the executive branch of the United States Government, or of any independent agency of the United States, a Federal Reserve bank director, officer, or employee, or an officer or employee of the District of Columbia, including a special Government employee, participates personally and substantially as a Government officer or employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, in a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which, to his knowledge, he, his spouse, minor child, general partner, organization in which he is serving as officer, director, trustee, general partner or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest - Shall be subject to the penalties set forth in section 216 of this title.

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Contracting with Small Businesses

FAR 19.201, General policy.

(a) It is the policy of the Government to provide maximum practicable opportunities in its acquisitions to small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns.

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8(a) Contracting

FAR 19.811-1, The 8(a) program, sole source.

- The contracting agency awards a contract to the SBA and the 8(a) company is a subcontractor
- The SBA delegates back to the contracting agency the authority to administer the subcontract
- The award form shall cite 41 U.S.C. 253(c)(5) or 10 U.S.C. 2304(c)(5) (as appropriate) as the authority for use of other than full and open competition

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Subcontracting by Set-Aside Small Businesses

FAR 52.219-14, Limitations on Subcontracting.

(1) *Services (except construction)*. At least 50 percent of the cost of contract performance incurred for personnel shall be expended for employees of the concern.

(2) *Supplies (other than procurement from a nonmanufacturer of such supplies)*. The concern shall perform work for at least 50 percent of the cost of manufacturing the supplies, not including the cost of materials.

(3) *General construction*. The concern will perform at least 15 percent of the cost of the contract, not including the cost of materials, with its own employees.

(4) *Construction by special trade contractors*. The concern will perform at least 25 percent of the cost of the contract, not including the cost of materials, with its own employees.

8

Commercial Items

FAR 12.101, Policy.

Agencies shall—

(a) Conduct market research to determine whether commercial items or nondevelopmental items are available that could meet the agency's requirements;

(b) Acquire commercial items or nondevelopmental items when they are available to meet the needs of the agency; and

(c) Require prime contractors and subcontractors at all tiers to incorporate, to the maximum extent practicable, commercial items or nondevelopmental items as components of items supplied to the agency.

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Small Business Size Protest

13 CFR 121.1001-1010, Size Protest Regulations.

- Competitor, contracting officer, or the SBA may initiate
- SBA area office collects information and makes a size determination
- The size determination generally applies only to that procurement – some categories it applies until cured
- Area office size determination can be appealed to SBA Office of Hearings and Appeals

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Basic Ordering Agreements with an 8(a)

FAR 19.804-5, Basic ordering agreements.

(a) The contracting activity must offer, and SBA must accept, each order under a basic ordering agreement (BOA) in addition to offering and accepting the BOA itself.

(b) SBA will not accept for award on a sole-source basis any order that would cause the total dollar amount of orders issued under a specific BOA to exceed the competitive threshold amount (currently $4 million).

(c) Once an 8(a) concern's program term expires, the concern otherwise exits the 8(a) Program, or becomes other than small for the NAICS code assigned under the BOA, SBA will not accept new orders for the concern.

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Bid Protests

FAR Part 33.1, Protests.

- Protests to agency
  - No right for awardee to intervene; no administrative record produced; no discovery; no hearing – avoids embarrassing customer, allows customer to police itself, fastest
- Protests to GAO
  - Awardee may intervene; various portions of administrative record produced; limited written discovery; hearings in limited cases; GAO has unfettered ADR authority which may limit due process, fast
- Protest to Court of Federal Claims
  - Awardee may intervene; administrative record produced; any form of discovery uncommon but possible; typically cross-motions on administrative record and oral argument; DOJ Government counsel adds motions and expense; fast and generally fairest

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1. A ban on obtaining procurement information
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3. A requirement for government employees participating personally and substantially in a procurement to report employment contacts by or with a potential offeror
4. A 1-year ban for certain former government employees from accepting compensation from the contractor

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Gratuities

FAR 52.203-03, Gratuities.

- The contract may be terminated by written notice if the Contractor, its agent, or another representative—

  (1) Offered or gave a gratuity (e.g., an entertainment or gift) to an officer, official, or employee of the Government; and

  (2) Intended, by the gratuity, to obtain a contract or favorable treatment under a contract.

- Applies to all contracts that exceed $150,000

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Anti-Kickback

FAR 52.203-07, Anti-Kickback Procedures.

- The Anti-Kickback Act of 1986 prohibits any person from—
  - (1) Providing or attempting to provide or offering to provide any kickback;
  - (2) Soliciting, accepting, or attempting to accept any kickback; or
  - (3) Including, directly or indirectly, the amount of any kickback in the contract price charged by a prime Contractor to the United States or in the contract price charged by a subcontractor to a prime Contractor or higher tier subcontractor.
- Applies to all contracts that exceed $150,000

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Code of Conduct

FAR 52.203-13, Contractor Code of Business Ethics and Conduct.

- Contractor must
  - Have a code of business ethics and conduct
  - Train employees regarding compliance with the code
  - Establish internal controls
  - Report to the agency IG with a copy to the contracting officer, credible evidence of violations of criminal law involving fraud, conflict of interest, bribery, gratuity violations, or violations of the Civil False Claims Act and report overpayments to the contracting officer.
- Applies to contracts exceeding $5,000,000 and 120 days.

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Contingent Fees for Business Development

FAR 3.402, Statutory requirements.

Contractors' arrangements to pay contingent fees for soliciting or obtaining Government contracts have long been considered contrary to public policy because such arrangements may lead to attempted or actual exercise of improper influence. In 10 U.S.C. 2306(b) and 41 U.S.C. 254(a), Congress affirmed this public policy but permitted certain exceptions. These statutes—

(a) Require in every negotiated contract a warranty by the contractor against contingent fees;

(b) Permit, as an exception to the warranty, contingent fee arrangements between contractors and bona fide employees or bona fide agencies; and

(c) Provide that, for breach or violation of the warranty by the contractor, the Government may annul the contract without liability or deduct from the contract price or consideration, or otherwise recover, the full amount of the contingent fee.

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False Claims Act

18 U.S.C. § 287, False, fictitious or fraudulent claims (criminal)

31 U.S.C. §§ 3729-3733, False claims (civil)

any person who –

(A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval;

(B) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim;

(E) is authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(G) knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government

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False Claims Act

Scienter

- Criminal
  - Knowingly with intent
- Civil

  (1) the terms "knowing" and "knowingly" –

  (A) mean that a person, with respect to information –

  (i) has actual knowledge of the information;

  (ii) acts in deliberate ignorance of the truth or falsity of the information; or

  (iii) acts in reckless disregard of the truth or falsity of the information

  (B) require no proof of specific intent to defraud;

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Qui Tam (Whistleblower)

18 U.S.C. § 3730, Civil Actions for False Claims.

(b) Actions by Private Persons. –

(1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

(d) Award to Qui Tam Plaintiff. –

(1) If the Government proceeds with an action brought by a person under subsection (b), such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action. . . . .Any such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

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Safeguarding Classified Information

FAR SubPart 4.4, Safeguarding Classified Information Within Industry.

a) Executive Order 12829, January 6, 1993 (58 FR 3479, January 8, 1993), entitled “National Industrial Security Program” (NISP), establishes a program to safeguard Federal Government classified information that is released to contractors, licensees, and grantees of the United States Government. Executive Order 12829 amends Executive Order 10865, February 20, 1960 (25 FR 1583, February 25, 1960), entitled “Safeguarding Classified Information Within Industry,” as amended by Executive Order 10909, January 17, 1961 (26 FR 508, January 20, 1961).

(b) The National Industrial Security Program Operating Manual (NISPOM) incorporates the requirements of these Executive orders.

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E-Verify

FAR SubPart 22.18, Employment Eligibility Verification.

Federal contractors with E-Verify FAR clause must use Department of Homeland Security E-Verify system to check immigration status of their employees

- All U.S. New hires, except only those working on a federal government contract where employed by
  - An institution of higher education
  - A State or local government or the government of a Federally recognized Indian tribe
  - A surety taking over performance
- All employees working on a federal government contract
- Exempt
  - Performance entirely outside U.S. or less than 120 days
  - Contracts or subcontracts under $100,000
  - Commercially available off-the-shelf (COTS) items and COTS services for COTS items
  - Employees with security clearances confidential and above or HSPD-12

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Service Contract Act

FAR 22.1002-2, Wage determinations based on prevailing rates.

Contractors performing on service contracts in excess of $2,500 to which no predecessor contractor's collective bargaining agreement applies shall pay their employees at least the wages and fringe benefits found by the Department of Labor to prevail in the locality or, in the absence of a wage determination, the minimum wage set forth in the Fair Labor Standards Act. www.wdol.gov

FAR 22.1002-3, Wage determinations based on collective bargaining agreements.

Generally -- Successor contractors performing on contracts in excess of $2,500 for substantially the same services performed in the same locality must pay wages and fringe benefits (including accrued wages and benefits and prospective increases) at least equal to those contained in any bona fide collective bargaining agreement entered into under the predecessor contract.

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Equal Opportunity

FAR 22.802, General.

(a) Executive Order 11246, as amended, sets forth the Equal Opportunity clause and requires that all agencies—

(1) Include this clause in all nonexempt contracts and subcontracts (see 22.807); and

(2) Act to ensure compliance with the clause and the regulations of the Secretary of Labor to promote the full realization of equal employment opportunity for all persons, regardless of race, color, religion, sex, or national origin.

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Affirmative Action

FAR, 22.804, Affirmative action programs.

FAR 22.804-1, Nonconstruction

Except as provided in 22.807, each nonconstruction prime contractor and each subcontractor with 50 or more employees and either a contract or subcontract of $50,000 or more, or Government bills of lading that in any 12-month period total, or can reasonably be expected to total, $50,000 or more, is required to develop a written affirmative action program for each of its establishments. Each contractor and subcontractor shall develop its written affirmative action programs within 120 days from the commencement of its first such Government contract, subcontract, or Government bill of lading.

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Central Contractor Registration

FAR 4.1102, CCR Policy.

(a) Prospective contractors shall be registered in the CCR database prior to award of a contract or agreement, except for—

(1) Purchases that use a Governmentwide commercial purchase card as both the purchasing and payment mechanism, as opposed to using the purchase card only as a payment method;

(2) Classified contracts (see 2.101) when registration in the CCR database, or use of CCR data, could compromise the safeguarding of classified information or national security

(3) And other specified exceptions.

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Central Contractor Registration/Corporate Transactions

FAR 4.1102, CCR Policy.

(c) (1)

(i) If a contractor has legally changed its business name, "doing business as" name, or division name (whichever is shown on the contract), or has transferred the assets used in performing the contract, but has not completed the necessary requirements regarding novation and change-of-name agreements in Subpart 42.12, the contractor shall provide the responsible contracting officer a minimum of one business day's written notification of its intention to change the name in the CCR database; comply with the requirements of Subpart 42.12; and agree in writing to the timeline and procedures specified by the responsible contracting officer. The contractor must provide with the notification sufficient documentation to support the legally changed name.

(ii) If the contractor fails to comply with the requirements of paragraph (g)(1)(i) of the clause at 52.204-7, Central Contractor Registration, or fails to perform the agreement at 52.204-7(g)(1)(i)(C), and, in the absence of a properly executed novation or change-of-name agreement, the CCR information that shows the contractor to be other than the contractor indicated in the contract will be considered to be incorrect information within the meaning of the "Suspension of Payment" paragraph of the EFT clause of the contract.

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Central Contractor Registration/Assignment of Payments

FAR 4.1102, CCR Policy.

(2) The contractor shall not change the name or address for electronic funds transfer payments (EFT) or manual payments, as appropriate, in the CCR record to reflect an assignee for the purpose of assignment of claims (see Subpart 32.8, Assignment of Claims).

(3) Assignees shall be separately registered in the CCR database. Information provided to the contractor's CCR record that indicates payments, including those made by EFT, to an ultimate recipient other than that contractor will be considered to be incorrect information within the meaning of the "Suspension of payment" paragraph of the EFT clause of the contract.

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Online Representations and Certifications Application

FAR 4.1201, ORCA Policy.

(a) Prospective contractors shall complete electronic annual representations and certifications at http://orca.bpn.gov in conjunction with required registration in the Central Contractor Registration (CCR) database (see FAR 4.1102).

(b) (1) Prospective contractors shall update the representations and certifications submitted to ORCA as necessary, but at least annually, to ensure they are kept current, accurate, and complete. The representations and certifications are effective until one year from date of submission or update to ORCA.

(2) When any of the conditions in paragraph (b) of the clause at 52.219-28, Post-Award Small Business Program Rerepresentation, apply, contractors that represented they were small businesses prior to award of a contract must update the representations and certifications in ORCA as directed by the clause. Contractors that represented they were other than small businesses prior to award of a contract may update the representations and certifications in ORCA as directed by the clause, if their size status has changed since contract award.

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FAR Cost Principles

FAR 31.201-1, Composition of total cost.

(a) The total cost, including standard costs properly adjusted for applicable variances, of a contract is the sum of the direct and indirect costs allocable to the contract, incurred or to be incurred, plus any allocable cost of money pursuant to 31.205-10, less any allocable credits. In ascertaining what constitutes a cost, any generally accepted method of determining or estimating costs that is equitable and is consistently applied may be used.

(b) While the total cost of a contract includes all costs properly allocable to the contract, the allowable costs to the Government are limited to those allocable costs which are allowable pursuant to Part 31 and applicable agency supplements.

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Allowable Costs

FAR 31.201-2, Determining allowability.

(a) A cost is allowable only when the cost complies with all of the following requirements:

(1) Reasonableness.

(2) Allocability.

(3) Standards promulgated by the CAS Board, if applicable, otherwise, generally accepted accounting principles and practices appropriate to the circumstances.

(4) Terms of the contract.

(5) Any limitations set forth in this subpart.

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Reasonable Costs

FAR 31.201-3, Determining reasonableness.

(a) A cost is reasonable if, in its nature and amount, it does not exceed that which would be incurred by a prudent person in the conduct of competitive business. Reasonableness of specific costs must be examined with particular care in connection with firms or their separate divisions that may not be subject to effective competitive restraints. No presumption of reasonableness shall be attached to the incurrence of costs by a contractor. If an initial review of the facts results in a challenge of a specific cost by the contracting officer or the contracting officer's representative, the burden of proof shall be upon the contractor to establish that such cost is reasonable.

(b) What is reasonable depends upon a variety of considerations and circumstances

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Intellectual Property - Patents

FAR 27.102 General guidance.

(a) The Government encourages the maximum practical commercial use of inventions made under Government contracts.

(b) Generally, the Government will not refuse to award a contract on the grounds that the prospective contractor may infringe a patent. The Government may authorize and consent to the use of inventions in the performance of certain contracts, even though the inventions may be covered by U.S. patents.

(c) Generally, contractors providing commercial items should indemnify the Government against liability for the infringement of U.S. patents.

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Intellectual Property – Technical Data

FAR 27.102, General guidance.

(d) The Government recognizes rights in data developed at private expense, and limits its demands for delivery of that data. When such data is delivered, the Government will acquire only those rights essential to its needs.

(e) Generally, the Government requires that contractors obtain permission from copyright owners before including copyrighted works, owned by others, in data to be delivered to the Government.

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Contract audit

FAR 42.101, Contract audit responsibilities.

(a) The auditor is responsible for—

(1) Submitting information and advice to the requesting activity, based on the auditor's analysis of the contractor's financial and accounting records or other related data as to the acceptability of the contractor's incurred and estimated costs;

(2) Reviewing the financial and accounting aspects of the contractor's cost control systems; and

(3) Performing other analyses and reviews that require access to the contractor's financial and accounting records supporting proposed and incurred costs.

(b) Normally, for contractors other than educational institutions and nonprofit organizations, the Defense Contract Audit Agency (DCAA) is the responsible Government audit agency. . . . For educational institutions and nonprofit organizations, audit cognizance will be determined according to the provisions of OMB Circular A-133, Audits of Institutions of Higher Education and Other Non-Profit Institutions.

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Total Incurred Cost Audit

DCAM 6-102.1 Audit Objectives

The auditor's primary objective is to examine the contractor's cost representations, in whatever form they may be presented (such as interim and final public vouchers, progress payments, incurred cost proposals, termination claims and final overhead claims), and to express an opinion as to whether such incurred costs are reasonable, applicable to the contract, determined under generally accepted accounting principles and cost accounting standards applicable in the circumstances, and not prohibited by the contract, by statute or regulation, or by previous agreement with, or decision of, the contracting officer. In addition, the auditor must determine whether the accounting system remains adequate for subsequent cost determinations which may be required for current or future contracts. The

discovery of fraud or other unlawful activity is not the primary audit objective; however, the audit work should be designed to provide reasonable assurance of detecting abuse or illegal acts that could significantly affect the audit objective. If illegal activity is suspected, the circumstances should be reported in accordance with 4-700.

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Business System Audits

DCAM 5-100 Section 1 --- Obtaining an Understanding of a Contractor's Internal Controls and Assessing Control Risk

a. This section outlines the auditor's fundamental requirements and responsibilities for obtaining and documenting an understanding of a contractor's internal controls and for assessing control risk as a basis for planning related audits.

b. These fundamental requirements and responsibilities apply to each of the contractor's accounting and management systems (accounting, IT, budget, purchasing, material management, compensation, labor, indirect and other direct costs, billing) that are used to propose, charge or bill significant costs to Government contracts.

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Audit of Cost Share

DCAM 14-909.5b Audit Procedures, Cost Share.

Cost share includes both cash and/or in-kind contributions. DoD Grant and Agreement Regulations (DoDGARs) 34.2 require that in-kind contributions may be in the form of real property, equipment, supplies and other expendable property, and the value of goods and purchased services directly benefiting and specifically identifiable to the project or program. Issues to consider when evaluating any claimed cost share include pre-agreement costs, indirect costs, prior IR&D cost, and in-kind valuation/usage.

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Disputes

FAR, 33.202, Contract Disputes Act of 1978.

The Contract Disputes Act of 1978, as amended (41 U.S.C. 601-613) (the Act), establishes procedures and requirements for asserting and resolving claims subject to the Act. In addition, the Act provides for—

(a) The payment of interest on contractor claims;

(b) Certification of contractor claims; and

(c) A civil penalty for contractor claims that are fraudulent or based on a misrepresentation of fact.

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Claim

FAR 33.206, Initiation of a claim.

(a) Contractor claims shall be submitted, in writing, to the contracting officer for a decision within 6 years after accrual of a claim, unless the contracting parties agreed to a shorter time period. The contracting officer shall document the contract file with evidence of the date of receipt of any submission from the contractor deemed to be a claim by the contracting officer.

(b) The contracting officer shall issue a written decision on any Government claim initiated against a contractor within 6 years after accrual of the claim, unless the contracting parties agreed to a shorter time period. The 6-year period shall not apply to . . . a Government claim based on a contractor claim involving fraud.

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Decision on Claim

FAR 33.211, Contracting officer's decision.

(a) When a claim by or against a contractor cannot be satisfied or settled by mutual agreement and a decision on the claim is necessary, the contracting officer shall—

(1) Review the facts pertinent to the claim;

(2) Secure assistance from legal and other advisors;

(3) Coordinate with the contract administration officer or contracting office, as appropriate; and

(4) Prepare a written decision that shall include—

(i) A description of the claim or dispute;

(ii) A reference to the pertinent contract terms;

(iii) A statement of the factual areas of agreement and disagreement;

(iv) A statement of the contracting officer's decision, with supporting rationale;

(v) Paragraphs substantially as follows **[see next slides]**

(vi) Demand for payment prepared in accordance with 32.604 and 32.605 in all cases where the decision results in a finding that the contractor is indebted to the Government.

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Right to Appeal

Final Decision Mandatory Language

"This is the final decision of the Contracting Officer. You may appeal this decision to the agency board of contract appeals. If you decide to appeal, you must, within 90 days from the date you receive this decision, mail or otherwise furnish written notice to the agency board of contract appeals and provide a copy to the Contracting Officer from whose decision this appeal is taken. The notice shall indicate that an appeal is intended, reference this decision, and identify the contract by number.

(cont'd next slide)

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Appellate Forums

Final Decision Mandatory Language

With regard to appeals to the agency board of contract appeals, you may, solely at your election, proceed under the board's—

(1) Small claim procedure for claims of $50,000 or less or, in the case of a small business concern (as defined in the Small Business Act and regulations under that Act), $150,000 or less; or

(2) Accelerated procedure for claims of $100,000 or less.

Instead of appealing to the agency board of contract appeals, you may bring an action directly in the United States Court of Federal Claims (except as provided in the Contract Disputes Act of 1978, 41 U.S.C. 603, regarding Maritime Contracts) within 12 months of the date you receive this decision"

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Intro to Legal Issues in Government Contracts, Grants and Other Funding Agreements[1]

Holly Emrick Svetz[1]
Steven W. Cave

I. Regulatory Overlay Imposed by Congress

The United States Government awards contracts for various products and services. These purchases by federal agencies amount to over $100 billion a year and include buying complex weapons systems to paper clips, janitorial services, office supplies, materials, consulting services, and cancer research. The Government buys almost every category of commodity and service available in the private market.

Contracting with the Government differs from commercial contracting. A plethora of statutes and regulations govern each transaction, causing the contracting process as a whole to be highly regulated. Those statutes and regulations govern the contracts in nearly every manner.[2] Congress delegates its Constitutional authority to contract with private parties to Government Agencies and other authorized organizations in the agencies' organic statutes. The agencies are required, however, to abide by and impose the congressionally mandated regulatory scheme that imposes strict compliance terms on both agencies and contractors.

The statutory foundations of the federal public procurement process include:

- Armed Services Procurement Act of 1947 ("ASPA")[3],
- The Federal Property and Administrative Services Act of 1949 ("FPASA")[4],
- Truth in Negotiations Act of 1962 ("TINA")[5]
- Office of Federal Procurement Policy Act of 1974[6]
- Contract Disputes Act of 1978 ("CDA"")[7]
- Competition in Contracting Act of 1984 ("CICA")[8]
- Federal Acquisition Streamlining Act of 1994 ("FASA")[9]
- The Competition in Contracting Act ("CICA")[10]
- Clinger-Cohen Act of 1996[11]

The ASPA governs procurement of "property" (not land), construction and services provided to the Department of Defense.[12] The FPASA governs civilian agency acquisitions similar to those covered by the ASPA. CICA is applicable to both defense and civilian agencies and requires procuring agencies to use "full and open competition" to award federal contracts with certain statutory exceptions. These exceptions, implemented in Federal Acquisition Regulations ("FAR") Subpart 6.3, Other Than Full and Open Competition, are the circumstances when a federal agency may award a contract using a sole source contract or limited competition.

"The Federal Acquisition Regulations System is established for the codification and publication of uniform policies and procedures for acquisition by all executive agencies. The

[1] Holly Emrick Svetz is a Member and Steven W. Cave is an associate practicing government contracts law in the Tysons Corner, Virginia office of Womble Carlyle Sandridge & Rice PLLC.

Federal Acquisition Regulations System consists of the FAR, which is the primary document, and agency acquisition regulations that implement or supplement the FAR." *See* 48 C.F.R. Subpart 1.101 (2011). The FAR sets forth the baseline, uniform policies and procedures for acquisitions by all federal agencies. The FAR's purpose is to provide standard and consistent terms that govern federal procurement procedures. It also guarantees contractors, and the public, that the procurement process is conducted in a fair and impartial manner.

The FAR is comprised of 53 "parts." General acquisition matters are explained in the first six parts. "Acquisition planning" is the subject of parts 6-12. The remaining FAR parts cover a broad range of topics, including contracting methods and types of contracts, socioeconomic programs, labor laws, affirmative action requirements, contract administration and management, and applicable clauses and forms.

The pertinent FAR clauses are often integrated into federal procurement contracts by simply referring contractors to the FAR part and section that is incorporated.[13] This means that for the majority of regulations requiring compliance actions, contractors are likely to see only a number followed by the short title of the clause -- *e.g.*, 52.222-26, Equal Opportunity (Mar 2007). In a non-commercial item contract, a Government contract can contain, by reference, 50-75 standard FAR clauses. The contractor has a duty to read, understand, and ensure or certify compliance with all FAR clauses contained in a Government solicitation, most of which will be incorporated in the resultant contract.

This compliance obligation is one of the fundamental differences between public and commercial contracts. While contractors may have some limited flexibility in negotiating which FAR clauses are incorporated into a Government contract, the terms of the incorporated clauses cannot be negotiated. In this respect, Government contracts operate more as a statement of compliance requirements than contracts because they simply relay the contractor's obligations instead of reflecting a final agreement of negotiated terms.

Inexperienced contractors can also fall into the trap of thinking that the only compliance requirements are those enumerated and incorporated into the contract. This misconception is dangerous because in addition the enumerated FAR clauses, contractors must also comply with statutes and regulations that are not expressly included but are considered "mandatory contract clauses which express a significant or deeply ingrained strand of public procurement policy."[14] A few of the most commonly integrated clauses are covered in Section II below.

Although the intent of the FAR was to consolidate the individual agency regulations into one comprehensive set of regulations that apply to all procuring agencies, some government agencies have unique supplements to the FAR. Driven by each agency's differing organic legislation, supplemental agency regulations often expand on the FAR's principles or, in some instances, replace it. The major agency supplements to the FAR are:

- Department of Defense ("DoD") -- Department of Defense FAR Supplement ("DFARS")
- General Services Administration -- General Services Administration Acquisition Regulation ("GSAR")
- NASA -- NASA FAR Supplement ("NFS")

- Department of Energy ("DoE") -- Department of Energy Acquisition Regulations ("DEAR").

The agency supplements are intended to be read in conjunction with the FAR to ensure that contractors are aware of the full set of regulations governing an issue.

FAR Subpart 1.6 explains the authority a contracting officer has to enter into, administer, and terminate contracts. This is an important distinguishing characteristic of Government contracts because the concept of "apparent authority" does not exist in Government contracting. The Head of the Agency has contract authority and in most cases will delegate that authority to the Head of the Contracting Activity within that agency.[15] For the Government to be properly bound, a contractor must deal with an authorized government agent. As a result, the Contracting Officer or other properly designated Government official plays a vital role in the contracting process.

In addition to the FAR, federal agencies must also operate in accordance with the statute creating the agency. "A federal agency is a creature of law and can function only to the extent authorized by law."[16] This limitation most often arises within the subject of appropriations and spending of federal funds.[17]

II. Obligations Not Reflected in Agreements

In addition to the FAR clauses that are expressly incorporated into Government contracts, there are additional statutory requirements with which contractors must comply. Government agencies are prohibited from contracting away existing statutory obligations.[18] There are three major statutory obligations that are inherent in all Government contracts.

A. Civil and Criminal False Claims Acts ("FCA")

The civil and criminal False Claims Acts impose sanctions for the submission of false or fraudulent claims for payment.[19] Under the civil False Claims Act, those who knowingly submit, or cause another person or entity to submit, false claims for payment of government funds are liable for three times the Government's damages plus civil penalties of $5,500 to $11,000 per false claim. The criminal penalties imposed by the criminal false claims act include imprisonment of up to five years and a fine.[20]

The civil False Claims Act[21] imposes liability on <u>both</u> the companies and the actual individuals who submit false claims for payment. There is an important distinction in the burden of proof applied to the Government in an alleged criminal false claims act violation. In a case alleging a criminal False Claims Act violation, the Government must prove that the violator had requisite knowledge and intent to commit the crime. This means that "knowingly" submitting a false claim under the criminal Act requires the Government to prove that the defendant had actual knowledge of the false nature of the claim and submitted it anyway.

Under the civil False Claims Act, "knowingly" is not limited to "actual knowledge" of the "falsity" of the claim. Rather, "knowingly" also applies to anyone who has "deliberate ignorance" or "reckless disregard" of the "truth or falsity" of a claim.[22]

The following as examples of actions that have resulted in False Claims Act allegations against government contractors:

- Billing for goods and services that were never delivered or rendered
- Billing for lobbying activities when certifying that the contractor has not spent Government money on such activities
- Submitting false service records or samples in order to show better-than-actual performance
- Presenting broken or untested equipment as operational and tested
- Billing for brand name equipment but actually providing alternative equipment
- Double billing: Charging more than once for the same goods or service
- Phantom employees and doctored time slips: Charging for employees that were not actually on the job, or billing for made-up hours in order to maximize reimbursements
- Upcoding employee work: Billing at doctor rates for work that was actually conducted by a nurse or resident intern
- Being over-paid by the Government for sale of a good or service, and then not reporting that overpayment
- Misrepresenting the value of imported goods or their country of origin for tariff or domestic preferences purposes
- False certification that a contractor meets the requirements to be eligible for a contract award (*i.e.* the contractor is minority or veteran-owned)
- Failing to report known product defects in order to be able to continue to sell or bill the Government for the product
- Billing for research that was never conducted; falsifying research data that was paid for by the Government
- Winning a contract through kickbacks or bribes, when certifying it will not[23]

In sum, when the Government relies upon a false representation of compliance in awarding a contract, and subsequently makes payments under that contract, the invoices may be considered false claims. As seen by the list, however, sloppy billing oversight and failure to bill strictly in accordance with the contract's terms can also lead to a false claim.

In an effort to fully combat fraud and waste, the False Claims Act both allows and incentivizes private parties, usually disgruntled employees, to bring fraud to the Government's attention. The Act includes an ancient legal device called a "*qui tam*" provision. The provision compensates a private person, known as a "relator," to bring a lawsuit on behalf of the United States, where the private person simply has information that the named defendant has knowingly submitted or caused the submission of false or fraudulent claims to the United States. The relator need not have been personally harmed by the defendant's conduct in order to take

advantage of the monetary incentives offered by the Government.[24] In exchange for bringing the fraud to the Government's attention and the risk involved to the relator, the relator may be awarded a portion of the funds recovered, typically between 15 and 25 percent.[25]

B. False Statements

Under the False Statements Act, it is a criminal offense for a contractor to make false statements to the Government. A government contractor must ensure that it does not:

(1) falsif[y], conceal[], or cover[] up by any trick, scheme, or device a material fact;
(2) make[] any materially false, fictitious, or fraudulent statement or representation; or
(3) make[] or use[] any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry. . . .[26]

Similar to False Claims, False Statements can arise in an array of circumstances. Bids and proposals, along with invoices, certified pricing documents or any other submissions, written or oral, to the Government can form the basis of a false statement. If any of the preceding contain false information or statements, the contractor may be liable under the False Statements Act.

Like the False Claims Act, the False Statements Act's penalties are not limited to the indicted company. The Act includes a provision that allows individuals that submit false statements to the Government to be individually prosecuted.

The penalties associated with a false statement include fines and imprisonment of up to five years for each false statement. As with the False Claims Act, there are limitations on the applicability of the False Statements Act. The Act requires one to "knowingly and willfully" make a materially false, fictitious or fraudulent statement or representation. "Knowingly" and "willfully" are not defined in the Act itself but the Government must be able to prove both in order to successfully prosecute a case.

C. Foreign Corrupt Practices Act

The Foreign Corrupt Practices Act of 1977 ("FCPA"),[27] is the Government's main weapon in its anti-corruption and anti-bribery efforts. According to the Department of Justice ("DOJ"), the law was enacted to make it unlawful for certain classes of persons and entities to make improper payments or bribes to foreign government officials to assist in obtaining or retaining business.[28]

The FCPA can apply to any individual, firm, officer, director, employee, or agent of a firm and any stockholder acting on behalf of a firm. The "person" making or authorizing the payment must corruptly intend the payment to induce the recipient to misuse an official position to direct business wrongfully to the payer or to any other person. The prohibition does not extend to United States Government officials -- separate statutes for domestic bribery preceded the FCPA. It only applies to payments made to a foreign official, a foreign political party or party official, or any candidate for foreign political office. The FCPA prohibits payments made in order to "assist" a company in obtaining or retaining business. DOJ interprets "obtaining or

retaining business" broadly; the term encompasses more than the mere award or renewal of a contract.

There are exceptions to the rule, including payments to facilitate or expedite performance of a "routine governmental action." There are also affirmative defenses that a contractor can use to avoid improper prosecution. Nevertheless, if a contractor violates the FCPA, business entities are subject to a fine of up to $2,000,000 and officers, directors, stockholders, employees, and agents are subject to a fine of up to $100,000 and imprisonment for up to five years. Although there is a baseline amount provided by the statute, the fines may be up to twice the benefit that the defendant sought to obtain by making the corrupt payment.

III. Initial Hurdles

A. Code of Business Conduct and Ethics

FAR 3.1002 states that

> 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.

In 2007, a FAR clause was introduced, mandating that contractors have a written Contractor Code of Business Ethics and Conduct if they receive a contract award in excess of $5 million with a period of performance of at least 120 days. [29]

The code of business ethics and conduct must : (1) be in writing; (2) be issued within 30 days of the contract award (unless the contracting officer allows a longer time period); (3) be furnished to each employee engaged in performance of the contract; and (4) "promote" compliance with the contractor's code of business ethics and conduct.

1. Training

The clause requires a contractor's compliance program to include "effective training programs" and tailored dissemination of information that is "appropriate to an individuals' respective role and responsibilities."[30] The FAR exempts contractors that qualify as small businesses or sell only commercial items from this training requirement, but as a practical matter, however, in order to be able to make the required disclosures, exempt organizations will still need to set up training, compliance programs, and internal controls.[31]. In a rather unusual move, contractors are required to train not only their own employees, but also "agents and subcontractors" in certain instances.[32]

2. Internal Controls

Contractors also must develop internal control systems which must include systems and procedures to facilitate discovery of improper conduct in connection with Government contracts.[33] Small businesses and commercial item contractors are also exempt from this requirement. The clause mandates periodic reviews of business practices and systems, such as accounting, IT, budget, purchasing, material management, compensation, labor, indirect and other direct costs, and billing systems to assure compliance with the contractor's standards of business ethics and conduct.[34]

3. Mandatory Disclosure

Finally, and most importantly, the clause requires contractors to "timely" disclose a violation of criminal laws or the civil False Claims Act, in writing to the Inspector General of the contracting agency, when the contractor has "credible evidence" that a violation has occurred in connection with the award, performance or closeout of a contract.[35] According to the clause, a "knowing failure" to disclose certain criminal offenses and violations of the civil False Claims Act is cause for suspension or debarment. Where contractors had previously made voluntary disclosures and received credit for coming forward, these disclosures are now mandatory, with the possibility of suspension or debarment for failing to disclose an action the Government considers a violation. Due to the extreme penalty a contractor may suffer, it is prudent for even small businesses and commercial item companies to conduct ethics training and implement internal controls to mitigate and uncover misconduct.

Unlike the requirement for a Contractor Code of Business Ethics, there are no exceptions to this mandatory disclosure requirement for small businesses, commercial item contractors, or contracts performed entirely outside the United States. Prime contractors are obligated to flow this clause down in subcontracts valued over $5 million and over 120 days of performance. In the instance that the names of the parties are changed in the subcontract clause, the subcontract should still state that disclosures by subcontractors should be made directly to the Government, not to the prime contractor.[36] This disclosure obligation survives for three years after final payment is made on a contract.[37]

The clause does limit the violations requiring disclosure to those within the knowledge of the contractor's principals. "Principal" is defined as "an officer, director, owner, partner, or a person having primary management or supervisory responsibilities within a business entity (e.g., general manager; plant manager; head of a subsidiary, division, or business segment; and similar positions.)."[38]

B. CCR/Grants.gov/ORCA

Before submitting a proposal, contractors are required take a number of preliminary registration and compliance steps. Central Contractor Registration ("CCR") is the primary vendor database for the U.S. Federal Government and since October 1, 2003, it is federally mandated that any company wishing to contract with the Government must be registered in CCR before being awarded a contract.[39] Contractors that have failed to pre-register are ineligible for award.[40] There are a limited number of exceptions to this requirement. This is contrary to the

common misconception that in order to begin complying with Government contract regulations, a company needs to be receiving revenue from the Government.

Vendors must maintain and update their CCR records annually. This requires contractors to physically log into their CCR accounts and certify that all contractor information, including payment information, is correct.

Filling out the Online Representations and Certifications Application ("ORCA") is also a requirement for prospective contractors. ORCA replaces most of the paper based Representations and Certifications in Section K of solicitations with one centralized Internet application. Prior to ORCA, vendors were required to submit Representations and Certifications for every qualifying contract award. ORCA allows contractors to enter their Representations and Certifications once. The online database allows the Contracting Officer to view every record of every contractor.

A contractor must be registered in ORCA if the solicitation requires that the contractor to have an active registration in CCR.[41] Like the CCR, the contractor's ORCA record expires every year and must be updated to maintain compliance with the FAR. A proposal received within the one year period allows a contracting officer to rely on the Representations and Certifications but any proposal received after the one year period may not rely on outdated information.

After completing the CCR registration, organizations wishing to pursue grant opportunities must also complete the Grants.gov registration process. Like the CCR, all registration requirements at Grants.gov must be met prior to submitting an application for a grant. The Grants.gov registration must be renewed annually.

Yet another website requires contractors' attention. The Federal Funding Accountability and Transparency Act of 2006 ("Transparency Act"), as amended by the Government Funding Transparency Act of 2008, requires contractors to report compensation of the top five most highly paid executives and their first-tier subcontractors' executive compensation information.[42] The Transparency Act,[43] was enacted to reduce "wasteful and unnecessary spending," by calling for the Office of Management and Budget to establish a public website containing full disclosure of all Federal award information for contracts values at $25,000 or more.

1. Equal Opportunity/Affirmative action Plans and Reporting

Executive Order 11246 ("EO 11246") and the FAR Equal Opportunity clause prohibit federals contractors and subcontractors from discriminating on the basis of race, religion, color, gender and national origin. The Equal Opportunity clause requires contractors to take affirmative actions to ensure that protected class applicants are given employment opportunities, and that current employees are treated without regard to their race, color, religion, sex or national origin during employment.[44] Affirmative steps shall include, but not be limited to:

(i) Employment;

(ii) Upgrading;

(iii) Demotion;

(iv) Transfer;

(v) Recruitment or recruitment advertising;

(vi) Layoff or termination;

(vii) Rates of pay or other forms of compensation; and

(viii) Selection for training, including apprenticeship.[45]

The FAR clause and the Executive Order make equal employment opportunity and affirmative action integral elements of a contractor's agreement with the Government. [46] The FAR clause requires contractors to take a number of steps in furtherance of the affirmative action requirement in order to ensure equal opportunity employment.[47] Failure to comply with the non-discrimination or affirmative action provisions is a violation of the contract and can subject the contractor to penalties, including contract termination and contractor suspension or debarment.[48] Section 503 of the Rehabilitation Act of 1973 and the Vietnam Era Veterans' Readjustment Assistance Act of 1974 also have nondiscrimination and affirmative action requirements for workers with disabilities and veteran status, respectively.

2. Small Business Status

The Government "sets aside" a certain number of contract opportunities for small businesses to compete only amongst other small businesses. In order to compete for small business "set aside" contracts, a contractor must self-certify its number of employees and revenue receipts in the CCR. Based on the information entered into the CCR registration, the company can then self-certify its status as a small business in the ORCA database.

At the time of proposal submission, the company must actually be small and have self-certified its small business status based on the standard specified in the solicitation. Federal agencies use ORCA to verify a company's small business size status. Certain types of small businesses must undergo additional certification procedures, including 8(a), Service Disabled Veteran-Owned Small Businesses, and Woman-Owned Small Businesses.

In order to qualify as a small business, the contractor must meet the Government's definition of a small business. "A size standard, which is usually stated in number of employees or average annual receipts, represents the largest size that a business (including its subsidiaries and affiliates) may be to remain classified as a small business for SBA and federal contracting programs."[49] To determine business size, a prospective contractor should first locate the North American Industry Classification System ("NAICS") codes that best describe the business's activities.[50] The Small Business Administration ("SBA") has established a Table of Small Business Size Standards,[51] which is matched to the NAICS codes and specifies the maximum industry size standard based on both number of employees and annual revenue. Instructions on calculating average annual receipts and average employment of a company can be found in the SBA regulations.[52]

When certifying itself as small for any particular solicitation, however, the contractor must use the NAICS code that is identified by the contracting officer in the solicitation.

3. Small Business Subcontracting Plans

Section 8(d) of the Small Business Act[53] and the FAR "Utilization of Small Business Concerns" clause requires that small businesses, small disadvantaged businesses, HUBZone small businesses, woman-owned small businesses, veteran-owned small businesses, and service-disabled veteran-owned small businesses have "maximum practicable opportunity to participate as subcontractors under Federal contracts . . . to the fullest extent consistent with efficient contract performance."[54] This clause, sometimes referred to as the "best efforts" clause, requires any concern that receives a Federal contract exceeding the simplified acquisition threshold to agree to provide maximum practicable opportunities to small business, consistent with the efficient performance of the contract.[55] This requirement applies to all contractors, regardless of size status.

As a result, "other-than-small" businesses that receive a Federal contract or subcontract with a value at least $650,000[56] must adopt a Small Business Subcontracting Plan with goals to subcontract a percentage of available subcontracting dollars for each category of small business.[57] Prior to award, the proposed subcontracting plan must be negotiated and approved by the contracting officer.[58] Once approved, the resultant subcontracting plan is "included in and made a part of the contract."[59] The incorporated plan then creates a new obligation for the contractor to make a good faith effort achieve the utilization goals in the plan by actually using small and disadvantaged businesses. Failure to make a good faith effort to achieve the goals established in the plan is a material breach of the contract and can result in liquidated damages.[60]

There are major elements that must be included in a subcontracting plan in order for the plan to be deemed acceptable. The major elements can be broken down into the following general categories:

(1) Separate percentage goals for each small business category[61]

(2) The name of the organization's subcontracting plan administrator and a description of his or her duties[62]

(3) A description of the efforts that the company will make to ensure that all small businesses will have an equitable opportunity to compete for subcontracts[63]

(4) Assurances that the company will "flow down" applicable subcontracting requirements to its subcontractors, including, at a minimum, the "Utilization of Small Business Concerns" clause[64]

(5) Assurances that the company will cooperate in any studies or surveys and submit periodic reports to the Government[65]

(6) A recitation of the types of records the company will maintain to demonstrate its compliance with the plan.[66]

The FAR clause also requires the "other-than-small contractor" or subcontractor to submit periodic reports highlighting its small business subcontracting realization, measured against the goals in its subcontracting plans.

4. Lobbying Restrictions

The Byrd Amendment restricts federal contractors' lobbying activities and is applicable to every federal contract, subcontract, grant, and cooperative agreement exceeding $100,000.[67] With limited exceptions, a contractor may not use "appropriated funds" (funds paid by the Government under a government funding agreement) to pay any person to lobby either Congressional or Executive Branch personnel.[68] The statute defines "lobbying" to mean "contacting Congressional or Executive Branch officials to try to secure a contract, grant, or cooperative agreement, or an amendment to such instruments."[69] The FAR defines "influencing or attempting to influence" as "making, with the intent to influence, any communication to or appearance before an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with any covered Federal action."[70]

Additionally, even where a contractor uses other than appropriated funds (such as commercial revenues) to pay for lobbying, the contractor must file a public disclosure form to the contracting officer and it is subsequently made available to the public.[71] Any contractor who requests or receives a Federal contract exceeding $100,000 must submit the certification and disclosures required by the Certification and Disclosure Regarding Payments to Influence Certain Federal Transactions clause with its offer."[72]

When a contractor violates the lobbying restrictions, agencies must impose and collect civil penalties pursuant to the federal Program Fraud and Civil Remedies Act.[73] The civil penalty is a fine of up to $100,000 for each prohibited expenditure or failure to file the lobbying disclosure form.[74] False certifications can also lead to criminal prosecution under the federal False Claims Act or the False Statements Act.

5. E-Verify

On June 6, 2008, the President issued Executive Order 13465 "Economy and Efficiency in Government Procurement through Compliance with Certain Immigration and Nationality Act Provisions and the Use of an Electronic Employment Eligibility Verification System." The Order stated that:

> Executive departments and agencies that enter into contracts shall require, as a condition of each contract, that the contractor agree to use an electronic employment eligibility verification system designated by the Secretary of Homeland Security to verify the employment of: (i) all persons hired during the contract term by the contractor to perform employment duties within the United States; and (ii) all persons assigned by the contractor to perform work within the United States on the federal contract.

The FAR was amended to include the Employment Eligibility Verification clause, which requires contractors to enroll and verify all employees as eligible to work in the United States.[75] The clause lays out the requirements to verify a new employee's status, as well as prior employees that are working on a contract.

When awarded a contract that contains the E-Verify clause, the contractor must enroll in the E-Verify program within 30 calendar days of the contract award date. This applies to covered subcontractors on the project as well.

C. Accounting Systems Consistent with Cost Principles

The FAR cost principles are the rules that guide payments for cost reimbursable contracts awarded to for-profit entities. The cost principles provide detailed rules governing whether costs are allowable, can be allocated to a contract, and whether the costs are reasonable.[76] A cost must satisfy all three of these requirements before it can be paid to the contractor.[77] It is the contractor's burden to show that every cost incurred under a contract is allowable, reasonable and properly allocated. This requires the contractor to have accounting systems in place that ensure proper allocation of costs and support contentions that the cost is allowable and reasonable.

The FAR cost principles recognize that some contractors are subject to Cost Accounting Standards,[78] while others should use generally acceptable accounting principles and practices appropriate to the circumstances.[79] The FAR also provides that a contractor's use of the generally accepted accounting principles may be considered in determining the allowability of a cost.[80] One of the primary challenges facing a new government contractor is the complex list of costs that are not allowed to be included in a contractor's indirect costs being charged on government contracts. Because of this, it is important for companies performing cost reimbursement type contracts to put in place an accounting system that can segregate these unallowable costs into a separate "unallowable cost pool," thereby demonstrating to the government auditor that unallowable costs have not been included in invoiced costs.

D. Intellectual Property Protection

Congress enacted the Bayh-Dole Act in 1980 to establish a uniform patent policy across the federal government.[81] The "Patent Rights -- Ownership by the Contractor" clause generally applies to all inventions conceived or first reduced to practice in the performance of a project, regardless of whether the invention resulted from a fully or partially funded federal contract.[82] The clause lays out, in detail, the contractor's and Government's rights and obligations with respect to both pre-conceived intellectual property and intellectual property conceived under the contract. Generally, the contractor retains ownership in the invention and the Government receives certain rights in the invention for government purposes.

Likewise, intellectual property typically protected by copyright or trade secret regimes follows the same general approach. Under the rubric "data" or "technical data," the contractor retains ownership, while the Government obtains anywhere from Limited to Unlimited Rights in the data or technical data produced under the contract.[83] DoD and other national security agencies have a different regulatory regime than civilian agencies. To ensure a contractor retains the rights it intends, the contractor must make appropriate disclosures regarding the rights the contractor intends the Government to receive in the proposal and mark the information using legends proscribed in the appropriate FAR or DFARS clause. In addition, any information not submitted as a contract deliverable that an organization wishes to protect from disclosure should be marked with the legend designated for unsolicited proposals.[84]

E. Export Controls

Under United States laws and regulations, exporting is a privilege, not a right. There are three Federal Government agencies responsible for implementing export control regulations: the Department of Commerce[85], the Department of State[86], and the Department of Treasury.[87] Federal export control laws and regulations prohibit the unlicensed transfer of information or materials related to certain products and technologies overseas to anyone, including U.S. citizens, or to foreign nationals or representatives of a foreign entity on United States soil for reasons of national security. This regime also applies to entities that are not government contractors. Approval must be given by means of an export license or technology assistance agreement before a person or entity can export controlled items, commodities, technology, software and information, to restricted foreign countries, persons, and entities.

The areas that are subject to export controls include:

- Direct export of a controlled item
- Foreign national access/use of a controlled item or technology, even within the contractor's U.S. operations
- Foreign travel to a restricted country
- Publications that are not generally accessible
- Conversations with non-U.S. persons involving controlled technology
- Taking or shipping a controlled item out of the United States.

The Department of State regulates and restricts the transfer and export of technologies relating to military applications listed on the Munitions List[88] under the International Traffic in Arms Regulations ("ITAR"). The Department of Commerce restricts the transfer and export of "dual use" technologies relating to civilian applications listed on the Commerce Control List ("CCL")[89] under the Export Administration Regulations ("EAR").

Each set of regulations contains separate penalties for export control violations. For example, the ITAR provides criminal sanctions that include a fine of up to $1,000,000 for the violating entity and a fine and imprisonment for the violating individual. The EAR also provides for a fine of up to $1,000,000 for the violating entity and fines and imprisonment for the violating individual.

All companies dealing with technology of any kind are well-advised to put in place a compliance program that identifies items or information that require licenses or technology assistance agreements well before the intended export event.

F. Commercial Item Status

Federal Acquisition Streamlining Act of 1994 ("FASA") required agencies to adopt practices that offer contractors selling "commercial items" to the Government a "streamlined" or pared-down version of the compliance requirements.[90] The implementing FAR regulations generally define the minimum compliance requirements for commercial item contracts and

subcontracts.[91] This allows contractors without a substantial Government sales base to avoid the cost of implementing a large number of unique compliance procedures in response to Government-specific regulations. In exchange for the Government's agreement to lower compliance thresholds, contractors must demonstrate that the Government is being offered a fair price for the value of the product or service received. The commercial item, as defined by the FAR, is an item that provides the Government with some assuredness that the price of the item represents a fair price, driven by market pressures.

The FAR includes a comprehensive definition of commercial items that covers a broader range of supplies and services, but the essence of the definition is "[a]ny item, other than real property, that is of a type customarily used by the general public or by non-governmental entities for purposes other than governmental purposes, and— (1) has been sold, leased, or licensed to the general public; or (2) has been offered for sale, lease, or license to the general public."[92]

Thus, in order to qualify an item as a "commercial item" prior to a contract award, contractors must demonstrate that the item is commercially available and that the sale price offered has been set by the market and not arbitrarily. To do this, contractors can submit catalog pricing, historical price lists or other data demonstrating the reasonableness of the price.

Commercial item coverage includes items not yet available, commercial products with minor modifications, and other specified circumstances where there is no catalog or market pricing, but the Government often requires additional evidence that the price is fair.

IV. Teaming and Proposal Phase

After solicitation documents are released, contractors must assess their ability to perform under the contract and prepare a response in the form of a bid or proposal. In many instances, a contractor may have the internal resources and past performance experience to successfully compete for a contract. Other times, a contractor may not have sufficient internal resources or experience, but still wishes to compete for a contract opportunity. The FAR permits contractors to compete for these awards by joining resources with another contractor.

A. Teaming Agreements

A teaming agreement is not a Government contract; it is a contract between two private parties that allows both parties to agree to combine resources to bid on Government contracts. The teaming agreement is governed by whatever law terms the parties specify or applies by common law and unless otherwise specified in the teaming agreement, neither party is required to abide by procurement regulations in performance of the agreement.

One of the parties typically assumes the role of the "lead" contractor that submits the bid or proposal with the support and resources of the second contractor or team of contractors. In exchange for the confidential proposal information of the subcontractor team and certainty of subcontract products and labor, a teaming agreement often requires an exclusive relationship between the parties for the pursuit of the opportunity.

The Government generally recognizes the validity of a teaming arrangement, despite its potentially anti-competitive nature "provided that the arrangements are identified and company

relationships are fully disclosed in an offer or, for arrangements entered into after submission of an offer, before the arrangement becomes effective"[93] and the purpose of the arrangement is not to eliminate competitors. Thus, full disclosure of the teaming arrangement must be part of the lead contractor's bid or proposal.

Typical negotiating points in teaming agreements that contractors should be aware of including protection of confidential information and data rights, whether to include an exclusivity provision, what event or time will spur termination of the agreement, and the scope of work promised to a subcontractor.

B. Proposal Certifications/Representations/Assertions in Addition to ORCA

In addition to the representations made prior to submitting a proposal, contractors are required to certify compliance measures at the proposal stage. These measures originate from statutes and regulations.

1. Service Contract Act/Davis-Bacon Act

The Service Contract Act ("SCA") and the Davis-Bacon Act ("DBA") require contractors to essentially pay the prevailing wage and provide the fringe benefits prevailing in the locality. Although the provisions are similar, they apply to different types of Government contracts.

The SCA requires "[c]ontractors performing on service contracts in excess of $2,500" to "pay their employees at least the wages and fringe benefits found by the Department of Labor to prevail in the locality or, in the absence of a wage determination, the minimum wage set forth in the Fair Labor Standards Act."[94] The wages and benefits of a collective bargaining agreement act as a wage determination for unionized workers.[95] The SCA has limited application, however. It only applies to contracts for services and does not apply to work performed outside the United States or to certain regulated services.[96]

The DBA applies to contracts "…in excess of $2,000 to which the United States or the District of Columbia is a party for construction, alteration, and/or repair, including painting and decorating, of public building or public works of the United States or the District of Columbia."[97] Like the SCA, the DBA requires the contractor to pay prevailing wages and provide minimum fringe benefits, as determined by the U.S. Department of Labor, to all laborers and mechanics working on the site of federal government construction projects in excess of $2,000.[98] The DBA also requires the prime contractor and all subcontractors to provide certified payrolls every week for the life of the project.[99]

Penalties for violations of the SCA or the DBA require the contracting officer to "withhold from payments due the contractor an amount equal to the estimated wage underpayment and estimated liquidated damages due the United States under the Contract Work Hours and Safety Standards Act."[100] Violation of the SCA or DBA is also grounds for suspension and debarment.

2. Data Rights Assertions Table

While the ORCA contains a very small space for contractors to generally assert what data or software will be delivered to the Government with less than Unlimited Rights for the Government, contractors may assert rights in intellectual property for the specific deliverable information in a particular contract by completing the appropriate Data Rights Assertion Table and including it in the contractor's proposal.[101] The table identifies and asserts restrictions on the Government's use, release, or disclosure of technical data, software, or other intellectual property.

3. Domestic Preference Requirements

While the ORCA permits a contractor to make a general declaration regarding non-domestic products generally, most contractors prefer to identify each item of supply's country of origin for each individual opportunity with the proposal.. Domestic preference provisions in the FAR require federal agencies to limit the procurement of supplies to those only produced inside the United States. The Buy American Act ("BAA") and the Trade Agreements Act ("TAA") are the two primary domestic preference provisions.[102]

The BAA applies to supplies acquired for use in Government contract, including supplies acquired under contracts set aside for small business concerns, if:

(1) the supply contract value exceeds the micro-purchase threshold; or

(2) the supply portion of a contract for services that involves the furnishing of supplies (e.g., lease) exceeds the micro-purchase threshold.[103]

The BAA does not apply to services. There are exceptions to the general applicability of the BAA, including a public interest exception, a nonavailability exception, and an unreasonable cost exception.[104] One important application of the BAA is mandated by the American Reinvestment and Recovery Act of 2009 ("ARRA"). The BAA requires that all iron, steel, and manufactured goods used in any project funded wholly or partially by the ARRA, be produced in the United States.

Importantly, the TAA provides the authority for the President, or an authorized Government representative to waive the BAA requirements.[105] The TAA generally applies to agency acquisitions of supplies or services valued in excess of $203,000.[106] The TAA requires agencies to procure only "U.S.-made or designated country end products."[107] Designated countries are those with which the United States has trade agreements. Contractors are required to certify that each "end product" supplied meets the TAA requirements. "End products" are "those articles, materials and supplies to be acquired for public use."[108] Like the BAA, there are multiple exceptions to the application of the TAA.[109]

An item may consist of components from various countries, or the components of a product may be assembled in a third country. This can cause it to be difficult to determine which country is the "country of origin." The test to determine country of origin is "substantial transformation" (e.g., transforming an article into a new and different article of commerce, with a name, character, or use distinct from the original article).[110]

V. Contract Award and Administration

A. Debriefings and Bid Protests

Unsuccessful offerors that have spent time and resources responding to a Government solicitation are entitled to a post-award debriefing if requested within three days of receipt of the notice from the Government.[111] The FAR strongly suggests that the debriefing occur with five days of the written request. The debriefing can occur in any method acceptable to the contracting officer, as long as it conveys certain minimum information.[112]

Some disappointed offerors may want to challenge the award of a contract to a competitor. The Government contracting regulations provide specific procedures to challenge the award in a proceeding called a "bid protest."[113] The bid protest allows offerors to seek a review of the agency evaluation and call into question decisions that an agency made in awarding the contract to a competitor.

Bid protests can be filed either pre-award or post-award. Pre-award protests generally challenge a flaw in the solicitation documents, in the solicitation process, or elimination of the offeror from the competitive range.[114] Post award protests can be filed for a vast array of reasons that ultimately challenge the reasonableness of the agency's evaluation in light of the solicitation documents.

Disappointed offerors can choose any one of three forums to bring a bid protest, the agency itself,[115] the Government Accountability Office,[116] or the U.S. Court of Federal Claims.[117] There are very short timeframes to file a protest with the agency or at the GAO. Both have a ten day window to formally file protest and an even shorter period of time to ensure that performance under the contract is halted pending the outcome of the protest.

Protests require disappointed offerors to prove that the procurement was flawed and that the protestor was prejudiced as a result of the defect. Contractors face difficult decisions regarding whether to file a protest because outside counsel generally must be retained to be admitted under a protective order and offerors may be concerned about a dispute with its potential customer. Most agencies, however, understand that bid protests are a necessary part of the process.

B. Requests for Equitable Adjustments/Claims

"Generally, Government contracts contain a changes clause that permits the contracting officer to make unilateral changes, in designated areas, within the general scope of the contract."[118] "The contractor must continue performance of the contract as changed, except that in cost-reimbursement or incrementally funded contracts the contractor is not obligated to continue performance or incur costs beyond the limits established in the Limitation of Cost or Limitation of Funds clause.[119] These changes should be "formal" changes, otherwise known as a contract modification or change order.[120] In practice, "constructive changes" are often issued informally. For both formal and informal changes, the contractor can submit a "request for equitable adjustment" ("REA"), or change order proposal to recover the cost, plus a fair profit, for the changed scope of work.[121]

A formalized request for payment resulting from a change is a formal "claim" under the contract's disputes clause. A claim can be submitted for increased compensation to match the increased scope of the work, or to settle disagreements over contract terms. To qualify for the exception to sovereign immunity offered by the Contract Disputes Act ("CDA"), a contractor must comply with the procedural elements described in the FAR. One example of the unique procedural requirements under the CDA is that a claim must include a certification if the amount exceeds $100,000.[122]

C. Stop Work Orders/Terminations

One of the main differences between a commercial and Government contract is that the Government can issue a unilateral stop work order or terminate the contract for any reason.[123] A stop work order generally:

> will be issued only if it is advisable to suspend work pending a decision by the Government and a supplemental agreement providing for the suspension is not feasible. Issuance of a stop-work order shall be approved at a level higher than the contracting officer. Stop-work orders shall not be used in place of a termination notice after a decision to terminate has been made.[124]

Stop work orders include a description of the work to be stopped, instructions concerning the issuance of further orders, guidance to be taken on subcontracts, and any further suggestions on minimizing costs incurred.[125] "As soon as feasible after a stop-work order is issued, but before its expiration, the contracting officer should take one of three actions:

> (1) Terminate the contract;
>
> (2) Cancel the stop-work order (any cancellation of a stop-work order shall be subject to the same approvals as were required for its issuance); or
>
> (3) Extend the period of the stop-work order if it is necessary and if the contractor agrees (any extension of the stop-work order shall be by a supplemental agreement.[126]

Alternatively, the termination clause permits the Government to terminate the contract, at any time, with or without cause. The Termination for Convenience (Fixed Price) FAR clause provides that "[t]he Government may terminate performance of work under this contract in whole or, from time to time, in part if the Contracting Officer determines that a termination is in the Government's interest."[127] There are procedural and substantive requirements that the Government is advised to follow, but once the termination is issued, the contractor must:

> (1) stop work immediately on the terminated portion of the contract;
>
> (2) terminate all subcontracts related to the terminated portion of the prime contract;
>
> (3) advise the Government of any special circumstances precluding stoppage of work;
>
> (4) perform the continued portion of the contract if the termination is partial;
>
> (5) take any action necessary to protect property in the contractor's possession in which the Government has an interest;

(6) notify the Government of any legal proceedings growing out of any subcontract;

(7) settle any subcontractor claims arising out of the termination; and

(8) dispose of termination inventory as directed by the Government.[128]

In exchange for the Government's right to unilaterally terminate the contract, the contractor is entitled to recover certain costs, including:[129]

(1) its performance costs incurred up to the date of termination;

(2) certain costs that continue after the date of termination (e.g., idle facilities or idle capacity costs);

(3) so-called "termination settlement expenses" (i.e. , the costs to terminate the contract and submit a termination claim to the Government); and

(4) profit or fee for work performed.[130]

The costs are requested in a "termination settlement proposal" that must be submitted by the terminated contractor within one year of the effective date of termination.

D. Novation Agreements for Corporate Transactions

The Anti-Assignment Act prohibits Government contracts from being transferred or assigned to a third party.[131] Once the Government has gone to all the trouble of issuing a solicitation, determined the responsibility of the offerors, conducted a source selection, and awarded a contract as required by the Competition in Contracting Act, the Government does not want its contracts transferred willy-nilly. However, based on a long common law and regulatory history that does not appear to have been contemplated by the statute, but, like most aspects of government contract law, is quite practical, the FAR provides a method to transfer the contracts known as novating the contracts. [132]

A contract that is transferred as a matter of law in a stock purchase is not subject to the Anti-Assignment Act because the Act does not prohibit a contractor from selling ownership interests in an organization that possesses Government contracts. Under an asset purchase agreement, however, the buyer and the seller organizations must enter into a three party agreement with the Government to novate the contracts. Despite these general rules, the contracting officer retains the discretion to require a novation agreement at any time, including stock purchases.

The novation agreement is usually handled after the closing of the asset sale because documents from the closing are required in support of the agreement and because the government does not care to work on documents for deals that never close. For that reason, the novation is not typically a document in the closing binder, but is referenced in the terms of the asset purchase agreement. The practical reason a buyer wants a novation agreement is to create privity of contract between the buyer and the Government so the buyer can get paid for performance under the contract.[133] The FAR has a "suggested" novation agreement form that may be adapted depending on the situation.[134] Nevertheless, the contracting officer must act in

the interest of the Government in novating a contract, so departures from the form may be difficult to obtain.[135]

One aspect of a novation agreement that is unexpected for the uninitiated is that, absent extraordinary circumstances, the seller must continue to "guarantee" performance under the contract.[136] This creates an ongoing risk of liability for the seller and may be accounted for in the purchase agreement.

VI. Contract Close-out

Contractor obligations do not end upon completing physical performance of a contract. The FAR provides specific time periods after actual completion in which a contract should be closed out.[137] Contract files should be closed as soon as practical after the contracting officer receives a contract completion statement from the contract administration office.[138] The FAR provides "standard" times for contract closeout based on the type of contract.[139] For past performance purposes, at the actual completion of a contract or the end of an option year, an evaluation of contractor performance is required.[140] The office administering the contract is responsible for initiating administrative closeout of the contract after receiving evidence of its actual completion.[141]

A. Audits

The FAR Audit clause calls for the contracting officer to "examine and audit all of the Contractor's records" for contracts which require the contractor to submit cost or pricing data in connection with any contract pricing action:[142]

> Under a cost-reimbursement, incentive, time-and-materials, labor-hour, or price redeterminable contract, or any combination of these, the Contractor shall maintain and the Contracting Officer, or an authorized representative of the Contracting Officer, shall have the right to examine and audit all records and other evidence sufficient to reflect properly all costs claimed to have been incurred or anticipated to be incurred directly or indirectly in performance of this contract. This right of examination shall include inspection at all reasonable times of the Contractor's plants, or parts of them, engaged in performing the contract.[143]

The contracting officer has the right to examine the contractor's books and records for a period of three years after the expiration of the contract, and requires prime contractors to include a similar clause in covered subcontracts.[144] Nevertheless, the Government may waive its right of access to a contractor's records if the waiver is specific in nature.

Issues have arisen over the data to which the Government has access. The FAR requires contractors to provide the head of an agency access to all contractor and subcontractor records (including books, documents, or other data) that are related to:

(1) The proposal for the contract or subcontract;

(2) The discussions conducted on the proposal;

(3) Pricing of the contract or subcontract; or

(4) Performance of the contract or subcontract.[145]

B. Government Property Disposition

Government property provided to the contractor during contract performance and not consumed must be "dispositioned" at the end of the contract.[146] Contractor property that is acquired or manufactured, but is "excess" to the contract at completion, may also become government property under certain conditions.[147] The FAR provides procedures for the proper disposition of government property, which include contractor reporting of all government property.[148] The Government will review the report and provide specific instructions to ship, leave in place, sell, or scrap the property.[149]

C. Invention Disclosure

The FAR Patents clause requires the contractor to submit "a report prior to the closeout of the contract listing all subject inventions or stating that there were none."[150] This invention disclosure is a relatively simple process that does not require significant disclosure of information. Although only enforced once, the Government has the right to take title to inventions that were conceived or first actually reduced to practice during performance of the contract if they are not disclosed.[151]

VII. Subcontractor Obligations and Rights

Subcontractors are often forced to comply with a number of FAR clauses that are "flowed-down" by the prime contractor. This requires the subcontractor to comply with the same clauses that the prime contractor agreed to comply with in the prime contract. In other words, the by flowing down all of the compliance requirements to a subcontractor, the prime contractor can impose the same requirements on its subcontractors that the Government imposes on the prime contractor.

In addition to having a multitude of non-commercial obligations to comply with, subcontractors also face limited contractual rights. One of the major limitations is that even though the work is ultimately for the benefit of the Government, subcontractors have no standing to sue the Government. Subcontractors cannot pursue a request for an equitable adjustment or a claim against the Government in its individual capacity. Therefore, if the Government either issues changes to the contract or the subcontractor is insufficiently paid, the subcontractor cannot attempt to retrieve money from the Government, regardless of the prime contractor's status or solvency.[152] Likewise, proposed subcontractors cannot protest the award of a contract.[153]

Subcontractors do have some remedies. The subcontractor can seek to have the prime contractor sponsor its claim or bid protest or, alternatively, the subcontractor may pursue its right to sue the prime contractor for breach of contract.

A. Most Major Prime Contractor Obligations Flow With the Money

Not all prime contractors have the resources and expertise that a contract can require and, as a result, prime contractors seek products and services from subcontractors. In exchange for the revenue provided, however, prime contractors impose many of the laws and regulations

governing the performance of Government contracts. The prime contractors impose these obligations by flowing down requisite FAR clauses and statutes to the subcontractor.

The subcontractor will typically attempt to negotiate removal of some of the prime contractor's flow-downs, while, the prime contractor will typically take steps to make certain that the major contract compliance requirements are imposed on the subcontractor. Some of the requirements that are not as common in commercial agreements include clauses allowing the prime contractor to issue unilateral change orders, stop work orders and contract terminations. Indeed, the FAR provides that when the Government terminates a contract for convenience, in whole or in part, the prime contractor is required to terminate affected subcontracts.[154]

B. Intellectual Property

The FAR Patents clause addresses the intellectual property rights allocation that prime contractors may impose upon subcontractors under a Government contract.[155] The prime contractor is required to "flow down" the substance of the data rights clauses without taking additional rights as a condition of subcontracting where only the Government's funds are being provided:

> At all tiers, the patent rights clause must be modified to identify the parties as follows: references to the Government are not changed, and the subcontractor has all rights and obligations of the Contractor in the clause. The Contractor shall not, as part of the consideration for awarding the subcontract, obtain rights in the subcontractor's subject inventions.[156]

This means that the Government does obtain a royalty-free license under the subcontract agreement but the prime contractor is precluded from obtaining similar rights in exchange for the subcontract agreement and revenue stream.

With respect to technical data, the DFARS data clause expresses the same concept:

> Whenever any technical data for noncommercial items is to be obtained from a subcontractor or supplier for delivery to the Government under this contract, the Contractor shall use this same clause in the subcontract or other contractual instrument, and require its subcontractors or suppliers to do so, without alteration, except to identify the parties. No other clause shall be used to enlarge or diminish the Government's, the Contractor's, or a higher-tier subcontractor's or supplier's rights in a subcontractor's or supplier's technical data.[157]

Both clauses protect subcontractors from aggressive prime contractors offering a contract opportunity in exchange for relinquishment of the subcontractor's intellectual property rights. Neither clause, however, prohibits the private parties from separately entering into a purchase or licensing agreement whereby the prime contractor obtains rights to use the intellectual property in consideration of value not contained in the prime contract.

[1] This program is designed to teach attendees unfamiliar with government contracts to recognize common government contracting compliance issues and how compliance failures may result in organizational liability. Government contracts incorporate a myriad of legal practice areas, including employment, intellectual property, international law, ethics and accounting, to name but a few. In a complex legal arena where a breach of contract can result in civil or criminal fraud investigations, a firm understanding of compliance policies and procedures is a must for all corporate counsel. The New to In-House Committee is presenting this topic in a panel discussion format with support from sponsor, Womble, Carlyle, Sandridge & Rice PLLC.

[2] In the rare absence of a statute or regulation, ordinary commercial law can govern a Government contract.

[3] 10 U.S.C. § 2301 *et seq.*

[4] 40 U.S.C. §§ 471-514 and 41 U.S.C. §§ 251-260.

[5] 10 U.S.C. § 2306 *et seq.*

[6] 41 U.S.C. § 401 *et seq.*

[7] 41 U.S.C. § 601 *et seq.*

[8] 10 U.S.C. § 2301 *et seq*. & 41 U.S.C. § 403.

[9] Pub. L. No. 103-355, 108 Stat. 3243 (1994).

[10] Found in various United States Code Sections, including Sections 10, 31, 40 and 41.

[11] 40 U.S.C. § 1401 *et seq*. & 41 U.S.C. § 251 *et seq*.

[12] 10 U.S.C. §§ 2301-2314.

[13] This is often referred to, in the industry, as "incorporation by reference."

[14] *G.L. Christian & Assoc. v. United States*, 312 F.2d 424, 427 (1963).

[15] FAR Subpart 1.601, General, states –

> (a) Unless specifically prohibited by another provision of law, authority and responsibility to contract for authorized supplies and services are vested in the agency head. The agency head may establish contracting activities and delegate broad authority to manage the agency's contracting functions to heads of such contracting activities. Contracts may be entered into and signed on behalf of the Government only by contracting officers. In some agencies, a relatively small number of high-level officials are designated contracting officers solely by virtue of their positions.

48 C.F.R. Subpart 1.602-1, Authority, states –

> (a) Contracting officers have authority to enter into, administer, or terminate contracts and make related determinations and findings. Contracting officers may bind the Government only to the extent of the authority delegated to them. Contracting officers shall receive from the appointing authority (see 1.603-1) clear instructions in writing regarding the limits of their authority. Information on the limits of the contracting officers' authority shall be readily available to the public and agency personnel.

(b) No contract shall be entered into unless the contracting officer ensures that all requirements of law, executive orders, regulations, and all other applicable procedures, including clearances and approvals, have been met.

[16] *See* General Accounting Office, *Principles of Federal Appropriations Law*, (2d ed., 1991) at www.gao.gov/special.pubs/og91005.pdf., last visited 5/31/2011 (citing *United States v. MacCollom*, 426 U.S. 317, 321 (1976)).

[17] *See United States v. MacCollom*, 426 U.S. 317, 321 (1976) ("The established rule is that the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress."). Congressional appropriation of funds will not be discussed in this Primer Article.

[18] *G.L. Christian & Assoc. v. United States*, 312 F.2d 424, 427 (1963).

[19] 31 U.S.C. §§ 3729-3733; 18 U.S.C. § 287.

[20] 18 U.S.C. § 287.

[21] 31 U.S.C. §§ 3729-3733.

[22] 31 U.S.C. § 3729(b).

[23] Types of Fraud Prosecuted Under the FCA, available at: http://www.taf.org/whyfca.htm, last visited August 16, 2011.

[24] Department of Justice Memorandum, FALSE CLAIMS ACT CASES: GOVERNMENT INTERVENTION IN QUI TAM (WHISTLEBLOWER) SUITS, found at http://www.justice.gov/usao/pae/Documents/fcaprocess2.pdf, last visited August 16, 2011.
[25] Relators are also protected by Whistleblower Protection statutes and regulations that prohibit retaliatory actions against whistleblowers. *See* Whistleblower Protection Act of 1989; Whistleblower Protection Enhancement Act of 2009; FAR Subpart 3.9, Whistleblower Protections for Contractor Employees.
[26] 18 U.S.C. § 1001, *et seq.*
[27] 15 U.S.C. §§ 78dd-1, *et seq.*
[28] Foreign Corrupt Practices Act Overview, located at, http://www.justice.gov/criminal/fraud/fcpa, last visited August 16, 2011.
[29] FAR 52.203-13.
[30] FAR 52.203-13(c)(1)(i) (as amended by final rule).
[31]Svetz, Holly Emrick, Kearney, James K., *Bad News and Good News for Government Contractors: Mandatory Disclosures and COTS Exemptions*, January 22, 2009, available at: http://www.wcsr.com/client-alerts/bad-news-and-good-news-for-government-contractors-mandatory-disclosures-and-cots-exemptions, last visited August 15, 2011.
[32] The clause requires training to be provided to the "Contractor's principals and employees, and as appropriate, the Contractor's agents and subcontractors." FAR 52.203-13(c)(1)(ii).
[33] *Id.*; FAR Case 2006–007, Contractor Code of Business Ethics and Conduct, 72 Fed. Reg. 65873, Nov. 23, 2007.
[34] *See* Svetz, Holly Emrick, Kearney, James K., *Federal Government Contractors And Subcontractors Now Must Have Codes of Business Ethics and Conduc*t, Nov. 29, 2007, available at http://www.wcsr.com/articles/federal-government-contractors-and-subcontractors-now-must-have-codes-of-business-ethics-and-conduct, last visited August 16, 2011; DCAA Memorandum for Regional Directors, *et al.*, Audit Guidance on Federal Acquisition Regulation Revisions Related to Contractor Code of Business Ethics and Conduct.
[35] FAR 52.203-13(b)(3)(i); *see also* Svetz, Holly E., Kearney, James K., *Bad News and Good News for Government Contractors: Mandatory Disclosures and COTS Exemptions*, January 22, 2009, available at: http://www.wcsr.com/client-alerts/bad-news-and-good-news-for-government-contractors-mandatory-disclosures-and-cots-exemptions, last visited August 15, 2011.
[36] FAR 52.203-13(b)(3)(i).
[37] *Id*.
[38] *Id*.
[39] FAR 4.1102.
[40] FAR 4.1103(a)(1).
[41] FAR 52.204-8 mandates the use of ORCA on or after January 1, 2005.
[42] FAR 52.204-10.
[43] Public Law 109-282, 31 U.S.C. 6101.
[44] FAR 52.222-26.
[45] FAR 52.222-26(c)(2).
[46] Executive Order 11246; FAR 52.222-27.
[47] FAR 52.222-27(g)(1)-(6).
[48] FAR 52.222-26(c)(8).
[49] 13 CFR 121.
[50] NACIS Codes can be found at: http://www.census.gov/naics/2007/index.html, last visited August 16, 2011.
[51] The Size Standards Table is available at: http://www.sba.gov/sites/default/files/Size_Standards_Table.pdf, last visited August 16, 2011.
[52] 13 CFR § 121.104 and 13 CFR § 121.106.
[53] 15 U.S.C. § 637(d).
[54] FAR 52.219-8(a)-(b).
[55] FAR 52.219-8.
[56] The contract value must exceed $1,000,000 for construction of a public facility.
[57] FAR 52.219-9.
[58] FAR 52.219-9(c).

[59] *Id*.
[60] FAR 52.219-9(k)(2); FAR 52.219-16.
[61] FAR 52.219-9(d)(1).
[62] FAR 52.219-9(d)(7).
[63] FAR 52.219-9(d)(8).
[64] FAR 52.219-9(d)(9).
[65] FAR 52.219-9(d)(10).
[66] FAR 52.219-9(d)(11).
[67] 31 U.S.C. § 1352; FAR Subpart 3.8.
[68] FAR 3.802(a).
[69] 31 U.S.C. § 1352.
[70] FAR 3.801.
[71] FAR 3.802(b) (requiring contractors to file OMB Standard Form LLL, available at: http://www.whitehouse.gov/omb/grants/sflllin.pdf.
[72] FAR 3.083(a); FAR 52.203-11.
[73] 31 U.S.C. §3803.
[74] FAR 3.807.
[75] FAR 52.222-54.
[76] FAR Part 31.
[77] FAR 31.201-2(a).
[78] 48 C.F.R. Part 9904.
[79] FAR 31.201-3(b)(2); 31.201-2(a)(3).
[80] FAR 31.201-3(b)(2); FAR 31.201(a)(3).
[81] 37 CFR 401.
[82] FAR 52.227-11.
[83] *See generally* FAR 52.227-14.
[84] FAR 52.215-1(e).
[85] Export Administration Regulations ("EAR") 15 C.F.R. Parts 700-799.
[86] International Traffic in Arms Regulations ("ITAR") 22 C.F.R. Parts 120-130.
[87] Iraq Sanctions Regulations, Terrorism Sanctions Regulations, & Others, 31 C.F.R. Parts 500-599.
[88] 22 CFR Part 121.
[89] 22 CFR Supplement No. 1 to Part 774.
[90] Pub. L. No. 103-355, 108 Stat. 3243 (1994).
[91] FAR Part 12.
[92] FAR 2.101.
[93] FAR Subpart 9.603.
[94] FAR 22.1002-2.
[95] FAR 22.1001-3.
[96] 29 CFR § 4.123(d).
[97] FAR Subpart 22.4.
[98] FAR 22.403-1; *see also* FAR 52.222-6.
[99] FAR 22.406-6; FAR 52.222-8.
[100] FAR 22.302.
[101] FAR 52.227-15; DFARS 252.227-7013; DFARS 252.227-7014.
[102] FAR Subpart 25.1 (Implementing the Buy American Act); FAR Subpart 25.4 (Implementing the Trade Agreements Act).
[103] FAR 25.100(b).
[104] FAR 25.103.
[105] FAR 25.402(a)(1).
[106] FAR 25.402(b).
[107] FAR 25.403(c).
[108] FAR 25.003.
[109] FAR 25.401.
[110] FAR 25.001(c)(2).
[111] FAR 15.506.

[112] FAR 15.506(b).
[113] *See* FAR Part 33.
[114] FAR 33.101.
[115] FAR 33.103.
[116] FAR 33.104.
[117] 28 U.S.C. § 1491(b).
[118] FAR 43.201(a).
[119] FAR 43.201(b); FAR 32.702.
[120] FAR 52.243-4(a)-(b).
[121] *See* FAR 52.243-1; 52.243-2; FAR 52.243-3; 52.243-4; 52.243-5; 52.243-7.
[122] Requests for Equitable Adjustments under Department of Defense contracts may also require a certification in some instances.
[123] FAR 42.1303 Stop-work orders; FAR 52.249-2, Termination for the Convenience of the Government (Fixed Price).
[124] FAR 42.1303(b).
[125] FAR 42.1303(c).
[126] FAR 42.1303(e).
[127] FAR 52.249-2.
[128] FAR 52.249-2(b).
[129] *See* FAR Subpart 49.2.
[130] FAR 52.249(g)(2).
[131] 41 U.S.C. § 15.
[132] FAR Subpart 42.12.
[133] FAR 42.1204.
[134] FAR 42.1204(i).
[135] FAR 42.1203(c).
[136] FAR 42.1204(i).
[137] FAR 4.804-1.
[138] FAR 4.804-2(b).
[139] FAR 4.804-1.
[140] FAR 42.1502.
[141] FAR 4.804-5.
[142] FAR 52.215-2.
[143] FAR 52.215-2(b).
[144] FAR 52.215-2(f)-(g).
[145] 10 U.S.C. §§ 2306a(g) and 2313(a)(2).
[146] FAR Subpart 45.604.
[147] FAR 45.402(a).
[148] FAR Subpart 45.604.
[149] *Id.*
[150] FAR 52.227-11(c)(1).
[151] FAR 52.227-11(d)(1)(i).
[152] Jurisdiction under the Contract Disputes Act is limited to contractors in privity with the Government. *United States v. Johnson Controls, Inc.*, 713 F.2d 1541 (Fed. Cir. 1983).
[153] 4 C.F.R. §§ 21.5(h) and 21.13.
[154] FAR 52.249.
[155] FAR 52.227-11(k).
[156] FAR 52.227-11(k)(3).
[157] DFARS 252.227-7013(k)(2).

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False Claims Act Update

October 2011

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False Claims Act, 31 U.S.C. § 3729

- Imposes liability on any person who:
  - knowingly presents or causes to be presented a false or fraudulent claim for payment or approval
  - knowingly makes or uses a false record or statement material to a false or fraudulent claim
  - knowingly makes or uses a false record or statement material to an obligation to pay or transmit money or property to the Government or knowingly conceals or knowingly and avoids or decreases an obligation to pay or transmit money or property to the Government

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False Claims Act, 31 U.S.C. § 3729

- Intent required for liability
  - Actual knowledge
  - Deliberate ignorance of the truth
  - Reckless disregard of the truth
- Damages for violation of FCA
  - 3x actual damages
  - $5,500 – $11,000 civil penalty per “claim”
  - Attorneys’ Fees

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False Claims Act, 31 U.S.C. § 3729

- Private plaintiff can sue on behalf of United States
- Whistleblower can recover up to 30% of amount paid to Government
- Congress intended qui tam actions to help the government uncover fraud and abuse by unleashing a "posse of ad hoc deputies to uncover and prosecute frauds against the government."
  - *United States ex rel. Milam v. University of Texas M.D. Andersen Cancer Ctr.*, 961 F.2d 46, 49 (4th Cir. 1992)

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Recent Amendments to FCA

- Two laws
  - Fraud Enforcement and Recovery Act (FERA) (May 20, 2009)
  - Affordable Care Act (March 23, 2010)
- Significance
  - First material amendments to FCA since 1986
  - Overall expansion of FCA liability
  - Removal of several important FCA defenses

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Recent Amendments to FCA

- Presentment
  - Requirement to present claim to U.S. is eliminated
- Intent
  - Requirement that defendant intended to defraud the federal government is eliminated
- Materiality
  - Now an explicit element of FCA claim
  - Standard is “natural tendency” to influence

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Public Disclosure Bar Weakened

- Pre amendment:
  - barred qui tam suits based on information previously disclosed to public unless whistleblower was “original source”
- Post amendment:
  - Circumstances constituting public disclosure narrowed
  - Broadened definition of “original source”
  - Bar is no longer jurisdictional

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Enhanced Investigative Tools

- ***Pre-FERA***
  - only Attorney General could issue Civil Investigative Demand (CID)
  - documents produced could not be shared with relator
- ***Post-FERA***
  - AG can delegate authority to issue CID
  - materials can be shared with relator
- ***Significance***
  - DOJ or AUSAs no longer have to rely on agencies to issue subpoenas or conduct interviews
  - expect relators to have better chance of surviving Rule 12 motion to dismiss

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Expansion of Retaliation Provision

- Protections now extend to contractors and agents
- Protection now applies to lawful acts in furtherance of efforts to stop violations
- Consider revising H/R and Compliance policies to track changes

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Revisions to so-called "reverse false claims" provision

- Contractors have always had a duty to return overpayments
- However, now, retention of overpayment may give rise to FCA liability
- "The burden for providing accurate claims now goes on the provider. It's a pretty significant increase in the power of the government and responsibilities of providers." *-- New York IG James Sheehan*

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Retention of Overpayment Liability

- Per FERA, it is a violation of FCA to "knowingly conceal[] or knowingly and improperly avoid[] or decrease[] an obligation to pay" money to the U.S.

- What is an "obligation"
  - an "established duty, whether or not fixed, ... arising from the retention of an overpayment"

- Does not require submission of false record or statement but simple act of concealing or avoiding the "obligation" to pay back funds

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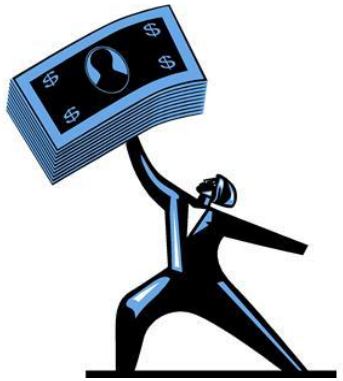
Retention of Overpayment Liability

- A “person” who receives an “overpayment” must:
  - Report and return the overpayment to the applicable payor (e.g., CMS or DoD); and
  - Provide written notification of the reason for the overpayment



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Retention of Overpayment Liability

- An overpayment must be reported and returned by the later of:
  - The date that is 60 days after the date on which the overpayment was identified; or
  - The date any corresponding cost report is due, if applicable
- Overpayment retained after the deadline is an "obligation" under FCA
  - Treble damages and penalties under FCA
  - Debarment from contract program
  - Civil monetary penalty

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Retention of Overpayment Liability

- Returning overpayment is mandatory once it is “identified”
  - “identified” is not defined
- At what point does retention of overpayment give rise to liability?
  - ***Plaintiffs’ view:*** clock starts upon report or concern that an overpayment was received
  - ***Better view:*** clock starts once the fact of an overpayment is confirmed and the amount of the refund is quantified

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Retention of Overpayment Liability

- Providers should consider protocol for dealing with potential overpayments
  - Appropriate review of suspected overpayments
  - Fast track approval of repayment once overpayment has been identified
  - Payment letter to applicable payor

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Changes to Other Criminal Provisions

- 18 U.S.C. § 1347
  - lowered the intent requirement
  - Gvmt not required to prove actual knowledge of the statute
- 18 U.S.C. § 24
  - broadened definition of “health care offense” to include violation of AKS

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U.S. Sentencing Guidelines

- U.S.S.C. directed to update guidelines to increase offense levels by 20-50% for crimes involving more than $1 million in losses
- Key driver is “intended loss” to federal healthcare programs

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Other Penalties

- Failure to grant timely access to OIG for audits, investigations and other reasons
  - Civil monetary penalties
- Obstruction of audit or investigation
  - Permissive exclusion

HELPFUL WEBSITES

GUIDANCE ON DOING BUSINESS WITH THE FEDERAL GOVERNMENT

Small Business Administration (SBA). Provides good basic information on working with the government (even if you're not small).
www.sba.gov/category/navigation-structure/contracting/working-with-government

General Services Administration (GSA). The GSA is the largest buyer of commercial products and services. It has ordering schedules covering everything from cars to IT hardware, software and services to transportation and relocation services.
www.gsa.gov

LISTINGS OF BUSINESS OPPORTUNITIES

FedBizOpps.gov. A list of Federal business opportunities.
www.fbo.gov/

SBA. This site provides information about Federal business opportunities, with links to various agencies.
www.sba.gov/content/federal-business-opportunities

Grant.gov. A clearinghouse for federal grant opportunities.
grants.gov/

ACQUISITION REGULATIONS

Federal Acquisition Regulation (FAR). The overarching regulation that governs how the government purchases its requirements. In addition, there are agency supplements that address specific agency requirements dictated by other statutes.
www.acquisition.gov/far/

Department of Defense, Defense FAR Supplement (DFARS).
www.acq.osd.mil/dpap/dars/dfarspgi/current/index.html

General Services Administration (GSA), General Service Administration Acquisition Manual (GSAM).
www.gsa.gov/portal/content/101180

SMALL BUSINESS SITES

NAICS Codes. Table of NAICS code size standards for small business by industry code
http://www.sba.gov/content/table-small-business-size-standards

SBA Regulations. SBA small business regulations generally
http://www.gpo.gov/fdsys/pkg/CFR-2011-title13-vol1/xml/CFR-2011-title13-vol1-part121.xml

8(a) Program. SBA small business regulations for 8(a) companies
http://www.gpo.gov/fdsys/pkg/CFR-2011-title13-vol1/xml/CFR-2011-title13-vol1-part124.xml

Service Disabled Veterans. SBA small business regulations for Service Disabled Veteran-Owned Small Businesses
http://www.gpo.gov/fdsys/pkg/CFR-2011-title13-vol1/xml/CFR-2011-title13-vol1-part125.xml

HubZones. SBA small business regulations for HUBZone small businesses
http://www.gpo.gov/fdsys/pkg/CFR-2011-title13-vol1/xml/CFR-2011-title13-vol1-part126.xml

Women-Owned Businesses. SBA small business regulations for Women-Owned Small Businesses
http://www.gpo.gov/fdsys/pkg/CFR-2011-title13-vol1/xml/CFR-2011-title13-vol1-part127.xml

OTHER REGULATIONS

Federal Travel Regulation (FTR) - The FTR is the regulation contained in 41 Code of Federal Regulations (CFR), Chapters 300 through 304. It implements statutory requirements and Executive branch policies for travel by Federal civilian employees and others authorized to travel at government expense. It is often used to limit reimbursement of contract travel costs.
www.gsa.gov/portal/category/21222

FALSE CLAIMS ACT

Discussion of the False Claims Act. This Centers for Medicare and Medicaid Services (CMS) site provides an overview of the "heart" of the FCA.
https://www.cms.gov/smdl/downloads/SMD032207Att2.pdf

State False Claims Acts. The Office of the Inspector General, U.S. Department of Health and Human Services, provides an overview of state FCA laws reviewed by OIG.
www.oig.hhs.gov/fraud/state-false-claims-act-reviews/index.asp

General Information. The Taxpayers Against Fraud, a nonprofit public interest organization, provides an overview from a "non-government" perspective, including trends, cases, settlements, etc.
www.taf.org/whyfca.htm

Qui Tam process. The Department of Justice provides an overview of the qui tam process.
www.justice.gov/usao/pae/documents/fcaprocess2.pd

MISCELLANEOUS

Central Contractor Registration. The CCR collects, validates, stores and disseminates data in support of agency acquisition and award missions. You must register to be considered for Federal opportunities.
www.bpn.gov/ccr/default.aspx

U.S. Citizenship and Immigration Services, E-Verify for Federal Contractors
http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=534bbd181e09d110VgnVCM1000004718190aRCRD&vgnextchannel=534bbd181e09d110VgnVCM1000004718190aRCRD

Access to the US. Code, Code of Federal Regulations, statutes, and much more.
http://www.gpoaccess.gov/cfr/index.html

ACC ON-LINE RESOURCES – GOVERNMENT CONTRACTS

FAR Code of Conduct Training Course (Feb 2011)
http://www.acc.com/legalresources/resource.cfm?show=1276795

Federal Contracts: Termination for Convenience (July 2011)
http://www.acc.com/legalresources/quickcounsel/fctfc.cfm

Export Controls: An Introduction (June 2011)
http://www.acc.com/legalresources/quickcounsel/Export-Controls.cfm

Ethics Issues in Government Investigations (Oct 2010)
http://www.acc.com/legalresources/resource.cfm?show=1238662

The Government Investigator is Knocking: Now What? (Sept 2010)
http://www.acc.com/legalresources/resource.cfm?show=265476

In-house Counsel Beware: The False Claims Act Might Impact Your Business
http://www.acc.com/legalresources/resource.cfm?show=721320

Developments for Federal Contractors and Subcontractors (Including Commercial Vendors) (Oct 2009)
http://www.acc.com/legalresources/resource.cfm?show=740240

Federal Contracting Equal Opportunity Requirements (Feb 2009)
http://www.acc.com/legalresources/resource.cfm?show=141362

Government Contracts for the Generalist (Oct 2008)
http://www.acc.com/legalresources/resource.cfm?show=159747

RFP / RFQ Checklist

Start-Up

- ❑ Add to Deltek Vision Activities Calendar and Create or Link Opportunity Record
- ❑ Check Opportunity Record-Edit/Add info to all Tabs & Fields
- ❑ Create Project Folder and Subfolders on P Drive
- ❑ Confirm Distribution of RFP/RFQ – Distribute
- ❑ Engage Graphics Right Away
- ❑ Review RFP/RFQ
- ❑ Confirm GO
- ❑ Agreement/Contracts – to legal if necessary
- ❑ Insurance Requirements – to Erin if necessary
- ❑ Send Other Forms to appropriate individuals
- ❑ Complete Proposal Directive Form
- ❑ Schedule Strategy/Kick-off Meeting
- ❑ Check client website DAILY for Amendments - Distribute

Research

- ❑ Do your homework and be prepared.
- ❑ Remember to look on Google, All proposal Network Drives (and project drives if granted access), Vision, and SharePoint (all areas – Marketing/Proposals/projects/etc.) for information regarding projects, personnel, relevant proposal text.

First Draft

- ❑ Mock-up a COMPLETE DRAFT - *research and write where appropriate*
- ❑ Pull Covers, Tabs, Matrices, Org Charts, etc. from templates
- ❑ Do your Why Hill bullets
- ❑ QA/QC Review - use your "buddy" before sending out
- ❑ Distribute Draft For Review

Second / Third Draft

- ❑ Continue Research, Writing, Editing - *don't wait for information – create it or go get it!*
- ❑ Distribute to Team/VJD/TJS/P&G Director
- ❑ Provide a start for each section
- ❑ Keep in close contact with the BD Pursuit Lead (BE PERSISTANT)
- ❑ Request all appropriate information from your subconsultants – *provide our templates if possible*

Assemble

- ❑ READ the entire submission and
- ❑ Reread RFP/RFQ/And AMENDMENTS
- ❑ Make corrections from BD Pursuit Team
- ❑ Spell check, check formatting and style, and check for unnecessary double spaces.
- ❑ Have fresh eyes do a QC
- ❑ Distribute Draft
- ❑ Make Mailing Labels
- ❑ Make final corrections/improvements.
- ❑ Get PD signatures on letter (Electronic signature must have written approval)
- ❑ Make final copy(s)
- ❑ Give to BD Pursuit Team/P&G Team for flipping and final review before mailing out.
- ❑ Wrap it and Send it off.

Closeout (within 24 hours)

- ❑ Confirm delivery to client – email final PDF & Confirmation to Pursuit Team
- ❑ Upload Final PDF on SharePoint
- ❑ Update Vision Opportunity Record / add SharePoint link to File Tab
- ❑ Tag Boilerplate/Vision changes-add/edit accordingly/link new/revised BP docs to SharePoint
- ❑ Add Email correspondence to File
- ❑ Clean off extraneous documents
- ❑ Clean up any mess and restock supplies

RFP/RFQ Evaluation

Information in this form provides the details required for evaluating an RFP/RFQ.

EVALUATION – Indicate if this is an RFP or RFQ, Include Title and Number, and Indicate the Status (Go, No-Go, Undecided)

RFP	RFQ	Title and Number	Go	No-Go	Undecided

OPPORTUNITY

Project:		Project Location:	
Client:		Client Address:	
Managing Office:		Office Splits:	
BD Manager:		Proposal Manager:	
Technical Lead:		Construction Cost:	

Milestones	Date/Weekday	Time	Client Contact/Location/Phone #
Quals Due:			
Site Visit:			
Pre-Proposal Mtg:			
Proposal Due:			
Presentation:			
Notifice of Award:			

Subconsultants

Subconsultant Roles:					
Participation Roles:	☐ MBE ☐ WBE ☐ DBE ☐ SBE	Budget:		Schedule:	
Contract Type:	☐ CPTF ☐ ATC ☐ Lump Sum	Funding Availability:		Geo Limitations:	

SCOPE OF WORK

SUBMITTAL REQUIREMENTS AND SCHEDULE

Section Title/Task	Requirement/Instruction:	Assigned to:	Due:

Special Instructions, Notes, Highlights – nclude Page Limitations, Single vs Double Sided, Fonts & Size, Attachments, Binding, Environmental Requirements, etc.

Required Documents – Identify Required Certificates, Bonds, Notarized Forms, Licenses, etc.

Distribution of Original and Copies – Include All Recipients

EVALUATION

Evaluation Criteria

Questions that Clarify Project, Scope & Requirements

COMMENTS

Prepared by:		Distribution:	

Proposal Directive

BD Lead:	Name
Proposal Manager:	Name
Graphics / Multimedia:	Name
Assisting:	Name

SUMMARY OF FACTS

Date Due:	**Tuesday, September 16, 2009** Prebid Date: 00/00/00 Questions Due: 00/00/00 Shortlist Selection: 00/00/00 Presentation Date: 00/00/00 Final Selection: 00/00/00
Time Due:	**4:00PM**
Client Name:	NBA
Project Name:	Sacramento Convergence
Number of Copies:	10 – 15 Leave Behind Copies
Time Limit (for presentations):	45 minutes
Partners/Subs:	Gerry N. Kamilos, LLC (LEAD) Hill Redwood Development Corp Hill International, Inc. (CM/PM) Redwood Capital Advisors, LLC
Project Description:	Sacremento Kings Arena Cal Expo and Structured Parking

GRAPHIC THEME/NEEDS

KeyNote, PowerPoint, Leave Behinds, Graphic Collage, Transit Themes, and Concepts, etc.

OTHER RELEVANT INFORMATION

Why Team/Differentiators:	Gather these necessary points to create your win theme message throughout submission and place here for discussion at kickoff meeting
Relevant Projects:	List Top 10
Key Personnel:	Principal in Charge, Project Manager, others
Website	to download RFP and/or amendments

PROPOSAL OUTLINE

Section	Responsibility	Due Date
Cover Letter		
Table of Contents		
Technical Proposal a. Introduction to Firm • History • Locations • Personnel by Discipline b. Project Understanding • Scope of Services c. Project Approach • Management Plan • Methodology • Communications Plan • Staffing Approach d. Firm Qualifications • Last 5Years e. Team • Key Personnel • Subconsultants • Resumes f. Subcontracting Plan		
Price Proposal a. Price b. Schedule c. Terms and Conditions		
Appendix a. Forms b. cccc c. cccc		

SCHEDULE

RFP Received: ?

Strategy Meeting/Kick-off Date (within 24 hours of receipt of RFP): ?

Pink Team Date (first draft): ?

Red Team Date (final draft): ?

Green Team Date (fee review): ?

Production Date (1 to 2 days before due date): ?

MONTH

MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY
Day	Day	Day	Day	Day
Day	Day	Day	Day	Day
Day	Day	Day	Day	Day
Day	Day	Day	Day	Day

PROJECT WIN PLAN

Complete this Win Plan to highlight the strategy for winning this opportunity.

OPPORTUNITY

Project Title/RFP #:		Date:	
Proposal #/Charge #:		Review Date/Time:	
Technical Lead:		Cost Prop. (Y/N):	
Project Manager:		Project #:	
BD Manager:		Construction Value:	
Proposal Manager:		Prof. Services Budget:	
Professional Services:		Contract Duration:	

PROJECT STATUS

SUBMISSION DATE

Quals Due Date:	
Proposal Due Date:	
Presentation Date:	

CLIENT

CLIENT ISSUES/HOT BUTTONS	HOW WE WILL ADDRESS CLIENT ISSUES/HOT BUTTONS
1.	
2.	
3.	

SELECTION

SELECTION CRITERIA	HOW WE WILL MEET SELECTION CRITERIA
1.	
2.	
3.	

PROJECT GOALS & OBJECTIVES

PROJECT GOALS & OBJECTIVES	HOW WE WILL MEET GOALS & OBJECTIVES
1.	
2.	
3.	

SELECTION COMMITTEE

NAME	AGENCY / TITLE	ISSUES
1.		
2.		
3.		

PROJECT TEAM

POTENTIAL TEAMING PARTNERS	ROLE	RATIONALE
1.		
2.		
3.		

STRENGTHS	WEAKNESSES
1.	1.
2.	2.
3.	3.

STRATEGIES FOR MITIGATING WEAKNESSES	DISCRIMINATORS (AT LEAST 3 QUALIFIED POINTS)
1.	1.
2.	2.
3.	3.

COMPETITION

COMPETITOR ASSESSMENT

Score each Competitor using 1-5 Points for each Criteria (1 = Low; 5 = High) – Total the Points in the Right Column

Firm / Specific Assignment	Project Experience	Performance / Track Record	Existing Market Penetration / Knowledge	Strength of Proposed PM	Bench Strength	Quality of Resources	Pursuit Resources	**Total Points**
1.								
2.								
3.								

25-35 Points = Tough Competition; 19-24 Points = Medium Competition; 1-18 Points = Light Competition

COMPETITOR STRENGTHS AND WEAKNESSES

COMPETITOR TEAM	STRENGTHS	WEAKNESSES
1.		
2.		
3.		

STRATEGIES FOR COUNTERING COMPETITORS

COMPETITOR TEAM	STRATEGY FOR COUNTERING COMPETITOR
1.	
2.	
3.	

STRATEGY FOR WINNING

ADDITIONAL COMMENTS

ATTACH ALL RELEVANT DOCUMENTS

Prepared by:		Distribution	
	Business Development Lead/Capture Manager		Executive Sponsor, Principal in Charge, Regional Manager, Project Manager, Proposal Manager

requirements of a contract may have a controlling role such to be considered a joint venturer affiliated on the contract with the prime contractor. A joint venture affiliation finding is limited to particular contracts unless the SBA size determination finds general affiliation between the parties. The rules governing 8(a) Program joint ventures are described in 13 CFR 124.513.

(iv) Where a concern is not considered as being an affiliate of a concern with which it is participating in a joint venture, it is necessary, nevertheless, in computing annual receipts, etc., for the purpose of applying size standards, to include such concern's share of the joint venture receipts (as distinguished from its share of the profits of such venture).

(v) *Franchise and license agreements.* If a concern operates or is to operate under a franchise (or a license) agreement, the following policy is applicable: In determining whether the franchisor controls or has the power to control and, therefore, is affiliated with the franchisee, the restraints imposed on a franchisee by its franchise agreement shall not be considered, provided that the franchisee has the right to profit from its effort and the risk of loss or failure, commensurate with ownership. Even though a franchisee may not be controlled by the franchisor by virtue of the contractual relationship between them, the franchisee may be controlled by the franchisor or others through common ownership or common management, in which case they would be considered as affiliated.

(vi) *Size determination for teaming arrangements.* For size determination purposes, apply the size standard tests in paragraphs (7)(i)(A) and (B) of this section when a teaming arrangement of two or more business concerns submits an offer, as appropriate.

"Annual receipts." (1) Annual receipts of a concern which has been in business for 3 or more complete fiscal years means the annual average gross revenue of the concern taken for the last 3 fiscal years. For the purpose of this definition, gross revenue of the concern includes revenues from sales of products and services, interest, rents, fees, commissions and/or whatever other sources derived, but less returns and allowances, sales of fixed assets, interaffiliate transactions between a concern and its domestic and foreign affiliates, and taxes collected for remittance (and if due, remitted) to a third party. Such revenues shall be measured as entered on the regular books of account of the concern whether on a cash, accrual, or other basis of accounting acceptable to the U.S. Treasury Department for the purpose of supporting Federal income tax returns, except when a change in accounting method from cash to accrual or accrual to cash has taken place during such 3-year period, or when the completed contract method has been used.

(i) In any case of change in accounting method from cash to accrual or accrual to cash, revenues for such 3-year period shall, prior to the calculation of the annual average, be restated to the accrual method. In any case, where the completed contract method has been used to account for revenues in such 3-year period, revenues must be restated on an accrual basis using the percentage of completion method.

(ii) In the case of a concern which does not keep regular books of accounts, but which is subject to U.S. Federal income taxation, "annual receipts" shall be measured as reported, or to be reported to the U.S. Treasury Department, Internal Revenue Service, for Federal income tax purposes, except that any return based on a change in accounting method or on the completed contract method of accounting must be restated as provided for in the preceding paragraphs.

(2) Annual receipts of a concern that has been in business for less than 3 complete fiscal years means its total receipts for the period it has been in business, divided by the number of weeks including fractions of a week that it has been in business, and multiplied by 52. In calculating total receipts, the definitions and adjustments related to a change of accounting method and the completed contract method of paragraph (1) of this definition, are applicable.

"Number of employees" is a measure of the average employment of a business concern and means its average employment, including the employees of its domestic and foreign affiliates, based on the number of persons employed on a full-time, part-time, temporary, or other basis during each of the pay periods of the preceding 12 months. If a business has not been in existence for 12 months, "number of employees" means the average employment of such concern and its affiliates during the period that such concern has been in existence based on the number of persons employed during each of the pay periods of the period that such concern has been in business. If a business has acquired an affiliate during the applicable 12-month period, it is necessary, in computing the applicant's number of employees, to include the affiliate's number of employees during the entire period, rather than only its employees during the period in which it has been an affiliate. The employees of a former affiliate are not included, even if such concern had been an affiliate during a portion of the period.

19.102 Size standards.

(a) The SBA establishes small business size standards on an industry-by-industry basis. (See 13 CFR Part 121.)

(b) Small business size standards are applied by—

(1) Classifying the product or service being acquired in the industry whose definition, as found in the North American Industry Classification System (NAICS) Manual (available via the Internet at *http://www.census.gov/epcd/www/naics.html*), best describes the principal nature of the product or service being acquired;

(2) Identifying the size standard SBA established for that industry; and

(3) Specifying the size standard in the solicitation so that offerors can appropriately represent themselves as small or large.

(c) For size standard purposes, a product or service shall be classified in only one industry, whose definition best describes the principal nature of the product or service being acquired even though for other purposes it could be classified in more than one.

(d) When acquiring a product or service that could be classified in two or more industries with different size standards, contracting officers shall apply the size standard for the industry accounting for the greatest percentage of the contract price.

(e) If a solicitation calls for more than one item and allows offers to be submitted on any or all of the items, an offeror must meet the size standard for each item it offers to furnish. If a solicitation calling for more than one item requires offers on all or none of the items, an offeror may qualify as a small business by meeting the size standard for the item accounting for the greatest percentage of the total contract price.

(f) Any concern submitting a bid or offer in its own name, other than on a construction or service contract, that proposes to furnish an end product it did not manufacture (a "nonmanufacturer"), is a small business if it has no more than 500 employees, and—

(1) Except as provided in paragraphs (f)(4) through (f)(7) of this section, in the case of Government acquisitions set-aside for small businesses, furnishes in the performance of the contract, the product of a small business manufacturer or producer. The end product furnished must be manufactured or produced in the United States or its outlying areas. The term "nonmanufacturer" includes a concern that can, but elects not to, manufacture or produce the end product for the specific acquisition. For size determination purposes, there can be only one manufacturer of the end product being acquired. The manufacturer of the end product being acquired is the concern that, with its own forces, transforms inorganic or organic substances including raw materials and/or miscellaneous parts or components into the end product. However, see the limitations on subcontracting at 52.219-14 that apply to any small business offeror other than a nonmanufacturer for purposes of set-asides and 8(a) awards.

(2) A concern which purchases items and packages them into a kit is considered to be a nonmanufacturer small business and can qualify as such for a given acquisition if it meets the size qualifications of a small nonmanufacturer for the acquisition, and if more than 50 percent of the total value of the kit and its contents is accounted for by items manufactured by small business.

(3) For the purpose of receiving a Certificate of Competency on an unrestricted acquisition, a small business nonmanufacturer may furnish any domestically produced or manufactured product.

(4) In the case of acquisitions set aside for small business or awarded under section 8(a) of the Small Business Act, when the acquisition is for a specific product (or a product in a class of products) for which the SBA has determined that there are no small business manufacturers or processors in the Federal market, then the SBA may grant a class waiver so that a nonmanufacturer does not have to furnish the product of a small business. For the most current listing of classes for which SBA has granted a waiver, contact an SBA Office of Government Contracting. A listing is also available on SBA's Internet Homepage at *http://www.sba.gov/gc*. Contracting officers may request that the SBA waive the nonmanufacturer rule for a particular class of products.

(5) For a specific solicitation, a contracting officer may request a waiver of that part of the nonmanufacturer rule which requires that the actual manufacturer or processor be a small business concern if no known domestic small business manufacturers or processors can reasonably be expected to offer a product meeting the requirements of the solicitation.

(6) Requests for waivers shall be sent to the—

Associate Administrator for Government Contracting
United States Small Business Administration
Mail Code 6250
409 Third Street, SW
Washington, DC 20416.

(7) The SBA provides for an exception to the nonmanufacturer rule if—

(i) The procurement of a manufactured end product processed under the procedures set forth in Part 13—

(A) Is set aside for small business; and

(B) Is not anticipated to exceed $25,000; and

(ii) The offeror supplies an end product that is manufactured or produced in the United States or its outlying areas.

(8) For non-manufacturer rules pertaining to HUBZone contracts, see 19.1303(e).

(g) The industry size standards are published by the Small Business Administration and are available via the Internet at *http://www.sba.gov/size*.

PART 121—SMALL BUSINESS SIZE REGULATIONS

Subpart A—Size Eligibility Provisions and Standards

PROVISIONS OF GENERAL APPLICABILITY

SIZE STANDARDS USED TO DEFINE SMALL BUSINESS CONCERNS

SIZE ELIGIBILITY REQUIREMENTS FOR SBA FINANCIAL ASSISTANCE

SIZE ELIGIBILITY REQUIREMENTS FOR GOVERNMENT PROCUREMENT

SIZE ELIGIBILITY REQUIREMENTS FOR SALES OR LEASE OF GOVERNMENT PROPERTY

SIZE ELIGIBILITY REQUIREMENTS FOR THE 8(A) BUSINESS DEVELOPMENT PROGRAM

AUTHORITY: 15 U.S.C. 632, 634(b)(6), 636(b), 637(a), 644, 662(5) and 694a; Pub. L. 105–135, sec. 401 *et seq.*, 111 Stat. 2592.

SOURCE: 61 FR 3286, Jan. 31, 1996, unless otherwise noted.

EDITORIAL NOTE: Nomenclature changes to part 121 appear at 72 FR 50039 and 50040, Aug. 30, 2007.

Subpart A—Size Eligibility Provisions and Standards

PROVISIONS OF GENERAL APPLICABILITY

§ 121.101 What are SBA size standards?

(a) SBA's size standards define whether a business entity is small and, thus, eligible for Government programs and preferences reserved for "small business" concerns. Size standards have been established for types of economic activity, or industry, generally under the North American Industry Classification System (NAICS).

(b) NAICS is described in the North American Industry Classification Manual–United States, which is available from the National Technical Information Service, 5285 Port Royal Road, Springfield, VA 22161; by calling 1(800) 553–6847 or 1(703) 605–6000; or via the Internet at *http://www.ntis.gov/products/naics.aspx*. The manual includes definitions for each industry, tables showing relationships between 1997 NAICS and 1987 SICs, and a comprehensive index.

NAICS assigns codes to all economic activity within twenty broad sectors. Section 121.201 provides a full table of small business size standards matched to the U.S. NAICS industry codes. A full table matching a size standard with each NAICS Industry or U.S. Industry code is also published annually by SBA in the FEDERAL REGISTER.

[65 FR 30840, May 15, 2000, as amended at 67 FR 52602, Aug. 13, 2002; 74 FR 46313, Sept. 9, 2009]

§ 121.102 How does SBA establish size standards?

(a) SBA considers economic characteristics comprising the structure of an industry, including degree of competition, average firm size, start-up costs and entry barriers, and distribution of firms by size. It also considers technological changes, competition from other industries, growth trends, historical activity within an industry, unique factors occurring in the industry which may distinguish small firms from other firms, and the objectives of its programs and the impact on those programs of different size standard levels.

(b) As part of its review of a size standard, SBA will investigate if any concern at or below a particular standard would be dominant in the industry. SBA will take into consideration market share of a concern and other appropriate factors which may allow a concern to exercise a major controlling influence on a national basis in which a number of business concerns are engaged. Size standards seek to ensure that a concern that meets a specific size standard is not dominant in its field of operation.

(c) As part of its review of size standards, SBA's Office of Size Standards will examine the impact of inflation on monetary-based size standards (e.g., receipts, net income, assets) at least once every five years and submit a report to the Administrator or designee. If SBA finds that inflation has significantly eroded the value of the monetary-based size standards, it will issue a proposed rule to increase size standards.

(d) Please address any requests to change existing size standards or establish new ones for emerging industries to the Division Chief, Office of Size Standards, Small Business Administration, 409 3rd Street, SW., Washington, DC 20416.

[61 FR 3286, Jan. 31, 1996, as amended at 67 FR 3045, Jan. 23, 2002]

§ 121.103 How does SBA determine affiliation?

(a) *General Principles of Affiliation.* (1) Concerns and entities are affiliates of each other when one controls or has the power to control the other, or a third party or parties controls or has the power to control both. It does not matter whether control is exercised, so long as the power to control exists.

(2) SBA considers factors such as ownership, management, previous relationships with or ties to another concern, and contractual relationships, in determining whether affiliation exists.

(3) Control may be affirmative or negative. Negative control includes, but is not limited to, instances where a minority shareholder has the ability, under the concern's charter, by-laws, or shareholder's agreement, to prevent a quorum or otherwise block action by the board of directors or shareholders.

(4) Affiliation may be found where an individual, concern, or entity exercises control indirectly through a third party.

(5) In determining whether affiliation exists, SBA will consider the totality of the circumstances, and may find affiliation even though no single factor is sufficient to constitute affiliation.

(6) In determining the concern's size, SBA counts the receipts, employees, or other measure of size of the concern whose size is at issue and all of its domestic and foreign affiliates, regardless of whether the affiliates are organized for profit.

(b) *Exceptions to affiliation coverage.* (1) Business concerns owned in whole or substantial part by investment companies licensed, or development companies qualifying, under the Small Business Investment Act of 1958, as amended, are not considered affiliates of such investment companies or development companies.

(2)(i) Business concerns owned and controlled by Indian Tribes, Alaska Native Corporations (ANCs) organized pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601 *et seq.*),

Native Hawaiian Organizations (NHOs), Community Development Corporations (CDCs) authorized by 42 U.S.C. 9805, or wholly-owned entities of Indian Tribes, ANCs, NHOs, or CDCs are not considered affiliates of such entities.

(ii) Business concerns owned and controlled by Indian Tribes, ANCs, NHOs, CDCs, or wholly-owned entities of Indian Tribes, ANCs, NHOs, or CDCs are not considered to be affiliated with other concerns owned by these entities because of their common ownership or common management. In addition, affiliation will not be found based upon the performance of common administrative services, such as bookkeeping and payroll, so long as adequate payment is provided for those services. Affiliation may be found for other reasons.

(3) Business concerns which are part of an SBA approved pool of concerns for a joint program of research and development as authorized by the Small Business Act are not affiliates of one another because of the pool.

(4) Business concerns which lease employees from concerns primarily engaged in leasing employees to other businesses or which enter into a co-employer arrangement with a Professional Employer Organization (PEO) are not affiliated with the leasing company or PEO solely on the basis of a leasing agreement.

(5) For financial, management or technical assistance under the Small Business Investment Act of 1958, as amended, (an applicant is not affiliated with the investors listed in paragraphs (b)(5) (i) through (vi) of this section.

(i) Venture capital operating companies, as defined in the U.S. Department of Labor regulations found at 29 CFR 2510.3–101(d);

(ii) Employee benefit or pension plans established and maintained by the Federal government or any state, or their political subdivisions, or any agency or instrumentality thereof, for the benefit of employees;

(iii) Employee benefit or pension plans within the meaning of the Employee Retirement Income Security Act of 1974, as amended (29 U.S.C. 1001, *et seq.*);

(iv) Charitable trusts, foundations, endowments, or similar organizations exempt from Federal income taxation under section 501(c) of the Internal Revenue Code of 1986, as amended (26 U.S.C. 501(c));

(v) Investment companies registered under the Investment Company Act of 1940, as amended (1940 Act) (15 U.S.C. 80a-1, *et seq.*); and

(vi) Investment companies, as defined under the 1940 Act, which are not registered under the 1940 Act because they are beneficially owned by less than 100 persons, if the company's sales literature or organizational documents indicate that its principal purpose is investment in securities rather than the operation of commercial enterprises.

(6) A protege firm is not an affiliate of a mentor firm solely because the protege firm receives assistance from the mentor firm under Federal Mentor-Protege programs. Affiliation may be found for other reasons.

(7) The member shareholders of a small agricultural cooperative, as defined in the Agricultural Marketing Act (12 U.S.C. 1141j), are not considered affiliated with the cooperative by virtue of their membership in the cooperative.

(c) *Affiliation based on stock ownership.* (1) A person (including any individual, concern or other entity) that owns, or has the power to control, 50 percent or more of a concern's voting stock, or a block of voting stock which is large compared to other outstanding blocks of voting stock, controls or has the power to control the concern.

(2) If two or more persons (including any individual, concern or other entity) each owns, controls, or has the power to control less than 50 percent of a concern's voting stock, and such minority holdings are equal or approximately equal in size, and the aggregate of these minority holdings is large as compared with any other stock holding, SBA presumes that each such person controls or has the power to control the concern whose size is at issue. This presumption may be rebutted by a showing that such control or power to control does not in fact exist.

(3) If a concern's voting stock is widely held and no single block of stock is large as compared with all other stock holdings, the concern's

Board of Directors and CEO or President will be deemed to have the power to control the concern in the absence of evidence to the contrary.

(d) *Affiliation arising under stock options, convertible securities, and agreements to merge.* (1) In determining size, SBA considers stock options, convertible securities, and agreements to merge (including agreements in principle) to have a present effect on the power to control a concern. SBA treats such options, convertible securities, and agreements as though the rights granted have been exercised.

(2) Agreements to open or continue negotiations towards the possibility of a merger or a sale of stock at some later date are not considered "agreements in principle" and are thus not given present effect.

(3) Options, convertible securities, and agreements that are subject to conditions precedent which are incapable of fulfillment, speculative, conjectural, or unenforceable under state or Federal law, or where the probability of the transaction (or exercise of the rights) occurring is shown to be extremely remote, are not given present effect.

(4) An individual, concern or other entity that controls one or more other concerns cannot use options, convertible securities, or agreements to appear to terminate such control before actually doing so. SBA will not give present effect to individuals', concerns' or other entities' ability to divest all or part of their ownership interest in order to avoid a finding of affiliation.

(e) *Affiliation based on common management.* Affiliation arises where one or more officers, directors, managing members, or partners who control the board of directors and/or management of one concern also control the board of directors or management of one or more other concerns.

(f) *Affiliation based on identity of interest.* Affiliation may arise among two or more persons with an identity of interest. Individuals or firms that have identical or substantially identical business or economic interests (such as family members, individuals or firms with common investments, or firms that are economically dependent through contractual or other relationships) may be treated as one party with such interests aggregated. Where SBA determines that such interests should be aggregated, an individual or firm may rebut that determination with evidence showing that the interests deemed to be one are in fact separate.

(g) *Affiliation based on the newly organized concern rule.* Affiliation may arise where former officers, directors, principal stockholders, managing members, or key employees of one concern organize a new concern in the same or related industry or field of operation, and serve as the new concern's officers, directors, principal stockholders, managing members, or key employees, and the one concern is furnishing or will furnish the new concern with contracts, financial or technical assistance, indemnification on bid or performance bonds, and/or other facilities, whether for a fee or otherwise. A concern may rebut such an affiliation determination by demonstrating a clear line of fracture between the two concerns. A "key employee" is an employee who, because of his/her position in the concern, has a critical influence in or substantive control over the operations or management of the concern.

(h) *Affiliation based on joint ventures.* A joint venture is an association of individuals and/or concerns with interests in any degree or proportion by way of contract, express or implied, consorting to engage in and carry out no more than three specific or limited-purpose business ventures for joint profit over a two year period, for which purpose they combine their efforts, property, money, skill, or knowledge, but not on a continuing or permanent basis for conducting business generally. This means that the joint venture entity cannot submit more than three offers over a two year period, starting from the date of the submission of the first offer. A joint venture may or may not be in the form of a separate legal entity. The joint venture is viewed as a business entity in determining power to control its management. SBA may also determine that the relationship between a prime contractor and its subcontractor is a joint venture, and that affiliation between the two exists, pursuant to paragraph (h)(4) of this section.

(1) Parties to a joint venture are affiliates if any one of them seeks SBA financial assistance for use in connection with the joint venture.

(2) Except as provided in paragraph (h)(3) of this section, concerns submitting offers on a particular procurement or property sale as joint venturers are affiliated with each other with regard to the performance of that contract.

(3) *Exception to affiliation for certain joint ventures.* (i) A joint venture of two or more business concerns may submit an offer as a small business for a Federal procurement without regard to affiliation under paragraph (h) of this section so long as each concern is small under the size standard corresponding to the NAICS code assigned to the contract, provided:

(A) The procurement qualifies as a "bundled" requirement, at any dollar value, within the meaning of § 125.2(d)(1)(i) of this chapter; or

(B) The procurement is other than a "bundled" requirement within the meaning of § 125.2(d)(1)(i) of this chapter, and:

(1) For a procurement having a receipts based size standard, the dollar value of the procurement, including options, exceeds half the size standard corresponding to the NAICS code assigned to the contract; or

(2) For a procurement having an employee-based size standard, the dollar value of the procurement, including options, exceeds $10 million.

(ii) A joint venture of at least one 8(a) Participant and one or more other business concerns may submit an offer for a competitive 8(a) procurement without regard to affiliation under paragraph (h) of this section so long as the requirements of § 124.513(b)(1) of this chapter are met.

(iii) Two firms approved by SBA to be a mentor and protégé under 13 CFR 124.520 may joint venture as a small business for any Federal Government procurement, provided the protégé qualifies as small for the size standard corresponding to the NAICS code assigned to the procurement and, for purposes of 8(a) sole source requirements, has not reached the dollar limit set forth in 13 CFR 124.519.

(4) A contractor and its ostensible subcontractor are treated as joint venturers, and therefore affiliates, for size determination purposes. An ostensible subcontractor is a subcontractor that performs primary and vital requirements of a contract, or of an order under a multiple award schedule contract, or a subcontractor upon which the prime contractor is unusually reliant. All aspects of the relationship between the prime and subcontractor are considered, including, but not limited to, the terms of the proposal (such as contract management, technical responsibilities, and the percentage of subcontracted work), agreements between the prime and subcontractor (such as bonding assistance or the teaming agreement), and whether the subcontractor is the incumbent contractor and is ineligible to submit a proposal because it exceeds the applicable size standard for that solicitation.

(5) For size purposes, a concern must include in its receipts its proportionate share of joint venture receipts, and in its total number of employees its proportionate share of joint venture employees.

(i) *Affiliation based on franchise and license agreements.* The restraints imposed on a franchisee or licensee by its franchise or license agreement relating to standardized quality, advertising, accounting format and other similar provisions, generally will not be considered in determining whether the franchisor or licensor is affiliated with the franchisee or licensee provided the franchisee or licensee has the right to profit from its efforts and bears the risk of loss commensurate with ownership. Affiliation may arise, however, through other means, such as common ownership, common management or excessive restrictions upon the sale of the franchise interest.

[61 FR 3286, Jan. 31, 1996, as amended at 62 FR 26381, May 14, 1997; 63 FR 35738, June 30, 1998; 64 FR 57370, Oct. 25, 1999; 65 FR 30840, May 15, 2000; 65 FR 35812, June 6, 2000; 65 FR 45833, July 26, 2000; 69 FR 29201, May 21, 2004; 70 FR 51248, Aug. 30, 2005]

§ 121.104 How does SBA calculate annual receipts?

(a) *Receipts* means "total income" (or in the case of a sole proprietorship, "gross income") plus "cost of goods sold"

as these terms are defined and reported on Internal Revenue Service (IRS) tax return forms (such as Form 1120 for corporations; Form 1120S and Schedule K for S corporations; Form 1120, Form 1065 or Form 1040 for LLCs; Form 1065 and Schedule K for partnerships; Form 1040, Schedule F for farms; Form 1040, Schedule C for other sole proprietorships). Receipts do not include net capital gains or losses; taxes collected for and remitted to a taxing authority if included in gross or total income, such as sales or other taxes collected from customers and excluding taxes levied on the concern or its employees; proceeds from transactions between a concern and its domestic or foreign affiliates; and amounts collected for another by a travel agent, real estate agent, advertising agent, conference management service provider, freight forwarder or customs broker. For size determination purposes, the only exclusions from receipts are those specifically provided for in this paragraph. All other items, such as subcontractor costs, reimbursements for purchases a contractor makes at a customer's request, and employee-based costs such as payroll taxes, may not be excluded from receipts.

(1) The Federal income tax return and any amendments filed with the IRS on or before the date of self-certification must be used to determine the size status of a concern. SBA will not use tax returns or amendments filed with the IRS after the initiation of a size determination.

(2) When a concern has not filed a Federal income tax return with the IRS for a fiscal year which must be included in the period of measurement, SBA will calculate the concern's annual receipts for that year using any other available information, such as the concern's regular books of account, audited financial statements, or information contained in an affidavit by a person with personal knowledge of the facts.

(b) *Completed fiscal year* means a taxable year including any short year. "Taxable year" and "short year" have the meanings attributed to them by the IRS.

(c) *Period of measurement.* (1) Annual receipts of a concern that has been in business for three or more completed fiscal years means the total receipts of the concern over its most recently completed three fiscal years divided by three.

(2) Annual receipts of a concern which has been in business for less than three complete fiscal years means the total receipts for the period the concern has been in business divided by the number of weeks in business, multiplied by 52.

(3) Where a concern has been in business three or more complete fiscal years but has a short year as one of the years within its period of measurement, annual receipts means the total receipts for the short year and the two full fiscal years divided by the total number of weeks in the short year and the two full fiscal years, multiplied by 52.

(d) *Annual receipts of affiliates.* (1) The average annual receipts size of a business concern with affiliates is calculated by adding the average annual receipts of the business concern with the average annual receipts of each affiliate.

(2) If a concern has acquired an affiliate or been acquired as an affiliate during the applicable period of measurement or before the date on which it self-certified as small, the annual receipts used in determining size status includes the receipts of the acquired or acquiring concern. Furthermore, this aggregation applies for the entire period of measurement, not just the period after the affiliation arose.

(3) If the business concern or an affiliate has been in business for a period of less than three years, the receipts for the fiscal year with less than a 12 month period are annualized in accordance with paragraph (c)(2) of this section. Receipts are determined for the concern and its affiliates in accordance with paragraph (c) of this section even though this may result in using a different period of measurement to calculate an affiliate's annual receipts.

(4) The annual receipts of a former affiliate are not included if affiliation ceased before the date used for determining size. This exclusion of annual receipts of a former affiliate applies

during the entire period of measurement, rather than only for the period after which affiliation ceased.

(e) Unless otherwise defined in this section, all terms shall have the meaning attributed to them by the IRS.

[61 FR 3286, Jan. 31, 1996, as amended at 65 FR 48604, Aug. 9, 2000; 69 FR 29203, May 21, 2004]

§ 121.105 How does SBA define "business concern or concern"?

(a)(1) Except for small agricultural cooperatives, a business concern eligible for assistance from SBA as a small business is a business entity organized for profit, with a place of business located in the United States, and which operates primarily within the United States or which makes a significant contribution to the U.S. economy through payment of taxes or use of American products, materials or labor.

(2) A small agricultural cooperative is an association (corporate or otherwise) acting pursuant to the provisions of the Agricultural Marketing Act (12 U.S.C.A. 1141j) whose size does not exceed the size standard established by SBA for other similar agricultural small business concerns. A small agricultural cooperative's member shareholders are not considered to be affiliates of the cooperative by virtue of their membership in the cooperative. However, a business concern or cooperative that does not qualify as small under this part may not be a member of a small agricultural cooperative.

(b) A business concern may be in the legal form of an individual proprietorship, partnership, limited liability company, corporation, joint venture, association, trust or cooperative, except that where the form is a joint venture there can be no more than 49 percent participation by foreign business entities in the joint venture.

(c) A firm will not be treated as a separate business concern if a substantial portion of its assets and/or liabilities are the same as those of a predecessor entity. In such a case, the annual receipts and employees of the predecessor will be taken into account in determining size.

[61 FR 3286, Jan. 31, 1996, as amended at 70 FR 51248, Aug. 30, 2005]

§ 121.106 How does SBA calculate number of employees?

(a) In determining a concern's number of employees, SBA counts all individuals employed on a full-time, part-time, or other basis. This includes employees obtained from a temporary employee agency, professional employee organization or leasing concern. SBA will consider the totality of the circumstances, including criteria used by the IRS for Federal income tax purposes, in determining whether individuals are employees of a concern. Volunteers (*i.e.*, individuals who receive no compensation, including no in-kind compensation, for work performed) are not considered employees.

(b) Where the size standard is number of employees, the method for determining a concern's size includes the following principles:

(1) The average number of employees of the concern is used (including the employees of its domestic and foreign affiliates) based upon numbers of employees for each of the pay periods for the preceding completed 12 calendar months.

(2) Part-time and temporary employees are counted the same as full-time employees.

(3) If a concern has not been in business for 12 months, the average number of employees is used for each of the pay periods during which it has been in business.

(4)(i) The average number of employees of a business concern with affiliates is calculated by adding the average number of employees of the business concern with the average number of employees of each affiliate. If a concern has acquired an affiliate or been acquired as an affiliate during the applicable period of measurement or before the date on which it self-certified as small, the employees counted in determining size status include the employees of the acquired or acquiring concern. Furthermore, this aggregation applies for the entire period of measurement, not just the period after the affiliation arose.

(ii) The employees of a former affiliate are not counted if affiliation ceased before the date used for determining size. This exclusion of employees of a former affiliate applies during

the entire period of measurement, rather than only for the period after which affiliation ceased.

[61 FR 3286, Jan. 31, 1996, as amended at 69 FR 29203, May 21, 2004]

§ 121.107 How does SBA determine a concern's "primary industry"?

In determining the primary industry in which a concern or a concern combined with its affiliates is engaged, SBA considers the distribution of receipts, employees and costs of doing business among the different industries in which business operations occurred for the most recently completed fiscal year. SBA may also consider other factors, such as the distribution of patents, contract awards, and assets.

§ 121.108 What are the penalties for misrepresentation of size status?

In addition to other laws which may be applicable, section 16(d) of the Small Business Act, 15 U.S.C. 645(d), provides severe criminal penalties for knowingly misrepresenting the small business size status of a concern in connection with procurement programs. Section 16(a) of the Act also provides, in part, for criminal penalties for knowingly making false statements or misrepresentations to SBA for the purpose of influencing in any way the actions of the Agency.

Size Standards Used To Define Small Business Concerns

§ 121.201 What size standards has SBA identified by North American Industry Classification System codes?

The size standards described in this section apply to all SBA programs unless otherwise specified in this part. The size standards themselves are expressed either in number of employees or annual receipts in millions of dollars, unless otherwise specified. The number of employees or annual receipts indicates the maximum allowed for a concern and its affiliates to be considered small.

Small Business Size Standards by NAICS Industry

NAICS codes	NAICS U.S. industry title	Size standards in millions of dollars	Size standards in number of employees
Sector 11—Agriculture, Forestry, Fishing and Hunting			
Subsector 111—Crop Production			
111110	Soybean Farming	$0.75	
111120	Oilseed (except Soybean) Farming	$0.75	
111130	Dry Pea and Bean Farming	$0.75	
111140	Wheat Farming	$0.75	
111150	Corn Farming	$0.75	
111160	Rice Farming	$0.75	
111191	Oilseed and Grain Combination Farming	$0.75	
111199	All Other Grain Farming	$0.75	
111211	Potato Farming	$0.75	
111219	Other Vegetable (except Potato) and Melon Farming	$0.75	
111310	Orange Groves	$0.75	
111320	Citrus (except Orange) Groves	$0.75	
111331	Apple Orchards	$0.75	
111332	Grape Vineyards	$0.75	
111333	Strawberry Farming	$0.75	
111334	Berry (except Strawberry) Farming	$0.75	
111335	Tree Nut Farming	$0.75	
111336	Fruit and Tree Nut Combination Farming	$0.75	
111339	Other Noncitrus Fruit Farming	$0.75	
111411	Mushroom Production	$0.75	
111419	Other Food Crops Grown Under Cover	$0.75	
111421	Nursery and Tree Production	$0.75	
111422	Floriculture Production	$0.75	
111910	Tobacco Farming	$0.75	
111920	Cotton Farming	$0.75	
111930	Sugarcane Farming	$0.75	
111940	Hay Farming	$0.75	
111991	Sugar Beet Farming	$0.75	
111992	Peanut Farming	$0.75	
111998	All Other Miscellaneous Crop Farming	$0.75	

SMALL BUSINESS SIZE STANDARDS BY NAICS INDUSTRY—Continued

NAICS codes	NAICS U.S. industry title	Size standards in millions of dollars	Size standards in number of employees
	Subsector 112—Animal Production		
112111	Beef Cattle Ranching and Farming	$0.75	
112112	Cattle Feedlots	$2.00	
112120	Dairy Cattle and Milk Production	$0.75	
112210	Hog and Pig Farming	$0.75	
112310	Chicken Egg Production	$12.5	
112320	Broilers and Other Meat Type Chicken Production	$0.75	
112330	Turkey Production	$0.75	
112340	Poultry Hatcheries	$0.75	
112390	Other Poultry Production	$0.75	
112410	Sheep Farming	$0.75	
112420	Goat Farming	$0.75	
112511	Finfish Farming and Fish Hatcheries	$0.75	
112512	Shellfish Farming	$0.75	
112519	Other Aquaculture	$0.75	
112910	Apiculture	$0.75	
112920	Horse and Other Equine Production	$0.75	
112930	Fur-Bearing Animal and Rabbit Production	$0.75	
112990	All Other Animal Production	$0.75	
	Subsector 113—Forestry and Logging		
113110	Timber Tract Operations	$7.0	
113210	Forest Nurseries and Gathering of Forest Products	$7.0	
113310	Logging		500
	Subsector 114—Fishing, Hunting and Trapping		
114111	Finfish Fishing	$4.0	
114112	Shellfish Fishing	$4.0	
114119	Other Marine Fishing	$4.0	
114210	Hunting and Trapping	$4.0	
	Subsector 115—Support Activities for Agriculture and Forestry		
115111	Cotton Ginning	$7.0	
115112	Soil Preparation, Planting, and Cultivating	$7.0	
115113	Crop Harvesting, Primarily by Machine	$7.0	
115114	Postharvest Crop Activities (except Cotton Ginning)	$7.0	
115115	Farm Labor Contractors and Crew Leaders	$7.0	
115116	Farm Management Services	$7.0	
115210	Support Activities for Animal Production	$7.0	
115310	Support Activities for Forestry	$7.0	
Except,	Forest Fire Suppression [17]	[17] $17.5	
Except,	Fuels Management Services [17]	[17] $17.5	
	Sector 21—Mining, Quarrying, and Oil and Gas Extraction		
	Subsector 211—Oil and Gas Extraction		
211111	Crude Petroleum and Natural Gas Extraction		500
211112	Natural Gas Liquid Extraction		500
	Subsector 212—Mining (except Oil and Gas)		
212111	Bituminous Coal and Lignite Surface Mining		500
212112	Bituminous Coal Underground Mining		500
212113	Anthracite Mining		500
212210	Iron Ore Mining		500
212221	Gold Ore Mining		500
212222	Silver Ore Mining		500
212231	Lead Ore and Zinc Ore Mining		500
212234	Copper Ore and Nickel Ore Mining		500
212291	Uranium-Radium-Vanadium Ore Mining		500
212299	All Other Metal Ore Mining		500
212311	Dimension Stone Mining and Quarrying		500
212312	Crushed and Broken Limestone Mining and Quarrying		500
212313	Crushed and Broken Granite Mining and Quarrying		500
212319	Other Crushed and Broken Stone Mining and Quarrying		500
212321	Construction Sand and Gravel Mining		500

SMALL BUSINESS SIZE STANDARDS BY NAICS INDUSTRY—Continued

NAICS codes	NAICS U.S. industry title	Size standards in millions of dollars	Size standards in number of employees
212322	Industrial Sand Mining		500
212324	Kaolin and Ball Clay Mining		500
212325	Clay and Ceramic and Refractory Minerals Mining		500
212391	Potash, Soda, and Borate Mineral Mining		500
212392	Phosphate Rock Mining		500
212393	Other Chemical and Fertilizer Mineral Mining		500
212399	All Other Nonmetallic Mineral Mining		500
	Subsector 213—Support Activities for Mining		
213111	Drilling Oil and Gas Wells		500
213112	Support Activities for Oil and Gas Operations	$7.0	
213113	Support Activities for Coal Mining	$7.0	
213114	Support Activities for Metal Mining	$7.0	
213115	Support Activities for Nonmetallic Minerals (except Fuels)	$7.0	
	Sector 22—Utilities		
	Subsector 221—Utilities		
221111	Hydroelectric Power Generation	See footnote 1	
221112	Fossil Fuel Electric Power Generation	See footnote 1	
221113	Nuclear Electric Power Generation	See footnote 1	
221119	Other Electric Power Generation	See footnote 1	
221121	Electric Bulk Power Transmission and Control	See footnote 1	
221122	Electric Power Distribution	See footnote 1	
221210	Natural Gas Distribution		500
221310	Water Supply and Irrigation Systems	$7.0	
221320	Sewage Treatment Facilities	$7.0	
221330	Steam and Air-Conditioning Supply	$12.5	
	Sector 23—Construction		
	Subsector 236—Construction of Buildings		
236115	New Single-Family Housing Construction (except Operative Builders)	$33.5	
236116	New Multifamily Housing Construction (except Operative Builders)	$33.5	
236117	New Housing Operative Builders	$33.5	
236118	Residential Remodelers	$33.5	
236210	Industrial Building Construction	$33.5	
236220	Commercial and Institutional Building Construction	$33.5	
	Subsector 237—Heavy and Civil Engineering Construction		
237110	Water and Sewer Line and Related Structures Construction	$33.5	
237120	Oil and Gas Pipeline and Related Structures Construction	$33.5	
237130	Power and Communication Line and Related Structures Construction	$33.5	
237210	Land Subdivision	$7.0	
237310	Highway, Street, and Bridge Construction	$33.5	
237990	Other Heavy and Civil Engineering Construction	$33.5	
Except,	Dredging and Surface Cleanup Activities[2]	[2]$20.0	
	Subsector 238—Specialty Trade Contractors		
238110	Poured Concrete Foundation and Structure Contractors	$14.0	
238120	Structural Steel and Precast Concrete Contractors	$14.0	
238130	Framing Contractors	$14.0	
238140	Masonry Contractors	$14.0	
238150	Glass and Glazing Contractors	$14.0	
238160	Roofing Contractors	$14.0	
238170	Siding Contractors	$14.0	
238190	Other Foundation, Structure, and Building Exterior Contractors	$14.0	
238210	Electrical Contractors and Other Wiring Installation Contractors	$14.0	
238220	Plumbing, Heating, and Air-Conditioning Contractors	$14.0	
238290	Other Building Equipment Contractors	$14.0	
238310	Drywall and Insulation Contractors	$14.0	
238320	Painting and Wall Covering Contractors	$14.0	
238330	Flooring Contractors	$14.0	
238340	Tile and Terrazzo Contractors	$14.0	
238350	Finish Carpentry Contractors	$14.0	
238390	Other Building Finishing Contractors	$14.0	

SMALL BUSINESS SIZE STANDARDS BY NAICS INDUSTRY—Continued

NAICS codes	NAICS U.S. industry title	Size standards in millions of dollars	Size standards in number of employees
238910	Site Preparation Contractors	$14.0	
238990	All Other Specialty Trade Contractors	$14.0	
Except,	Building and Property Specialty Trade Services [13]	[13] $14.0	
	Sectors 31–33—Manufacturing		
	Subsector 311—Food Manufacturing		
311111	Dog and Cat Food Manufacturing		500
311119	Other Animal Food Manufacturing		500
311211	Flour Milling		500
311212	Rice Milling		500
311213	Malt Manufacturing		500
311221	Wet Corn Milling		750
311222	Soybean Processing		500
311223	Other Oilseed Processing		1,000
311225	Fats and Oils Refining and Blending		1,000
311230	Breakfast Cereal Manufacturing		1,000
311311	Sugarcane Mills		500
311312	Cane Sugar Refining		750
311313	Beet Sugar Manufacturing		750
311320	Chocolate and Confectionery Manufacturing from Cacao Beans		500
311330	Confectionery Manufacturing from Purchased Chocolate		500
311340	Nonchocolate Confectionery Manufacturing		500
311411	Frozen Fruit, Juice and Vegetable Manufacturing		500
311412	Frozen Specialty Food Manufacturing		500
311421	Fruit and Vegetable Canning [3]		[3] 500
311422	Specialty Canning		1,000
311423	Dried and Dehydrated Food Manufacturing		500
311511	Fluid Milk Manufacturing		500
311512	Creamery Butter Manufacturing		500
311513	Cheese Manufacturing		500
311514	Dry, Condensed, and Evaporated Dairy Product Manufacturing		500
311520	Ice Cream and Frozen Dessert Manufacturing		500
311611	Animal (except Poultry) Slaughtering		500
311612	Meat Processed from Carcasses		500
311613	Rendering and Meat Byproduct Processing		500
311615	Poultry Processing		500
311711	Seafood Canning		500
311712	Fresh and Frozen Seafood Processing		500
311811	Retail Bakeries		500
311812	Commercial Bakeries		500
311813	Frozen Cakes, Pies, and Other Pastries Manufacturing		500
311821	Cookie and Cracker Manufacturing		750
311822	Flour Mixes and Dough Manufacturing from Purchased Flour		500
311823	Dry Pasta Manufacturing		500
311830	Tortilla Manufacturing		500
311911	Roasted Nuts and Peanut Butter Manufacturing		500
311919	Other Snack Food Manufacturing		500
311920	Coffee and Tea Manufacturing		500
311930	Flavoring Syrup and Concentrate Manufacturing		500
311941	Mayonnaise, Dressing and Other Prepared Sauce Manufacturing		500
311942	Spice and Extract Manufacturing		500
311991	Perishable Prepared Food Manufacturing		500
311999	All Other Miscellaneous Food Manufacturing		500
	Subsector 312—Beverage and Tobacco Product Manufacturing		
312111	Soft Drink Manufacturing		500
312112	Bottled Water Manufacturing		500
312113	Ice Manufacturing		500
312120	Breweries		500
312130	Wineries		500
312140	Distilleries		750
312210	Tobacco Stemming and Redrying		500
312221	Cigarette Manufacturing		1,000
312229	Other Tobacco Product Manufacturing		500
	Subsector 313—Textile Mills		
313111	Yarn Spinning Mills		500

SMALL BUSINESS SIZE STANDARDS BY NAICS INDUSTRY—Continued

NAICS codes	NAICS U.S. industry title	Size standards in millions of dollars	Size standards in number of employees
313112	Yarn Texturizing, Throwing and Twisting Mills		500
313113	Thread Mills		500
313210	Broadwoven Fabric Mills		1,000
313221	Narrow Fabric Mills		500
313222	Schiffli Machine Embroidery		500
313230	Nonwoven Fabric Mills		500
313241	Weft Knit Fabric Mills		500
313249	Other Knit Fabric and Lace Mills		500
313311	Broadwoven Fabric Finishing Mills		1,000
313312	Textile and Fabric Finishing (except Broadwoven Fabric) Mills		500
313320	Fabric Coating Mills		1,000
	Subsector 314—Textile Product Mills		
314110	Carpet and Rug Mills		500
314121	Curtain and Drapery Mills		500
314129	Other Household Textile Product Mills		500
314911	Textile Bag Mills		500
314912	Canvas and Related Product Mills		500
314991	Rope, Cordage and Twine Mills		500
314992	Tire Cord and Tire Fabric Mills		1,000
314999	All Other Miscellaneous Textile Product Mills		500
	Subsector 315—Apparel Manufacturing		
315111	Sheer Hosiery Mills		500
315119	Other Hosiery and Sock Mills		500
315191	Outerwear Knitting Mills		500
315192	Underwear and Nightwear Knitting Mills		500
315211	Men's and Boys' Cut and Sew Apparel Contractors		500
315212	Women's, Girls', and Infants' Cut and Sew Apparel Contractors		500
315221	Men's and Boys' Cut and Sew Underwear and Nightwear Manufacturing.		500
315222	Men's and Boys' Cut and Sew Suit, Coat and Overcoat Manufacturing.		500
315223	Men's and Boys' Cut and Sew Shirt (except Work Shirt) Manufacturing.		500
315224	Men's and Boys' Cut and Sew Trouser, Slack and Jean Manufacturing.		500
315225	Men's and Boys' Cut and Sew Work Clothing Manufacturing		500
315228	Men's and Boys' Cut and Sew Other Outerwear Manufacturing		500
315231	Women's and Girls' Cut and Sew Lingerie, Loungewear and Nightwear Manufacturing.		500
315232	Women's and Girls' Cut and Sew Blouse and Shirt Manufacturing		500
315233	Women's and Girls' Cut and Sew Dress Manufacturing		500
315234	Women's and Girls' Cut and Sew Suit, Coat, Tailored Jacket and Skirt Manufacturing.		500
315239	Women's and Girls' Cut and Sew Other Outerwear Manufacturing		500
315291	Infants' Cut and Sew Apparel Manufacturing		500
315292	Fur and Leather Apparel Manufacturing		500
315299	All Other Cut and Sew Apparel Manufacturing		500
315991	Hat, Cap and Millinery Manufacturing		500
315992	Glove and Mitten Manufacturing		500
315993	Men's and Boys' Neckwear Manufacturing		500
315999	Other Apparel Accessories and Other Apparel Manufacturing		500
	Subsector 316—Leather and Allied Product Manufacturing		
316110	Leather and Hide Tanning and Finishing		500
316211	Rubber and Plastics Footwear Manufacturing		1,000
316212	House Slipper Manufacturing		500
316213	Men's Footwear (except Athletic) Manufacturing		500
316214	Women's Footwear (except Athletic) Manufacturing		500
316219	Other Footwear Manufacturing		500
316991	Luggage Manufacturing		500
316992	Women's Handbag and Purse Manufacturing		500
316993	Personal Leather Good (except Women's Handbag and Purse) Manufacturing.		500
316999	All Other Leather Good and Allied Product Manufacturing		500

SMALL BUSINESS SIZE STANDARDS BY NAICS INDUSTRY—Continued

NAICS codes	NAICS U.S. industry title	Size standards in millions of dollars	Size standards in number of employees
	Subsector 321—Wood Product Manufacturing		
321113	Sawmills		500
321114	Wood Preservation		500
321211	Hardwood Veneer and Plywood Manufacturing		500
321212	Softwood Veneer and Plywood Manufacturing		500
321213	Engineered Wood Member (except Truss) Manufacturing		500
321214	Truss Manufacturing		500
321219	Reconstituted Wood Product Manufacturing		500
321911	Wood Window and Door Manufacturing		500
321912	Cut Stock, Resawing Lumber, and Planing		500
321918	Other Millwork (including Flooring)		500
321920	Wood Container and Pallet Manufacturing		500
321991	Manufactured Home (Mobile Home) Manufacturing		500
321992	Prefabricated Wood Building Manufacturing		500
321999	All Other Miscellaneous Wood Product Manufacturing		500
	Subsector 322—Paper Manufacturing		
322110	Pulp Mills		750
322121	Paper (except Newsprint) Mills		750
322122	Newsprint Mills		750
322130	Paperboard Mills		750
322211	Corrugated and Solid Fiber Box Manufacturing		500
322212	Folding Paperboard Box Manufacturing		750
322213	Setup Paperboard Box Manufacturing		500
322214	Fiber Can, Tube, Drum, and Similar Products Manufacturing		500
322215	Non-Folding Sanitary Food Container Manufacturing		750
322221	Coated and Laminated Packaging Paper Manufacturing		500
322222	Coated and Laminated Paper Manufacturing		500
322223	Coated Paper Bag and Pouch Manufacturing		500
322224	Uncoated Paper and Multiwall Bag Manufacturing		500
322225	Laminated Aluminum Foil Manufacturing for Flexible Packaging Uses		500
322226	Surface-Coated Paperboard Manufacturing		500
322231	Die-Cut Paper and Paperboard Office Supplies Manufacturing		500
322232	Envelope Manufacturing		500
322233	Stationery, Tablet, and Related Product Manufacturing		500
322291	Sanitary Paper Product Manufacturing		500
322299	All Other Converted Paper Product Manufacturing		500
	Subsector 323—Printing and Related Support Activities		
323110	Commercial Lithographic Printing		500
323111	Commercial Gravure Printing		500
323112	Commercial Flexographic Printing		500
323113	Commercial Screen Printing		500
323114	Quick Printing		500
323115	Digital Printing		500
323116	Manifold Business Forms Printing		500
323117	Books Printing		500
323118	Blankbook, Loose-leaf Binder and Device Manufacturing		500
323119	Other Commercial Printing		500
323121	Tradebinding and Related Work		500
323122	Prepress Services		500
	Subsector 324—Petroleum and Coal Products Manufacturing		
324110	Petroleum Refineries[4]		[4] 1,500
324121	Asphalt Paving Mixture and Block Manufacturing		500
324122	Asphalt Shingle and Coating Materials Manufacturing		750
324191	Petroleum Lubricating Oil and Grease Manufacturing		500
324199	All Other Petroleum and Coal Products Manufacturing		500
	Subsector 325—Chemical Manufacturing		
325110	Petrochemical Manufacturing		1,000
325120	Industrial Gas Manufacturing		1,000
325131	Inorganic Dye and Pigment Manufacturing		1,000
325132	Synthetic Organic Dye and Pigment Manufacturing		750
325181	Alkalies and Chlorine Manufacturing		1,000
325182	Carbon Black Manufacturing		500

SMALL BUSINESS SIZE STANDARDS BY NAICS INDUSTRY—Continued

NAICS codes	NAICS U.S. industry title	Size standards in millions of dollars	Size standards in number of employees
325188	All Other Basic Inorganic Chemical Manufacturing		1,000
325191	Gum and Wood Chemical Manufacturing		500
325192	Cyclic Crude and Intermediate Manufacturing		750
325193	Ethyl Alcohol Manufacturing		1,000
325199	All Other Basic Organic Chemical Manufacturing		1,000
325211	Plastics Material and Resin Manufacturing		750
325212	Synthetic Rubber Manufacturing		1,000
325221	Cellulosic Organic Fiber Manufacturing		1,000
325222	Noncellulosic Organic Fiber Manufacturing		1,000
325311	Nitrogenous Fertilizer Manufacturing		1,000
325312	Phosphatic Fertilizer Manufacturing		500
325314	Fertilizer (Mixing Only) Manufacturing		500
325320	Pesticide and Other Agricultural Chemical Manufacturing		500
325411	Medicinal and Botanical Manufacturing		750
325412	Pharmaceutical Preparation Manufacturing		750
325413	In-Vitro Diagnostic Substance Manufacturing		500
325414	Biological Product (except Diagnostic) Manufacturing		500
325510	Paint and Coating Manufacturing		500
325520	Adhesive Manufacturing		500
325611	Soap and Other Detergent Manufacturing		750
325612	Polish and Other Sanitation Good Manufacturing		500
325613	Surface Active Agent Manufacturing		500
325620	Toilet Preparation Manufacturing		500
325910	Printing Ink Manufacturing		500
325920	Explosives Manufacturing		750
325991	Custom Compounding of Purchased Resins		500
325992	Photographic Film, Paper, Plate and Chemical Manufacturing		500
325998	All Other Miscellaneous Chemical Product and Preparation Manufacturing.		500
	Subsector 326—Plastics and Rubber Products Manufacturing		
326111	Plastics Bag and Pouch Manufacturing		500
326112	Plastics Packaging Film and Sheet(including Laminated) Manufacturing.		500
326113	Unlaminated Plastics Film and Sheet (except Packaging) Manufacturing.		500
326121	Unlaminated Plastics Profile Shape Manufacturing		500
326122	Plastics Pipe and Pipe Fitting Manufacturing		500
326130	Laminated Plastics Plate, Sheet (except Packaging), and Shape Manufacturing.		500
326140	Polystyrene Foam Product Manufacturing		500
326150	Urethane and Other Foam Product (except Polystyrene) Manufacturing.		500
326160	Plastics Bottle Manufacturing		500
326191	Plastics Plumbing Fixture Manufacturing		500
326192	Resilient Floor Covering Manufacturing		750
326199	All Other Plastics Product Manufacturing		500
326211	Tire Manufacturing (except Retreading)[5]		[5] 1,000
326212	Tire Retreading		500
326220	Rubber and Plastics Hoses and Belting Manufacturing		500
326291	Rubber Product Manufacturing for Mechanical Use		500
326299	All Other Rubber Product Manufacturing		500
	Subsector 327—Nonmetallic Mineral Product Manufacturing		
327111	Vitreous China Plumbing Fixture and China and Earthenware Bathroom Accessories Manufacturing.		750
327112	Vitreous China, Fine Earthenware and Other Pottery Product Manufacturing.		500
327113	Porcelain Electrical Supply Manufacturing		500
327121	Brick and Structural Clay Tile Manufacturing		500
327122	Ceramic Wall and Floor Tile Manufacturing		500
327123	Other Structural Clay Product Manufacturing		500
327124	Clay Refractory Manufacturing		500
327125	Nonclay Refractory Manufacturing		750
327211	Flat Glass Manufacturing		1,000
327212	Other Pressed and Blown Glass and Glassware Manufacturing		750
327213	Glass Container Manufacturing		750
327215	Glass Product Manufacturing Made of Purchased Glass		500
327310	Cement Manufacturing		750

SMALL BUSINESS SIZE STANDARDS BY NAICS INDUSTRY—Continued

NAICS codes	NAICS U.S. industry title	Size standards in millions of dollars	Size standards in number of employees
327320	Ready-Mix Concrete Manufacturing		500
327331	Concrete Block and Brick Manufacturing		500
327332	Concrete Pipe Manufacturing		500
327390	Other Concrete Product Manufacturing		500
327410	Lime Manufacturing		500
327420	Gypsum Product Manufacturing		1,000
327910	Abrasive Product Manufacturing		500
327991	Cut Stone and Stone Product Manufacturing		500
327992	Ground or Treated Mineral and Earth Manufacturing		500
327993	Mineral Wool Manufacturing		750
327999	All Other Miscellaneous Nonmetallic Mineral Product Manufacturing		500
	Subsector 331—Primary Metal Manufacturing		
331111	Iron and Steel Mills		1,000
331112	Electrometallurgical Ferroalloy Product Manufacturing		750
331210	Iron and Steel Pipe and Tube Manufacturing from Purchased Steel		1,000
331221	Rolled Steel Shape Manufacturing		1,000
331222	Steel Wire Drawing		1,000
331311	Alumina Refining		1,000
331312	Primary Aluminum Production		1,000
331314	Secondary Smelting and Alloying of Aluminum		750
331315	Aluminum Sheet, Plate and Foil Manufacturing		750
331316	Aluminum Extruded Product Manufacturing		750
331319	Other Aluminum Rolling and Drawing		750
331411	Primary Smelting and Refining of Copper		1,000
331419	Primary Smelting and Refining of Nonferrous Metal (except Copper and Aluminum).		750
331421	Copper Rolling, Drawing and Extruding		750
331422	Copper Wire (except Mechanical) Drawing		1,000
331423	Secondary Smelting, Refining, and Alloying of Copper		750
331491	Nonferrous Metal (except Copper and Aluminum) Rolling, Drawing and Extruding.		750
331492	Secondary Smelting, Refining, and Alloying of Nonferrous Metal (except Copper and Aluminum).		750
331511	Iron Foundries		500
331512	Steel Investment Foundries		500
331513	Steel Foundries (except Investment)		500
331521	Aluminum Die-Casting Foundries		500
331522	Nonferrous (except Aluminum) Die-Casting Foundries		500
331524	Aluminum Foundries (except Die-Casting)		500
331525	Copper Foundries (except Die-Casting)		500
331528	Other Nonferrous Foundries (except Die-Casting)		500
	Subsector 332—Fabricated Metal Product Manufacturing		
332111	Iron and Steel Forging		500
332112	Nonferrous Forging		500
332114	Custom Roll Forming		500
332115	Crown and Closure Manufacturing		500
332116	Metal Stamping		500
332117	Powder Metallurgy Part Manufacturing		500
332211	Cutlery and Flatware (except Precious) Manufacturing		500
332212	Hand and Edge Tool Manufacturing		500
332213	Saw Blade and Handsaw Manufacturing		500
332214	Kitchen Utensil, Pot and Pan Manufacturing		500
332311	Prefabricated Metal Building and Component Manufacturing		500
332312	Fabricated Structural Metal Manufacturing		500
332313	Plate Work Manufacturing		500
332321	Metal Window and Door Manufacturing		500
332322	Sheet Metal Work Manufacturing		500
332323	Ornamental and Architectural Metal Work Manufacturing		500
332410	Power Boiler and Heat Exchanger Manufacturing		500
332420	Metal Tank (Heavy Gauge) Manufacturing		500
332431	Metal Can Manufacturing		1,000
332439	Other Metal Container Manufacturing		500
332510	Hardware Manufacturing		500
332611	Spring (Heavy Gauge) Manufacturing		500
332612	Spring (Light Gauge) Manufacturing		500
332618	Other Fabricated Wire Product Manufacturing		500
332710	Machine Shops		500

SMALL BUSINESS SIZE STANDARDS BY NAICS INDUSTRY—Continued

NAICS codes	NAICS U.S. industry title	Size standards in millions of dollars	Size standards in number of employees
332721	Precision Turned Product Manufacturing		500
332722	Bolt, Nut, Screw, Rivet and Washer Manufacturing		500
332811	Metal Heat Treating		750
332812	Metal Coating, Engraving (except Jewelry and Silverware), and Allied Services to Manufacturers.		500
332813	Electroplating, Plating, Polishing, Anodizing and Coloring		500
332911	Industrial Valve Manufacturing		500
332912	Fluid Power Valve and Hose Fitting Manufacturing		500
332913	Plumbing Fixture Fitting and Trim Manufacturing		500
332919	Other Metal Valve and Pipe Fitting Manufacturing		500
332991	Ball and Roller Bearing Manufacturing		750
332992	Small Arms Ammunition Manufacturing		1,000
332993	Ammunition (except Small Arms) Manufacturing		1,500
332994	Small Arms Manufacturing		1,000
332995	Other Ordnance and Accessories Manufacturing		500
332996	Fabricated Pipe and Pipe Fitting Manufacturing		500
332997	Industrial Pattern Manufacturing		500
332998	Enameled Iron and Metal Sanitary Ware Manufacturing		750
332999	All Other Miscellaneous Fabricated Metal Product Manufacturing		500
	Subsector 333—Machinery Manufacturing[6]		
333111	Farm Machinery and Equipment Manufacturing		500
333112	Lawn and Garden Tractor and Home Lawn and Garden Equipment Manufacturing.		500
333120	Construction Machinery Manufacturing		750
333131	Mining Machinery and Equipment Manufacturing		500
333132	Oil and Gas Field Machinery and Equipment Manufacturing		500
333210	Sawmill and Woodworking Machinery Manufacturing		500
333220	Plastics and Rubber Industry Machinery Manufacturing		500
333291	Paper Industry Machinery Manufacturing		500
333292	Textile Machinery Manufacturing		500
333293	Printing Machinery and Equipment Manufacturing		500
333294	Food Product Machinery Manufacturing		500
333295	Semiconductor Machinery Manufacturing		500
333298	All Other Industrial Machinery Manufacturing		500
333311	Automatic Vending Machine Manufacturing		500
333312	Commercial Laundry, Drycleaning and Pressing Machine Manufacturing.		500
333313	Office Machinery Manufacturing		1,000
333314	Optical Instrument and Lens Manufacturing		500
333315	Photographic and Photocopying Equipment Manufacturing		500
333319	Other Commercial and Service Industry Machinery Manufacturing		500
333411	Air Purification Equipment Manufacturing		500
333412	Industrial and Commercial Fan and Blower Manufacturing		500
333414	Heating Equipment (except Warm Air Furnaces) Manufacturing		500
333415	Air-Conditioning and Warm Air Heating Equipment and Commercial and Industrial Refrigeration Equipment Manufacturing.		750
333511	Industrial Mold Manufacturing		500
333512	Machine Tool (Metal Cutting Types) Manufacturing		500
333513	Machine Tool (Metal Forming Types) Manufacturing		500
333514	Special Die and Tool, Die Set, Jig and Fixture Manufacturing		500
333515	Cutting Tool and Machine Tool Accessory Manufacturing		500
333516	Rolling Mill Machinery and Equipment Manufacturing		500
333518	Other Metalworking Machinery Manufacturing		500
333611	Turbine and Turbine Generator Set Unit Manufacturing		1,000
333612	Speed Changer, Industrial High- Speed Drive and Gear Manufacturing.		500
333613	Mechanical Power Transmission Equipment Manufacturing		500
333618	Other Engine Equipment Manufacturing		1,000
333911	Pump and Pumping Equipment Manufacturing		500
333912	Air and Gas Compressor Manufacturing		500
333913	Measuring and Dispensing Pump Manufacturing		500
333921	Elevator and Moving Stairway Manufacturing		500
333922	Conveyor and Conveying Equipment Manufacturing		500
333923	Overhead Traveling Crane, Hoist and Monorail System Manufacturing.		500
333924	Industrial Truck, Tractor, Trailer and Stacker Machinery Manufacturing.		750
333991	Power-Driven Hand Tool Manufacturing		500

SMALL BUSINESS SIZE STANDARDS BY NAICS INDUSTRY—Continued

NAICS codes	NAICS U.S. industry title	Size standards in millions of dollars	Size standards in number of employees
333992	Welding and Soldering Equipment Manufacturing		500
333993	Packaging Machinery Manufacturing		500
333994	Industrial Process Furnace and Oven Manufacturing		500
333995	Fluid Power Cylinder and Actuator Manufacturing		500
333996	Fluid Power Pump and Motor Manufacturing		500
333997	Scale and Balance Manufacturing		500
333999	All Other Miscellaneous General Purpose Machinery Manufacturing ..		500
	Subsector 334—Computer and Electronic Product Manufacturing[6]		
334111	Electronic Computer Manufacturing		1,000
334112	Computer Storage Device Manufacturing		1,000
334113	Computer Terminal Manufacturing		1,000
334119	Other Computer Peripheral Equipment Manufacturing		1,000
334210	Telephone Apparatus Manufacturing		1,000
334220	Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing.		750
334290	Other Communications Equipment Manufacturing		750
334310	Audio and Video Equipment Manufacturing		750
334411	Electron Tube Manufacturing		750
334412	Bare Printed Circuit Board Manufacturing		500
334413	Semiconductor and Related Device Manufacturing		500
334414	Electronic Capacitor Manufacturing		500
334415	Electronic Resistor Manufacturing		500
334416	Electronic Coil, Transformer, and Other Inductor Manufacturing		500
334417	Electronic Connector Manufacturing		500
334418	Printed Circuit Assembly (Electronic Assembly) Manufacturing		500
334419	Other Electronic Component Manufacturing		500
334510	Electromedical and Electrotherapeutic Apparatus Manufacturing		500
334511	Search, Detection, Navigation, Guidance, Aeronautical, and Nautical System and Instrument Manufacturing.		750
334512	Automatic Environmental Control Manufacturing for Residential, Commercial and Appliance Use.		500
334513	Instruments and Related Products Manufacturing for Measuring, Displaying, and Controlling Industrial Process Variables.		500
334514	Totalizing Fluid Meter and Counting Device Manufacturing		500
334515	Instrument Manufacturing for Measuring and Testing Electricity and Electrical Signals.		500
334516	Analytical Laboratory Instrument Manufacturing		500
334517	Irradiation Apparatus Manufacturing		500
334518	Watch, Clock, and Part Manufacturing		500
334519	Other Measuring and Controlling Device Manufacturing		500
334611	Software Reproducing		500
334612	Prerecorded Compact Disc (except Software), Tape, and Record Reproducing.		750
334613	Magnetic and Optical Recording Media Manufacturing		1,000
	Subsector 335—Electrical Equipment, Appliance and Component Manufacturing[6]		
335110	Electric Lamp Bulb and Part Manufacturing		1,000
335121	Residential Electric Lighting Fixture Manufacturing		500
335122	Commercial, Industrial and Institutional Electric Lighting Fixture Manufacturing.		500
335129	Other Lighting Equipment Manufacturing		500
335211	Electric Housewares and Household Fan Manufacturing		750
335212	Household Vacuum Cleaner Manufacturing		750
335221	Household Cooking Appliance Manufacturing		750
335222	Household Refrigerator and Home Freezer Manufacturing		1,000
335224	Household Laundry Equipment Manufacturing		1,000
335228	Other Major Household Appliance Manufacturing		500
335311	Power, Distribution and Specialty Transformer Manufacturing		750
335312	Motor and Generator Manufacturing		1,000
335313	Switchgear and Switchboard Apparatus Manufacturing		750
335314	Relay and Industrial Control Manufacturing		750
335911	Storage Battery Manufacturing		500
335912	Primary Battery Manufacturing		1,000
335921	Fiber Optic Cable Manufacturing		1,000
335929	Other Communication and Energy Wire Manufacturing		1,000
335931	Current-Carrying Wiring Device Manufacturing		500
335932	Noncurrent-Carrying Wiring Device Manufacturing		500
335991	Carbon and Graphite Product Manufacturing		750

SMALL BUSINESS SIZE STANDARDS BY NAICS INDUSTRY—Continued

NAICS codes	NAICS U.S. industry title	Size standards in millions of dollars	Size standards in number of employees
335999	All Other Miscellaneous Electrical Equipment and Component Manufacturing.		500
	Subsector 336—Transportation Equipment Manufacturing[6]		
336111	Automobile Manufacturing		1,000
336112	Light Truck and Utility Vehicle Manufacturing		1,000
336120	Heavy Duty Truck Manufacturing		1,000
336211	Motor Vehicle Body Manufacturing		1,000
336212	Truck Trailer Manufacturing		500
336213	Motor Home Manufacturing		1,000
336214	Travel Trailer and Camper Manufacturing		500
336311	Carburetor, Piston, Piston Ring and Valve Manufacturing		500
336312	Gasoline Engine and Engine Parts Manufacturing		750
336321	Vehicular Lighting Equipment Manufacturing		500
336322	Other Motor Vehicle Electrical and Electronic Equipment Manufacturing.		750
336330	Motor Vehicle Steering and Suspension Components (except Spring) Manufacturing.		750
336340	Motor Vehicle Brake System Manufacturing		750
336350	Motor Vehicle Transmission and Power Train Parts Manufacturing		750
336360	Motor Vehicle Seating and Interior Trim Manufacturing		500
336370	Motor Vehicle Metal Stamping		500
336391	Motor Vehicle Air-Conditioning Manufacturing		750
336399	All Other Motor Vehicle Parts Manufacturing		750
336411	Aircraft Manufacturing		1,500
336412	Aircraft Engine and Engine Parts Manufacturing		1,000
336413	Other Aircraft Part and Auxiliary Equipment Manufacturing[7]		[7]1,000
336414	Guided Missile and Space Vehicle Manufacturing		1,000
336415	Guided Missile and Space Vehicle Propulsion Unit and Propulsion Unit Parts Manufacturing.		1,000
336419	Other Guided Missile and Space Vehicle Parts and Auxiliary Equipment Manufacturing.		1,000
336510	Railroad Rolling Stock Manufacturing		1,000
336611	Ship Building and Repairing		1,000
336612	Boat Building		500
336991	Motorcycle, Bicycle and Parts Manufacturing		500
336992	Military Armored Vehicle, Tank and Tank Component Manufacturing		1,000
336999	All Other Transportation Equipment Manufacturing		500
	Subsector 337—Furniture and Related Product Manufacturing		
337110	Wood Kitchen Cabinet and Counter Top Manufacturing		500
337121	Upholstered Household Furniture Manufacturing		500
337122	Nonupholstered Wood Household Furniture Manufacturing		500
337124	Metal Household Furniture Manufacturing		500
337125	Household Furniture (except Wood and Metal) Manufacturing		500
337127	Institutional Furniture Manufacturing		500
337129	Wood Television, Radio, and Sewing Machine Cabinet Manufacturing.		500
337211	Wood Office Furniture Manufacturing		500
337212	Custom Architectural Woodwork and Millwork Manufacturing		500
337214	Office Furniture (Except Wood) Manufacturing		500
337215	Showcase, Partition, Shelving, and Locker Manufacturing		500
337910	Mattress Manufacturing		500
337920	Blind and Shade Manufacturing		500
	Subsector 339—Miscellaneous Manufacturing		
339112	Surgical and Medical Instrument Manufacturing		500
339113	Surgical Appliance and Supplies Manufacturing		500
339114	Dental Equipment and Supplies Manufacturing		500
339115	Ophthalmic Goods Manufacturing		500
339116	Dental Laboratories		500
339911	Jewelry (except Costume) Manufacturing		500
339912	Silverware and Hollowware Manufacturing		500
339913	Jewelers' Material and Lapidary Work Manufacturing		500
339914	Costume Jewelry and Novelty Manufacturing		500
339920	Sporting and Athletic Goods Manufacturing		500
339931	Doll and Stuffed Toy Manufacturing		500
339932	Game, Toy, and Children's Vehicle Manufacturing		500

SMALL BUSINESS SIZE STANDARDS BY NAICS INDUSTRY—Continued

NAICS codes	NAICS U.S. industry title	Size standards in millions of dollars	Size standards in number of employees
339941	Pen and Mechanical Pencil Manufacturing		500
339942	Lead Pencil and Art Good Manufacturing		500
339943	Marking Device Manufacturing		500
339944	Carbon Paper and Inked Ribbon Manufacturing		500
339950	Sign Manufacturing		500
339991	Gasket, Packing, and Sealing Device Manufacturing		500
339992	Musical Instrument Manufacturing		500
339993	Fastener, Button, Needle and Pin Manufacturing		500
339994	Broom, Brush and Mop Manufacturing		500
339995	Burial Casket Manufacturing		500
339999	All Other Miscellaneous Manufacturing		500
	Sector 42—Wholesale Trade		
	(These NAICS codes shall not be used to classify Government acquisitions for supplies. They also shall not be used by Federal Government contractors when subcontracting for the acquisition for supplies. The applicable manufacturing NAICS code shall be used to classify acquisitions for supplies. A Wholesale Trade or Retail Trade business concern submitting an offer or a quote on a supply acquisition is categorized as a nonmanufacturer and deemed small if it has 500 or fewer employees and meets the requirements of 13 CFR 121.406.)		
	Subsector 423—Merchant Wholesalers, Durable Goods		
423110	Automobile and Other Motor Vehicle Merchant Wholesalers		100
423120	Motor Vehicle Supplies and New Parts Merchant Wholesalers		100
423130	Tire and Tube Merchant Wholesalers		100
423140	Motor Vehicle Parts (Used) Merchant Wholesalers		100
423210	Furniture Merchant Wholesalers		100
423220	Home Furnishing Merchant Wholesalers		100
423310	Lumber, Plywood, Millwork, and Wood Panel Merchant Wholesalers		100
423320	Brick, Stone, and Related Construction Material Merchant Wholesalers.		100
423330	Roofing, Siding, and Insulation Material Merchant Wholesalers		100
423390	Other Construction Material Merchant Wholesalers		100
423410	Photographic Equipment and Supplies Merchant Wholesalers		100
423420	Office Equipment Merchant Wholesalers		100
423430	Computer and Computer Peripheral Equipment and Software Merchant Wholesalers.		100
423440	Other Commercial Equipment Merchant Wholesalers		100
423450	Medical, Dental, and Hospital Equipment and Supplies Merchant Wholesalers.		100
423460	Ophthalmic Goods Merchant Wholesalers		100
423490	Other Professional Equipment and Supplies Merchant Wholesalers		100
423510	Metal Service Centers and Other Metal Merchant Wholesalers		100
423520	Coal and Other Mineral and Ore Merchant Wholesalers		100
423610	Electrical Apparatus and Equipment, Wiring Supplies, and Related Equipment Merchant Wholesalers.		100
423620	Electrical and Electronic Appliance, Television, and Radio Set Merchant Wholesalers.		100
423690	Other Electronic Parts and Equipment Merchant Wholesalers		100
423710	Hardware Merchant Wholesalers		100
423720	Plumbing and Heating Equipment and Supplies (Hydronics) Merchant Wholesalers.		100
423730	Warm Air Heating and Air-Conditioning Equipment and Supplies Merchant Wholesalers.		100
423740	Refrigeration Equipment and Supplies Merchant Wholesalers		100
423810	Construction and Mining (except Oil Well) Machinery and Equipment Merchant Wholesalers.		100
423820	Farm and Garden Machinery and Equipment Merchant Wholesalers		100
423830	Industrial Machinery and Equipment Merchant Wholesalers		100
423840	Industrial Supplies Merchant Wholesalers		100
423850	Service Establishment Equipment and Supplies Merchant Wholesalers.		100
423860	Transportation Equipment and Supplies (except Motor Vehicle) Merchant Wholesalers.		100
423910	Sporting and Recreational Goods and Supplies Merchant Wholesalers.		100
423920	Toy and Hobby Goods and Supplies Merchant Wholesalers		100
423930	Recyclable Material Merchant Wholesalers		100
423940	Jewelry, Watch, Precious Stone, and Precious Metal Merchant Wholesalers.		100

SMALL BUSINESS SIZE STANDARDS BY NAICS INDUSTRY—Continued

NAICS codes	NAICS U.S. industry title	Size standards in millions of dollars	Size standards in number of employees
423990	Other Miscellaneous Durable Goods Merchant Wholesalers		100
	Subsector 424—Merchant Wholesalers, Nondurable Goods		
424110	Printing and Writing Paper Merchant Wholesalers		100
424120	Stationary and Office Supplies Merchant Wholesalers		100
424130	Industrial and Personal Service Paper Merchant Wholesalers		100
424210	Drugs and Druggists' Sundries Merchant Wholesalers		100
424310	Piece Goods, Notions, and Other Dry Goods Merchant Wholesalers		100
424320	Men's and Boys' Clothing and Furnishings Merchant Wholesalers		100
424330	Women's, Children's, and Infants' Clothing and Accessories Merchant Wholesalers.		100
424340	Footwear Merchant Wholesalers		100
424410	General Line Grocery Merchant Wholesalers		100
424420	Packaged Frozen Food Merchant Wholesalers		100
424430	Dairy Product (except Dried or Canned) Merchant Wholesalers		100
424440	Poultry and Poultry Product Merchant Wholesalers		100
424450	Confectionery Merchant Wholesalers		100
424460	Fish and Seafood Merchant Wholesalers		100
424470	Meat and Meat Product Merchant Wholesalers		100
424480	Fresh Fruit and Vegetable Merchant Wholesalers		100
424490	Other Grocery and Related Products Merchant Wholesalers		100
424510	Grain and Field Bean Merchant Wholesalers		100
424520	Livestock Merchant Wholesalers		100
424590	Other Farm Product Raw Material Merchant Wholesalers		100
424610	Plastics Materials and Basic Forms and Shapes Merchant Wholesalers.		100
424690	Other Chemical and Allied Products Merchant Wholesalers		100
424710	Petroleum Bulk Stations and Terminals		100
424720	Petroleum and Petroleum Products Merchant Wholesalers (except Bulk Stations and Terminals).		100
424810	Beer and Ale Merchant Wholesalers		100
424820	Wine and Distilled Alcoholic Beverage Merchant Wholesalers		100
424910	Farm Supplies Merchant Wholesalers		100
424920	Book, Periodical, and Newspaper Merchant Wholesalers		100
424930	Flower, Nursery Stock, and Florists' Supplies Merchant Wholesalers		100
424940	Tobacco and Tobacco Product Merchant Wholesalers		100
424950	Paint, Varnish, and Supplies Merchant Wholesalers		100
424990	Other Miscellaneous Nondurable Goods Merchant Wholesalers		100
	Subsector 425—Wholesale Electronic Markets and Agents and Brokers		
425110	Business to Business Electronic Markets		100
425120	Wholesale Trade Agents and Brokers		100
	Sector 44–45—Retail Trade		
	(These NAICS codes shall not be used to classify Government acquisitions for supplies. They also shall not be used by Federal Government contractors when subcontracting for the acquisition for supplies. The applicable manufacturing NAICS code shall be used to classify acquisitions for supplies. A Wholesale Trade or Retail Trade business concern submitting an offer or a quote on a supply acquisition is categorized as a nonmanufacturer and deemed small if it has 500 or fewer employees and meets the requirements of 13 CFR 121.406.)		
	Subsector 441—Motor Vehicle and Parts Dealers		
441110	New Car Dealers		200
441120	Used Car Dealers	$23.0	
441210	Recreational Vehicle Dealers	$30.0	
441221	Motorcycle, ATV, and Personal Watercraft Dealers	30.0	
441222	Boat Dealers	30.0	
441229	Aircraft Dealers, Retail	25.5	
Except,			
441310	Automotive Parts and Accessories Stores	14.0	
441320	Tire Dealers	14.0	
	Subsector 442—Furniture and Home Furnishings Stores		
442110	Furniture Stores	19.0	
442210	Floor Covering Stores	$7.0	
442291	Window Treatment Stores	$7.0	
442299	All Other Home Furnishings Stores	19.0	

SMALL BUSINESS SIZE STANDARDS BY NAICS INDUSTRY—Continued

NAICS codes	NAICS U.S. industry title	Size standards in millions of dollars	Size standards in number of employees
	Subsector 443—Electronics and Appliance Stores		
443111	Household Appliance Stores	10.0	
443112	Radio, Television and Other Electronics Stores	25.5	
443120	Computer and Software Stores	25.5	
443130	Camera and Photographic Supplies Stores	19.0	
	Subsector 444—Building Material and Garden Equipment and Supplies Dealers		
444110	Home Centers	35.5	
444120	Paint and Wallpaper Stores	25.5	
444130	Hardware Stores	$7.0	
444190	Other Building Material Dealers	19.0	
444210	Outdoor Power Equipment Stores	$7.0	
444220	Nursery and Garden Centers	10.0	
	Subsector 445—Food and Beverage Stores		
445110	Supermarkets and Other Grocery (except Convenience) Stores	30.0	
445120	Convenience Stores	$27.0	
445210	Meat Markets	$7.0	
445220	Fish and Seafood Markets	$7.0	
445230	Fruit and Vegetable Markets	$7.0	
445291	Baked Goods Stores	$7.0	
445292	Confectionery and Nut Stores	$7.0	
445299	All Other Specialty Food Stores	$7.0	
445310	Beer, Wine and Liquor Stores	$7.0	
	Subsector 446—Health and Personal Care Stores		
446110	Pharmacies and Drug Stores	25.5	
446120	Cosmetics, Beauty Supplies and Perfume Stores	25.5	
446130	Optical Goods Stores	19.0	
446191	Food (Health) Supplement Stores	14.0	
446199	All Other Health and Personal Care Stores	$7.0	
	Subsector 447—Gasoline Stations		
447110	Gasoline Stations with Convenience Stores	$27.0	
447190	Other Gasoline Stations	14.0	
	Subsector 448—Clothing and Clothing Accessories Stores		
448110	Men's Clothing Stores	10.0	
448120	Women's Clothing Stores	25.5	
448130	Children's and Infants' Clothing Stores	30.0	
448140	Family Clothing Stores	35.5	
448150	Clothing Accessories Stores	14.0	
448190	Other Clothing Stores	19.0	
448210	Shoe Stores	25.5	
448310	Jewelry Stores	14.0	
448320	Luggage and Leather Goods Stores	25.5	
	Subsector 451—Sporting Good, Hobby, Book and Music Stores		
451110	Sporting Goods Stores	14.0	
451120	Hobby, Toy and Game Stores	25.5	
451130	Sewing, Needlework and Piece Goods Stores	25.5	
451140	Musical Instrument and Supplies Stores	10.0	
451211	Book Stores	25.5	
451212	News Dealers and Newsstands	$7.0	
451220	Prerecorded Tape, Compact Disc and Record Stores	30.0	
	Subsector 452—General Merchandise Stores		
452111	Department Stores (except Discount Department Stores)	30.0	
452112	Discount Department Stores	$27.0	
452910	Warehouse Clubs and Superstores	$27.0	
452990	All Other General Merchandise Stores	30.0	

SMALL BUSINESS SIZE STANDARDS BY NAICS INDUSTRY—Continued

NAICS codes	NAICS U.S. industry title	Size standards in millions of dollars	Size standards in number of employees
	Subsector 453—Miscellaneous Store Retailers		
453110	Florists	$7.0	
453210	Office Supplies and Stationary Stores	30.0	
453220	Gift, Novelty and Souvenir Stores	$7.0	
453310	Used Merchandise Stores	$7.0	
453910	Pet and Pet Supplies Stores	19.0	
453920	Art Dealers	$7.0	
453930	Manufactured (Mobile) Home Dealers	14.0	
453991	Tobacco Stores	$7.0	
453998	All Other Miscellaneous Store Retailers (except Tobacco Stores)	$7.0	
	Subsector 454—Nonstore Retailers		
454111	Electronic Shopping	30.0	
454112	Electronic Auctions	35.5	
454113	Mail Order Houses	35.5	
454210	Vending Machine Operators	10.0	
454311	Heating Oil Dealers		50
454312	Liquefied Petroleum Gas (Bottled Gas) Dealers		50
454319	Other Fuel Dealers	$7.0	
454390	Other Direct Selling Establishments	$7.0	
	Sectors 48–49—Transportation and Warehousing		
	Subsector 481—Air Transportation		
481111	Scheduled Passenger Air Transportation		1,500
481112	Scheduled Freight Air Transportation		1,500
481211	Nonscheduled Chartered Passenger Air Transportation		1,500
Except,	Offshore Marine Air Transportation Services	$28.0	
481212	Nonscheduled Chartered Freight Air Transportation		1,500
Except,	Offshore Marine Air Transportation Services	$28.0	
481219	Other Nonscheduled Air Transportation	$7.0	
	Subsector 482—Rail Transportation		
482111	Line-Haul Railroads		1,500
482112	Short Line Railroads		500
	Subsector 483—Water Transportation [15]		
483111	Deep Sea Freight Transportation		500
483112	Deep Sea Passenger Transportation		500
483113	Coastal and Great Lakes Freight Transportation		500
483114	Coastal and Great Lakes Passenger Transportation		500
483211	Inland Water Freight Transportation		500
483212	Inland Water Passenger Transportation		500
	Subsector 484—Truck Transportation		
484110	General Freight Trucking, Local	$25.5	
484121	General Freight Trucking, Long-Distance, Truckload	$25.5	
484122	General Freight Trucking, Long-Distance, Less Than Truckload	$25.5	
484210	Used Household and Office Goods Moving	$25.5	
484220	Specialized Freight (except Used Goods) Trucking, Local	$25.5	
484230	Specialized Freight (except Used Goods) Trucking, Long-Distance	$25.5	
	Subsector 485—Transit and Ground Passenger Transportation		
485111	Mixed Mode Transit Systems	$7.0	
485112	Commuter Rail Systems	$7.0	
485113	Bus and Motor Vehicle Transit Systems	$7.0	
485119	Other Urban Transit Systems	$7.0	
485210	Interurban and Rural Bus Transportation	$7.0	
485310	Taxi Service	$7.0	
485320	Limousine Service	$7.0	
485410	School and Employee Bus Transportation	$7.0	
485510	Charter Bus Industry	$7.0	
485991	Special Needs Transportation	$7.0	
485999	All Other Transit and Ground Passenger Transportation	$7.0	

SMALL BUSINESS SIZE STANDARDS BY NAICS INDUSTRY—Continued

NAICS codes	NAICS U.S. industry title	Size standards in millions of dollars	Size standards in number of employees
	Subsector 486—Pipeline Transportation		
486110	Pipeline Transportation of Crude Oil		1,500
486210	Pipeline Transportation of Natural Gas	$7.0	
486910	Pipeline Transportation of Refined Petroleum Products		1,500
486990	All Other Pipeline Transportation	$34.5	
	Subsector 487—Scenic and Sightseeing Transportation		
487110	Scenic and Sightseeing Transportation, Land	$7.0	
487210	Scenic and Sightseeing Transportation, Water	$7.0	
487990	Scenic and Sightseeing Transportation, Other	$7.0	
	Subsector 488—Support Activities for Transportation		
488111	Air Traffic Control	$7.0	
488119	Other Airport Operations	$7.0	
488190	Other Support Activities for Air Transportation	$7.0	
488210	Support Activities for Rail Transportation	$7.0	
488310	Port and Harbor Operations	$25.5	
488320	Marine Cargo Handling	$25.5	
488330	Navigational Services to Shipping	$7.0	
488390	Other Support Activities for Water Transportation	$7.0	
488410	Motor Vehicle Towing	$7.0	
488490	Other Support Activities for Road Transportation	$7.0	
488510	Freight Transportation Arrangement [10]	[10] $7.0	
Except,	Non-Vessel Owning Common Carriers and Household Goods Forwarders.	$25.5	
488991	Packing and Crating	$25.5	
488999	All Other Support Activities for Transportation	$7.0	
	Subsector 491—Postal Service		
491110	Postal Service	$7.0	
	Subsector 492—Couriers and Messengers		
492110	Couriers and Express Delivery Services		1,500
492210	Local Messengers and Local Delivery	$25.5	
	Subsector 493—Warehousing and Storage		
493110	General Warehousing and Storage	$25.5	
493120	Refrigerated Warehousing and Storage	$25.5	
493130	Farm Product Warehousing and Storage	$25.5	
493190	Other Warehousing and Storage	$25.5	
	Sector 51—Information		
	Subsector 511—Publishing Industries (except Internet)		
511110	Newspaper Publishers		500
511120	Periodical Publishers		500
511130	Book Publishers		500
511140	Directory and Mailing List Publishers		500
511191	Greeting Card Publishers		500
511199	All Other Publishers		500
511210	Software Publishers	$25.0	
	Subsector 512—Motion Picture and Sound Recording Industries		
512110	Motion Picture and Video Production	$29.5	
512120	Motion Picture and Video Distribution	$29.5	
512131	Motion Picture Theaters (except Drive-Ins)	$7.0	
512132	Drive-In Motion Picture Theaters	$7.0	
512191	Teleproduction and Other Postproduction Services	$29.5	
512199	Other Motion Picture and Video Industries	$7.0	
512210	Record Production	$7.0	
512220	Integrated Record Production/Distribution		750
512230	Music Publishers		500
512240	Sound Recording Studios	$7.0	

SMALL BUSINESS SIZE STANDARDS BY NAICS INDUSTRY—Continued

NAICS codes	NAICS U.S. industry title	Size standards in millions of dollars	Size standards in number of employees
512290	Other Sound Recording Industries	$7.0	
	Subsector 515—Broadcasting (except Internet)		
515111	Radio Networks	$7.0	
515112	Radio Stations	$7.0	
515120	Television Broadcasting	$14.0	
515210	Cable and Other Subscription Programming	$15.0	
	Subsector 517—Telecommunications		
517110	Wired Telecommunications Carriers		1,500
517210	Wireless Telecommunications Carriers (except Satellite)		1,500
517410	Satellite Telecommunications	$15.0	
517911	Telecommunications Resellers		1,500
517919	All Other Telecommunications	$25.0	
	Subsector 518—Data Processing, Hosting, and Related Services		
518210	Data Processing, Hosting, and Related Services	$25.0	
	Subsector 519—Other Information Services		
519110	News Syndicates	$7.0	
519120	Libraries and Archives	$7.0	
519130	Internet Publishing and Broadcasting and Web Search Portals		500
519190	All Other Information Services	$7.0	
	Sector 52—Finance and Insurance		
	Subsector 522—Credit Intermediation and Related Activities		
522110	Commercial Banking [8]	[8] $175 million in assets	
522120	Savings Institutions [8]	[8] $175 million in assets	
522130	Credit Unions [8]	[8] $175 million in assets	
522190	Other Depository Credit Intermediation [8]	[8] $175 million in assets	
522210	Credit Card Issuing [8]	[8] $175 million in assets	
522220	Sales Financing	$7.0	
522291	Consumer Lending	$7.0	
522292	Real Estate Credit	$7.0	
522293	International Trade Financing [8]	[8] $175 million in assets	
522294	Secondary Market Financing	$7.0	
522298	All Other Non-Depository Credit Intermediation	$7.0	
522310	Mortgage and Nonmortgage Loan Brokers	$7.0	
522320	Financial Transactions Processing, Reserve, and Clearing House Activities.	$7.0	
522390	Other Activities Related to Credit Intermediation	$7.0	
	Subsector 523—Securities, Commodity Contracts, and Other Financial Investments and Related Activities		
523110	Investment Banking and Securities Dealing	$7.0	
523120	Securities Brokerage	$7.0	
523130	Commodity Contracts Dealing	$7.0	
523140	Commodity Contracts Brokerage	$7.0	
523210	Securities and Commodity Exchanges	$7.0	
523910	Miscellaneous Intermediation	$7.0	
523920	Portfolio Management	$7.0	
523930	Investment Advice	$7.0	
523991	Trust, Fiduciary and Custody Activities	$7.0	
523999	Miscellaneous Financial Investment Activities	$7.0	
	Subsector 524—Insurance Carriers and Related Activities		
524113	Direct Life Insurance Carriers	$7.0	
524114	Direct Health and Medical Insurance Carriers	$7.0	

SMALL BUSINESS SIZE STANDARDS BY NAICS INDUSTRY—Continued

NAICS codes	NAICS U.S. industry title	Size standards in millions of dollars	Size standards in number of employees
524126	Direct Property and Casualty Insurance Carriers		1,500
524127	Direct Title Insurance Carriers	$7.0	
524128	Other Direct Insurance (except Life, Health and Medical) Carriers	$7.0	
524130	Reinsurance Carriers	$7.0	
524210	Insurance Agencies and Brokerages	$7.0	
524291	Claims Adjusting	$7.0	
524292	Third Party Administration of Insurance and Pension Funds	$7.0	
524298	All Other Insurance Related Activities	$7.0	
	Subsector 525—Funds, Trusts and Other Financial Vehicles		
525110	Pension Funds	$7.0	
525120	Health and Welfare Funds	$7.0	
525190	Other Insurance Funds	$7.0	
525910	Open-End Investment Funds	$7.0	
525920	Trusts, Estates, and Agency Accounts	$7.0	
525930	Real Estate Investment Trusts	$7.0	
525990	Other Financial Vehicles	$7.0	
	Sector 53—Real Estate and Rental and Leasing		
	Subsector 531—Real Estate		
531110	Lessors of Residential Buildings and Dwellings	$7.0	
531120	Lessors of Nonresidential Buildings (except Miniwarehouses)	$7.0	
531130	Lessors of Miniwarehouses and Self Storage Units	$25.5	
531190	Lessors of Other Real Estate Property	$7.0	
Except,	Leasing of Building Space to Federal Government by Owners [9]	[9] $20.5	
531210	Offices of Real Estate Agents and Brokers [10]	[10] $2.0	
531311	Residential Property Managers	$2.0	
531312	Nonresidential Property Managers	$2.0	
531320	Offices of Real Estate Appraisers	$2.0	
531390	Other Activities Related to Real Estate	$2.0	
	Subsector 532—Rental and Leasing Services		
532111	Passenger Car Rental	$25.5	
532112	Passenger Car Leasing	$25.5	
532120	Truck, Utility Trailer, and RV (Recreational Vehicle) Rental and Leasing.	$25.5	
532210	Consumer Electronics and Appliances Rental	$7.0	
532220	Formal Wear and Costume Rental	$7.0	
532230	Video Tape and Disc Rental	$7.0	
532291	Home Health Equipment Rental	$7.0	
532292	Recreational Goods Rental	$7.0	
532299	All Other Consumer Goods Rental	$7.0	
532310	General Rental Centers	$7.0	
532411	Commercial Air, Rail, and Water Transportation Equipment Rental and Leasing.	$7.0	
532412	Construction, Mining and Forestry Machinery and Equipment Rental and Leasing.	$7.0	
532420	Office Machinery and Equipment Rental and Leasing	$25.0	
532490	Other Commercial and Industrial Machinery and Equipment Rental and Leasing.	$7.0	
	Subsector 533—Lessors of Nonfinancial Intangible Assets (except Copyrighted Works)		
533110	Lessors of Nonfinancial Intangible Assets (except Copyrighted Works).	$7.0	
	Sector 54—Professional, Scientific and Technical Services		
	Subsector 541—Professional, Scientific and Technical Services		
541110	Offices of Lawyers	$7.0	
541191	Title Abstract and Settlement Offices	$7.0	
541199	All Other Legal Services	$7.0	
541211	Offices of Certified Public Accountants	$8.5	
541213	Tax Preparation Services	$7.0	
541214	Payroll Services	$8.5	
541219	Other Accounting Services	$8.5	

SMALL BUSINESS SIZE STANDARDS BY NAICS INDUSTRY—Continued

NAICS codes	NAICS U.S. industry title	Size standards in millions of dollars	Size standards in number of employees
541310	Architectural Services	$4.5	
541320	Landscape Architectural Services	$7.0	
541330	Engineering Services	$4.5	
Except,	Military and Aerospace Equipment and Military Weapons	$27.0	
Except,	Contracts and Subcontracts for Engineering Services Awarded Under the National Energy Policy Act of 1992.	$27.0	
Except,	Marine Engineering and Naval Architecture	$18.5	
541340	Drafting Services	$7.0	
Except,	Map Drafting	$4.5	
541350	Building Inspection Services	$7.0	
541360	Geophysical Surveying and Mapping Services	$4.5	
541370	Surveying and Mapping (except Geophysical) Services	$4.5	
541380	Testing Laboratories	$12.0	
541410	Interior Design Services	$7.0	
541420	Industrial Design Services	$7.0	
541430	Graphic Design Services	$7.0	
541490	Other Specialized Design Services	$7.0	
541511	Custom Computer Programming Services	$25.0	
541512	Computer Systems Design Services	$25.0	
541513	Computer Facilities Management Services	$25.0	
541519	Other Computer Related Services	$25.0	
Except,	Information Technology Value Added Resellers[18]		[18]150
541611	Administrative Management and General Management Consulting Services.	$7.0	
541612	Human Resources Consulting Services	$7.0	
541613	Marketing Consulting Services	$7.0	
541614	Process, Physical Distribution and Logistics Consulting Services	$7.0	
541618	Other Management Consulting Services	$7.0	
541620	Environmental Consulting Services	$7.0	
541690	Other Scientific and Technical Consulting Services	$7.0	
541711	Research and Development in Biotechnology.[11]		[11]500
541712	Research and Development in the Physical, Engineering, and Life Sciences (except Biotechnology).[11]		[11]500
Except,	Aircraft		1,500
Except,	Aircraft Parts, and Auxiliary Equipment, and Aircraft Engine Parts		1,000
Except,	Space Vehicles and Guided Missiles, their Propulsion Units, their Propulsion Units Parts, and their Auxiliary Equipment and Parts.		1,000
541720	Research and Development in the Social Sciences and Humanities	$7.0	
541810	Advertising Agencies[10]	[10]$7.0	
541820	Public Relations Agencies	$7.0	
541830	Media Buying Agencies	$7.0	
541840	Media Representatives	$7.0	
541850	Display Advertising	$7.0	
541860	Direct Mail Advertising	$7.0	
541870	Advertising Material Distribution Services	$7.0	
541890	Other Services Related to Advertising	$7.0	
541910	Marketing Research and Public Opinion Polling	$7.0	
541921	Photography Studios, Portrait	$7.0	
541922	Commercial Photography	$7.0	
541930	Translation and Interpretation Services	$7.0	
541940	Veterinary Services	$7.0	
541990	All Other Professional, Scientific and Technical Services	$7.0	
	Sector 55—Management of Companies and Enterprises		
	Subsector 551—Management of Companies and Enterprises		
551111	Offices of Bank Holding Companies	$7.0	
551112	Offices of Other Holding Companies	$7.0	
	Sector 56—Administrative and Support, Waste Management and Remediation Services		
	Subsector 561—Administrative and Support Services		
561110	Office Administrative Services	$7.0	
561210	Facilities Support Services[12]	[12]$35.5	
561311	Employment Placement Agencies	$7.0	
561312	Executive Search Services	$7.0	
561320	Temporary Help Services	$13.5	
561330	Professional Employer Organizations	$13.5	
561410	Document Preparation Services	$7.0	

SMALL BUSINESS SIZE STANDARDS BY NAICS INDUSTRY—Continued

NAICS codes	NAICS U.S. industry title	Size standards in millions of dollars	Size standards in number of employees
561421	Telephone Answering Services	$7.0	
561422	Telemarketing Bureaus and Other Contact Centers	$7.0	
561431	Private Mail Centers	$7.0	
561439	Other Business Service Centers (including Copy Shops)	$7.0	
561440	Collection Agencies	$7.0	
561450	Credit Bureaus	$7.0	
561491	Repossession Services	$7.0	
561492	Court Reporting and Stenotype Services	$7.0	
561499	All Other Business Support Services	$7.0	
561510	Travel Agencies [10]	[10] $3.5	
561520	Tour Operators [10]	[10] $7.0	
561591	Convention and Visitors Bureaus	$7.0	
561599	All Other Travel Arrangement and Reservation Services	$7.0	
561611	Investigation Services	$12.5	
561612	Security Guards and Patrol Services	$18.5	
561613	Armored Car Services	$12.5	
561621	Security Systems Services (except Locksmiths)	$12.5	
561622	Locksmiths	$7.0	
561710	Exterminating and Pest Control Services	$7.0	
561720	Janitorial Services	$16.5	
561730	Landscaping Services	$7.0	
561740	Carpet and Upholstery Cleaning Services	$4.5	
561790	Other Services to Buildings and Dwellings	$7.0	
561910	Packaging and Labeling Services	$7.0	
561920	Convention and Trade Show Organizers [10]	[10] $7.0	
561990	All Other Support Services	$7.0	
	Subsector 562—Waste Management and Remediation Services		
562111	Solid Waste Collection	$12.5	
562112	Hazardous Waste Collection	$12.5	
562119	Other Waste Collection	$12.5	
562211	Hazardous Waste Treatment and Disposal	$12.5	
562212	Solid Waste Landfill	$12.5	
562213	Solid Waste Combustors and Incinerators	$12.5	
562219	Other Nonhazardous Waste Treatment and Disposal	$12.5	
562910	Remediation Services	$14.0	
Except,	Environmental Remediation Services [14]		[14] 500
562920	Materials Recovery Facilities	$12.5	
562991	Septic Tank and Related Services	$7.0	
562998	All Other Miscellaneous Waste Management Services	$7.0	
	Sector 61—Educational Services		
	Subsector 611—Educational Services		
611110	Elementary and Secondary Schools	$7.0	
611210	Junior Colleges	$7.0	
611310	Colleges, Universities and Professional Schools	$7.0	
611410	Business and Secretarial Schools	$7.0	
611420	Computer Training	$7.0	
611430	Professional and Management Development Training	$7.0	
611511	Cosmetology and Barber Schools	$7.0	
611512	Flight Training	$25.5	
611513	Apprenticeship Training	$7.0	
611519	Other Technical and Trade Schools	$7.0	
Except,	Job Corps Centers [16]	[16] $35.5	
611610	Fine Arts Schools	$7.0	
611620	Sports and Recreation Instruction	$7.0	
611630	Language Schools	$7.0	
611691	Exam Preparation and Tutoring	$7.0	
611692	Automobile Driving Schools	$7.0	
611699	All Other Miscellaneous Schools and Instruction	$7.0	
611710	Educational Support Services	$7.0	
	Sector 62—Health Care and Social Assistance		
	Subsector 621—Ambulatory Health Care Services		
621111	Offices of Physicians (except Mental Health Specialists)	$10.0	
621112	Offices of Physicians, Mental Health Specialists	$10.0	

SMALL BUSINESS SIZE STANDARDS BY NAICS INDUSTRY—Continued

NAICS codes	NAICS U.S. industry title	Size standards in millions of dollars	Size standards in number of employees
621210	Offices of Dentists	$7.0	
621310	Offices of Chiropractors	$7.0	
621320	Offices of Optometrists	$7.0	
621330	Offices of Mental Health Practitioners (except Physicians)	$7.0	
621340	Offices of Physical, Occupational and Speech Therapists and Audiologists.	$7.0	
621391	Offices of Podiatrists	$7.0	
621399	Offices of All Other Miscellaneous Health Practitioners	$7.0	
621410	Family Planning Centers	$10.0	
621420	Outpatient Mental Health and Substance Abuse Centers	$10.0	
621491	HMO Medical Centers	$10.0	
621492	Kidney Dialysis Centers	$34.5	
621493	Freestanding Ambulatory Surgical and Emergency Centers	$10.0	
621498	All Other Outpatient Care Centers	$10.0	
621511	Medical Laboratories	$13.5	
621512	Diagnostic Imaging Centers	$13.5	
621610	Home Health Care Services	$13.5	
621910	Ambulance Services	$7.0	
621991	Blood and Organ Banks	$10.0	
621999	All Other Miscellaneous Ambulatory Health Care Services	$10.0	
	Subsector 622—Hospitals		
622110	General Medical and Surgical Hospitals	$34.5	
622210	Psychiatric and Substance Abuse Hospitals	$34.5	
622310	Specialty (except Psychiatric and Substance Abuse) Hospitals	$34.5	
	Subsector 623—Nursing and Residential Care Facilities		
623110	Nursing Care Facilities	$13.5	
623210	Residential Mental Retardation Facilities	$10.0	
623220	Residential Mental Health and Substance Abuse Facilities	$7.0	
623311	Continuing Care Retirement Communities	$13.5	
623312	Homes for the Elderly	$7.0	
623990	Other Residential Care Facilities	$7.0	
	Subsector 624—Social Assistance		
624110	Child and Youth Services	$7.0	
624120	Services for the Elderly and Persons with Disabilities	$7.0	
624190	Other Individual and Family Services	$7.0	
624210	Community Food Services	$7.0	
624221	Temporary Shelters	$7.0	
624229	Other Community Housing Services	$7.0	
624230	Emergency and Other Relief Services	$7.0	
624310	Vocational Rehabilitation Services	$7.0	
624410	Child Day Care Services	$7.0	
	Sector 71—Arts, Entertainment and Recreation		
	Subsector 711—Performing Arts, Spectator Sports and Related Industries		
711110	Theater Companies and Dinner Theaters	$7.0	
711120	Dance Companies	$7.0	
711130	Musical Groups and Artists	$7.0	
711190	Other Performing Arts Companies	$7.0	
711211	Sports Teams and Clubs	$7.0	
711212	Race Tracks	$7.0	
711219	Other Spectator Sports	$7.0	
711310	Promoters of Performing Arts, Sports and Similar Events with Facilities.	$7.0	
711320	Promoters of Performing Arts, Sports and Similar Events without Facilities.	$7.0	
711410	Agents and Managers for Artists, Athletes, Entertainers and Other Public Figures.	$7.0	
711510	Independent Artists, Writers, and Performers	$7.0	
	Subsector 712—Museums, Historical Sites and Similar Institutions		
712110	Museums	$7.0	
712120	Historical Sites	$7.0	

SMALL BUSINESS SIZE STANDARDS BY NAICS INDUSTRY—Continued

NAICS codes	NAICS U.S. industry title	Size standards in millions of dollars	Size standards in number of employees
712130	Zoos and Botanical Gardens	$7.0	
712190	Nature Parks and Other Similar Institutions	$7.0	
	Subsector 713—Amusement, Gambling and Recreation Industries		
713110	Amusement and Theme Parks	$7.0	
713120	Amusement Arcades	$7.0	
713210	Casinos (except Casino Hotels)	$7.0	
713290	Other Gambling Industries	$7.0	
713910	Golf Courses and Country Clubs	$7.0	
713920	Skiing Facilities	$7.0	
713930	Marinas	$7.0	
713940	Fitness and Recreational Sports Centers	$7.0	
713950	Bowling Centers	$7.0	
713990	All Other Amusement and Recreation Industries	$7.0	
	Sector 72—Accommodation and Food Services		
	Subsector 721—Accommodation		
721110	Hotels (except Casino Hotels) and Motels	$30.0	
721120	Casino Hotels	30.0	
721191	Bed and Breakfast Inns	$7.0	
721199	All Other Traveler Accommodation	$7.0	
721211	RV (Recreational Vehicle) Parks and Campgrounds	$7.0	
721214	Recreational and Vacation Camps (except Campgrounds)	$7.0	
721310	Rooming and Boarding Houses	$7.0	
	Subsector 722—Food Services and Drinking Places		
722110	Full-Service Restaurants	$7.0	
722211	Limited-Service Restaurants	10.0	
722212	Cafeterias, Grill Buffets, and Buffets	25.5	
722213	Snack and Nonalcoholic Beverage Bars	$7.0	
722310	Food Service Contractors	35.5	
722320	Caterers	$7.0	
722330	Mobile Food Services	$7.0	
722410	Drinking Places (Alcoholic Beverages)	$7.0	
	Sector 81—Other Services (Except Public Administration)		
	Subsector 811—Repair and Maintenance		
811111	General Automotive Repair	$7.0	
811112	Automotive Exhaust System Repair	$7.0	
811113	Automotive Transmission Repair	$7.0	
811118	Other Automotive Mechanical and Electrical Repair and Maintenance	$7.0	
811121	Automotive Body, Paint and Interior Repair and Maintenance	$7.0	
811122	Automotive Glass Replacement Shops	$10.0	
811191	Automotive Oil Change and Lubrication Shops	$7.0	
811192	Car Washes	$7.0	
811198	All Other Automotive Repair and Maintenance	$7.0	
811211	Consumer Electronics Repair and Maintenance	$7.0	
811212	Computer and Office Machine Repair and Maintenance	$25.0	
811213	Communication Equipment Repair and Maintenance	10.0	
811219	Other Electronic and Precision Equipment Repair and Maintenance	19.0	
811310	Commercial and Industrial Machinery and Equipment (except Automotive and Electronic) Repair and Maintenance.	$7.0	
811411	Home and Garden Equipment Repair and Maintenance	$7.0	
811412	Appliance Repair and Maintenance	14.0	
811420	Reupholstery and Furniture Repair	$7.0	
811430	Footwear and Leather Goods Repair	$7.0	
811490	Other Personal and Household Goods Repair and Maintenance	$7.0	
	Subsector 812—Personal and Laundry Services		
812111	Barber Shops	$7.0	
812112	Beauty Salons	$7.0	
812113	Nail Salons	$7.0	
812191	Diet and Weight Reducing Centers	19.0	
812199	Other Personal Care Services	$7.0	

SMALL BUSINESS SIZE STANDARDS BY NAICS INDUSTRY—Continued

NAICS codes	NAICS U.S. industry title	Size standards in millions of dollars	Size standards in number of employees
812210	Funeral Homes and Funeral Services	$7.0	
812220	Cemeteries and Crematories	19.0	
812310	Coin-Operated Laundries and Drycleaners	$7.0	
812320	Dry-cleaning and Laundry Services (except Coin-Operated)	5.0	
812331	Linen Supply	30.0	
812332	Industrial Launderers	35.5	
812910	Pet Care (except Veterinary) Services	$7.0	
812921	Photo Finishing Laboratories (except One-Hour)	19.0	
812922	One-Hour Photo Finishing	$14.0	
812930	Parking Lots and Garages	35.5	
812990	All Other Personal Services	$7.0	
	Subsector 813—Religious, Grantmaking, Civic, Professional and Similar Organizations		
813110	Religious Organizations	$7.0	
813211	Grantmaking Foundations	30.0	
813212	Voluntary Health Organizations	25.5	
813219	Other Grant Making and Giving Services	35.5	
813311	Human Rights Organizations	25.5	
813312	Environment, Conservation and Wildlife Organizations	14.0	
813319	Other Social Advocacy Organizations	$7.0	
813410	Civic and Social Organizations	$7.0	
813910	Business Associations	$7.0	
813920	Professional Organizations	14.0	
813930	Labor Unions and Similar Labor Organizations	$7.0	
813940	Political Organizations	$7.0	
813990	Other Similar Organizations (except Business, Professional, Labor, and Political Organizations).	$7.0	
	Sector 92—Public Administration [19]		
	(Small business size standards are not established for this sector. Establishments in the Public Administration sector are Federal, state, and local government agencies which administer and oversee government programs and activities that are not performed by private establishments.)		

Footnotes

1. *NAICS codes 221111, 221112, 221113, 221119, 221121,* and *221122*—A firm is small if, including its affiliates, it is primarily engaged in the generation, transmission, and/or distribution of electric energy for sale and its total electric output for the preceding fiscal year did not exceed 4 million megawatt hours.

2. *NAICS code 237990*—Dredging: To be considered small for purposes of Government procurement, a firm must perform at least 40 percent of the volume dredged with its own equipment or equipment owned by another small dredging concern.

3. *NAICS code 311421*—For purposes of Government procurement for food canning and preserving, the standard of 500 employees excludes agricultural labor as defined in 3306(k) of the Internal Revenue Code, 26 U.S.C. 3306(k).

4. *NAICS code 324110*—For purposes of Government procurement, the petroleum refiner must be a concern that has no more than 1,500 employees nor more than 125,000 barrels per calendar day total Operable Atmospheric Crude Oil Distillation capacity. Capacity includes owned or leased facilities as well as facilities under a processing agreement or an arrangement such as an exchange agreement or a throughput. The total product to be delivered under the contract must be at least 90 percent refined by the successful bidder from either crude oil or bona fide feedstocks.

5. *NAICS code 326211*—For Government procurement, a firm is small for bidding on a contract for pneumatic tires within Census Classification codes 30111 and 30112, provided that:

(a) The value of tires within Census Classification codes 30111 and 30112 which it manufactured in the United States during the previous calendar year is more than 50 percent of the value of its total worldwide manufacture,

(b) The value of pneumatic tires within Census Classification codes 30111 and 30112 comprising its total worldwide manufacture during the preceding calendar year was less than 5 percent of the value of all such tires manufactured in the United States during that period, and

(c) The value of the principal product which it manufactured or otherwise produced, or sold worldwide during the preceding calendar year is less than 10 percent of the total value of such products manufactured or otherwise produced or sold in the United States during that period.

6. *NAICS Subsectors 333, 334, 335* and *336*—For rebuilding machinery or equipment on a factory basis, or equivalent, use the NAICS code for a newly manufactured product. Concerns performing major rebuilding or overhaul activities do not necessarily have to meet the criteria for being a "manufacturer" although the activities may be classified under a manufacturing NAICS code. Ordinary repair services or preservation are not considered rebuilding.

7. *NAICS code 336413*—Contracts for the rebuilding or overhaul of aircraft ground support equipment on a contract basis are classified under NAICS code 336413.

8. *NAICS Codes 522110, 522120, 522130, 522190, 522210* and *522293*—A financial institution's assets are determined by averaging the assets reported on its four quarterly financial statements for the preceding year. "Assets" for the purposes of this size standard means the assets defined according to the Federal Financial Institutions Examination Council 034 call report form.

9. *NAICS code 531190—Leasing of building space to the Federal Government by Owners:* For Government procurement, a size standard of $20.5 million in gross receipts applies to the owners of building space leased to the Federal Government. The standard does not apply to an agent.

10. *NAICS codes 488510 (part) 531210, 541810, 561510, 561520,* and *561920*—As measured by total revenues, but excluding funds received in trust for an unaffiliated third party, such as bookings or sales subject to commissions. The commissions received are included as revenues.

11. *NAICS codes 541711 and 541712*—For research and development contracts requiring the delivery of a manufactured product, the appropriate size standard is that of the manufacturing industry.

(a) "Research and Development" means laboratory or other physical research and development. It does not include economic, educational, engineering, operations, systems, or other nonphysical research; or computer programming, data processing, commercial and/or medical laboratory testing.

(b) For purposes of the Small Business Innovation Research (SBIR) program only, a different definition has been established by law. See § 121.701 of these regulations.

(c) "Research and Development" for guided missiles and space vehicles includes evaluations and simulation, and other services requiring thorough knowledge of complete missiles and spacecraft.

12. *NAICS code 561210*—Facilities Support Services:

(a) If one or more activities of Facilities Support Services as defined in paragraph (b) (below in this footnote) can be identified with a specific industry and that industry accounts for 50% or more of the value of an entire procurement, then the proper classification of the procurement is that of the specific industry, not Facilities Support Services.

(b) "Facilities Support Services" requires the performance of three or more separate activities in the areas of services or specialty trade contractors industries. If services are performed, these service activities must each be in a separate NAICS industry. If the procurement requires the use of specialty trade contractors (plumbing, painting, plastering, carpentry, etc.), all such specialty trade contractors activities are considered a single activity and classified as "Building and Property Specialty Trade Services." Since "Building and Property Specialty Trade Services" is only one activity, two additional activities of separate NAICS industries are required for a procurement to be classified as "Facilities Support Services."

13. *NAICS code 238990*—Building and Property Specialty Trade Services: If a procurement requires the use of multiple specialty trade contractors (*i.e.,* plumbing, painting, plastering, carpentry, etc.), and no specialty trade accounts for 50% or more of the value of the procurement, all such specialty trade contractors activities are considered a single activity and classified as Building and Property Specialty Trade Services.

14. *NAICS 562910*—Environmental Remediation Services:

(a) For SBA assistance as a small business concern in the industry of Environmental Remediation Services, other than for Government procurement, a concern must be engaged primarily in furnishing a range of services for the remediation of a contaminated environment to an acceptable condition including, but not limited to, preliminary assessment, site inspection, testing, remedial investigation, feasibility studies, remedial design, containment, remedial action, removal of contaminated materials, storage of contaminated materials and security and site closeouts. If one of such activities accounts for 50 percent or more of a concern's total revenues, employees, or other related factors, the concern's primary industry is that of the particular industry and not the Environmental Remediation Services Industry.

(b) For purposes of classifying a Government procurement as Environmental Remediation Services, the general purpose of the procurement must be to restore or directly support the restoration of a contaminated

environment (such as, preliminary assessment, site inspection, testing, remedial investigation, feasibility studies, remedial design, remediation services, containment, removal of contaminated materials, storage of contaminated materials or security and site closeouts), although the general purpose of the procurement need not necessarily include remedial actions. Also, the procurement must be composed of activities in three or more separate industries with separate NAICS codes or, in some instances (e.g., engineering), smaller sub-components of NAICS codes with separate, distinct size standards. These activities may include, but are not limited to, separate activities in industries such as: Heavy Construction; Specialty Trade Contractors; Engineering Services; Architectural Services; Management Consulting Services; Hazardous and Other Waste Collection; Remediation Services, Testing Laboratories; and Research and Development in the Physical, Engineering and Life Sciences. If any activity in the procurement can be identified with a separate NAICS code, or component of a code with a separate distinct size standard, and that industry accounts for 50 percent or more of the value of the entire procurement, then the proper size standard is the one for that particular industry, and not the Environmental Remediation Service size standard.

15. *Subsector 483—Water Transportation—Offshore Marine Services:* The applicable size standard shall be $28.0 million for firms furnishing specific transportation services to concerns engaged in offshore oil and/or natural gas exploration, drilling production, or marine research; such services encompass passenger and freight transportation, anchor handling, and related logistical services to and from the work site or at sea.

16. *NAICS codes 611519*—Job Corps Centers. For classifying a Federal procurement, the purpose of the solicitation must be for the management and operation of a U.S. Department of Labor Job Corps Center. The activities involved include admissions activities, life skills training, educational activities, comprehensive career preparation activities, career development activities, career transition activities, as well as the management and support functions and services needed to operate and maintain the facility. For SBA assistance as a small business concern, other than for Federal Government procurements, a concern must be primarily engaged in providing the services to operate and maintain Federal Job Corps Centers.

17. *NAICS code 115310* (Support Activities for Forestry)—Forest Fire Suppression and Fuels Management Services are two components of Support Activities for Forestry. Forest Fire Suppression includes establishments which provide services to fight forest fires. These firms usually have fire-fighting crews and equipment. Fuels Management Services firms provide services to clear land of hazardous materials that would fuel forest fires. The treatments used by these firms may include prescribed fire, mechanical removal, establishing fuel breaks, thinning, pruning, and piling.

18. NAICS code 541519—An Information Technology Value Added Reseller provides a total solution to information technology acquisitions by providing multi-vendor hardware and software along with significant services. Significant value added services consist of, but are not limited to, configuration consulting and design, systems integration, installation of multi-vendor computer equipment, customization of hardware or software, training, product technical support, maintenance, and end user support. For purposes of Government procurement, an information technology procurement classified under this industry category must consist of at least 15% and not more than 50% of value added services as measured by the total price less the cost of information technology hardware, computer software, and profit. If the contract consists of less than 15% of value added services, then it must be classified under a NAICS manufacturing industry. If the contract consists of more than 50% of value added services, then it must be classified under the NAICS industry that best describes the predominate service of the procurement. To qualify as an Information Technology Value Added Reseller for purposes of SBA assistance, other than for Government procurement, a concern must be primarily engaged in providing information technology equipment and computer software and provide value added services which account for at least 15% of its receipts but not more than 50% of its receipts.

19. *NAICS Sector 92*—Small business size standards are not established for this sector. Establishments in the Public Administration sector are Federal, State, and local government agencies which administer and oversee government programs and activities that are not performed by private establishments. Concerns performing operational services for the administration of a government program are classified under the NAICS private sector industry based on the activities performed. Similarly, procurements for these types of services are classified under the NAICS private sector industry that best describes the activities to be performed. For example, if a government agency issues a procurement for law enforcement services, the requirement would be classified using one of the NAICS industry codes under 56161, Investigation, Guard, and Armored Car Services.

[65 FR 30840, May 15, 2000]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting § 121.201, see the List of CFR Sections Affected, which appears in the

Finding Aids section of the printed volume and at www.fdsys.gov.

EDITORIAL NOTE: At 73 FR 12870, Mar. 11, 2008, § 121.201 was amended; however, several amendments could not be incorporated due to inaccurate amendatory instruction.

SIZE ELIGIBILITY REQUIREMENTS FOR SBA FINANCIAL ASSISTANCE

§ 121.301 What size standards are applicable to financial assistance programs?

(a) For Business Loans (other than for 7(a) Business Loans for the period beginning May 5, 2009 and ending on September 30, 2010) and for Disaster Loans (other than physical disaster loans), an applicant business concern must satisfy two criteria:

(1) The size of the applicant alone (without affiliates) must not exceed the size standard designated for the industry in which the applicant is primarily engaged; and

(2) The size of the applicant combined with its affiliates must not exceed the size standard designated for either the primary industry of the applicant alone or the primary industry of the applicant and its affiliates, which ever is higher. These size standards are set forth in § 121.201.

(b) For Development Company programs and, for the period beginning May 5, 2009 and ending on September 30, 2010, for 7(a) Business Loans, an applicant must meet one of the following standards:

(1) The same standards applicable under paragraph (a) of this section; or

(2) Including its affiliates, tangible net worth not in excess of $8.5 million, and average net income after Federal income taxes (excluding any carry-over losses) for the preceding two completed fiscal years not in excess of $3.0 million. If the applicant is not required by law to pay Federal income taxes at the enterprise level, but is required to pass income through to its shareholders, partners, beneficiaries, or other equitable owners, the applicant's "net income after Federal income taxes" will be its net income reduced by an amount computed as follows:

(i) If the applicant is not required by law to pay State (and local, if any) income taxes at the enterprise level, multiply its net income by the marginal State income tax rate (or by the combined State and local income tax rates, as applicable) that would have applied if it were a taxable corporation.

(ii) Multiply the applicant's net income, less any deduction for State and local income taxes calculated under paragraph (b)(2)(i) of this section, by the marginal Federal income tax rate that would have applied if the applicant were a taxable corporation.

(iii) Sum the results obtained in paragraphs (b)(2)(i) and (b)(2)(ii) of this section.

(c) For the Small Business Investment Company (SBIC) program, an applicant must meet one of the following standards:

(1) The same standards applicable under paragraph (a) of this section; or

(2) Including its affiliates, tangible net worth not in excess of $18 million, and average net income after Federal income taxes (excluding any carry-over losses) for the preceding two completed fiscal years not in excess of $6 million. If the applicant is not required by law to pay Federal income taxes at the enterprise level, but is required to pass income through to its shareholders, partners, beneficiaries, or other equitable owners, the applicant's "net income after Federal income taxes" will be its net income reduced by an amount computed as follows:

(i) If the applicant is not required by law to pay State (and local, if any) income taxes at the enterprise level, multiply its net income by the marginal State income tax rate (or by the combined State and local income tax rates, as applicable) that would have applied if it were a taxable corporation.

(ii) Multiply the applicant's net income, less any deduction for State and local income taxes calculated under paragraph (c)(2)(i) of this section, by the marginal Federal income tax rate that would have applied if the applicant were a taxable corporation.

(iii) Add the results obtained in paragraphs (c)(2)(i) and (c)(2)(ii) of this section.

(d) For Surety Bond Guarantee assistance—

(1) A business concern, combined with its affiliates, must meet the size

standard for the primary industry in which such business concern, combined with its affiliates, is engaged.

(2) For any contract or subcontract, public or private, to be performed in the Presidentially-declared disaster areas resulting from the 2005 Hurricanes Katrina, Rita or Wilma, a construction (general or special trade) concern or concern performing a contract for services is small if it meets the size standard set forth in paragraph (d)(1) of this section, or the average annual receipts of the concern, together with its affiliates, do not exceed $7 million, whichever is higher.

(e) The applicable size standards for purposes of SBA's financial assistance programs, excluding the Surety Bond Guarantee assistance program, are increased by 25% whenever the applicant agrees to use all of the financial assistance within a labor surplus area. Labor surplus areas are listed monthly in the Department of Labor publication "Area Trends in Employment and Unemployment."

[61 FR 3286, Jan. 31, 1996, as amended at 66 FR 30648, June 7, 2001; 67 FR 3056, Jan. 23, 2002; 69 FR 29204, May 21, 2004; 70 FR 69047, 69052, Nov. 14, 2005; 70 FR 72594, Dec. 6, 2005; 71 FR 62208, Oct. 24, 2006; 73 FR 41254, July 18, 2008; 74 FR 20580, May 5, 2009; 74 FR 36110, July 22, 2009; 75 FR 48550, Aug. 11, 2010]

§ 121.302 When does SBA determine the size status of an applicant?

(a) The size status of an applicant for SBA financial assistance is determined as of the date the application for financial assistance is accepted for processing by SBA, except for applications under the Preferred Lenders Program (PLP), the Disaster Loan program, the SBIC program, and the New Markets Venture Capital (NMCV) program.

(b) For the Preferred Lenders program, size is determined as of the date of approval of the loan by the Preferred Lender.

(c) For disaster loan assistance (other than physical disaster loans), size status is determined as of the date the disaster commenced, as set forth in the Disaster Declaration. For economic injury disaster loan assistance under disaster declarations for Hurricanes Katrina, Rita, and Wilma, size status is determined as of the date SBA accepts the application for processing, and for applications submitted before December 6, 2005, whether denied because of size status or pending, such applications shall be deemed resubmitted on December 6, 2005. For pre-disaster mitigation loans, size status is determined as of the date SBA accepts a complete Pre-Disaster Mitigation Small Business Loan Application for processing. Refer to § 123.408 of this chapter to find out what SBA considers to be a complete Pre-Disaster Mitigation Small Business Loan Application.

(d) For financial assistance from an SBIC licensee or an NMVC company, size is determined as of the date a concern's application is accepted for processing by the SBIC or the NMVC company.

(e) Changes in size after the applicable date when size is determined will not disqualify an applicant for assistance.

[61 FR 3286, Jan. 31, 1996, as amended at 64 FR 48276, Sept. 3, 1999; 67 FR 11880, Mar. 15, 2002; 67 FR 62337, Oct. 7, 2002; 69 FR 29204, May 21, 2004; 70 FR 72594, Dec. 6, 2005; 73 FR 41254, July 18, 2008; 75 FR 48550, Aug. 11, 2010]

§ 121.303 What size procedures are used by SBA before it makes a formal size determination?

(a) A concern that submits an application for financial assistance is deemed to have certified that it is small under the applicable size standard. SBA may question the concern's status based on information supplied in the application or from any other source.

(b) A small business investment company, a development company, a surety bond company, or a preferred lender may accept as true the size information provided by an applicant, unless credible evidence to the contrary is apparent.

(c) Size is initially considered by the individual with final financial assistance authority. This is not a formal size determination. A formal determination may be requested prior to a denial of eligibility based on size.

(d) An applicant may request a formal size determination when assistance has been denied for size ineligibility. Except for disaster loan eligibility, a request for a formal size determination must be made to the Government Contracting Area Director serving the area in which the headquarters of the applicant is located, regardless of the location of the parent company or affiliates. For disaster loan assistance, the request for a size determination must be made to the Area Director for the Disaster Area Office which denied the assistance.

(e) There are no time limitations for making a formal size determination for purposes of financial assistance. The official making the formal size determination must provide a copy of the determination to the applicant, to the requesting SBA official, and to other interested SBA program officials.

§ 121.304 What are the size requirements for refinancing an existing SBA loan?

(a) A concern that applies to refinance an existing SBA loan or guarantee will be considered small for the refinancing even though its size has increased since the date of the original financing to exceed its applicable size standard, provided that:

(1) The increase in size is due to natural growth (as distinguished from merger, acquisition or similar management action); and

(2) SBA determines that refinancing is necessary to protect the Government's financial interest.

(b) If a concern's size has increased other than by natural growth, the concern and its affiliates must be small at the time the application for refinancing is accepted for processing by SBA.

§ 121.305 What size eligibility requirements exist for obtaining financial assistance relating to particular procurements?

A concern qualified as small for a particular procurement, including an 8(a) subcontract, is small for financial assistance directly and primarily relating to the performance of the particular procurement.

Size Eligibility Requirements for Government Procurement

§ 121.401 What procurement programs are subject to size determinations?

The rules set forth in §§ 121.401 through 121.413 apply to all Federal procurement programs for which status as a small business is required or advantageous, including the small business set-aside program, SBA's Certificate of Competency program, SBA's 8(a) Business Development program, SBA's HUBZone program, the Women-Owned Small Business (WOSB) Federal Contract Assistance Procedures, SBA's Service-Disabled Veteran-Owned Small Business program, the Small Business Subcontracting program, and the Federal Small Disadvantaged Business (SDB) program.

[70 FR 56814, Sept. 29, 2005, as amended at 73 FR 56947, Oct. 1, 2008]

Effective Date Note: At 75 FR 62280, Oct. 7, 2010, § 121.401 was revised, effective Feb 4, 2011. For the convenience of the user, the revised text is set forth as follows:

§ 121.401 What procurement programs are subject to size determinations?

The rules set forth in §§ 121.401 through 121.413 apply to all Federal procurement programs for which status as a small business is required or advantageous, including the small business set-aside program, SBA's Certificate of Competency program, SBA's 8(a) Business Development program, SBA's HUBZone program, the Women Owned Small Business (WOSB) Federal Contract Program, SBA's Service-Disabled Veteran-Owned Small Business program, the Small Business Subcontracting program, and the Federal Small Disadvantaged Business (SDB) program.

§ 121.402 What size standards are applicable to Federal Government Contracting programs?

(a) A concern must not exceed the size standard for the NAICS code specified in the solicitation. The contracting officer must specify the size standard in effect on the date the solicitation is issued. If SBA amends the size standard and it becomes effective before the date initial offers (including price) are due, the contracting officer may amend the solicitation and use the new size standard.

(b) The procuring agency contracting officer, or authorized representative,

designates the proper NAICS code and size standard in a solicitation, selecting the NAICS code which best describes the principal purpose of the product or service being acquired. Primary consideration is given to the industry descriptions in the NAICS United States Manual, the product or service description in the solicitation and any attachments to it, the relative value and importance of the components of the procurement making up the end item being procured, and the function of the goods or services being purchased. Other factors considered include previous Government procurement classifications of the same or similar products or services, and the classification which would best serve the purposes of the Small Business Act. A procurement is usually classified according to the component which accounts for the greatest percentage of contract value. Acquisitions for supplies must be classified under the appropriate manufacturing NAICS code, not under a Wholesale Trade or Retail Trade NAICS code. A concern that submits an offer or quote for a contract or subcontract where the NAICS code assigned to the contract or subcontract is one for supplies, and furnishes a product it did not itself manufacture or produce, is categorized as a nonmanufacturer and deemed small if it has 500 or fewer employees and meets the requirements of 13 CFR 121.406.

(c) The NAICS code assigned to a procurement and its corresponding size standard is final unless timely appealed to SBA's Office of Hearings and Appeals (OHA), or unless SBA assigns an NAICS code or size standard as provided in paragraph (d) of this section.

(d) An unclear, incomplete or missing NAICS code designation or size standard in the solicitation may be clarified, completed or supplied by SBA in connection with a formal size determination or size appeal.

(e) Any offeror or other interested party adversely affected by an NAICS code designation or size standard designation may appeal the designations to OHA under part 134 of this chapter.

[61 FR 3286, Jan. 31, 1996, as amended at 65 FR 30863, May 15, 2000; 69 FR 29205, May 21, 2004; 75 FR 61604, Oct. 6, 2010]

§ 121.403 Are SBA size determinations and NAICS code designations binding on parties?

Formal size determinations and NAICS code designations made by authorized SBA officials are binding upon the parties. Opinions otherwise provided by SBA officials to contracting officers or others are advisory in nature, and are not binding or appealable.

[61 FR 3286, Jan. 31, 1996, as amended at 65 FR 30863, May 15, 2000]

§ 121.404 When does SBA determine the size status of a business concern?

(a) SBA determines the size status of a concern, including its affiliates, as of the date the concern submits a written self-certification that it is small to the procuring activity as part of its initial offer (or other formal response to a solicitation) which includes price. Where an agency modifies a solicitation so that initial offers are no longer responsive to the solicitation, a concern must recertify that it is a small business at the time it submits a responsive offer, which includes price, to the modified solicitation.

(b) A concern applying to be certified as a Participant in SBA's 8(a) Business Development program (under part 124, subpart A, of this chapter), as a small disadvantaged business (under part 124, subpart B, of this chapter), or as a HUBZone small business (under part 126 of this chapter) must qualify as a small business for its primary industry classification as of the date of its application and the date of certification by SBA.

(c) The size status of an applicant for a Certificate of Competency (COC) relating to an unrestricted procurement is determined as of the date of the concern's application for the COC.

(d) Size status for purposes of compliance with the nonmanufacturer rule set forth in §121.406(b)(1) and the ostensible subcontractor rule set forth in §121.103(h)(4) is determined as of the date of the final proposal revision for negotiated acquisitions and final bid for sealed bidding.

(e) For subcontracting purposes, a concern must qualify as small as of the date that it certifies that it is small for the subcontract. The applicable size

standard is that which is set forth in §121.410 and which is in effect at the time the concern self-certifies that it is small for the subcontract.

(f) For purposes of two-step sealed bidding under subpart 14.5 of the FAR, 48 CFR, a concern must qualify as small as of the date that it certifies that it is small as part of its step one proposal.

(g) A concern that qualified as a small business at the time it receives a contract is considered a small business throughout the life of that contract. Where a concern grows to be other than small, the procuring agency may exercise options and still count the award as an award to a small business. However, the following exceptions apply:

(1) Within 30 days of an approved contract novation, a contractor must recertify its small business size status to the procuring agency, or inform the procuring agency that it is other than small. If the contractor is other than small, the agency can no longer count the options or orders issued pursuant to the contract, from that point forward, towards its small business goals.

(2) In the case of a merger or acquisition, where contract novation is not required, the contractor must, within 30 days of the transaction becoming final, recertify its small business size status to the procuring agency, or inform the procuring agency that it is other than small. If the contractor is other than small, the agency can no longer count the options or orders issued pursuant to the contract, from that point forward, towards its small business goals. The agency and the contractor must immediately revise all applicable Federal contract databases to reflect the new size status.

(3) For the purposes of contracts with durations of more than five years (including options), including Multiple Award Schedule (MAS) Contracts, Multiple Agency Contracts (MACs) and Government-wide Acquisition Contracts (GWACs), a contracting officer must request that a business concern re-certify its small business size status no more than 120 days prior to the end of the fifth year of the contract, and no more than 120 days prior to exercising any option thereafter. If the contractor certifies that it is other than small, the agency can no longer count the options or orders issued pursuant to the contract towards its small business prime contracting goals. The agency and the contractor must immediately revise all applicable Federal contract databases to reflect the new size status.

(i) A business concern that certified itself as other than small, either initially or prior to an option being exercised, may recertify itself as small for a subsequent option period if it meets the applicable size standard.

(ii) Re-certification does not change the terms and conditions of the contract. The limitations on subcontracting, non-manufacturer and subcontracting plan requirements in effect at the time of contract award remain in effect throughout the life of the contract.

(iii) A request for a size re-certification shall include the size standard in effect at the time of re-certification that corresponds to the NAICS code that that was initially assigned to the contract.

(iv) A contracting officer must assign a NAICS code and size standard to each order under a long-term contract. The NAICS code and size standard assigned to an order must correspond to a NAICS code and size standard assigned to the underlying long-term contract. A concern will be considered small for that order only if it certified itself as small under the same or lower size standard.

(v) Where the contracting officer explicitly requires concerns to recertify their size status in response to a solicitation for an order, SBA will determine size as of the date the concern submits its self-representation as part of its response to the solicitation for the order.

(vi) A Blanket Purchase Agreement (BPA) is not a contract. Goods and services are acquired under a BPA when an order is issued. Thus, a concern's size may not be determined based on its size at the time of a response to a solicitation for a BPA.

(h) A follow-on or renewal contract is a new contracting action. As such, size is determined as of the date the concern submits a written self-certification that it is small to the procuring

agency as part of its initial offer including price for the follow-on or renewal contract.

[69 FR 29205, May 21, 2004, as amended at 71 FR 19813, Apr. 18, 2006; 71 FR 66443, Nov. 15, 2006]

§ 121.405 May a business concern self-certify its small business size status?

(a) A concern must self-certify it is small under the size standard specified in the solicitation, or as clarified, completed or supplied by SBA pursuant to § 121.402(d).

(b) A contracting officer may accept a concern's self-certification as true for the particular procurement involved in the absence of a written protest by other offerors or other credible information which causes the contracting officer or SBA to question the size of the concern.

(c) Procedures for protesting the self-certification of an offeror are set forth in §§ 121.1001 through 121.1009.

§ 121.406 How does a small business concern qualify to provide manufactured products under small business set-aside or 8(a) contracts?

(a) *General.* In order to qualify as a small business concern for a small business set-aside or 8(a) contract to provide manufactured products, an offeror must either:

(1) Be the manufacturer of the end item being procured (and the end item must be manufactured or produced in the United States); or

(2) Comply with the requirements of paragraph (b), (c) or (d) of this section as a nonmanufacturer, a kit assembler or a supplier under Simplified Acquisition Procedures.

(b) *Nonmanufacturers.* (1) A concern may qualify for a requirement to provide manufactured products as a nonmanufacturer if it:

(i) Does not exceed 500 employees;

(ii) Is primarily engaged in the retail or wholesale trade and normally sells the type of item being supplied; and

(iii) Will supply the end item of a small business manufacturer or processor made in the United States, or obtains a waiver of such requirement pursuant to paragraph (b)(3) of this section.

(2) For size purposes, there can be only one manufacturer of the end item being acquired. The manufacturer is the concern which, with its own facilities, performs the primary activities in transforming inorganic or organic substances, including the assembly of parts and components, into the end item being acquired. The end item must possess characteristics which, as a result of mechanical, chemical or human action, it did not possess before the original substances, parts or components were assembled or transformed. The end item may be finished and ready for utilization or consumption, or it may be semifinished as a raw material to be used in further manufacturing. Firms which perform only minimal operations upon the item being procured do not qualify as manufacturers of the end item. Firms that add substances, parts, or components to an existing end item to modify its performance will not be considered the end item manufacturer where those identical modifications can be performed by and are available from the manufacturer of the existing end item:

(i) SBA will evaluate the following factors in determining whether a concern is the manufacturer of the end item:

(A) The proportion of total value in the end item added by the efforts of the concern, excluding costs of overhead, testing, quality control, and profit;

(B) The importance of the elements added by the concern to the function of the end item, regardless of their relative value; and

(C) The concern's technical capabilities; plant, facilities and equipment; production or assembly line processes; packaging and boxing operations; labeling of products; and product warranties.

(ii) Firms that provide computer and other information technology equipment primarily consisting of component parts (such as motherboards, video cards, network cards, memory, power supplies, storage devices, and similar items) who install components totaling less than 50% of the value of the end item are generally not considered the manufacturer of the end item.

(3) The Administrator or designee may waive the requirement set forth in

paragraph (b)(1)(iii) of this section under the following two circumstances:

(i) The contracting officer has determined that no small business manufacturer or processor reasonably can be expected to offer a product meeting the specifications (including period for performance) required by a particular solicitation and SBA reviews and accepts that determination; or

(ii) SBA determines that no small business manufacturer or processor of the product or class of products is available to participate in the Federal procurement market.

(4) The two waiver possibilities identified in paragraph (b)(3) of this section are called "individual" and "class" waivers respectively, and the procedures for them are contained in § 121.1204.

(5) Any SBA waiver of the nonmanufacturer rule has no effect on requirements external to the Small Business Act which involve domestic sources of supply, such as the Buy American Act.

(c) *Kit assemblers.* (1) Where the manufactured item being acquired is a kit of supplies or other goods provided by an offeror for a special purpose, the offeror cannot exceed 500 employees, and 50 percent of the total value of the components of the kit must be manufactured by business concerns in the United States which are small under the size standards for the NAICS codes of the components being assembled. The offeror need not itself be the manufacturer of any of the items assembled.

(2) Where the Government has specified an item for the kit which is not produced by U.S. small business concerns, such item shall be excluded from the calculation of total value in paragraph (c)(1) of this section.

(d) *Simplified Acquisition Procedures.* Where the procurement of a manufactured item is processed under Simplified Acquisition Procedures, as defined in § 13.101 of the Federal Acquisition Regulation (FAR) (48 CFR 13.101), and where the anticipated cost of the procurement will not exceed $25,000, the offeror need not supply the end product of a small business concern as long as the product acquired is manufactured or produced in the United States, and the offeror does not exceed 500 employees. The offeror need not itself be the manufacturer of any of the items acquired.

(e) These requirements do not apply to small business concern subcontractors.

[61 FR 3286, Jan. 31, 1996; 61 FR 7986, Mar. 1, 1996, as amended at 65 FR 30863, May 15, 2000; 69 FR 29205, May 21, 2004]

§ 121.407 What are the size procedures for multiple item procurements?

If a procurement calls for two or more specific end items or types of services with different size standards and the offeror may submit an offer on any or all end items or types of services, the offeror must meet the size standard for each end item or service item for which it submits an offer. If the procurement calls for more than one specific end item or type of service and an offeror is required to submit an offer on all items, the offeror may qualify as a small business for the procurement if it meets the size standard of the item which accounts for the greatest percentage of the total contract value.

§ 121.408 What are the size procedures for SBA's Certificate of Competency Program?

(a) A firm which applies for a COC must file an "Application for Small Business Size Determination" (SBA Form 355). If the initial review of SBA Form 355 indicates the applicant, including its affiliates, is small for purposes of the COC program, SBA will process the application for COC. If the review indicates the applicant, including its affiliates, is other than small, SBA will initiate a formal size determination as set forth in § 121.1009. In such a case, SBA will not further process the COC application until a formal size determination is made.

(b) A concern is ineligible for a COC if a formal SBA size determination finds the concern other than small.

§ 121.409 What size standard applies in an unrestricted procurement for Certificate of Competency purposes?

For the purpose of receiving a Certificate of Competency in an unrestricted procurement, the applicable size standard is that corresponding to

the NAICS code set forth in the solicitation. For a manufactured product, a concern must also furnish a domestically produced or manufactured product, regardless of the size status of the product manufacturer. The offeror need not be the manufacturer of any of the items acquired.

[61 FR 3286, Jan. 31, 1996, as amended at 65 FR 30863, May 15, 2000]

§ 121.410 What are the size standards for SBA's Section 8(d) Subcontracting Program?

For subcontracting purposes pursuant to sections 8(d) of the Small Business Act, a concern is small for subcontracts which relate to Government procurements if it does not exceed the size standard for the NAICS code that the prime contractor believes best describes the product or service being acquired by the subcontract. However, subcontracts for engineering services awarded under the National Energy Policy Act of 1992 have the same size standard as Military and Aerospace Equipment and Military Weapons under NAICS code 541330.

[61 FR 3286, Jan. 31, 1996, as amended at 65 FR 30863, May 15, 2000; 69 FR 29205, May 21, 2004; 74 FR 46313, Sept. 9, 2009]

§ 121.411 What are the size procedures for SBA's Section 8(d) Subcontracting Program?

(a) Prime contractors may rely on the information contained in the Central Contractor Registration (CCR), or equivalent data base maintained or sanctioned by SBA, as an accurate representation of a concern's size and ownership characteristics for purposes of maintaining a small business source list. Even though a concern is on a small business source list, it must still qualify and self-certify as a small business at the time it submits its offer as a section 8(d) subcontractor.

(b) Upon determination of the successful subcontract offeror for a competitive subcontract, but prior to award, the prime contractor must inform each unsuccessful subcontract offeror in writing of the name and location of the apparent successful offeror.

(c) The self-certification of a concern subcontracting or proposing to subcontract under section 8(d) of the Small Business Act may be protested by the contracting officer, the prime contractor, the appropriate SBA official or any other interested party.

[61 FR 3286, Jan. 31, 1996, as amended at 69 FR 29205, May 21, 2004]

§ 121.412 What are the size procedures for partial small business set-asides?

A firm is required to meet size standard requirements only for the small business set-aside portion of a procurement, and is not required to qualify as a small business for the unrestricted portion.

§ 121.413 [Reserved]

Size Eligibility Requirements for Sales or Lease of Government Property

§ 121.501 What programs for sales or leases of Government property are subject to size determinations?

Sections 121.501 through 121.512 apply to small business size determinations for the purpose of the sale or lease of Government property, including the Timber Sales Program, the Special Salvage Timber Sales Program, and the sale of Government petroleum, coal and uranium.

§ 121.502 What size standards are applicable to programs for sales or leases of Government property?

(a) Unless otherwise specified in this part—

(1) A concern primarily engaged in manufacturing is small for sales or leases of Government property if it does not exceed 500 employees;

(2) A concern not primarily engaged in manufacturing is small for sales or leases of Government property if it has annual receipts not exceeding $7.0 million.

(b) Size status for such sales and leases is determined by the primary industry of the applicant business concern.

[61 FR 3286, Jan. 31, 1996, as amended at 67 FR 3056, Jan. 23, 2002; 70 FR 72594, Dec. 6, 2005; 73 FR 41254, July 18, 2008]

§ 121.503 Are SBA size determinations binding on parties?

Formal size determinations based upon a specific Government sale or lease, or made in response to a request from another Government agency under §121.901, are binding upon the parties. Other SBA opinions provided to contracting officers or others are only advisory, and are not binding or appealable.

§ 121.504 When does SBA determine the size status of a business concern?

SBA determines the size status of a concern (including its affiliates) as of the date the concern submits a written self-certification that it is small to the Government as part of its initial offer including price where there is a specific sale or lease at issue, or as set forth in §121.903 if made in response to a request of another Government agency.

§ 121.505 What is the effect of a self-certification?

(a) A contracting officer may accept a concern's self-certification as true for the particular sale or lease involved, in the absence of a written protest by other offerors or other credible information which would cause the contracting officer or SBA to question the size of the concern.

(b) Procedures for protesting the self-certification of an offeror are set forth in §§121.1001 through 121.1009.

§ 121.506 What definitions are important for sales or leases of Government-owned timber?

(a) *Forest product industry* means logging, wood preserving, and the manufacture of lumber and wood related products such as veneer, plywood, hardboard, particle board, or wood pulp, and of products of which lumber or wood related products are the principal raw materials.

(b) *Logging of timber* means felling and bucking, yarding, and/or loading. It does not mean hauling.

(c) *Manufacture of logs* means, at a minimum, breaking down logs into rough cuts of the finished product.

(d) *Sell* means, in addition to its usual and customary meaning, the exchange of sawlogs for sawlogs on a product-for-product basis with or without monetary adjustment, and an indirect transfer, such as the sale of the assets of a concern after it has been awarded one or more set-aside sales of timber.

(e) *Significant logging of timber* means that a concern uses its own employees to perform at least two of the following: felling and bucking, yarding, and loading.

§ 121.507 What are the size standards and other requirements for the purchase of Government-owned timber (other than Special Salvage Timber)?

(a) To be small for purposes of the sale of Government-owned timber (other than Special Salvage Timber) a concern must:

(1) Be primarily engaged in the logging or forest products industry;

(2) Not exceed 500 employees, taking into account its affiliates; and

(3) If it does not intend at the time of the offer to resell the timber—

(i) Agree that it will manufacture the logs with its own facilities or those of another business which meets the requirements of paragraphs (a)(1) and (a)(2) of this section;

(ii) Agree that if it eventually resells the timber, it will resell no more than 30% of the sawtimber volume to other businesses which do not meet the requirements of paragraphs (a)(1) and (a)(2) of this section; and

(iii) Agree that if it becomes acquired or controlled by a business which does not meet the requirements of paragraphs (a)(1) and (a)(2) of this section, it will require as a condition of the acquisition or change of control that the acquiring or controlling business resell at least 70% of the sawtimber volume to businesses which do meet the requirements of paragraphs (a)(1) and (a)(2) of this section; or

(4) If it intends at the time of offer to resell the timber—

(i) Agree that it will not sell more than 30% of such timber (50% of such timber if the concern is an Alaskan business) to a business which does not meet the requirements of paragraphs (a)(1) and (a)(2) of this section; and

(ii) Agree that if it becomes acquired or controlled by a business which does

not meet the requirements of paragraphs (a)(1) and (a)(2) of this section, it will require as a condition of the acquisition or change of control that the acquiring or controlling business resell at least 70% of the sawtimber volume (or at least 50% of the sawtimber volume, if it is an Alaskan business) to businesses which meet the requirements of paragraphs (a)(1) and (a)(2) of this section.

(b) For a period of three years following the date upon which a concern purchases timber under a small business set-aside (other than through the Special Salvage Timber Sale program), it must maintain a record of:

(1) The name, address and size status of every concern to which it sells the timber or sawlogs; and

(2) The species, grades and volumes of sawlogs sold.

(c) For a period of three years following the date upon which a concern purchases timber, it must by contract require all small business repurchasers of the sawlogs or timber it purchased under the small business set-aside to maintain the records described in paragraph (b) of this section.

§ 121.508 What are the size standards and other requirements for the purchase of Government-owned Special Salvage Timber?

(a) In order to purchase Government-owned Special Salvage Timber from the United States Forest Service or the Bureau of Land Management as a small business, a concern must:

(1) Be primarily engaged in the logging or forest product industry;

(2) Have, together with its affiliates, no more than twenty-five employees during any pay period for the last twelve months; and

(3) If it does not intend at the time of offer to resell the timber—

(i) Agree that it will manufacture a significant portion of the logs with its own employees; and

(ii) Agree that it will log the timber only with its own employees or with employees of another business which is eligible for award of a Special Salvage Timber sales contract; or

(4) If it intends at the time of offer to resell the timber, agree that it will perform a significant portion of timber logging with its own employees and that it will subcontract the remainder of the timber logging to a concern which is eligible for award of a Special Salvage Timber sales contract.

§ 121.509 What is the size standard for leasing of Government land for coal mining?

A concern is small for this purpose if it:

(a) Together with its affiliates, does not have more than 250 employees;

(b) Maintains management and control of the actual mining operations of the tract; and

(c) Agrees that if it subleases the Government land, it will be to another small business, and that it will require its sublessors to agree to the same.

§ 121.510 What is the size standard for leasing of Government land for uranium mining?

A concern is small for this purpose if it, together with its affiliates, does not have more than 100 employees.

§ 121.511 What is the size standard for buying Government-owned petroleum?

A concern is small for this purpose if it is primarily engaged in petroleum refining and meets the size standard for a petroleum refining business.

§ 121.512 What is the size standard for stockpile purchases?

A concern is small for this purpose if:

(a) It is primarily engaged in the purchase of materials which are not domestic products; and

(b) Its annual receipts, together with its affiliates, do not exceed $57.5 million.

[61 FR 3286, Jan. 31, 1996, as amended at 67 FR 3056, Jan. 23, 2002; 70 FR 72594, Dec. 6, 2005; 73 FR 41254, July 18, 2008]

SIZE ELIGIBILITY REQUIREMENTS FOR THE 8(A) BUSINESS DEVELOPMENT PROGRAM

§ 121.601 What is a small business for purposes of admission to SBA's 8(a) Business Development program?

An applicant must not exceed the size standard corresponding to its primary industry classification in order

to qualify for admission to SBA's 8(a) Business Development Program.

[69 FR 29205, May 21, 2004]

§ 121.602 At what point in time must a 8(a) BD applicant be small?

A 8(a) BD applicant must be small for its primary industry at the time SBA certifies it for admission into the program.

[61 FR 3286, Jan. 31, 1996, as amended at 69 FR 29206, May 21, 2004]

§ 121.603 How does SBA determine whether a Participant is small for a particular 8(a) BD subcontract?

(a) *Self certification by Participant.* A 8(a) BD Participant must certify that it qualifies as a small business under the NAICS code assigned to a particular 8(a) BD subcontract as part of its initial offer including price to the procuring agency. The Participant also must submit a copy of its offer, including its self-certification as to size, to the appropriate SBA district office at the same time it submits the offer to the procuring agency. *See* § 121.404 for the time at which size is determined for, and § 121.406 for the applicability of the nonmanufacturer rule to, 8(a) BD procurements.

(b) *Verification of size by SBA.* Within 30 days of its receipt of a Participant's size self-certification for a particular 8(a) BD subcontract, the SBA district office serving the geographic area in which the Participant's principal office is located will review the Participant's self-certification and determine if it is small for purposes of that subcontract. The SBA district office will review the Participant's most recent financial statements and other relevant data and then notify the Participant of its decision.

(c) *Changes in size between date of self-certification and date of award.* (1) Where SBA verifies that the selected Participant is small for a particular procurement, subsequent changes in size up to the date of award, except those due to merger with or acquisition by another business concern, will not affect the firm's size status for that procurement.

(2) Where a Participant has merged with or been acquired by another business concern between the date of its self-certification and the date of award, the concern must recertify its size status, and SBA must verify the new certification before award can occur.

(d) *Finding Participant to be other than small.* (1) A Participant may request a formal size determination (pursuant to §§ 121.1001 through 121.1009) with the SBA Government Contracting Area Office serving the geographic area in which the principal office of the Participant is located within 5 working days of its receipt of notice from the SBA district office that it is not small for a particular 8(a) BD subcontract.

(2) Where the Participant does not timely request a formal size determination, SBA may accept the procurement in support of another Participant, or may rescind its acceptance of the offer for the 8(a) BD program, as appropriate.

[61 FR 3286, Jan. 31, 1996, as amended at 65 FR 30863, May 15, 2000; 69 FR 29206, May 21, 2004]

§ 121.604 Are 8(a) BD Participants considered small for purposes of other SBA assistance?

A concern which SBA determines to be a small business for the award of a 8(a) BD subcontract will be considered to have met applicable size eligibility requirements of other SBA programs where that assistance directly and primarily relates to the performance of the 8(a) BD subcontract in question.

[61 FR 3286, Jan. 31, 1996, as amended at 69 FR 29206, May 21, 2004]

SIZE ELIGIBILITY REQUIREMENTS FOR THE SMALL BUSINESS INNOVATION RESEARCH (SBIR) PROGRAM

§ 121.701 What SBIR programs are subject to size determinations?

(a) These sections apply to size status for award of a funding agreement pursuant to the Small Business Innovation Development Act of 1982 (Pub. L. 97–219, 15 U.S.C. 638(e) through (k)).

(b) *Funding agreement officer* means a contracting officer, a grants officer, or a cooperative agreement officer.

(c) *Funding agreement* means any contract, grant or cooperative agreement

entered into between any Federal agency and any small business for the performance of experimental, developmental, or research work funded in whole or in part by the Federal Government. Such work includes:

(1) A systematic, intensive study directed toward greater knowledge or understanding of the subject studied;

(2) A systematic study directed specifically toward applying new knowledge to meet a recognized need; or

(3) A systematic application of knowledge toward the production of useful materials, devices, and systems or methods, including design, development, and improvement of prototypes and new processes to meet specific requirements.

§ 121.702 What size standards are applicable to the SBIR program?

To be eligible for award of funding agreements in the SBA's Small Business Innovation Research (SBIR) program, a business concern must meet the requirements of paragraphs (a) and (b) below:

(a) *Ownership and control.* (1) An SBIR awardee must (i) be a concern which is at least 51% owned and controlled by one or more individuals who are citizens of the United States, or permanent resident aliens in the United States; or

(ii) Be a concern which is at least 51% owned and controlled by another business concern that is itself at least 51% owned and controlled by individuals who are citizens of, or permanent resident aliens in the United States; or

(iii) Be a joint venture in which each entity to the venture must meet the requirements set forth in either paragraphs (a)(1)(i) or (a)(1)(ii) of this section.

(2) If an Employee Stock Ownership Plan owns all or part of the concern, SBA considers each stock trustee and plan member to be an owner.

(3) If a trust owns all or part of the concern, SBA considers each trustee and trust beneficiary to be an owner.

(b) *Size.* An SBIR awardee, together with its affiliates, not have more than 500 employees.

[69 FR 70185, Dec. 3, 2004, as amended at 71 FR 69183, Nov. 30, 2006]

§ 121.703 Are formal size determinations binding on parties?

Size determinations by authorized SBA officials are formal actions based upon a specific funding agreement, and are binding upon the parties. Other SBA opinions provided to funding agreement officers or others, are only advisory, and are not binding or appealable.

§ 121.704 When does SBA determine the size status of a business concern?

The size status of a concern for the purpose of a funding agreement under the SBIR program is determined as of the date of the award for both Phase I and Phase II SBIR awards or on the date of the request for a size determination, if an award is pending.

[69 FR 29206, May 21, 2004]

§ 121.705 Must a business concern self-certify its size status?

(a) A firm must self-certify that it currently meets the eligibility requirements set forth in § 121.702 of this title or will meet those eligibility requirements on the date of award of a funding agreement for a Phase I or Phase II SBIR award.

(b) A funding agreement officer may accept a concern's self-certification as true for the particular funding agreement involved in the absence of a written protest by other offerors or other credible information which would cause the funding agreement officer or SBA to question the size of the concern.

(c) Procedures for protesting an offeror's self-certification are set forth in §§ 121.1001 through 121.1009.

[61 FR 3286, Jan. 31, 1996, as amended at 69 FR 29206, May 21, 2004]

SIZE ELIGIBILITY REQUIREMENTS FOR PAYING REDUCED PATENT FEES

§ 121.801 May patent fees be reduced if a concern is small?

These sections apply to size status for the purpose of paying reduced patent fees authorized by Pub. L. 97–247, 96 Stat. 317. The eligibility requirements for independent inventors and nonprofit organizations for the purpose of

paying reduced patent fees are set forth in regulations of the Patent and Trademark Office of the Department of Commerce, 37 CFR 1.9, 1.27, 1.28.

§ 121.802 What size standards are applicable to reduced patent fees programs?

A concern eligible for reduced patent fees is one:

(a) Whose number of employees, including affiliates, does not exceed 500 persons; and

(b) Which has not assigned, granted, conveyed, or licensed (and is under no obligation to do so) any rights in the invention to any person who made it and could not be classified as an independent inventor, or to any concern which would not qualify as a non-profit organization or a small business concern under this section.

§ 121.803 Are formal size determinations binding on parties?

Size determinations by authorized SBA officials are formal actions, based upon a specific patent application pursuant to the rules of the Patent and Trademark Office, Department of Commerce, and are binding upon the parties. Other SBA opinions provided to patent applicants or others are only advisory, and are not binding or appealable.

§ 121.804 When does SBA determine the size status of a business concern?

Size status is determined as of the date of the patent applicant's written verification of size.

§ 121.805 May a business concern self-certify its size status?

(a) A concern verifies its size status with its submission of its patent application.

(b) Any attempt to establish small size status improperly (fraudulently, through gross negligence, or otherwise) may result in remedial action by the Patent and Trademark Office.

(c) In the absence of credible information indicating otherwise, the Patent and Trademark Office may accept the verification by the concern as a small business as true.

(d) Questions concerning the size verification are resolved initially by the Patent and Trademark Office. If not verified as small, the applicant may request a formal SBA size determination.

Size Eligibility Requirements for Compliance With Programs of Other Agencies

§ 121.901 Can other Government agencies obtain SBA size determinations?

Upon request by another Government agency, SBA will provide a size determination, under SBA rules, standards and procedures, for its use in determining compliance with small business requirements of its statutes, regulations or programs.

§ 121.902 What size standards are applicable to programs of other agencies?

SBA size standards. The size standards for compliance with programs of other agencies are those for SBA programs which are most comparable to the programs of such other agencies, unless the agency and SBA agree otherwise.

[67 FR 13716, Mar. 26, 2002]

§ 121.903 How may an agency use size standards for its programs that are different than those established by SBA?

(a) Federal agencies or departments promulgating regulations relating to small businesses usually use SBA size criteria. In limited circumstances, if they decide the SBA size standard is not suitable for their programs, then agency heads may establish a more appropriate small business definition for the exclusive use in such programs, but only when:

(1) The size standard will determine:

(i) The size of a manufacturing concern by its average number of employees based on the preceding twelve calendar months, determined according to § 121.106;

(ii) The size of a services concern by its average annual receipts over a period of at least three years, determined according to § 121.104;

(iii) The size of other concerns on data over a period of at least three years; or,

(iv) Other factors approved by SBA;

(2) The agency has consulted in writing with SBA's Division Chief, office of Size Standards at least fourteen (14) calendar days before publishing the proposed rule which is part of the rulemaking process. The written consultation will include:

(i) What size standard the agency contemplates using;

(ii) To what agency program it will apply;

(iii) How the agency arrived at this particular size standard for this program; and,

(iv) Why SBA's existing size standards do not satisfy the program requirements;

(3) The agency proposes the size standard for public comment pursuant to the Administrative Procedure Act, 5 U.S.C. 553;

(4) The agency provides a copy of the proposed rule, when it publishes it for public comment as part of the rulemaking process, to SBA's Division Chief, Office of Size Standards; and

(5) SBA's Administrator approves the size standard before the agency adopts a final rule or otherwise prescribes the size standard for its use. The agency's request for the SBA Administrator's approval must include:

(i) Copies of all comments on the proposed size standard received in response to the proposed rule;

(ii) A separate written justification for the intended size standard;

(iii) A copy of the intended final rule if available at that time, or a copy of the intended final rule and preamble prior to its publication; and

(iv) Other information SBA may request in connection with the request.

(b) When approving any size standard established pursuant to this section, SBA's Administrator will ensure that the size standard varies from industry to industry to the extent necessary to reflect the differing characteristics of the various industries, and consider other relevant factors.

(c) Where the agency head is developing a size standard for the sole purpose of performing a Regulatory Flexibility Analysis pursuant to section 601(3) of the Regulatory Flexibility Act, the department or agency may, after consultation with the SBA Office of Advocacy, establish a size standard different from SBA's which is more appropriate for such analysis.

[67 FR 13716, Mar. 26, 2002]

§ 121.904 When does SBA determine the size status of a business concern?

For compliance with programs of other agencies, SBA will base its size determination on the size of the concern as of the date set forth in the request of the other agency.

[67 FR 13716, Mar. 26, 2002]

PROCEDURES FOR SIZE PROTESTS AND REQUESTS FOR FORMAL SIZE DETERMINATIONS

§ 121.1001 Who may initiate a size protest or request a formal size determination?

(a) *Size Status Protests.* (1) For SBA's Small Business Set-Aside Program, including the Property Sales Program, or any instance in which a procurement or order has been restricted to or reserved for small business or a particular group of small business, the following entities may file a size protest in connection with a particular procurement, sale or order:

(i) Any offeror whom the contracting officer has not eliminated for reasons unrelated to size;

(ii) The contracting officer;

(iii) The SBA Government Contracting Area Director having responsibility for the area in which the headquarters of the protested offeror is located, regardless of the location of a parent company or affiliates, or the Director, Office of Government Contracting; and

(iv) Other interested parties. Other interested parties include large businesses where only one concern submitted an offer for the specific procurement in question. A concern found to be other than small in connection with the procurement is not an interested party unless there is only one remaining offeror after the concern is found to be other than small.

(2) For competitive 8(a) contracts, the following entities may protest:

(i) Any offeror whom the contracting officer has not eliminated for reasons unrelated to size;

(ii) The contracting officer; or

(iii) The SBA District Director, or designee, in either the district office serving the geographical area in which the procuring activity is located or the district office that services the apparent successful offeror, or the Associate Administrator for Business Development.

(3) For SBA's Subcontracting Program, the following entities may protest:

(i) The prime contractor;

(ii) The contracting officer;

(iii) Other potential subcontractors;

(iv) The responsible SBA Government Contracting Area Director or the Director, Office of Government Contracting; and

(v) Other interested parties.

(4) For SBA's Small Business Innovation Research (SBIR) Program, the following entities may protest:

(i) A prospective offeror;

(ii) The funding agreement officer;

(iii) The responsible SBA Government Contracting Area Director or the Division Chief, Office of Technology; and

(iv) Other interested parties.

(5) For the Department of Defense's Small Disadvantaged Business (SDB) Program, and any other similar program of another Federal agency, the following entities may file a protest in connection with a particular SDB procurement:

(i) Any offeror for the specific SDB requirement whom the contracting officer has not eliminated for reasons unrelated to size;

(ii) The contracting officer; and

(iii) The responsible SBA Area Director for Government Contracting, the SBA Director, Office of Government Contracting, or the SBA Associate Administrator for Business Development;

(6) For SBA's HUBZone program, the following entities may protest in connection with a particular HUBZone procurement:

(i) Any concern that submits an offer for a specific HUBZone set-aside procurement that the contracting officer has not eliminated for reasons unrelated to size;

(ii) Any concern that submitted an offer in full and open competition and its opportunity for award will be affected by a price evaluation preference given a qualified HUBZone SBC;

(iii) The contracting officer; and

(iv) The SBA Director, Office of HUBZone, or designee.

(7) For any unrestricted Government procurement in which a business concern has represented itself as a small business concern, the following entities may protest in connection with a particular procurement:

(i) Any offeror;

(ii) The contracting officer; and

(iii) The responsible SBA Government Contracting Area Director, the Director, Office of Government Contracting, or the Associate Administrator for Business Development.

(8) For SBA's Service Disabled Veteran-Owned Small Business Concern program, the following entities may protest in connection with a particular service-disabled veteran-owned procurement:

(i) Any concern that submits an offer for a specific service-disabled veteran-owned small business set-aside contract;

(ii) The contracting officer;

(iii) The SBA Government Contracting Area Director; and

(iv) The Director, Office of Government Contracting, or designee.

(9) For SBA's WOSB Federal Contracting Assistance Procedures, the following entities may protest:

(i) Any concern that submits an offer for a specific requirement set aside for WOSBs or WOSBs owned by one or more women who are economically disadvantaged (EDWOSB) pursuant to part 127;

(ii) The contracting officer;

(iii) The SBA Government Contracting Area Director; and

(iv) The Director for Government Contracting, or designee.

(b) *Request for Size Determinations.* (1) For SBA's Financial Assistance Programs, the following entities may request a formal size determination:

(i) The applicant for assistance; and

(ii) The SBA official with authority to take final action on the assistance

requested. That official may also request the appropriate Government Contracting Area Office to determine whether affiliation exists between an applicant for financial assistance and one or more other entities for purposes of determining whether the applicant would exceed the loan limit amount imposed by § 120.151 of this chapter.

(iii) The SBA Associate Administrator for Investment or designee may request a formal size determination for any purpose relating to the SBIC program (*see* part 107 of this chapter) or the NMVC program (*see* part 108 of this chapter). A formal size determination includes a request to determine whether or not affiliation exists between two or more entities for any purpose relating to the SBIC program.

(2) For SBA's 8(a) BD program:

(i) Concerning initial or continued 8(a) BD eligibility, the following entities may request a formal size determination:

(A) The 8(a) BD applicant concern or Participant; or

(B) The Director of the Division of Program Certification and Eligibility or the Associate Administrator for Business Development.

(ii) Concerning individual sole source 8(a) contract awards, the following entities may request a formal size determination:

(A) The Participant nominated for award of the particular sole source contract;

(B) The SBA program official with authority to execute the 8(a) contract or, where applicable, the procuring activity contracting officer who has been delegated SBA's 8(a) contract execution functions; or

(C) The SBA District Director in the district office that services the Participant, or the Associate Administrator for Business Development.

(3) For SBA's Certificate of Competency Program, the following entities may request a formal size determination:

(i) The offeror who has applied for a COC; and

(ii) The responsible SBA Government Contracting Area Director or the Director, Office of Government Contracting.

(4) For SBA's sale or lease of government property, the following entities may request a formal size determination:

(i) The responsible SBA Government Contracting Area Director or the Director, Office of Government Contracting; and

(ii) Authorized officials of other Federal agencies administering a property sales program.

(5) For eligibility to pay reduced patent fees, the following entities may request a formal size determination:

(i) The applicant for the reduced patent fees; and

(ii) The Patent and Trademark Office.

(6) For purposes of determining compliance with small business requirements of another Government agency program not otherwise specified in this section, an official with authority to administer the program involved may request a formal size determination.

(7) In connection with initial or continued eligibility for the Small Disadvantaged Business (SDB) program, the following may request a formal size determination:

(i) The applicant or SDB concern; or

(ii) The Director of the Division of Program Certification and Eligibility or the Associate Administrator for Business Development.

(8) In connection with initial or continued eligibility for the HUBZone program, the following may request a formal size determination:

(i) The applicant or qualified HUBZone business concern; or

(ii) The Director, Office of HUBZone, or designee.

(9) For purposes of validating that firms listed in the Central Contractor Registration database are small, the Government Contracting Area Director or the Director, Office of Government Contracting may initiate a formal size determination when sufficient information exists that calls into question a firm's small business status. The current date will be used to determine size, and SBA will initiate the process to remove from the database the small

business designation of any firm found to be other than small.

[61 FR 3286, Jan. 31, 1996, as amended at 63 FR 31907, June 11, 1998; 63 FR 35739, June 30, 1998; 69 FR 25266, May 5, 2004; 69 FR 29206, May 21, 2004; 69 FR 29420, May 24, 2004; 69 FR 44461, July 26, 2004; 73 FR 56947, Oct. 1, 2008; 74 FR 45753, Sept. 4, 2009]

EFFECTIVE DATE NOTE: At 75 FR 62280, Oct. 7, 2010, §121.1001 was amended by revising paragraph (a)(9), effective Feb 4, 2011. For the convenience of the user, the revised text is set forth as follows:

§ 121.1001 Who may initiate a size protest or request a formal size determination?

(a) * * *

(9) For SBA's WOSB Federal Contracting Program, the following entities may protest:

(i) Any concern that submits an offer for a specific requirement set aside for WOSBs or WOSBs owned by one or more women who are economically disadvantaged (EDWOSB) pursuant to part 127 of this chapter;

(ii) The contracting officer;

(iii) The SBA Government Contracting Area Director; and

(iv) The Director for Government Contracting, or designee.

* * * * *

§ 121.1002 Who makes a formal size determination?

The responsible Government Contracting Area Director or designee makes all formal size determinations in response to either a size protest or a request for a formal size determination, with the exception of size determinations for purposes of the Disaster Loan Program, which will be made by the Disaster Area Office Director or designee responsible for the area in which the disaster occurred.

§ 121.1003 Where should a size protest be filed?

A protest involving a government procurement or sale must be filed with the contracting officer for the procurement or sale, who must forward the protest to the SBA Government Contracting Area Office serving the area in which the headquarters of the protested concern is located, regardless of the location of any parent company or affiliates.

§ 121.1004 What time limits apply to size protests?

(a) *Protests by entities other than contracting officers or SBA*—(1) *Non-negotiated procurement or sale.* A protest must be received by the contracting officer prior to the close of business on the 5th day, exclusive of Saturdays, Sundays, and legal holidays, after bid or proposal opening.

(2) *Negotiated procurement.* A protest must be received by the contracting officer prior to the close of business on the 5th day, exclusive of Saturdays, Sundays, and legal holidays, after the contracting officer has notified the protestor of the identity of the prospective awardee.

(3) *Long-term contracts.* For contracts with durations greater than five years (including options), including all existing long-term contracts, Multiple Award Schedule (MAS) Contracts, Multiple Agency Contracts (MACs), and Government-wide Acquisition Contracts (GWACs):

(i) Protests regarding size certifications made for contracts must be received by the contracting officer prior to the close of business on the 5th day, exclusive of Saturdays, Sundays, and legal holidays, after receipt of notice (including notice received in writing, orally, or via electronic posting) of the identity of the prospective awardee or award.

(ii) Protests regarding size certifications made for an option period must be received by the contracting officer prior to the close of business on the 5th day, exclusive of Saturdays, Sundays, and legal holidays, after receipt of notice (including notice received in writing, orally, or via electronic posting) of the size certification made by the protested concern.

(A) A contracting officer is not required to terminate a contract where a concern is found to be other than small pursuant to a size protest concerning a size certification made for an option period.

(B) [Reserved]

(iii) Protests relating to size certifications made in response to a contracting officer's request for size certifications in connection with an individual order must be received by the contracting officer prior to the close of

business on the 5th day, exclusive of Saturdays, Sundays, and legal holidays, after receipt of notice (including notice received in writing, orally, or via electronic posting) of the identity of the prospective awardee or award.

(4) *Electronic notification of award.* Where notification of award is made electronically, such as posting on the Internet under Simplified Acquisition Procedures, a protest must be received by the contracting officer before close of business on the fifth day, exclusive of Saturdays, Sundays, and legal holidays, after the electronic posting.

(5) *No notice of award.* Where there is no requirement for written pre-award notice or notice of award, or where the contracting officer has failed to provide written notification of award, the 5-day protest period will commence upon oral notification by the contracting officer or authorized representative or another means (such as public announcements or other oral communications) of the identity of the apparent successful offeror.

(b) *Protests by contracting officers or SBA.* The time limitations in paragraph (a) of this section do not apply to contracting officers or SBA, and they may file protests before or after awards, except to the extent set forth in paragraph (e) of this section. Notwithstanding paragraph (e), for purposes of the SBIR program the contracting officer and SBA may file a protest in anticipation of award.

(c) *Effect of contract award.* A timely filed protest applies to the procurement in question even though a contracting officer awarded the contract prior to receipt of the protest.

(d) *Untimely protests.* A protest received after the allotted time limits must still be forwarded to SBA. SBA will dismiss untimely protests.

(e) *Premature protests.* A protest filed by any party, including the contracting officer, before bid opening or notification to offerors of the selection of the apparent successful offer will be dismissed as premature.

[61 FR 3286, Jan. 31, 1996, as amended at 69 FR 29206, May 21, 2004; 71 FR 66444, Nov. 15, 2006]

§ 121.1005 How must a protest be filed with the contracting officer?

A protest must be delivered to the contracting officer by hand, telegram, mail, facsimile, Federal Express or other overnight delivery service, e-mail, or telephone. If a protest is made by telephone, the contracting officer must later receive a confirming letter either within the 5-day period in § 121.1004(a)(1) or postmarked no later than one day after the date of the telephone protest.

[61 FR 3286, Jan. 31, 1996, as amended at 69 FR 29206, May 21, 2004]

§ 121.1006 When will a size protest be referred to an SBA Government Contracting Area Office?

(a) A contracting officer who receives a protest (other than from SBA) must forward the protest promptly to the SBA Government Contracting Area Office serving the area in which the headquarters of the offeror is located.

(b) A contracting officer's referral must contain the following information:

(1) The protest and any accompanying materials;

(2) A copy of the self-certification as to size;

(3) Identification of the applicable size standard;

(4) A copy of the solicitation;

(5) Identification of the date of bid opening or notification provided to unsuccessful offerors;

(6) The date on which the protest was received; and

(7) A complete address and point of contact for the protested concern.

§ 121.1007 Must a protest of size status relate to a particular procurement and be specific?

(a) *Particular procurement.* A protest challenging the size of a concern which does not pertain to a particular procurement or sale will not be acted on by SBA.

(b) *A protest must include specific facts.* A protest must be sufficiently specific to provide reasonable notice as to the grounds upon which the protested concern's size is questioned. Some basis for the belief or allegation stated in the protest must be given. A protest

merely alleging that the protested concern is not small or is affiliated with unnamed other concerns does not specify adequate grounds for the protest. No particular form is prescribed for a protest. Where materials supporting the protest are available, they should be submitted with the protest.

(c) *Non-specific protests will be dismissed.* Protests which do not contain sufficient specificity will be dismissed by SBA. The following are examples of allegation specificity:

Example 1: An allegation that concern X is large because it employs more than 500 employees (where 500 employees is the applicable size standard) without setting forth a basis for the allegation is non-specific.

Example 2: An allegation that concern X is large because it exceeds the 500 employee size standard (where 500 employees is the applicable size standard) because a higher employment figure was published in publication Y is sufficiently specific.

Example 3: An allegation that concern X is affiliated with concern Y without setting forth any basis for the allegation is non-specific.

Example 4: An allegation that concern X is affiliated with concern Y because Mr. A is the majority shareholder in both concerns is sufficiently specific.

Example 5: An allegation that concern X has revenues in excess of $5 million (where $5 million is the applicable size standard) without setting forth a basis for the allegation is non-specific.

Example 6: An allegation that concern X exceeds the size standard (where the applicable size standard is $5 million) because it received Government contracts in excess of $5 million last year is sufficiently specific.

[61 FR 3286, Jan. 31, 1996, as amended at 69 FR 29206, May 21, 2004]

§ 121.1008 What occurs after SBA receives a size protest or request for a formal size determination?

(a) When SBA receives a size protest, the SBA Area Director for Government Contracting, or designee, will notify the contracting officer, the protested concern, and the protestor that the protest has been received. If the protest pertains to a requirement involving SBA's HUBZone program, the Area Director will also notify the D/HUB of the protest. If the protest pertains to a requirement set aside for WOSBs or EDWOSBs, the Area Director will also notify SBA's Director for Government Contracting of the protest. If the protest pertains to a requirement involving SBA's SBIR Program, the Area Director will also notify the Division Chief, Office of Technology. If the protest involves the size status of a concern that SBA has certified as a small disadvantaged business (SDB) (*see* part 124, subpart B of this chapter) the Area Director will notify SBA's Associate Administrator for Business Development. If the protest pertains to a requirement that has been reserved for competition among eligible 8(a) BD program participants, the Area Director will notify the SBA district office servicing the 8(a) concern whose size status has been protested. SBA will provide a copy of the protest to the protested concern together with SBA Form 355, Application for Small Business Size Determination, by certified mail, return receipt requested, or by any overnight delivery service that provides proof of receipt. SBA will ask the protested concern to complete the form and respond to the allegations in the protest.

(b) When SBA receives a request for a formal size determination in accord with §121.1001(b), SBA will provide a blank copy of SBA Form 355 to the concern whose size is at issue.

(c) The protested concern or concern whose size is at issue must return the completed SBA Form 355 and all other requested information to SBA within 3 working days from the date of receipt of the blank form from SBA. SBA has discretion to grant an extension of time to file the form. The firm must attach to the completed SBA Form 355 its answers to the allegations contained in the protest, where applicable, together with any supporting material.

(d) If a concern whose size status is at issue fails to submit a completed SBA Form 355, responses to the allegations of the protest, or other requested information within the time allowed by SBA, or if it submits incomplete information, SBA may presume that disclosure of the information required by the form or other missing information would demonstrate that the concern is other than a small business. A concern whose size status is at issue must furnish information about its alleged affiliates to SBA, despite any third party claims of privacy or confidentiality,

because SBA will not disclose information obtained in the course of a size determination except as permitted by Federal law.

[61 FR 3286, Jan. 31, 1996, as amended at 63 FR 31908, June 11, 1998; 69 FR 29207, May 21, 2004; 73 FR 56948, Oct. 1, 2008; 74 FR 45753, Sept. 4, 2009]

EFFECTIVE DATE NOTE: At 75 FR 62280, Oct. 7, 2010, §121.1008(a) was amended by adding a sentence after the third sentence, effective Feb 4, 2011. For the convenience of the user, the added text is set forth as follows:

§ 121.1008 What occurs after SBA receives a size protest or request for a formal size determination?

(a) * * * If the protest pertains to a requirement set aside for WOSBs or EDWOSBs, the Area Director will also notify SBA's Director for Government Contracting of the protest. * * *

§ 121.1009 What are the procedures for making the size determination?

(a) *Time frame for making size determination.* After receipt of a protest or a request for a formal size determination, SBA will make a formal size determination within 10 working days, if possible.

(b) *Basis for determination.* The size determination will be based primarily on the information supplied by the protestor or the entity requesting the size determination and that provided by the concern whose size status is at issue. The determination, however, may also be based on grounds not raised in the protest or request for size determination. SBA may use other information and may make requests for additional information to the protestor, the concern whose size status is at issue and any alleged affiliates, or other parties.

(c) *Burden of persuasion.* The concern whose size is under consideration has the burden of establishing its small business size.

(d) *Weight of evidence.* SBA will give greater weight to specific, signed, factual evidence than to general, unsupported allegations or opinions. In the case of refusal or failure to furnish requested information within a required time period, SBA may assume that disclosure would be contrary to the interests of the party failing to make disclosure.

(e) *Formal size determination.* The SBA will base its formal size determination upon the record, including reasonable inferences from the record, and will state in writing the basis for its findings and conclusions.

(f) *Notification of determination.* SBA will promptly notify the contracting officer, the protestor, and the protested offeror, as well as each affiliate or alleged affiliate, of the size determination. The notification will be by certified mail, return receipt requested, or by any overnight delivery service that provides proof of receipt.

(g) *Results of an SBA Size Determination.* (1) A formal size determination becomes effective immediately and remains in full force and effect unless and until reversed by OHA.

(2) A contracting officer may award a contract based on SBA's formal size determination.

(3) If the formal size determination is appealed to OHA, the OHA decision on appeal will apply to the pending procurement or sale if the decision is received before award. OHA decisions received after contract award will not apply to that procurement or sale, but will have future effect, unless the contracting officer agrees to apply the OHA decision to the procurement or sale.

(4) Once SBA has determined that a concern is other than small for purposes of a particular procurement, the concern cannot later become eligible for the procurement by reducing its size.

(5) A concern determined to be other than small under a particular size standard is ineligible for any procurement or any assistance authorized by the Small Business Act or the Small Business Investment Act of 1958 which requires the same or a lower size standard, unless SBA recertifies the concern to be small pursuant to §121.1010 or OHA reverses the adverse size determination. After an adverse size determination, a concern cannot self-certify as small under the same or lower size standard unless it is first recertified as small by SBA. If a concern does so, it may be in violation of criminal laws, including section 16(d) of the Small Business Act, 15 U.S.C. 645(d). If the concern has already certified itself as

small on a pending procurement or on an application for SBA assistance, the concern must immediately inform the officials responsible for the pending procurement or requested assistance of the adverse size determination.

(h) Limited reopening of size determinations. In cases where the size determination contains clear administrative error or a clear mistake of fact, SBA may, in its sole discretion, reopen the size determination to correct the error or mistake, provided no appeal has been filed with OHA.

[61 FR 3286, Jan. 31, 1996, as amended at 67 FR 47245, July 18, 2002; 69 FR 29207, May 21, 2004]

§ 121.1010 How does a concern become recertified as a small business?

(a) A concern may request SBA to recertify it as small at any time by filing an application for recertification with the Government Contracting Area Office responsible for the area in which the headquarters of the applicant is located, regardless of the location of parent companies or affiliates. No particular form is prescribed for the application; however, the request for recertification must be accompanied by a current completed SBA Form 355 and any other information sufficient to show a significant change in its ownership, management, or other factors bearing on its status as a small concern.

(b) Recertification will not be required nor will the prohibition against future self-certification apply if the adverse SBA size determination is based solely on a finding of affiliation due to a joint venture (e.g., ostensible subcontracting) limited to a particular Government procurement or property sale, or is based on an ineligible manufacturer where the eligible small business bidder or offeror is a nonmanufacturer on a particular Government procurement.

(c) A denial of an application for recertification is a formal size determination and may be reviewed by OHA at the discretion of that office.

(d) The granting of an application for recertification has future effect only. While it is a formal size determination, notice of recertification is required to be given only to the applicant.

Appeals of Size Determinations and NAICS Code Designations

§ 121.1101 Are formal size determinations subject to appeal?

(a) Appeals from formal size determinations may be made to OHA. Unless an appeal is made to OHA, the size determination made by a SBA Government Contracting Area Office or Disaster Area Office is the final decision of the agency. The procedures for appealing a formal size determination to OHA are set forth in part 134 of this chapter. The OHA appeal is an administrative remedy that must be exhausted before judicial review of a formal size determination may be sought in a court.

(b) OHA will not review a formal size determination where the contract has been awarded and the issue(s) raised in a petition for review are contract specific, such as compliance with the nonmanufacturer rule (*see* § 121.406(b)), or joint venture or ostensible subcontractor rule (*see* § 121.103(h)).

[69 FR 29207, May 21, 2004]

§ 121.1102 Are NAICS code designations subject to appeal?

A NAICS code designation made by a procuring activity contracting officer may be appealed to OHA. The procedures governing OHA appeals are set forth in part 134 of this chapter. The OHA appeal is an administrative remedy that must be exhausted before judicial review of a NAICS code designation may be sought in a court.

[67 FR 47245, July 18, 2002]

§ 121.1103 What are the procedures for appealing a NAICS code designation?

(a) Any interested party adversely affected by a NAICS code designation may appeal the designation to OHA. The only exception is that, for a sole source contract reserved under SBA's 8(a) Business Development program (*see* part 124 of this chapter), only SBA's Associate Administrator for Business Development may appeal the NAICS code designation.

(b) The contracting officer's determination of the applicable NAICS code is final unless appealed as follows:

(1) An appeal from a contracting officer's NAICS code designation and applicable size standard must be served and filed within 10 calendar days after the issuance of the initial solicitation. OHA will summarily dismiss an untimely NAICS code appeal.

(2)(i) The appeal petition must be in writing and must be sent to the Office of Hearings & Appeals, U.S. Small Business Administration, 409 3rd Street, SW., Suite 5900, Washington, DC 20416.

(ii) There is no required format for a NAICS code appeal, but an appeal must include the following information: the solicitation or contract number; the name, address, and telephone number of the contracting officer; a full and specific statement as to why the NAICS code designation is erroneous, and argument in support thereof; and the name, address and telephone number of the appellant or its attorney.

(3) The appellant must serve the appeal petition upon the contracting officer who assigned the NAICS code to the acquisition and SBA's Office of General Counsel, Associate General Counsel for Procurement Law, 409 3rd Street, SW., Washington, DC 20416.

(4) Upon receipt of a NAICS code appeal, OHA will notify the contracting officer by notice and order of the date OHA received the appeal, the docket number, and the Judge assigned to the case. The contracting officer's response to the appeal must include argument and supporting evidence (*see* part 134, subpart C, of this chapter) and must be received by OHA within 10 calendar days from the date of the docketing notice and order, unless otherwise specified by the Judge. Upon receipt of OHA's docketing notice and order, the contracting officer must immediately send to OHA a copy of the solicitation relating to the NAICS code appeal.

(5) After close of the record, OHA will issue a decision and inform all interested parties, including the appellant and contracting officer. If OHA's decision is received by the contracting officer before the date offers are due, the solicitation must be amended if the contracting officer's designation of the NAICS code is reversed. If OHA's decision is received by the contracting officer after the due date of initial offers, the decision will not apply to the pending procurement, but will apply to future solicitations for the same products or services.

[69 FR 29207, May 21, 2004; 74 FR 45753, Sept. 4, 2009]

Subpart B—Other Applicable Provisions

WAIVERS OF THE NONMANUFACTURER RULE FOR CLASSES OF PRODUCTS AND INDIVIDUAL CONTRACTS

§ 121.1201 What is the Nonmanufacturer Rule?

The Nonmanufacturer Rule is set forth in § 121.406(b).

§ 121.1202 When will a waiver of the Nonmanufacturer Rule be granted for a class of products?

(a) A waiver for a class of products (class waiver) will be granted when there are no small business manufacturers or processors available to participate in the Federal market for that class of products.

(b) *Federal market* means acquisitions by the Federal Government from offerors located in the United States, or such smaller area as SBA designates if it concludes that the class of products is not supplied on a national basis.

(1) When considering the appropriate market area for a product, SBA presumes that the entire United States is the relevant Federal market, unless it is clearly demonstrated that a class of products cannot be procured on a national basis. This presumption may be particularly difficult to overcome in the case of manufactured products, since such items typically have a market area encompassing the entire United States.

(2) When considering geographic segmentation of a Federal market, SBA will not necessarily use market definitions dependent on airline radius, political, or SBA regional boundaries. Market areas typically follow established transportation routes rather than jurisdictional borders. SBA examines the following factors, among others, in cases where geographic segmentation for a class of products is urged:

(i) Whether perishability affects the area in which the product can practically be sold;

(ii) Whether transportation costs are high as a proportion of the total value of the product so as to limit the economic distribution of the product;

(iii) Whether there are legal barriers to transportation of the item;

(iv) Whether a fixed, well-delineated boundary exists for the purported market area and whether this boundary has been stable over time; and

(v) Whether a small business, not currently selling in the defined market area, could potentially enter the market from another area and supply the market at a reasonable price.

(c) *Available to participate* in the context of the Federal market means that contractors exist that have been awarded or have performed a contract to supply a specific class of products to the Federal Government within 24 months from the date of the request for waiver, either directly or through a dealer, or who have submitted an offer on a solicitation for that class of products within that time frame.

(d) *Class of products* is an individual subdivision within an NAICS Industry Number as established by the Office of Management and Budget in the NAICS Manual.

[61 FR 3286, Jan. 31, 1996, as amended at 65 FR 30863, May 15, 2000]

§ 121.1203 When will a waiver of the Nonmanufacturer Rule be granted for an individual contract?

An individual waiver for a product in a specific solicitation will be approved when the SBA Director, Office of Government Contracting reviews and accepts a contracting officer's determination that no small business manufacturer or processor can reasonably be expected to offer a product meeting the specifications of a solicitation, including the period of performance.

§ 121.1204 What are the procedures for requesting and granting waivers?

(a) *Waivers for classes of products.* (1) SBA may, at its own initiative, examine a class of products for possible waiver of the Nonmanufacturer Rule.

(2) Any interested person, business, association, or Federal agency may submit a request for a waiver for a particular class of products. Requests should be addressed or hand-carried to the Director, Office of Government Contracting, Small Business Administration, 409 3rd Street SW., Washington, DC 20416.

(3) Requests for a waiver of a class of products need not be in any particular form, but should include a statement of the class of products to be waived, the applicable NAICS code, and detailed information on the efforts made to identify small business manufacturers or processors for the class.

(4) If SBA decides that there are small business manufacturers or processors in the Federal procurement market, it will deny the request for waiver, issue notice of the denial, and provide the names, addresses, and telephone numbers of the sources found. If SBA does not initially confirm the existence of small business manufacturers or processors in the Federal market, it will:

(i) Publish notices in the Commerce Business Daily and the FEDERAL REGISTER seeking information on small business manufacturers or processors, announcing a notice of intent to waive the Nonmanufacturer Rule for that class of products and affording the public a 15-day comment period; and

(ii) If no small business sources are identified, publish a notice in the FEDERAL REGISTER stating that no small business sources were found and that a waiver of the Nonmanufacturer Rule for that class of products has been granted.

(5) An expedited procedure for issuing a class waiver may be used for emergency situations, but only if the contracting officer provides a determination to the Director, Office of Government Contracting that the procurement is proceeding under the authority of FAR §6.302–2 (48 CFR 6.302–2) for "unusual and compelling urgency," or provides a determination materially the same as one of unusual and compelling urgency. Under the expedited procedure, if a small business manufacturer or processor is not identified by a PASS search, the SBA will grant the waiver for the class of products and then publish a notice in the FEDERAL REGISTER. The notice will state that a

waiver has been granted, and solicit public comment for future procurements.

(6) The decision by the Director, Office of Government Contracting to grant or deny a waiver is the final decision by the Agency.

(7) A waiver of the Nonmanufacturer Rule for classes of products has no specific time limitation. SBA will, however, periodically review existing class waivers to the Nonmanufacturer Rule to determine if small business manufacturers or processors have become available to participate in the Federal market for the waived classes of products and the waiver should be terminated.

(i) Upon SBA's receipt of evidence that a small business manufacturer or processor exists in the Federal market for a waived class of products, the waiver will be terminated by the Director, Office of Government Contracting. This evidence may be discovered by SBA during a periodic review of existing waivers or may be brought to SBA's attention by other sources.

(ii) SBA will announce its intent to terminate a waiver for a class of products through the publication of a notice in the FEDERAL REGISTER, asking for comments regarding the proposed termination.

(iii) Unless public comment reveals that no small business manufacturer or processor in fact exists for the class of products in question, SBA will publish a final Notice of Termination in the FEDERAL REGISTER.

(b) *Individual waivers for specific solicitations.* (1) A contracting officer's request for a waiver of the Nonmanufacturer Rule for specific solicitations need not be in any particular form, but must, at a minimum, include:

(i) A definitive statement of the specific item to be waived and justification as to why the specific item is required;

(ii) The solicitation number, NAICS code, dollar amount of the procurement, and a brief statement of the procurement history;

(iii) A determination by the contracting officer that there are no known small business manufacturers or processors for the requested items (the determination must contain a narrative statement of the contracting officer's efforts to search for small business manufacturers or processors of the item and the results of those efforts, and a statement by the contracting officer that there are no known small business manufacturers for the items and that no small business manufacturer or processor can reasonably be expected to offer the required items); and

(iv) For contracts expected to exceed $500,000, a copy of the Statement of Work.

(2) Requests should be addressed to the Director, Office of Government Contracting, Small Business Administration, 409 3rd Street, SW., Washington, DC 20416.

(3) SBA will examine the contracting officer's determination and any other information it deems necessary to make an informed decision on the individual waiver request. If SBA's research verifies that no small business manufacturers or processors exist for the item, the Director, Office of Government Contracting will grant an individual, one-time waiver. If a small business manufacturer or processor is found for the product in question, the Associate Administrator will deny the request. Either decision represents a final decision by SBA.

[61 FR 3286, Jan. 31, 1996, as amended at 65 FR 30863, May 15, 2000]

§ 121.1205 How is a list of previously granted class waivers obtained?

A list of classes of products for which waivers for the Nonmanufacturer Rule have been granted is maintained in SBA Web site at: *http://www.sba.gov/aboutsba/sbaprograms/gc/programs/gc_waivers_nonmanufacturer.html.* A list of such waivers may also be obtained by contacting the Office of Government Contracting, U.S. Small Business Administration, 409 3rd Street, SW., Washington, DC 20416, or the nearest SBA Government Contracting Area Office.

[69 FR 29208, May 21, 2004, as amended at 74 FR 46313, Sept. 9, 2009]

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 3.303.

(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 certifications.

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

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

(1) Cost or pricing data (as defined by 10 U.S.C. 2306a(h)) with respect to procurements subject to that section, and section 304A(h) of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 254b(h)), with respect to procurements subject to that section.

(2) Indirect costs and direct labor rates.

(3) Proprietary information about manufacturing processes, operations, or techniques marked by the contractor in accordance with applicable law or regulation.

(4) Information marked by the contractor as "contractor bid or proposal information" in accordance with applicable law or regulation.

(5) Information marked in accordance with 52.215-1(e).

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

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

"In excess of $10,000,000" means—

(1) The value, or estimated value, at the time of award, of the contract, including all options;

(2) The total estimated value at the time of award of all orders under an indefinite-delivery, indefinite-quantity, or requirements contract;

(3) Any multiple award schedule contract, unless the contracting officer documents a lower estimate;

(4) The value of a delivery order, task order, or an order under a Basic Ordering Agreement;

(5) The amount paid or to be paid in settlement of a claim; or

(6) The estimated monetary value of negotiated overhead or other rates when applied to the Government portion of the applicable allocation base.

"Official" means—

(1) An officer, as defined in 5 U.S.C. 2104;

(2) An employee, as defined in 5 U.S.C. 2105;

(3) A member of the uniformed services, as defined in 5 U.S.C. 2101(3); or

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

"Participating personally and substantially in a Federal agency procurement" means—

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

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

(ii) Preparing or developing the solicitation.

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

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

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

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

(3) "Participating substantially" means that the official's involvement is of significance to the matter. Substantial participation requires more than official responsibility, knowledge, perfunctory involvement, or involvement on an administrative or peripheral issue. Participation may be substantial even though it is not determinative of the outcome of a particular matter. A finding of substantiality should be based not only on the effort devoted to a matter, but on the importance of the effort. While a series of peripheral involvements may be insubstantial, the single act of approving or participating in a critical step may be substantial. However, the review of procurement documents solely to determine compliance with regulatory, administrative, or budgetary procedures, does not constitute substantial participation in a procurement.

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

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

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

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

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

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

3.104-2 General.

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

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

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

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

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

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

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

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

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

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

of a Federal agency procurement contract to which the information relates. (See 3.104-4(a).)

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

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

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

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

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

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

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

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

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

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

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

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

(d) *Prohibition on former official's acceptance of compensation from a contractor (subsection 27(d) of the Act).* (1) A former official of a Federal agency may not accept compensation from a contractor that has been awarded a competitive or sole source contract, as an employee, officer, director, or consultant of the contractor within a period of 1 year after such former official—

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

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

(iii) Personally made for the Federal agency a decision to—

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

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

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

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

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

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

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

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

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

3.104-4 Disclosure, protection, and marking of contractor bid or proposal information and source selection information.

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

(b) Contractor bid or proposal information and source selection information must be protected from unauthorized

disclosure in accordance with 14.401, 15.207, applicable law, and agency regulations.

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

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

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

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

(3) For technical data marked as proprietary by a contractor, the contracting officer must follow the procedures in 27.404-5.

(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 rights in the data.

(f) This section does not authorize—

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

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

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

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

3.104-5 Disqualification.

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

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

(1) Identify the procurement;

(2) Describe the nature of the agency official's participation in the procurement and specify the approximate dates or time period of participation; and

(3) Identify the offeror and describe its interest in the procurement.

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

(2) After the conditions of 3.104-3(c)(1)(ii)(A) or (B) have been met, the head of the contracting activity (HCA), after consultation with the agency ethics official, may authorize the disqualified official to resume participation in the procurement, or may determine that an additional disqualification period is necessary to protect the integrity of

the procurement process. In determining the disqualification period, the HCA must consider any factors that create an appearance that the disqualified official acted without complete impartiality in the procurement. The HCA's reinstatement decision should be in writing.

(3) Government officer or employee must also comply with the provisions of 18 U.S.C. 208 and 5 CFR Part 2635 regarding any resumed participation in a procurement matter. Government officer or employee may not be reinstated to participate in a procurement matter affecting the financial interest of someone with whom the individual is seeking employment, unless the individual receives—

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

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

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

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

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

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

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

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

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

(d)(1) If complete information is not included in the request, the agency ethics official may ask the requester to provide more information or request information from other persons, including the source selection authority, the contracting officer, or the requester's immediate supervisor.

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

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

3.104-7 Violations or possible violations.

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

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

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

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

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

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

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

(2) Begin an investigation;

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

(4) Conclude that a violation occurred; or

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

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

from appropriate parties regarding the violation or possible violation.

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

(1) If a contract has not been awarded—

(i) Cancel the procurement;

(ii) Disqualify an offeror; or

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

(2) If a contract has been awarded—

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

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

(A) The contractor or someone acting for the contractor has been convicted for an offense where the conduct constitutes a violation of 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(e)(1) of the Act; or

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

(3) Refer the matter to the agency suspending or debarring official.

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

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

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

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

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

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

(b) An offeror who engages in employment discussion with an official subject to the restrictions of 3.104-3, knowing that the official has not complied with 3.104-3(c)(1), is subject to the criminal, civil, or administrative penalties set forth in subsection 27(e) of the Act.

(c) An official who refuses to terminate employment discussions (see 3.104-5) may be subject to agency administrative actions under 5 CFR 2635.604(d) if the official's disqualification from participation in a particular procurement interferes substantially with the individual's ability to perform assigned duties.

3.104-9 Contract clauses.

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

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

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

ocation. The revocation shall take effect upon the person's receipt of the notification and shall remain in effect until the report is filed.

"(D) Any person who is granted a waiver under this subsection shall be ineligible for appointment in the civil service unless all reports required of such person by subparagraphs (A) and (B) have been filed.

"(E) As used in this subsection, the term 'civil service' has the meaning given that term in section 2101 of title 5."

EFFECTIVE DATE OF 1978 AMENDMENT

Section 503 of Pub. L. 95–521, which provided that the amendments made by section 501 (amending this section) shall become effective on July 1, 1979, was amended generally by Pub. L. 101–194, title VI, § 601(a), Nov. 30, 1989, 103 Stat. 1761, and is now set out in the Appendix to Title 5, Government Organization and Employees.

Section 502 of Pub. L. 95–521, which provided that the amendments made by section 501 (amending this section) shall not apply to those individuals who left Government service prior to the effective date of such amendments (July 1, 1979) or, in the case of individuals who occupied positions designated pursuant to section 207(d) of title 18, United States Code, prior to the effective date of such designation; except that any such individual who returns to Government service on or after the effective date of such amendments or designation shall be thereafter covered by such amendments or designation, was amended generally by Pub. L. 101–194, title VI, § 601(a), Nov. 30, 1989, 103 Stat. 1761, and is now set out in the Appendix to Title 5.

EFFECTIVE DATE

Section effective 90 days after Oct. 23, 1962, see section 4 of Pub. L. 87–849, set out as a note under section 201 of this title.

REGULATIONS

Responsibility of Office of Government Ethics for promulgating regulations and interpreting this section, see section 201(c) of Ex. Ord. No. 12674, Apr. 12, 1989, 54 F.R. 15159, as amended, set out as a note under section 7301 of Title 5, Government Organization and Employees.

CONSTRUCTION OF 2007 AMENDMENT

Pub. L. 110–81, title I, § 104(c), Sept. 14, 2007, 121 Stat. 740, provided that: "Except as expressly identified in this section [amending this section and section 450i of Title 25, Indians] and in the amendments made by this section, nothing in this section or the amendments made by this section affects any other provision of law."

TRANSFER OF FUNCTIONS

Certain functions of Clerk of House of Representatives transferred to Director of Non-legislative and Financial Services by section 7 of House Resolution No. 423, One Hundred Second Congress, Apr. 9, 1992. Director of Non-legislative and Financial Services replaced by Chief Administrative Officer of House of Representatives by House Resolution No. 6, One Hundred Fourth Congress, Jan. 4, 1995.

AGENCIES WITHIN EXECUTIVE OFFICE OF PRESIDENT

For provisions relating to treatment of agencies within the Executive Office of the President as one agency under subsec. (c) of this section, see Ex. Ord. No. 12674, § 202, Apr. 12, 1989, 54 F.R. 15160, as amended, set out as a note under section 7301 of Title 5, Government Organization and Employees.

EXEMPTIONS

Exemptions from former section 284 of this title deemed to be exemptions from this section, see section 2 of Pub. L. 87–849, set out as a note under section 203 of this title.

§ 208. Acts affecting a personal financial interest

(a) Except as permitted by subsection (b) hereof, whoever, being an officer or employee of the executive branch of the United States Government, or of any independent agency of the United States, a Federal Reserve bank director, officer, or employee, or an officer or employee of the District of Columbia, including a special Government employee, participates personally and substantially as a Government officer or employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, in a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which, to his knowledge, he, his spouse, minor child, general partner, organization in which he is serving as officer, director, trustee, general partner or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest—

Shall be subject to the penalties set forth in section 216 of this title.

(b) Subsection (a) shall not apply—

(1) if the officer or employee first advises the Government official responsible for appointment to his or her position of the nature and circumstances of the judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter and makes full disclosure of the financial interest and receives in advance a written determination made by such official that the interest is not so substantial as to be deemed likely to affect the integrity of the services which the Government may expect from such officer or employee;

(2) if, by regulation issued by the Director of the Office of Government Ethics, applicable to all or a portion of all officers and employees covered by this section, and published in the Federal Register, the financial interest has been exempted from the requirements of subsection (a) as being too remote or too inconsequential to affect the integrity of the services of the Government officers or employees to which such regulation applies;

(3) in the case of a special Government employee serving on an advisory committee within the meaning of the Federal Advisory Committee Act (including an individual being considered for an appointment to such a position), the official responsible for the employee's appointment, after review of the financial disclosure report filed by the individual pursuant to the Ethics in Government Act of 1978, certifies in writing that the need for the individual's services outweighs the potential for a conflict of interest created by the financial interest involved; or

(4) if the financial interest that would be affected by the particular matter involved is that resulting solely from the interest of the officer or employee, or his or her spouse or minor child, in birthrights—

(A) in an Indian tribe, band, nation, or other organized group or community, includ-

ing any Alaska Native village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians,

(B) in an Indian allotment the title to which is held in trust by the United States or which is inalienable by the allottee without the consent of the United States, or

(C) in an Indian claims fund held in trust or administered by the United States,

if the particular matter does not involve the Indian allotment or claims fund or the Indian tribe, band, nation, organized group or community, or Alaska Native village corporation as a specific party or parties.

(c)(1) For the purpose of paragraph (1) of subsection (b), in the case of class A and B directors of Federal Reserve banks, the Board of Governors of the Federal Reserve System shall be deemed to be the Government official responsible for appointment.

(2) The potential availability of an exemption under any particular paragraph of subsection (b) does not preclude an exemption being granted pursuant to another paragraph of subsection (b).

(d)(1) Upon request, a copy of any determination granting an exemption under subsection (b)(1) or (b)(3) shall be made available to the public by the agency granting the exemption pursuant to the procedures set forth in section 105 of the Ethics in Government Act of 1978. In making such determination available, the agency may withhold from disclosure any information contained in the determination that would be exempt from disclosure under section 552 of title 5. For purposes of determinations under subsection (b)(3), the information describing each financial interest shall be no more extensive than that required of the individual in his or her financial disclosure report under the Ethics in Government Act of 1978.

(2) The Office of Government Ethics, after consultation with the Attorney General, shall issue uniform regulations for the issuance of waivers and exemptions under subsection (b) which shall—

(A) list and describe exemptions; and

(B) provide guidance with respect to the types of interests that are not so substantial as to be deemed likely to affect the integrity of the services the Government may expect from the employee.

(Added Pub. L. 87–849, §1(a), Oct. 23, 1962, 76 Stat. 1124; amended Pub. L. 95–188, title II, §205, Nov. 16, 1977, 91 Stat. 1388; Pub. L. 101–194, title IV, §405, Nov. 30, 1989, 103 Stat. 1751; Pub. L. 101–280, §5(e), May 4, 1990, 104 Stat. 159; Pub. L. 103–322, title XXXIII, §§330002(b), 330008(6), Sept. 13, 1994, 108 Stat. 2140, 2143.)

REFERENCES IN TEXT

The Federal Advisory Committee Act, referred to in subsec. (b)(3), is Pub. L. 92–463, Oct. 6, 1972, 86 Stat. 770, as amended, which is set out in the Appendix to Title 5, Government Organization and Employees.

The Ethics in Government Act of 1978, referred to in subsecs. (b)(3) and (d)(1), is Pub. L. 95–521, Oct. 26, 1978, 92 Stat. 1824, as amended. For complete classification of this Act to the Code, see Short Title note set out under section 101 of Pub. L. 95–521 in the Appendix to Title 5 and Tables.

The Alaska Native Claims Settlement Act, referred to in subsec. (b)(4)(A), is Pub. L. 92–203, Dec. 18, 1971, 85 Stat. 688, as amended, which is classified generally to chapter 33 (§1601 et seq.) of Title 43, Public Lands. For complete classification of this Act to the Code, see Short Title note set out under section 1601 of Title 43 and Tables.

PRIOR PROVISIONS

A prior section 208, act June 25, 1948, ch. 645, 62 Stat. 693, related to the acceptance of solicitation of a bribe by a judicial officer, prior to the general amendment of this chapter by Pub. L. 87–849 and is substantially covered by revised section 201.

Provisions similar to those comprising this section were contained in section 434 of this title prior to the repeal of such section and the general amendment of this chapter by Pub. L. 87–849.

AMENDMENTS

1994—Subsec. (b)(4). Pub. L. 103–322, §330008(6), inserted "if" after "(4)".

Subsec. (c)(1). Pub. L. 103–322, §330002(b), substituted "banks" for "Banks".

1990—Subsec. (a). Pub. L. 101–280, §5(e)(2), made technical correction to directory language of Pub. L. 101–194, §405(1)(C). See 1989 Amendment note below.

Subsec. (b)(2). Pub. L. 101–280, §5(e)(1)(A), substituted "subsection (a)" for "paragraph (1)".

Subsec. (b)(3). Pub. L. 101–280, §5(e)(1)(B), struck out "section 107 of" after "individual pursuant to".

Subsec. (d)(1). Pub. L. 101–280, §5(e)(1)(C), amended par. (1) generally. Prior to amendment, par. (1) read as follows: "A copy of any determination by other than the Director of the Office of Government Ethics granting an exemption pursuant to subsection (b)(1) or (b)(3) shall be submitted to the Director, who shall make all determinations available to the public pursuant to section 105 of the Ethics in Government Act of 1978. For determinations pursuant to subsection (b)(3), the information from the financial disclosure report of the officer or employee involved describing the asset or assets that necessitated the waiver shall also be made available to the public. This subsection shall not apply, however, if the head of the agency or his or her designee determines that the determination under subsection (b)(1) or (b)(3), as the case may be, involves classified information."

1989—Subsec. (a). Pub. L. 101–194, §405(1), as amended by Pub. L. 101–280, §5(e)(2), inserted "or" after "United States Government," and "an officer or employee" before "of the District of Columbia", substituted "general partner" for "partner" in two places, and substituted "Shall be subject to the penalties set forth in section 216 of this title" for "Shall be fined not more than $10,000, or imprisoned not more than two years, or both".

Subsec. (b). Pub. L. 101–194, §405(2), added subsec. (b) and struck out former subsec. (b), which read as follows: "Subsection (a) hereof shall not apply (1) if the officer or employee first advises the Government official responsible for appointment to his position of the nature and circumstances of the judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter and makes full disclosure of the financial interest and receives in advance a written determination made by such official that the interest is not so substantial as to be deemed likely to affect the integrity of the services which the Government may expect from such officer or employee, or (2) if, by general rule or regulation published in the Federal Register, the financial interest has been exempted from the requirements of clause (1) hereof as being too remote or too inconsequential to affect the

integrity of Government officers' or employees' services. In the case of class A and B directors of Federal Reserve banks, the Board of Governors of the Federal Reserve System shall be the Government official responsible for appointment."

Subsecs. (c), (d). Pub. L. 101–194, §405(2), added subsecs. (c) and (d).

1977—Subsec. (a). Pub. L. 95–188, §205(a), extended conflicts of interest prohibition to a Federal Reserve bank director, officer, or employee.

Subsec. (b). Pub. L. 95–188, §205(b), inserted at end "In the case of class A and B directors of Federal Reserve banks, the Board of Governors of the Federal Reserve System shall be the Government official responsible for appointment."

EFFECTIVE DATE

Section effective 90 days after Oct. 23, 1962, see section 4 of Pub. L. 87–849, set out as a note under section 201 of this title.

EXEMPTIONS

Exemptions from former section 434 of this title deemed to be exemptions from this section, see section 2 of Pub. L. 87–849, set out as a note under section 203 of this title.

REGULATIONS

Responsibility of Office of Government Ethics for promulgating regulations and interpreting this section, see section 201(c) of Ex. Ord. No. 12674, Apr. 12, 1989, 54 F.R. 15159, as amended, set out as a note under section 7301 of Title 5, Government Organization and Employees.

DELEGATION OF AUTHORITY

Authority of the President under subsec. (b) of this section to grant exemptions or approvals to individuals delegated to agency heads, see section 401 of Ex. Ord. No. 12674, Apr. 12, 1989, 54 F.R. 15159, as amended, set out as a note under section 7301 of Title 5, Government Organization and Employees.

Authority of the President under subsec. (b) of this section to grant exemptions or approvals for Presidential appointees to committees, commissions, boards, or similar groups established by the President, and for individuals appointed pursuant to sections 105 and 107(a) of Title 3, The President, delegated to Counsel to the President, see section 402 of Ex. Ord. No. 12674, Apr. 12, 1989, 54 F.R. 15159, as amended, set out as a note under section 7301 of Title 5.

"PARTICULAR MATTER" DEFINED

Pub. L. 100–446, title III, §319, Sept. 27, 1988, 102 Stat. 1826, which provided that notwithstanding any other provision of law, for the purposes of this section "particular matter", as applied to employees of the Department of the Interior and the Indian Health Service, means "particular matter involving specific parties", was repealed by Pub. L. 101–194, title V, §505(b), Nov. 30, 1989, 103 Stat. 1756, as amended by Pub. L. 101–280, §6(c), May 4, 1990, 104 Stat. 160.

Similar provisions were contained in Pub. L. 100–202, §101(g) [title III, §318], Dec. 22, 1987, 101 Stat. 1329–213, 1329–255.

§ 209. Salary of Government officials and employees payable only by United States

(a) Whoever receives any salary, or any contribution to or supplementation of salary, as compensation for his services as an officer or employee of the executive branch of the United States Government, of any independent agency of the United States, or of the District of Columbia, from any source other than the Government of the United States, except as may be contributed out of the treasury of any State, county, or municipality; or

Whoever, whether an individual, partnership, association, corporation, or other organization pays, makes any contribution to, or in any way supplements, the salary of any such officer or employee under circumstances which would make its receipt a violation of this subsection—

Shall be subject to the penalties set forth in section 216 of this title.

(b) Nothing herein prevents an officer or employee of the executive branch of the United States Government, or of any independent agency of the United States, or of the District of Columbia, from continuing to participate in a bona fide pension, retirement, group life, health or accident insurance, profit-sharing, stock bonus, or other employee welfare or benefit plan maintained by a former employer.

(c) This section does not apply to a special Government employee or to an officer or employee of the Government serving without compensation, whether or not he is a special Government employee, or to any person paying, contributing to, or supplementing his salary as such.

(d) This section does not prohibit payment or acceptance of contributions, awards, or other expenses under the terms of chapter 41 of title 5.

(e) This section does not prohibit the payment of actual relocation expenses incident to participation, or the acceptance of same by a participant in an executive exchange or fellowship program in an executive agency: *Provided*, That such program has been established by statute or Executive order of the President, offers appointments not to exceed three hundred and sixty-five days, and permits no extensions in excess of ninety additional days or, in the case of participants in overseas assignments, in excess of three hundred and sixty-five days.

(f) This section does not prohibit acceptance or receipt, by any officer or employee injured during the commission of an offense described in section 351 or 1751 of this title, of contributions or payments from an organization which is described in section 501(c)(3) of the Internal Revenue Code of 1986 and which is exempt from taxation under section 501(a) of such Code.

(g)(1) This section does not prohibit an employee of a private sector organization, while assigned to an agency under chapter 37 of title 5, from continuing to receive pay and benefits from such organization in accordance with such chapter.

(2) For purposes of this subsection, the term "agency" means an agency (as defined by section 3701 of title 5) and the Office of the Chief Technology Officer of the District of Columbia.

(h) This section does not prohibit a member of the reserve components of the armed forces on active duty pursuant to a call or order to active duty under a provision of law referred to in section 101(a)(13) of title 10 from receiving from any person that employed such member before the call or order to active duty any payment of any part of the salary or wages that such person would have paid the member if the member's employment had not been interrupted by such call or order to active duty.

(Added Pub. L. 87–849, §1(a), Oct. 23, 1962, 76 Stat. 1125; amended Pub. L. 96–174, Dec. 29, 1979, 93 Stat. 1288; Pub. L. 97–171, Apr. 13, 1982, 96 Stat.

Schedule, to be considered references to rates payable under specified sections of Title 5, Government Organization and Employees, see section 529 [title I, § 101(c)(1)] of Pub. L. 101–509, set out in a note under section 5376 of Title 5.

§ 423. Restrictions on disclosing and obtaining contractor bid or proposal information or source selection information

(a) Prohibition on disclosing procurement information

(1) A person described in paragraph (2) shall not, other than as provided by law, knowingly disclose contractor bid or proposal information or source selection information before the award of a Federal agency procurement contract to which the information relates. In the case of an employee of a private sector organization assigned to an agency under chapter 37 of title 5, in addition to the restriction in the preceding sentence, such employee shall not, other than as provided by law, knowingly disclose contractor bid or proposal information or source selection information during the three-year period after the end of the assignment of such employee.

(2) Paragraph (1) applies to any person who—

(A) 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

(B) 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

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

(c) Actions required of procurement officers when contacted by offerors regarding non-Federal employment

(1) If an agency official who is participating personally and substantially in a Federal agency procurement for a contract in excess of the simplified acquisition threshold contacts or is contacted by a person who is a bidder or offeror in that Federal agency procurement regarding possible non-Federal employment for that official, the official shall—

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

(B)(i) reject the possibility of non-Federal employment; or

(ii) disqualify himself or herself from further personal and substantial participation in that Federal agency procurement until such time as the agency has authorized the official to resume participation in such procurement, in accordance with the requirements of section 208 of title 18 and applicable agency regulations on the grounds that—

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

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

(2) Each report required by this subsection shall be retained by the agency for not less than two years following the submission of the report. All such reports shall be made available to the public upon request, except that any part of a report that is exempt from the disclosure requirements of section 552 of title 5 under subsection (b)(1) of such section may be withheld from disclosure to the public.

(3) An official who knowingly fails to comply with the requirements of this subsection shall be subject to the penalties and administrative actions set forth in subsection (e) of this section.

(4) A bidder or offeror who engages in employment discussions with an official who is subject to the restrictions of this subsection, knowing that the official has not complied with subparagraph (A) or (B) of paragraph (1), shall be subject to the penalties and administrative actions set forth in subsection (e) of this section.

(d) Prohibition on former official's acceptance of compensation from contractor

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

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

(B) 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

(C) personally made for the Federal agency—

(i) a decision to award a contract, subcontract, modification of a contract or subcontract, or a task order or delivery order in excess of $10,000,000 to that contractor;

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

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

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

(2) Nothing in paragraph (1) 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 subparagraph (A), (B), or (C) of such paragraph.

(3) A former official who knowingly accepts compensation in violation of this subsection

shall be subject to penalties and administrative actions as set forth in subsection (e) of this section.

(4) A contractor who provides compensation to a former official knowing that such compensation is accepted by the former official in violation of this subsection shall be subject to penalties and administrative actions as set forth in subsection (e) of this section.

(5) Regulations implementing this subsection shall include procedures for an official or former official of a Federal agency to request advice from the appropriate designated agency ethics official regarding whether the official or former official is or would be precluded by this subsection from accepting compensation from a particular contractor.

(e) Penalties and administrative actions

(1) Criminal penalties

Whoever engages in conduct constituting a violation of subsection (a) or (b) of this section for the purpose of either—

(A) exchanging the information covered by such subsection for anything of value, or

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

shall be imprisoned for not more than 5 years or fined as provided under title 18, or both.

(2) Civil penalties

The Attorney General may bring a civil action in an appropriate United States district court against any person who engages in conduct constituting a violation of subsection (a), (b), (c), or (d) of this section. Upon proof of such conduct by a preponderance of the evidence, the person is subject to a civil penalty. An individual who engages in such conduct is subject to a civil penalty of not more than $50,000 for each violation plus twice the amount of compensation which the individual received or offered for the prohibited conduct. An organization that engages in such conduct is subject to a civil penalty of not more than $500,000 for each violation plus twice the amount of compensation which the organization received or offered for the prohibited conduct.

(3) Administrative actions

(A) If a Federal agency receives information that a contractor or a person has engaged in conduct constituting a violation of subsection (a), (b), (c), or (d) of this section, the Federal agency shall consider taking one or more of the following actions, as appropriate:

(i) Cancellation of the Federal agency procurement, if a contract has not yet been awarded.

(ii) Rescission of a contract with respect to which—

(I) the contractor or someone acting for the contractor has been convicted for an offense punishable under paragraph (1), or

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

(iii) Initiation of suspension or debarment proceedings for the protection of the Government in accordance with procedures in the Federal Acquisition Regulation.

(iv) Initiation of adverse personnel action, pursuant to the procedures in chapter 75 of title 5 or other applicable law or regulation.

(B) If a Federal agency rescinds a contract pursuant to subparagraph (A)(ii), the United States is entitled to recover, in addition to any penalty prescribed by law, the amount expended under the contract.

(C) For purposes of any suspension or debarment proceedings initiated pursuant to subparagraph (A)(iii), engaging in conduct constituting an offense under subsection (a), (b), (c), or (d) of this section affects the present responsibility of a Government contractor or subcontractor.

(f) Definitions

As used in this section:

(1) The term ''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:

(A) Cost or pricing data (as defined by section 2306a(h) of title 10, with respect to procurements subject to that section, and section 254b(h) of this title, with respect to procurements subject to that section).

(B) Indirect costs and direct labor rates.

(C) Proprietary information about manufacturing processes, operations, or techniques marked by the contractor in accordance with applicable law or regulation.

(D) Information marked by the contractor as ''contractor bid or proposal information'', in accordance with applicable law or regulation.

(2) The term ''source selection information'' means any of the following information prepared for use by a Federal agency for the purpose of evaluating a bid or proposal to enter into a Federal agency procurement contract, if that information has not been previously made available to the public or disclosed publicly:

(A) Bid prices submitted in response to a Federal agency solicitation for sealed bids, or lists of those bid prices before public bid opening.

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

(C) Source selection plans.

(D) Technical evaluation plans.

(E) Technical evaluations of proposals.

(F) Cost or price evaluations of proposals.

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

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

(I) The reports and evaluations of source selection panels, boards, or advisory councils.

(J) Other information marked as "source selection information" based on a case-by-case determination by the head of the agency, his designee, or the contracting officer that its disclosure would jeopardize the integrity or successful completion of the Federal agency procurement to which the information relates.

(3) The term "Federal agency" has the meaning provided such term in section 102 of title 40.

(4) The term "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.

(5) The term "contracting officer" means a person who, by appointment in accordance with applicable regulations, has the authority to enter into a Federal agency procurement contract on behalf of the Government and to make determinations and findings with respect to such a contract.

(6) The term "protest" means a written objection by an interested party to the award or proposed award of a Federal agency procurement contract, pursuant to subchapter V of chapter 35 of title 31.

(7) The term "official" means the following:

(A) An officer, as defined in section 2104 of title 5.

(B) An employee, as defined in section 2105 of title 5.

(C) A member of the uniformed services, as defined in section 2101(3) of title 5.

(g) Limitation on protests

No person may file a protest against the award or proposed award of a Federal agency procurement contract alleging a violation of subsection (a), (b), (c), or (d) of this section, nor may the Comptroller General of the United States consider such an allegation in deciding a protest, unless that person reported to the Federal agency responsible for the procurement, no later than 14 days after the person first discovered the possible violation, the information that the person believed constitutes evidence of the offense.

(h) Savings provisions

This section does not—

(1) restrict the disclosure of information to, or its receipt by, any person or class of persons authorized, in accordance with applicable agency regulations or procedures, to receive that information;

(2) restrict a contractor from disclosing its own bid or proposal information or the recipient from receiving that information;

(3) restrict the disclosure or receipt of information relating to a Federal agency procurement after it has been canceled by the Federal agency before contract award unless the Federal agency plans to resume the procurement;

(4) prohibit 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;

(5) authorize the withholding of information from, nor restrict its receipt by, Congress, a committee or subcommittee of Congress, the Comptroller General, a Federal agency, or an inspector general of a Federal agency;

(6) authorize the withholding of information from, nor restrict its receipt by, the Comptroller General of the United States in the course of a protest against the award or proposed award of a Federal agency procurement contract; or

(7) limit the applicability of any requirements, sanctions, contract penalties, and remedies established under any other law or regulation.

(Pub. L. 93–400, § 27, as added Pub. L. 100–679, § 6(a), Nov. 17, 1988, 102 Stat. 4063; amended Pub. L. 101–189, div. A, title VIII, § 814(a)–(d)(1), Nov. 29, 1989, 103 Stat. 1495–1498; Pub. L. 101–510, div. A, title XIV, § 1484(*l*)(6), Nov. 5, 1990, 104 Stat. 1720; Pub. L. 102–25, title VII, § 705(i), Apr. 6, 1991, 105 Stat. 121; Pub. L. 103–355, title VIII, § 8301(e), Oct. 13, 1994, 108 Stat. 3397; Pub. L. 104–106, div. D, title XLIII, § 4304(a), Feb. 10, 1996, 110 Stat. 659; Pub. L. 107–347, title II, § 209(d)(4), Dec. 17, 2002, 116 Stat. 2930.)

CODIFICATION

"Section 102 of title 40" substituted in subsec. (f)(3) for "section 3 of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 472)" on authority of Pub. L. 107–217, § 5(c), Aug. 21, 2002, 116 Stat. 1303, the first section of which enacted Title 40, Public Buildings, Property, and Works.

AMENDMENTS

2002—Subsec. (a)(1). Pub. L. 107–347 inserted at end "In the case of an employee of a private sector organization assigned to an agency under chapter 37 of title 5, in addition to the restriction in the preceding sentence, such employee shall not, other than as provided by law, knowingly disclose contractor bid or proposal information or source selection information during the three-year period after the end of the assignment of such employee."

1996—Pub. L. 104–106 amended section generally, substituting subsecs. (a) to (h) relating to restrictions on disclosing and obtaining contractor bid or proposal information and source selection information for former subsecs. (a) to (p) relating to procurement integrity.

1994—Subsec. (e)(1)(B). Pub. L. 103–355 inserted ", except in the case of a contract for the procurement of commercial items," after "certifies in writing to such contracting officer" in introductory provisions.

1991—Subsec. (p)(8). Pub. L. 102–25 substituted "has the meaning given such term by section 109(3) of the Ethics in Government Act of 1978 (5 U.S.C. App.)." for "has the same meaning as the term 'designated agency official' in section 209(10) of the Ethics in Government Act of 1978 (92 Stat. 1850; 5 U.S.C. App.)."

1990—Subsec. (f)(3)(D), (F). Pub. L. 101–510 redesignated subpar. (D), defining term "civil service", as (F).

1989—Subsecs. (a)(1), (b)(1). Pub. L. 101–189, § 814(a)(1)(A), inserted ", except as provided in subsection (c) of this section" before semicolon at end.

Subsec. (c). Pub. L. 101–189, § 814(a)(1)(C), added subsec. (c). Former subsec. (c) redesignated (d).

Subsec. (d). Pub. L. 101–189, § 814(a)(1)(B)(ii), redesignated subsec. (c) as (d). Former subsec. (d) redesignated (e).

Subsec. (e). Pub. L. 101–189, § 814(a)(1)(B)(ii), redesignated subsec. (d) as (e). Former subsec. (e) redesignated (f).

Subsec. (e)(1)(A)(i), (B)(ii), (2)(A), (3)(A). Pub. L. 101–189, § 814(c)(1)(A)–(D), substituted "(d), or (f)" for "(c), or (e)".

Subsec. (e)(7)(B)(ii). Pub. L. 101–189, § 814(c)(1)(E), substituted "subsection (*o*)" for "subsection (m)".

Subsec. (f). Pub. L. 101–189, § 814(a)(2)(B), substituted "Restrictions resulting from procurement activities of procurement officials" for "Restrictions on Government officials and employees" as heading, and "(1) No individual who, while serving as an officer or employee of the Government or member of the Armed Forces, was a procurement official with respect to a particular procurement may knowingly—" for "No Government official or employee, civilian, or military, who has participated personally and substantially in the conduct of any Federal agency procurement or who has personally reviewed and approved the award, modification, or extension of any contract for such procurement shall—".

Pub. L. 101–189, § 814(a)(2)(A), redesignated pars. (1) and (2) as subpars. (A) and (B), respectively.

Pub. L. 101–189, § 814(a)(1)(B)(ii), redesignated subsec. (e) as (f). Former subsec. (f) redesignated (g).

Subsec. (f)(2). Pub. L. 101–189, § 814(a)(2)(C), added par. (2).

Subsec. (f)(3). Pub. L. 101–189, § 814(d)(1), added par. (3).

Subsec. (g). Pub. L. 101–189, § 814(a)(1)(B)(ii), redesignated subsec. (f) as (g). Former subsec. (g) redesignated (h).

Subsec. (g)(1). Pub. L. 101–189, § 814(c)(2), substituted "subsection (*o*)" for "subsection (m)".

Subsec. (h). Pub. L. 101–189, § 814(a)(1)(B)(ii), redesignated subsec. (g) as (h). Former subsec. (h) redesignated (i).

Subsec. (h)(1). Pub. L. 101–189, § 814(c)(3)(A), substituted "subsection (e)" for "subsection (d)".

Subsec. (h)(2). Pub. L. 101–189, § 814(c)(3)(B), substituted "(b) or (d)" for "(b) or (c)".

Subsec. (h)(3). Pub. L. 101–189, § 814(c)(3)(C), substituted "(i) and (j)" for "(h) and (i)".

Subsec. (i). Pub. L. 101–189, § 814(c)(4), substituted "(d), or (f)" for "(c), or (e)".

Pub. L. 101–189, § 814(a)(1)(B)(ii), redesignated subsec. (h) as (i). Former subsec. (i) redesignated (j).

Subsec. (j). Pub. L. 101–189, § 814(a)(1)(B)(ii), redesignated subsec. (i) as (j). Former subsec. (j) redesignated (*l*).

Subsec. (j)(1). Pub. L. 101–189, § 814(c)(5), substituted "subsection (p)" for "subsection (n)" and "subsection (*o*)" for "subsection (m)".

Subsec. (k). Pub. L. 101–189, § 814(a)(3), added subsec. (k). Former subsec. (k) redesignated (m).

Subsec. (*l*). Pub. L. 101–189, § 814(a)(1)(B)(i), redesignated subsec. (j) as (*l*). Former subsec. (*l*) redesignated (n).

Subsec. (*l*)(1). Pub. L. 101–189, § 814(c)(6)(A), substituted "subsections (b), (c), and (e)" for "subsection (b)".

Subsec. (*l*)(2). Pub. L. 101–189, § 814(c)(6)(B), substituted "subsections (b), (c), and (e)" for "subsection (b)" and "(d), or (f)" for "(c), or (e)".

Subsecs. (m), (n). Pub. L. 101–189, § 814(a)(1)(B)(i), redesignated subsecs. (k) and (*l*) as (m) and (n), respectively. Former subsecs. (m) and (n) redesignated (*o*) and (p), respectively.

Subsec. (*o*). Pub. L. 101–189, § 814(a)(4), amended subsec. (*o*) generally. Prior to amendment, subsec. (*o*) read as follows: "Government-wide regulations and guidelines deemed appropriate to carry out this section shall be issued in the Federal Acquisition Regulation within 180 days after November 17, 1988."

Pub. L. 101–189, § 814(a)(1)(B)(i), redesignated subsec. (m) as (*o*).

Subsec. (p). Pub. L. 101–189, § 814(a)(1)(B)(i), redesignated subsec. (n) as (p).

Subsec. (p)(1). Pub. L. 101–189, § 814(b)(1), substituted "on the earliest specific date, as determined under implementing regulations, on which an authorized official orders or requests an action described in clauses (i)–(viii) of paragraph (3)(A)," for "with the development, preparation, and issuance of a procurement solicitation,".

Subsec. (p)(3)(A). Pub. L. 101–189, § 814(b)(2), added subpar. (A) and struck out former subpar. (A) which read as follows: "The term 'procurement official' means any civilian or military official or employee of an agency who has participated personally and substantially in the conduct of the agency procurement concerned, including all officials and employees who are responsible for reviewing or approving the procurement, as further defined by applicable implementing regulations."

Subsec. (p)(8). Pub. L. 101–189, § 814(b)(3), added par. (8).

EFFECTIVE DATE OF 2002 AMENDMENT

Amendment by Pub. L. 107–347 effective 120 days after Dec. 17, 2002, see section 402(a) of Pub. L. 107–347, set out as an Effective Date note under section 3601 of Title 44, Public Printing and Documents.

EFFECTIVE DATE OF 1996 AMENDMENT

For effective date and applicability of amendment by Pub. L. 104–106, see section 4401 of Pub. L. 104–106, set out as a note under section 251 of this title.

EFFECTIVE DATE OF 1994 AMENDMENT

For effective date and applicability of amendment by Pub. L. 103–355, see section 10001 of Pub. L. 103–355, set out as a note under section 251 of this title.

EFFECTIVE DATE

Section 6(b) of Pub. L. 100–679, as amended by Pub. L. 101–28, § 1, May 15, 1989, 103 Stat. 57, provided that: "The amendment made by subsection (a) [enacting this section] shall take effect July 16, 1989."

REGULATIONS

Section 814(e) of Pub. L. 101–189 provided that: "Not later than 90 days after the date of the enactment of this section [Nov. 29, 1989], regulations implementing the amendments made by this section to the provisions of section 27 of the Office of Federal Procurement Policy Act (41 U.S.C. 423) shall be issued in accordance with sections 6 and 25 of such Act (41 U.S.C. 405, 421), after coordination with the Director of the Office of Government Ethics."

CLARIFICATION OF FREQUENCY OF CERTIFICATION BY EMPLOYEES AND CONTRACTORS

Section 815(b) of Pub. L. 101–510 provided that: "Not later than 30 days after the date of the enactment of this Act [Nov. 5, 1990], the regulations implementing section 27(e)(1)(B) of the Office of Federal Procurement Policy Act (41 U.S.C. 423(e)(1)(B)) shall be revised to ensure that a contractor is required to obtain from each officer, employee, agent, representative, and consultant of the contractor only one certification (as described in clauses (i) and (ii) of that section) during the person's employment or association with the contractor and that such certification shall be made at the earliest possible date after the person begins his or her employment or association with the contractor."

SUSPENSION OF EFFECT OF SECTION

Section 815(a)(1) of Pub. L. 101–510 provided that subsection (f) of this section shall have no force or effect during the period beginning on Dec. 1, 1990, and ending on May 31, 1991.

Pub. L. 101–194, title V, § 507(1), Nov. 30, 1989, 103 Stat. 1759, provided that the provisions of this section shall have no force or effect during the period beginning Dec. 1, 1989, and ending one year after such date.

§ 424. Repealed. Pub. L. 103–355, title VIII, § 8303(b), Oct. 13, 1994, 108 Stat. 3398

Section, Pub. L. 93–400, § 28, as added Pub. L. 100–679, § 9, Nov. 17, 1988, 102 Stat. 4069, related to establishment

ocation. The revocation shall take effect upon the person's receipt of the notification and shall remain in effect until the report is filed.

"(D) Any person who is granted a waiver under this subsection shall be ineligible for appointment in the civil service unless all reports required of such person by subparagraphs (A) and (B) have been filed.

"(E) As used in this subsection, the term 'civil service' has the meaning given that term in section 2101 of title 5."

EFFECTIVE DATE OF 1978 AMENDMENT

Section 503 of Pub. L. 95–521, which provided that the amendments made by section 501 (amending this section) shall become effective on July 1, 1979, was amended generally by Pub. L. 101–194, title VI, § 601(a), Nov. 30, 1989, 103 Stat. 1761, and is now set out in the Appendix to Title 5, Government Organization and Employees.

Section 502 of Pub. L. 95–521, which provided that the amendments made by section 501 (amending this section) shall not apply to those individuals who left Government service prior to the effective date of such amendments (July 1, 1979) or, in the case of individuals who occupied positions designated pursuant to section 207(d) of title 18, United States Code, prior to the effective date of such designation; except that any such individual who returns to Government service on or after the effective date of such amendments or designation shall be thereafter covered by such amendments or designation, was amended generally by Pub. L. 101–194, title VI, § 601(a), Nov. 30, 1989, 103 Stat. 1761, and is now set out in the Appendix to Title 5.

EFFECTIVE DATE

Section effective 90 days after Oct. 23, 1962, see section 4 of Pub. L. 87–849, set out as a note under section 201 of this title.

REGULATIONS

Responsibility of Office of Government Ethics for promulgating regulations and interpreting this section, see section 201(c) of Ex. Ord. No. 12674, Apr. 12, 1989, 54 F.R. 15159, as amended, set out as a note under section 7301 of Title 5, Government Organization and Employees.

CONSTRUCTION OF 2007 AMENDMENT

Pub. L. 110–81, title I, § 104(c), Sept. 14, 2007, 121 Stat. 740, provided that: "Except as expressly identified in this section [amending this section and section 450i of Title 25, Indians] and in the amendments made by this section, nothing in this section or the amendments made by this section affects any other provision of law."

TRANSFER OF FUNCTIONS

Certain functions of Clerk of House of Representatives transferred to Director of Non-legislative and Financial Services by section 7 of House Resolution No. 423, One Hundred Second Congress, Apr. 9, 1992. Director of Non-legislative and Financial Services replaced by Chief Administrative Officer of House of Representatives by House Resolution No. 6, One Hundred Fourth Congress, Jan. 4, 1995.

AGENCIES WITHIN EXECUTIVE OFFICE OF PRESIDENT

For provisions relating to treatment of agencies within the Executive Office of the President as one agency under subsec. (c) of this section, see Ex. Ord. No. 12674, § 202, Apr. 12, 1989, 54 F.R. 15160, as amended, set out as a note under section 7301 of Title 5, Government Organization and Employees.

EXEMPTIONS

Exemptions from former section 284 of this title deemed to be exemptions from this section, see section 2 of Pub. L. 87–849, set out as a note under section 203 of this title.

§ 208. Acts affecting a personal financial interest

(a) Except as permitted by subsection (b) hereof, whoever, being an officer or employee of the executive branch of the United States Government, or of any independent agency of the United States, a Federal Reserve bank director, officer, or employee, or an officer or employee of the District of Columbia, including a special Government employee, participates personally and substantially as a Government officer or employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, in a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which, to his knowledge, he, his spouse, minor child, general partner, organization in which he is serving as officer, director, trustee, general partner or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest—

Shall be subject to the penalties set forth in section 216 of this title.

(b) Subsection (a) shall not apply—

(1) if the officer or employee first advises the Government official responsible for appointment to his or her position of the nature and circumstances of the judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter and makes full disclosure of the financial interest and receives in advance a written determination made by such official that the interest is not so substantial as to be deemed likely to affect the integrity of the services which the Government may expect from such officer or employee;

(2) if, by regulation issued by the Director of the Office of Government Ethics, applicable to all or a portion of all officers and employees covered by this section, and published in the Federal Register, the financial interest has been exempted from the requirements of subsection (a) as being too remote or too inconsequential to affect the integrity of the services of the Government officers or employees to which such regulation applies;

(3) in the case of a special Government employee serving on an advisory committee within the meaning of the Federal Advisory Committee Act (including an individual being considered for an appointment to such a position), the official responsible for the employee's appointment, after review of the financial disclosure report filed by the individual pursuant to the Ethics in Government Act of 1978, certifies in writing that the need for the individual's services outweighs the potential for a conflict of interest created by the financial interest involved; or

(4) if the financial interest that would be affected by the particular matter involved is that resulting solely from the interest of the officer or employee, or his or her spouse or minor child, in birthrights—

(A) in an Indian tribe, band, nation, or other organized group or community, includ-

ing any Alaska Native village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians,

(B) in an Indian allotment the title to which is held in trust by the United States or which is inalienable by the allottee without the consent of the United States, or

(C) in an Indian claims fund held in trust or administered by the United States,

if the particular matter does not involve the Indian allotment or claims fund or the Indian tribe, band, nation, organized group or community, or Alaska Native village corporation as a specific party or parties.

(c)(1) For the purpose of paragraph (1) of subsection (b), in the case of class A and B directors of Federal Reserve banks, the Board of Governors of the Federal Reserve System shall be deemed to be the Government official responsible for appointment.

(2) The potential availability of an exemption under any particular paragraph of subsection (b) does not preclude an exemption being granted pursuant to another paragraph of subsection (b).

(d)(1) Upon request, a copy of any determination granting an exemption under subsection (b)(1) or (b)(3) shall be made available to the public by the agency granting the exemption pursuant to the procedures set forth in section 105 of the Ethics in Government Act of 1978. In making such determination available, the agency may withhold from disclosure any information contained in the determination that would be exempt from disclosure under section 552 of title 5. For purposes of determinations under subsection (b)(3), the information describing each financial interest shall be no more extensive than that required of the individual in his or her financial disclosure report under the Ethics in Government Act of 1978.

(2) The Office of Government Ethics, after consultation with the Attorney General, shall issue uniform regulations for the issuance of waivers and exemptions under subsection (b) which shall—

(A) list and describe exemptions; and

(B) provide guidance with respect to the types of interests that are not so substantial as to be deemed likely to affect the integrity of the services the Government may expect from the employee.

(Added Pub. L. 87–849, §1(a), Oct. 23, 1962, 76 Stat. 1124; amended Pub. L. 95–188, title II, §205, Nov. 16, 1977, 91 Stat. 1388; Pub. L. 101–194, title IV, §405, Nov. 30, 1989, 103 Stat. 1751; Pub. L. 101–280, §5(e), May 4, 1990, 104 Stat. 159; Pub. L. 103–322, title XXXIII, §§330002(b), 330008(6), Sept. 13, 1994, 108 Stat. 2140, 2143.)

REFERENCES IN TEXT

The Federal Advisory Committee Act, referred to in subsec. (b)(3), is Pub. L. 92–463, Oct. 6, 1972, 86 Stat. 770, as amended, which is set out in the Appendix to Title 5, Government Organization and Employees.

The Ethics in Government Act of 1978, referred to in subsecs. (b)(3) and (d)(1), is Pub. L. 95–521, Oct. 26, 1978, 92 Stat. 1824, as amended. For complete classification of this Act to the Code, see Short Title note set out under section 101 of Pub. L. 95–521 in the Appendix to Title 5 and Tables.

The Alaska Native Claims Settlement Act, referred to in subsec. (b)(4)(A), is Pub. L. 92–203, Dec. 18, 1971, 85 Stat. 688, as amended, which is classified generally to chapter 33 (§1601 et seq.) of Title 43, Public Lands. For complete classification of this Act to the Code, see Short Title note set out under section 1601 of Title 43 and Tables.

PRIOR PROVISIONS

A prior section 208, act June 25, 1948, ch. 645, 62 Stat. 693, related to the acceptance of solicitation of a bribe by a judicial officer, prior to the general amendment of this chapter by Pub. L. 87–849 and is substantially covered by revised section 201.

Provisions similar to those comprising this section were contained in section 434 of this title prior to the repeal of such section and the general amendment of this chapter by Pub. L. 87–849.

AMENDMENTS

1994—Subsec. (b)(4). Pub. L. 103–322, §330008(6), inserted "if" after "(4)".

Subsec. (c)(1). Pub. L. 103–322, §330002(b), substituted "banks" for "Banks".

1990—Subsec. (a). Pub. L. 101–280, §5(e)(2), made technical correction to directory language of Pub. L. 101–194, §405(1)(C). See 1989 Amendment note below.

Subsec. (b)(2). Pub. L. 101–280, §5(e)(1)(A), substituted "subsection (a)" for "paragraph (1)".

Subsec. (b)(3). Pub. L. 101–280, §5(e)(1)(B), struck out "section 107 of" after "individual pursuant to".

Subsec. (d)(1). Pub. L. 101–280, §5(e)(1)(C), amended par. (1) generally. Prior to amendment, par. (1) read as follows: "A copy of any determination by other than the Director of the Office of Government Ethics granting an exemption pursuant to subsection (b)(1) or (b)(3) shall be submitted to the Director, who shall make all determinations available to the public pursuant to section 105 of the Ethics in Government Act of 1978. For determinations pursuant to subsection (b)(3), the information from the financial disclosure report of the officer or employee involved describing the asset or assets that necessitated the waiver shall also be made available to the public. This subsection shall not apply, however, if the head of the agency or his or her designee determines that the determination under subsection (b)(1) or (b)(3), as the case may be, involves classified information."

1989—Subsec. (a). Pub. L. 101–194, §405(1), as amended by Pub. L. 101–280, §5(e)(2), inserted "or" after "United States Government," and "an officer or employee" before "of the District of Columbia", substituted "general partner" for "partner" in two places, and substituted "Shall be subject to the penalties set forth in section 216 of this title" for "Shall be fined not more than $10,000, or imprisoned not more than two years, or both".

Subsec. (b). Pub. L. 101–194, §405(2), added subsec. (b) and struck out former subsec. (b), which read as follows: "Subsection (a) hereof shall not apply (1) if the officer or employee first advises the Government official responsible for appointment to his position of the nature and circumstances of the judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter and makes full disclosure of the financial interest and receives in advance a written determination made by such official that the interest is not so substantial as to be deemed likely to affect the integrity of the services which the Government may expect from such officer or employee, or (2) if, by general rule or regulation published in the Federal Register, the financial interest has been exempted from the requirements of clause (1) hereof as being too remote or too inconsequential to affect the

integrity of Government officers' or employees' services. In the case of class A and B directors of Federal Reserve banks, the Board of Governors of the Federal Reserve System shall be the Government official responsible for appointment."

Subsecs. (c), (d). Pub. L. 101–194, §405(2), added subsecs. (c) and (d).

1977—Subsec. (a). Pub. L. 95–188, §205(a), extended conflicts of interest prohibition to a Federal Reserve bank director, officer, or employee.

Subsec. (b). Pub. L. 95–188, §205(b), inserted at end "In the case of class A and B directors of Federal Reserve banks, the Board of Governors of the Federal Reserve System shall be the Government official responsible for appointment."

EFFECTIVE DATE

Section effective 90 days after Oct. 23, 1962, see section 4 of Pub. L. 87–849, set out as a note under section 201 of this title.

EXEMPTIONS

Exemptions from former section 434 of this title deemed to be exemptions from this section, see section 2 of Pub. L. 87–849, set out as a note under section 203 of this title.

REGULATIONS

Responsibility of Office of Government Ethics for promulgating regulations and interpreting this section, see section 201(c) of Ex. Ord. No. 12674, Apr. 12, 1989, 54 F.R. 15159, as amended, set out as a note under section 7301 of Title 5, Government Organization and Employees.

DELEGATION OF AUTHORITY

Authority of the President under subsec. (b) of this section to grant exemptions or approvals to individuals delegated to agency heads, see section 401 of Ex. Ord. No. 12674, Apr. 12, 1989, 54 F.R. 15159, as amended, set out as a note under section 7301 of Title 5, Government Organization and Employees.

Authority of the President under subsec. (b) of this section to grant exemptions or approvals for Presidential appointees to committees, commissions, boards, or similar groups established by the President, and for individuals appointed pursuant to sections 105 and 107(a) of Title 3, The President, delegated to Counsel to the President, see section 402 of Ex. Ord. No. 12674, Apr. 12, 1989, 54 F.R. 15159, as amended, set out as a note under section 7301 of Title 5.

"PARTICULAR MATTER" DEFINED

Pub. L. 100–446, title III, §319, Sept. 27, 1988, 102 Stat. 1826, which provided that notwithstanding any other provision of law, for the purposes of this section "particular matter", as applied to employees of the Department of the Interior and the Indian Health Service, means "particular matter involving specific parties", was repealed by Pub. L. 101–194, title V, §505(b), Nov. 30, 1989, 103 Stat. 1756, as amended by Pub. L. 101–280, §6(c), May 4, 1990, 104 Stat. 160.

Similar provisions were contained in Pub. L. 100–202, §101(g) [title III, §318], Dec. 22, 1987, 101 Stat. 1329–213, 1329–255.

§ 209. Salary of Government officials and employees payable only by United States

(a) Whoever receives any salary, or any contribution to or supplementation of salary, as compensation for his services as an officer or employee of the executive branch of the United States Government, of any independent agency of the United States, or of the District of Columbia, from any source other than the Government of the United States, except as may be contributed out of the treasury of any State, county, or municipality; or

Whoever, whether an individual, partnership, association, corporation, or other organization pays, makes any contribution to, or in any way supplements, the salary of any such officer or employee under circumstances which would make its receipt a violation of this subsection—

Shall be subject to the penalties set forth in section 216 of this title.

(b) Nothing herein prevents an officer or employee of the executive branch of the United States Government, or of any independent agency of the United States, or of the District of Columbia, from continuing to participate in a bona fide pension, retirement, group life, health or accident insurance, profit-sharing, stock bonus, or other employee welfare or benefit plan maintained by a former employer.

(c) This section does not apply to a special Government employee or to an officer or employee of the Government serving without compensation, whether or not he is a special Government employee, or to any person paying, contributing to, or supplementing his salary as such.

(d) This section does not prohibit payment or acceptance of contributions, awards, or other expenses under the terms of chapter 41 of title 5.

(e) This section does not prohibit the payment of actual relocation expenses incident to participation, or the acceptance of same by a participant in an executive exchange or fellowship program in an executive agency: *Provided*, That such program has been established by statute or Executive order of the President, offers appointments not to exceed three hundred and sixty-five days, and permits no extensions in excess of ninety additional days or, in the case of participants in overseas assignments, in excess of three hundred and sixty-five days.

(f) This section does not prohibit acceptance or receipt, by any officer or employee injured during the commission of an offense described in section 351 or 1751 of this title, of contributions or payments from an organization which is described in section 501(c)(3) of the Internal Revenue Code of 1986 and which is exempt from taxation under section 501(a) of such Code.

(g)(1) This section does not prohibit an employee of a private sector organization, while assigned to an agency under chapter 37 of title 5, from continuing to receive pay and benefits from such organization in accordance with such chapter.

(2) For purposes of this subsection, the term "agency" means an agency (as defined by section 3701 of title 5) and the Office of the Chief Technology Officer of the District of Columbia.

(h) This section does not prohibit a member of the reserve components of the armed forces on active duty pursuant to a call or order to active duty under a provision of law referred to in section 101(a)(13) of title 10 from receiving from any person that employed such member before the call or order to active duty any payment of any part of the salary or wages that such person would have paid the member if the member's employment had not been interrupted by such call or order to active duty.

(Added Pub. L. 87–849, §1(a), Oct. 23, 1962, 76 Stat. 1125; amended Pub. L. 96–174, Dec. 29, 1979, 93 Stat. 1288; Pub. L. 97–171, Apr. 13, 1982, 96 Stat.

service-disabled veteran-owned small business set-aside, or under subpart 19.15 as an economically disadvantaged women-owned small business (EDWOSB) or women-owned small business (WOSB) set-aside.

(11) Conduct annual reviews to assess the—

(i) Extent to which small businesses are receiving a fair share of Federal procurements, including contract opportunities under the programs administered under the Small Business Act;

(ii) Adequacy of contract bundling documentation and justifications; and

(iii) Actions taken to mitigate the effects of necessary and justified contract bundling on small businesses.

(12) Provide a copy of the assessment made under paragraph (d)(11) of this section to the Agency Head and SBA Administrator.

(e) Small Business Specialists must be appointed and act in accordance with agency regulations.

(f)(1) Each agency shall designate, at levels it determines appropriate, personnel responsible for determining whether, in order to achieve the contracting agency's goal for SDB concerns, the use of the SDB mechanism in Subpart 19.11 has resulted in an undue burden on non-SDB firms in one of the Industry Subsectors and regions identified by Department of Commerce following paragraph (b) of this section, or is otherwise inappropriate. Determinations under this subpart are for the purpose of determining future acquisitions and shall not affect ongoing acquisitions. Requests for a determination, including supporting rationale, may be submitted to the agency designee. If the agency designee makes an affirmative determination that the SDB mechanism has an undue burden or is otherwise inappropriate, the determination shall be forwarded through agency channels to the OFPP, which shall review the determination in consultation with the Department of Commerce and the Small Business Administration. At a minimum, the following information should be included in any submittal:

(i) A determination of undue burden or other inappropriate effect, including proposed corrective action.

(ii) The Industry Subsector affected.

(iii) Supporting information to justify the determination, including, but not limited to, dollars and percentages of contracts awarded by the contracting activity under the affected Industry Subsector for the previous two fiscal years and current fiscal year to date for—

(A) Total awards;

(B) Total awards to SDB concerns;

(C) Awards to SDB concerns awarded contracts under the SDB price evaluation adjustment where the SDB concerns would not otherwise have been the successful offeror;

(D) Number of successful and unsuccessful SDB offerors; and

(E) Number of successful and unsuccessful non-SDB offerors.

(iv) A discussion of the pertinent findings, including any peculiarities related to the industry, regions or demographics.

(v) A discussion of other efforts the agency has undertaken to ensure equal opportunity for SDBs in contracting with the agency.

(2) After consultation with OFPP, or if the agency does not receive a response from OFPP within 90 days after notice is provided to OFPP, the contracting agency may limit the use of the SDB mechanism in Subpart 19.11 until the Department of Commerce determines the updated price evaluation adjustment, as required by this section. This limitation shall not apply to solicitations that already have been synopsized.

19.202 Specific policies.

In order to further the policy in 19.201(a), contracting officers shall comply with the specific policies listed in this section and shall consider recommendations of the agency Director of Small and Disadvantaged Business Utilization, or the Director's designee, as to whether a particular acquisition should be awarded under subpart 19.5, 19.8, 19.13, 19.14, or 19.15. Agencies shall establish procedures including dollar thresholds for review of acquisitions by the Director or the Director's designee for the purpose of making these recommendations. The contracting officer shall document the contract file whenever the Director's recommendations are not accepted.

19.202-1 Encouraging small business participation in acquisitions.

Small business concerns shall be afforded an equitable opportunity to compete for all contracts that they can perform to the extent consistent with the Government's interest. When applicable, the contracting officer shall take the following actions:

(a) Divide proposed acquisitions of supplies and services (except construction) into reasonably small lots (not less than economic production runs) to permit offers on quantities less than the total requirement.

(b) Plan acquisitions such that, if practicable, more than one small business concern may perform the work, if the work exceeds the amount for which a surety may be guaranteed by SBA against loss under 15 U.S.C. 694b.

(c) Ensure that delivery schedules are established on a realistic basis that will encourage small business participation to the extent consistent with the actual requirements of the Government.

(d) Encourage prime contractors to subcontract with small business concerns (see Subpart 19.7).

(e)(1) Provide a copy of the proposed acquisition package to the SBA procurement center representative (or, if a procurement center representative is not assigned, see 19.402(a)) at least 30 days prior to the issuance of the solicitation if—

(i) The proposed acquisition is for supplies or services currently being provided by a small business and the proposed acquisition is of a quantity or estimated dollar value, the magnitude of which makes it unlikely that small businesses can compete for the prime contract;

(ii) The proposed acquisition is for construction and seeks to package or consolidate discrete construction projects and the magnitude of this consolidation makes it unlikely that small businesses can compete for the prime contract; or

(iii) The proposed acquisition is for a bundled requirement. (See 10.001(c)(2)(i) for mandatory 30-day notice requirement to incumbent small business concerns.) The contracting officer shall provide all information relative to the justification of contract bundling, including the acquisition plan or strategy, and if the acquisition involves substantial bundling, the information identified in 7.107(e). When the acquisition involves substantial bundling, the contracting officer shall also provide the same information to the agency Office of Small and Disadvantaged Business Utilization.

(2) The contracting officer also must provide a statement explaining why the—

(i) Proposed acquisition cannot be divided into reasonably small lots (not less than economic production runs) to permit offers on quantities less than the total requirement;

(ii) Delivery schedules cannot be established on a realistic basis that will encourage small business participation to the extent consistent with the actual requirements of the Government;

(iii) Proposed acquisition cannot be structured so as to make it likely that small businesses can compete for the prime contract;

(iv) Consolidated construction project cannot be acquired as separate discrete projects; or

(v) Bundling is necessary and justified.

(3) The 30-day notification process shall occur concurrently with other processing steps required prior to the issuance of the solicitation.

(4) If the contracting officer rejects the SBA representative's recommendation made in accordance with 19.402(c)(2), the contracting officer shall document the basis for the rejection and notify the SBA representative in accordance with 19.505.

19.202-2 Locating small business sources.

The contracting officer must, to the extent practicable, encourage maximum participation by small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns in acquisitions by taking the following actions:

(a) Before issuing solicitations, make every reasonable effort to find additional small business concerns, unless lists are already excessively long and only some of the concerns on the list will be solicited. This effort should include contacting the SBA procurement center representative (or, if a procurement center representative is not assigned, see 19.402(a)).

(b) Publicize solicitations and contract awards through the Governmentwide point of entry (see Subparts 5.2 and 5.3).

19.202-3 Equal low bids.

In the event of equal low bids (see 14.408-6), awards shall be made first to small business concerns which are also labor surplus area concerns, and second to small business concerns which are not also labor surplus area concerns.

19.202-4 Solicitation.

The contracting officer must encourage maximum response to solicitations by small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns by taking the following actions:

(a) Allow the maximum amount of time practicable for the submission of offers.

(b) Furnish specifications, plans, and drawings with solicitations, or furnish information as to where they may be obtained or examined.

(c) Provide to any small business concern, upon its request, a copy of bid sets and specifications with respect to any contract to be let, the name and telephone number of an agency contact to answer questions related to such prospective contract and adequate citations to each major Federal law or agency rule with which such business concern must comply in performing such contract other than laws or agency rules with which the small business must comply when doing business with other than the Government.

19.202-5 Data collection and reporting requirements.

Agencies must measure the extent of small business participation in their acquisition programs by taking the following actions:

(a) Require each prospective contractor to represent whether it is a small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, women-owned small business, EDWOSB concern, or WOSB concern eligible under the WOSB Program (see the provision at 52.219-1, Small Business Program Representations).

(b) Accurately measure the extent of participation by small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns in Government acquisitions in terms of the total value of contracts placed during each fiscal year, and report data to the SBA at the end of each fiscal year (see Subpart 4.6).

19.808 Contract negotiation.

19.808-1 Sole source.

(a) The SBA may not accept for negotiation a sole-source 8(a) contract that exceeds $20 million unless the requesting agency has completed a justification in accordance with the requirements of 6.303.

(b) The SBA is responsible for initiating negotiations with the agency within the time established by the agency. If the SBA does not initiate negotiations within the agreed time and the agency cannot allow additional time, the agency may, after notifying the SBA, proceed with the acquisition from other sources.

(c) The SBA should participate, whenever practicable, in negotiating the contracting terms. When mutually agreeable, the SBA may authorize the contracting activity to negotiate directly with the 8(a) contractor. Whether or not direct negotiations take place, the SBA is responsible for approving the resulting contract before award.

19.808-2 Competitive.

In competitive 8(a) acquisitions subject to Part 15, the contracting officer conducts negotiations directly with the competing 8(a) firms. Conducting competitive negotiations among 8(a) firms prior to SBA's formal acceptance of the acquisition for the 8(a) Program may be grounds for SBA's not accepting the acquisition for the 8(a) Program.

19.809 Preaward considerations.

The contracting officer should request a preaward survey of the 8(a) contractor whenever considered useful. If the results of the preaward survey or other information available to the contracting officer raise substantial doubt as to the firm's ability to perform, the contracting officer must refer the matter to SBA for Certificate of Competency consideration under Subpart 19.6.

19.810 SBA appeals.

(a) The SBA Administrator may submit the following matters for determination to the agency head if the SBA and the contracting officer fail to agree on them:

(1) The decision not to make a particular acquisition available for award under the 8(a) Program.

(2) A contracting officer's decision to reject a specific 8(a) firm for award of an 8(a) contract after SBA's acceptance of the requirement for the 8(a) Program.

(3) The terms and conditions of a proposed 8(a) contract, including the contracting activity's NAICS code designation and estimate of the fair market price.

(b) Notification of a proposed appeal to the agency head by the SBA must be received by the contracting officer within 5 working days after the SBA is formally notified of the contracting officer's decision. The SBA will provide the agency Director for Small and Disadvantaged Business Utilization a copy of this notification of the intent to appeal. The SBA must send the written appeal to the head of the contracting activity within 15 working days of SBA's notification of intent to appeal or the contracting activity may consider the appeal withdrawn. Pending issuance of a decision by the agency head, the contracting officer must suspend action on the acquisition. The contracting officer need not suspend action on the acquisition if the contracting officer makes a written determination that urgent and compelling circumstances that significantly affect the interests of the United States will not permit waiting for a decision.

(c) If the SBA appeal is denied, the decision of the agency head shall specify the reasons for the denial, including the reasons why the selected firm was determined incapable of performance, if appropriate. The decision shall be made a part of the contract file.

19.811 Preparing the contracts.

19.811-1 Sole source.

(a) The contract to be awarded by the agency to the SBA shall be prepared in accordance with agency procedures and in the same detail as would be required in a contract with a business concern. The contracting officer shall use the Standard Form 26 as the award form, except for construction contracts, in which case the Standard Form 1442 shall be used as required in 36.701(a).

(b) The agency shall prepare the contract that the SBA will award to the 8(a) contractor in accordance with agency procedures, as if the agency were awarding the contract directly to the 8(a) contractor, except for the following:

(1) The award form shall cite 41 U.S.C. 253(c)(5) or 10 U.S.C. 2304(c)(5) (as appropriate) as the authority for use of other than full and open competition.

(2) Appropriate clauses shall be included, as necessary, to reflect that the contract is between the SBA and the 8(a) contractor.

(3) The following items shall be inserted by the SBA:

(i) The SBA contract number.

(ii) The effective date.

(iii) The typed name of the SBA's contracting officer.

(iv) The signature of the SBA's contracting officer.

(v) The date signed.

(4) The SBA will obtain the signature of the 8(a) contractor prior to signing and returning the prime contract to the contracting officer for signature. The SBA will make every effort to obtain signatures and return the contract, and any subsequent bilateral modification, to the contracting officer within a maximum of 10 working days.

(c) Except in procurements where the SBA will make advance payments to its 8(a) contractor, the agency contracting officer may, as an alternative to the procedures in paragraphs (a) and (b) of this subsection, use a single contract document for both the prime contract between the agency and the SBA and its 8(a) contractor. The single contract document shall contain the information in paragraphs (b) (1), (2), and (3)

of this subsection. Appropriate blocks on the Standard Form (SF) 26 or 1442 will be asterisked and a continuation sheet appended as a tripartite agreement which includes the following:

(1) Agency acquisition office, prime contract number, name of agency contracting officer and lines for signature, date signed, and effective date.

(2) The SBA office, the SBA contract number, name of the SBA contracting officer, and lines for signature and date signed.

(3) Name and lines for the 8(a) subcontractor's signature and date signed.

(d) For acquisitions not exceeding the simplified acquisition threshold, the contracting officer may use the alternative procedures in paragraph (c) of this subsection with the appropriate simplified acquisition forms.

19.811-2 Competitive.

(a) The contract will be prepared in accordance with 14.408-1(d), except that appropriate blocks on the Standard Form 26 or 1442 will be asterisked and a continuation sheet appended as a tripartite agreement which includes the following:

(1) The agency contracting activity, prime contract number, name of agency contracting officer, and lines for signature, date signed, and effective date.

(2) The SBA office, the SBA subcontract number, name of the SBA contracting officer and lines for signature and date signed.

(b) The process for obtaining signatures shall be as specified in 19.811-1(b)(4).

19.811-3 Contract clauses.

(a) The contracting officer shall insert the clause at 52.219-11, Special 8(a) Contract Conditions, in contracts between the SBA and the agency when the acquisition is accomplished using the procedures of 19.811-1(a) and (b).

(b) The contracting officer shall insert the clause at 52.219-12, Special 8(a) Subcontract Conditions, in contracts between the SBA and its 8(a) contractor when the acquisition is accomplished using the procedures of 19.811-1(a) and (b).

(c) The contracting officer shall insert the clause at 52.219-17, Section 8(a) Award, in competitive solicitations and contracts when the acquisition is accomplished using the procedures of 19.805 and in sole source awards which utilize the alternative procedure in 19.811-1(c).

(d) The contracting officer shall insert the clause at 52.219-18, Notification of Competition Limited to Eligible 8(a) Concerns, in competitive solicitations and contracts when the acquisition is accomplished using the procedures of 19.805.

(1) The clause at 52.219-18 with its Alternate I will be used when competition is to be limited to 8(a) concerns within one or more specific SBA districts pursuant to 19.804-2.

(2) The clause at 52.219-18 with its Alternate II will be used when the acquisition is for a product in a class for which the Small Business Administration has waived the nonmanufacturer rule (see 19.102(f)(4) and (5)).

(e) The contracting officer shall insert the clause at 52.219-14, Limitations on Subcontracting, in any solicitation and contract resulting from this subpart.

19.812 Contract administration.

(a) The contracting officer shall assign contract administration functions, as required, based on the location of the 8(a) contractor (see Federal Directory of Contract Administration Services Components (available via the Internet at *http://www.dcma.mil/casbook/casbook.htm*)).

(b) The agency shall distribute copies of the contract(s) in accordance with Part 4. All contracts and modifications, if any, shall be distributed to both the SBA and the firm in accordance with the timeframes set forth in 4.201.

(c) To the extent consistent with the contracting activity's capability and resources, 8(a) contractors furnishing requirements shall be afforded production and technical assistance, including, when appropriate, identification of causes of deficiencies in their products and suggested corrective action to make such products acceptable.

(d) An 8(a) contract, whether in the base or an option year, must be terminated for convenience if the 8(a) concern to which it was awarded transfers ownership or control of the firm or if the contract is transferred or novated for any reason to another firm, unless the Administrator of the SBA waives the requirement for contract termination (13 CFR 124.515). The Administrator may waive the termination requirement only if certain conditions exist. Moreover, a waiver of the requirement for termination is permitted only if the 8(a) firm's request for waiver is made to the SBA prior to the actual relinquishment of ownership or control, except in the case of death or incapacity where the waiver must be submitted within 60 days after such an occurrence. The clauses in the contract entitled "Special 8(a) Contract Conditions" and "Special 8(a) Subcontract Conditions" require the SBA and the 8(a) subcontractor to notify the contracting officer when ownership of the firm is being transferred. When the contracting officer receives information that an 8(a) contractor is planning to transfer ownership or control to another firm, the contracting officer must take action immediately to preserve the option of waiving the termination requirement. The contracting officer should determine the timing of the proposed transfer and its effect on contract performance and mission support. If the contracting officer determines that the SBA does not intend to waive the termination requirement, and termination of the contract would severely impair attainment of the agency's

Subsec. (d)(3). Pub. L. 103–355, §1061(c)(3)(B), struck out par. (3) which read as follows: "In the case of award of a contract under paragraph (1)(B), the executive agency shall award the contract based on the proposals as received (and as clarified, if necessary, in discussions conducted for the purpose of minor clarification)."

Subsec. (d)(4). Pub. L. 103–355, §1061(c)(3)(B), redesignated par. (4) as (2).

Subsecs. (e) to (g). Pub. L. 103–355, §1064, added subsec. (e) and redesignated former subsecs. (e) and (f) as (f) and (g), respectively.

Subsec. (h). Pub. L. 103–355, §1065, added subsec. (h).

Subsec. (i). Pub. L. 103–355, §1066, added subsec. (i).

1984—Subsec. (f). Pub. L. 98–577 added subsec. (f).

EFFECTIVE DATE OF 1996 AMENDMENTS

Section 1074(b)(7) of Pub. L. 104–201 provided that the amendment made by that section is effective Feb. 10, 1996.

For effective date and applicability of amendment by sections 4103(b) and 4104(b) of Pub. L. 104–106, see section 4401 of Pub. L. 104–106, set out as a note under section 251 of this title.

Amendment by section 5607(c) of Pub. L. 104–106 effective 180 days after Feb. 10, 1996, see section 5701 of Pub. L. 104–106, Feb. 10, 1996, 110 Stat. 702.

EFFECTIVE DATE OF 1994 AMENDMENT

For effective date and applicability of amendment by Pub. L. 103–355, see section 10001 of Pub. L. 103–355, set out as a note under section 251 of this title.

EFFECTIVE DATE OF 1984 AMENDMENT

Section 201(b) of Pub. L. 98–577 provided that: "The amendment made by subsection (a) [amending this section] shall apply with respect to any solicitation issued more than 180 days after the date of enactment of this Act [Oct. 30, 1984]."

EFFECTIVE DATE

Section applicable with respect to any solicitation for bids or proposals issued after Mar. 31, 1985, see section 2751 of Pub. L. 98–369, set out as an Effective Date of 1984 Amendment note under section 251 of this title.

SMALL BUSINESS ACT

Section not to affect or supersede the provisions of section 637(a) of Title 15, Commerce and Trade, see section 2711(c) of Pub. L. 98–369, set out as a note under section 253 of this title.

EX. ORD. NO. 12979. AGENCY PROCUREMENT PROTESTS

Ex. Ord. No. 12979, Oct. 25, 1995, 60 F.R. 55171, provided:

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to ensure effective and efficient expenditure of public funds and fair and expeditious resolution of protests to the award of Federal procurement contracts, it is hereby ordered as follows:

SECTION 1. Heads of executive departments and agencies ("agencies") engaged in the procurement of supplies and services shall prescribe administrative procedures for the resolution of protests to the award of their procurement contracts as an alternative to protests in fora outside the procuring agencies. Procedures prescribed pursuant to this order shall:

(a) emphasize that whenever conduct of a procurement is contested, all parties should use their best efforts to resolve the matter with agency contracting officers;

(b) to the maximum extent practicable, provide for inexpensive, informal, procedurally simple, and expeditious resolution of protests, including, where appropriate and as permitted by law, the use of alternative dispute resolution techniques, third party neutrals, and another agency's personnel;

(c) allow actual or prospective bidders or offerors whose direct economic interests would be affected by the award or failure to award the contract to request a review, at a level above the contracting officer, of any decision by a contracting officer that is alleged to have violated a statute or regulation and, thereby, caused prejudice to the protester; and

(d) except where immediate contract award or performance is justified for urgent and compelling reasons or is determined to be in the best interest of the United States, prohibit award or performance of the contract while a timely filed protest is pending before the agency. To allow for the withholding of a contract award or performance, the agency must have received notice of the protest within either 10 calendar days after the contract award or 5 calendar days after the bidder or offeror who is protesting the contract award was given the opportunity to be debriefed by the agency, whichever date is later.

SEC. 2. The Administrator for Federal Procurement Policy shall: (a) work with the heads of executive agencies to provide policy guidance and leadership necessary to implement provisions of this order; and

(b) review and evaluate agency experience and performance under this order, and report on any findings to the President within 2 years from the date of this order.

SEC. 3. The Administrator of General Services, the Secretary of Defense, and the Administrator of the National Aeronautics and Space Administration, in coordination with the Office of Federal Procurement Policy, shall amend the Federal Acquisition Regulation, 48 C.F.R. 1, within 180 days of the date of this order to further the purposes of this order.

WILLIAM J. CLINTON.

DEFINITIONS

The definitions in section 102 of Title 40, Public Buildings, Property, and Works, apply to this subchapter.

§ 253c. Encouragement of new competition

(a) "Qualification requirement" defined

In this section, "qualification requirement" means a requirement for testing or other quality assurance demonstration that must be completed by an offeror before award of a contract.

(b) Agency head; functions; prior to enforcement of qualification requirement

Except as provided in subsection (c) of this section, the head of the agency shall, before enforcing any qualification requirement—

(1) prepare a written justification stating the necessity for establishing the qualification requirement and specify why the qualification requirement must be demonstrated before contract award;

(2) specify in writing and make available to a potential offeror upon request all requirements which a prospective offeror, or its product, must satisfy in order to become qualified, such requirements to be limited to those least restrictive to meet the purposes necessitating the establishment of the qualification requirement;

(3) specify an estimate of the costs of testing and evaluation likely to be incurred by a potential offeror in order to become qualified;

(4) ensure that a potential offeror is provided, upon request, a prompt opportunity to demonstrate at its own expense (except as provided in subsection (d) of this section) its ability to meet the standards specified for qualification using qualified personnel and facilities of the agency concerned or of another

agency obtained through interagency agreement, or under contract, or other methods approved by the agency (including use of approved testing and evaluation services not provided under contract to the agency);

(5) if testing and evaluation services are provided under contract to the agency for the purposes of clause (4), provide to the extent possible that such services be provided by a contractor who is not expected to benefit from an absence of additional qualified sources and who shall be required in such contract to adhere to any restriction on technical data asserted by the potential offeror seeking qualification; and

(6) ensure that a potential offeror seeking qualification is promptly informed as to whether qualification is attained and, in the event qualification is not attained, is promptly furnished specific information why qualification was not attained.

(c) Applicability; waiver authority; referral of offers

(1) Subsection (b) of this section does not apply with respect to a qualification requirement established by statute prior to October 30, 1984.

(2) Except as provided in paragraph (3), if it is unreasonable to specify the standards for qualification which a prospective offeror or its product must satisfy, a determination to that effect shall be submitted to the advocate for competition of the procuring activity responsible for the purchase of the item subject to the qualification requirement. After considering any comments of the advocate for competition reviewing such determination, the head of the procuring activity may waive the requirements of paragraphs (2) through (5) of subsection (b) of this section for up to two years with respect to the item subject to the qualification requirement.

(3) The waiver authority contained in paragraph (2) shall not apply with respect to any qualified products list.

(4) A potential offeror may not be denied the opportunity to submit and have considered an offer for a contract solely because the potential offeror has not been identified as meeting a qualification requirement, if the potential offeror can demonstrate to the satisfaction of the contracting officer that the potential offeror or its product meets the standards established for qualification or can meet such standards before the date specified for award of the contract.

(5) Nothing contained in this subsection requires the referral of an offer to the Small Business Administration pursuant to section 637(b)(7) of title 15 if the basis for the referral is a challenge by the offeror to either the validity of the qualification requirement or the offeror's compliance with such requirement.

(6) The head of an agency need not delay a proposed procurement in order to comply with subsection (b) of this section or in order to provide a potential offeror with an opportunity to demonstrate its ability to meet the standards specified for qualification.

(d) Number; qualified sources or products; fewer than two actual manufacturers; functions of agency head

(1) If the number of qualified sources or qualified products available to compete actively for an anticipated future requirement is fewer than two actual manufacturers or the products of two actual manufacturers, respectively, the head of the agency concerned shall—

(A) periodically publish notice in the Commerce Business Daily soliciting additional sources or products to seek qualification, unless the contracting officer determines that such publication would compromise national security; and

(B) bear the cost of conducting the specified testing and evaluation (excluding the costs associated with producing the item or establishing the production, quality control, or other system to be tested and evaluated) for a small business concern or a product manufactured by a small business concern which has met the standards specified for qualification and which could reasonably be expected to compete for a contract for that requirement, but such costs may be borne only if the head of the agency determines that such additional qualified sources or products are likely to result in cost savings from increased competition for future requirements sufficient to offset (within a reasonable period of time considering the duration and dollar value of anticipated future requirements) the costs incurred by the agency.

(2) The head of an agency shall require a prospective contractor requesting the United States to bear testing and evaluation costs under paragraph (1)(B) to certify as to its status as a small business concern under section 632 of title 15.

(e) Examination; need for qualification requirement

Within seven years after the establishment of a qualification requirement, the need for such qualification requirement shall be examined and the standards of such requirement revalidated in accordance with the requirements of subsection (b) of this section. The preceding sentence does not apply in the case of a qualification requirement for which a waiver is in effect under subsection (c)(2) of this section.

(f) Enforcement determination by agency head

Except in an emergency as determined by the head of the agency, whenever the head of the agency determines not to enforce a qualification requirement for a solicitation, the agency may not thereafter enforce that qualification requirement unless the agency complies with the requirements of subsection (b) of this section.

(June 30, 1949, ch. 288, title III, §303C, formerly §303D, as added Pub. L. 98–577, title II, §202(a), Oct. 30, 1984, 98 Stat. 3069; renumbered §303C, Pub. L. 99–145, title XIII, §1304(c)(4)(A), Nov. 8, 1985, 99 Stat. 742.)

EFFECTIVE DATE

Section 202(b) of Pub. L. 98–577 provided that: "The amendment made by subsection (a) [enacting this section] shall apply with respect to solicitations issued more than 180 days after the date of enactment of this Act [Oct. 30, 1984]."

DEFINITIONS

The definitions in section 102 of Title 40, Public Buildings, Property, and Works, apply to this subchapter.

§ 253d. Validation of proprietary data restrictions

(a) Contracts; delivery of technical services; contents

A contract for property or services entered into by an executive agency which provides for the delivery of technical data, shall provide that—

(1) a contractor or subcontractor at any tier shall be prepared to furnish to the contracting officer a written justification for any restriction asserted by the contractor or subcontractor on the right of the United States to use such technical data; and

(2) the contracting officer may review the validity of any restriction asserted by the contractor or by a subcontractor under the contract on the right of the United States to use technical data furnished to the United States under the contract if the contracting officer determines that reasonable grounds exist to question the current validity of the asserted restriction and that the continued adherence to the asserted restriction by the United States would make it impracticable to procure the item competitively at a later time.

(b) Review; challenge; notice

If after such review the contracting officer determines that a challenge to the asserted restriction is warranted, the contracting officer shall provide written notice to the contractor or subcontractor asserting the restriction. Such notice shall state—

(1) the grounds for challenging the asserted restriction; and

(2) the requirement for a response within 60 days justifying the current validity of the asserted restriction.

(c) Written request; additional time; schedule of responses

If a contractor or subcontractor asserting a restriction subject to this section submits to the contracting officer a written request, showing the need for additional time to comply with the requirement to justify the current validity of the asserted restriction, additional time to adequately permit the submission of such justification shall be provided by the contracting officer as appropriate. If a party asserting a restriction receives notices of challenges to restrictions on technical data from more than one contracting officer, and notifies each contracting officer of the existence of more than one challenge, the contracting officer initiating the first in time challenge, after consultation with the party asserting the restriction and the other contracting officers, shall formulate a schedule of responses to each of the challenges that will afford the party asserting the restriction with an equitable opportunity to respond to each such challenge.

(d) Decision; validity of asserted restriction; failure to submit response

(1) Upon a failure by the contractor or subcontractor to submit any response under subsection (b) of this section, the contracting officer shall issue a decision pertaining to the validity of the asserted restriction.

(2) If a justification is submitted in response to the notice provided pursuant to subsection (b) of this section, a contracting officer shall within 60 days of receipt of any justification submitted, issue a decision or notify the party asserting the restriction of the time within which a decision will be issued.

(e) Claim; considered claim within Contract Disputes Act of 1978

If a claim pertaining to the validity of the asserted restriction is submitted in writing to a contracting officer by a contractor or subcontractor at any tier, such claim shall be considered a claim within the meaning of the Contract Disputes Act of 1978 (41 U.S.C. 601 et seq.).

(f) Challenge; use of technical data; sustained; liability of United States for costs and fees

(1) If, upon final disposition, the contracting officer's challenge to the restriction on the right of the United States to use such technical data is sustained—

(A) the restriction on the right of the United States to use the technical data shall be cancelled; and

(B) if the asserted restriction is found not to be substantially justified, the contractor or subcontractor, as appropriate, shall be liable to the United States for payment of the cost to the United States of reviewing the asserted restriction and the fees and other expenses (as defined in section 2412(d)(2)(A) of title 28) incurred by the United States in challenging the asserted restriction, unless special circumstances would make such payment unjust.

(2) If, upon final disposition, the contracting officer's challenge to the restriction on the right of the United States to use such technical data is not sustained—

(A) the United States shall continue to be bound by the restriction; and

(B) the United States shall be liable for payment to the party asserting the restriction for fees and other expenses (as defined in section 2412(d)(2)(A) of title 28) incurred by the party asserting the restriction in defending the asserted restriction if the challenge by the United States is found not to be made in good faith.

(June 30, 1949, ch. 288, title III, § 303D, formerly § 303E, as added Pub. L. 98–577, title II, § 203(a), Oct. 30, 1984, 98 Stat. 3071; renumbered § 303D, Pub. L. 99–145, title XIII, § 1304(c)(4)(A), Nov. 8, 1985, 99 Stat. 742.)

REFERENCES IN TEXT

The Contract Disputes Act of 1978, referred to in subsec. (e), is Pub. L. 95–563, Nov. 1, 1978, 92 Stat. 2383, as amended, which is classified principally to chapter 9 (§ 601 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 601 of this title and Tables.

EFFECTIVE DATE

Section 203(b) of Pub. L. 98–577 provided that: "The amendment made by subsection (a) [enacting this section] shall apply with respect to solicitations issued more than 60 days after the date of the enactment of this Act [Oct. 30, 1984]."

2006], the Comptroller General shall submit to the committees described in paragraph (3) a report on the use of advisory and assistance services contracts by the Federal Government.

"(2) DEFENSE AND CIVILIAN AGENCY CONTRACTS COVERED.—The report shall cover both of the following:

"(A) Advisory and assistance services contracts as defined in section 2304b of title 10, United States Code.

"(B) Advisory and assistance services contracts as defined in section 303I(i) of the Federal Property and Administrative Services Act of 1949 ([former] 41 U.S.C. 253i(i)) [now 41 U.S.C. 4105(a)].

"(3) MATTERS COVERED.—The report shall address the following issues:

"(A) The extent to which executive agencies and elements of the Department of Defense require advisory and assistance services for periods of greater than five years.

"(B) The extent to which such advisory and assistance services are provided by the same contractors under recurring contracts.

"(C) The rationale for contracting for advisory and assistance services that will be needed on a continuing basis, rather than performing the services inside the Federal Government.

"(D) The contract types and oversight mechanisms used by the Federal Government in contracts for advisory and assistance services and the extent to which such contract types and oversight mechanisms are adequate to protect the interests of the Government and taxpayers.

"(E) The actions taken by the Federal Government to prevent organizational conflicts of interest and improper personal services contracts in its contracts for advisory and assistance services.

"(4) COMMITTEES.—The committees described in this paragraph are the following:

"(A) The Committees on Armed Services and on Homeland Security and Governmental Affairs of the Senate.

"(B) The Committees on Armed Services and on Government Reform [now Oversight and Government Reform] of the House of Representatives."

§ 2304c. Task and delivery order contracts: orders

(a) ISSUANCE OF ORDERS.—The following actions are not required for issuance of a task or delivery order under a task or delivery order contract:

(1) A separate notice for such order under section 1708 of title 41 or section 8(e) of the Small Business Act (15 U.S.C. 637(e)).

(2) Except as provided in subsection (b), a competition (or a waiver of competition approved in accordance with section 2304(f) of this title) that is separate from that used for entering into the contract.

(b) MULTIPLE AWARD CONTRACTS.—When multiple task or delivery order contracts are awarded under section 2304a(d)(1)(B) or 2304b(e) of this title, all contractors awarded such contracts shall be provided a fair opportunity to be considered, pursuant to procedures set forth in the contracts, for each task or delivery order in excess of $2,500 that is to be issued under any of the contracts unless—

(1) the agency's need for the services or property ordered is of such unusual urgency that providing such opportunity to all such contractors would result in unacceptable delays in fulfilling that need;

(2) only one such contractor is capable of providing the services or property required at the level of quality required because the services or property ordered are unique or highly specialized;

(3) the task or delivery order should be issued on a sole-source basis in the interest of economy and efficiency because it is a logical follow-on to a task or delivery order already issued on a competitive basis; or

(4) it is necessary to place the order with a particular contractor in order to satisfy a minimum guarantee.

(c) STATEMENT OF WORK.—A task or delivery order shall include a statement of work that clearly specifies all tasks to be performed or property to be delivered under the order.

(d) ENHANCED COMPETITION FOR ORDERS IN EXCESS OF $5,000,000.—In the case of a task or delivery order in excess of $5,000,000, the requirement to provide all contractors a fair opportunity to be considered under subsection (b) is not met unless all such contractors are provided, at a minimum—

(1) a notice of the task or delivery order that includes a clear statement of the agency's requirements;

(2) a reasonable period of time to provide a proposal in response to the notice;

(3) disclosure of the significant factors and subfactors, including cost or price, that the agency expects to consider in evaluating such proposals, and their relative importance;

(4) in the case of an award that is to be made on a best value basis, a written statement documenting the basis for the award and the relative importance of quality and price or cost factors; and

(5) an opportunity for a post-award debriefing consistent with the requirements of section 2305(b)(5) of this title.

(e) PROTESTS.—(1) A protest is not authorized in connection with the issuance or proposed issuance of a task or delivery order except for—

(A) a protest on the ground that the order increases the scope, period, or maximum value of the contract under which the order is issued; or

(B) a protest of an order valued in excess of $10,000,000.

(2) Notwithstanding section 3556 of title 31, the Comptroller General of the United States shall have exclusive jurisdiction of a protest authorized under paragraph (1)(B).

(3) Paragraph (1)(B) and paragraph (2) of this subsection shall not be in effect after September 30, 2016.

(f) TASK AND DELIVERY ORDER OMBUDSMAN.—Each head of an agency who awards multiple task or delivery order contracts pursuant to section 2304a(d)(1)(B) or 2304b(e) of this title shall appoint or designate a task and delivery order ombudsman who shall be responsible for reviewing complaints from the contractors on such contracts and ensuring that all of the contractors are afforded a fair opportunity to be considered for task or delivery orders when required under subsection (b). The task and delivery order ombudsman shall be a senior agency official who is independent of the contracting officer for the contracts and may be the agency's competition advocate.

(g) APPLICABILITY.—This section applies to task and delivery order contracts entered into under sections 2304a and 2304b of this title.

(Added Pub. L. 103–355, title I, §1004(a)(1), Oct. 13, 1994, 108 Stat. 3252; amended Pub. L. 110–181, div. A, title VIII, §843(a)(2), Jan. 28, 2008, 122 Stat. 237; Pub. L. 111–350, §5(b)(14), Jan. 4, 2011, 124 Stat. 3843; Pub. L. 111–383, div. A, title VIII, §825, title X, §1075(f)(5)(A), Jan. 7, 2011, 124 Stat. 4270, 4376.)

AMENDMENTS

2011—Subsec. (a)(1). Pub. L. 111–350 substituted "section 1708 of title 41" for "section 18 of the Office of Federal Procurement Policy Act (41 U.S.C. 416)".

Subsec. (e). Pub. L. 111–383, §1075(f)(5)(A), made technical correction to directory language of Pub. L. 110–181, §843(a)(2)(C). See 2008 Amendment note below.

Subsec. (e)(3). Pub. L. 111–383, §825, amended par. (3) generally. Prior to amendment, par. (3) read as follows: "This subsection shall be in effect for three years, beginning on the date that is 120 days after the date of the enactment of the National Defense Authorization Act for Fiscal Year 2008."

2008—Subsec. (d). Pub. L. 110–181, §843(a)(2), added subsec. (d). Former subsec. (d) redesignated (e).

Subsec. (e). Pub. L. 110–181, §843(a)(2)(C), as amended by Pub. L. 111–383, §1075(f)(5)(A), added subsec. (e) and struck out former subsec. (e). Former text read as follows: "A protest is not authorized in connection with the issuance or proposed issuance of a task or delivery order except for a protest on the ground that the order increases the scope, period, or maximum value of the contract under which the order is issued."

Pub. L. 110–181, §843(a)(2)(A), redesignated subsec. (d) as (e). Former subsec. (e) redesignated (f).

Subsecs. (f), (g). Pub. L. 110–181, §843(a)(2)(A), redesignated subsecs. (e) and (f) as (f) and (g), respectively.

EFFECTIVE DATE OF 2008 AMENDMENT

Pub. L. 110–181, div. A, title VIII, §843(a)(3)(B), Jan. 28, 2008, 122 Stat. 238, provided that: "The amendments made by paragraph (2) [amending this section] shall take effect on the date that is 120 days after the date of the enactment of this Act [Jan. 28, 2008], and shall apply with respect to any task or delivery order awarded on or after such date."

EFFECTIVE DATE

For effective date and applicability of section, see section 10001 of Pub. L. 103–355, set out as an Effective Date of 1994 Amendment note under section 2302 of this title.

PROVISIONS NOT AFFECTED BY PUB. L. 103–355

This section not to be construed as modifying or superseding, or as intended to impair or restrict, authorities or responsibilities under former 40 U.S.C. 759 or chapter 11 of Title 40, Public Buildings, Property, and Works, see section 1004(d) of Pub. L. 103–355, set out as a note under section 2304a of this title.

§ 2304d. Task and delivery order contracts: definitions

In sections 2304a, 2304b, and 2304c of this title:

(1) The term "task order contract" means a contract for services that does not procure or specify a firm quantity of services (other than a minimum or maximum quantity) and that provides for the issuance of orders for the performance of tasks during the period of the contract.

(2) The term "delivery order contract" means a contract for property that does not procure or specify a firm quantity of property (other than a minimum or maximum quantity) and that provides for the issuance of orders for the delivery of property during the period of the contract.

(Added Pub. L. 103–355, title I, §1004(a)(1), Oct. 13, 1994, 108 Stat. 3253.)

EFFECTIVE DATE

For effective date and applicability of section, see section 10001 of Pub. L. 103–355, set out as an Effective Date of 1994 Amendment note under section 2302 of this title.

PROVISIONS NOT AFFECTED BY PUB. L. 103–355

This section not to be construed as modifying or superseding, or as intended to impair or restrict, authorities or responsibilities under former 40 U.S.C. 759 or chapter 11 of Title 40, Public Buildings, Property, and Works, see section 1004(d) of Pub. L. 103–355, set out as a note under section 2304a of this title.

§ 2304e. Contracts: prohibition on competition between Department of Defense and small businesses and certain other entities

(a) EXCLUSION.—In any case in which the Secretary of Defense plans to use competitive procedures for a procurement, if the procurement is to be conducted as described in subsection (b), then the Secretary shall exclude the Department of Defense from competing in the procurement.

(b) PROCUREMENT DESCRIPTION.—The requirement to exclude the Department of Defense under subsection (a) applies in the case of a procurement to be conducted by excluding from competition entities in the private sector other than—

(1) small business concerns in furtherance of section 8 or 15 of the Small Business Act (15 U.S.C. 637 or 644); or

(2) entities described in subsection (a)(1) of section 2323 of this title in furtherance of the goal specified in that subsection.

(Added Pub. L. 103–160, div. A, title VIII, §848(a)(1), Nov. 30, 1993, 107 Stat. 1724, §2304a; renumbered §2304e, Pub. L. 104–106, div. D, title XLIII, §4321(b)(6)(A), Feb. 10, 1996, 110 Stat. 672.)

AMENDMENTS

1996—Pub. L. 104–106 renumbered section 2304a of this title as this section.

EFFECTIVE DATE

Section 848(b) of Pub. L. 103–160 provided that: "Section 2304a [now 2304e] of title 10, United States Code, as added by subsection (a), shall take effect on the date of the enactment of this Act [Nov. 30, 1993]."

§ 2305. Contracts: planning, solicitation, evaluation, and award procedures

(a)(1)(A) In preparing for the procurement of property or services, the head of an agency shall—

(i) specify the agency's needs and solicit bids or proposals in a manner designed to achieve full and open competition for the procurement;

(ii) use advance procurement planning and market research; and

(iii) develop specifications in such manner as is necessary to obtain full and open competi-

tion with due regard to the nature of the property or services to be acquired.

(B) Each solicitation under this chapter shall include specifications which—

(i) consistent with the provisions of this chapter, permit full and open competition; and

(ii) include restrictive provisions or conditions only to the extent necessary to satisfy the needs of the agency or as authorized by law.

(C) For the purposes of subparagraphs (A) and (B), the type of specification included in a solicitation shall depend on the nature of the needs of the agency and the market available to satisfy such needs. Subject to such needs, specifications may be stated in terms of—

(i) function, so that a variety of products or services may qualify;

(ii) performance, including specifications of the range of acceptable characteristics or of the minimum acceptable standards; or

(iii) design requirements.

(2) In addition to the specifications described in paragraph (1), a solicitation for sealed bids or competitive proposals (other than for a procurement for commercial items using special simplified procedures or a purchase for an amount not greater than the simplified acquisition threshold) shall at a minimum include—

(A) a statement of—

(i) all significant factors and significant subfactors which the head of the agency reasonably expects to consider in evaluating sealed bids (including price) or competitive proposals (including cost or price, cost-related or price-related factors and subfactors, and noncost-related or nonprice-related factors and subfactors); and

(ii) the relative importance assigned to each of those factors and subfactors; and

(B)(i) in the case of sealed bids—

(I) a statement that sealed bids will be evaluated without discussions with the bidders; and

(II) the time and place for the opening of the sealed bids; or

(ii) in the case of competitive proposals—

(I) either a statement that the proposals are intended to be evaluated with, and award made after, discussions with the offerors, or a statement that the proposals are intended to be evaluated, and award made, without discussions with the offerors (other than discussions conducted for the purpose of minor clarification) unless discussions are determined to be necessary; and

(II) the time and place for submission of proposals.

(3)(A) In prescribing the evaluation factors to be included in each solicitation for competitive proposals, the head of an agency—

(i) shall clearly establish the relative importance assigned to the evaluation factors and subfactors, including the quality of the product or services to be provided (including technical capability, management capability, prior experience, and past performance of the offeror);

(ii) shall include cost or price to the Federal Government as an evaluation factor that must be considered in the evaluation of proposals; and

(iii) shall disclose to offerors whether all evaluation factors other than cost or price, when combined, are—

(I) significantly more important than cost or price;

(II) approximately equal in importance to cost or price; or

(III) significantly less important than cost or price.

(B) The regulations implementing clause (iii) of subparagraph (A) may not define the terms "significantly more important" and "significantly less important" as specific numeric weights that would be applied uniformly to all solicitations or a class of solicitations.

(4) Nothing in this subsection prohibits an agency from—

(A) providing additional information in a solicitation, including numeric weights for all evaluation factors and subfactors on a case-by-case basis; or

(B) stating in a solicitation that award will be made to the offeror that meets the solicitation's mandatory requirements at the lowest cost or price.

(5) The head of an agency, in issuing a solicitation for a contract to be awarded using sealed bid procedures, may not include in such solicitation a clause providing for the evaluation of prices for options to purchase additional property or services under the contract unless the head of the agency has determined that there is a reasonable likelihood that the options will be exercised.

(b)(1) The head of an agency shall evaluate sealed bids and competitive proposals and make an award based solely on the factors specified in the solicitation.

(2) All sealed bids or competitive proposals received in response to a solicitation may be rejected if the head of the agency determines that such action is in the public interest.

(3) Sealed bids shall be opened publicly at the time and place stated in the solicitation. The head of the agency shall evaluate the bids in accordance with paragraph (1) without discussions with the bidders and, except as provided in paragraph (2), shall award a contract with reasonable promptness to the responsible bidder whose bid conforms to the solicitation and is most advantageous to the United States, considering only price and the other price-related factors included in the solicitation. The award of a contract shall be made by transmitting, in writing or by electronic means, notice of the award to the successful bidder. Within three days after the date of contract award, the head of the agency shall notify, in writing or by electronic means, each bidder not awarded the contract that the contract has been awarded.

(4)(A) The head of an agency shall evaluate competitive proposals in accordance with paragraph (1) and may award a contract—

(i) after discussions with the offerors, provided that written or oral discussions have been conducted with all responsible offerors

19.808 Contract negotiation.

19.808-1 Sole source.

(a) The SBA may not accept for negotiation a sole-source 8(a) contract that exceeds $20 million unless the requesting agency has completed a justification in accordance with the requirements of 6.303.

(b) The SBA is responsible for initiating negotiations with the agency within the time established by the agency. If the SBA does not initiate negotiations within the agreed time and the agency cannot allow additional time, the agency may, after notifying the SBA, proceed with the acquisition from other sources.

(c) The SBA should participate, whenever practicable, in negotiating the contracting terms. When mutually agreeable, the SBA may authorize the contracting activity to negotiate directly with the 8(a) contractor. Whether or not direct negotiations take place, the SBA is responsible for approving the resulting contract before award.

19.808-2 Competitive.

In competitive 8(a) acquisitions subject to Part 15, the contracting officer conducts negotiations directly with the competing 8(a) firms. Conducting competitive negotiations among 8(a) firms prior to SBA's formal acceptance of the acquisition for the 8(a) Program may be grounds for SBA's not accepting the acquisition for the 8(a) Program.

19.809 Preaward considerations.

The contracting officer should request a preaward survey of the 8(a) contractor whenever considered useful. If the results of the preaward survey or other information available to the contracting officer raise substantial doubt as to the firm's ability to perform, the contracting officer must refer the matter to SBA for Certificate of Competency consideration under Subpart 19.6.

19.810 SBA appeals.

(a) The SBA Administrator may submit the following matters for determination to the agency head if the SBA and the contracting officer fail to agree on them:

(1) The decision not to make a particular acquisition available for award under the 8(a) Program.

(2) A contracting officer's decision to reject a specific 8(a) firm for award of an 8(a) contract after SBA's acceptance of the requirement for the 8(a) Program.

(3) The terms and conditions of a proposed 8(a) contract, including the contracting activity's NAICS code designation and estimate of the fair market price.

(b) Notification of a proposed appeal to the agency head by the SBA must be received by the contracting officer within 5 working days after the SBA is formally notified of the contracting officer's decision. The SBA will provide the agency Director for Small and Disadvantaged Business Utilization a copy of this notification of the intent to appeal. The SBA must send the written appeal to the head of the contracting activity within 15 working days of SBA's notification of intent to appeal or the contracting activity may consider the appeal withdrawn. Pending issuance of a decision by the agency head, the contracting officer must suspend action on the acquisition. The contracting officer need not suspend action on the acquisition if the contracting officer makes a written determination that urgent and compelling circumstances that significantly affect the interests of the United States will not permit waiting for a decision.

(c) If the SBA appeal is denied, the decision of the agency head shall specify the reasons for the denial, including the reasons why the selected firm was determined incapable of performance, if appropriate. The decision shall be made a part of the contract file.

19.811 Preparing the contracts.

19.811-1 Sole source.

(a) The contract to be awarded by the agency to the SBA shall be prepared in accordance with agency procedures and in the same detail as would be required in a contract with a business concern. The contracting officer shall use the Standard Form 26 as the award form, except for construction contracts, in which case the Standard Form 1442 shall be used as required in 36.701(a).

(b) The agency shall prepare the contract that the SBA will award to the 8(a) contractor in accordance with agency procedures, as if the agency were awarding the contract directly to the 8(a) contractor, except for the following:

(1) The award form shall cite 41 U.S.C. 253(c)(5) or 10 U.S.C. 2304(c)(5) (as appropriate) as the authority for use of other than full and open competition.

(2) Appropriate clauses shall be included, as necessary, to reflect that the contract is between the SBA and the 8(a) contractor.

(3) The following items shall be inserted by the SBA:

(i) The SBA contract number.

(ii) The effective date.

(iii) The typed name of the SBA's contracting officer.

(iv) The signature of the SBA's contracting officer.

(v) The date signed.

(4) The SBA will obtain the signature of the 8(a) contractor prior to signing and returning the prime contract to the contracting officer for signature. The SBA will make every effort to obtain signatures and return the contract, and any subsequent bilateral modification, to the contracting officer within a maximum of 10 working days.

(c) Except in procurements where the SBA will make advance payments to its 8(a) contractor, the agency contracting officer may, as an alternative to the procedures in paragraphs (a) and (b) of this subsection, use a single contract document for both the prime contract between the agency and the SBA and its 8(a) contractor. The single contract document shall contain the information in paragraphs (b) (1), (2), and (3)

of this subsection. Appropriate blocks on the Standard Form (SF) 26 or 1442 will be asterisked and a continuation sheet appended as a tripartite agreement which includes the following:

(1) Agency acquisition office, prime contract number, name of agency contracting officer and lines for signature, date signed, and effective date.

(2) The SBA office, the SBA contract number, name of the SBA contracting officer, and lines for signature and date signed.

(3) Name and lines for the 8(a) subcontractor's signature and date signed.

(d) For acquisitions not exceeding the simplified acquisition threshold, the contracting officer may use the alternative procedures in paragraph (c) of this subsection with the appropriate simplified acquisition forms.

19.811-2 Competitive.

(a) The contract will be prepared in accordance with 14.408-1(d), except that appropriate blocks on the Standard Form 26 or 1442 will be asterisked and a continuation sheet appended as a tripartite agreement which includes the following:

(1) The agency contracting activity, prime contract number, name of agency contracting officer, and lines for signature, date signed, and effective date.

(2) The SBA office, the SBA subcontract number, name of the SBA contracting officer and lines for signature and date signed.

(b) The process for obtaining signatures shall be as specified in 19.811-1(b)(4).

19.811-3 Contract clauses.

(a) The contracting officer shall insert the clause at 52.219-11, Special 8(a) Contract Conditions, in contracts between the SBA and the agency when the acquisition is accomplished using the procedures of 19.811-1(a) and (b).

(b) The contracting officer shall insert the clause at 52.219-12, Special 8(a) Subcontract Conditions, in contracts between the SBA and its 8(a) contractor when the acquisition is accomplished using the procedures of 19.811-1(a) and (b).

(c) The contracting officer shall insert the clause at 52.219-17, Section 8(a) Award, in competitive solicitations and contracts when the acquisition is accomplished using the procedures of 19.805 and in sole source awards which utilize the alternative procedure in 19.811-1(c).

(d) The contracting officer shall insert the clause at 52.219-18, Notification of Competition Limited to Eligible 8(a) Concerns, in competitive solicitations and contracts when the acquisition is accomplished using the procedures of 19.805.

(1) The clause at 52.219-18 with its Alternate I will be used when competition is to be limited to 8(a) concerns within one or more specific SBA districts pursuant to 19.804-2.

(2) The clause at 52.219-18 with its Alternate II will be used when the acquisition is for a product in a class for which the Small Business Administration has waived the nonmanufacturer rule (see 19.102(f)(4) and (5)).

(e) The contracting officer shall insert the clause at 52.219-14, Limitations on Subcontracting, in any solicitation and contract resulting from this subpart.

19.812 Contract administration.

(a) The contracting officer shall assign contract administration functions, as required, based on the location of the 8(a) contractor (see Federal Directory of Contract Administration Services Components (available via the Internet at *http://www.dcma.mil/casbook/casbook.htm*)).

(b) The agency shall distribute copies of the contract(s) in accordance with Part 4. All contracts and modifications, if any, shall be distributed to both the SBA and the firm in accordance with the timeframes set forth in 4.201.

(c) To the extent consistent with the contracting activity's capability and resources, 8(a) contractors furnishing requirements shall be afforded production and technical assistance, including, when appropriate, identification of causes of deficiencies in their products and suggested corrective action to make such products acceptable.

(d) An 8(a) contract, whether in the base or an option year, must be terminated for convenience if the 8(a) concern to which it was awarded transfers ownership or control of the firm or if the contract is transferred or novated for any reason to another firm, unless the Administrator of the SBA waives the requirement for contract termination (13 CFR 124.515). The Administrator may waive the termination requirement only if certain conditions exist. Moreover, a waiver of the requirement for termination is permitted only if the 8(a) firm's request for waiver is made to the SBA prior to the actual relinquishment of ownership or control, except in the case of death or incapacity where the waiver must be submitted within 60 days after such an occurrence. The clauses in the contract entitled "Special 8(a) Contract Conditions" and "Special 8(a) Subcontract Conditions" require the SBA and the 8(a) subcontractor to notify the contracting officer when ownership of the firm is being transferred. When the contracting officer receives information that an 8(a) contractor is planning to transfer ownership or control to another firm, the contracting officer must take action immediately to preserve the option of waiving the termination requirement. The contracting officer should determine the timing of the proposed transfer and its effect on contract performance and mission support. If the contracting officer determines that the SBA does not intend to waive the termination requirement, and termination of the contract would severely impair attainment of the agency's

(c) Payments, including any progress payments under this subcontract, will be made directly to the subcontractor by the _____ [*insert name of contracting agency*].

(End of clause)

52.219-13 [Reserved]

52.219-14 Limitations on Subcontracting.

As prescribed in 19.508(e) or 19.811-3(e), insert the following clause:

LIMITATIONS ON SUBCONTRACTING (DEC 1996)

(a) This clause does not apply to the unrestricted portion of a partial set-aside.

(b) By submission of an offer and execution of a contract, the Offeror/Contractor agrees that in performance of the contract in the case of a contract for—

(1) *Services (except construction).* At least 50 percent of the cost of contract performance incurred for personnel shall be expended for employees of the concern.

(2) *Supplies (other than procurement from a nonmanufacturer of such supplies).* The concern shall perform work for at least 50 percent of the cost of manufacturing the supplies, not including the cost of materials.

(3) *General construction.* The concern will perform at least 15 percent of the cost of the contract, not including the cost of materials, with its own employees.

(4) *Construction by special trade contractors.* The concern will perform at least 25 percent of the cost of the contract, not including the cost of materials, with its own employees.

(End of clause)

52.219-15 [Reserved]

52.219-16 Liquidated Damages—Subcontracting Plan.

As prescribed in 19.708(b)(2), insert the following clause:

LIQUIDATED DAMAGES—SUBCONTRACTING PLAN (JAN 1999)

(a) "Failure to make a good faith effort to comply with the subcontracting plan," as used in this clause, means a willful or intentional failure to perform in accordance with the requirements of the subcontracting plan approved under the clause in this contract entitled "Small Business Subcontracting Plan," or willful or intentional action to frustrate the plan.

(b) Performance shall be measured by applying the percentage goals to the total actual subcontracting dollars or, if a commercial plan is involved, to the pro rata share of actual subcontracting dollars attributable to Government contracts covered by the commercial plan. If, at contract completion or, in the case of a commercial plan, at the close of the fiscal year for which the plan is applicable, the Contractor has failed to meet its subcontracting goals and the Contracting Officer decides in accordance with paragraph (c) of this clause that the Contractor failed to make a good faith effort to comply with its subcontracting plan, established in accordance with the clause in this contract entitled "Small Business Subcontracting Plan," the Contractor shall pay the Government liquidated damages in an amount stated. The amount of probable damages attributable to the Contractor's failure to comply shall be an amount equal to the actual dollar amount by which the Contractor failed to achieve each subcontract goal.

(c) Before the Contracting Officer makes a final decision that the Contractor has failed to make such good faith effort, the Contracting Officer shall give the Contractor written notice specifying the failure and permitting the Contractor to demonstrate what good faith efforts have been made and to discuss the matter. Failure to respond to the notice may be taken as an admission that no valid explanation exists. If, after consideration of all the pertinent data, the Contracting Officer finds that the Contractor failed to make a good faith effort to comply with the subcontracting plan, the Contracting Officer shall issue a final decision to that effect and require that the Contractor pay the Government liquidated damages as provided in paragraph (b) of this clause.

(d) With respect to commercial plans, the Contracting Officer who approved the plan will perform the functions of the Contracting Officer under this clause on behalf of all agencies with contracts covered by the commercial plan.

(e) The Contractor shall have the right of appeal, under the clause in this contract entitled, Disputes, from any final decision of the Contracting Officer.

(f) Liquidated damages shall be in addition to any other remedies that the Government may have.

(End of clause)

52.219-17 Section 8(a) Award.

As prescribed in 19.811-3(c), insert the following clause:

SECTION 8(A) AWARD (DEC 1996)

(a) By execution of a contract, the Small Business Administration (SBA) agrees to the following:

(1) To furnish the supplies or services set forth in the contract according to the specifications and the terms and conditions by subcontracting with the Offeror who has been determined an eligible concern pursuant to the provisions of section 8(a) of the Small Business Act, as amended (15 U.S.C. 637(a)).

(2) Except for novation agreements and advance payments, delegates to the _____ [*insert name of contracting activity*] the responsibility for administering the contract with complete authority to take any action on behalf of the Government under the terms and conditions of the contract; *provided*, however that the contracting agency shall give advance notice to the SBA before it issues a final notice terminating the right of the subcontractor to proceed with further performance, either in whole or in part, under the contract.

12.000 Scope of part.

This part prescribes policies and procedures unique to the acquisition of commercial items. It implements the Federal Government's preference for the acquisition of commercial items contained in Title VIII of the Federal Acquisition Streamlining Act of 1994 (Public Law 103-355) by establishing acquisition policies more closely resembling those of the commercial marketplace and encouraging the acquisition of commercial items and components.

12.001 Definition.

"Subcontract," as used in this part, includes, but is not limited to, a transfer of commercial items between divisions, subsidiaries, or affiliates of a contractor or subcontractor.

Subpart 12.1—Acquisition of Commercial Items—General

12.101 Policy.

Agencies shall—

(a) Conduct market research to determine whether commercial items or nondevelopmental items are available that could meet the agency's requirements;

(b) Acquire commercial items or nondevelopmental items when they are available to meet the needs of the agency; and

(c) Require prime contractors and subcontractors at all tiers to incorporate, to the maximum extent practicable, commercial items or nondevelopmental items as components of items supplied to the agency.

12.102 Applicability.

(a) This part shall be used for the acquisition of supplies or services that meet the definition of commercial items at 2.101.

(b) Contracting officers shall use the policies in this part in conjunction with the policies and procedures for solicitation, evaluation and award prescribed in Part 13, Simplified Acquisition Procedures; Part 14, Sealed Bidding; or Part 15, Contracting by Negotiation, as appropriate for the particular acquisition.

(c) Contracts for the acquisition of commercial items are subject to the policies in other parts of the FAR. When a policy in another part of the FAR is inconsistent with a policy in this part, this part 12 shall take precedence for the acquisition of commercial items.

(d) The definition of commercial item in section 2.101 uses the phrase "purposes other than governmental purposes." These purposes are those that are not unique to a government.

(e) This part shall not apply to the acquisition of commercial items—

(1) At or below the micro-purchase threshold;

(2) Using the Standard Form 44 (see 13.306);

(3) Using the imprest fund (see 13.305);

(4) Using the Governmentwide commercial purchase card; or

(5) Directly from another Federal agency.

(f)(1) Contracting officers may treat any acquisition of supplies or services that, as determined by the head of the agency, are to be used to facilitate defense against or recovery from nuclear, biological, chemical, or radiological attack, as an acquisition of commercial items.

(2) A contract in an amount greater than $17.5 million that is awarded on a sole source basis for an item or service treated as a commercial item under paragraph (f)(1) of this section but does not meet the definition of a commercial item as defined at FAR 2.101 shall not be exempt from—

(i) Cost accounting standards (see Subpart 30.2); or

(ii) Certified cost or pricing data requirements (see 15.403).

(g)(1) In accordance with section 1431 of the National Defense Authorization Act for Fiscal Year 2004 (Public Law 108-136) (41 U.S.C. 437), the contracting officer also may use Part 12 for any acquisition for services that does not meet the definition of commercial item in FAR 2.101, if the contract or task order—

(i) Is entered into on or before November 24, 2013;

(ii) Has a value of $29.5 million or less;

(iii) Meets the definition of performance-based acquisition at FAR 2.101;

(iv) Uses a quality assurance surveillance plan;

(v) Includes performance incentives where appropriate;

(vi) Specifies a firm-fixed price for specific tasks to be performed or outcomes to be achieved; and

(vii) Is awarded to an entity that provides similar services to the general public under terms and conditions similar to those in the contract or task order.

(2) In exercising the authority specified in paragraph (g)(1) of this section, the contracting officer may tailor paragraph (a) of the clause at FAR 52.212-4 as may be necessary to ensure the contract's remedies adequately protect the Government's interests.

12.103 Commercially available off-the-shelf (COTS) items.

COTS items are defined in 2.101. Unless indicated otherwise, all of the policies that apply to commercial items also apply to COTS. Section 12.505 lists the laws that are not applicable to COTS (in addition to 12.503 and 12.504); the components test of the Buy American Act, and the two recovered materials certifications in Subpart 23.4, do not apply to COTS.

Subpart 19.2—Policies

19.201 General policy.

(a) It is the policy of the Government to provide maximum practicable opportunities in its acquisitions to small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns. Such concerns must also have the maximum practicable opportunity to participate as subcontractors in the contracts awarded by any executive agency, consistent with efficient contract performance. The Small Business Administration (SBA) counsels and assists small business concerns and assists contracting personnel to ensure that a fair proportion of contracts for supplies and services is placed with small business.

(b) The Department of Commerce will determine on an annual basis, by North American Industry Classification System (NAICS) Industry Subsector, and region, if any, the authorized small disadvantaged business (SDB) procurement mechanisms and applicable factors (percentages). The Department of Commerce determination shall only affect solicitations that are issued on or after the effective date of the determination. The effective date of the Department of Commerce determination shall be no less than 60 days after its publication date. The Department of Commerce determination shall not affect ongoing acquisitions. The SDB procurement mechanisms are a price evaluation adjustment for SDB concerns (see Subpart 19.11), an evaluation factor or subfactor for participation of SDB concerns (see 19.1202), and monetary subcontracting incentive clauses for SDB concerns (see 19.1203). The Department of Commerce determination shall also include the applicable factors, by NAICS Industry Subsector, to be used in the price evaluation adjustment for SDB concerns (see 19.1104). The General Services Administration shall post the Department of Commerce determination at *https://www.acquisition.gov/References/sdbadjustments.htm*. The authorized procurement mechanisms shall be applied consistently with the policies and procedures in this subpart. The agencies shall apply the procurement mechanisms determined by the Department of Commerce. The Department of Commerce, in making its determination, is not limited to the SDB procurement mechanisms identified in this section where the Department of Commerce has found substantial and persuasive evidence of—

(1) A persistent and significant underutilization of minority firms in a particular industry, attributable to past or present discrimination; and

(2) A demonstrated incapacity to alleviate the problem by using those mechanisms.

(c) Heads of contracting activities are responsible for effectively implementing the small business programs within their activities, including achieving program goals. They are to ensure that contracting and technical personnel maintain knowledge of small business program requirements and take all reasonable action to increase participation in their activities' contracting processes by these businesses.

(d) The Small Business Act requires each agency with contracting authority to establish an Office of Small and Disadvantaged Business Utilization (see section (k) of the Small Business Act). For the Department of Defense, in accordance with the National Defense Authorization Act for Fiscal Year 2006 (Public Law 109-163), the Office of Small and Disadvantaged Business Utilization has been redesignated as the Office of Small Business Programs. Management of the office shall be the responsibility of an officer or employee of the agency who shall, in carrying out the purposes of the Act—

(1) Be known as the Director of Small and Disadvantaged Business Utilization, or for the Department of Defense, the Director of Small Business Programs;

(2) Be appointed by the agency head;

(3) Be responsible to and report directly to the agency head or the deputy to the agency head;

(4) Be responsible for the agency carrying out the functions and duties in sections 8, 15, and 31 of the Small Business Act.

(5) Work with the SBA procurement center representative (or, if a procurement center representative is not assigned, see 19.402(a)) to—

(i) Identify proposed solicitations that involve bundling;

(ii) Facilitate small business participation as contractors including small business contract teams, where appropriate; and

(iii) Facilitate small business participation as subcontractors and suppliers where participation by small business concerns as contractors is unlikely;

(6) Assist small business concerns in obtaining payments under their contracts, late payment, interest penalties, or information on contractual payment provisions;

(7) Have supervisory authority over agency personnel to the extent that their functions and duties relate to sections 8, 15, and 31 of the Small Business Act.

(8) Assign a small business technical advisor to each contracting activity within the agency to which the SBA has assigned a representative (see 19.402)—

(i) Who shall be a full-time employee of the contracting activity, well qualified, technically trained, and familiar with the supplies or services contracted for by the activity; and

(ii) Whose principal duty is to assist the SBA's assigned representative in performing functions and duties relating to sections 8, 15, and 31 of the Small Business Act;

(9) Cooperate and consult on a regular basis with the SBA in carrying out the agency's functions and duties in sections 8, 15, and 31 of the Small Business Act;

(10) Make recommendations in accordance with agency procedures as to whether a particular acquisition should be awarded under subpart 19.5 as a small business set-aside, under subpart 19.8 as a Section 8(a) award, under subpart 19.13 as a HUBZone set-aside, under subpart 19.14 as a

service-disabled veteran-owned small business set-aside, or under subpart 19.15 as an economically disadvantaged women-owned small business (EDWOSB) or women-owned small business (WOSB) set-aside.

(11) Conduct annual reviews to assess the—

(i) Extent to which small businesses are receiving a fair share of Federal procurements, including contract opportunities under the programs administered under the Small Business Act;

(ii) Adequacy of contract bundling documentation and justifications; and

(iii) Actions taken to mitigate the effects of necessary and justified contract bundling on small businesses.

(12) Provide a copy of the assessment made under paragraph (d)(11) of this section to the Agency Head and SBA Administrator.

(e) Small Business Specialists must be appointed and act in accordance with agency regulations.

(f)(1) Each agency shall designate, at levels it determines appropriate, personnel responsible for determining whether, in order to achieve the contracting agency's goal for SDB concerns, the use of the SDB mechanism in Subpart 19.11 has resulted in an undue burden on non-SDB firms in one of the Industry Subsectors and regions identified by Department of Commerce following paragraph (b) of this section, or is otherwise inappropriate. Determinations under this subpart are for the purpose of determining future acquisitions and shall not affect ongoing acquisitions. Requests for a determination, including supporting rationale, may be submitted to the agency designee. If the agency designee makes an affirmative determination that the SDB mechanism has an undue burden or is otherwise inappropriate, the determination shall be forwarded through agency channels to the OFPP, which shall review the determination in consultation with the Department of Commerce and the Small Business Administration. At a minimum, the following information should be included in any submittal:

(i) A determination of undue burden or other inappropriate effect, including proposed corrective action.

(ii) The Industry Subsector affected.

(iii) Supporting information to justify the determination, including, but not limited to, dollars and percentages of contracts awarded by the contracting activity under the affected Industry Subsector for the previous two fiscal years and current fiscal year to date for—

(A) Total awards;

(B) Total awards to SDB concerns;

(C) Awards to SDB concerns awarded contracts under the SDB price evaluation adjustment where the SDB concerns would not otherwise have been the successful offeror;

(D) Number of successful and unsuccessful SDB offerors; and

(E) Number of successful and unsuccessful non-SDB offerors.

(iv) A discussion of the pertinent findings, including any peculiarities related to the industry, regions or demographics.

(v) A discussion of other efforts the agency has undertaken to ensure equal opportunity for SDBs in contracting with the agency.

(2) After consultation with OFPP, or if the agency does not receive a response from OFPP within 90 days after notice is provided to OFPP, the contracting agency may limit the use of the SDB mechanism in Subpart 19.11 until the Department of Commerce determines the updated price evaluation adjustment, as required by this section. This limitation shall not apply to solicitations that already have been synopsized.

19.202 Specific policies.

In order to further the policy in 19.201(a), contracting officers shall comply with the specific policies listed in this section and shall consider recommendations of the agency Director of Small and Disadvantaged Business Utilization, or the Director's designee, as to whether a particular acquisition should be awarded under subpart 19.5, 19.8, 19.13, 19.14, or 19.15. Agencies shall establish procedures including dollar thresholds for review of acquisitions by the Director or the Director's designee for the purpose of making these recommendations. The contracting officer shall document the contract file whenever the Director's recommendations are not accepted.

19.202-1 Encouraging small business participation in acquisitions.

Small business concerns shall be afforded an equitable opportunity to compete for all contracts that they can perform to the extent consistent with the Government's interest. When applicable, the contracting officer shall take the following actions:

(a) Divide proposed acquisitions of supplies and services (except construction) into reasonably small lots (not less than economic production runs) to permit offers on quantities less than the total requirement.

(b) Plan acquisitions such that, if practicable, more than one small business concern may perform the work, if the work exceeds the amount for which a surety may be guaranteed by SBA against loss under 15 U.S.C. 694b.

(c) Ensure that delivery schedules are established on a realistic basis that will encourage small business participation to the extent consistent with the actual requirements of the Government.

(d) Encourage prime contractors to subcontract with small business concerns (see Subpart 19.7).

(e)(1) Provide a copy of the proposed acquisition package to the SBA procurement center representative (or, if a procurement center representative is not assigned, see 19.402(a)) at least 30 days prior to the issuance of the solicitation if—

33.000 Scope of part.

This part prescribes policies and procedures for filing protests and for processing contract disputes and appeals.

Subpart 33.1—Protests

33.101 Definitions.

As used in this subpart—

"Day" means a calendar day, unless otherwise specified. In the computation of any period—

(1) The day of the act, event, or default from which the designated period of time begins to run is not included; and

(2) The last day after the act, event, or default is included unless—

(i) The last day is a Saturday, Sunday, or Federal holiday; or

(ii) In the case of a filing of a paper at any appropriate administrative forum, the last day is a day on which weather or other conditions cause the closing of the forum for all or part of the day, in which event the next day on which the appropriate administrative forum is open is included.

"Filed" means the complete receipt of any document by an agency before its close of business. Documents received after close of business are considered filed as of the next day. Unless otherwise stated, the agency close of business is presumed to be 4:30 p.m., local time.

"Interested party for the purpose of filing a protest" means an actual or prospective offeror whose direct economic interest would be affected by the award of a contract or by the failure to award a contract.

"Protest" means a written objection by an interested party to any of the following:

(1) A solicitation or other request by an agency for offers for a contract for the procurement of property or services.

(2) The cancellation of the solicitation or other request.

(3) An award or proposed award of the contract.

(4) A termination or cancellation of an award of the contract, if the written objection contains an allegation that the termination or cancellation is based in whole or in part on improprieties concerning the award of the contract.

33.102 General.

(a) Contracting officers shall consider all protests and seek legal advice, whether protests are submitted before or after award and whether filed directly with the agency or the Government Accountability Office (GAO). (See 19.302 for protests of small business status, 19.305 for protests of disadvantaged business status, 19.306 for protests of HUBZone small business status, and 19.307 for protests of service-disabled veteran-owned small business status, and 19.308 for protests of the status of an economically disadvantaged women-owned small business concern or of a women-owned small business concern eligible under the Women-Owned Small Business Program.)

(b) If, in connection with a protest, the head of an agency determines that a solicitation, proposed award, or award does not comply with the requirements of law or regulation, the head of the agency may—

(1) Take any action that could have been recommended by the Comptroller General had the protest been filed with the Government Accountability Office;

(2) Pay appropriate costs as stated in 33.104(h); and

(3) Require the awardee to reimburse the Government's costs, as provided in this paragraph, where a postaward protest is sustained as the result of an awardee's intentional or negligent misstatement, misrepresentation, or miscertification. In addition to any other remedy available, and pursuant to the requirements of Subpart 32.6, the Government may collect this debt by offsetting the amount against any payment due the awardee under any contract between the awardee and the Government.

(i) When a protest is sustained by GAO under circumstances that may allow the Government to seek reimbursement for protest costs, the contracting officer will determine whether the protest was sustained based on the awardee's negligent or intentional misrepresentation. If the protest was sustained on several issues, protest costs shall be apportioned according to the costs attributable to the awardee's actions.

(ii) The contracting officer shall review the amount of the debt, degree of the awardee's fault, and costs of collection, to determine whether a demand for reimbursement ought to be made. If it is in the best interests of the Government to seek reimbursement, the contracting officer shall notify the contractor in writing of the nature and amount of the debt, and the intention to collect by offset if necessary. Prior to issuing a final decision, the contracting officer shall afford the contractor an opportunity to inspect and copy agency records pertaining to the debt to the extent permitted by statute and regulation, and to request review of the matter by the head of the contracting activity.

(iii) When appropriate, the contracting officer shall also refer the matter to the agency debarment official for consideration under Subpart 9.4.

(c) In accordance with 31 U.S.C. 1558, with respect to any protest filed with the GAO, if the funds available to the agency for a contract at the time a protest is filed in connection with a solicitation for, proposed award of, or award of such a contract would otherwise expire, such funds shall remain available for obligation for 100 days after the date on which the final ruling is made on the protest. A ruling is considered final on the date on which the time allowed for filing an appeal or request for reconsideration has expired, or the date on which a decision is rendered on such appeal or request, whichever is later.

(d) *Protest likely after award.* The contracting officer may stay performance of a contract within the time period contained in paragraph 33.104(c)(1) if the contracting officer makes a written determination that—

(1) A protest is likely to be filed; and

(2) Delay of performance is, under the circumstances, in the best interests of the United States.

(e) An interested party wishing to protest is encouraged to seek resolution within the agency (see 33.103) before filing a protest with the GAO, but may protest to the GAO in accordance with GAO regulations (4 CFR Part 21).

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

33.103 Protests to the agency.

(a) *Reference.* Executive Order 12979, Agency Procurement Protests, establishes policy on agency procurement protests.

(b) Prior to submission of an agency protest, all parties shall use their best efforts to resolve concerns raised by an interested party at the contracting officer level through open and frank discussions.

(c) The agency should provide for inexpensive, informal, procedurally simple, and expeditious resolution of protests. Where appropriate, the use of alternative dispute resolution techniques, third party neutrals, and another agency's personnel are acceptable protest resolution methods.

(d) The following procedures are established to resolve agency protests effectively, to build confidence in the Government's acquisition system, and to reduce protests outside of the agency:

(1) Protests shall be concise and logically presented to facilitate review by the agency. Failure to substantially comply with any of the requirements of paragraph (d)(2) of this section may be grounds for dismissal of the protest.

(2) Protests shall include the following information:

(i) Name, address, and fax and telephone numbers of the protester.

(ii) Solicitation or contract number.

(iii) Detailed statement of the legal and factual grounds for the protest, to include a description of resulting prejudice to the protester.

(iv) Copies of relevant documents.

(v) Request for a ruling by the agency.

(vi) Statement as to the form of relief requested.

(vii) All information establishing that the protester is an interested party for the purpose of filing a protest.

(viii) All information establishing the timeliness of the protest.

(3) All protests filed directly with the agency will be addressed to the contracting officer or other official designated to receive protests.

(4) In accordance with agency procedures, interested parties may request an independent review of their protest at a level above the contracting officer; solicitations should advise potential bidders and offerors that this review is available. Agency procedures and/or solicitations shall notify potential bidders and offerors whether this independent review is available as an alternative to consideration by the contracting officer of a protest or is available as an appeal of a contracting officer decision on a protest. Agencies shall designate the official(s) who are to conduct this independent review, but the official(s) need not be within the contracting officer's supervisory chain. When practicable, officials designated to conduct the independent review should not have had previous personal involvement in the procurement. If there is an agency appellate review of the contracting officer's decision on the protest, it will not extend GAO's timeliness requirements. Therefore, any subsequent protest to the GAO must be filed within 10 days of knowledge of initial adverse agency action (4 CFR 21.2(a)(3)).

(e) Protests based on alleged apparent improprieties in a solicitation shall be filed before bid opening or the closing date for receipt of proposals. In all other cases, protests shall be filed no later than 10 days after the basis of protest is known or should have been known, whichever is earlier. The agency, for good cause shown, or where it determines that a protest raises issues significant to the agency's acquisition system, may consider the merits of any protest which is not timely filed.

(f) *Action upon receipt of protest.* (1) Upon receipt of a protest before award, a contract may not be awarded, pending agency resolution of the protest, unless contract award is justified, in writing, for urgent and compelling reasons or is determined, in writing, to be in the best interest of the Government. Such justification or determination shall be approved at a level above the contracting officer, or by another official pursuant to agency procedures.

(2) If award is withheld pending agency resolution of the protest, the contracting officer will inform the offerors whose offers might become eligible for award of the contract. If appropriate, the offerors should be requested, before expiration of the time for acceptance of their offers, to extend the time for acceptance to avoid the need for resolicitation. In the event of failure to obtain such extension of offers, consideration should be given to proceeding with award pursuant to paragraph (f)(1) of this section.

(3) Upon receipt of a protest within 10 days after contract award or within 5 days after a debriefing date offered to the protester under a timely debriefing request in accordance with 15.505 or 15.506, whichever is later, the contracting officer shall immediately suspend performance, pending res-

olution of the protest within the agency, including any review by an independent higher level official, unless continued performance is justified, in writing, for urgent and compelling reasons or is determined, in writing, to be in the best interest of the Government. Such justification or determination shall be approved at a level above the contracting officer, or by another official pursuant to agency procedures.

(4) Pursuing an agency protest does not extend the time for obtaining a stay at GAO. Agencies may include, as part of the agency protest process, a voluntary suspension period when agency protests are denied and the protester subsequently files at GAO.

(g) Agencies shall make their best efforts to resolve agency protests within 35 days after the protest is filed. To the extent permitted by law and regulation, the parties may exchange relevant information.

(h) Agency protest decisions shall be well-reasoned, and explain the agency position. The protest decision shall be provided to the protester using a method that provides evidence of receipt.

33.104 Protests to GAO.

Procedures for protests to GAO are found at 4 CFR Part 21 (GAO Bid Protest Regulations). In the event guidance concerning GAO procedure in this section conflicts with 4 CFR Part 21, 4 CFR Part 21 governs.

(a) *General procedure.* (1) A protester is required to furnish a copy of its complete protest to the official and location designated in the solicitation or, in the absence of such a designation, to the contracting officer, so it is received no later than 1 day after the protest is filed with the GAO. The GAO may dismiss the protest if the protester fails to furnish a complete copy of the protest within 1 day.

(2) Immediately after receipt of the GAO's written notice that a protest has been filed, the agency shall give notice of the protest to the contractor if the award has been made, or, if no award has been made, to all parties who appear to have a reasonable prospect of receiving award if the protest is denied. The agency shall furnish copies of the protest submissions to such parties with instructions to (i) communicate directly with the GAO, and (ii) provide copies of any such communication to the agency and to other participating parties when they become known. However, if the protester has identified sensitive information and requests a protective order, then the contracting officer shall obtain a redacted version from the protester to furnish to other interested parties, if one has not already been provided.

(3)(i) Upon notice that a protest has been filed with the GAO, the contracting officer shall immediately begin compiling the information necessary for a report to the GAO. The agency shall submit a complete report to the GAO within 30 days after the GAO notifies the agency by telephone that a protest has been filed, or within 20 days after receipt from the GAO of a determination to use the express option, unless the GAO—

(A) Advises the agency that the protest has been dismissed; or

(B) Authorizes a longer period in response to an agency's request for an extension. Any new date is documented in the agency's file.

(ii) When a protest is filed with the GAO, and an actual or prospective offeror so requests, the procuring agency shall, in accordance with any applicable protective orders, provide actual or prospective offerors reasonable access to the protest file. However, if the GAO dismisses the protest before the documents are submitted to the GAO, then no protest file need be made available. Information exempt from disclosure under 5 U.S.C. 552 may be redacted from the protest file. The protest file shall be made available to non-intervening actual or prospective offerors within a reasonable time after submittal of an agency report to the GAO. The protest file shall include an index and as appropriate—

(A) The protest;

(B) The offer submitted by the protester;

(C) The offer being considered for award or being protested;

(D) All relevant evaluation documents;

(E) The solicitation, including the specifications or portions relevant to the protest;

(F) The abstract of offers or relevant portions; and

(G) Any other documents that the agency determines are relevant to the protest, including documents specifically requested by the protester.

(iii) At least 5 days prior to the filing of the report, in cases in which the protester has filed a request for specific documents, the agency shall provide to all parties and the GAO a list of those documents, or portions of documents, that the agency has released to the protester or intends to produce in its report, and those documents that the agency intends to withhold from the protester and the reasons for the proposed withholding. Any objection to the scope of the agency's proposed disclosure or nondisclosure of the documents must be filed with the GAO and the other parties within 2 days after receipt of this list.

(iv) The agency report to the GAO shall include—

(A) A copy of the documents described in 33.104(a)(3)(ii);

(B) The contracting officer's signed statement of relevant facts, including a best estimate of the contract value, and a memorandum of law. The contracting officer's statement shall set forth findings, actions, and recommendations, and any additional evidence or information not provided in the protest file that may be necessary to determine the merits of the protest; and

(C) A list of parties being provided the documents.

(4)(i) At the same time the agency submits its report to the GAO, the agency shall furnish copies of its report to the protester and any intervenors. A party shall receive all relevant documents, except—

(A) Those that the agency has decided to withhold from that party for any reason, including those covered by a protective order issued by the GAO. Documents covered by a protective order shall be released only in accordance with the terms of the order. Examples of documents the agency may decide to exclude from a copy of the report include documents previously furnished to or prepared by a party; classified information; and information that would give the party a competitive advantage; and

(B) Protester's documents which the agency determines, pursuant to law or regulation, to withhold from any interested party.

(ii)(A) If the protester requests additional documents within 2 days after the protester knew the existence or relevance of additional documents, or should have known, the agency shall provide the requested documents to the GAO within 2 days of receipt of the request.

(B) The additional documents shall also be provided to the protester and other interested parties within this 2-day period unless the agency has decided to withhold them for any reason (see subdivision (a)(4)(i) of this section). This includes any documents covered by a protective order issued by the GAO. Documents covered by a protective order shall be provided only in accordance with the terms of the order.

(C) The agency shall notify the GAO of any documents withheld from the protester and other interested parties and shall state the reasons for withholding them.

(5) The GAO may issue protective orders which establish terms, conditions, and restrictions for the provision of any document to an interested party. Protective orders prohibit or restrict the disclosure by the party of procurement sensitive information, trade secrets or other proprietary or confidential research, development or commercial information that is contained in such document. Protective orders do not authorize withholding any documents or information from the United States Congress or an executive agency.

(i) *Requests for protective orders.* Any party seeking issuance of a protective order shall file its request with the GAO as soon as practicable after the protest is filed, with copies furnished simultaneously to all parties.

(ii) *Exclusions and rebuttals.* Within 2 days after receipt of a copy of the protective order request, any party may file with the GAO a request that particular documents be excluded from the coverage of the protective order, or that particular parties or individuals be included in or excluded from the protective order. Copies of the request shall be furnished simultaneously to all parties.

(iii) *Additional documents.* If the existence or relevance of additional documents first becomes evident after a protective order has been issued, any party may request that these additional documents be covered by the protective order. Any party to the protective order also may request that individuals not already covered by the protective order be included in the order. Requests shall be filed with the GAO, with copies furnished simultaneously to all parties.

(iv) *Sanctions and remedies.* The GAO may impose appropriate sanctions for any violation of the terms of the protective order. Improper disclosure of protected information will entitle the aggrieved party to all appropriate remedies under law or equity. The GAO may also take appropriate action against an agency which fails to provide documents designated in a protective order.

(6) The protester and other interested parties are required to furnish a copy of any comments on the agency report directly to the GAO within 10 days, or 5 days if express option is used, after receipt of the report, with copies provided to the contracting officer and to other participating interested parties. If a hearing is held, these comments are due within 5 days after the hearing.

(7) Agencies shall furnish the GAO with the name, title, and telephone number of one or more officials (in both field and headquarters offices, if desired) whom the GAO may contact who are knowledgeable about the subject matter of the protest. Each agency shall be responsible for promptly advising the GAO of any change in the designated officials.

(b) *Protests before award.*(1) When the agency has received notice from the GAO of a protest filed directly with the GAO, a contract may not be awarded unless authorized, in accordance with agency procedures, by the head of the contracting activity, on a nondelegable basis, upon a written finding that—

(i) Urgent and compelling circumstances which significantly affect the interest of the United States will not permit awaiting the decision of the GAO; and

(ii) Award is likely to occur within 30 days of the written finding.

(2) A contract award shall not be authorized until the agency has notified the GAO of the finding in paragraph (b)(1) of this section.

(3) When a protest against the making of an award is received and award will be withheld pending disposition of the protest, the contracting officer should inform the offerors whose offers might become eligible for award of the protest. If appropriate, those offerors should be requested, before expiration of the time for acceptance of their offer, to extend the time for acceptance to avoid the need for resolicitation. In the event of failure to obtain such extensions of offers, consideration should be given to proceeding under paragraph (b)(1) of this section.

(c) *Protests after award.*(1) When the agency receives notice of a protest from the GAO within 10 days after contract award or within 5 days after a debriefing date offered to the protester for any debriefing that is required by 15.505 or 15.506, whichever is later, the contracting officer shall immediately suspend performance or terminate the awarded con-

tract, except as provided in paragraphs (c)(2) and (3) of this section.

(2) In accordance with agency procedures, the head of the contracting activity may, on a nondelegable basis, authorize contract performance, notwithstanding the protest, upon a written finding that—

(i) Contract performance will be in the best interests of the United States; or

(ii) Urgent and compelling circumstances that significantly affect the interests of the United States will not permit waiting for the GAO's decision.

(3) Contract performance shall not be authorized until the agency has notified the GAO of the finding in paragraph (c)(2) of this section.

(4) When it is decided to suspend performance or terminate the awarded contract, the contracting officer should attempt to negotiate a mutual agreement on a no-cost basis.

(5) When the agency receives notice of a protest filed with the GAO after the dates contained in paragraph (c)(1), the contracting officer need not suspend contract performance or terminate the awarded contract unless the contracting officer believes that an award may be invalidated and a delay in receiving the supplies or services is not prejudicial to the Government's interest.

(d) *Findings and notice.* If the decision is to proceed with contract award, or continue contract performance under paragraphs (b) or (c) of this section, the contracting officer shall include the written findings or other required documentation in the file. The contracting officer also shall give written notice of the decision to the protester and other interested parties.

(e) *Hearings.* The GAO may hold a hearing at the request of the agency, a protester, or other interested party who has responded to the notice in paragraph (a)(2) of this section. A recording or transcription of the hearing will normally be made, and copies may be obtained from the GAO. All parties may file comments on the hearing and the agency report within 5 days of the hearing.

(f) *GAO decision time.* GAO issues its recommendation on a protest within 100 days from the date of filing of the protest with the GAO, or within 65 days under the express option. The GAO attempts to issue its recommendation on an amended protest that adds a new ground of protest within the time limit of the initial protest. If an amended protest cannot be resolved within the initial time limit, the GAO may resolve the amended protest through an express option.

(g) *Notice to GAO.* If the agency has not fully implemented the GAO recommendations with respect to a solicitation for a contract or an award or a proposed award of a contract within 60 days of receiving the GAO recommendations, the head of the contracting activity responsible for that contract shall report the failure to the GAO not later than 5 days after the expiration of the 60-day period. The report shall explain the reasons why the GAO's recommendation, exclusive of costs, has not been followed by the agency.

(h) *Award of costs.* (1) If the GAO determines that a solicitation for a contract, a proposed award, or an award of a contract does not comply with a statute or regulation, the GAO may recommend that the agency pay to an appropriate protester the cost, exclusive of profit, of filing and pursuing the protest, including reasonable attorney, consultant, and expert witness fees, and bid and proposal preparation costs. The agency shall use funds available for the procurement to pay the costs awarded.

(2) The protester shall file its claim for costs with the contracting agency within 60 days after receipt of the GAO's recommendation that the agency pay the protester its costs. Failure to file the claim within that time may result in forfeiture of the protester's right to recover its costs.

(3) The agency shall attempt to reach an agreement on the amount of costs to be paid. If the agency and the protester are unable to agree on the amount to be paid, the GAO may, upon request of the protester, recommend to the agency the amount of costs that the agency should pay.

(4) Within 60 days after the GAO recommends the amount of costs the agency should pay the protester, the agency shall notify the GAO of the action taken by the agency in response to the recommendation.

(5) No agency shall pay a party, other than a small business concern within the meaning of section 3(a) of the Small Business Act (see 2.101, "Small business concern"), costs under paragraph (h)(2) of this section—

(i) For consultant and expert witness fees that exceed the highest rate of compensation for expert witnesses paid by the Government pursuant to 5 U.S.C. 3109 and 5 CFR 304.105; or

(ii) For attorneys' fees that exceed $150 per hour, unless the agency determines, based on the recommendation of the Comptroller General on a case-by-case basis, that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee. The cap placed on attorneys' fees for businesses, other than small businesses, constitutes a benchmark as to a "reasonable" level for attorneys' fees for small businesses.

(6) Before paying a recommended award of costs, agency personnel should consult legal counsel. Section 33.104(h) applies to all recommended awards of costs that have not yet been paid.

(7) Any costs the contractor receives under this section shall not be the subject of subsequent proposals, billings, or claims against the Government, and those exclusions should be reflected in the cost agreement.

(8) If the Government pays costs, as provided in paragraph (h)(1) of this section, where a postaward protest is sustained as the result of an awardee's intentional or negligent

misstatement, misrepresentation, or miscertification, the Government may require the awardee to reimburse the Government the amount of such costs. In addition to any other remedy available, and pursuant to the requirements of Subpart 32.6, the Government may collect this debt by offsetting the amount against any payment due the awardee under any contract between the awardee and the Government.

33.105 [Reserved]

33.106 Solicitation provision and contract clause.

(a) The contracting officer shall insert the provision at 52.233-2, Service of Protest, in solicitations for contracts expected to exceed the simplified acquisition threshold.

(b) The contracting officer shall insert the clause at 52.233-3, Protest After Award, in all solicitations and contracts. If a cost reimbursement contract is contemplated, the contracting officer shall use the clause with its Alternate I.

Subpart 52.2—Text of Provisions and Clauses

52.200 Scope of subpart.

This subpart sets forth the text of all FAR provisions and clauses (see 52.101(b)(1)) and gives a cross-reference to the location in the FAR that prescribes the provision or clause.

52.201 [Reserved]

52.202-1 Definitions.

As prescribed in 2.201, insert the following clause:

DEFINITIONS (JULY 2004)

(a) When a solicitation provision or contract clause uses a word or term that is defined in the Federal Acquisition Regulation (FAR), the word or term has the same meaning as the definition in FAR 2.101 in effect at the time the solicitation was issued, unless—

(1) The solicitation, or amended solicitation, provides a different definition;

(2) The contracting parties agree to a different definition;

(3) The part, subpart, or section of the FAR where the provision or clause is prescribed provides a different meaning; or

(4) The word or term is defined in FAR Part 31, for use in the cost principles and procedures.

(b) The FAR Index is a guide to words and terms the FAR defines and shows where each definition is located. The FAR Index is available via the Internet at *http://www.acqnet.gov* at the end of the FAR, after the FAR Appendix.

(End of clause)

52.203-1 [Reserved]

52.203-2 Certificate of Independent Price Determination.

As prescribed in 3.103-1, insert the following provision. If the solicitation is a Request for Quotations, the terms "Quotation" and "Quoter" may be substituted for "Offer" and "Offeror."

CERTIFICATE OF INDEPENDENT PRICE DETERMINATION (APR 1985)

(a) The offeror certifies that—

(1) The prices in this offer have been arrived at independently, without, for the purpose of restricting competition, any consultation, communication, or agreement with any other offeror or competitor relating to—

(i) Those prices;

(ii) The intention to submit an offer; or

(iii) The methods or factors used to calculate the prices offered.

(2) The prices in this offer have not been and will not be knowingly disclosed by the offeror, directly or indirectly, to any other offeror or competitor before bid opening (in the case of a sealed bid solicitation) or contract award (in the case of a negotiated solicitation) unless otherwise required by law; and

(3) No attempt has been made or will be made by the offeror to induce any other concern to submit or not to submit an offer for the purpose of restricting competition.

(b) Each signature on the offer is considered to be a certification by the signatory that the signatory—

(1) Is the person in the offeror's organization responsible for determining the prices being offered in this bid or proposal, and that the signatory has not participated and will not participate in any action contrary to paragraphs (a)(1) through (a)(3) of this provision; or

(2)(i) Has been authorized, in writing, to act as agent for the following principals in certifying that those principals have not participated, and will not participate in any action contrary to paragraphs (a)(1) through (a)(3) of this provision _____ [*insert full name of person(s) in the offeror's organization responsible for determining the prices offered in this bid or proposal, and the title of his or her position in the offeror's organization*];

(ii) As an authorized agent, does certify that the principals named in subdivision (b)(2)(i) of this provision have not participated, and will not participate, in any action contrary to paragraphs (a)(1) through (a)(3) of this provision; and

(iii) As an agent, has not personally participated, and will not participate, in any action contrary to paragraphs (a)(1) through (a)(3) of this provision.

(c) If the offeror deletes or modifies paragraph (a)(2) of this provision, the offeror must furnish with its offer a signed statement setting forth in detail the circumstances of the disclosure.

(End of provision)

52.203-3 Gratuities.

As prescribed in 3.202, insert the following clause:

GRATUITIES (APR 1984)

(a) The right of the Contractor to proceed may be terminated by written notice if, after notice and hearing, the agency head or a designee determines that the Contractor, its agent, or another representative—

(1) Offered or gave a gratuity (*e.g.*, an entertainment or gift) to an officer, official, or employee of the Government; and

(2) Intended, by the gratuity, to obtain a contract or favorable treatment under a contract.

(b) The facts supporting this determination may be reviewed by any court having lawful jurisdiction.

(c) If this contract is terminated under paragraph (a) of this clause, the Government is entitled—

(1) To pursue the same remedies as in a breach of the contract; and

(2) In addition to any other damages provided by law, to exemplary damages of not less than 3 nor more than 10 times the cost incurred by the Contractor in giving gratuities to the person concerned, as determined by the agency head or a designee. (This paragraph (c)(2) is applicable only if this contract uses money appropriated to the Department of Defense.)

(d) The rights and remedies of the Government provided in this clause shall not be exclusive and are in addition to any other rights and remedies provided by law or under this contract.

(End of clause)

52.203-4 [Reserved]

52.203-5 Covenant Against Contingent Fees.

As prescribed in 3.404, insert the following clause:

COVENANT AGAINST CONTINGENT FEES (APR 1984)

(a) The Contractor warrants that no person or agency has been employed or retained to solicit or obtain this contract upon an agreement or understanding for a contingent fee, except a bona fide employee or agency. For breach or violation of this warranty, the Government shall have the right to annul this contract without liability or, in its discretion, to deduct from the contract price or consideration, or otherwise recover, the full amount of the contingent fee.

(b) "Bona fide agency," as used in this clause, means an established commercial or selling agency, maintained by a contractor for the purpose of securing business, that neither exerts nor proposes to exert improper influence to solicit or obtain Government contracts nor holds itself out as being able to obtain any Government contract or contracts through improper influence.

"Bona fide employee," as used in this clause, means a person, employed by a contractor and subject to the contractor's supervision and control as to time, place, and manner of performance, who neither exerts nor proposes to exert improper influence to solicit or obtain Government contracts nor holds out as being able to obtain any Government contract or contracts through improper influence.

"Contingent fee," as used in this clause, means any commission, percentage, brokerage, or other fee that is contingent upon the success that a person or concern has in securing a Government contract.

"Improper influence," as used in this clause, means any influence that induces or tends to induce a Government employee or officer to give consideration or to act regarding a Government contract on any basis other than the merits of the matter.

(End of clause)

52.203-6 Restrictions on Subcontractor Sales to the Government.

As prescribed in 3.503-2, insert the following clause:

RESTRICTIONS ON SUBCONTRACTOR SALES TO THE GOVERNMENT (SEPT 2006)

(a) Except as provided in (b) of this clause, the Contractor shall not enter into any agreement with an actual or prospective subcontractor, nor otherwise act in any manner, which has or may have the effect of restricting sales by such subcontractors directly to the Government of any item or process (including computer software) made or furnished by the subcontractor under this contract or under any follow-on production contract.

(b) The prohibition in (a) of this clause does not preclude the Contractor from asserting rights that are otherwise authorized by law or regulation.

(c) The Contractor agrees to incorporate the substance of this clause, including this paragraph (c), in all subcontracts under this contract which exceed the simplified acquisition threshold.

(END OF CLAUSE)

Alternate I (Oct 1995). As prescribed in 3.503-2, substitute the following paragraph in place of paragraph (b) of the basic clause:

(b) The prohibition in paragraph (a) of this clause does not preclude the Contractor from asserting rights that are otherwise authorized by law or regulation. For acquisitions of commercial items, the prohibition in paragraph (a) applies only to the extent that any agreement restricting sales by subcontractors results in the Federal Government being treated differently from any other prospective purchaser for the sale of the commercial item(s).

52.203-7 Anti-Kickback Procedures.

As prescribed in 3.502-3, insert the following clause:

ANTI-KICKBACK PROCEDURES (OCT 2010)

(a) *Definitions.*

"Kickback," as used in this clause, means any money, fee, commission, credit, gift, gratuity, thing of value, or compensation of any kind which is provided, directly or indirectly, to any prime Contractor, prime Contractor employee, subcontractor, or subcontractor employee for the purpose of improperly obtaining or rewarding favorable treatment in connection with a prime contract or in connection with a subcontract relating to a prime contract.

(c) If this contract is terminated under paragraph (a) of this clause, the Government is entitled—

(1) To pursue the same remedies as in a breach of the contract; and

(2) In addition to any other damages provided by law, to exemplary damages of not less than 3 nor more than 10 times the cost incurred by the Contractor in giving gratuities to the person concerned, as determined by the agency head or a designee. (This paragraph (c)(2) is applicable only if this contract uses money appropriated to the Department of Defense.)

(d) The rights and remedies of the Government provided in this clause shall not be exclusive and are in addition to any other rights and remedies provided by law or under this contract.

(End of clause)

52.203-4 [Reserved]

52.203-5 Covenant Against Contingent Fees.

As prescribed in 3.404, insert the following clause:

COVENANT AGAINST CONTINGENT FEES (APR 1984)

(a) The Contractor warrants that no person or agency has been employed or retained to solicit or obtain this contract upon an agreement or understanding for a contingent fee, except a bona fide employee or agency. For breach or violation of this warranty, the Government shall have the right to annul this contract without liability or, in its discretion, to deduct from the contract price or consideration, or otherwise recover, the full amount of the contingent fee.

(b) "Bona fide agency," as used in this clause, means an established commercial or selling agency, maintained by a contractor for the purpose of securing business, that neither exerts nor proposes to exert improper influence to solicit or obtain Government contracts nor holds itself out as being able to obtain any Government contract or contracts through improper influence.

"Bona fide employee," as used in this clause, means a person, employed by a contractor and subject to the contractor's supervision and control as to time, place, and manner of performance, who neither exerts nor proposes to exert improper influence to solicit or obtain Government contracts nor holds out as being able to obtain any Government contract or contracts through improper influence.

"Contingent fee," as used in this clause, means any commission, percentage, brokerage, or other fee that is contingent upon the success that a person or concern has in securing a Government contract.

"Improper influence," as used in this clause, means any influence that induces or tends to induce a Government employee or officer to give consideration or to act regarding a Government contract on any basis other than the merits of the matter.

(End of clause)

52.203-6 Restrictions on Subcontractor Sales to the Government.

As prescribed in 3.503-2, insert the following clause:

RESTRICTIONS ON SUBCONTRACTOR SALES TO THE GOVERNMENT (SEPT 2006)

(a) Except as provided in (b) of this clause, the Contractor shall not enter into any agreement with an actual or prospective subcontractor, nor otherwise act in any manner, which has or may have the effect of restricting sales by such subcontractors directly to the Government of any item or process (including computer software) made or furnished by the subcontractor under this contract or under any follow-on production contract.

(b) The prohibition in (a) of this clause does not preclude the Contractor from asserting rights that are otherwise authorized by law or regulation.

(c) The Contractor agrees to incorporate the substance of this clause, including this paragraph (c), in all subcontracts under this contract which exceed the simplified acquisition threshold.

(END OF CLAUSE)

Alternate I (Oct 1995). As prescribed in 3.503-2, substitute the following paragraph in place of paragraph (b) of the basic clause:

(b) The prohibition in paragraph (a) of this clause does not preclude the Contractor from asserting rights that are otherwise authorized by law or regulation. For acquisitions of commercial items, the prohibition in paragraph (a) applies only to the extent that any agreement restricting sales by subcontractors results in the Federal Government being treated differently from any other prospective purchaser for the sale of the commercial item(s).

52.203-7 Anti-Kickback Procedures.

As prescribed in 3.502-3, insert the following clause:

ANTI-KICKBACK PROCEDURES (OCT 2010)

(a) *Definitions.*

"Kickback," as used in this clause, means any money, fee, commission, credit, gift, gratuity, thing of value, or compensation of any kind which is provided, directly or indirectly, to any prime Contractor, prime Contractor employee, subcontractor, or subcontractor employee for the purpose of improperly obtaining or rewarding favorable treatment in connection with a prime contract or in connection with a subcontract relating to a prime contract.

"Person," as used in this clause, means a corporation, partnership, business association of any kind, trust, joint-stock company, or individual.

"Prime contract," as used in this clause, means a contract or contractual action entered into by the United States for the purpose of obtaining supplies, materials, equipment, or services of any kind.

"Prime Contractor" as used in this clause, means a person who has entered into a prime contract with the United States.

"Prime Contractor employee," as used in this clause, means any officer, partner, employee, or agent of a prime Contractor.

"Subcontract," as used in this clause, means a contract or contractual action entered into by a prime Contractor or subcontractor for the purpose of obtaining supplies, materials, equipment, or services of any kind under a prime contract.

"Subcontractor," as used in this clause, (1) means any person, other than the prime Contractor, who offers to furnish or furnishes any supplies, materials, equipment, or services of any kind under a prime contract or a subcontract entered into in connection with such prime contract, and (2) includes any person who offers to furnish or furnishes general supplies to the prime Contractor or a higher tier subcontractor.

"Subcontractor employee," as used in this clause, means any officer, partner, employee, or agent of a subcontractor.

(b) The Anti-Kickback Act of 1986 (41 U.S.C. 51-58) (the Act), prohibits any person from—

(1) Providing or attempting to provide or offering to provide any kickback;

(2) Soliciting, accepting, or attempting to accept any kickback; or

(3) Including, directly or indirectly, the amount of any kickback in the contract price charged by a prime Contractor to the United States or in the contract price charged by a subcontractor to a prime Contractor or higher tier subcontractor.

(c)(1) The Contractor shall have in place and follow reasonable procedures designed to prevent and detect possible violations described in paragraph (b) of this clause in its own operations and direct business relationships.

(2) When the Contractor has reasonable grounds to believe that a violation described in paragraph (b) of this clause may have occurred, the Contractor shall promptly report in writing the possible violation. Such reports shall be made to the inspector general of the contracting agency, the head of the contracting agency if the agency does not have an inspector general, or the Department of Justice.

(3) The Contractor shall cooperate fully with any Federal agency investigating a possible violation described in paragraph (b) of this clause.

(4) The Contracting Officer may (i) offset the amount of the kickback against any monies owed by the United States under the prime contract and/or (ii) direct that the Prime Contractor withhold from sums owed a subcontractor under the prime contract the amount of the kickback. The Contracting Officer may order that monies withheld under subdivision (c)(4)(ii) of this clause be paid over to the Government unless the Government has already offset those monies under subdivision (c)(4)(i) of this clause. In either case, the Prime Contractor shall notify the Contracting Officer when the monies are withheld.

(5) The Contractor agrees to incorporate the substance of this clause, including paragraph (c)(5) but excepting paragraph (c)(1), in all subcontracts under this contract which exceed $150,000.

(End of clause)

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

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

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

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

(1) Cancel the solicitation, if the contract has not yet been awarded or issued; or

(2) Rescind the contract with respect to which—

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

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

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

(ii) The head of the contracting activity has determined, based upon a preponderance of the evidence, that the Contractor or someone acting for the Contractor has engaged in conduct constituting an offense punishable under subsection 27(e)(1) of the Act.

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

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

(End of clause)

(c) and (d) of the provision at FAR 52.203-11, Certification and Disclosure Regarding Payments to Influence Certain Federal Transactions, from each person requesting or receiving a subcontract exceeding $150,000 under this contract. The Contractor or subcontractor that awards the subcontract shall retain the declaration.

(2) A copy of each subcontractor disclosure form (but not certifications) shall be forwarded from tier to tier until received by the prime Contractor. The prime Contractor shall, at the end of the calendar quarter in which the disclosure form is submitted by the subcontractor, submit to the Contracting Officer within 30 days a copy of all disclosures. Each subcontractor certification shall be retained in the subcontract file of the awarding Contractor.

(3) The Contractor shall include the substance of this clause, including this paragraph (g), in any subcontract exceeding $150,000.

(End of clause)

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 (APR 2010)

(a) Definitions. As used in this clause—

"Agent" means any individual, including a director, an officer, an employee, or an independent Contractor, authorized to act on behalf of the organization.

"Full cooperation"— (1) Means disclosure to the Government of the information sufficient for law enforcement to identify the nature and extent of the offense and the individuals responsible for the conduct. It includes providing timely and complete response to Government auditors' and investigators' request for documents and access to employees with information;

(2) Does not foreclose any Contractor rights arising in law, the FAR, or the terms of the contract. It does not require—

(i) A Contractor to waive its attorney-client privilege or the protections afforded by the attorney work product doctrine; or

(ii) Any officer, director, owner, or employee of the Contractor, including a sole proprietor, to waive his or her attorney client privilege or Fifth Amendment rights; and

(3) Does not restrict a Contractor from—

(i) Conducting an internal investigation; or

(ii) Defending a proceeding or dispute arising under the contract or related to a potential or disclosed violation.

"Principal" means an officer, director, owner, partner, or a person having primary management or supervisory responsibilities within a business entity (*e.g.*, general manager; plant manager; head of a division or business segment; and similar positions).

"Subcontract" means any contract entered into by a subcontractor to furnish supplies or services for performance of a prime contract or a subcontract.

"Subcontractor" means any supplier, distributor, vendor, or firm that furnished supplies or services to or for a prime contractor or another subcontractor.

"United States," 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) Make a copy of the code available to each employee engaged in performance of the contract.

(2) The Contractor shall—

(i) Exercise due diligence to prevent and detect criminal conduct; and

(ii) Otherwise promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law.

(3)(i) The Contractor shall timely disclose, in writing, to the agency Office of the Inspector General (OIG), with a copy to the Contracting Officer, whenever, in connection with the award, performance, or closeout of this contract or any subcontract thereunder, the Contractor has credible evidence that a principal, employee, agent, or subcontractor of the Contractor has committed—

(A) A violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code; or

(B) A violation of the civil False Claims Act (31 U.S.C. 3729-3733).

(ii) The Government, to the extent permitted by law and regulation, will safeguard and treat information obtained pursuant to the Contractor's disclosure as confidential where the information has been marked "confidential" or "proprietary" by the company. To the extent permitted by law and regulation, such information will not be released by the Government to the public pursuant to a Freedom of Information Act request, 5 U.S.C. Section 552, without prior notification to the Contractor. The Government may transfer documents provided by the Contractor to any department or agency within the Executive Branch if the information relates to matters within the organization's jurisdiction.

(iii) If the violation relates to an order against a Governmentwide acquisition contract, a multi-agency contract, a multiple-award schedule contract such as the Federal Supply Schedule, or any other procurement instrument intended for use by multiple agencies, the Contractor shall notify the OIG

of the ordering agency and the IG of the agency responsible for the basic contract.

(c) Business ethics awareness and compliance program and internal control system. This paragraph (c) does not apply if the Contractor has represented itself as a small business concern pursuant to the award of this contract or if this contract is for the acquisition of a commercial item as defined at FAR 2.101. The Contractor shall establish the following within 90 days after contract award, unless the Contracting Officer establishes a longer time period:

(1) An ongoing business ethics awareness and compliance program.

(i) This program shall include reasonable steps to communicate periodically and in a practical manner the Contractor's standards and procedures and other aspects of the Contractor's business ethics awareness and compliance program and internal control system, by conducting effective training programs and otherwise disseminating information appropriate to an individual's respective roles and responsibilities.

(ii) The training conducted under this program shall be provided to the Contractor's principals and employees, and as appropriate, the Contractor's agents and subcontractors.

(2) An internal control system.

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

(A) Establish standards and procedures to facilitate timely discovery of improper conduct in connection with Government contracts; and

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

(ii) At a minimum, the Contractor's internal control system shall provide for the following:

(A) Assignment of responsibility at a sufficiently high level and adequate resources to ensure effectiveness of the business ethics awareness and compliance program and internal control system.

(B) Reasonable efforts not to include an individual as a principal, whom due diligence would have exposed as having engaged in conduct that is in conflict with the Contractor's code of business ethics and conduct.

(C) 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, including—

(1) Monitoring and auditing to detect criminal conduct;

(2) Periodic evaluation of the effectiveness of the business ethics awareness and compliance program and internal control system, especially if criminal conduct has been detected; and

(3) Periodic assessment of the risk of criminal conduct, with appropriate steps to design, implement, or modify the business ethics awareness and compliance program and the internal control system as necessary to reduce the risk of criminal conduct identified through this process.

(D) An internal reporting mechanism, such as a hotline, which allows for anonymity or confidentiality, by which employees may report suspected instances of improper conduct, and instructions that encourage employees to make such reports.

(E) Disciplinary action for improper conduct or for failing to take reasonable steps to prevent or detect improper conduct.

(F) Timely disclosure, in writing, to the agency OIG, with a copy to the Contracting Officer, whenever, in connection with the award, performance, or closeout of any Government contract performed by the Contractor or a subcontract thereunder, the Contractor has credible evidence that a principal, employee, agent, or subcontractor of the Contractor has committed a violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 U.S.C. or a violation of the civil False Claims Act (31 U.S.C. 3729-3733).

(1) If a violation relates to more than one Government contract, the Contractor may make the disclosure to the agency OIG and Contracting Officer responsible for the largest dollar value contract impacted by the violation.

(2) If the violation relates to an order against a Governmentwide acquisition contract, a multi-agency contract, a multiple-award schedule contract such as the Federal Supply Schedule, or any other procurement instrument intended for use by multiple agencies, the contractor shall notify the OIG of the ordering agency and the IG of the agency responsible for the basic contract, and the respective agencies' contracting officers.

(3) The disclosure requirement for an individual contract continues until at least 3 years after final payment on the contract.

(4) The Government will safeguard such disclosures in accordance with paragraph (b)(3)(ii) of this clause.

(G) Full cooperation with any Government agencies responsible for audits, investigations, or corrective actions.

(d) *Subcontracts.* (1) 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.

(2) In altering this clause to identify the appropriate parties, all disclosures of violation of the civil False Claims Act or of Federal criminal law shall be directed to the agency Office of the Inspector General, with a copy to the Contracting Officer.

(End of clause)

Subpart 3.4—Contingent Fees

3.400 Scope of subpart.

This subpart prescribes policies and procedures that restrict contingent fee arrangements for soliciting or obtaining Government contracts to those permitted by 10 U.S.C. 2306(b) and 41 U.S.C. 254(a).

3.401 Definitions.

As used in this subpart—

"Bona fide agency" means an established commercial or selling agency, maintained by a contractor for the purpose of securing business, that neither exerts nor proposes to exert improper influence to solicit or obtain Government contracts nor holds itself out as being able to obtain any Government contract or contracts through improper influence.

"Bona fide employee" means a person, employed by a contractor and subject to the contractor's supervision and control as to time, place, and manner of performance, who neither exerts nor proposes to exert improper influence to solicit or obtain Government contracts nor holds out as being able to obtain any Government contract or contracts through improper influence.

"Contingent fee" means any commission, percentage, brokerage, or other fee that is contingent upon the success that a person or concern has in securing a Government contract.

"Improper influence" means any influence that induces or tends to induce a Government employee or officer to give consideration or to act regarding a Government contract on any basis other than the merits of the matter.

3.402 Statutory requirements.

Contractors' arrangements to pay contingent fees for soliciting or obtaining Government contracts have long been considered contrary to public policy because such arrangements may lead to attempted or actual exercise of improper influence. In 10 U.S.C. 2306(b) and 41 U.S.C. 254(a), Congress affirmed this public policy but permitted certain exceptions. These statutes—

(a) Require in every negotiated contract a warranty by the contractor against contingent fees;

(b) Permit, as an exception to the warranty, contingent fee arrangements between contractors and bona fide employees or bona fide agencies; and

(c) Provide that, for breach or violation of the warranty by the contractor, the Government may annul the contract without liability or deduct from the contract price or consideration, or otherwise recover, the full amount of the contingent fee.

3.403 Applicability.

This subpart applies to all contracts. Statutory requirements for negotiated contracts are, as a matter of policy, extended to sealed bid contracts.

3.404 Contract clause.

The contracting officer shall insert the clause at 52.203-5, Covenant Against Contingent Fees, in all solicitations and contracts exceeding the simplified acquisition threshold, other than those for commercial items (see Parts 2 and 12).

3.405 Misrepresentations or violations of the Covenant Against Contingent Fees.

(a) Government personnel who suspect or have evidence of attempted or actual exercise of improper influence, misrepresentation of a contingent fee arrangement, or other violation of the Covenant Against Contingent Fees shall report the matter promptly to the contracting officer or appropriate higher authority in accordance with agency procedures.

(b) When there is specific evidence or other reasonable basis to suspect one or more of the violations in paragraph (a) of this section, the chief of the contracting office shall review the facts and, if appropriate, take or direct one or more of the following, or other, actions:

(1) If before award, reject the bid or proposal.

(2) If after award, enforce the Government's right to annul the contract or to recover the fee.

(3) Initiate suspension or debarment action under Subpart 9.4.

(4) Refer suspected fraudulent or criminal matters to the Department of Justice, as prescribed in agency regulations.

3.406 Records.

For enforcement purposes, agencies shall preserve any specific evidence of one or more of the violations in 3.405(a), together with all other pertinent data, including a record of actions taken. Contracting offices shall not retire or destroy these records until it is certain that they are no longer needed for enforcement purposes. If the original record is maintained in a central file, a copy must be retained in the contract file.

tractor, or are otherwise logically grouped for the purpose of analyzing information on price trends; and

"(B) for which there is a potential for the price paid to be significantly higher (on a percentage basis) than the prices previously paid in procurements of the same or similar items for the Department of Defense, as determined by the head of the procuring Department of Defense agency or the Secretary of the procuring military department on the basis of criteria prescribed by the Secretary of Defense.

"(3) The head of a Department of Defense agency or the Secretary of a military department shall take appropriate action to address any unreasonable escalation in prices being paid for items procured by that agency or military department as identified in an analysis conducted pursuant to paragraph (1).

"(4) Not later than April 1 of each of fiscal years 2000 through 2009, the Secretary of Defense shall submit to the Committee on Armed Services of the Senate and the Committee on Armed Services of the House of Representatives a report on the analyses of price trends that were conducted by the Secretary of each military department and the Director of the Defense Logistics Agency for categories of exempt commercial items during the preceding fiscal year under the procedures prescribed pursuant to paragraph (1). The report shall include a description of the actions taken by each Secretary and the Director to identify and address any unreasonable price escalation for the categories of items.

"(d) EXEMPT COMMERCIAL ITEMS DEFINED.—For the purposes of this section, the term 'exempt commercial item' means a commercial item that is exempt under subsection (b)(1)(B) of section 2306a of title 10, United States Code, or subsection (b)(1)(B) of section 304A of the Federal Property and Administrative Services Act of 1949 ([former] 41 U.S.C. 254b) [now 41 U.S.C. 3503(a)(2)], from the requirements for submission of certified cost or pricing data under that section."

REVIEW BY INSPECTOR GENERAL

Section 803(b) of Pub. L. 101–510 provided that (1) after increase in threshold for submission of cost or pricing data under subsec. (a) of this section, as amended by section 803(a) of Pub. L. 101–510, had been in effect for three years, Inspector General of Department of Defense was to conduct review of effects of increase in threshold, (2) that such review was to address whether increasing threshold improved acquisition process in terms of reduced paperwork, financial or other savings to government, an increase in number of contractors participating in defense contracting process, and adequacy of information available to contracting officers in cases in which certified cost or pricing data were not required under this section, (3) that Inspector General was to submit to Secretary of Defense a report on review conducted under paragraph (1), with Secretary of Defense required to submit such report to Congress, along with appropriate comments, upon completion of report (and comments) but not later than date on which President submitted budget to Congress pursuant to section 1105 of Title 31, Money and Finance, for fiscal year 1996, prior to repeal by Pub. L. 103–355, title I, § 1210, Oct. 13, 1994, 108 Stat. 3277.

§ 2306b. Multiyear contracts: acquisition of property

(a) IN GENERAL.—To the extent that funds are otherwise available for obligation, the head of an agency may enter into multiyear contracts for the purchase of property whenever the head of that agency finds each of the following:

(1) That the use of such a contract will result in substantial savings of the total anticipated costs of carrying out the program through annual contracts.

(2) That the minimum need for the property to be purchased is expected to remain substantially unchanged during the contemplated contract period in terms of production rate, procurement rate, and total quantities.

(3) That there is a reasonable expectation that throughout the contemplated contract period the head of the agency will request funding for the contract at the level required to avoid contract cancellation.

(4) That there is a stable design for the property to be acquired and that the technical risks associated with such property are not excessive.

(5) That the estimates of both the cost of the contract and the anticipated cost avoidance through the use of a multiyear contract are realistic.

(6) In the case of a purchase by the Department of Defense, that the use of such a contract will promote the national security of the United States.

(7) In the case of a contract in an amount equal to or greater than $500,000,000, that the conditions required by subparagraphs (C) through (F) of paragraph (1) of subsection (i) will be met, in accordance with the Secretary's certification and determination under such subsection, by such contract.

(b) REGULATIONS.—(1) Each official named in paragraph (2) shall prescribe acquisition regulations for the agency or agencies under the jurisdiction of such official to promote the use of multiyear contracting as authorized by subsection (a) in a manner that will allow the most efficient use of multiyear contracting.

(2)(A) The Secretary of Defense shall prescribe the regulations applicable to the Department of Defense.

(B) The Secretary of Homeland Security shall prescribe the regulations applicable to the Coast Guard, except that the regulations prescribed by the Secretary of Defense shall apply to the Coast Guard when it is operating as a service in the Navy.

(C) The Administrator of the National Aeronautics and Space Administration shall prescribe the regulations applicable to the National Aeronautics and Space Administration.

(c) CONTRACT CANCELLATIONS.—The regulations may provide for cancellation provisions in multiyear contracts to the extent that such provisions are necessary and in the best interests of the United States. The cancellation provisions may include consideration of both recurring and nonrecurring costs of the contractor associated with the production of the items to be delivered under the contract.

(d) PARTICIPATION BY SUBCONTRACTORS, VENDORS, AND SUPPLIERS.—In order to broaden the defense industrial base, the regulations shall provide that, to the extent practicable—

(1) multiyear contracting under subsection (a) shall be used in such a manner as to seek, retain, and promote the use under such contracts of companies that are subcontractors, vendors, or suppliers; and

(2) upon accrual of any payment or other benefit under such a multiyear contract to any subcontractor, vendor, or supplier company participating in such contract, such payment or benefit shall be delivered to such company in the most expeditious manner practicable.

(e) PROTECTION OF EXISTING AUTHORITY.—The regulations shall provide that, to the extent practicable, the administration of this section, and of the regulations prescribed under this section, shall not be carried out in a manner to preclude or curtail the existing ability of an agency—

(1) to provide for competition in the production of items to be delivered under such a contract; or

(2) to provide for termination of a prime contract the performance of which is deficient with respect to cost, quality, or schedule.

(f) CANCELLATION OR TERMINATION FOR INSUFFICIENT FUNDING.—In the event funds are not made available for the continuation of a contract made under this section into a subsequent fiscal year, the contract shall be canceled or terminated. The costs of cancellation or termination may be paid from—

(1) appropriations originally available for the performance of the contract concerned;

(2) appropriations currently available for procurement of the type of property concerned, and not otherwise obligated; or

(3) funds appropriated for those payments.

(g) CONTRACT CANCELLATION CEILINGS EXCEEDING $100,000,000.—(1) Before any contract described in subsection (a) that contains a clause setting forth a cancellation ceiling in excess of $100,000,000 may be awarded, the head of the agency concerned shall give written notification of the proposed contract and of the proposed cancellation ceiling for that contract to the congressional defense committees, and such contract may not then be awarded until the end of a period of 30 days beginning on the date of such notification.

(2) In the case of a contract described in subsection (a) with a cancellation ceiling described in paragraph (1), if the budget for the contract does not include proposed funding for the costs of contract cancellation up to the cancellation ceiling established in the contract, the head of the agency concerned shall, as part of the certification required by subsection (i)(1)(A), give written notification to the congressional defense committees of—

(A) the cancellation ceiling amounts planned for each program year in the proposed multiyear procurement contract, together with the reasons for the amounts planned;

(B) the extent to which costs of contract cancellation are not included in the budget for the contract; and

(C) a financial risk assessment of not including budgeting for costs of contract cancellation.

(h) DEFENSE ACQUISITIONS OF WEAPON SYSTEMS.—In the case of the Department of Defense, the authority under subsection (a) includes authority to enter into the following multiyear contracts in accordance with this section:

(1) A multiyear contract for the purchase of a weapon system, items and services associated with a weapon system, and logistics support for a weapon system.

(2) A multiyear contract for advance procurement of components, parts, and materials necessary to the manufacture of a weapon system, including a multiyear contract for such advance procurement that is entered into in order to achieve economic-lot purchases and more efficient production rates.

(i) DEFENSE ACQUISITIONS SPECIFICALLY AUTHORIZED BY LAW.—(1) A multiyear contract may not be entered into for any fiscal year under this section for a defense acquisition program that has been specifically authorized by law to be carried out using multiyear contract authority unless the Secretary of Defense certifies in writing by no later than March 1 of the year in which the Secretary requests legislative authority to enter into such contract that each of the following conditions is satisfied:

(A) The Secretary has determined that each of the requirements in paragraphs (1) through (6) of subsection (a) will be met by such contract and has provided the basis for such determination to the congressional defense committees.

(B) The Secretary's determination under subparagraph (A) was made after the completion of a cost analysis performed by the Director of Cost Assessment and Program Analysis and such analysis supports the findings.

(C) The system being acquired pursuant to such contract has not been determined to have experienced cost growth in excess of the critical cost growth threshold pursuant to section 2433(d) of this title within 5 years prior to the date the Secretary anticipates such contract (or a contract for advance procurement entered into consistent with the authorization for such contract) will be awarded.

(D) A sufficient number of end items of the system being acquired under such contract have been delivered at or within the most current estimates of the program acquisition unit cost or procurement unit cost for such system to determine that current estimates of such unit costs are realistic.

(E) During the fiscal year in which such contract is to be awarded, sufficient funds will be available to perform the contract in such fiscal year, and the future-years defense program for such fiscal year will include the funding required to execute the program without cancellation.

(F) The contract is a fixed price type contract.

(G) The proposed multiyear contract provides for production at not less than minimum economic rates given the existing tooling and facilities.

(2) If for any fiscal year a multiyear contract to be entered into under this section is authorized by law for a particular procurement program and that authorization is subject to certain conditions established by law (including a condition as to cost savings to be achieved under the multiyear contract in comparison to specified other contracts) and if it appears (after negotiations with contractors) that such savings cannot be achieved, but that substantial savings could nevertheless be achieved through the use of a multiyear contract rather than specified other contracts, the President may submit to Congress a request for relief from the specified

cost savings that must be achieved through multiyear contracting for that program. Any such request by the President shall include details about the request for a multiyear contract, including details about the negotiated contract terms and conditions.

(3) In the case of the Department of Defense, a multiyear contract in an amount equal to or greater than $500,000,000 may not be entered into for any fiscal year under this section unless the contract is specifically authorized by law in an Act other than an appropriations Act.

(4)(A) The Secretary of Defense may obligate funds for procurement of an end item under a multiyear contract for the purchase of property only for procurement of a complete and usable end item.

(B) The Secretary of Defense may obligate funds appropriated for any fiscal year for advance procurement under a contract for the purchase of property only for the procurement of those long-lead items necessary in order to meet a planned delivery schedule for complete major end items that are programmed under the contract to be acquired with funds appropriated for a subsequent fiscal year (including an economic order quantity of such long-lead items when authorized by law).

(5) The Secretary may make the certification under paragraph (1) notwithstanding the fact that one or more of the conditions of such certification are not met if the Secretary determines that, due to exceptional circumstances, proceeding with a multiyear contract under this section is in the best interest of the Department of Defense and the Secretary provides the basis for such determination with the certification.

(6) The Secretary of Defense may not delegate the authority to make the certification under paragraph (1) or the determination under paragraph (5) to an official below the level of Under Secretary of Defense for Acquisition, Technology, and Logistics.

(7) The Secretary of Defense shall send a notification containing the findings of the agency head under subsection (a), and the basis for such findings, 30 days prior to the award of a multiyear contract for a defense acquisition program that has been specifically authorized by law.

(j) DEFENSE CONTRACT OPTIONS FOR VARYING QUANTITIES.—The Secretary of Defense may instruct the Secretary of the military department concerned to incorporate into a proposed multiyear contract negotiated priced options for varying the quantities of end items to be procured over the period of the contract.

(k) MULTIYEAR CONTRACT DEFINED.—For the purposes of this section, a multiyear contract is a contract for the purchase of property for more than one, but not more than five, program years. Such a contract may provide that performance under the contract during the second and subsequent years of the contract is contingent upon the appropriation of funds and (if it does so provide) may provide for a cancellation payment to be made to the contractor if such appropriations are not made.

(*l*) VARIOUS ADDITIONAL REQUIREMENTS WITH RESPECT TO MULTIYEAR DEFENSE CONTRACTS.—(1)(A) The head of an agency may not initiate a contract described in subparagraph (B) unless the congressional defense committees are notified of the proposed contract at least 30 days in advance of the award of the proposed contract.

(B) Subparagraph (A) applies to the following contracts:

(i) A multiyear contract—

(I) that employs economic order quantity procurement in excess of $20,000,000 in any one year of the contract; or

(II) that includes an unfunded contingent liability in excess of $20,000,000.

(ii) Any contract for advance procurement leading to a multiyear contract that employs economic order quantity procurement in excess of $20,000,000 in any one year.

(2) The head of an agency may not initiate a multiyear contract for which the economic order quantity advance procurement is not funded at least to the limits of the Government's liability.

(3) The head of an agency may not initiate a multiyear procurement contract for any system (or component thereof) if the value of the multiyear contract would exceed $500,000,000 unless authority for the contract is specifically provided in an appropriations Act.

(4) Not later than the date of the submission of the President's budget request under section 1105 of title 31, the Secretary of Defense shall submit a report to the congressional defense committees each year, providing the following information with respect to each multiyear contract (and each extension of an existing multiyear contract) entered into, or planned to be entered into, by the head of an agency during the current or preceding year, shown for each year in the current future-years defense program and in the aggregate over the period of the current future-years defense program:

(A) The amount of total obligational authority under the contract (or contract extension) and the percentage that such amount represents of—

(i) the applicable procurement account; and

(ii) the agency procurement total.

(B) The amount of total obligational authority under all multiyear procurements of the agency concerned (determined without regard to the amount of the multiyear contract (or contract extension)) under multiyear contracts in effect at the time the report is submitted and the percentage that such amount represents of—

(i) the applicable procurement account; and

(ii) the agency procurement total.

(C) The amount equal to the sum of the amounts under subparagraphs (A) and (B), and the percentage that such amount represents of—

(i) the applicable procurement account; and

(ii) the agency procurement total.

(D) The amount of total obligational authority under all Department of Defense multiyear procurements (determined without regard to the amount of the multiyear contract (or contract extension)), including any multiyear

contract (or contract extension) that has been authorized by the Congress but not yet entered into, and the percentage that such amount represents of the procurement accounts of the Department of Defense treated in the aggregate.

(5) The head of an agency may not enter into a multiyear contract (or extend an existing multiyear contract), the value of which would exceed $500,000,000 (when entered into or when extended, as the case may be), until the Secretary of Defense submits to the congressional defense committees a report containing the information described in paragraph (4) with respect to the contract (or contract extension).

(6) The head of an agency may not terminate a multiyear procurement contract until 10 days after the date on which notice of the proposed termination is provided to the congressional defense committees.

(7) The execution of multiyear contracting authority shall require the use of a present value analysis to determine lowest cost compared to an annual procurement.

(8) This subsection does not apply to the National Aeronautics and Space Administration or to the Coast Guard.

(9) In this subsection:

(A) The term "applicable procurement account" means, with respect to a multiyear procurement contract (or contract extension), the appropriation account from which payments to execute the contract will be made.

(B) The term "agency procurement total" means the procurement accounts of the agency entering into a multiyear procurement contract (or contract extension) treated in the aggregate.

(m) INCREASED FUNDING AND REPROGRAMMING REQUESTS.—Any request for increased funding for the procurement of a major system under a multiyear contract authorized under this section shall be accompanied by an explanation of how the request for increased funding affects the determinations made by the Secretary under subsection (i).

(Added Pub. L. 103–355, title I, §1022(a)(1), Oct. 13, 1994, 108 Stat. 3257; amended Pub. L. 104–106, div. A, title XV, §1502(a)(10), div. E, title LVI, §5601(b), Feb. 10, 1996, 110 Stat. 503, 699; Pub. L. 105–85, div. A, title VIII, §806(a)(1), (b)(1), (c), title X, §1073(a)(47), (48)(A), Nov. 18, 1997, 111 Stat. 1834, 1835, 1903; Pub. L. 106–65, div. A, title VIII, §809, title X, §1067(1), Oct. 5, 1999, 113 Stat. 705, 774; Pub. L. 106–398, §1 [[div. A], title VIII, §§802(c), 806], Oct. 30, 2000, 114 Stat. 1654, 1654A–205, 1654A–207; Pub. L. 107–296, title XVII, §1704(b)(1), Nov. 25, 2002, 116 Stat. 2314; Pub. L. 107–314, div. A, title VIII, §820(a), Dec. 2, 2002, 116 Stat. 2613; Pub. L. 108–136, div. A, title X, §1043(b)(10), Nov. 24, 2003, 117 Stat. 1611; Pub. L. 108–375, div. A, title VIII, §814(a), title X, §1084(b)(2), Oct. 28, 2004, 118 Stat. 2014, 2060; Pub. L. 110–181, div. A, title VIII, §811(a), Jan. 28, 2008, 122 Stat. 217; Pub. L. 111–23, title I, §101(d)(2), May 22, 2009, 123 Stat. 1709.)

AMENDMENTS

2009—Subsec. (i)(1)(B). Pub. L. 111–23 substituted "Director of Cost Assessment and Program Analysis" for "Cost Analysis Improvement Group of the Department of Defense".

2008—Subsec. (a)(7). Pub. L. 110–181, §811(a)(1), added par. (7).

Subsec. (i)(1). Pub. L. 110–181, §811(a)(2), (3), inserted "the Secretary of Defense certifies in writing by no later than March 1 of the year in which the Secretary requests legislative authority to enter into such contract that" after "unless" in introductory provisions, added subpars. (A) to (F), redesignated former subpar. (B) as (G), and struck out former subpar. (A) which read as follows: "The Secretary of Defense certifies to Congress that the current future-years defense program fully funds the support costs associated with the multiyear program."

Subsec. (i)(5) to (7). Pub. L. 110–181, §811(a)(4), added pars. (5) to (7).

Subsec. (m). Pub. L. 110–181, §811(a)(5), added subsec. (m).

2004—Subsec. (g). Pub. L. 108–375, §814(a)(1), designated existing provisions as par. (1).

Subsec. (g)(1). Pub. L. 108–375, §§814(a)(2), 1084(b)(2), amended par. (1) identically, substituting "congressional defense committees" for "Committee on Armed Services and the Committee on Appropriations of the Senate and the Committee on Armed Services and the Committee on Appropriations of the House of Representatives".

Subsec. (g)(2). Pub. L. 108–375, §814(a)(3), added par. (2).

2003—Subsec. (*l*)(9), (10). Pub. L. 108–136 redesignated par. (10) as (9) and struck out former par. (9) which read as follows: "In this subsection, the term 'congressional defense committees' means the following:

"(A) The Committee on Armed Services of the Senate and the Subcommittee on Defense of the Committee on Appropriations of the Senate.

"(B) The Committee on Armed Services of the House of Representatives and the Subcommittee on National Security of the Committee on Appropriations of the House of Representatives."

2002—Subsec. (b)(2)(B). Pub. L. 107–296 substituted "of Homeland Security" for "of Transportation".

Subsec. (i)(4). Pub. L. 107–314 added par. (4).

2000—Subsec. (k). Pub. L. 106–398, §1 [[div. A], title VIII, §802(c)], struck out "or services" after "purchase of property".

Subsec. (*l*)(4). Pub. L. 106–398, §1 [[div. A], title VIII, §806(1)(A)], in introductory provisions, substituted "Not later than the date of the submission of the President's budget request under section 1105 of title 31, the Secretary of Defense shall submit a report to the congressional defense committees each year, providing the following information with respect to each multiyear contract (and each extension of an existing multiyear contract) entered into, or planned to be entered into, by the head of an agency during the current or preceding year" for "The head of an agency may not enter into a multiyear contract (or extend an existing multiyear contract) until the Secretary of Defense submits to the congressional defense committees a report with respect to that contract (or contract extension) that provides the following information".

Subsec. (*l*)(4)(B). Pub. L. 106–398, §1 [[div. A], title VIII, §806(1)(B)], substituted "in effect at the time the report is submitted" for "in effect immediately before the contract (or contract extension) is entered into" in introductory provisions.

Subsec. (*l*)(5) to (10). Pub. L. 106–398, §1 [[div. A], title VIII, §806(2), (3)], added par. (5) and redesignated former pars. (5) to (9) as (6) to (10), respectively.

1999—Subsec. (g). Pub. L. 106–65, §1067(1), substituted "and the Committee on Armed Services" for "and the Committee on National Security".

Subsec. (*l*)(4) to (7). Pub. L. 106–65, §809(1), (2), added par. (4) and redesignated former pars. (4) to (6) as (5) to (7), respectively. Former par. (7) redesignated (8).

Subsec. (*l*)(8). Pub. L. 106–65, §809(1), redesignated par. (7) as (8).

Subsec. (*l*)(8)(B). Pub. L. 106–65, §1067(1), substituted "Committee on Armed Services" for "Committee on National Security".

Subsec. (*l*)(9). Pub. L. 106–65, § 809(3), added par. (9).

1997—Pub. L. 105–85, § 1073(a)(48)(A), inserted ": acquisition of property" in section catchline.

Subsec. (a). Pub. L. 105–85, § 806(c)(1), substituted "finds each of the following:" for "finds—" in introductory provisions, capitalized first letter of first word in pars. (1) to (6), and substituted a period for semicolon at end of pars. (1) to (4) and for "; and" at end of par. (5).

Subsec. (d)(1). Pub. L. 105–85, § 806(c)(2), substituted "subsection (a)" for "paragraph (1)".

Subsec. (i)(1)(A). Pub. L. 105–85, § 806(c)(3), substituted "future-years" for "five-year".

Subsec. (i)(3). Pub. L. 105–85, § 806(a)(1), added par. (3).

Subsec. (k). Pub. L. 105–85, § 1073(a)(47), substituted "this section" for "this subsection".

Subsec. (*l*). Pub. L. 105–85, § 806(b)(1), added subsec. (*l*).

1996—Subsec. (g). Pub. L. 104–106, § 1502(a)(10), substituted "the Committee on Armed Services and the Committee on Appropriations of the Senate and the Committee on National Security and the Committee on Appropriations of the" for "the Committees on Armed Services and on Appropriations of the Senate and".

Subsecs. (k), (*l*). Pub. L. 104–106, § 5601(b), redesignated subsec. (*l*) as (k) and struck out former subsec. (k) which read as follows: "INAPPLICABILITY TO AUTOMATIC DATA PROCESSING CONTRACTS.—This section does not apply to contracts for the purchase of property to which section 111 of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 759) applies."

EFFECTIVE DATE OF 2008 AMENDMENT

Pub. L. 110–181, div. A, title VIII, § 811(b), Jan. 28, 2008, 122 Stat. 219, provided that: "The amendments made by this section [amending this section] shall take effect on the date of the enactment of this Act [Jan. 28, 2008] and shall apply with respect to multiyear contracts for the purchase of major systems for which legislative authority is requested on or after that date."

EFFECTIVE DATE OF 2002 AMENDMENTS

Pub. L. 107–314, div. A, title VIII, § 820(b), Dec. 2, 2002, 116 Stat. 2614, provided that:

"(1) Paragraph (4) of section 2306b(i) of title 10, United States Code, as added by subsection (a), shall not apply with respect to any contract awarded before the date of the enactment of this Act [Dec. 2, 2002].

"(2) Nothing in this section [amending this section] shall be construed to authorize the expenditure of funds under any contract awarded before the date of the enactment of this Act for any purpose other than the purpose for which such funds have been authorized and appropriated."

Amendment by Pub. L. 107–296 effective on the date of transfer of the Coast Guard to the Department of Homeland Security, see section 1704(g) of Pub. L. 107–296, set out as a note under section 101 of this title.

EFFECTIVE DATE OF 1997 AMENDMENT

Section 806(a)(2) of Pub. L. 105–85 provided that: "Paragraph (3) of section 2306b(i) of title 10, United States Code, as added by paragraph (1), shall not apply with respect to a contract authorized by law before the date of the enactment of this Act [Nov. 18, 1997]."

Section 806(b)(2) of Pub. L. 105–85 provided that: "The amendment made by paragraph (1) [amending this section] shall take effect on October 1, 1998."

EFFECTIVE DATE OF 1996 AMENDMENT

Amendment by section 5601(b) of Pub. L. 104–106 effective 180 days after Feb. 10, 1996, see section 5701 of Pub. L. 104–106, Feb. 10, 1996, 110 Stat. 702.

EFFECTIVE DATE

For effective date and applicability of section, see section 10001 of Pub. L. 103–355, set out as an Effective Date of 1994 Amendment note under section 2302 of this title.

MULTIYEAR PROCUREMENT CONTRACTS

Pub. L. 105–56, title VIII, § 8008, Oct. 8, 1997, 111 Stat. 1221, provided that:

"(a) None of the funds provided in this Act [see Tables for classification] shall be available to initiate: (1) a multiyear contract that employs economic order quantity procurement in excess of $20,000,000 in any one year of the contract or that includes an unfunded contingent liability in excess of $20,000,000; or (2) a contract for advance procurement leading to a multiyear contract that employs economic order quantity procurement in excess of $20,000,000 in any one year, unless the congressional defense committees [Committee on Armed Services and Subcommittee on National Security of the Committee on Appropriations of the House of Representatives and Committee on Armed Services and Subcommittee on Defense of the Committee on Appropriations of the Senate] have been notified at least 30 days in advance of the proposed contract award: *Provided*, That no part of any appropriation contained in this Act shall be available to initiate a multiyear contract for which the economic order quantity advance procurement is not funded at least to the limits of the Government's liability: *Provided further*, That no part of any appropriation contained in this Act shall be available to initiate multiyear procurement contracts for any systems or component thereof if the value of the multiyear contract would exceed $500,000,000 unless specifically provided in this Act: *Provided further*, That no multiyear procurement contract can be terminated without 10-day prior notification to the congressional defense committees: *Provided further*, That the execution of multiyear authority shall require the use of a present value analysis to determine lowest cost compared to an annual procurement.

"Funds appropriated in title III of this Act [111 Stat. 1211] may be used for multiyear procurement contracts as follows:

"Apache Longbow radar;

"AV–8B aircraft; and

"Family of Medium Tactical Vehicles.

"(b) None of the funds provided in this Act and hereafter may be used to submit to Congress (or to any committee of Congress) a request for authority to enter into a contract covered by those provisions of subsection (a) that precede the first proviso of that subsection unless—

"(1) such request is made as part of the submission of the President's Budget for the United States Government for any fiscal year and is set forth in the Appendix to that budget as part of proposed legislative language for appropriations bills for the next fiscal year; or

"(2) such request is formally submitted by the President as a budget amendment; or

"(3) the Secretary of Defense makes such request in writing to the congressional defense committees."

Similar provisions were contained in the following appropriation acts:

Pub. L. 111–118, div. A, title VIII, § 8011, Dec. 19, 2009, 123 Stat. 3428, as amended by Pub. L. 111–212, title I, § 305, July 29, 2010, 124 Stat. 2311.

Pub. L. 110–329, div. C, title VIII, § 8011, Sept. 30, 2008, 122 Stat. 3621.

Pub. L. 110–116, div. A, title VIII, § 8010, Nov. 13, 2007, 121 Stat. 1315.

Pub. L. 109–289, div. A, title VIII, § 8008, Sept. 29, 2006, 120 Stat. 1273.

Pub. L. 109–148, div. A, title VIII, § 8008, Dec. 30, 2005, 119 Stat. 2698.

Pub. L. 108–287, title VIII, § 8008, Aug. 5, 2004, 118 Stat. 970.

Pub. L. 108–87, title VIII, § 8008, Sept. 30, 2003, 117 Stat. 1072.

Pub. L. 107–248, title VIII, § 8008, Oct. 23, 2002, 116 Stat. 1537.

Pub. L. 107–117, div. A, title VIII, § 8008, Jan. 10, 2002, 115 Stat. 2248.

Pub. L. 106–259, title VIII, § 8008, Aug. 9, 2000, 114 Stat. 675.

Pub. L. 106–79, title VIII, § 8008, Oct. 25, 1999, 113 Stat. 1232.

Pub. L. 105–262, title VIII, § 8008, Oct. 17, 1998, 112 Stat. 2298.

section (a) of this section are appropriate for use in individual contracting situations;

(2) regarding the factors that may be used in selecting contractors; and

(3) providing for a uniform approach to be used Government-wide.

(June 30, 1949, ch. 288, title III, § 303M, as added Pub. L. 104–106, div. D, title XLI, § 4105(b)(1), Feb. 10, 1996, 110 Stat. 647.)

CODIFICATION

"Sections 1101 to 1104 of title 40" substituted in subsec. (a) for "the Brooks Architect-Engineers Act (title IX of this Act)" and in subsec. (c)(1) for "the Brooks Architect-Engineers Act (40 U.S.C. 541 et seq.)" on authority of Pub. L. 107–217, § 5(c), Aug. 21, 2002, 116 Stat. 1303, the first section of which enacted Title 40, Public Buildings, Property, and Works.

EFFECTIVE DATE

For effective date and applicability of section, see section 4401 of Pub. L. 104–106, set out as an Effective Date of 1996 Amendment note under section 251 of this title.

§ 254. Contract requirements

(a) Contracts awarded using procedures other than sealed-bid procedures

Except as provided in subsection (b) of this section, contracts awarded after using procedures other than sealed-bid procedures may be of any type which in the opinion of the agency head will promote the best interests of the Government. Every contract awarded after using procedures other than sealed-bid procedures shall contain a suitable warranty, as determined by the agency head, by the contractor that no person or selling agency has been employed or retained to solicit or secure such contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the contractor for the purpose of securing business, for the breach or violation of which warranty the Government shall have the right to annul such contract without liability or in its discretion to deduct from the contract price or consideration the full amount of such commission, percentage, brokerage, or contingent fee. The preceding sentence does not apply to a contract for an amount that is not greater than the simplified acquisition threshold or to a contract for the acquisition of commercial items.

(b) Barred contracts; fee limitation; determination of use; advance notification

The cost-plus-a-percentage-of-cost system of contracting shall not be used, and in the case of a cost-plus-a-fixed-fee contract the fee shall not exceed 10 percent of the estimated cost of the contract, exclusive of the fee, as determined by the agency head at the time of entering into such contract (except that a fee not in excess of 15 percent of such estimated cost is authorized in any such contract for experimental, developmental, or research work and that a fee inclusive of the contractor's costs and not in excess of 6 percent of the estimated cost, exclusive of fees, as determined by the agency head at the time of entering into the contract, of the project to which such fee is applicable is authorized in contracts for architectural or engineering services relating to any public works or utility project). All cost and cost-plus-a-fixed-fee contracts shall provide for advance notification by the contractor to the procuring agency of any subcontract thereunder on a cost-plus-a-fixed-fee basis and of any fixed-price subcontract or purchase order which exceeds in dollar amount either the simplified acquisition threshold or 5 percent of the total estimated cost of the prime contract; and a procuring agency, through any authorized representative thereof, shall have the right to inspect the plans and to audit the books and records of any prime contractor or subcontractor engaged in the performance of a cost or cost-plus-a-fixed-fee contract.

(June 30, 1949, ch. 288, title III, § 304, 63 Stat. 395; Oct. 31, 1951, ch. 652, 65 Stat. 700; July 12, 1952, ch. 703, § 1(m), 66 Stat. 594; Pub. L. 89–607, § 2, Sept. 27, 1966, 80 Stat. 850; Pub. L. 98–369, div. B, title VII, §§ 2712, 2714(a)(2), (3), July 18, 1984, 98 Stat. 1181, 1184; Pub. L. 103–355, title I, §§ 1071, 1251(a)(1), title II, § 2251(b), title IV, §§ 4103(c), 4402(c), title VIII, § 8204(b), title X, § 10005(e), Oct. 13, 1994, 108 Stat. 3270, 3278, 3320, 3341, 3349, 3396, 3408.)

AMENDMENTS

1994—Subsec. (a). Pub. L. 103–355, §§ 4103(c), 8204(b), inserted at end "The preceding sentence does not apply to a contract for an amount that is not greater than the simplified acquisition threshold or to a contract for the acquisition of commercial items."

Subsec. (b). Pub. L. 103–355, §§ 4402(c), 10005(e), substituted "percent" for "per centum" wherever appearing and "either the simplified acquisition threshold" for "either $25,000" in last sentence.

Pub. L. 103–355, § 1071, struck out after first sentence "Neither a cost nor a cost-plus-a-fixed-fee contract nor an incentive-type contract shall be used unless the agency head determines that such method of contracting is likely to be less costly than other methods or that it is impractical to secure property or services of the kind or quality required without the use of a cost or cost-plus-a-fixed-fee contract or an incentive-type contract."

Subsec. (c). Pub. L. 103–355, § 2251(b), struck out subsec. (c) which related to examination of books, records, etc. of contractors, time limitations, exemptions, exceptional conditions, and reports to Congress. See section 254d of this title.

Subsec. (d). Pub. L. 103–355, § 1251(a)(1), struck out subsec. (d) which related to submission of cost or pricing data by contractors and subcontractors, certificate requirements, adjustment of price, inspection of books, records, etc., necessity of data, and exceptions. See section 254b of this title.

1984—Pub. L. 98–369, § 2714(a)(2), amended section catchline generally.

Subsec. (a). Pub. L. 98–369, § 2714(a)(3)(A), (B), substituted "awarded after using procedures other than sealed-bid procedures" for "negotiated pursuant to section 252(c) of this title" in first and second sentences.

Subsec. (c). Pub. L. 98–369, § 2714(a)(3)(C), substituted "awarded after using procedures other than sealed-bid procedures" for "negotiated without advertising pursuant to authority contained in this Act" in first sentence.

Subsec. (d). Pub. L. 98–369, § 2712, added subsec. (d).

1966—Subsec. (c). Pub. L. 89–607 provided for exemption of certain contracts with foreign contractors from the requirement for an examination-of-records clause, such determination to be reported to Congress.

1952—Subsec. (b). Act July 12, 1952, substituted "property" for "supplies".

1951—Subsec. (c). Act Oct. 31, 1951, added subsec. (c).

EFFECTIVE DATE OF 1994 AMENDMENT

For effective date and applicability of amendment by Pub. L. 103–355, see section 10001 of Pub. L. 103–355, set out as a note under section 251 of this title.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–369 applicable with respect to any solicitation for bids or proposals issued after Mar. 31, 1985, see section 2751 of Pub. L. 98–369, set out as a note under section 251 of this title.

EFFECTIVE DATE

Section effective July 1, 1949, see section 605, formerly section 505, of act June 30, 1949, ch. 288, 63 Stat. 403; renumbered by act Sept. 5, 1950, ch. 849, § 6(a), (b), 64 Stat. 583.

REGULATIONS ON THE USE OF COST-REIMBURSEMENT CONTRACTS

Pub. L. 110–417, [div. A], title VIII, § 864, Oct. 14, 2008, 122 Stat. 4549, provided that:

"(a) IN GENERAL.—Not later than 270 days after the date of the enactment of this Act [Oct. 14, 2008], the Federal Acquisition Regulation shall be revised to address the use of cost-reimbursement contracts.

"(b) CONTENT.—The regulations promulgated under subsection (a) shall include, at a minimum, guidance regarding—

"(1) when and under what circumstances cost-reimbursement contracts are appropriate;

"(2) the acquisition plan findings necessary to support a decision to use cost-reimbursement contracts; and

"(3) the acquisition workforce resources necessary to award and manage cost-reimbursement contracts.

"(c) INSPECTOR GENERAL REVIEW.—Not later than one year after the regulations required by subsection (a) are promulgated, the Inspector General for each executive agency shall review the use of cost-reimbursement contracts by such agency for compliance with such regulations and shall include the results of the review in the Inspector General's next semiannual report.

"(d) REPORT.—Subject to subsection (f), the Director of the Office of Management and Budget shall submit an annual report to Congressional committees identified in subsection (e) on the use of cost-reimbursement contracts and task or delivery orders by all executive agencies. The report shall be submitted no later than March 1 and shall cover the fiscal year ending September 30 of the prior year. The report shall include—

"(1) the total number and value of contracts awarded and orders issued during the covered fiscal year;

"(2) the total number and value of cost-reimbursement contracts awarded and orders issued during the covered fiscal year; and

"(3) an assessment of the effectiveness of the regulations promulgated pursuant to subsection (a) in ensuring the appropriate use of cost-reimbursement contracts.

"(e) CONGRESSIONAL COMMITTEES DEFINED.—The report required by subsection (d) shall be submitted to the Committee on Oversight and Government Reform of the House of Representatives; the Committee on Homeland Security and Governmental Affairs of the Senate; the Committees on Appropriations of the House of Representatives and the Senate; and, in the case of the Department of Defense and the Department of Energy, the Committees on Armed Services of the Senate and the House of Representatives.

"(f) REQUIREMENTS LIMITED TO CERTAIN AGENCIES AND YEARS.—

"(1) AGENCIES.—The requirement in subsection (c) shall apply only to those executive agencies that awarded contracts or issued orders (under contracts previously awarded) in a total amount of at least $1,000,000,000 in the fiscal year proceeding the fiscal year in which the assessments and reports are submitted.

"(2) YEARS.—The report required by subsection (d) shall be submitted from March 1, 2009, until March 1, 2014.

"(g) EXECUTIVE AGENCY DEFINED.—In this section, the term 'executive agency' has the meaning given such term in section 4(1) of the Office of Federal Procurement Policy Act (41 U.S.C. 403(1))."

EXEMPTION OF FUNCTIONS

Functions authorized by Foreign Assistance Act of 1961, as amended, as exempt, see Ex. Ord. No. 11223, eff. May 12, 1965, 30 F.R. 6635, set out as a note under section 2393 of Title 22, Foreign Relations and Intercourse.

FOREIGN CONTRACTORS

Secretaries of Defense, Army, Navy, or Air Force, or their designees, to determine, prior to exercising the authority provided in the amendment of this section by Pub. L. 89–607 to exempt certain contracts with foreign contractors from the requirement of an examination-of-records clause, that all reasonable efforts have been made to include such examination-of-records clause, as required by par. (11) of Part I of Ex. Ord. No. 10789, and that alternate sources of supply are not reasonably available, see par. (11) of Part I of Ex. Ord. No. 10789, eff. Nov. 14, 1958, 23 F.R. 8897, as amended, set out as a note under section 1431 of Title 50, War and National Defense.

EXECUTIVE ORDER NO. 12800

Ex. Ord. No. 12800, Apr. 13, 1992, 57 F.R. 12985, 13413, which required Federal contractors to post a notice that employees could not be required to be members of a union in order to retain their jobs, was revoked by Ex. Ord. No. 12836, § 1, Feb. 1, 1993, 58 F.R. 7045, which was itself revoked as it relates to notification of employee rights concerning payment of union dues or fees by Ex. Ord. No. 13201, § 11, Feb. 17, 2001, 66 F.R. 11221, which was itself revoked by Ex. Ord. No. 13496, § 13, Jan. 30, 2009, 74 F.R. 6110, set out below, and as it relates to project agreements by Ex. Ord. No. 13202, § 8, Feb. 17, 2001, 66 F.R. 11226, which was itself revoked by Ex. Ord. No. 13502, § 8, Feb. 6, 2009, 74 F.R. 6986, set out as a note under section 251 of this title.

EXECUTIVE ORDER NO. 13201

Ex. Ord. No. 13201, Feb. 17, 2001, 66 F.R. 11221, which related to notification of employee rights concerning payment of union dues or fees, was revoked by Ex. Ord. No. 13496, § 13, Jan. 30, 2009, 74 F.R. 6110, set out below.

EX. ORD. NO. 13496. NOTIFICATION OF EMPLOYEE RIGHTS UNDER FEDERAL LABOR LAWS

Ex. Ord. No. 13496, Jan. 30, 2009, 74 F.R. 6107, provided:

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Federal Property and Administrative Services Act, 40 U.S.C. 101 *et seq.*, and in order to ensure the economical and efficient administration and completion of Government contracts, it is hereby ordered that:

SECTION 1. *Policy*. This order is designed to promote economy and efficiency in Government procurement. When the Federal Government contracts for goods or services, it has a proprietary interest in ensuring that those contracts will be performed by contractors whose work will not be interrupted by labor unrest. The attainment of industrial peace is most easily achieved and workers' productivity is enhanced when workers are well informed of their rights under Federal labor laws, including the National Labor Relations Act (Act), 29 U.S.C. 151 *et seq.* As the Act recognizes, "encouraging the practice and procedure of collective bargaining and . . . protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection" will "eliminate the causes of certain substantial obstruc-

tions to the free flow of commerce" and "mitigate and eliminate these obstructions when they have occurred." 29 U.S.C. 151. Relying on contractors whose employees are informed of such rights under Federal labor laws facilitates the efficient and economical completion of the Federal Government's contracts.

SEC. 2. *Contract Clause.* Except in contracts exempted in accordance with section 3 of this order, all Government contracting departments and agencies shall, to the extent consistent with law, include the following provisions in every Government contract, other than collective bargaining agreements as defined in 5 U.S.C. 7103(a)(8) and purchases under the simplified acquisition threshold as defined in the Office of Federal Procurement Policy Act, 41 U.S.C. 403.

"1. During the term of this contract, the contractor agrees to post a notice, of such size and in such form, and containing such content as the Secretary of Labor shall prescribe, in conspicuous places in and about its plants and offices where employees covered by the National Labor Relations Act engage in activities relating to the performance of the contract, including all places where notices to employees are customarily posted both physically and electronically. The notice shall include the information contained in the notice published by the Secretary of Labor in the Federal Register (Secretary's Notice).

"2. The contractor will comply with all provisions of the Secretary's Notice, and related rules, regulations, and orders of the Secretary of Labor.

"3. In the event that the contractor does not comply with any of the requirements set forth in paragraphs (1) or (2) above, this contract may be cancelled, terminated, or suspended in whole or in part, and the contractor may be declared ineligible for further Government contracts in accordance with procedures authorized in or adopted pursuant to Executive Order [number as provided by the Federal Register [13496]] of [insert new date [Jan. 30, 2009]]. Such other sanctions or remedies may be imposed as are provided in Executive Order [number as provided by the Federal Register [13496]] of [insert new date [Jan. 30, 2009]], or by rule, regulation, or order of the Secretary of Labor, or as are otherwise provided by law.

"4. The contractor will include the provisions of paragraphs (1) through (3) above in every subcontract entered into in connection with this contract (unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to section 3 of Executive Order [number as provided by the Federal Register [13496]] of [insert new date [Jan. 30, 2009]]) so that such provisions will be binding upon each subcontractor. The contractor will take such action with respect to any such subcontract as may be directed by the Secretary of Labor as a means of enforcing such provisions, including the imposition of sanctions for noncompliance: Provided, however, that if the contractor becomes involved in litigation with a subcontractor, or is threatened with such involvement, as a result of such direction, the contractor may request the United States to enter into such litigation to protect the interests of the United States."

SEC. 3. *Administration.*

(a) The Secretary of Labor (Secretary) shall be responsible for the administration and enforcement of this order. The Secretary shall adopt such rules and regulations and issue such orders as are necessary and appropriate to achieve the purposes of this order.

(b) Within 120 days of the effective date of this order, the Secretary shall initiate a rulemaking to prescribe the size, form, and content of the notice to be posted by a contractor under paragraph 1 of the contract clause described in section 2 of this order. Such notice shall describe the rights of employees under Federal labor laws, consistent with the policy set forth in section 1 of this order.

(c) Whenever the Secretary finds that an act of Congress, clarification of existing law by the courts or the National Labor Relations Board, or other circumstances make modification of the contractual provisions set out in subsection (a) of this section necessary to achieve the purposes of this order, the Secretary promptly shall issue such rules, regulations, or orders as are needed to cause the substitution or addition of appropriate contractual provisions in Government contracts thereafter entered into.

SEC. 4. *Exemptions.* (a) If the Secretary finds that the application of any of the requirements of this order would not serve the purposes of this order or would impair the ability of the Government to procure goods or services on an economical and efficient basis, the Secretary may exempt a contracting department or agency or group of departments or agencies from the requirements of any or all of the provisions of this order with respect to a particular contract or subcontract or any class of contracts or subcontracts.

(b) The Secretary may, if the Secretary finds that special circumstances require an exemption in order to serve the national interest, exempt a contracting department or agency from the requirements of any or all of the provisions of section 2 of this order with respect to a particular contract or subcontract or class of contracts or subcontracts.

SEC. 5. *Investigation.*

(a) The Secretary may investigate any Government contractor, subcontractor, or vendor to determine whether the contractual provisions required by section 2 of this order have been violated.

Such investigations shall be conducted in accordance with procedures established by the Secretary.

(b) The Secretary shall receive and investigate complaints by employees of a Government contractor or subcontractor, where such complaints allege a failure to perform or a violation of the contractual provisions required by section 2 of this order.

SEC. 6. *Compliance.*

(a) The Secretary, or any agency or officer in the executive branch lawfully designated by rule, regulation, or order of the Secretary, may hold such hearings, public or private, regarding compliance with this order as the Secretary may deem advisable.

(b) The Secretary may hold hearings, or cause hearings to be held, in accordance with subsection (a) of this section, prior to imposing, ordering, or recommending the imposition of sanctions under this order. Neither an order for cancellation, termination, or suspension of any contract or debarment of any contractor from further Government contracts under section 7(b) of this order nor the inclusion of a contractor on a published list of noncomplying contractors under section 7(c) of this order shall be carried out without affording the contractor an opportunity for a hearing.

SEC. 7. *Remedies.* In accordance with such rules, regulations, or orders as the Secretary may issue or adopt, the Secretary may:

(a) after consulting with the contracting department or agency, direct that department or agency to cancel, terminate, suspend, or cause to be cancelled, terminated, or suspended, any contract, or any portion or portions thereof, for failure of the contractor to comply with the contractual provisions required by section 2 of this order; contracts may be cancelled, terminated, or suspended absolutely, or continuance of contracts may be conditioned upon future compliance: Provided, that before issuing a directive under this subsection, the Secretary shall provide the head of the contracting department or agency an opportunity to offer written objections to the issuance of such a directive, which objections shall include a complete statement of reasons for the objections, among which reasons shall be a finding that completion of the contract is essential to the agency's mission: And provided further, that no directive shall be issued by the Secretary under this subsection so long as the head of the contracting department or agency, or his or her designee, continues to object to the issuance of such directive;

(b) after consulting with each affected contracting department or agency, provide that one or more contracting departments or agencies shall refrain from entering into further contracts, or extensions or other

modifications of existing contracts, with any noncomplying contractor, until such contractor has satisfied the Secretary that such contractor has complied with and will carry out the provisions of this order: Provided, that before issuing a directive under this subsection, the Secretary shall provide the head of each contracting department or agency an opportunity to offer written objections to the issuance of such a directive, which objections shall include a complete statement of reasons for the objections, among which reasons shall be a finding that further contracts or extensions or other modifications of existing contracts with the noncomplying contractor are essential to the agency's mission: And provided further, that no directive shall be issued by the Secretary under this subsection so long as the head of a contracting department or agency, or his or her designee, continues to object to the issuance of such directive; and

(c) publish, or cause to be published, the names of contractors that have, in the judgment of the Secretary, failed to comply with the provisions of this order or of related rules, regulations, and orders of the Secretary.

SEC. 8. *Reports.* Whenever the Secretary invokes section 7(a) or 7(b) of this order, the contracting department or agency shall report to the Secretary the results of the action it has taken within such time as the Secretary shall specify.

SEC. 9. *Cooperation.* Each contracting department and agency shall cooperate with the Secretary and provide such information and assistance as the Secretary may require in the performance of the Secretary's functions under this order.

SEC. 10. *Sufficiency of Remedies.* If the Secretary finds that the authority vested in the Secretary by sections 5 through 9 of this order is not sufficient to effectuate the purposes of this order, the Secretary shall develop recommendations on how better to effectuate those purposes.

SEC. 11. *Delegation.* The Secretary may, in accordance with law, delegate any function or duty of the Secretary under this order to any officer in the Department of Labor or to any other officer in the executive branch of the Government, with the consent of the head of the department or agency in which that officer serves.

SEC. 12. *Implementation.* To the extent permitted by law, the Federal Acquisition Regulatory Council (FAR Council) shall take whatever action is required to implement in the Federal Acquisition Regulation (FAR) the provisions of this order and any related rules, regulations, or orders issued by the Secretary under this order and shall amend the FAR to require each solicitation of offers for a contract to include a provision that implements section 2 of this order.

SEC. 13. *Revocation of Prior Order and Actions.* Executive Order 13201 of February 17, 2001, is revoked. The heads of executive departments and agencies shall, to the extent permitted by law, revoke expeditiously any orders, rules, regulations, guidelines, or policies implementing or enforcing Executive Order 13201.

SEC. 14. *Severability.* If any provision of this order, or the application of such provision to any person or circumstance, is held to be invalid, the remainder of this order and the application of the provisions of such to any person or circumstances shall not be affected thereby.

SEC. 15. *General Provisions.*

(a) Nothing in this order shall be construed to impair or otherwise affect:

(i) authority granted by law to a department, agency, or the head thereof; or

(ii) functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

SEC. 16. *Effective Date.* This order shall become effective immediately, and shall apply to contracts resulting from solicitations issued on or after the effective date of the rule promulgated by the Secretary pursuant to section 3(b) of this order.

BARACK OBAMA.

DEFINITIONS

The definitions in section 102 of Title 40, Public Buildings, Property, and Works, apply to this subchapter.

§ 254a. Cost-type research and development contracts with educational institutions

On and after September 5, 1962, provision may be made in cost-type research and development contracts (including grants) with universities, colleges, or other educational institutions for payment of reimbursable indirect costs on the basis of predetermined fixed-percentage rates applied to the total, or an element thereof, of the reimbursable direct costs incurred.

(Pub. L. 87–638, Sept. 5, 1962, 76 Stat. 437.)

CODIFICATION

Section was not enacted as part of title III of act June 30, 1949, ch. 288, 63 Stat. 393, which comprises this subchapter.

§ 254b. Cost or pricing data: truth in negotiations

(a) Required cost or pricing data and certification

(1) The head of an executive agency shall require offerors, contractors, and subcontractors to make cost or pricing data available as follows:

(A) An offeror for a prime contract under this subchapter to be entered into using procedures other than sealed-bid procedures shall be required to submit cost or pricing data before the award of a contract if—

(i) in the case of a prime contract entered into after October 13, 1994, the price of the contract to the United States is expected to exceed $500,000; and

(ii) in the case of a prime contract entered into on or before October 13, 1994, the price of the contract to the United States is expected to exceed $100,000.

(B) The contractor for a prime contract under this subchapter shall be required to submit cost or pricing data before the pricing of a change or modification to the contract if—

(i) in the case of a change or modification made to a prime contract referred to in subparagraph (A)(i), the price adjustment is expected to exceed $500,000;

(ii) in the case of a change or modification made to a prime contract that was entered into on or before October 13, 1994, and that has been modified pursuant to paragraph (6), the price adjustment is expected to exceed $500,000; and

(iii) in the case of a change or modification not covered by clause (i) or (ii), the price adjustment is expected to exceed $100,000.

(C) An offeror for a subcontract (at any tier) of a contract under this subchapter shall be re-

payment of the whole or any part of any claim, account, or demand against the United States, whether the same has or has not already been so used or presented, and whether such claim, account, or demand, or any part thereof has or has not already been allowed or paid; or

Whoever presents, uses, or attempts to use any such document, record, file, or paper so taken and carried away, to procure the payment of any money from or by the United States, or any officer, employee, or agent thereof, or the allowance or payment of the whole or any part of any claim, account, or demand against the United States—

Shall be fined under this title or imprisoned not more than five years, or both.

(June 25, 1948, ch. 645, 62 Stat. 698; Pub. L. 103–322, title XXXIII, § 330016(1)(K), Sept. 13, 1994, 108 Stat. 2147.)

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 92 (Mar. 4, 1909, ch. 321, § 40, 35 Stat. 1096).

Word "employee" was inserted after "officer" in two places to clarify scope of section.

The words "five years" were substituted for "ten years" in the punishment provision to conform to like provisions in similar offenses. (See section 1001 of this title.)

Changes were made in phraseology.

AMENDMENTS

1994—Pub. L. 103–322 substituted "fined under this title" for "fined not more than $5,000".

§ 286. Conspiracy to defraud the Government with respect to claims

Whoever enters into any agreement, combination, or conspiracy to defraud the United States, or any department or agency thereof, by obtaining or aiding to obtain the payment or allowance of any false, fictitious or fraudulent claim, shall be fined under this title or imprisoned not more than ten years, or both.

(June 25, 1948, ch. 645, 62 Stat. 698; Pub. L. 103–322, title XXXIII, § 330016(1)(L), Sept. 13, 1994, 108 Stat. 2147.)

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 83 (Mar. 4, 1909, ch. 321, § 35, 35 Stat. 1095; Oct. 23, 1918, ch. 194, 40 Stat. 1015; June 18, 1934, ch. 587, 48 Stat. 996; Apr. 4, 1938, ch. 69, 52 Stat. 197).

To clarify meaning of "department" the word "agency" was inserted after it. (See definitions of "department" and "agency" in section 6 of this title.)

Words "or any corporation in which the United States of America is a stockholder" were omitted as unnecessary in view of definition of "agency" in section 6 of this title.

Minor changes in phraseology were made.

AMENDMENTS

1994—Pub. L. 103–322 substituted "fined under this title" for "fined not more than $10,000".

§ 287. False, fictitious or fraudulent claims

Whoever makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent, shall be imprisoned not more than five years and shall be subject to a fine in the amount provided in this title.

(June 25, 1948, ch. 645, 62 Stat. 698; Pub. L. 99–562, § 7, Oct. 27, 1986, 100 Stat. 3169.)

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 80 (Mar. 4, 1909, ch. 321, § 35, 35 Stat. 1095; Oct. 23, 1918, ch. 194, 40 Stat. 1015; June 18, 1934, ch. 587, 48 Stat. 996; Apr. 4, 1938, ch. 69, 52 Stat. 197).

Section 80 of title 18, U.S.C., 1940 ed., was divided into two parts. That portion making it a crime to present false claims was retained as this section. The part relating to false statements is now section 1001 of this title.

To clarify meaning of "department" words "agency" and "or agency" were inserted after it. (See definitions of "department" and "agency" in section 6 of this title.)

Words "or any corporation in which the United States of America is a stockholder" which appeared in two places were omitted as unnecessary in view of definition of "agency" in section 6 of this title.

The words "five years" were substituted for "ten years" to harmonize the punishment provisions of comparable sections involving offenses of the gravity of felonies, but not of such heinous character as to warrant a 10-year punishment. (See sections 914, 1001, 1002, 1005, 1006 of this title.)

Reference to persons causing or procuring was omitted as unnecessary in view of definition of "principal" in section 2 of this title.

Minor changes in phraseology were made.

AMENDMENTS

1986—Pub. L. 99–562 substituted "imprisoned not more than five years and shall be subject to a fine in the amount provided in this title" for "fined not more than $10,000 or imprisoned not more than five years, or both".

INCREASED PENALTIES FOR FALSE CLAIMS IN DEFENSE PROCUREMENT

Pub. L. 99–145, title IX, § 931(a), Nov. 8, 1985, 99 Stat. 699, provided that: "Notwithstanding sections 287 and 3623 of title 18, United States Code, the maximum fine that may be imposed under such section for making or presenting any claim upon or against the United States related to a contract with the Department of Defense, knowing such claim to be false, fictitious, or fraudulent, is $1,000,000."

[Section 931(c) of Pub. L. 99–145 provided that section 931(a) is applicable to claims made or presented on or after Nov. 8, 1985.]

§ 288. False claims for postal losses

Whoever makes, alleges, or presents any claim or application for indemnity for the loss of any registered or insured letter, parcel, package, or other article or matter, or the contents thereof, knowing such claim or application to be false, fictitious, or fraudulent; or

Whoever for the purpose of obtaining or aiding to obtain the payment or approval of any such claim or application, makes or uses any false statement, certificate, affidavit, or deposition; or

Whoever knowingly and willfully misrepresents, or misstates, or, for the purpose aforesaid, knowingly and willfully conceals any material fact or circumstance in respect of any such claim or application for indemnity—

Shall be fined under this title or imprisoned not more than one year, or both.

surplus. The words "of bringing a civil action" are substituted for "in prosecuting the debt" for consistency in the revised title and with other titles of the United States Code. The words "of the United States to final judgment" and "to the United States" are omitted as surplus.

Subsection (b)(2)(B) is substituted for 31:227(3d sentence) for consistency and to eliminate unnecessary words.

In subsection (c), the words "for debt and costs", "thereon", and "from the plaintiff" are omitted as surplus.

AMENDMENTS

1996—Subsec. (a). Pub. L. 104–316, § 202(p)(1), (2), substituted "Secretary of the Treasury" for "Comptroller General" before "shall withhold" and "Secretary" for "Comptroller General" after "presented to the".

Subsecs. (b), (c). Pub. L. 104–316, § 202(p)(2), substituted "Secretary" for "Comptroller General" wherever appearing.

§ 3729. False claims

(a) LIABILITY FOR CERTAIN ACTS.—

(1) IN GENERAL.—Subject to paragraph (2), any person who—

(A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval;

(B) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim;

(C) conspires to commit a violation of subparagraph (A), (B), (D), (E), (F), or (G);

(D) has possession, custody, or control of property or money used, or to be used, by the Government and knowingly delivers, or causes to be delivered, less than all of that money or property;

(E) is authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(F) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge property; or

(G) knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government,

is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, as adjusted by the Federal Civil Penalties Inflation Adjustment Act of 1990 (28 U.S.C. 2461 note; Public Law 104–410[1]), plus 3 times the amount of damages which the Government sustains because of the act of that person.

(2) REDUCED DAMAGES.—If the court finds that—

(A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;

(B) such person fully cooperated with any Government investigation of such violation; and

(C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation,

the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of that person.

(3) COSTS OF CIVIL ACTIONS.—A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.

(b) DEFINITIONS.—For purposes of this section—

(1) the terms "knowing" and "knowingly"—

(A) mean that a person, with respect to information—

(i) has actual knowledge of the information;

(ii) acts in deliberate ignorance of the truth or falsity of the information; or

(iii) acts in reckless disregard of the truth or falsity of the information; and

(B) require no proof of specific intent to defraud;

(2) the term "claim"—

(A) means any request or demand, whether under a contract or otherwise, for money or property and whether or not the United States has title to the money or property, that—

(i) is presented to an officer, employee, or agent of the United States; or

(ii) is made to a contractor, grantee, or other recipient, if the money or property is to be spent or used on the Government's behalf or to advance a Government program or interest, and if the United States Government—

(I) provides or has provided any portion of the money or property requested or demanded; or

(II) will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded; and

(B) does not include requests or demands for money or property that the Government has paid to an individual as compensation for Federal employment or as an income subsidy with no restrictions on that individual's use of the money or property;

(3) the term "obligation" means an established duty, whether or not fixed, arising from

[1] So in original. Probably should be "101–410".

an express or implied contractual, grantor-grantee, or licensor-licensee relationship, from a fee-based or similar relationship, from statute or regulation, or from the retention of any overpayment; and

(4) the term "material" means having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.

(c) EXEMPTION FROM DISCLOSURE.—Any information furnished pursuant to subsection (a)(2) shall be exempt from disclosure under section 552 of title 5.

(d) EXCLUSION.—This section does not apply to claims, records, or statements made under the Internal Revenue Code of 1986.

(Pub. L. 97–258, Sept. 13, 1982, 96 Stat. 978; Pub. L. 99–562, § 2, Oct. 27, 1986, 100 Stat. 3153; Pub. L. 103–272, § 4(f)(1)(O), July 5, 1994, 108 Stat. 1362; Pub. L. 111–21, § 4(a), May 20, 2009, 123 Stat. 1621.)

HISTORICAL AND REVISION NOTES

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
3729	31:231.	R.S. § 3490.

In the section, before clause (1), the words "a member of an armed force of the United States" are substituted for "in the military or naval forces of the United States, or in the militia called into or actually employed in the service of the United States" and "military or naval service" for consistency with title 10. The words "is liable" are substituted for "shall forfeit and pay" for consistency. The words "civil action" are substituted for "suit" for consistency in the revised title and with other titles of the United States Code. The words "and such forfeiture and damages shall be sued for in the same suit" are omitted as unnecessary because of rules 8 and 10 of the Federal Rules of Civil Procedure (28 App. U.S.C.). In clauses (1)–(3), the words "false or fraudulent" are substituted for "false, fictitious, or fraudulent" and "Fraudulent or fictitious" to eliminate unnecessary words and for consistency. In clause (1), the words "presents, or causes to be presented" are substituted for "shall make or cause to be made, or present or cause to be presented" for clarity and consistency and to eliminate unnecessary words. The words "officer or employee of the Government or a member of an armed force" are substituted for "officer in the civil, military, or naval service of the United States" for consistency in the revised title and with other titles of the Code. The words "upon or against the Government of the United States, or any department of the United States, or any department or officer thereof" are omitted as surplus. In clause (2), the word "knowingly" is substituted for "knowing the same to contain any fraudulent or fictitious statement or entry" to eliminate unnecessary words. The words "record or statement" are substituted for "bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition" for consistency in the revised title and with other titles of the Code. In clause (3), the words "conspires to" are substituted for "enters into any agreement, combination, or conspiracy" to eliminate unnecessary words. The words "of the United States, or any department or officer thereof" are omitted as surplus. In clause (4), the words "charge", "or other", and "to any other person having authority to receive the same" are omitted as surplus. In clause (5), the words "document certifying receipt" are substituted for "certificate, voucher, receipt, or other paper certifying the receipt" to eliminate unnecessary words. The words "arms, ammunition, provisions, clothing, or other", "to any other person", and "the truth of" are omitted as surplus. In clause (6), the words "arms, equipments, ammunition, clothes, military stores, or other" are omitted as surplus. The words "member of an armed force" are substituted for "soldier, officer, sailor, or other person called into or employed in the military or naval service" for consistency with title 10. The words "such soldier, sailor, officer, or other person" are omitted as surplus.

REFERENCES IN TEXT

The Internal Revenue Code of 1986, referred to in subsec. (d), is classified generally to Title 26, Internal Revenue Code.

AMENDMENTS

2009—Subsecs. (a), (b). Pub. L. 111–21, § 4(a)(1), (2), added subsecs. (a) and (b) and struck out former subsecs. (a) and (b) which related to liability for certain acts and defined "knowing" and "knowingly", respectively.

Subsec. (c). Pub. L. 111–21, § 4(a)(4), substituted "subsection (a)(2)" for "subparagraphs (A) through (C) of subsection (a)".

Pub. L. 111–21, § 4(a)(2), (3), redesignated subsec. (d) as (c) and struck out heading and text of former subsec. (c). Prior to amendment, text read as follows: "For purposes of this section, 'claim' includes any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded."

Subsecs. (d), (e). Pub. L. 111–21, § 4(a)(3), redesignated subsecs. (d) and (e) as (c) and (d), respectively.

1994—Subsec. (e). Pub. L. 103–272 substituted "1986" for "1954".

1986—Subsec. (a). Pub. L. 99–562, § 2(1), designated existing provisions as subsec. (a), inserted subsec. heading, and substituted "Any person who" for "A person not a member of an armed force of the United States is liable to the United States Government for a civil penalty of $2,000, an amount equal to 2 times the amount of damages the Government sustains because of the act of that person, and costs of the civil action, if the person" in introductory provisions.

Subsec. (a)(1). Pub. L. 99–562, § 2(2), substituted "United States Government or a member of the Armed Forces of the United States" for "Government or a member of an armed force".

Subsec. (a)(2). Pub. L. 99–562, § 2(3), inserted "by the Government" after "approved".

Subsec. (a)(4). Pub. L. 99–562, § 2(4), substituted "control of property" for "control of public property" and "by the Government" for "in an armed force".

Subsec. (a)(5). Pub. L. 99–562, § 2(5), substituted "by the Government" for "in an armed force" and "true;" for "true; or".

Subsec. (a)(6). Pub. L. 99–562, § 2(6), substituted "an officer or employee of the Government, or a member of the Armed Forces," for "a member of an armed force" and "property; or" for "property."

Subsec. (a)(7). Pub. L. 99–562, § 2(7), added par. (7).

Subsecs. (b) to (e). Pub. L. 99–562, § 2(7), added subsecs. (b) to (e).

EFFECTIVE DATE OF 2009 AMENDMENT

Pub. L. 111–21, § 4(f), May 20, 2009, 123 Stat. 1625, provided that: "The amendments made by this section [amending this section and sections 3730 to 3733 of this title] shall take effect on the date of enactment of this Act [May 20, 2009] and shall apply to conduct on or after the date of enactment, except that—

"(1) subparagraph (B) of section 3729(a)(1) of title 31, United States Code, as added by subsection (a)(1), shall take effect as if enacted on June 7, 2008, and apply to all claims under the False Claims Act (31 U.S.C. 3729 et seq.) that are pending on or after that date; and

"(2) section 3731(b) [probably should be section 3731] of title 31, as amended by subsection (b); section 3733, of title 31, as amended by subsection (c); and section 3732 of title 31, as amended by subsection (e); shall apply to cases pending on the date of enactment."

INCREASED PENALTIES FOR FALSE CLAIMS IN DEFENSE PROCUREMENT

Pub. L. 99–145, title IX, § 931(b), Nov. 8, 1985, 99 Stat. 699, provided that: "Notwithstanding section 3729 of title 31, United States Code, the amount of the liability under that section in the case of a person who makes a false claim related to a contract with the Department of Defense shall be a civil penalty of $2,000, an amount equal to three times the amount of the damages the Government sustains because of the act of the person, and costs of the civil action."

[Section 931(c) of Pub. L. 99–145 provided that section 931(b) is applicable to claims made or presented on or after Nov. 8, 1985.]

§ 3730. Civil actions for false claims

(a) RESPONSIBILITIES OF THE ATTORNEY GENERAL.—The Attorney General diligently shall investigate a violation under section 3729. If the Attorney General finds that a person has violated or is violating section 3729, the Attorney General may bring a civil action under this section against the person.

(b) ACTIONS BY PRIVATE PERSONS.—(1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

(3) The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2). Any such motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until 20 days after the complaint is unsealed and served upon the defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure.

(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall—

(A) proceed with the action, in which case the action shall be conducted by the Government; or

(B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

(5) When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.

(c) RIGHTS OF THE PARTIES TO QUI TAM ACTIONS.—(1) If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. Such person shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2).

(2)(A) The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.

(B) The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera.

(C) Upon a showing by the Government that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation, such as—

(i) limiting the number of witnesses the person may call;

(ii) limiting the length of the testimony of such witnesses;

(iii) limiting the person's cross-examination of witnesses; or

(iv) otherwise limiting the participation by the person in the litigation.

(D) Upon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the person in the litigation.

(3) If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. If the Government so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts (at the Government's expense). When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause.

(4) Whether or not the Government proceeds with the action, upon a showing by the Government that certain actions of discovery by the person initiating the action would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than 60 days. Such a showing shall be conducted in camera. The court may extend the 60-day period upon a further

showing in camera that the Government has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

(5) Notwithstanding subsection (b), the Government may elect to pursue its claim through any alternate remedy available to the Government, including any administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section. Any finding of fact or conclusion of law made in such other proceeding that has become final shall be conclusive on all parties to an action under this section. For purposes of the preceding sentence, a finding or conclusion is final if it has been finally determined on appeal to the appropriate court of the United States, if all time for filing such an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review.

(d) AWARD TO QUI TAM PLAINTIFF.—(1) If the Government proceeds with an action brought by a person under subsection (b), such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action. Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government[1] Accounting Office report, hearing, audit, or investigation, or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation. Any payment to a person under the first or second sentence of this paragraph shall be made from the proceeds. Any such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(2) If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(3) Whether or not the Government proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation of section 3729 upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action which the person would otherwise receive under paragraph (1) or (2) of this subsection, taking into account the role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the person bringing the action is convicted of criminal conduct arising from his or her role in the violation of section 3729, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the United States to continue the action, represented by the Department of Justice.

(4) If the Government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

(e) CERTAIN ACTIONS BARRED.—(1) No court shall have jurisdiction over an action brought by a former or present member of the armed forces under subsection (b) of this section against a member of the armed forces arising out of such person's service in the armed forces.

(2)(A) No court shall have jurisdiction over an action brought under subsection (b) against a Member of Congress, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the Government when the action was brought.

(B) For purposes of this paragraph, "senior executive branch official" means any officer or employee listed in paragraphs (1) through (8) of section 101(f) of the Ethics in Government Act of 1978 (5 U.S.C. App.).

(3) In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.

(4)(A) The court shall dismiss an action or claim under this section, unless opposed by the Government, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed—

(i) in a Federal criminal, civil, or administrative hearing in which the Government or its agent is a party;

(ii) in a congressional, Government Accountability Office, or other Federal report, hearing, audit, or investigation; or

(iii) from the news media,

unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph, "original source" means an individual who either (i) prior

[1] So in original. Probably should be "General".

to a public disclosure under subsection (e)(4)(a), has voluntarily disclosed to the Government the information on which allegations or transactions in a claim are based, or (2) who has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions, and who has voluntarily provided the information to the Government before filing an action under this section.

(f) GOVERNMENT NOT LIABLE FOR CERTAIN EXPENSES.—The Government is not liable for expenses which a person incurs in bringing an action under this section.

(g) FEES AND EXPENSES TO PREVAILING DEFENDANT.—In civil actions brought under this section by the United States, the provisions of section 2412(d) of title 28 shall apply.

(h) RELIEF FROM RETALIATORY ACTIONS.—

(1) IN GENERAL.—Any employee, contractor, or agent shall be entitled to all relief necessary to make that employee, contractor, or agent whole, if that employee, contractor, or agent is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful acts done by the employee, contractor, agent or associated others in furtherance of an action under this section or other efforts to stop 1 or more violations of this subchapter.

(2) RELIEF.—Relief under paragraph (1) shall include reinstatement with the same seniority status that employee, contractor, or agent would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An action under this subsection may be brought in the appropriate district court of the United States for the relief provided in this subsection.

(3) LIMITATION ON BRINGING CIVIL ACTION.—A civil action under this subsection may not be brought more than 3 years after the date when the retaliation occurred.

(Pub. L. 97–258, Sept. 13, 1982, 96 Stat. 978; Pub. L. 99–562, §§ 3, 4, Oct. 27, 1986, 100 Stat. 3154, 3157; Pub. L. 100–700, § 9, Nov. 19, 1988, 102 Stat. 4638; Pub. L. 101–280, § 10(a), May 4, 1990, 104 Stat. 162; Pub. L. 103–272, § 4(f)(1)(P), July 5, 1994, 108 Stat. 1362; Pub. L. 111–21, § 4(d), May 20, 2009, 123 Stat. 1624; Pub. L. 111–148, title X, § 10104(j)(2), Mar. 23, 2010, 124 Stat. 901; Pub. L. 111–203, title X, § 1079A(c), July 21, 2010, 124 Stat. 2079.)

HISTORICAL AND REVISION NOTES

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
3730(a)	31:233.	R.S. § 3492.
3730(b)(1)	31:232(A), (B)(less words between 3d and 4th commas).	R.S. § 3491(A)–(E); restated Dec. 23, 1943, ch. 377, § 1, 57 Stat. 608; June 11, 1960, Pub. L. 86–507, § 1(28), (29), 74 Stat. 202.
3730(b)(2)	31:232(C)(1st–3d sentences, 5th sentence proviso).	
3730(b)(3)	31:232(C)(4th sentence, 5th sentence less proviso).	
3730(b)(4)	31:232(C)(last sentence), (D).	
3730(c)(1)	31:232(E)(1).	
3730(c)(2)	31:232(E)(2)(less proviso).	
3730(d)	31:232(B)(words between 3d and 4th commas), (E)(2)(proviso).	

In the section, the words "civil action" are substituted for "suit" for consistency in the revised title and with other titles of the United States Code.

In subsection (a), the words "Attorney General" are substituted for "several district attorneys of the United States [subsequently changed to 'United States attorneys' because of section 1 of the Act of June 25, 1948 (ch. 646, 62 Stat. 909)] for the respective districts, for the District of Columbia, and for the several Territories" because of 28:509. The words "by persons liable to such suit" are omitted as surplus. The words "and found within their respective districts or Territories" are omitted because of the restatement. The words "If the Attorney General finds that a person has violated or is violating section 3729, the Attorney General may bring a civil action under this section against the person" are substituted for "and to cause them to be proceeded against in due form of law for the recovery of such forfeiture and damages" for clarity and consistency. The words "as the district judge may order" are omitted as surplus. The words "of the Attorney General" are substituted for "the person bringing the suit" for consistency in the section.

In subsection (b)(1), the words "Except as hereinafter provided" are omitted as unnecessary. The words "for a violation of section 3729 of this title" are added because of the restatement. The words "and carried on", "several" and "full power and" are omitted as surplus. The words "of the action" are substituted for "to hear, try, and determine such suit" to eliminate unnecessary words. The words "Trial is in the judicial district within whose jurisdictional limits the person charged with a violation is found or the violation occurs" are substituted for "within whose jurisdictional limits the person doing or committing such act shall be found, shall wheresoever such act may have been done or committed" for consistency in the revised title and with other titles of the Code. The words "withdrawn or" and "judge of the" are omitted as surplus. The words "Attorney General" are substituted for "district attorney [subsequently changed to 'United States attorneys' because of section 1 of the Act of June 25, 1948 (ch. 646, 62 Stat. 909)], first filed in the case" because of 28:509.

In subsection (b)(2), before clause (A), the words "bill of", "Whenever any such suit shall be brought by any person under clause (B) of this section" and "to the effective prosecution of such suit or" are omitted as surplus. The words "served on the Government under rule 4 of the Federal Rules of Civil Procedure (28 App. U.S.C.)" are substituted for "notice . . . shall be given to the United States by serving upon the United States Attorney for the district in which such suit shall have been brought . . . and by sending, by registered mail, or by certified mail, to the Attorney General of the United States at Washington, District of Columbia" because of 28:509 and to eliminate unnecessary words. The words "proceed with the action" are added for clarity. Clause (A) is substituted for "shall fail, or decline in writing to the court, during said period of sixty days to enter any such suit" for clarity and consistency. In clause (B), the words "a period of" and "therein" are omitted as surplus.

In subsection (b)(3), the words "within said period" are omitted as surplus. The words "proceeds with the action" are substituted for "shall enter appearance in such suit" for consistency. The words "In carrying on such suit" and "and may proceed in all respects as if it were instituting the suit" are omitted as surplus.

In subsection (b)(4), the words "Unless the Government proceeds with the action" are added because of

the restatement. The words "shall dismiss an action brought by the person on discovering" are substituted for "shall have no jurisdiction to proceed with any such suit . . . or pending suit . . . whenever it shall be made to appear that" to eliminate unnecessary words. The words "or any agency, officer, or employee thereof" are omitted as unnecessary. The text of 31:232(C)(last sentence proviso) and (D) is omitted as executed.

In subsection (c), the words "herein provided", "fair and . . . compensation to such person", and "involved therein, which shall be collected" are omitted as surplus.

In subsection (c)(2), the words "whether heretofore or hereafter brought" are omitted as unnecessary. The words "bringing the action or settling the claim" are substituted for "who brought such suit and prosecuted it to final judgment, or to settlement" for clarity and consistency. The words "as provided in clause (B) of this section" are omitted as unnecessary. The words "the civil penalty" are substituted for "forfeiture" for clarity and consistency. The words "to his own use", "the court may", and "to be allowed and taxed according to any provision of law or rule of court in force, or that shall be in force in suits between private parties in said court" are omitted as surplus.

Subsection (d) is substituted for 31:232(B)(words between 3d and 4th commas) and (E)(2)(proviso) to eliminate unnecessary words.

REFERENCES IN TEXT

The Federal Rules of Civil Procedure, referred to in subsec. (b)(2), (3), are set out in the Appendix to Title 28, Judiciary and Judicial Procedure.

Section 101(f) of the Ethics in Government Act of 1978, referred to in subsec. (e)(2)(B), is section 101(f) of Pub. L. 95–521, title I, Oct. 26, 1978, 92 Stat. 1824, which was set out in the Appendix to Title 5, Government Organization and Employees.

AMENDMENTS

2010—Subsec. (e)(4). Pub. L. 111–148 added par. (4) and struck out former par. (4) which read as follows:

"(4)(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

"(B) For purposes of this paragraph, 'original source' means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information."

Subsec. (h)(1). Pub. L. 111–203, §1079A(c)(1), substituted "agent or associated others in furtherance of an action under this section or other efforts to stop 1 or more violations of this subchapter" for "or agent on behalf of the employee, contractor, or agent or associated others in furtherance of other efforts to stop 1 or more violations of this subchapter".

Subsec. (h)(3). Pub. L. 111–203, §1079A(c)(2), added par. (3).

2009—Subsec. (h). Pub. L. 111–21 amended subsec. (h) generally. Prior to amendment, subsec. (h) read as follows: "Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An employee may bring an action in the appropriate district court of the United States for the relief provided in this subsection."

1994—Subsec. (e)(2)(B). Pub. L. 103–272 substituted "paragraphs (1) through (8)" for "section paragraphs (1) through (8)".

1990—Subsec. (e)(2)(B). Pub. L. 101–280 substituted "paragraphs (1) through (8) of section 101(f)" for "201(f)".

1988—Subsec. (c)(4). Pub. L. 100–700, §9(b)(1), which directed amendment of section 3730 of title 28 by substituting "with the action" for "with action" in subsec. (c)(4), was executed to subsec. (c)(4) of this section as the probable intent of Congress.

Subsec. (d)(3). Pub. L. 100–700, §9(a)(1), (2), added par. (3). Former par. (3) redesignated (4).

Subsec. (d)(4). Pub. L. 100–700, §9(b)(2), which directed amendment of section 3730 of title 28 by substituting "claim of the person bringing the action" for "claim of the person bringing the actions" in subsec. (d)(4), was executed to subsec. (d)(4) of this section as the probable intent of Congress.

Pub. L. 100–700, §9(a)(1), redesignated former par. (3) as (4).

1986—Pub. L. 99–562, §3, amended section generally, revising and expanding provisions of subsecs. (a) to (c), adding subsecs. (d) and (e), redesignating former subsec. (d) as (f), and adding subsec. (g).

Subsec. (h). Pub. L. 99–562, §4, added subsec. (h).

EFFECTIVE DATE OF 2010 AMENDMENT

Amendment by Pub. L. 111–203 effective 1 day after July 21, 2010, except as otherwise provided, see section 4 of Pub. L. 111–203, set out as an Effective Date note under section 5301 of Title 12, Banks and Banking.

EFFECTIVE DATE OF 2009 AMENDMENT

Amendment by Pub. L. 111–21 effective May 20, 2009, and applicable to conduct on or after May 20, 2009, see section 4(f) of Pub. L. 111–21, set out as a note under section 3729 of this title.

EFFECTIVE DATE OF 1990 AMENDMENT

Section 10(c) of Pub. L. 101–280 provided that: "The amendments made by subsections (a) and (b) [amending this section and section 2397a of Title 10, Armed Forces] shall take effect on January 1, 1991."

§ 3731. False claims procedure

(a) A subpena requiring the attendance of a witness at a trial or hearing conducted under section 3730 of this title may be served at any place in the United States.

(b) A civil action under section 3730 may not be brought—

(1) more than 6 years after the date on which the violation of section 3729 is committed, or

(2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed,

whichever occurs last.

(c) If the Government elects to intervene and proceed with an action brought under 3730(b),[1]

[1] So in original. Probably should be preceded by "section".

the Government may file its own complaint or amend the complaint of a person who has brought an action under section 3730(b) to clarify or add detail to the claims in which the Government is intervening and to add any additional claims with respect to which the Government contends it is entitled to relief. For statute of limitations purposes, any such Government pleading shall relate back to the filing date of the complaint of the person who originally brought the action, to the extent that the claim of the Government arises out of the conduct, transactions, or occurrences set forth, or attempted to be set forth, in the prior complaint of that person.

(d) In any action brought under section 3730, the United States shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence.

(e) Notwithstanding any other provision of law, the Federal Rules of Criminal Procedure, or the Federal Rules of Evidence, a final judgment rendered in favor of the United States in any criminal proceeding charging fraud or false statements, whether upon a verdict after trial or upon a plea of guilty or nolo contendere, shall estop the defendant from denying the essential elements of the offense in any action which involves the same transaction as in the criminal proceeding and which is brought under subsection (a) or (b) of section 3730.

(Pub. L. 97–258, Sept. 13, 1982, 96 Stat. 979; Pub. L. 99–562, § 5, Oct. 27, 1986, 100 Stat. 3158; Pub. L. 111–21, § 4(b), May 20, 2009, 123 Stat. 1623.)

HISTORICAL AND REVISION NOTES

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
3731(a)	31:232(F).	R.S. § 3491(F); added Nov. 2, 1978, Pub. L. 95–582, § 1, 92 Stat. 2479.
3731(b)	31:235.	R.S. § 3494.

In subsection (b), the words "A civil action under section 3730 of this title" are substituted for "Every such suit" for clarity.

REFERENCES IN TEXT

The Federal Rules of Criminal Procedure, referred to in subsec. (e), are set out in the Appendix to Title 18, Crimes and Criminal Procedure.

The Federal Rules of Evidence, referred to in subsec. (e), are set out in the Appendix to Title 28, Judiciary and Judicial Procedure.

AMENDMENTS

2009—Subsecs. (c) to (e). Pub. L. 111–21, which directed amendment of section "3731(b)" of this title by adding subsec. (c) and redesignating former subsecs. (c) and (d) as (d) and (e), respectively, was executed by making the amendment to this section, to reflect the probable intent of Congress.

1986—Subsecs. (b) to (d). Pub. L. 99–562 added subsecs. (b) to (d) and struck out former subsec. (b) which read as follows: "A civil action under section 3730 of this title must be brought within 6 years from the date the violation is committed."

EFFECTIVE DATE OF 2009 AMENDMENT

Amendment by Pub. L. 111–21 effective May 20, 2009, and applicable to conduct on or after May 20, 2009, except that this section, as amended by Pub. L. 111–21, applicable to cases pending on May 20, 2009, see section 4(f) of Pub. L. 111–21, set out as a note under section 3729 of this title.

§ 3732. False claims jurisdiction

(a) ACTIONS UNDER SECTION 3730.—Any action under section 3730 may be brought in any judicial district in which the defendant or, in the case of multiple defendants, any one defendant can be found, resides, transacts business, or in which any act proscribed by section 3729 occurred. A summons as required by the Federal Rules of Civil Procedure shall be issued by the appropriate district court and served at any place within or outside the United States.

(b) CLAIMS UNDER STATE LAW.—The district courts shall have jurisdiction over any action brought under the laws of any State for the recovery of funds paid by a State or local government if the action arises from the same transaction or occurrence as an action brought under section 3730.

(c) SERVICE ON STATE OR LOCAL AUTHORITIES.—With respect to any State or local government that is named as a co-plaintiff with the United States in an action brought under subsection (b), a seal on the action ordered by the court under section 3730(b) shall not preclude the Government or the person bringing the action from serving the complaint, any other pleadings, or the written disclosure of substantially all material evidence and information possessed by the person bringing the action on the law enforcement authorities that are authorized under the law of that State or local government to investigate and prosecute such actions on behalf of such governments, except that such seal applies to the law enforcement authorities so served to the same extent as the seal applies to other parties in the action.

(Added Pub. L. 99–562, § 6(a), Oct. 21, 1986, 100 Stat. 3158; amended Pub. L. 111–21, § 4(e), May 20, 2009, 123 Stat. 1625.)

REFERENCES IN TEXT

The Federal Rules of Civil Procedure, referred to in subsec. (a), are set out in the Appendix to Title 28, Judiciary and Judicial Procedure.

AMENDMENTS

2009—Subsec. (c). Pub. L. 111–21 added subsec. (c).

EFFECTIVE DATE OF 2009 AMENDMENT

Amendment by Pub. L. 111–21 effective May 20, 2009, and applicable to conduct on or after May 20, 2009, except that this section, as amended by Pub. L. 111–21, applicable to cases pending on May 20, 2009, see section 4(f) of Pub. L. 111–21, set out as a note under section 3729 of this title.

§ 3733. Civil investigative demands

(a) IN GENERAL.—

(1) ISSUANCE AND SERVICE.—Whenever the Attorney General, or a designee (for purposes of this section), has reason to believe that any person may be in possession, custody, or control of any documentary material or information relevant to a false claims law investigation, the Attorney General, or a designee, may, before commencing a civil proceeding under section 3730(a) or other false claims law, or making an election under section 3730(b),

issue in writing and cause to be served upon such person, a civil investigative demand requiring such person—

(A) to produce such documentary material for inspection and copying,

(B) to answer in writing written interrogatories with respect to such documentary material or information,

(C) to give oral testimony concerning such documentary material or information, or

(D) to furnish any combination of such material, answers, or testimony.

The Attorney General may delegate the authority to issue civil investigative demands under this subsection. Whenever a civil investigative demand is an express demand for any product of discovery, the Attorney General, the Deputy Attorney General, or an Assistant Attorney General shall cause to be served, in any manner authorized by this section, a copy of such demand upon the person from whom the discovery was obtained and shall notify the person to whom such demand is issued of the date on which such copy was served. Any information obtained by the Attorney General or a designee of the Attorney General under this section may be shared with any qui tam relator if the Attorney General or designee determine it is necessary as part of any false claims act[1] investigation.

(2) CONTENTS AND DEADLINES.—

(A) Each civil investigative demand issued under paragraph (1) shall state the nature of the conduct constituting the alleged violation of a false claims law which is under investigation, and the applicable provision of law alleged to be violated.

(B) If such demand is for the production of documentary material, the demand shall—

(i) describe each class of documentary material to be produced with such definiteness and certainty as to permit such material to be fairly identified;

(ii) prescribe a return date for each such class which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying; and

(iii) identify the false claims law investigator to whom such material shall be made available.

(C) If such demand is for answers to written interrogatories, the demand shall—

(i) set forth with specificity the written interrogatories to be answered;

(ii) prescribe dates at which time answers to written interrogatories shall be submitted; and

(iii) identify the false claims law investigator to whom such answers shall be submitted.

(D) If such demand is for the giving of oral testimony, the demand shall—

(i) prescribe a date, time, and place at which oral testimony shall be commenced;

(ii) identify a false claims law investigator who shall conduct the examination and the custodian to whom the transcript of such examination shall be submitted;

(iii) specify that such attendance and testimony are necessary to the conduct of the investigation;

(iv) notify the person receiving the demand of the right to be accompanied by an attorney and any other representative; and

(v) describe the general purpose for which the demand is being issued and the general nature of the testimony, including the primary areas of inquiry, which will be taken pursuant to the demand.

(E) Any civil investigative demand issued under this section which is an express demand for any product of discovery shall not be returned or returnable until 20 days after a copy of such demand has been served upon the person from whom the discovery was obtained.

(F) The date prescribed for the commencement of oral testimony pursuant to a civil investigative demand issued under this section shall be a date which is not less than seven days after the date on which demand is received, unless the Attorney General or an Assistant Attorney General designated by the Attorney General determines that exceptional circumstances are present which warrant the commencement of such testimony within a lesser period of time.

(G) The Attorney General shall not authorize the issuance under this section of more than one civil investigative demand for oral testimony by the same person unless the person requests otherwise or unless the Attorney General, after investigation, notifies that person in writing that an additional demand for oral testimony is necessary.

(b) PROTECTED MATERIAL OR INFORMATION.—

(1) IN GENERAL.—A civil investigative demand issued under subsection (a) may not require the production of any documentary material, the submission of any answers to written interrogatories, or the giving of any oral testimony if such material, answers, or testimony would be protected from disclosure under—

(A) the standards applicable to subpoenas or subpoenas duces tecum issued by a court of the United States to aid in a grand jury investigation; or

(B) the standards applicable to discovery requests under the Federal Rules of Civil Procedure, to the extent that the application of such standards to any such demand is appropriate and consistent with the provisions and purposes of this section.

(2) EFFECT ON OTHER ORDERS, RULES, AND LAWS.—Any such demand which is an express demand for any product of discovery supersedes any inconsistent order, rule, or provision of law (other than this section) preventing or restraining disclosure of such product of discovery to any person. Disclosure of any product of discovery pursuant to any such express demand does not constitute a waiver of any right or privilege which the person making such disclosure may be entitled to invoke to resist discovery of trial preparation materials.

(c) SERVICE; JURISDICTION.—

[1] So in original. Probably should be "law".

(1) BY WHOM SERVED.—Any civil investigative demand issued under subsection (a) may be served by a false claims law investigator, or by a United States marshal or a deputy marshal, at any place within the territorial jurisdiction of any court of the United States.

(2) SERVICE IN FOREIGN COUNTRIES.—Any such demand or any petition filed under subsection (j) may be served upon any person who is not found within the territorial jurisdiction of any court of the United States in such manner as the Federal Rules of Civil Procedure prescribe for service in a foreign country. To the extent that the courts of the United States can assert jurisdiction over any such person consistent with due process, the United States District Court for the District of Columbia shall have the same jurisdiction to take any action respecting compliance with this section by any such person that such court would have if such person were personally within the jurisdiction of such court.

(d) SERVICE UPON LEGAL ENTITIES AND NATURAL PERSONS.—

(1) LEGAL ENTITIES.—Service of any civil investigative demand issued under subsection (a) or of any petition filed under subsection (j) may be made upon a partnership, corporation, association, or other legal entity by—

(A) delivering an executed copy of such demand or petition to any partner, executive officer, managing agent, or general agent of the partnership, corporation, association, or entity, or to any agent authorized by appointment or by law to receive service of process on behalf of such partnership, corporation, association, or entity;

(B) delivering an executed copy of such demand or petition to the principal office or place of business of the partnership, corporation, association, or entity; or

(C) depositing an executed copy of such demand or petition in the United States mails by registered or certified mail, with a return receipt requested, addressed to such partnership, corporation, association, or entity at its principal office or place of business.

(2) NATURAL PERSONS.—Service of any such demand or petition may be made upon any natural person by—

(A) delivering an executed copy of such demand or petition to the person; or

(B) depositing an executed copy of such demand or petition in the United States mails by registered or certified mail, with a return receipt requested, addressed to the person at the person's residence or principal office or place of business.

(e) PROOF OF SERVICE.—A verified return by the individual serving any civil investigative demand issued under subsection (a) or any petition filed under subsection (j) setting forth the manner of such service shall be proof of such service. In the case of service by registered or certified mail, such return shall be accompanied by the return post office receipt of delivery of such demand.

(f) DOCUMENTARY MATERIAL.—

(1) SWORN CERTIFICATES.—The production of documentary material in response to a civil investigative demand served under this section shall be made under a sworn certificate, in such form as the demand designates, by—

(A) in the case of a natural person, the person to whom the demand is directed, or

(B) in the case of a person other than a natural person, a person having knowledge of the facts and circumstances relating to such production and authorized to act on behalf of such person.

The certificate shall state that all of the documentary material required by the demand and in the possession, custody, or control of the person to whom the demand is directed has been produced and made available to the false claims law investigator identified in the demand.

(2) PRODUCTION OF MATERIALS.—Any person upon whom any civil investigative demand for the production of documentary material has been served under this section shall make such material available for inspection and copying to the false claims law investigator identified in such demand at the principal place of business of such person, or at such other place as the false claims law investigator and the person thereafter may agree and prescribe in writing, or as the court may direct under subsection (j)(1). Such material shall be made so available on the return date specified in such demand, or on such later date as the false claims law investigator may prescribe in writing. Such person may, upon written agreement between the person and the false claims law investigator, substitute copies for originals of all or any part of such material.

(g) INTERROGATORIES.—Each interrogatory in a civil investigative demand served under this section shall be answered separately and fully in writing under oath and shall be submitted under a sworn certificate, in such form as the demand designates, by—

(1) in the case of a natural person, the person to whom the demand is directed, or

(2) in the case of a person other than a natural person, the person or persons responsible for answering each interrogatory.

If any interrogatory is objected to, the reasons for the objection shall be stated in the certificate instead of an answer. The certificate shall state that all information required by the demand and in the possession, custody, control, or knowledge of the person to whom the demand is directed has been submitted. To the extent that any information is not furnished, the information shall be identified and reasons set forth with particularity regarding the reasons why the information was not furnished.

(h) ORAL EXAMINATIONS.—

(1) PROCEDURES.—The examination of any person pursuant to a civil investigative demand for oral testimony served under this section shall be taken before an officer authorized to administer oaths and affirmations by the laws of the United States or of the place where the examination is held. The officer before whom the testimony is to be taken shall put the witness on oath or affirmation and shall, personally or by someone acting under the direction of the officer and in the officer's

presence, record the testimony of the witness. The testimony shall be taken stenographically and shall be transcribed. When the testimony is fully transcribed, the officer before whom the testimony is taken shall promptly transmit a copy of the transcript of the testimony to the custodian. This subsection shall not preclude the taking of testimony by any means authorized by, and in a manner consistent with, the Federal Rules of Civil Procedure.

(2) PERSONS PRESENT.—The false claims law investigator conducting the examination shall exclude from the place where the examination is held all persons except the person giving the testimony, the attorney for and any other representative of the person giving the testimony, the attorney for the Government, any person who may be agreed upon by the attorney for the Government and the person giving the testimony, the officer before whom the testimony is to be taken, and any stenographer taking such testimony.

(3) WHERE TESTIMONY TAKEN.—The oral testimony of any person taken pursuant to a civil investigative demand served under this section shall be taken in the judicial district of the United States within which such person resides, is found, or transacts business, or in such other place as may be agreed upon by the false claims law investigator conducting the examination and such person.

(4) TRANSCRIPT OF TESTIMONY.—When the testimony is fully transcribed, the false claims law investigator or the officer before whom the testimony is taken shall afford the witness, who may be accompanied by counsel, a reasonable opportunity to examine and read the transcript, unless such examination and reading are waived by the witness. Any changes in form or substance which the witness desires to make shall be entered and identified upon the transcript by the officer or the false claims law investigator, with a statement of the reasons given by the witness for making such changes. The transcript shall then be signed by the witness, unless the witness in writing waives the signing, is ill, cannot be found, or refuses to sign. If the transcript is not signed by the witness within 30 days after being afforded a reasonable opportunity to examine it, the officer or the false claims law investigator shall sign it and state on the record the fact of the waiver, illness, absence of the witness, or the refusal to sign, together with the reasons, if any, given therefor.

(5) CERTIFICATION AND DELIVERY TO CUSTODIAN.—The officer before whom the testimony is taken shall certify on the transcript that the witness was sworn by the officer and that the transcript is a true record of the testimony given by the witness, and the officer or false claims law investigator shall promptly deliver the transcript, or send the transcript by registered or certified mail, to the custodian.

(6) FURNISHING OR INSPECTION OF TRANSCRIPT BY WITNESS.—Upon payment of reasonable charges therefor, the false claims law investigator shall furnish a copy of the transcript to the witness only, except that the Attorney General, the Deputy Attorney General, or an Assistant Attorney General may, for good cause, limit such witness to inspection of the official transcript of the witness' testimony.

(7) CONDUCT OF ORAL TESTIMONY.—(A) Any person compelled to appear for oral testimony under a civil investigative demand issued under subsection (a) may be accompanied, represented, and advised by counsel. Counsel may advise such person, in confidence, with respect to any question asked of such person. Such person or counsel may object on the record to any question, in whole or in part, and shall briefly state for the record the reason for the objection. An objection may be made, received, and entered upon the record when it is claimed that such person is entitled to refuse to answer the question on the grounds of any constitutional or other legal right or privilege, including the privilege against self-incrimination. Such person may not otherwise object to or refuse to answer any question, and may not directly or through counsel otherwise interrupt the oral examination. If such person refuses to answer any question, a petition may be filed in the district court of the United States under subsection (j)(1) for an order compelling such person to answer such question.

(B) If such person refuses to answer any question on the grounds of the privilege against self-incrimination, the testimony of such person may be compelled in accordance with the provisions of part V of title 18.

(8) WITNESS FEES AND ALLOWANCES.—Any person appearing for oral testimony under a civil investigative demand issued under subsection (a) shall be entitled to the same fees and allowances which are paid to witnesses in the district courts of the United States.

(i) CUSTODIANS OF DOCUMENTS, ANSWERS, AND TRANSCRIPTS.—

(1) DESIGNATION.—The Attorney General shall designate a false claims law investigator to serve as custodian of documentary material, answers to interrogatories, and transcripts of oral testimony received under this section, and shall designate such additional false claims law investigators as the Attorney General determines from time to time to be necessary to serve as deputies to the custodian.

(2) RESPONSIBILITY FOR MATERIALS; DISCLOSURE.—(A) A false claims law investigator who receives any documentary material, answers to interrogatories, or transcripts of oral testimony under this section shall transmit them to the custodian. The custodian shall take physical possession of such material, answers, or transcripts and shall be responsible for the use made of them and for the return of documentary material under paragraph (4).

(B) The custodian may cause the preparation of such copies of such documentary material, answers to interrogatories, or transcripts of oral testimony as may be required for official use by any false claims law investigator, or other officer or employee of the Department of Justice. Such material, answers, and transcripts may be used by any such authorized false claims law investigator or other officer

or employee in connection with the taking of oral testimony under this section.

(C) Except as otherwise provided in this subsection, no documentary material, answers to interrogatories, or transcripts of oral testimony, or copies thereof, while in the possession of the custodian, shall be available for examination by any individual other than a false claims law investigator or other officer or employee of the Department of Justice authorized under subparagraph (B). The prohibition in the preceding sentence on the availability of material, answers, or transcripts shall not apply if consent is given by the person who produced such material, answers, or transcripts, or, in the case of any product of discovery produced pursuant to an express demand for such material, consent is given by the person from whom the discovery was obtained. Nothing in this subparagraph is intended to prevent disclosure to the Congress, including any committee or subcommittee of the Congress, or to any other agency of the United States for use by such agency in furtherance of its statutory responsibilities.

(D) While in the possession of the custodian and under such reasonable terms and conditions as the Attorney General shall prescribe—

(i) documentary material and answers to interrogatories shall be available for examination by the person who produced such material or answers, or by a representative of that person authorized by that person to examine such material and answers; and

(ii) transcripts of oral testimony shall be available for examination by the person who produced such testimony, or by a representative of that person authorized by that person to examine such transcripts.

(3) USE OF MATERIAL, ANSWERS, OR TRANSCRIPTS IN OTHER PROCEEDINGS.—Whenever any attorney of the Department of Justice has been designated to appear before any court, grand jury, or Federal agency in any case or proceeding, the custodian of any documentary material, answers to interrogatories, or transcripts of oral testimony received under this section may deliver to such attorney such material, answers, or transcripts for official use in connection with any such case or proceeding as such attorney determines to be required. Upon the completion of any such case or proceeding, such attorney shall return to the custodian any such material, answers, or transcripts so delivered which have not passed into the control of such court, grand jury, or agency through introduction into the record of such case or proceeding.

(4) CONDITIONS FOR RETURN OF MATERIAL.—If any documentary material has been produced by any person in the course of any false claims law investigation pursuant to a civil investigative demand under this section, and—

(A) any case or proceeding before the court or grand jury arising out of such investigation, or any proceeding before any Federal agency involving such material, has been completed, or

(B) no case or proceeding in which such material may be used has been commenced within a reasonable time after completion of the examination and analysis of all documentary material and other information assembled in the course of such investigation,

the custodian shall, upon written request of the person who produced such material, return to such person any such material (other than copies furnished to the false claims law investigator under subsection (f)(2) or made for the Department of Justice under paragraph (2)(B)) which has not passed into the control of any court, grand jury, or agency through introduction into the record of such case or proceeding.

(5) APPOINTMENT OF SUCCESSOR CUSTODIANS.—In the event of the death, disability, or separation from service in the Department of Justice of the custodian of any documentary material, answers to interrogatories, or transcripts of oral testimony produced pursuant to a civil investigative demand under this section, or in the event of the official relief of such custodian from responsibility for the custody and control of such material, answers, or transcripts, the Attorney General shall promptly—

(A) designate another false claims law investigator to serve as custodian of such material, answers, or transcripts, and

(B) transmit in writing to the person who produced such material, answers, or testimony notice of the identity and address of the successor so designated.

Any person who is designated to be a successor under this paragraph shall have, with regard to such material, answers, or transcripts, the same duties and responsibilities as were imposed by this section upon that person's predecessor in office, except that the successor shall not be held responsible for any default or dereliction which occurred before that designation.

(j) JUDICIAL PROCEEDINGS.—

(1) PETITION FOR ENFORCEMENT.—Whenever any person fails to comply with any civil investigative demand issued under subsection (a), or whenever satisfactory copying or reproduction of any material requested in such demand cannot be done and such person refuses to surrender such material, the Attorney General may file, in the district court of the United States for any judicial district in which such person resides, is found, or transacts business, and serve upon such person a petition for an order of such court for the enforcement of the civil investigative demand.

(2) PETITION TO MODIFY OR SET ASIDE DEMAND.—(A) Any person who has received a civil investigative demand issued under subsection (a) may file, in the district court of the United States for the judicial district within which such person resides, is found, or transacts business, and serve upon the false claims law investigator identified in such demand a petition for an order of the court to modify or set aside such demand. In the case of a petition addressed to an express demand for any product of discovery, a petition to modify or set aside such demand may be brought only in the district court of the United States for the judicial district in which the proceeding in which such discovery was

obtained is or was last pending. Any petition under this subparagraph must be filed—

(i) within 20 days after the date of service of the civil investigative demand, or at any time before the return date specified in the demand, whichever date is earlier, or

(ii) within such longer period as may be prescribed in writing by any false claims law investigator identified in the demand.

(B) The petition shall specify each ground upon which the petitioner relies in seeking relief under subparagraph (A), and may be based upon any failure of the demand to comply with the provisions of this section or upon any constitutional or other legal right or privilege of such person. During the pendency of the petition in the court, the court may stay, as it deems proper, the running of the time allowed for compliance with the demand, in whole or in part, except that the person filing the petition shall comply with any portions of the demand not sought to be modified or set aside.

(3) PETITION TO MODIFY OR SET ASIDE DEMAND FOR PRODUCT OF DISCOVERY.—(A) In the case of any civil investigative demand issued under subsection (a) which is an express demand for any product of discovery, the person from whom such discovery was obtained may file, in the district court of the United States for the judicial district in which the proceeding in which such discovery was obtained is or was last pending, and serve upon any false claims law investigator identified in the demand and upon the recipient of the demand, a petition for an order of such court to modify or set aside those portions of the demand requiring production of any such product of discovery. Any petition under this subparagraph must be filed—

(i) within 20 days after the date of service of the civil investigative demand, or at any time before the return date specified in the demand, whichever date is earlier, or

(ii) within such longer period as may be prescribed in writing by any false claims law investigator identified in the demand.

(B) The petition shall specify each ground upon which the petitioner relies in seeking relief under subparagraph (A), and may be based upon any failure of the portions of the demand from which relief is sought to comply with the provisions of this section, or upon any constitutional or other legal right or privilege of the petitioner. During the pendency of the petition, the court may stay, as it deems proper, compliance with the demand and the running of the time allowed for compliance with the demand.

(4) PETITION TO REQUIRE PERFORMANCE BY CUSTODIAN OF DUTIES.—At any time during which any custodian is in custody or control of any documentary material or answers to interrogatories produced, or transcripts of oral testimony given, by any person in compliance with any civil investigative demand issued under subsection (a), such person, and in the case of an express demand for any product of discovery, the person from whom such discovery was obtained, may file, in the district court of the United States for the judicial district within which the office of such custodian is situated, and serve upon such custodian, a petition for an order of such court to require the performance by the custodian of any duty imposed upon the custodian by this section.

(5) JURISDICTION.—Whenever any petition is filed in any district court of the United States under this subsection, such court shall have jurisdiction to hear and determine the matter so presented, and to enter such order or orders as may be required to carry out the provisions of this section. Any final order so entered shall be subject to appeal under section 1291 of title 28. Any disobedience of any final order entered under this section by any court shall be punished as a contempt of the court.

(6) APPLICABILITY OF FEDERAL RULES OF CIVIL PROCEDURE.—The Federal Rules of Civil Procedure shall apply to any petition under this subsection, to the extent that such rules are not inconsistent with the provisions of this section.

(k) DISCLOSURE EXEMPTION.—Any documentary material, answers to written interrogatories, or oral testimony provided under any civil investigative demand issued under subsection (a) shall be exempt from disclosure under section 552 of title 5.

(*l*) DEFINITIONS.—For purposes of this section—

(1) the term "false claims law" means—

(A) this section and sections 3729 through 3732; and

(B) any Act of Congress enacted after the date of the enactment of this section which prohibits, or makes available to the United States in any court of the United States any civil remedy with respect to, any false claim against, bribery of, or corruption of any officer or employee of the United States;

(2) the term "false claims law investigation" means any inquiry conducted by any false claims law investigator for the purpose of ascertaining whether any person is or has been engaged in any violation of a false claims law;

(3) the term "false claims law investigator" means any attorney or investigator employed by the Department of Justice who is charged with the duty of enforcing or carrying into effect any false claims law, or any officer or employee of the United States acting under the direction and supervision of such attorney or investigator in connection with a false claims law investigation;

(4) the term "person" means any natural person, partnership, corporation, association, or other legal entity, including any State or political subdivision of a State;

(5) the term "documentary material" includes the original or any copy of any book, record, report, memorandum, paper, communication, tabulation, chart, or other document, or data compilations stored in or accessible through computer or other information retrieval systems, together with instructions and all other materials necessary to use or interpret such data compilations, and any product of discovery;

(6) the term "custodian" means the custodian, or any deputy custodian, designated by the Attorney General under subsection (i)(1);

Subpart 4.4—Safeguarding Classified Information Within Industry

4.401 [Reserved]

4.402 General.

(a) Executive Order 12829, January 6, 1993 (58 FR 3479, January 8, 1993), entitled "National Industrial Security Program" (NISP), establishes a program to safeguard Federal Government classified information that is released to contractors, licensees, and grantees of the United States Government. Executive Order 12829 amends Executive Order 10865, February 20, 1960 (25 FR 1583, February 25, 1960), entitled "Safeguarding Classified Information Within Industry," as amended by Executive Order 10909, January 17, 1961 (26 FR 508, January 20, 1961).

(b) The National Industrial Security Program Operating Manual (NISPOM) incorporates the requirements of these Executive orders. The Secretary of Defense, in consultation with all affected agencies and with the concurrence of the Secretary of Energy, the Chairman of the Nuclear Regulatory Commission, and the Director of Central Intelligence, is responsible for issuance and maintenance of this Manual. The following DoD publications implement the program:

(1) National Industrial Security Program Operating Manual (NISPOM) (DoD 5220.22-M).

(2) Industrial Security Regulation (DoD 5220.22-R).

(c) Procedures for the protection of information relating to foreign classified contracts awarded to U.S. industry, and instructions for the protection of U.S. information relating to classified contracts awarded to foreign firms, are prescribed in Chapter 10 of the NISPOM.

(d) Part 27—Patents, Data, and Copyrights, contains policy and procedures for safeguarding classified information in patent applications and patents.

4.403 Responsibilities of contracting officers.

(a) *Presolicitation phase.* Contracting officers shall review all proposed solicitations to determine whether access to classified information may be required by offerors, or by a contractor during contract performance.

(1) If access to classified information of another agency may be required, the contracting officer shall—

(i) Determine if the agency is covered by the NISP; and

(ii) Follow that agency's procedures for determining the security clearances of firms to be solicited.

(2) If the classified information required is from the contracting officer's agency, the contracting officer shall follow agency procedures.

(b) *Solicitation phase.* Contracting officers shall—

(1) Ensure that the classified acquisition is conducted as required by the NISP or agency procedures, as appropriate; and

(2) Include—

(i) An appropriate Security Requirements clause in the solicitation (see 4.404); and

(ii) As appropriate, in solicitations and contracts when the contract may require access to classified information, a requirement for security safeguards in addition to those provided in the clause (52.204-2, Security Requirements).

(c) *Award phase.* Contracting officers shall inform contractors and subcontractors of the security classifications and requirements assigned to the various documents, materials, tasks, subcontracts, and components of the classified contract as follows:

(1) Agencies covered by the NISP shall use the Contract Security Classification Specification, DD Form 254. The contracting officer, or authorized representative, is the approving official for the form and shall ensure that it is prepared and distributed in accordance with the Industrial Security Regulation.

(2) Contracting officers in agencies not covered by the NISP shall follow agency procedures.

4.404 Contract clause.

(a) The contracting officer shall insert the clause at 52.204-2, Security Requirements, in solicitations and contracts when the contract may require access to classified information, unless the conditions specified in paragraph (d) of this section apply.

(b) If a cost contract (see 16.302) for research and development with an educational institution is contemplated, the contracting officer shall use the clause with its Alternate I.

(c) If a construction or architect-engineer contract where employee identification is required for security reasons is contemplated, the contracting officer shall use the clause with its Alternate II.

(d) If the contracting agency is not covered by the NISP and has prescribed a clause and alternates that are substantially the same as those at 52.204-2, the contracting officer shall use the agency-prescribed clause as required by agency procedures.

Subpart 22.18—Employment Eligibility Verification

22.1800 Scope.

This subpart prescribes policies and procedures requiring contractors to utilize the Department of Homeland Security (DHS), United States Citizenship and Immigration Service's employment eligibility verification program (E-Verify) as the means for verifying employment eligibility of certain employees.

22.1801 Definitions.

As used in this subpart—

"Commercially available off-the-shelf (COTS) item"—

(1) Means any item of supply that is—

(i) A commercial item (as defined in paragraph (1) of the definition at 2.101);

(ii) Sold in substantial quantities in the commercial marketplace; and

(iii) Offered to the Government, without modification, in the same form in which it is sold in the commercial marketplace; and

(2) Does not include bulk cargo, as defined in section 3 of the Shipping Act of 1984 (46 U.S.C. App. 1702), such as agricultural products and petroleum products. Per 46 CFR 525.1 (c)(2), "bulk cargo" means cargo that is loaded and carried in bulk onboard ship without mark or count, in a loose unpackaged form, having homogenous characteristics. Bulk cargo loaded into intermodal equipment, except LASH or Seabee barges, is subject to mark and count and, therefore, ceases to be bulk cargo.

"Employee assigned to the contract" means an employee who was hired after November 6, 1986, who is directly performing work, in the United States, under a contract that is required to include the clause prescribed at 22.1803. An employee is not considered to be directly performing work under a contract if the employee—

(1) Normally performs support work, such as indirect or overhead functions; and

(2) Does not perform any substantial duties applicable to the contract.

"Subcontract" means any contract, as defined in 2.101, entered into by a subcontractor to furnish supplies or services for performance of a prime contract or a subcontract. It includes but is not limited to purchase orders, and changes and modifications to purchase orders.

"Subcontractor" means any supplier, distributor, vendor, or firm that furnishes supplies or services to or for a prime contractor or another subcontractor.

"United States", as defined in 8 U.S.C. 1101(a)(38), means the 50 States, the District of Columbia, Puerto Rico, Guam, and the U.S. Virgin Islands.

22.1802 Policy.

(a) Statutes and Executive orders require employers to abide by the immigration laws of the United States and to employ in the United States only individuals who are eligible to work in the United States. The E-Verify program provides an Internet-based means of verifying employment eligibility of workers employed in the United States, but is not a substitute for any other employment eligibility verification requirements.

(b) Contracting officers shall include in solicitations and contracts, as prescribed at 22.1803, requirements that Federal contractors must—

(1) Enroll as Federal contractors in E-Verify;

(2) Use E-Verify to verify employment eligibility of all new hires working in the United States, except that the contractor may choose to verify only new hires assigned to the contract if the contractor is—

(i) An institution of higher education (as defined at 20 U.S.C. 1001(a));

(ii) A State or local government or the government of a Federally recognized Indian tribe; or

(iii) A surety performing under a takeover agreement entered into with a Federal agency pursuant to a performance bond;

(3) Use E-Verify to verify employment eligibility of all employees assigned to the contract; and

(4) Include these requirements, as required by the clause at 52.222-54, in subcontracts for—

(i) Commercial or noncommercial services, except for commercial services that are part of the purchase of a COTS item (or an item that would be a COTS item, but for minor modifications), performed by the COTS provider, and are normally provided for that COTS item; and

(ii) Construction.

(c) Contractors may elect to verify employment eligibility of all existing employees working in the United States who were hired after November 6, 1986, instead of just those employees assigned to the contract. The contractor is not required to verify employment eligibility of—

(1) Employees who hold an active security clearance of confidential, secret, or top secret; or

(2) Employees for whom background investigations have been completed and credentials issued pursuant to Homeland Security Presidential Directive (HSPD)-12.

(d) In exceptional cases, the head of the contracting activity may waive the E-Verify requirement for a contract or subcontract or a class of contracts or subcontracts, either temporarily or for the period of performance. This waiver authority may not be delegated.

(e) DHS and the Social Security Administration (SSA) may terminate a contractor's MOU and deny access to the E-Verify system in accordance with the terms of the MOU. If DHS or SSA terminates a contractor's MOU, the terminating

agency must refer the contractor to a suspension or debarment official for possible suspension or debarment action. During the period between termination of the MOU and a decision by the suspension or debarment official whether to suspend or debar, the contractor is excused from its obligations under paragraph (b) of the clause at 52.222-54. If the contractor is suspended or debarred as a result of the MOU termination, the contractor is not eligible to participate in E-Verify during the period of its suspension or debarment. If the suspension or debarment official determines not to suspend or debar the contractor, then the contractor must reenroll in E-Verify.

22.1803 Contract clause.

Insert the clause at 52.222-54, Employment Eligibility Verification, in all solicitations and contracts that exceed the simplified acquisition threshold, except those that—

(a) Are only for work that will be performed outside the United States;

(b) Are for a period of performance of less than 120 days; or

(c) Are only for—

(1) Commercially available off-the-shelf items;

(2) Items that would be COTS items, but for minor modifications (as defined at paragraph (3)(ii) of the definition of "commercial item" at 2.101);

(3) Items that would be COTS items if they were not bulk cargo; or

(4) Commercial services that are—

(i) Part of the purchase of a COTS item (or an item that would be a COTS item, but for minor modifications);

(ii) Performed by the COTS provider; and

(iii) Are normally provided for that COTS item.

* * * * * *

Subpart 22.10—Service Contract Act of 1965, as Amended

22.1000 Scope of subpart.

This subpart prescribes policies and procedures implementing the provisions of the Service Contract Act of 1965, as amended (41 U.S.C. 351, *et seq.*), the applicable provisions of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 201, *et seq.*), and related Secretary of Labor regulations and instructions (29 CFR Parts 4, 6, 8, and 1925).

22.1001 Definitions.

As used in this subpart—

"Act" or "Service Contract Act" means the Service Contract Act of 1965.

"Agency labor advisor" means an individual responsible for advising contracting agency officials on Federal contract labor matters.

"Contractor" includes a subcontractor at any tier whose subcontract is subject to the provisions of the Act.

"Multiple year contracts" means contracts having a term of more than 1 year regardless of fiscal year funding. The term includes multiyear contracts (see 17.103).

"Service contract" means any Government contract, the principal purpose of which is to furnish services in the United States through the use of service employees, except as exempted under section 7 of the Act (41 U.S.C. 356; see 22.1003-3 and 22.1003-4), or any subcontract at any tier thereunder. See 22.1003-5 and 29 CFR 4.130 for a partial list of services covered by the Act.

"Service employee" means any person engaged in the performance of a service contract other than any person employed in a bona fide executive, administrative, or professional capacity, as those terms are defined in 29 CFR Part 541. The term "service employee" includes all such persons regardless of any contractual relationship that may be alleged to exist between a contractor or subcontractor and such persons.

"United States" means the 50 States, the District of Columbia, Puerto Rico, the Northern Mariana Islands, American Samoa, Guam, the U.S. Virgin Islands, Johnston Island, Wake Island, and Outer Continental Shelf lands as defined in the Outer Continental Shelf Lands Act (43 U.S.C. 1331, *et seq.*), but does not include any other place subject to U.S. jurisdiction or any U.S. base or possession in a foreign country (29 CFR 4.112).

"Wage and Hour Division" means the unit in the Employment Standards Administration of the Department of Labor to which is assigned functions of the Secretary of Labor under the Act.

"Wage determination" means a determination of minimum wages or fringe benefits made under sections 2(a) or 4(c) of the Act (41 U.S.C. 351(a) or 353(c)) applicable to the employment in a given locality of one or more classes of service employees.

22.1002 Statutory requirements.

22.1002-1 General.

Service contracts over $2,500 shall contain mandatory provisions regarding minimum wages and fringe benefits, safe and sanitary working conditions, notification to employees of the minimum allowable compensation, and equivalent Federal employee classifications and wage rates. Under 41 U.S.C. 353(d), service contracts may not exceed 5 years.

22.1002-2 Wage determinations based on prevailing rates.

Contractors performing on service contracts in excess of $2,500 to which no predecessor contractor's collective bargaining agreement applies shall pay their employees at least the wages and fringe benefits found by the Department of Labor to prevail in the locality or, in the absence of a wage determination, the minimum wage set forth in the Fair Labor Standards Act.

22.1002-3 Wage determinations based on collective bargaining agreements.

(a) Successor contractors performing on contracts in excess of $2,500 for substantially the same services performed in the same locality must pay wages and fringe benefits (including accrued wages and benefits and prospective increases) at least equal to those contained in any bona fide collective bargaining agreement entered into under the predecessor contract. This requirement is self-executing and is not contingent upon incorporating a wage determination or the wage and fringe benefit terms of the predecessor contractor's collective bargaining agreement in the successor contract. This requirement will not apply if the Secretary of Labor determines—

(1) After a hearing, that the wages and fringe benefits are substantially at variance with those which prevail for services of a similar character in the locality; or

(2) That the wages and fringe benefits are not the result of arm's length negotiations.

(b) Paragraphs in this Subpart 22.10 which deal with this statutory requirement and the Department of Labor's implementing regulations are 22.1010, concerning notification to contractors and bargaining representatives of procurement dates; 22.1012-2, explaining when a collective bargaining agreement will not apply due to late receipt by the contracting officer; and 22.1013 and 22.1021, explaining when the application of a collective bargaining agreement can be challenged due to a variance with prevailing rates or lack of arm's length bargaining.

22.1002-4 Application of the Fair Labor Standards Act minimum wage.

No contractor or subcontractor holding a service contract for any dollar amount shall pay any of its employees working on the contract less than the minimum wage specified in section 6(a)(1) of the Fair Labor Standards Act (29 U.S.C. 206).

22.1003 Applicability.

22.1003-1 General.

This Subpart 22.10 applies to all Government contracts, the principal purpose of which is to furnish services in the United States through the use of service employees, except as exempted in 22.1003-3 and 22.1003-4 of this section, or any subcontract at any tier thereunder. This subpart does not apply to individual contract requirements for services in contracts not having as their principal purpose the furnishing of services. The nomenclature, type, or particular form of contract used by contracting agencies is not determinative of coverage.

22.1003-2 Geographical coverage of the Act.

The Act applies to service contracts performed in the United States (see 22.1001). The Act does not apply to contracts performed outside the United States.

22.1003-3 Statutory exemptions.

The Act does not apply to—

(a) Any contract for construction, alteration, or repair of public buildings or public works, including painting and decorating;

(b) Any work required to be done in accordance with the provisions of the Walsh-Healey Public Contracts Act (41 U.S.C. 35-45);

(c) Any contract for transporting freight or personnel by vessel, aircraft, bus, truck, express, railroad, or oil or gas pipeline where published tariff rates are in effect;

(d) Any contract for furnishing services by radio, telephone, telegraph, or cable companies subject to the Communications Act of 1934;

(e) Any contract for public utility services;

(f) Any employment contract providing for direct services to a Federal agency by an individual or individuals; or

(g) Any contract for operating postal contract stations for the U.S. Postal Service.

22.1003-4 Administrative limitations, variations, tolerances, and exemptions.

(a) The Secretary of Labor may provide reasonable limitations and may make rules and regulations allowing reasonable variations, tolerances, and exemptions to and from any or all provisions of the Act other than section 10 (41 U.S.C. 358). These will be made only in special circumstances where it has been determined that the limitation, variation, tolerance, or exemption is necessary and proper in the public interest or to avoid the serious impairment of Government business, and is in accord with the remedial purpose of the Act to protect prevailing labor standards (41 U.S.C. 353(b)). See 29 CFR 4.123 for a listing of administrative exemptions, tolerances, and variations. Requests for limitations, variances, tolerances, and exemptions from the Act shall be submitted in writing through contracting channels and the agency labor advisor to the Wage and Hour Administrator.

(b) In addition to the statutory exemptions cited in 22.1003-3 of this subsection, the Secretary of Labor has exempted the following types of contracts from all provisions of the Act:

(1) Contracts entered into by the United States with common carriers for the carriage of mail by rail, air (except air star routes), bus, and ocean vessel, where such carriage is performed on regularly scheduled runs of the trains, airplanes, buses, and vessels over regularly established routes and accounts for an insubstantial portion of the revenue therefrom.

(2) Any contract entered into by the U.S. Postal Service with an individual owner-operator for mail service if it is not contemplated at the time the contract is made that the owner-operator will hire any service employee to perform the services under the contract except for short periods of vacation time or for unexpected contingencies or emergency situations such as illness, or accident.

(3) Contracts for the carriage of freight or personnel if such carriage is subject to rates covered by section 10721 of the Interstate Commerce Act.

(c) *Contracts for maintenance, calibration or repair of certain equipment.*— (1) *Exemption.* The Secretary of Labor has exempted from the Act contracts and subcontracts in which the primary purpose is to furnish maintenance, calibration, or repair of the following types of equipment, if the conditions at paragraph (c)(2) of this subsection are met:

(i) Automated data processing equipment and office information/word processing systems.

(ii) Scientific equipment and medical apparatus or equipment if the application of micro-electronic circuitry or other technology of at least similar sophistication is an essential element (for example, Federal Supply Classification (FSC) Group 65, Class 6515, "Medical Diagnostic Equipment;" Class 6525, "X-Ray Equipment;" FSC Group 66, Class 6630, "Chemical Analysis Instruments;" and Class 6665, "Geographical and Astronomical Instruments," are largely composed of the types of equipment exempted in this paragraph).

(iii) Office/business machines not otherwise exempt pursuant to paragraph (c)(1)(i) of this subsection, if such services are performed by the manufacturer or supplier of the equipment.

Subpart 22.8—Equal Employment Opportunity

22.800 Scope of subpart.

This subpart prescribes policies and procedures pertaining to nondiscrimination in employment by contractors and subcontractors.

22.801 Definitions.

As used in this subpart—

"Affirmative action program" means a contractor's program that complies with Department of Labor regulations to ensure equal opportunity in employment to minorities and women.

"Compliance evaluation" means any one or combination of actions that the Office of Federal Contract Compliance Programs (OFCCP) may take to examine a Federal contractor's compliance with one or more of the requirements of E.O. 11246.

"Contractor" includes the terms "prime contractor" and "subcontractor."

"Deputy Assistant Secretary" means the Deputy Assistant Secretary for Federal Contract Compliance, U.S. Department of Labor, or a designee.

"Equal Opportunity clause" means the clause at 52.222-26, Equal Opportunity, as prescribed in 22.810(e).

"E.O. 11246" means Parts II and IV of Executive Order 11246, September 24, 1965 (30 FR 12319), and any Executive order amending or superseding this order (see 22.802). This term specifically includes the Equal Opportunity clause at 52.222-26, and the rules, regulations, and orders issued pursuant to E.O. 11246 by the Secretary of Labor or a designee.

"Prime contractor" means any person who holds, or has held, a Government contract subject to E.O. 11246.

"Recruiting and training agency" means any person who refers workers to any contractor or provides or supervises apprenticeship or training for employment by any contractor.

"Site of construction" means the general physical location of any building, highway, or other change or improvement to real property that is undergoing construction, rehabilitation, alteration, conversion, extension, demolition, or repair; and any temporary location or facility at which a contractor or other participating party meets a demand or performs a function relating to a Government contract or subcontract.

"Subcontract" means any agreement or arrangement between a contractor and any person (in which the parties do not stand in the relationship of an employer and an employee)—

(1) For the purchase, sale, or use of personal property or nonpersonal services that, in whole or in part, are necessary to the performance of any one or more contracts; or

(2) Under which any portion of the contractor's obligation under any one or more contracts is performed, undertaken, or assumed.

"Subcontractor" means any person who holds, or has held, a subcontract subject to E.O. 11246. The term "first-tier subcontractor" means a subcontractor holding a subcontract with a prime contractor.

"United States" means the 50 States, the District of Columbia, Puerto Rico, the Northern Mariana Islands, American Samoa, Guam, the U.S. Virgin Islands, and Wake Island.

22.802 General.

(a) Executive Order 11246, as amended, sets forth the Equal Opportunity clause and requires that all agencies—

(1) Include this clause in all nonexempt contracts and subcontracts (see 22.807); and

(2) Act to ensure compliance with the clause and the regulations of the Secretary of Labor to promote the full realization of equal employment opportunity for all persons, regardless of race, color, religion, sex, or national origin.

(b) No contract or modification involving new acquisition shall be entered into, and no subcontract shall be approved by a contracting officer, with a person who has been found ineligible by the Deputy Assistant Secretary for reasons of noncompliance with the requirements of E.O. 11246.

(c) No contracting officer or contractor shall contract for supplies or services in a manner so as to avoid applicability of the requirements of E.O. 11246.

(d) Contractor disputes related to compliance with its obligation shall be handled according to the rules, regulations, and relevant orders of the Secretary of Labor (see 41 CFR 60-1.1).

22.803 Responsibilities.

(a) The Secretary of Labor is responsible for the—

(1) Administration and enforcement of prescribed parts of E.O. 11246; and

(2) Adoption of rules and regulations and the issuance of orders necessary to achieve the purposes of E.O. 11246.

(b) The Secretary of Labor has delegated authority and assigned responsibility to the Deputy Assistant Secretary for carrying out the responsibilities assigned to the Secretary by E.O. 11246, except for the issuance of rules and regulations of a general nature.

(c) The head of each agency is responsible for ensuring that the requirements of this subpart are carried out within the agency, and for cooperating with and assisting the OFCCP in fulfilling its responsibilities.

(d) In the event the applicability of E.O. 11246 and implementing regulations is questioned, the contracting officer shall forward the matter to the Deputy Assistant Secretary, through agency channels, for resolution.

22.804 Affirmative action programs.

22.804-1 Nonconstruction.

Except as provided in 22.807, each nonconstruction prime contractor and each subcontractor with 50 or more employees and either a contract or subcontract of $50,000 or more, or Government bills of lading that in any 12-month period total, or can reasonably be expected to total, $50,000 or more, is required to develop a written affirmative action program for each of its establishments. Each contractor and subcontractor shall develop its written affirmative action programs within 120 days from the commencement of its first such Government contract, subcontract, or Government bill of lading.

22.804-2 Construction.

(a) Construction contractors that hold a nonexempt (see 22.807) Government construction contract are required to meet—

(1) The contract terms and conditions citing affirmative action requirements applicable to covered geographical areas or projects; and

(2) Applicable requirements of 41 CFR 60-1 and 60–4.

(b) Each agency shall maintain a listing of covered geographical areas that are subject to affirmative action requirements that specify goals for minorities and women in covered construction trades. Information concerning, and additions to, this listing will be provided to the principally affected contracting officers in accordance with agency procedures. Any contracting officer contemplating a construction project in excess of $10,000 within a geographic area not known to be covered by specific affirmative action goals shall request instructions on the most current information from the OFCCP regional office, or as otherwise specified in agency regulations, before issuing the solicitation.

(c) Contracting officers shall give written notice to the OFCCP regional office within 10 working days of award of a construction contract subject to these affirmative action requirements. The notification shall include the name, address, and telephone number of the contractor; employer identification number; dollar amount of the contract; estimated starting and completion dates of the contract; the contract number; and the geographical area in which the contract is to be performed. When requested by the OFCCP regional office, the contracting officer shall arrange a conference among contractor, contracting activity, and compliance personnel to discuss the contractor's compliance responsibilities.

22.805 Procedures.

(a) *Preaward clearances for contracts and subcontracts of $10 million or more (excluding construction).* (1) Except as provided in paragraphs (a)(4) and (a)(8) of this section, if the estimated amount of the contract or subcontract is $10 million or more, the contracting officer shall request clearance from the appropriate OFCCP regional office before—

(i) Award of any contract, including any indefinite delivery contract or letter contract; or

(ii) Modification of an existing contract for new effort that would constitute a contract award.

(2) Preaward clearance for each proposed contract and for each proposed first-tier subcontract of $10 million or more shall be requested by the contracting officer directly from the OFCCP regional office(s). Verbal requests shall be confirmed by letter or facsimile transmission.

(3) When the contract work is to be performed outside the United States with employees recruited within the United States, the contracting officer shall send the request for a preaward clearance to the OFCCP regional office serving the area where the proposed contractor's corporate home or branch office is located in the United States, or the corporate location where personnel recruiting is handled, if different from the contractor's corporate home or branch office. If the proposed contractor has no corporate office or location within the United States, the preaward clearance request action should be based on the location of the recruiting and training agency in the United States.

(4) The contracting officer does not need to request a preaward clearance if—

(i) The specific proposed contractor is listed in OFCCP's National Preaward Registry via the Internet at *http://www.dol-esa.gov/preaward/*;

(ii) The projected award date is within 24 months of the proposed contractor's Notice of Compliance completion date in the Registry; and

(iii) The contracting officer documents the Registry review in the contract file.

(5) The contracting officer shall include the following information in the preaward clearance request:

(i) Name, address, and telephone number of the prospective contractor and of any corporate affiliate at which work is to be performed.

(ii) Name, address, and telephone number of each proposed first-tier subcontractor with a proposed subcontract estimated at $10 million or more.

(iii) Anticipated date of award.

(iv) Information as to whether the contractor and first-tier subcontractors have previously held any Government contracts or subcontracts.

(v) Place or places of performance of the prime contract and first-tier subcontracts estimated at $10 million or more, if known.

(vi) The estimated dollar amount of the contract and each first-tier subcontract, if known.

(6) The contracting officer shall allow as much time as feasible before award for the conduct of necessary compliance evaluation by OFCCP. As soon as the apparently successful

Subpart 4.11—Central Contractor Registration

4.1100 Scope.

This subpart prescribes policies and procedures for requiring contractor registration in the Central Contractor Registration (CCR) database, a part of the Business Partner Network (BPN) to—

(a) Increase visibility of vendor sources (including their geographical locations) for specific supplies and services; and

(b) Establish a common source of vendor data for the Government.

4.1101 Definition.

As used in this subpart—

"Agreement" means basic agreement, basic ordering agreement, or blanket purchase agreement.

4.1102 Policy.

(a) Prospective contractors shall be registered in the CCR database prior to award of a contract or agreement, except for—

(1) Purchases that use a Governmentwide commercial purchase card as both the purchasing and payment mechanism, as opposed to using the purchase card only as a payment method;

(2) Classified contracts (see 2.101) when registration in the CCR database, or use of CCR data, could compromise the safeguarding of classified information or national security;

(3) Contracts awarded by—

(i) Deployed contracting officers in the course of military operations, including, but not limited to, contingency operations as defined in 10 U.S.C. 101(a)(13) or humanitarian or peacekeeping operations as defined in 10 U.S.C. 2302(7); or

(ii) Contracting officers in the conduct of emergency operations, such as responses to natural or environmental disasters or national or civil emergencies, *e.g.,* Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5121);

(4) Contracts to support unusual or compelling needs (see 6.302-2);

(5) Awards made to foreign vendors for work performed outside the United States, if it is impractical to obtain CCR registration; and

(6) Micro-purchases that do not use the electronic funds transfer (EFT) method for payment and are not required to be reported (see Subpart 4.6).

(b) If practical, the contracting officer shall modify the contract or agreement awarded under paragraph (a)(3) or (a)(4) of this section to require CCR registration.

(c) (1) (i) If a contractor has legally changed its business name, "doing business as" name, or division name (whichever is shown on the contract), or has transferred the assets used in performing the contract, but has not completed the necessary requirements regarding novation and change-of-name agreements in Subpart 42.12, the contractor shall provide the responsible contracting officer a minimum of one business day's written notification of its intention to change the name in the CCR database; comply with the requirements of Subpart 42.12; and agree in writing to the timeline and procedures specified by the responsible contracting officer. The contractor must provide with the notification sufficient documentation to support the legally changed name.

(ii) If the contractor fails to comply with the requirements of paragraph (g)(1)(i) of the clause at 52.204-7, Central Contractor Registration, or fails to perform the agreement at 52.204-7(g)(1)(i)(C), and, in the absence of a properly executed novation or change-of-name agreement, the CCR information that shows the contractor to be other than the contractor indicated in the contract will be considered to be incorrect information within the meaning of the "Suspension of Payment" paragraph of the EFT clause of the contract.

(2) The contractor shall not change the name or address for electronic funds transfer payments (EFT) or manual payments, as appropriate, in the CCR record to reflect an assignee for the purpose of assignment of claims (see Subpart 32.8, Assignment of Claims).

(3) Assignees shall be separately registered in the CCR database. Information provided to the contractor's CCR record that indicates payments, including those made by EFT, to an ultimate recipient other than that contractor will be considered to be incorrect information within the meaning of the "Suspension of payment" paragraph of the EFT clause of the contract.

4.1103 Procedures.

(a) Unless the acquisition is exempt under 4.1102, the contracting officer—

(1) Shall verify that the prospective contractor is registered in the CCR database (see paragraph (b) of this section) before awarding a contract or agreement. Contracting officers are encouraged to check the CCR early in the acquisition process, after the competitive range has been established, and then communicate to the unregistered offerors that they must register;

(2) Should use the DUNS number or, if applicable, the DUNS+4 number, to verify registration—

(i) Via the Internet at *http://www.ccr.gov*;

(ii) By calling toll-free: 1-888-227-2423, commercial: (269) 961-5757, or Defense Switched Network (DSN) (used at certain Department of Defense locations): 932-5757; or

(iii) As otherwise provided by agency procedures; and

Subpart 4.12—Representations and Certifications

4.1200 Scope.

This subpart prescribes policies and procedures for requiring submission and maintenance of representations and certifications via the Online Representations and Certifications Application (ORCA) to—

(a) Eliminate the administrative burden for contractors of submitting the same information to various contracting offices; and

(b) Establish a common source for this information to procurement offices across the Government.

4.1201 Policy.

(a) Prospective contractors shall complete electronic annual representations and certifications at *http://orca.bpn.gov* in conjunction with required registration in the Central Contractor Registration (CCR) database (see FAR 4.1102).

(b)(1) Prospective contractors shall update the representations and certifications submitted to ORCA as necessary, but at least annually, to ensure they are kept current, accurate, and complete. The representations and certifications are effective until one year from date of submission or update to ORCA.

(2) When any of the conditions in paragraph (b) of the clause at 52.219-28, Post-Award Small Business Program Rerepresentation, apply, contractors that represented they were small businesses prior to award of a contract must update the representations and certifications in ORCA as directed by the clause. Contractors that represented they were other than small businesses prior to award of a contract may update the representations and certifications in ORCA as directed by the clause, if their size status has changed since contract award.

(c) Data in ORCA is archived and is electronically retrievable. Therefore, when a prospective contractor has completed representations and certifications electronically via ORCA, the contracting officer must reference the date of ORCA verification in the contract file, or include a paper copy of the electronically-submitted representations and certifications in the file. Either of these actions satisfies contract file documentation requirements of 4.803(a)(11). However, if an offeror identifies changes to ORCA data pursuant to the FAR provisions at 52.204-8(d) or 52.212-3(b), the contracting officer must include a copy of the changes in the contract file.

4.1202 Solicitation provision and contract clause.

Except for commercial item solicitations issued under FAR Part 12, insert in solicitations the provision at 52.204-8, Annual Representations and Certifications. The contracting officer shall check the applicable provisions at 52.204-8(c)(2). When the clause at 52.204-7, Central Contractor Registration, is included in the solicitation, do not include the following representations and certifications:

(a) 52.203-2, Certificate of Independent Price Determination.

(b) 52.203-11, Certification and Disclosure Regarding Payments to Influence Certain Federal Transactions.

(c) 52.204-3, Taxpayer Identification.

(d) 52.204-5, Women-Owned Business (Other Than Small Business).

(e) 52.209-2, Prohibition on Contracting with Inverted Domestic Corporations—Representation.

(f) 52.209-5, Certification Regarding Responsibility Matters.

(g) 52.214-14, Place of Performance—Sealed Bidding.

(h) 52.215-6, Place of Performance.

(i) 52.219-1, Small Business Program Representations (Basic & Alternate I).

(j) 52.219-2, Equal Low Bids.

(k) 52.219-22, Small Disadvantaged Business Status (Basic & Alternate I).

(l) 52.222-18, Certification Regarding Knowledge of Child Labor for Listed End Products.

(m) 52.222-22, Previous Contracts and Compliance Reports.

(n) 52.222-25, Affirmative Action Compliance.

(o) 52.222-38, Compliance with Veterans' Employment Reporting Requirements.

(p) 52.222-48, Exemption from Application of the Service Contract Act to Contracts for Maintenance, Calibration, or Repair of Certain Equipment Certification.

(q) 52.222-52, Exemption from Application of the Service Contract Act to Contracts for Certain Services—Certification.

(r) 52.223-1, Biobased Product Certification.

(s) 52.223-4, Recovered Material Certification.

(t) 52.223-9, Estimate of Percentage of Recovered Material Content for EPA-Designated Items (Alternate I only).

(u) 52.225-2, Buy American Act Certificate.

(v) 52.225-4, Buy American Act—Free Trade Agreements—Israeli Trade Act Certificate (Basic, Alternate I & II).

(w) 52.225-6, Trade Agreements Certificate.

(x) 52.225-20, Prohibition on Conducting Restricted Business Operations in Sudan—Certification.

(y) 52.225-25, Prohibition on Engaging in Sanctioned Activities Relating to Iran—Certification.

(z) 52.226-2, Historically Black College or University and Minority Institution Representation.

(aa) 52.227-6, Royalty Information (Basic & Alternate I).

(bb) 52.227-15, Representation of Limited Rights Data and Restricted Computer Software.

Subpart 31.2—Contracts with Commercial Organizations

31.201 General.

31.201-1 Composition of total cost.

(a) The total cost, including standard costs properly adjusted for applicable variances, of a contract is the sum of the direct and indirect costs allocable to the contract, incurred or to be incurred, plus any allocable cost of money pursuant to 31.205-10, less any allocable credits. In ascertaining what constitutes a cost, any generally accepted method of determining or estimating costs that is equitable and is consistently applied may be used.

(b) While the total cost of a contract includes all costs properly allocable to the contract, the allowable costs to the Government are limited to those allocable costs which are allowable pursuant to Part 31 and applicable agency supplements.

31.201-2 Determining allowability.

(a) A cost is allowable only when the cost complies with all of the following requirements:

(1) Reasonableness.

(2) Allocability.

(3) Standards promulgated by the CAS Board, if applicable, otherwise, generally accepted accounting principles and practices appropriate to the circumstances.

(4) Terms of the contract.

(5) Any limitations set forth in this subpart.

(b) Certain cost principles in this subpart incorporate the measurement, assignment, and allocability rules of selected CAS and limit the allowability of costs to the amounts determined using the criteria in those selected standards. Only those CAS or portions of standards specifically made applicable by the cost principles in this subpart are mandatory unless the contract is CAS-covered (see Part 30). Business units that are not otherwise subject to these standards under a CAS clause are subject to the selected standards only for the purpose of determining allowability of costs on Government contracts. Including the selected standards in the cost principles does not subject the business unit to any other CAS rules and regulations. The applicability of the CAS rules and regulations is determined by the CAS clause, if any, in the contract and the requirements of the standards themselves.

(c) When contractor accounting practices are inconsistent with this Subpart 31.2, costs resulting from such inconsistent practices in excess of the amount that would have resulted from using practices consistent with this subpart are unallowable.

(d) A contractor is responsible for accounting for costs appropriately and for maintaining records, including supporting documentation, adequate to demonstrate that costs claimed have been incurred, are allocable to the contract, and comply with applicable cost principles in this subpart and agency supplements. The contracting officer may disallow all or part of a claimed cost that is inadequately supported.

31.201-3 Determining reasonableness.

(a) A cost is reasonable if, in its nature and amount, it does not exceed that which would be incurred by a prudent person in the conduct of competitive business. Reasonableness of specific costs must be examined with particular care in connection with firms or their separate divisions that may not be subject to effective competitive restraints. No presumption of reasonableness shall be attached to the incurrence of costs by a contractor. If an initial review of the facts results in a challenge of a specific cost by the contracting officer or the contracting officer's representative, the burden of proof shall be upon the contractor to establish that such cost is reasonable.

(b) What is reasonable depends upon a variety of considerations and circumstances, including—

(1) Whether it is the type of cost generally recognized as ordinary and necessary for the conduct of the contractor's business or the contract performance;

(2) Generally accepted sound business practices, arm's-length bargaining, and Federal and State laws and regulations;

(3) The contractor's responsibilities to the Government, other customers, the owners of the business, employees, and the public at large; and

(4) Any significant deviations from the contractor's established practices.

31.201-4 Determining allocability.

A cost is allocable if it is assignable or chargeable to one or more cost objectives on the basis of relative benefits received or other equitable relationship. Subject to the foregoing, a cost is allocable to a Government contract if it—

(a) Is incurred specifically for the contract;

(b) Benefits both the contract and other work, and can be distributed to them in reasonable proportion to the benefits received; or

(c) Is necessary to the overall operation of the business, although a direct relationship to any particular cost objective cannot be shown.

31.201-5 Credits.

The applicable portion of any income, rebate, allowance, or other credit relating to any allowable cost and received by or accruing to the contractor shall be credited to the Government either as a cost reduction or by cash refund. See 31.205-6(j)(3) for rules governing refund or credit to the Government associated with pension adjustments and asset reversions.

27.000 Scope of part.

This part prescribes the policies, procedures, solicitation provisions, and contract clauses pertaining to patents, data, and copyrights.

27.001 Definition.

"United States," as used in this part, means the 50 States and the District of Columbia, U.S. territories and possessions, Puerto Rico, and the Northern Mariana Islands.

Subpart 27.1—General

27.101 Applicability.

This part applies to all agencies. However, agencies are authorized to adopt alternative policies, procedures, solicitation provisions, and contract clauses to the extent necessary to meet the specific requirements of laws, executive orders, treaties, or international agreements. Any agency adopting alternative policies, procedures, solicitation provisions, and contract clauses should include them in the agency's published regulations.

27.102 General guidance.

(a) The Government encourages the maximum practical commercial use of inventions made under Government contracts.

(b) Generally, the Government will not refuse to award a contract on the grounds that the prospective contractor may infringe a patent. The Government may authorize and consent to the use of inventions in the performance of certain contracts, even though the inventions may be covered by U.S. patents.

(c) Generally, contractors providing commercial items should indemnify the Government against liability for the infringement of U.S. patents.

(d) The Government recognizes rights in data developed at private expense, and limits its demands for delivery of that data. When such data is delivered, the Government will acquire only those rights essential to its needs.

(e) Generally, the Government requires that contractors obtain permission from copyright owners before including copyrighted works, owned by others, in data to be delivered to the Government.

42.000 Scope of part.

This part prescribes policies and procedures for assigning and performing contract administration and contract audit services.

42.001 [Reserved]

42.002 Interagency agreements.

(a) Agencies shall avoid duplicate audits, reviews, inspections, and examinations of contractors or subcontractors, by more than one agency, through the use of interagency agreements.

(b) Subject to the fiscal regulations of the agencies and applicable interagency agreements, the requesting agency shall reimburse the servicing agency for rendered services in accordance with the Economy Act (31 U.S.C. 1535).

(c) When an interagency agreement is established, the agencies are encouraged to consider establishing procedures for the resolution of issues that may arise under the agreement.

42.003 Cognizant Federal agency.

(a) For contractors other than educational institutions and nonprofit organizations, the cognizant Federal agency normally will be the agency with the largest dollar amount of negotiated contracts, including options. For educational institutions and nonprofit organizations, the cognizant Federal agency is established according to Subsection G.11 of OMB Circular A-21, Cost Principles for Educational Institutions, and Attachment A, Subsection E.2, of OMB Circular A-122, Cost Principles for Nonprofit Organizations, respectively.

(b) Once a Federal agency assumes cognizance for a contractor, it should remain cognizant for at least 5 years to ensure continuity and ease of administration. If, at the end of the 5-year period, another agency has the largest dollar amount of negotiated contracts, including options, the two agencies shall coordinate and determine which will assume cognizance. However, if circumstances warrant it and the affected agencies agree, cognizance may transfer prior to the expiration of the 5-year period.

Subpart 42.1—Contract Audit Services

42.101 Contract audit responsibilities.

(a) The auditor is responsible for—

(1) Submitting information and advice to the requesting activity, based on the auditor's analysis of the contractor's financial and accounting records or other related data as to the acceptability of the contractor's incurred and estimated costs;

(2) Reviewing the financial and accounting aspects of the contractor's cost control systems; and

(3) Performing other analyses and reviews that require access to the contractor's financial and accounting records supporting proposed and incurred costs.

(b) Normally, for contractors other than educational institutions and nonprofit organizations, the Defense Contract Audit Agency (DCAA) is the responsible Government audit agency. However, there may be instances where an agency other than DCAA desires cognizance of a particular contractor. In those instances, the two agencies shall agree on the most efficient and economical approach to meet contract audit requirements. For educational institutions and nonprofit organizations, audit cognizance will be determined according to the provisions of OMB Circular A-133, Audits of Institutions of Higher Education and Other Non-Profit Institutions.

42.102 Assignment of contract audit services.

(a) As provided in agency procedures or interagency agreements, contracting officers may request audit services directly from the responsible audit agency cited in the Directory of Federal Contract Audit Offices. The audit request should include a suspense date and should identify any information needed by the contracting officer.

(b) The responsible audit agency may decline requests for services on a case-by-case basis, if resources of the audit agency are inadequate to accomplish the tasks. Declinations shall be in writing.

42.103 Contract audit services directory.

(a) DCAA maintains and distributes the Directory of Federal Contract Audit Offices. The directory identifies cognizant audit offices and the contractors over which they have cognizance. Changes to audit cognizance shall be provided to DCAA so that the directory can be updated.

(b) Agencies may obtain a copy of the directory or information concerning cognizant audit offices by contacting the—

Defense Contract Audit Agency
ATTN: CMO
Publications Officer
8725 John J. Kingman Road
Suite 2135
Fort Belvoir, VA 22060-6219.

Subpart 33.2—Disputes and Appeals

33.201 Definitions.

As used in this subpart—

"Accrual of a claim" means the date when all events, that fix the alleged liability of either the Government or the contractor and permit assertion of the claim, were known or should have been known. For liability to be fixed, some injury must have occurred. However, monetary damages need not have been incurred.

"Alternative dispute resolution (ADR)" means any type of procedure or combination of procedures voluntarily used to resolve issues in controversy. These procedures may include, but are not limited to, conciliation, facilitation, mediation, fact-finding, minitrials, arbitration, and use of ombudsmen.

"Defective certification" means a certificate which alters or otherwise deviates from the language in 33.207(c) or which is not executed by a person duly authorized to bind the contractor with respect to the claim. Failure to certify shall not be deemed to be a defective certification.

"Issue in controversy" means a material disagreement between the Government and the contractor that—

(1) May result in a claim; or

(2) Is all or part of an existing claim.

"Misrepresentation of fact" means a false statement of substantive fact, or any conduct which leads to the belief of a substantive fact material to proper understanding of the matter in hand, made with intent to deceive or mislead.

33.202 Contract Disputes Act of 1978.

The Contract Disputes Act of 1978, as amended (41 U.S.C. 601-613) (the Act), establishes procedures and requirements for asserting and resolving claims subject to the Act. In addition, the Act provides for—

(a) The payment of interest on contractor claims;

(b) Certification of contractor claims; and

(c) A civil penalty for contractor claims that are fraudulent or based on a misrepresentation of fact.

33.203 Applicability.

(a) Except as specified in paragraph (b) of this section, this part applies to any express or implied contract covered by the Federal Acquisition Regulation.

(b) This subpart does not apply to any contract with—

(1) A foreign government or agency of that government, or

(2) An international organization or a subsidiary body of that organization, if the agency head determines that the application of the Act to the contract would not be in the public interest.

(c) This part applies to all disputes with respect to contracting officer decisions on matters "arising under" or "relating to" a contract. Agency Boards of Contract Appeals (BCA's) authorized under the Act continue to have all of the authority they possessed before the Act with respect to disputes arising under a contract, as well as authority to decide disputes relating to a contract. The clause at 52.233-1, Disputes, recognizes the "all disputes" authority established by the Act and states certain requirements and limitations of the Act for the guidance of contractors and contracting agencies. The clause is not intended to affect the rights and obligations of the parties as provided by the Act or to constrain the authority of the statutory agency BCA's in the handling and deciding of contractor appeals under the Act.

33.204 Policy.

The Government's policy is to try to resolve all contractual issues in controversy by mutual agreement at the contracting officer's level. Reasonable efforts should be made to resolve controversies prior to the submission of a claim. Agencies are encouraged to use ADR procedures to the maximum extent practicable. Certain factors, however, may make the use of ADR inappropriate (see 5 U.S.C. 572(b)). Except for arbitration conducted pursuant to the Administrative Dispute Resolution Act (ADRA), (5 U.S.C. 571, *et seq.*) agencies have authority which is separate from that provided by the ADRA to use ADR procedures to resolve issues in controversy. Agencies may also elect to proceed under the authority and requirements of the ADRA.

33.205 Relationship of the Act to Pub. L. 85-804.

(a) Requests for relief under Public Law 85-804 (50 U.S.C. 1431-1435) are not claims within the Contract Disputes Act of 1978 or the Disputes clause at 52.233-1, Disputes, and shall be processed under Subpart 50.1, Extraordinary Contractual Actions. However, relief formerly available only under Public Law 85-804; *i.e.*, legal entitlement to rescission or reformation for mutual mistake, is now available within the authority of the contracting officer under the Contract Disputes Act of 1978 and the Disputes clause. In case of a question whether the contracting officer has authority to settle or decide specific types of claims, the contracting officer should seek legal advice.

(b) A contractor's allegation that it is entitled to rescission or reformation of its contract in order to correct or mitigate the effect of a mistake shall be treated as a claim under the Act. A contract may be reformed or rescinded by the contracting officer if the contractor would be entitled to such remedy or relief under the law of Federal contracts. Due to the complex legal issues likely to be associated with allegations of legal entitlement, contracting officers shall make written decisions, prepared with the advice and assistance of legal counsel, either granting or denying relief in whole or in part.

(c) A claim that is either denied or not approved in its entirety under paragraph (b) of this section may be cognizable as a request for relief under Public Law 85-804 as imple-

CHAPTER 6

6-000 Incurred Costs Audit Procedures

6-001 Scope of Chapter

This chapter presents general guidance on auditing costs incurred under the broad types of contracts and functional areas of cost incurrence. Chapter 5 provides guidance on systems and internal control structure audits; Chapter 7 provides more specific guidance on auditing selected areas of cost; and Chapter 8 covers specific requirements of the Cost Accounting Standard Board rules, regulations and standards. Section 6-100 includes guidance on the integration of incurred cost audit procedures required by Chapters 1 through 8.

6-100 Section 1 --- Introduction to Incurred Cost Audit Objectives

6-101 Introduction

a. This section provides introductory guidance on the contract audit objectives and approach for incurred costs, including general considerations that apply under all types of contracts and for all cost categories.

b. In conducting incurred cost audits, observe any operations security (OPSEC) measures required by current DoD contracts or requests for proposals, in accordance with 3-205.

c. FAR 42.703-1, 10 U.S.C 2313(d) and 41 U.S.C. 254d require that contracting officers determine whether a previously conducted audit of indirect costs meets the current audit objectives for indirect costs on executed contracts, subcontracts, or modifications. If data can be obtained from an existing source, Federal Agencies are not to conduct duplicative audits of indirect costs. See 1-303e.

6-102 Audit Objectives and Approach for Incurred Costs

6-102.1 Audit Objectives

The auditor's primary objective is to examine the contractor's cost representations, in whatever form they may be presented (such as interim and final public vouchers, progress payments, incurred cost proposals, termination claims and final overhead claims), and to express an opinion as to whether such incurred costs are reasonable, applicable to the contract, determined under generally accepted accounting principles and cost accounting standards applicable in the circumstances, and not prohibited by the contract, by statute or regulation, or by previous agreement with, or decision of, the contracting officer. In addition, the auditor must determine whether the accounting system remains adequate for subsequent cost determinations which may be required for current or future contracts. The discovery of fraud or other unlawful activity is not the primary audit objective; however, the audit work should be designed to provide reasonable assurance of detecting abuse or illegal acts that could significantly affect the audit objective. If illegal activity is suspected, the circumstances should be reported in accordance with 4-700.

CHAPTER 5

5-000 Audit of Policies, Procedures, and Internal Controls Relative to Accounting and Management Systems

5-001 Scope of Chapter

This chapter provides audit guidance on implementing Government Auditing Standards---the second standard of fieldwork and SAS No. 55 as amended by SAS No. 78, Considerations of Internal Control in a Financial Statement Audit in performing audits of contractor accounting and management systems and related internal controls.

5-100 Section 1 --- Obtaining an Understanding of a Contractor's Internal Controls and Assessing Control Risk

5-101 Introduction

a. This section outlines the auditor's fundamental requirements and responsibilities for obtaining and documenting an understanding of a contractor's internal controls and for assessing control risk as a basis for planning related audits.

b. These fundamental requirements and responsibilities apply to each of the contractor's accounting and management systems (see 5-300 through 5-1200) that are used to propose, charge or bill significant costs to Government contracts.

c. The audit guidance discussed in sections 5-102 to 5-110 applies primarily to major contractors. This guidance can also be adapted for use at nonmajor contractors who have controls over some of the systems listed in 5-102d below and where audit effort to evaluate those systems is expected to be offset by reduced audit effort on other related audits. The guidance for auditing internal controls at nonmajor contractors is discussed in 5-111.

5-102 Background Information

a. Government Auditing Standard 6.10 requires the auditor to obtain a sufficient understanding of the contractor's internal controls and to assess control risk to plan the audit and to determine the nature, timing, and extent of tests to be performed. DCAA has chosen to incorporate the requirements of SAS 55 as amended by SAS 78 for attestation audits. The attestation standards (AT 101.45), under the planning standard, require the auditor to make preliminary judgments about attestation risk (control risk and inherent risk). (See 2-302.1 and 2-306)

b. It is important to remember that contractor management is responsible for establishing and maintaining adequate internal controls. In fulfilling this responsibility, estimates and judgments by management are required to assess the expected benefits and related costs of internal control activities. Internal control, as defined by SAS No. 78, is "a process effected by an entity's board of directors, management, and other personnel, designed to provide reasonable assurance regarding the achievement of objectives in the following categories: (a) reliability of financial reporting, (b) effectiveness and efficiency of operations, and (c) compliance with applicable laws and regulations."

c. A contractor's internal controls consist of five interrelated components:

- Control environment -- sets the tone of an organization, influencing the control consciousness of its people
- Risk assessment-- the entity's identification and analysis of relevant risks to achievement of its objectives, forming a basis for determining how the risks should be managed
- Control activities -- the policies and procedures that help ensure that management directives are carried out
- Information and communication -- the identification, capture, and exchange of information in a form and time frame that enable people to carry out their responsibilities
- Monitoring -- the process that assesses the quality of internal control performance over time

d. Elements of these components are designed into an entity's accounting and management systems to help ensure that management objectives are achieved as effectively and efficiently as possible. The relevant accounting and management systems in the contract audit environment and their respective CAM sections are listed below:

Control Environment and Overall Accounting System	5-300
General IT System	5-400
Budget and Planning System	5-500
Purchasing System	5-600
Material System	5-700
Compensation System	5-800
Labor System	5-900
Indirect and ODC System	5-1000
Billing System	5-1100
Estimating System	5-1200

e. The auditor should consider the contractor's control environment and overall accounting controls when assessing control risk for individual accounting and management systems (see 5-300). In addition, the auditor should consider the adequacy of general IT System controls (see 5-400) as they affect the operational effectiveness of control activities in other significant systems.

f. The components of internal control and the relevant control objectives identified with the accounting and management systems listed above apply to every contractor and should be considered in the context of the following:

- the contractor's size
- the contractor's organization and ownership characteristics
- the nature of the contractor's business
- the diversity and complexity of the contractor's operations
- the contractor's methods of transmitting, processing, maintaining, and accessing information
- applicable legal and regulatory requirements

Nonmajor contractors may have less formal internal controls that accomplish these control objectives (see 5-101c).

g. With a sound understanding of the critical aspects of each system, the auditor can more effectively and efficiently develop the audit procedures necessary to audit compliance with laws and regulations in other related audits.

h. SAS 70, as amended by SAS 78 and SAS 88, has been incorporated into the Government Auditing Standards. SAS 70 requires that the auditor gain an understanding of a service organization's controls when:

(1) the service organization is part of the user organization's information system,

(2) the service organization's controls are significant to the user organization's internal controls (i.e., controls are relevant to user cost objectives and costs affected by the service organization's controls are material), and

(3) the degree of interaction between internal controls at the user organization and at the service organization is low (i.e., the service organization may initiate transactions or otherwise affect the user organization's accounting records without prior approval of the user organization).

This understanding is necessary in order to assess control risk to plan the audit and to determine the nature, timing, and extent of tests to be performed. If the auditor needs to obtain this understanding but is unable to, the auditor will have to qualify the report or disclaim an opinion due to a scope limitation.

5-103 General Audit Policy

5-103.1 Internal Control Audit Policy and Approach

a. It is DCAA's policy that each relevant accounting or management system that has a significant impact on Government contract costs be audited on a cyclical basis, (i.e., every 2 - 4 years) based on a documented risk assessment. If past experience is favorable and current audit risk is considered to be low, an audit may be performed on a less frequent basis (however, no less frequently than 4 years). When the contractor changes the system, the auditor should give a high priority to the audit of the system change as a basis for relying on the system. In conjunction with Mandatory Annual Audit Requirement (MAAR) 1, Internal Control Audit Planning Summary and/or Internal Control Questionnaire (ICQ), at major contractors, the auditor should meet annually with top contractor representatives, such as senior management, internal auditors, audit committee members, or others during the annual planning coordination process (see DMIS User Manual, Planning Process, Other Considerations) to obtain information regarding any significant changes in accounting policies and procedures affecting internal control systems listed in 5-102d. The auditor should request and review for any audit leads a copy of the management representation letter provided to the contractor's external auditors, in conjunction with the audit of the company's financial statements. At large, multi-segment contractor locations, the management representation letter should be requested by the corporate auditor and/or the CAC. Corporate auditors should provide any relevant information from the management letter to auditors at the affected segments.

b. FAR or DFARS establishes specific requirements for certain system audits--- compensation, estimating, purchasing, and material management accounting systems. See the individual Chapter 5 sections for guidance on the timing of these audits and the procedures for obtaining waivers if the system is considered low risk.

c. In determining the significance of a system, the auditor should carefully consider the relationship of the system to Government contracts. For example, if a contractor incurs a significant amount of labor costs which are assigned to Government contracts, the contractor's compensation and labor systems would be considered significant. Likewise, if a contractor does not purchase significant amounts of materials for Government contracts, the contractor's purchasing and material systems would not be considered significant. (See 3-305.1)

d. The auditor's evaluation of the contractor's internal controls and assessment of control risk is documented in the permanent files on the Internal Control Audit Planning Summary (ICAPS) working papers for each significant system (see 3-300). After preparing the initial ICAPS, individual ICAPS forms will be updated whenever subsequent audit work indicates that revisions are necessary (3-305). The scope paragraph of every audit report must comment on the internal control work performed and the assessment of control risk (see 10-210.3f). In addition, the adequacy opinion, assessment of risk, and the nature and extent of related audit effort that is summarized on the ICAPS form is described in the Contractor Organization and Systems section (see 10-210.7c) and integrated into the planning and reporting of other attestation audits (see 10-410).

e. When a contractor that participates in self-governance programs furnishes the FAO with an initial internal control evaluation and compliance test plan, the FAO should establish a current audit assignment to update the audit of related internal controls. The objective is not to complete an internal control audit, but rather to coordinate with the contractor on the relevant control activities and compliance testing described in the related internal control audit program.

f. SEC registered public companies are required to follow additional reporting requirements as a result of the Sarbanes-Oxley Act of 2002, such as including in their annual reports filed with the SEC, management's report on internal control over financial reporting. Furthermore, the external auditors are required to attest to management's assessment of the company's internal controls over financial reporting. Auditors may be able to rely on work performed to support the information in the SEC filings when conducting internal control audits provided the requirements of 4-1000 "Relying Upon the Work of Others" is followed. Auditors should consider the potential opportunities for increased coordination with the contractor when planning and performing audits (see 4-202.1d).

g. Audits of internal control systems will be coordinated in writing with the ACO (see 4-103).

5-103.2 Coordinated Internal Control Auditing Process at Multi-Segment Contractor Geographical Locations

a. Auditing internal control systems at multi-segment contractors requires cognizant auditors to identify audit responsibilities at each geographical location to ensure appropriate audit coverage when contractor locations share components of an internal control system, such as policies and procedures, common technologies (e.g., software), or common management. The following should be considered as part of this coordinated process.

(1) The Contract Audit Coordinator (CAC) or Corporate Home Office Auditor (CHOA) cognizant of a multi-segment contractor is responsible for maintaining a current Responsibility Matrix (a copy of this EXCEL workbook is in APPS, Other Audit Guidance). This matrix serves as a tool to collect information on the multi-segment contractor's

internal control system (as well as information on incurred cost, CAS, EVMS, Washington Area Offices and offsite locations). The Responsibility Matrix contains a worksheet for each of the ten accounting and management systems (5-102d). These worksheets identify the contractor locations that have the primary management responsibility for each system. In addition, the individual system worksheets identify the contractor locations that share common system aspects/components (policies and procedures, software) with other locations and where significant control activities are performed.

(2) To initiate the coordinated audit process, the lead FAO cognizant of the contractor segment responsible for the design and maintenance of the shared system should coordinate with other cognizant FAOs to gain an understanding of the contractor's internal control system to determine the extent of common or shared aspects of the system. This understanding includes identifying where the key control activities are performed. The lead FAO should use the ICAPS Responsibility Matrix worksheets for the respective internal control systems to document (i) where the common aspects exist, (ii) where the control activities are performed, and (iii) the FAO(s) responsible for performing the specific internal control audit procedures. FAOs cognizant of segment locations should initiate assist audits from off-site locations as necessary. FAOs cognizant of off-site locations should not self-initiate audits of internal controls.

(3) All draft reports should be provided to the CAC or CHOA to ensure consistency of audit recommendations. (See 5-110 for guidance on reporting on internal control audits relating to multi-segment contractors.)

5-104 Audit Objectives

a. The purpose of each internal control audit is to gather sufficient evidence to express an opinion on the adequacy of the contractor's relevant accounting and management systems and the related internal controls for compliance with applicable laws and regulations and contract terms.

b. The objective in performing internal control audits is to assess control risk to determine the degree of reliance that can be placed on the contractor's internal controls in relevant accounting and management systems as a basis for planning the scope of other related audits.

c. In those cases where the auditor can rely on the contractor's system to record, process, summarize, and report in a manner consistent with Government contract laws and regulations, control risk would be considered low. In these cases the auditor should be able to minimize substantive testing.

d. In those cases where the contractor's internal control system(s) are inadequate, expanded testing in other related audits is often needed.

e. If a system has not been audited or a report on the full system (i.e., not a follow-up audit) has not been issued within the past four years, control risk should be assessed as "high" and an audit of the system should be scheduled as soon as possible. In the interim, substantive testing should be increased in related audits to compensate for the inability to rely upon internal controls.

f. At those contractors with outstanding internal control deficiencies, the auditor should recommend actions to the ACO to encourage the contractor to correct the deficiencies (e.g., suspension of costs, disapproval of system). When the contractor corrects the defi-

ciency or changes the system, the auditor should give a high priority to the audit of the system change as a basis for placing reliance on the system.

g. While the discovery of fraud or other unlawful/improper activity is not the primary objective of any audit, the auditor should be attentive to any condition which suggests that such a situation may exist. If such activity is suspected, the circumstances should be reported in accordance with 4-700.

5-105 Scope of Audit

a. While the nature and extent of audit effort depends upon contractor size and the amount and type of Government business (materiality and sensitivity), the scope of the internal control audit should include:

- gaining an understanding of the contractor's internal controls, including both manual and automated (IT) activities, which provide reasonable assurance that Government contract costs are allowable, allocable, and reasonable in accordance with contract terms, and that material misstatements are prevented or detected and corrected in a timely manner;
- documenting the understanding of the contractor's internal controls in the working papers and permanent files;
- testing the operational effectiveness of the system's internal controls;
- assessing control risk as a basis for designing substantive tests for related audit effort;
- reporting on the understanding of the internal controls, the assessment of control risk, and the adequacy of the system for Government contracts; and
- adjusting the audit scope of related audits based on the internal control strengths and/or weaknesses of the contractor accounting and management system audited.

b. In establishing the scope of audit effort, the auditor should carefully consider the nature and extent of documentation available from prior system audits, related audit effort, and permanent files. Once a comprehensive audit of a contractor's accounting or management system has been performed, it should serve as a baseline for establishing the scope of subsequent audits of that system. Subsequent audits should cover major system changes and other areas identified as high risk. They should also include tests of key internal controls over selected transactions to ensure that the controls are in place and operating effectively. The tests of the key controls need to be performed every two to four years irrespective of whether they were tested in the prior comprehensive audit of a contractor's accounting or management system.

c. The results of prior IT general internal control audits and applicable system audits should be evaluated for related system deficiencies. The following elements should be considered when auditing internal controls related to individual application systems (see the IS Auditing Knowledge Base available on DCAA's Intranet):

- The contractor's representation of the application system's internal controls should include a description of system operation and the identification of all related system policies, practices, and procedures.
- The number of employees having access to system data should be reasonable and based on need. Adequate security controls (logical and physical) should be incorporated to limit access to data input, review, and change authorizations. Authority to make changes to data, files, and programs should be limited, logged, and closely monitored.

- Current system flowcharts should describe data input characteristics, internal control points, internal control tables, and output reports. System operation should be verified to the policies, practices, procedures and flowcharts.
- Tests of system internal controls should trace the flow of significant transactions from the original source documents through data entry, through their interim and final processing stages. Any differences must be resolved with the contractor. Consider using CAATs to expedite the process.

d. Contractor management has a responsibility to establish and maintain effective internal controls. As part of the preliminary audit effort, the contractor should be requested to explain how their system operates, what controls are in place to achieve the control objectives identified with the system (5-102b), and what methods are used to monitor and evaluate their continued operation. The auditor should rely to the maximum extent possible on the contractor's self-assessment, monitoring and testing efforts (see 4-1000, Reliance on the Work of Others).

e. The following paragraphs contain general guidance for evaluating contractor accounting and management systems. This guidance is intended to provide the auditor with a framework for performing an internal control examination. However, this framework is not a substitute for professional judgment. Consequently, the auditor should adapt the guidance to respond to unusual or unique situations encountered in their individual audit circumstances.

5-106 Obtaining an Understanding of the Contractor Accounting and Management Systems

a. The first step in evaluating the contractor's internal controls is to obtain an understanding of the accounting or management system being audited. This understanding will serve as the foundation for evaluating related internal controls and will allow the auditor to design more effective and efficient audit procedures.

- To acquire a basic understanding of the accounting or management system being audited, the auditor should:
- Review the control objectives and audit procedures listed in the appropriate section of Chapter 5, the respective audit program, and the internal control matrix (available on the DCAA Intranet, and the APPS) for the accounting and management system to be audited.
- Review the contractor's system explanation and related documentation; e.g., system policy and procedure manual.
- Review relevant working papers from the permanent files and prior audits.
- Make inquiries of appropriate contractor management, supervisory, and staff personnel.
- Inspect relevant documents.
- Observe actual contractor operations.

b. In addition, the auditor should request that the contractor explain selected aspects of the system to help confirm the auditor's understanding. The auditor should walk-through the system---tracing one or more transactions from initiation through the various processing steps to inclusion in related cost estimates, reports, or billings on Government contracts. The auditor should observe actual processing activities and examine related documents to validate the understanding of the system. Selective transaction walk-through

to confirm the auditor's understanding are an important part of the audit process and should be performed for significant aspects of the system. If the auditor already has a sufficient understanding of the system as a result of prior audit experience, this procedure may not be necessary.

c. The extent of audit effort expended in gaining an understanding of the contractor's accounting and management systems is a matter of auditor judgment. Characteristics that should be considered include:

- the size and complexity of the contractor;
- level of previous experience with the contractor;
- nature and extent of systems documentation;
- the significance of costs proposed, charged, or billed to the Government by the system; and
- materiality judgments for specific accounts and transactions handled by the system.

d. Once the auditor has gained an adequate understanding of the contractor's accounting and management systems, that understanding should be documented in the audit working papers and related permanent files. This documentation will typically take the form of system flowcharts, narrative descriptions, and copies of relevant documents and reports. The method(s) used and extent of documentation required are a matter of professional judgment. However, the documentation should provide sufficient information to communicate the auditor's understanding in a clear and summarized manner.

5-107 Determining if Relevant Control Objectives and Related Control Activities Exist

a. The auditor should identify those control objectives which, if achieved, would provide reasonable assurance that material errors or misstatements would be prevented or detected in a timely manner. Control objectives can be classified into the three general areas:

(1) financial reporting control objectives which are concerned with ensuring the preparation of reliable financial statements,

(2) operational control objectives which are concerned with ensuring that the contractor's resources are being used effectively and efficiently, and

(3) compliance control objectives which are concerned with ensuring that the contractor complies with applicable laws and regulations.

While control objectives in each of these areas can have an impact on contract costs, DCAA auditors generally focus on operational and compliance controls.

b. Relevant control objectives for each contractor accounting and management system are discussed in this section, the specific section in Chapter 5 and the standard audit program for the individual system. The auditor should become familiar with all relevant control objectives for the accounting and management system to be reviewed prior to initiating the audit.

c. The auditor should also identify the control activities designed and implemented by the contractor to achieve each relevant control objective. Examples of control activities the contractor may have implemented to achieve the control objectives are available in the internal control matrix (available on the DCAA Intranet, and the APPS) for the accounting and management system to be audited. Controls may be either manual or automated. In many instances, control activities will be integrated into the contractor's IT system. As

needed, an IT audit specialist can assist the auditor in identifying and understanding IT related controls.

d. Once the auditor has obtained an adequate understanding of the contractor's system, a determination should be made as to whether relevant internal control activities exist and whether the effort to test and evaluate those controls would be justified by an equal or greater reduction in related substantive testing. For example, the auditor should expect that the costs to test and evaluate the contractor's labor accounting controls should be more than offset by the benefits of reduced labor substantive testing (e.g., floor checks).

e. If the auditor determines that relevant internal control activities do not exist or that the effort to perform tests of those controls is not justified, no control testing will be performed and control risk would be assessed at the maximum (High). This control risk assessment and its background rationale should be documented in the audit working papers.

f. If the auditor determines that relevant internal control activities can be identified and that the effort to perform tests of those controls is justified, the auditor should plan and perform appropriate tests of those controls.

5-108 Testing Controls

a. Testing controls involves selecting a sample of transactions and evaluating whether they were executed in accordance with established policies and procedures. GAAS and GAGAS require that tests of controls be performed to provide reasonable assurance that a contractor's internal control system is functioning as prescribed. The auditor also performs substantive tests to determine the validity and the propriety of accounting transactions and balances. SAS-55 (Consideration of Internal Control Structure in a Financial Statement Audit) provides that although the objectives of tests of controls and substantive tests are different, both objectives are often achieved simultaneously through the tests of details (substantive tests other than analytical review). The testing of details would be dual-purpose testing (AU319.64), because it not only relates to the specific transaction, but also covers the entire system. That is, the auditor may design a sample that will be used for dual purposes: assessing control risk and testing whether the recorded monetary amount of transactions is correct. Such tests determine if controls are adequately designed and operating effectively to prevent or detect material misstatements in a timely manner. The testing of the controls should be done at least every three years. The guidance in Sections 3 through 12 of Chapter 5 should be reviewed before determining what testing should be done. Tests of controls are necessary to support a control risk assessment other than high.

b. To obtain evidence of the effectiveness of particular internal control activities, the auditor should perform physical observations, inquiries of appropriate personnel, or inspection of relevant documents. No one specific test is always necessary, applicable, or equally effective in every circumstance. In fact, a combination of these types of tests is often required to provide the necessary level of assurance that controls are working effectively. Selected transactions must be tested, and audit evidence gathered to ascertain that there are no potential weaknesses. The type of audit procedures selected depends upon the nature of the control to be tested and the available evidence to review the control. Auditors should use the standard audit programs and the internal control matrixes available on the DCAA Intranet and the APPS and tailor their audit procedures to fit their individual circumstances.

c. The nature of the control influences the type of evidential matter that is available to review the control. For example, if the control provides documentary evidence, the auditor may decide to inspect the documentation. For other controls, such documentation may not be available or relevant. For example, segregation of duties controls generally do not provide documentary evidence. In such circumstances, the auditor may obtain evidential matter about the effectiveness of operation through observation or inquiry.

d. The timing of audit effort and the period covered by the audit should also be considered in selecting the appropriate audit procedures for testing controls. The evidential matter should relate to the audit period and, unless it is documentary evidence, should be obtained during the audit period when sufficient corroborative evidence is most likely to be available. When the evidence relates only to a specific point in time, such as evidence obtained from physical observation, the auditor should obtain additional evidence that the control was effective during the entire audit period. For example, the auditor may observe the control in operation during the audit period and use inquiry and inspection of procedures manuals to determine that the control was in operation during the entire period.

e. After determining the nature of audit procedures to be used to test controls, the auditor should determine the extent of testing to be performed. This determination is a matter of auditor judgment taking into consideration:

- the information gathered in developing an understanding of the internal control structure,
- the nature of the control to be tested,
- the nature and availability of evidential matter, and
- the contractor's monitoring and testing efforts.

The extent of testing is also significantly impacted by the FAO's total audit experience with the contractor. For instance, the extent of required testing of the estimating system is influenced by the current experience on forward pricing audits. In most instances, where there is significant proposal activity, the auditors have gained a great deal of knowledge of the estimating system controls during proposal audits.

f. When identified control activities are accomplished as part of the contractor's IT operations, the auditor should consider the use of Computer Assisted Audit Techniques (CAATs), such as DATATRAK, SAS, and FOCUS when performing tests of controls. In some instances, the assistance of IT specialists may be required to perform tests of controls. In these cases, auditors should contact their regional offices to obtain the necessary expertise.

5-109 Assessing Control Risk

a. Control risk is the probability that the contractor's internal controls will not prevent or detect a material error, irregularity, or misstatement in a timely manner. In assessing control risk, the auditor considers the effectiveness of established control activities to accomplish stated control objectives. The more effective the control activities, the lower the control risk.

b. The auditor should assess control risk for each relevant control objective. If the auditor concludes that the relevant internal controls do not exist or that other related audits

could be more efficiently performed by expanding substantive testing, then control risk should be assessed at the maximum (High). (see 5-111.2)

c. If the auditor has been able to identify relevant internal control policies and procedures and performed tests of those controls, the auditor should assess control risk as follows:

- High: The relevant control activities do not exist or they do exist but because of inadequate design or operation, they rarely accomplish the control objective.
- Moderate: The relevant control activities exist but, because of deficiencies, the control objective is not consistently accomplished.
- Low: The contractor's control activities consistently accomplish the control objective.

□ The assessment of control risk for each control objective is summarized on the system's ICAPS working paper (3-300) and translated to needed audit effort on other related audits.

d. When internal controls have been audited and tested, assessments of moderate or high risk should be tied to specific significant deficiencies/material weaknesses. A deficiency is a significant deficiency/material weakness when additional audit procedures are needed in related audits to protect the Governments interest because the contractor's internal controls are unlikely to accomplish an applicable control objective. The details would be described on the ICAPS working paper (see 3-305.4). The appropriate audit opinion for any system with a single significant deficiency/material weakness is inadequate (see 10-408.2a).

e. Significant deficiencies should be discussed with the ACO and the contractor immediately---do not wait until the final exit conference or until the final report is issued to start the resolution process (see 5-110c and 10-400). When possible, significant deficiencies should also be linked to relevant historical data that are available or can be reasonably developed. For example, if the auditor can link estimating system deficiencies to questioned costs on proposal audits or positive findings on postaward audits, the importance of correcting the deficiency is more apparent.

f. Assessments of low risk for specific control objectives mean the auditor can rely on the contractor's internal controls and can reduce testing in other related audits to analytical procedures or minimum transaction tests. The details would be described on the ICAPS working paper (3-305.4)

5-110 Internal Control Reporting

Reporting on internal controls relative to individual accounting and management systems and on compliance with laws and regulations must be made in all audit reports. This includes audit reports on functional areas as well as those related to specific proposals, claims, or other financial representations.

a. The internal control audit report for each relevant accounting and management system should follow the general guidance in 10-200 and 10-400. The following are the major highlights of the reporting guidance.

(1) The Subject of Audit section should state that the objective for auditing the specific contractor system and its related internal controls is to determine the adequacy of the system and the contractor's compliance with the relevant internal controls (see 10-405b).

(2) The Executive Summary and the Results of Audit sections should present an overall opinion of the system (i.e., adequate or inadequate). The executive summary should

briefly summarize the deficiencies and their cost impact. When the audit opinion on a contractor's estimating and/or purchasing system is inadequate, the executive summary should also include a recommendation for disapproval of the system or portions of the system affected by the deficiencies (see 10-406). Detailed explanations in a condition/recommendation format will be included in the results of audit section. The results of audit section should also state the auditor's control risk assessment and describe the impact this assessment will have on the nature and extent of audit effort on other attestation audits, e.g., "As a result of control risk assessments, our audit effort in the following areas will be [increased/decreased]." Identify the affected audit areas and describe the additional audit effort required (see 10-408).

(3) The Scope of Audit section should explain that the internal control audit includes obtaining an understanding of the internal controls, determining if the controls are adequate and in operation, and assessing control risk to use as a basis for planning the testing necessary in other attestation audits. This section should also identify the system's control objectives covered by the audit and refer to the Contractor Organization and Systems section that describes the current status of the system along with any needed background information (see 10-407).

(4) If significant deficiencies are noted during the audit, they should be discussed with the contractor and the ACO during the course of the audit and corrective action should be underway before the final audit report is issued. The Statements of Condition and Recommendations in the audit report should comment on the contractor's efforts to correct the deficiencies (see 5-110c).

(5) The status of the contractor's corrective action on prior recommendations should be detailed in the Results of Audit section and summarized in the Contractor Organization and Systems section.

b. Reports for other attestation audits, (e.g., forward pricing proposals, progress payment requests, and annual incurred cost audits) should follow the general guidance in Chapter 10. The report should refer to the relevant accounting and management systems internal control report(s) used to plan the audit.

(1) At those contractors with defined internal controls, the Scope of Audit section should:

(a) list the system(s) that provide for compliance with laws and regulations for the specific audit area,

(b) describe how assessed system(s) control risk was considered in determining the scope of audit (It is not necessary to define the degree of risk as low, moderate or high but it may be used for emphasis.), and

(c) refer to the Contractor Organization and Systems section that describes the current status of the system(s).

(2) The Contractor Organization and Systems section should:

(a) reference the last internal control audit report and the current opinion on the overall system,

(b) show the current assessment of control risk, and

(c) list any outstanding internal control deficiencies and the current status of those deficiencies.

(3) At nonmajor contractors that do not have defined internal controls or those where it was not beneficial to audit the controls, the auditor would assess control risk as "high". The scope paragraph should state that the audit tests performed to provide a

basis for opinion considered the auditor's assessment of control risk. (It is not necessary to define the degree of risk as "high" in the scope paragraph. The "assumed degree of risk" for the sake of audit expediency is not a reportable condition.)

c. Significant internal control weaknesses identified during an audit require immediate action intended to expedite the resolution process and to protect the Government.

(1) If a significant internal control deficiency is encountered during an internal control audit:

- Discuss the deficiency with the contractor, the cognizant ACO, and the CAC as soon as possible so as to expedite the resolution process. Do not wait until the final exit conference or the issuance of the audit report to convey such findings.
- The internal control audit report should describe the deficiency, its estimated cost impact, the contractor's efforts to correct the deficiency and increased audit effort in other related audits needed to mitigate the internal control weakness.

(2) If a significant or likely to be significant internal control deficiency is encountered during other related audits, a separate flash report should be issued (10-413). The flash report should, whenever possible, include a general statement (and estimate when possible) on the cost impact of the internal control weakness.

(3) As soon as practical, the deficiency(ies) cited in the flash report should be followed-up in an appropriately-scoped systems audit in which an audit opinion (versus disclaimer) is given. It is expected that most follow-ups will be initiated within 90 days. If initiation of a follow-up requires additional time due to conditions beyond the control of the FAO, the FAO manager should document the need for additional time and establish a definite date for the follow-up audit to begin.

(4) The auditor should work with the ACO and the contractor to correct the deficiency rather than performing expanded testing in a particular audit area. When the contractor corrects the deficiency, the auditor should give high priority to the audit of the system change as a basis for placing reliance on the system.

(5) If the contractor does not take timely corrective action to resolve the deficiency, the auditor should take appropriate steps to protect the Government's interest. The auditor should coordinate with the ACO and notify the contractor of the intent to suspend or disapprove costs related to the weakness. For example, reports on price proposals should question the related costs and contain an appropriate opinion and/or recommendation (see 9-200). If internal control deficiencies affect billings to the Government, the auditor should suspend any appropriate costs on public vouchers (see 6-900) or recommend to the ACO reductions on progress payment requests (see 14-206). DFARS 242.7502 provides procedures which the ACO should take upon receipt of an audit report identifying significant internal control deficiencies.

(6) If the contractor has contracts requiring an approved Earned Value Management System (EVMS), provide an assessment of whether any deficiencies are likely to have a material effect on the reliability of the contractor's EVMS (10-1204.5b). The auditor should immediately evaluate the impact of deficiencies which may have a material effect on reports submitted for specific contracts requiring an approved EVMS and provide the details in EVMS surveillance reports (11-210).

d. At nonmajor contractors, the lack of formal internal controls is not, in itself, a significant deficiency. Contractor reactions to internal control recommendations should be considered, and may be paramount, in assessing control risk – absence of a sufficient level of control consciousness within the organization may be a separate reportable condition.

e. For multi-segment contractor locations, generally, the following three types of reports may be issued:

- A report on the shared or common aspects;
- A report on the overall system adequacy and operational effectiveness; or
- A report on the testing of specific control activities.

(1) A separate report on the shared or common aspects should be issued to the cognizant ACO for resolving audit issues related to the common aspects of the system. Copies of this report should be provided to the auditors at the segments who will rely on the work performed when expressing an opinion on the overall system at their segment. Any weaknesses on the common aspects of the system must be assessed by each segment FAO to determine the impact on the audit opinion at the segment level. For example, a corporate office may have determined that the contractor's policy on travel does not comply with FAR 31.205-46. A segment FAO performing an Indirect/ODC internal control audit at a location that does not have significant travel costs may conclude that the deficiency on the shared aspects of the system (policy and procedures) has limited impact at that location and, therefore, no impact on the audit opinion on the system adequacy at that segment. However, alternatively, if a corporate office review of company-wide labor practices disclosed that the labor system allows for undocumented changes to employee time charges, this condition would likely render the system inadequate at all locations using that system to record significant labor costs.

(2) Typically, reports on overall system adequacy and operational effectiveness should be issued at the segment level. Generally, reports on system adequacy should not be issued at an offsite/plant location. The segment level report will incorporate (i) assist audits performed at offsite locations where significant control activities are performed and (ii) the report on the shared/common aspects of the system.

(3) Assist audit reports will not express an overall opinion on the system, but only provide an opinion on the elements or activities tested at the specific location.

(4) The segment level report should identify all locations where testing of controls was performed. The locations that did not participate in the testing of controls cannot rely on the segment level report for planning and conducting related audits. These locations would establish control risk at maximum. If significant inadequacies/deficiencies are found at assist (offsite) locations, the opinion in the segment level report should be impacted and thus may be considered inadequate.

5-111 Auditing Internal Controls at Nonmajor Contractors

a. The process for obtaining an understanding of a contractor's internal controls and assessing control risk at most nonmajor contractors is accomplished by using the Survey of Contractor's Organization, Accounting System, and System of Internal Controls (ICQ) and the Internal Control Matrix, Control Environment and Overall Accounting Controls (ICM-ACTG) which are available on the DCAA Intranet and the APPS. Nonmajor contractors may use less formal means to ensure that internal control objectives are achieved. However, if the nonmajor contractor has one or more of the accounting and management systems listed in 5-102d that generate significant costs, the auditor can use the CAM guidance in Chapter 5, the audit program related to the system, and the related ICAPS with the ICQ to audit the internal controls. When an accounting or management system audit is performed at a nonmajor contractor, the auditor should follow the guidance contained in 5-109 and 3-300 to assess control risk and to document the assessment of control risk on the ICAPS.

b. Smaller entities with active management involvement may not need extensive descriptions of accounting procedures, sophisticated accounting records, or written policies. Communications may be less formal and easier to achieve in a small or midsized company than in a larger enterprise due to the smaller organization's size and fewer levels as well as management's greater visibility and availability. However, when small or midsized entities are involved in complex transactions or are subject to the same legal and regulatory requirements as larger entities, more formal means of ensuring that internal control objectives are achieved may be necessary.

5-111.1 Understanding and Evaluating Internal Controls

a. The ICQ should be used to document the understanding of the internal controls at nonmajor contractors with auditable dollar volume (ADV) between $15 and $100 million. (MAAR 1). The ICM-ACTG should be considered with the annual risk assessments for financial capabilities and material misstatements due to fraud. The ICQ may also be used for contractors with ADV less than $15 million, or alternative procedures may be used provided they adequately document the required understanding of the internal controls. Alternative approaches for contractors with less than $15 million ADV include the use of a narrative format similar to the discussion on the contractor's accounting system (see 10-504.6b).

b. The control environment reflects management's overall attitude, awareness and actions concerning the importance of control and its emphasis in the company. To gain an understanding of the control environment, the auditor should consider the information in the ICQ or information from other identified alternative sources, and the ICM-ACTG.

c. The auditor should also obtain an understanding of the accounting system and specific control activities for each major cost element (i.e., labor, indirect costs, and purchased services and material). The auditor should consider the information contained in the ICQ, particularly Parts B - Control Environment and Overall Accounting System, C - Contractor's Risk Assessment, Information and Communications and Monitoring, and D - Accounting System Control Objectives and Activities.

d. If the auditor concludes it would be inefficient to test the controls given the audit objectives and materiality of the assertions, control risk will be assessed at maximum

(5-111.2). Planned audit procedures must achieve the audit objectives and be sufficient to reduce audit risk to an acceptable level. In such situations there is an additional documentation requirement where the assertions are significantly dependent upon computerized information systems. The work papers must document the basis of assessing control risk at the maximum level by addressing the ineffectiveness of the computerized system controls or the reasons why it would be inefficient to test the controls. In either case the work papers must also document how the planned procedures will reduce audit risk to an acceptable level (such as tracing transaction amounts in the computerized records to source documents or other forms of corroborating evidence, comparing computer record balances to previously prepared journal vouchers, trial balances, tax returns, or financial presentations prepared for other purposes). Materiality and risk specific to the data supporting the assertion are important considerations in determining the scope of procedures necessary to reduce audit risk to an acceptable level. If the auditor is unable to reduce audit risk to an acceptable level, the report should be qualified with specific reference to the unreliability of computerized information systems (10-210.4j.).

e. Based on the information obtained in b., c., and d. above, the auditor should summarize the understanding of the control environment, accounting system and control activities. The summary may be in the form of a narrative explanation which includes an identification of significant internal controls or reasons for assessing control risk at the maximum. The form and extent of documentation is influenced by the level of control risk assessed, the company's size, the complexity of the internal structure, and the extent to which assertions are significantly dependent upon computerized information systems.

5-111.2 Assessment of Control Risk

a. The purpose of evaluating the internal controls is to assess the contractor's level of control risk for determining the nature, timing and extent of transaction tests in related audits. Frequently, the auditor assesses control risk at the maximum (high) at nonmajor contractors because it is more efficient to perform substantive tests for significant and sensitive accounts than to test the effectiveness of the contractor's internal controls. Also, if the auditor determines that internal control systems do not exist because of the company's size or the internal control systems are so deficient that they cannot be relied on, the auditor would assess the control risk at the maximum (high).

b. If, on the other hand, the auditor determines that specific control activities exist and have been implemented, the auditor may decide to perform tests of the effectiveness of the specific controls in order to limit the amount of transaction testing in the areas or accounts impacted. The auditor may also rely on previous systems audits or other related audits if they adequately evaluated and tested the effectiveness of specific control activities that would affect the auditor's assessment of control risk. Generally, the standard audit program steps for Activity Code 17740 Accounting System Surveys/Audits (5-200) are not designed to provide sufficient tests of internal controls to assess control risk at less than maximum.

c. An assessment of control risk at less than the maximum (high), which could result in reduced substantive testing, requires that control activities exist, have been tested, and are operating effectively. For Government contract purposes control activities represent policies and procedures that management has established to provide assurance that contract costs are recorded, processed, summarized, and reported in a manner consistent with Government laws and regulations. The testing of control activities is generally time sensitive and needs to

be performed during the year the costs are incurred. If the control activities were not tested, control risk would be assessed at the maximum (high).

5-111.3 Reporting as Part of the Annual Incurred Cost Audit

The auditor's reporting on the review and evaluation of internal controls at nonmajor contractors is usually included as part of the report on the annual incurred cost audit.

a. The Scope of Audit section should identify the internal controls and the assessment of control risk that the auditor considered in planning the audit. This section should also describe any significant accounting system deficiencies that have a material impact on the incurred cost proposal and the audit.

b. The Contractors Organization and Systems section should describe the contractor's accounting system as well as the current status of any outstanding accounting system deficiencies and their cost impact (see 10-410).

5-111.4 Flash Reporting at Nonmajor Contractors

If a significant system deficiency is encountered at a nonmajor contractor (e.g., it does not segregate unallowable costs or routinely includes significant unallowable costs in its price proposals), issue a separate flash report when it is in the Government's best interests to do so. Consider that flash reporting should typically :

(1) bring the deficiency to the contracting officer's attention much sooner and clearer than first noting the deficiency in a related audit report (e.g., incurred cost audit report), and

(2) expedite the resolution of the deficiency and avoid its impact on other contractual actions (which may not be audited by DCAA).

When a flash report is issued at a nonmajor contractor, follow-up audit steps should be performed (preferably within 90 days) to fully determine the systemic nature and impact of the deficiency. Depending on the significance of costs generated by the system, the follow-up audit steps may be performed as an appropriately-scoped systems audit or added to the incurred cost audit or other programmed audit (see 10-413).

mented by Subpart 50.1. However, the claim must first be submitted to the contracting officer for consideration under the Contract Disputes Act of 1978 because the claim is not cognizable under Public Law 85-804, as implemented by Subpart 50.1, unless other legal authority in the agency concerned is determined to be lacking or inadequate.

33.206 Initiation of a claim.

(a) Contractor claims shall be submitted, in writing, to the contracting officer for a decision within 6 years after accrual of a claim, unless the contracting parties agreed to a shorter time period. This 6-year time period does not apply to contracts awarded prior to October 1, 1995. The contracting officer shall document the contract file with evidence of the date of receipt of any submission from the contractor deemed to be a claim by the contracting officer.

(b) The contracting officer shall issue a written decision on any Government claim initiated against a contractor within 6 years after accrual of the claim, unless the contracting parties agreed to a shorter time period. The 6-year period shall not apply to contracts awarded prior to October 1, 1995, or to a Government claim based on a contractor claim involving fraud.

33.207 Contractor certification.

(a) Contractors shall provide the certification specified in paragraph (c) of this section when submitting any claim exceeding $100,000.

(b) The certification requirement does not apply to issues in controversy that have not been submitted as all or part of a claim.

(c) The certification shall state as follows:

> I certify that the claim is made in good faith; that the supporting data are accurate and complete to the best of my knowledge and belief; that the amount requested accurately reflects the contract adjustment for which the contractor believes the Government is liable; and that I am duly authorized to certify the claim on behalf of the contractor.

(d) The aggregate amount of both increased and decreased costs shall be used in determining when the dollar thresholds requiring certification are met (see example in 15.403-4(a)(1)(iii) regarding certified cost or pricing data).

(e) The certification may be executed by any person duly authorized to bind the contractor with respect to the claim.

(f) A defective certification shall not deprive a court or an agency BCA of jurisdiction over that claim. Prior to the entry of a final judgment by a court or a decision by an agency BCA, however, the court or agency BCA shall require a defective certification to be corrected.

33.208 Interest on claims.

(a) The Government shall pay interest on a contractor's claim on the amount found due and unpaid from the date that—

(1) The contracting officer receives the claim (certified if required by 33.207(a)); or

(2) Payment otherwise would be due, if that date is later, until the date of payment.

(b) Simple interest on claims shall be paid at the rate, fixed by the Secretary of the Treasury as provided in the Act, which is applicable to the period during which the contracting officer receives the claim and then at the rate applicable for each 6-month period as fixed by the Treasury Secretary during the pendency of the claim. (See the clause at 52.232-17 for the right of the Government to collect interest on its claims against a contractor.)

(c) With regard to claims having defective certifications, interest shall be paid from either the date that the contracting officer initially receives the claim or October 29, 1992, whichever is later. However, if a contractor has provided a proper certificate prior to October 29, 1992, after submission of a defective certificate, interest shall be paid from the date of receipt by the Government of a proper certificate.

33.209 Suspected fraudulent claims.

If the contractor is unable to support any part of the claim and there is evidence that the inability is attributable to misrepresentation of fact or to fraud on the part of the contractor, the contracting officer shall refer the matter to the agency official responsible for investigating fraud.

33.210 Contracting officer's authority.

Except as provided in this section, contracting officers are authorized, within any specific limitations of their warrants, to decide or resolve all claims arising under or relating to a contract subject to the Act. In accordance with agency policies and 33.214, contracting officers are authorized to use ADR procedures to resolve claims. The authority to decide or resolve claims does not extend to—

(a) A claim or dispute for penalties or forfeitures prescribed by statute or regulation that another Federal agency is specifically authorized to administer, settle, or determine; or

(b) The settlement, compromise, payment, or adjustment of any claim involving fraud.

33.211 Contracting officer's decision.

(a) When a claim by or against a contractor cannot be satisfied or settled by mutual agreement and a decision on the claim is necessary, the contracting officer shall—

(1) Review the facts pertinent to the claim;

(2) Secure assistance from legal and other advisors;

(3) Coordinate with the contract administration officer or contracting office, as appropriate; and

(4) Prepare a written decision that shall include—

(i) A description of the claim or dispute;

(ii) A reference to the pertinent contract terms;

(iii) A statement of the factual areas of agreement and disagreement;

(iv) A statement of the contracting officer's decision, with supporting rationale;

(v) Paragraphs substantially as follows:

"This is the final decision of the Contracting Officer. You may appeal this decision to the agency board of contract appeals. If you decide to appeal, you must, within 90 days from the date you receive this decision, mail or otherwise furnish written notice to the agency board of contract appeals and provide a copy to the Contracting Officer from whose decision this appeal is taken. The notice shall indicate that an appeal is intended, reference this decision, and identify the contract by number.

With regard to appeals to the agency board of contract appeals, you may, solely at your election, proceed under the board's—

(1) Small claim procedure for claims of $50,000 or less or, in the case of a small business concern (as defined in the Small Business Act and regulations under that Act), $150,000 or less; or

(2) Accelerated procedure for claims of $100,000 or less.

Instead of appealing to the agency board of contract appeals, you may bring an action directly in the United States Court of Federal Claims (except as provided in the Contract Disputes Act of 1978, 41 U.S.C. 603, regarding Maritime Contracts) within 12 months of the date you receive this decision"; and

(vi) Demand for payment prepared in accordance with 32.604 and 32.605 in all cases where the decision results in a finding that the contractor is indebted to the Government.

(b) The contracting officer shall furnish a copy of the decision to the contractor by certified mail, return receipt requested, or by any other method that provides evidence of receipt. This requirement shall apply to decisions on claims initiated by or against the contractor.

(c) The contracting officer shall issue the decision within the following statutory time limitations:

(1) For claims of $100,000 or less, 60 days after receiving a written request from the contractor that a decision be rendered within that period, or within a reasonable time after receipt of the claim if the contractor does not make such a request.

(2) For claims over $100,000, 60 days after receiving a certified claim; provided, however, that if a decision will not be issued within 60 days, the contracting officer shall notify the contractor, within that period, of the time within which a decision will be issued.

(d) The contracting officer shall issue a decision within a reasonable time, taking into account—

(1) The size and complexity of the claim;

(2) The adequacy of the contractor's supporting data; and

(3) Any other relevant factors.

(e) The contracting officer shall have no obligation to render a final decision on any claim exceeding $100,000 which contains a defective certification, if within 60 days after receipt of the claim, the contracting officer notifies the contractor, in writing, of the reasons why any attempted certification was found to be defective.

(f) In the event of undue delay by the contracting officer in rendering a decision on a claim, the contractor may request the tribunal concerned to direct the contracting officer to issue a decision in a specified time period determined by the tribunal.

(g) Any failure of the contracting officer to issue a decision within the required time periods will be deemed a decision by the contracting officer denying the claim and will authorize the contractor to file an appeal or suit on the claim.

(h) The amount determined payable under the decision, less any portion already paid, should be paid, if otherwise proper, without awaiting contractor action concerning appeal. Such payment shall be without prejudice to the rights of either party.

33.212 Contracting officer's duties upon appeal.

To the extent permitted by any agency procedures controlling contacts with agency BCA personnel, the contracting officer shall provide data, documentation, information, and support as may be required by the agency BCA for use on a pending appeal from the contracting officer's decision.

33.213 Obligation to continue performance.

(a) In general, before passage of the Act, the obligation to continue performance applied only to claims arising under a contract. However, the Act, at 41 U.S.C. 605(b), authorizes agencies to require a contractor to continue contract performance in accordance with the contracting officer's decision pending a final resolution of any claim arising under, or relating to, the contract. (A claim arising under a contract is a claim that can be resolved under a contract clause, other than the clause at 52.233-1, Disputes, that provides for the relief sought by the claimant; however, relief for such claim can also be sought under the clause at 52.233-1. A claim relating to a contract is a claim that cannot be resolved under a contract clause other than the clause at 52.233-1.) This distinction is recognized by the clause with its Alternate I (see 33.215).

(b) In all contracts that include the clause at 52.233-1, Disputes, with its Alternate I, in the event of a dispute not arising under, but relating to, the contract, the contracting officer shall consider providing, through appropriate agency procedures,

You Say You Aren't A Government Contractor — Or Is It Just Wishful Thinking?

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It happens all the time—we find in due diligence for an acquisition, in the investigation of a violation, or just in conversation—clients who have been insisting vociferously that they don't have any obligations to comply with government contract regulations, actually do. Some common reasons organizations claim they are exempt from compliance measures are:

- We have no direct contracts with any governmental customer.
- We only sell commercial-off-the-shelf ("COTS") products.
- We sell in large lots to wholesalers, so it is impossible to trace any of our products to a government contract.
- We are a small business and we are the fifth company down in the supply chain.

For some government contract compliance requirements, these facts do make a difference and will insulate the organization. For others, however, they do not. Over the last two years, the emphasis on compliance and enforcement of laws and regulations that had, for at least a decade, largely only been enforced through whistleblower complaints, has swelled immensely. In fact, over these last two years that have brought an increased number of compliance reviews and audits, federal agencies have been hiring thousands of new employees to perform audits, investigations, and bring enforcement actions against contractors. Now, more than ever before, is the time to assess your status as an organization and face the reality that you may, in fact, fall under the umbrella of the laws and regulations governing contractors and subcontractors providing goods or services to the government.

In assisting you with this assessment, review the threshold compliance issues below and decide whether any of the issues may apply to your organization.

The most stringent and invasive requirements impact the human resources department of any organization that may be considered a government contractor or subcontractor.

Equal Opportunity Employment

The equal opportunity requirements of Executive Order 11246, also found in the Federal Acquisition Regulation ("FAR") clause 52.222-26 and 41 C.F.R. Part 60-1, apply to *every* subcontractor, at any tier, that has received $10,000 or more in federal contracts or subcontracts in the last twelve months. Contractors and subcontractors must submit required reports and conduct hiring and promotions in accordance with the requirements set forth in these regulations. Executive Order 11246 and its implementing regulations prohibit nonexempt government contractors and subcontractors from discriminating on the basis of race, color, religion, sex, or national origin and also require statements in employment advertisements conveying the notion that applicants will be considered without regard to race, color, religion, sex, or national origin.

Organizations are subcontractors if the products or services they perform are included in the scope of work for the prime contract. This is true regardless of whether the subcontractor is aware that its products or services are within the scope

of work. For example, in a large construction project, the doorknob supplier may be considered a low level COTS supplier, but because doorknobs are required in the building, the doorknob supplier is a government subcontractor for compliance purposes. Thus, regardless of the supplier's belief of its status as a government subcontractor, the supplier is, in fact, a government subcontractor and must comply with the regulations relating to equal opportunity employment. The equal opportunity requirements apply to work performance and hiring activities in the United States.

Affirmative Action

The affirmative action requirements contained in Executive Order 11246, also found in the Federal Acquisition Regulation ("FAR") clause 52.222-26 and 41 C.F.R. Part 60-1, apply to *every* subcontractor, at any tier, that has received $50,000 or more in federal contracts or subcontracts in the last twelve months. If an organization's actions are within the scope of the affirmative action regulations, it must comply with the three main affirmative action requirements including: maintaining a written affirmative action plan; posting notices; and collecting and reporting employment data.

Generally, an organization must establish affirmative action plans if it has at least $50,000 in government contracts or subcontracts and there are 50 or more employees. Affirmative action regulations apply to work performance and hiring activities in the United States.

There are separate affirmative action requirements for workers with disabilities[1] and veterans.[2] The requirements for disabled workers apply to subcontracts exceeding $15,000 and requirements for veterans apply to subcontracts exceeding $100,000.

Just as with the Equal Opportunity Employment regime, even when the requirement has not been expressly included in a subcontract, the Department of Labor has held employers responsible for failing to implement affirmative action obligations, reasoning that the organization should be able to tell when it is supporting a government contract.[3] Possible penalties imposed by the Department of Labor for failure to comply include suspension and debarment from government contracts, grants, loans and related federal programs. State and local governments and many very large corporations will also refuse to do business with an organization that is on the federal government list of suspended or debarred entities, which is why federal suspension or debarment are considered "death sentences" for organizations.

Employment Eligibility Verification

The employment eligibility verification, or E-Verify requirements apply to first tier subcontractors that have services and construction subcontracts with a value of at least $3,000. E-Verify requirements apply to work performance and hiring activities in the United States. The Immigration and Customs Enforcement branch of the Department of Homeland Security has dramatically increased its administrative enforcement actions against government contractors that have knowingly hired or harbored illegal aliens and has commenced suspension and debarment actions against violators.

More

The compliance requirements listed above highlight just a few examples of regulations that are applicable in almost every government subcontract and that have caused extensive disruption when an organization suddenly discovers they are germane to operation and must be obeyed. Additional compliance obligations are also likely to apply when an organization operates as a subcontractor to the government. These requirements include a code

[1] FAR 52.222-36 and 41 C.F.R. § 60-741.5.

[2] FAR 52.222-37 and 41 C.F.R. § 60-250.40.

[3] *See e.g.*, *In the Matter of Office of Federal Contract Compliance Programs, United States Dept. of Labor v. Fl. Hosp. of Orlando*, 2009-OFC-00002 (Oct. 2010) (an organization is responsible for complying with affirmative action regulations, even when it does not know it is considered a subcontractor to the government, when the organization is "performing [or] assuming or undertaking" of another company's prime contract to provide goods or services to the government.).

of business conduct and ethics, along with training and internal controls; domestic preference requirements; regulations requiring minimum wages by labor category and minimum benefits; plans to provide small businesses subcontracting opportunities; and identification of intellectual property rights, marking requirements, and licenses to the government.

The Ever-Changing Regulatory World

New regulations are constantly being drafted, proposed and adopted as final,[4] and old regulations are revised. Adoption of new regulations and changing old ones can play a significant role in operational planning. Alterations in the regulatory scheme may bring an organization that was previously not affected by the compliance requirements, into the sphere of government contract regulations, burdening the organization with previously unknown requirements such as implementing certain procedures, gathering certain data, reporting that data, and record retention.

Penalties For Non-Compliance

The risks of failing to comply with rules and regulations are substantial. As stated above, whether the organization believes it is a government contractor has no bearing on the penalties imposed for failing to comply with regulations. All entities that do business with the government can expect their compliance program to be tested by auditors, investigators, competitors, or whistleblowers.

If, as the result of an audit, the Department of Labor or any other regulatory body finds that an organization is not in compliance with rules and regulations, substantial penalties can be imposed. For example, the organization runs the risk of having its contracts terminated, receiving a government claim for repayment or penalties, extensive and invasive civil or criminal investigations, or suspension or debarment from government contracting, grants, loans and other federal government programs.

Conclusion

An organization can no longer afford to play the ostrich and put its head in the sand and hope the government never notices its role in government contracting. If your organization meets any of the criteria discussed above, you are a subcontractor and it is time to spend an adequate amount of time and resources to meet regulatory requirements rather than spending the time and resources in defending against draining government investigations.

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[4] *See e.g.*, Executive Order 13496, Notification of Employee Rights Under Federal Labor Laws, January 30, 2009.

June 2011

Texting While Driving Policies "ENCOURAGED" for Government Contractors

It is no secret that sending or reading e-mails or text-messages, or "texting," while driving is a hot topic for state legislatures. An estimated 16,000 fatalities occurred between 2002 and 2007 as a result of texting while driving,[1] causing regulation of what has become the preferred-communication medium for Generation Y. Today, thirty-four states ban texting while driving altogether, while an additional seven states prohibit novice drivers from texting behind the wheel.[2] Eleven of these states passed their respective laws as recently as 2010.[3] Although these state laws are hardly surprising, a new procurement regulation might catch some government contractors and subcontractors off guard. On July 5th, the Government adopted as final Federal Acquisition Regulation ("FAR") clause 52.223-18. A September 29, 2010 interim rule was previously entitled "Contractor Policy to Ban Text Messaging While Driving."[4] The final rule, which becomes effective August 4th, was re-named "*Encouraging* Contractor Policies to Ban Text Messaging While Driving" to better reflect its non-mandatory nature.[5]

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[1] Stephanie Hanes, *Texting Caused 'Total Distracted Deaths' to Rise, Study Finds*, THE CHRISTIAN SCI. MONITOR (Sept. 23, 2010), http://www.csmonitor.com/USA/Society/2010/0923/Texting-caused-total-distracted-driving-deaths-to-rise-study-finds.

[2] *Cell Phone and Texting Laws*, GOVERNORS HIGHWAY SAFETY ASS'N (July 2011), http://www.ghsa.org/html/stateinfo/laws/cellphone_laws.html.

[3] Michael Schrier, Jackson Kelley PLLC, *Text Messaging While Driving Prohibited for Government Contractors*, GOV'T CONTRACTS MONITOR (MAR. 30, 2011), http://govtcontractsmonitor.jacksonkelly.com/2011/03/text-messaging-while-driving-prohibited-for-federal-contractors.html.

[4] Federal Acquisition Regulation (interim rule); Contractor Policy to Ban Text Messaging While Driving, 75 Fed. Reg. 60,264 (Sept. 29, 2010).

[5] Federal Acquisition Regulation (final rule); Encouraging Contractor Policies to Ban Text Messaging While Driving, 76 Fed. Reg. 39,240, 39,240 (Jul. 5, 2011) (to be codified at FAR 52.223-18).

The Executive Order providing the authority for FAR 52.223-18 was issued by President Obama in September 2009.[6] The EO, entitled "Federal Leadership on Reducing Text Messaging While Driving," requires federal agencies to "encourage" government contractors and subcontractors to adopt and enforce policies that ban texting while driving government or company owned vehicles, or driving any vehicle while performing work for the federal Government.[7] Accordingly, the FAR was amended to include clause 52.223-18, which originally declared that contractors and subcontractors "should" adopt and enforce the anti-texting policies.[8] A training requirement of the clause states that contractors and subcontractors "should" establish, or re-evaluate, programs that increase awareness of policies on texting while driving and the safety risks associated with such behavior.[9] Finally, the language of FAR 52.223-18 must be inserted into all government contracts, subcontracts and solicitations issued after September 29, 2010 (which exceed the micro-purchase threshold, generally $3,000).[10] The only change to the final version of the rule is that "should" has been replaced with "encouraged to."[11] This minor alteration is insignificant for practical purposes.

On the one hand, government contractors and subcontractors can rest assured that "[i]mplementing [texting while driving] policies in any contract or subcontract is not mandatory."[12] But given the large number of states that have already banned texting while driving, FAR 52.223-18 should mean nothing new for many government contractors and subcontractors.

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[6] Exec. Order No. 13513, Federal Leadership on Reducing Text Messaging while Driving, 74 Fed. Reg. 51,225 (Oct. 6, 2009).
[7] *Id.*
[8] FAR 52.223-18(c) (2010).
[9] FAR 52.223-18(c)(2) (2010).
[10] FAR 52.223-18(d) (2010).
[11] Encouraging Contractor Policies to Ban Text Messaging While Driving, 76 Fed. Reg. at 39,240.
[12] *Id.* at 39,241.

On the other hand, as employers, government contractors and subcontractors should consider the possible benefits of implementing anti-texting policies.

- The Shield: A policy prohibiting employees from texting while driving where there is any connection to the organization's business could form the basis for a defense to a *respondeat superior* liability claim arising from an employee accident.[13]
- The Sword: A plaintiff's attorney could imply that a government contractor that did not adopt an anti-texting policy and train its employees accordingly is irresponsible and should bear liability for damages caused by its employees who text and drive.

Wise government contractors and subcontractors that have yet to adopt anti-texting while driving policies will strongly consider doing so.

Should you have any questions about the contents of this alert, please feel free to contact Holly Emrick Svetz (HSvetz@wcsr.com; 703-394-2261) or any member of our Government Contracts Team.[14]

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[13] Schrier, *supra* note 3.
[14] Special thanks to Summer Associate Brendan Mackesey for his contributions to this alert.

A Potpourri of Small Business Program Changes

Significant new initiatives have recently been launched by the U.S. Small Business Administration ("SBA") in an attempt to meet its small business contracting goals. These initiatives include establishing a women-owned small business set-aside program and also, after ten years of relatively no change to its 8(a) Business Development program, dramatic changes to the rules of that program. These new initiatives will have major implications for contractors for years to come. Some of the major highlights follow.

Women-Owned Small Business Set-Aside Program

On October 7, 2010, the SBA published a final rule expanding federal contracting opportunities for women-owned small businesses ("WOSB"s), which became effective on February 4, 2011 (the "final WOSB Rule").[1] The Final WOSB Rule authorizes contracting officers ("CO"s) to limit competition, or to set aside, contracts in certain industries in order to foster competition solely among WOSBs or economically disadvantaged women-owned small businesses ("EDWOSB"s). The Final WOSB Rule allows agencies to set aside five percent of federal contract dollars for WOSBs in industries where SBA has determined that WOSBs are underrepresented or substantially underrepresented. The program is intended to assist the Federal government in reaching its statutory goal of awarding five percent of federal contracting dollars to women-owned small businesses.[2]

Participation Requirements

To participate in either the WOSB or EDWOSB set aside program, a contractor must be 51 percent owned and controlled by one or more women, with "the management and daily business operations of the concern . . . [also] controlled by one or more women."[3] As with the Service-Disabled Veteran-Owned Small Business ("SDVOSB") set-aside program, women must own the business in a direct, personal capacity (*i.e.* – not through a separate business entity, a trust or employee stock ownership plan). Additionally, the owner(s) must be U.S. citizens.[4]

To qualify for EDWOSB set-asides, in addition to the requirements above, the contractor must be "small" in its "primary industry" and be considered "economically disadvantaged."[5] The SBA will use a "totality of the circumstances" test to determine whether a WOSB is "economically disadvantaged." Factors

[1] *Women-Owned Small Business Federal Contract Program*, Final Rule, 75 Fed. Reg. 62258, 62285 (Oct. 7, 2010) .

[2] *Id.* Women owned small businesses received 3.2 percent of federal procurement dollars in FY 2005, 3.4 percent in 2006, 3.39 percent in 2008 and 3.68 percent in 2009. *See Federal Procurement System Small Business Goaling Report*, FY 2006; *see also* SBA 2009 Government-Wide Small Business Procurement Scorecard; found at: http://archive.sba.gov/idc/groups/public/documents/sba_program_office/govt_wide_2009.pdf.

[3] *Id.*

[4] *Id.* at 62, 283.

[5] *Id.*

considered in determining whether a business is economically disadvantaged include, among other considerations, whether the business owner's personal income is less than $200,000, the fair market value of assets owned, and whether the business can obtain a line of credit based on the woman's ownership.[6] However, a WOSB need not be certified as "economically disadvantaged" to compete for set-aside contracts when a CO finds that WOSBs are "substantially under-represented" in that industry. In that event, all WOSBs, regardless of economic status, can compete for the set-aside.

Types of Contracts Eligible to be Set-Aside

To be eligible for a WOSB set-aside, the estimated value of a contract must be less than $5 million for manufacturing industry codes and less than $3 million for all other contracts.[7] The Final WOSB Rule identifies 83 industries[8] where WOSBs are "under-represented or substantially under-represented." Proposed set-aside contracts are limited to the procurement of goods or services in one of these 83 identified industries.[9]

Certification Requirements

As with certain other set-aside programs, the Final WOSB Rule requires a business to satisfy certification requirements which can be met by self-certification or certification by SBA approved third-party certifiers.[10] There are special requirements for each type of certification, and self-certification requires a more robust submission of company documents to the SBA for review than certification by an approved third-party certifier. In conjunction with the required registration in the Online Representations and Certifications Application ("ORCA") and Central Contractor Registration ("CCR") databases, the WOSB applicant must submit a copy of the WOSB Business Program Certification to the WOSB program repository and update its annual representations.[11] Anyone seeking to participate is advised to do so cautiously, however, given that the

[6] An exhaustive list of the factors is set forth in the Final WOSB Rule.

[7] *Id.*

[8] As originally proposed, the rule was to include only four industries. This was changed to 83 based on the large number of comments received by the SBA and the Kauffman-Rand Foundation's study identifying the 83 industries. The Rand Report is available to the public at http://www.Rand.org/pubs/technical_reports/TR442.

[9] The Final WOSB Rule also removes the requirement set forth in the proposed rule that each agency setting aside contracts for WOSBs must certify that it previously engaged in discrimination against WOSBs. *See Women-Owned Small Business Federal Contract Assistance Procedures*, 72 Fed. Reg. 73285, (Dec. 27, 2007) (proposed rule); *Women-Owned Small Business Federal Contract Program*, 75 Fed. Reg. 62258 (Oct. 7, 2010) (final rule). *See* SBA News Release, *SBA Releases Final Women-Owned Small Business Rule to Expand Access to Federal Contracting Opportunities*, Release No. 10-55, Oct. 4, 2010.

[10] Final WOSB Rule at 62,285.

[11] The WOSB program repository is a device that will be used by the SBA when contractors choose to self-certify eligibility to participate in the set-aside procurements. The repository is part of the SBA's General Login System where self-certifying contractors can upload their certifications and all required supporting documentation. The General Login System can be found at: https://eweb.sba.gov/gls/dsp_addcustomer.cfm.

SBA has announced its intention to engage in substantial auditing to ensure eligibility of participants and to vigorously pursue punitive action against ineligible contractors seeking to take advantage of the program.[12]

Changes to the 8(a) Business Development Program

For the first time in nearly ten years, the SBA has comprehensively revised the regulations governing the 8(a) Business Development program in a final rule issued on February 11, 2011 (the "Final 8(a) Rule").[13] Except for minor technical changes, the Final 8(a) Rule closely resembles the proposed rule published in October 2009 and, among other things, focuses on changing the mentor-protégé relationship and increasing the transparency of Alaska Native Corporations.

The Final 8(a) Rule went into effect on March 14, 2011 and only applies prospectively. Accordingly, approved mentor-protégé agreements and joint ventures in effect prior to March 14, 2011 will not be affected.

Changes to the Mentor-Protégé Program

Some of the major highlights of the new 8(a) program include:

- Although several agencies currently have mentor-protégé programs, only mentor-protégé agreements approved by SBA or DOD, pursuant to SBA's authorized mentor-protégé program, will avoid triggering affiliation rules. If contractors use other agencies' mentor-protégé agreements, they risk being considered "affiliated" on the basis of such agreements.[14]

- The Final 8(a) Rule requires that large businesses and their 8(a) protégés abide by 8(a) mentor-protégé requirements on non-8(a) set-aside contracts. Prior to the Final 8(a) Rule, approved 8(a) mentor-protégé contractor teams could pursue HUBZone, SDVOSB, and other small business set-asides without following the 8(a) restrictions regarding the relationship between the mentor and protégé.

- Mentors may have up to three simultaneous protégés, while protégés may have a second mentor in a secondary and unrelated NAICS code.

- Mentor-protégé agreements must be approved by the SBA before submitting a joint venture offer.

- The Final 8(a) Rule provides new consequences for mentors who fail to provide adequate assistance to their protégés, ranging from stop-work orders to debarment of the mentors.

[12] *See* SBA News Release, *SBA Releases Final Women-Owned Small Business Rule to Expand Access to Federal Contracting Opportunities*, Release No. 10-55, Oct. 4, 2010.

[13] *Small Business Size Regulations; 8(a) Business Development/Small Disadvantaged Business Status Determinations*, 76 Fed. Reg. 8222 (Feb 11, 2011).

[14] *Id.*

Changes to the Joint Venture Program

Major changes to the SBA Joint Venture program include:

- The 8(a) joint-venturer must receive profits "commensurate" with the 8(a) contractor's work. This is a change from the prior requirement that the 8(a) contractor receive at least 51 percent of the profits. SBA's comments, however, indicate that the large business/mentor may claim profit commensurate with the work performed up to as much as 60% of the profit of a joint venture.[15] Accordingly, the Final 8(a) Rule requires the 8(a) joint-venturer participant to perform at least 40 percent of the joint venture's work and to retain at least 40% of the profit.

- The 40% requirement replaces the "significant portion" language under the old rules. Contractors must now document how the 40% work requirements are met on every applicable 8(a) joint venture set-aside contract.

- Importantly, the 40 percent calculation now includes a joint venture's subcontracted work to a non-8(a) joint-venturer, typically a large business. For a populated joint venture,[16] where the employees of the individual joint venture members are no longer distinct, the Final 8(a) Rule recognizes that the requirement that the 8(a) partner perform at least 40% of the work done by the joint-venture as a whole may not always make sense.[17]

- Joint ventures are now eligible to receive three contract awards in a two-year period. This is a change from the previous rule allowing joint ventures to submit three proposals in a two-year period.

- The participants in a joint venture may also form other joint ventures and be awarded an additional three contracts in an overlapping two-year period. In the preamble to the Final 8(a) Rule, the SBA highlights issues that may arise if the same entities enter into multiple joint ventures with each other, including potential affiliation and organizational conflicts of interest.

- The non-8(a) joint venture partner is, with certain exceptions, generally prohibited from receiving sub-contracts under a set-aside contract. Exceptions include when the joint venture remains unpopulated and does not actually perform the work, and when the awarding agency determines that other potential contractors are not "available" for any one of several reasons.

- All joint ventures must now be formed through a written document.

[15] *Id.* at 8,243.

[16] A populated joint venture is a legal entity with its own employees and resources to perform the contract. An unpopulated joint venture is a contractual arrangement that is treated as a partnership and has no employees.

[17] In instances where the joint venture company hires the individuals necessary to perform the contract, the work of the joint venture will be done by the joint venture entity itself. The 8(a) joint-venturer, in such a circumstance, must clearly demonstrate the manner in which it will benefit or develop its business. *Id.*

Other Changes to the 8(a) Program

- Agencies seeking to award a sole-source contract under the 8(a) business development program, valued at $20 million or more,[18] must now provide adequate justification for not utilizing competitive procedures. The justification must be approved by the appropriate agency official prior to award, and the justification must be released to the public after award.[19]

- Not every firm completing its nine year term in the 8(a) program will "graduate." Rather, only a contractor that achieves the targets, objectives, and goals contained in its business plan and demonstrates its ability to compete in the marketplace will graduate.[20]

- In order to help 8(a) concerns compete in the current task and delivery order, multiple-award contracting environment, agencies can receive 8(a) credit for orders placed with 8(a) contractors under contracts not otherwise awarded as set-asides for 8(a) concerns, but only if the order is offered to and accepted for the 8(a) program and competed exclusively among eligible 8(a) concerns. In addition, the limitations on subcontracting provisions apply to the individual order.

- The Final 8(a) Rule adjusts the competitive threshold amounts (the maximum contract amounts that can be set-aside) to $5,500,000 for contracts using manufacturing industry codes and $3,500,000 for all other contracts.

- Alaskan Native Corporations ("ANC"s) and Native Hawaiian Organizations ("NHO"s), which are part of the SBA's 8(a) business development program, will now be required to report benefits flowing back to their respective communities. Each firm will be required to submit information relating to their funding of cultural programs, employment assistance, jobs, scholarships, internships and subsistence activities.

- A contractor participating in the 8(a) program must maintain its small size status for its primary industry code during its entire participation in the 8(a) program.

- Although ANCs will still be permitted to own more than one contractor-participant in the 8(a) program, "[a] firm owned by a Tribe or ANC may not receive a sole source 8(a) contract that is a

[18] $20 million is the total value of the contract, including all option years; or if there is a ceiling value on the contract, the ceiling value itself shall be used in evaluating whether the contract qualifies under the new regulation.

[19] *Federal Acquisition Regulation; Justification and Approval of Sole-Source 8(a) Contracts*, 76 Fed. Reg. 14,559 (Mar. 16, 2011) (interim rule). This change is made by a separate interim rule amending the Federal Acquisition Regulation and took effect March 16, 2011.

[20] Final 8(a) Rule, 76 Fed. Reg. 8,222.

follow-on contract to an 8(a) contract that was performed immediately previously by another Participant (or former Participant) owned by the same Tribe."

- The Small Jobs Act of 2010[21] created parity among the SBA's small business contracting programs when it eliminated language requiring COs to utilize HUBZone businesses first, when available. Section 1347 of the Act now offers COs discretion to treat all of the SBA's programs equally in awarding set-aside contracts.

Changes to the Veterans Affairs Ownership Verification of VOSBs and SDVOSBs

On January 19, 2011, the Department of Veterans Affairs ("DVA") issued a final rule affirming an earlier final rule and request for comments that established procedures for verifying ownership and control of VOSBs and SDVOSBs ("the Final DVA Rule").[22] The Final DVA Rule became effective on February 18, 2011 and includes the following:

- Eligible owners are no longer required to work full-time in the company for which they have applied for acceptance in the VOSB or SDVOSB verification program.
- Eligible owners can now have more than one business participating in the verification program at one time, if the veteran can demonstrate the requisite requirements of ownership and control.
- An applicant or a participant "must be controlled by one or more veterans or service-disabled veterans who possess requisite management capabilities. Owners need not work full-time but must show sustained and significant time invested in the business."
- Eligibility requirements for obtaining "verified status" are defined and the procedures for "examination visits" establishing that legitimate parties control VOSBs and SDVOSBs are detailed.

Should you have any questions about the contents of this alert, please feel free to contact Jim Kearney, Holly Svetz or Steve Cave.

[21] H.R. 5297 (Sept. 27, 2010).

[22] *VA Veteran-Owned Small Business Verification Guidelines*, 76 Fed. Reg. 3,017 (Jan. 19 2011).

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DoD SET TO WITHHOLD CONTRACT PAYMENTS

Notwithstanding recent amendments to its earlier proposed rule, the Department of Defense (DoD) is poised to begin withholding payments under cost reimbursable and time and materials contracts whenever it finds contractors' business systems deficient. This proposed rule represents a significant change in the contracting environment for companies performing work for DoD. As originally proposed, the Defense Federal Acquisition Regulations Supplement (DFARS) rule would have allowed contracting officers to withhold 10%, 50% or even 100% of contractor payments when the contracting officer decides that a contractor's "business systems" are "deficient." Amendments now lower the amounts that can be withheld, but even as amended the proposed rule would impose new compliance requirements that are difficult to understand on their face. Without clear criteria in the proposed rule, contractors face potentially substantial compliance costs in addition to severe monetary penalties for noncompliance.

Background

In September 2008, the GAO reported its investigations revealed that Defense Contract Audit Agency (DCAA) auditors were both too comfortable with contractors and were "production oriented."[1] Among other findings, GAO reported that DCAA supervisors dropped findings and changed audit opinions without adequate audit evidence and failed to comply with generally accepted government accounting standards (GAGAS).

Following this report, DCAA's then newly-appointed Director, April G. Stephenson, articulated the view that, going forward, even a single internal system defect rendering a contractor's business system inadequate should be met not with assistance to the contractor to facilitate compliance, but rather by withholding of contract payments. Subsequent DCAA guidance also set forth procedures that increased demands on contractors who fail immediately to comply with compliance requests. In addition, Director Stephenson made public comments in May 2009 before the Commission on Wartime Contracting proposing a regulatory structure requiring automatic withholding of contract funds when a contractor fails to maintain internal control systems.

The Proposed Rule

The proposed DFARS rule attaches enforcement muscle to Director Stephenson's views by adding a required clause to DoD contracts obligating contractors to certify that no major defects in their contractor "business systems" exist. "Defects" include any shortcoming in accounting systems, estimating systems, purchasing systems, earned value management systems, material management and accounting systems, and property management systems. As originally proposed in January 2010, DoD would have had the power to withhold 10 percent of contract

[1] GAO Report 09-468, *DCAA Audits: Widespread Problems with Audit Quality Require Significant Reform*, September 23, 2008.

payments if *any* business system was found to be deficient and 100 percent of contract payments if a major business system deficiency was found. Under the new proposal published in December 2010's Federal Register, DoD would now be able to withhold 5 percent of contract payments against large businesses and 2 percent for small businesses for any deficiencies. If the deficiencies are considered major or high risk, the maximum amount that could be withheld would be capped at 20 percent, down from 100 percent in the original proposal.[2] The proposed rule would reduce the amounts from 5 percent of total contract payments to 2 percent (2 percent to 1 percent for small businesses) when the contractor submits an acceptable corrective action plan within 45 days of a notice of the Contracting Officer's intent to withhold payments. Notably, the proposed rule does not clearly define what makes a deficiency "high risk" or "major."

Improved Oversight or a Compliance Nightmare?

DoD stated that the purpose of the proposed rule is "to improve the effectiveness of Defense Contract Management Agency (DCMA) and DCAA oversight of contractor business systems."[3] However, the proposed rule has drawn a heavy dose of criticism from commentators who note the rule's lack of objective standards.[4] Admittedly, revisions to the rule, as proposed, attempt more specifically to describe what qualifies as a deficiency within a given business system by setting forth criteria for finding deficiencies in each system. For example, the proposed rule sets forth seventeen attributes of an acceptable estimating system and eighteen attributes of an acceptable accounting system. But, even these elements of an acceptable system lack the objectivity and clarity to provide sufficient guidance to contractors seeking to comply. For instance, DoD states that an acceptable accounting system must create a "logical and consistent method for the accumulation and allocation of indirect costs to intermediate and final cost objectives." Of course, what exactly constitutes a "logical and consistent method for accumulation of indirect costs" will unfortunately not be clear to the contracting community until DCAA and contracting officers begin to assert deficiencies and withhold contract payments.

In addition, DoD's likely approach to enforcing the rule is unclear. Although the rule has been revised to state that the contracting officer has discretion regarding imposition of penalties, how that discretion will be exercised remains a mystery. Before DCAA's recent policy shift, contracting officers and DCAA auditors might have worked with the contractor to correct a business system deficiency or to assist the contractor in improving compliance. Auditors and inspectors would present deficiencies to contractors in draft form, giving them a chance to explain or correct the deficiency before finalizing their findings and issuing penalties. The discretion of the contracting officer to work with contractors to solve deficiencies has been, after all, an essential part of the authority vested in the contracting officer under the FAR.[5] But, DoD's proposed rule and DCAA's recent policy utterances appear to undermine contracting officer discretion by creating significant disincentives to take any action other than accepting auditors' findings of deficiency and impose a penalty.[6] Contracting officers may simply avoid

[2] *See* DFARS Case 2009-D038, 75 Fed. Reg. 75550 (December 3, 2010).
[3] DFARS Case 2009-D038, 75 Fed. Reg. 2457 (January 15, 2010).
[4] DFARS Case 2009-D038, 75 Fed. Reg. 75550 (December 3, 2010) and comments therein.
[5] FAR 1.602-1; FAR 1.602-2.
[6] *See* Note 4, *supra*.

possible career limiting challenges to audit findings by "rubber stamping" those findings now that DCAA has adopted a policy of permitting auditors and inspectors to challenge a contracting officer's decision not to heed their advice and findings.[7]

Moreover, although the proposed rule states that penalties should only be assessed against the contractor, for example, "if the contracting officer determines that there are one or more system deficiencies that adversely affect the contractor's earned value management system, leading to a potential risk of harm to the Government[,]"[8] will contracting officers be willing to defend an assessment of no adverse effect, in the face of DCAA disagreement? The recent DCAA guidance, coupled with the current assumptions that government procurement professionals and contractors have too comfortable a relationship, may foster an environment that leads to "knee jerk" determinations of adverse effect.

Should you have any questions about the proposed rule or its consequences, please feel free to contact Jim Kearney and Holly Svetz or any member of Womble Carlyle's Government Contracts practice team.

[7] MRD No. 09-PAS-004(R), *Audit Guidance on Reporting Significant/Sensitive Unsatisfactory Conditions Related to Actions of Government Officials* (March 13, 2009) (stating that "[U]nsatisfactory conditions may warrant an independent assessment" of significant/sensitive unsatisfactory contractor conditions or systems and that DCAA auditors should separate themselves from contracting officers and independently assess contracting officers' decisions where the contracting officer ignores a DCAA audit report or takes action inconsistent with regulations); s*ee also* DCAA Memorandum entitled *Audit Quality Month – August* 2008, August 6, 2008, sent from DCAA Director April Stephenson (stating that the contracting officer should not cause audit quality to suffer or impair the objectivity of the DCAA auditors).

[8] This is the language shift from the first proposed rule suggesting that a contract provision would be inserted providing that the contracting officer "will immediately withhold ten percent of each of the Contractor's payments under this contract" if the contracting officer determines that a business systems is deficient.

Government Contractor's/Subcontractor's Information and Compensation Go On Internet In Transparency Rule -- Be Aware

By Holly Emrick Svetz

You're the owner and Chief Executive Officer of a privately held, small, commercial item company that only does government contracts as a subcontractor, but over 80 percent of your business is with the federal government. You feel pretty insulated from government intrusion, right? Wrong.

As of July 9, 2010, as part of a transparency move, the total compensation of you and the other top five company executives will be posted on the Internet, with few exceptions. The public will also be able to see the first-tier subcontracts your company has been awarded and their value.

The only exceptions to reporting:

- classified contracts
- subcontracts to individuals
- subcontractors in previous tax year having gross income from all sources under $300,000

There is no exception for small businesses or privately-held companies or commercial item or commercial-off-the-shelf contracts.

This is new for prime contractors, too, except those working on contracts funded by the Recovery Act and those covered by an earlier pilot program.

The information to be provided about each first-tier subcontractor is:

- DUNS number for subcontractor and any parent company
- Name of subcontractor
- Amount of subcontract award
- Date of subcontract award
- Description of products or services being provided
- Subcontract number (assigned by prime contractor)
- Subcontractor's physical address, including nine digit zip and Congressional district
- Subcontractor's primary performance location, including nine digit zip and Congressional district
- Prime contract number and order number, if applicable
- Awarding federal agency
- Funding federal agency
- Government contracting office

- Treasury account symbol
- North American Industry Classification System (NAICS) code

The compensation must be reported for prime and first-tier subcontractors who in the preceding fiscal year received:

- 80% or more of its annual gross revenues from Federal contracts and subcontracts, loans, grants and subgrants, and cooperative agreements AND
- $25 million or more in annual gross revenues from Federal contracts and subcontracts, loans, grants and subgrants, and cooperative agreements AND
- The public does not have access to information of the executives through periodic reports filed with the Securities and Exchange Commission or the Internal Revenue Service

Rather than issuing a proposed rule, receiving comments, and then issuing a final rule, the change was issued as an interim rule. It is effective as of July 9, 2010, although comments may be submitted before September 7, 2010. The rule modifies the Federal Acquisition Regulation ("FAR") that governs the government contracts of all federal agencies, but does not govern grants and cooperative agreements.

There has been a build-up to this major transparency initiative.

A pilot program, which ended on January 1, 2009, required similar reporting, but applied only to prime contracts valued over $500 million and required reporting of subcontract awards over $1 million and exempted commercial item and classified contracts.

Since March 31, 2009, the FAR has required reporting of information about prime contracts and first-tier subcontracts and compensation of the top five executives when using Recovery Act funding.

This new rule is implemented in a new clause FAR 52.204-10, Reporting Executive Compensation and First-Tier Subcontract Awards, and in FAR 52.212-5 and 52.213-4 for commercial item and simplified acquisitions, respectively. The appropriate clause is required to be included in all solicitations issued on or after July 9, 2010 and the resulting contracts. In addition, procuring agency contracting officers are required to modify all ongoing contracts under which purchase orders or task orders are issued to include the clause for orders issued after July 9, 2010.

There is a phase-in period for first-tier subcontract reporting:

- July 9, 2010-September 30, 2010 -- prime contracts valued $20 million or more
- October 1, 2010-February 28, 2011 -- prime contracts valued $550,000 or more
- March 1, 2011 -- prime contracts valued $25,000 or more

Reporting of the information for the prime and subcontractor must be made by the end of the month following the month in which the contract is awarded. Additionally, each prime contractor must report annually the names and total compensation of each of the five most highly

compensated executives at the end of the prime contractor's and first-tier subcontractor's respective fiscal year.

The information must be reported by the prime contractor through http://www.fsrs.gov. The public may view prime contractor and first-tier subcontractor data at http://usaspending.gov

Contact Information

If you have any questions, please contact Holly Emrick Svetz (hsvetz@wcsr.com, (703) 394-2261) or the Womble Carlyle Government Contracts attorney with whom you usually work.

WCSR 4414778v1

"Made in Taiwan" Now OK for Sales to U.S. Government

Many companies with a supply chain or manufacturing facilities in Taiwan have long been precluded from selling their products to the U.S. Government because of domestic preferences. Effective August 11, 2009, the main barrier has been removed.

The Trade Agreements Act Is the Means

While most business persons have heard of the Buy American Act restrictions in selling to the U.S. Government, it is instead the Trade Agreements Act which now applies to more sales - all contracts for supplies or services that exceed $194,000. For example, all sales of commercial products on the popular General Services Administration ("GSA") "schedules" are subject to the Trade Agreements Act. The Federal Acquisition Regulation ("FAR") describes the situation concisely:

> The Trade Agreements Act (19 U.S.C. 2501, *et seq.*) provides the authority for the President to waive the Buy American Act and other discriminatory provisions for eligible products from countries that have signed an international trade agreement with the United States, or that meet certain other criteria, such as being a least developed country. The President has delegated this waiver authority to the U.S. Trade Representative ["USTR"]. In acquisitions covered by the [World Trade Organization] WTO [Government Procurement Agreement] GPA, Free Trade Agreements, or the Israeli Trade Act, the USTR has waived the Buy American Act and other discriminatory provisions for eligible products. Offers of eligible products receive equal consideration with domestic offers.

FAR 25.402(a)(1).

A country that has become a party to the WTO GPA and provides appropriate reciprocal competitive government procurement opportunities to U.S. products and services and supplies of such products and services is a "designated" country under the Trade Agreements Act.

Taiwan's Road To Designated Country Status

In 2002, Taiwan formally joined the WTO. Shortly thereafter, Taiwan submitted a proposal to accede to the GPA, allowing other foreign countries the opportunity to compete in Taiwan's public procurement market, while simultaneously permitting Taiwan to compete in those same countries' foreign procurement markets, including the much coveted U.S. market, which is valued at more than $200 billion. In May 2009, Taiwan's legislature approved Taiwan's GPA proposal and on June 8, 2009, Taiwan's President Ma Ying-jeou formally finalized the accession proposal, forwarding it to the WTO in Geneva for final approval. Taiwan's accession papers were received by the WTO on June 16, 2009, triggering a mandatory 30-day waiting period, after which time the accession was completed.

On July 14, 2009, the USTR issued a determination that Taiwan is designated a party to the WTO GPA for purposes of the Trade Agreements Act. 74 Fed. Reg. 34072 (July 14, 2009) at 34072.

What Does It All Mean?

When one of the Trade Agreements Act clauses is included in the solicitation for supplies or services by the US Government, the end product being purchased must either be a U.S. end product or a WTO GPA country end product (the Department of Defense version of the clause includes variations, but is similar). The test for a WTO GPA, or designated country, end product is:

> "WTO GPA country end product" means an article that—
> (1) Is wholly the growth, product, or manufacture of a WTO GPA country; or
> (2) In the case of an article that consists in whole or in part of materials from another country, has been substantially transformed in a WTO GPA country into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed. The term refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the end product includes services, (except transportation services) incidental to the article, provided that the value of those incidental services does not exceed that of the article itself.

FAR 52.225-4 (emphasis added).

If the end products are not substantially transformed in the U.S. or a WTO GPA country, the offeror is required to disclose the country in which the end products were transformed in a proposal. To accept those end products, the U.S. Government procurement office must obtain a waiver, which involves other factors and tests and is not favored.

On August 11, 2009, the FAR was amended to include Taiwan as a designated country under the Trade Agreements Act. 74 Fed. Reg. 40458 (Aug. 11. 2009) at 40461 2.

The Good News

Many U.S. and global companies have manufacturing operations in Taiwan. To comply with the Trade Agreements Act before this rule change, these companies were moving some of their operations to the U.S. or designated countries for U.S. Government sales. This change should open the U.S. Government market to many companies and products that could not qualify before. There are nuances not covered in this short article, so please obtain advice before commencing sales of Made in Taiwan products to the U.S. Government.

Contact Information

If you have any questions, please contact **Holly Emrick Svetz** (HSvetz@wcsr.com, (703) 394-2261) or the Government Contracts or other Womble Carlyle attorney with whom you usually work.

March 2009

THE PRESIDENT'S MEMORANDUM -- DOES IT REALLY CHANGE GOVERNMENT CONTRACTING?

Holly Emrick Svetz

On March 4, 2009, President Obama issued a Memorandum for the Heads of Executive Departments and Agencies with the subject "Government Contracting." The headlines of newspapers and electronic news services screamed things such as:

- President pledges 'accountable' government that cuts down on wasteful spending
- President Obama Ordered Reforms on Government Contracts
- Obama seeks to limit 'no-bid' contracts in Iraq, elsewhere
- Obama Calls for Review of How Government Contracts Are Awarded

In fact, a Presidential Memorandum has no authority to contravene federal law or regulation. It can, however, influence how the existing laws and regulations are implemented.

The main topics addressed by the Memorandum are:

- Increased number of sole-source contract awards
- Increase in award of cost reimbursement contracts
- Lack of acquisition workforce to oversee acquisition
- Contractors performing inherently governmental functions
- Contracts that are wasteful, inefficient, or not otherwise likely to meet the agency's needs

The Memorandum directs the Director of the Office of Management and Budget to issue "Government-wide guidance" by September 30, 2009 regarding the above issues.

The kinds of guidance we can expect will include:

- Higher levels of approvals for sole source and cost reimbursement contract awards
- Additional documentation requirements for justification of these awards is also likely
- Reports to agency procurement executive regarding service contracts that were outsourced under the A-76 process on the cost savings and efficiency of those contracts
- Reports on whether all agency service contracts are possibly performing inherently governmental functions
- Requirements for all agency procurement executives to conduct reviews of all awarded contracts to eliminate wasteful or inefficient contracts

This Presidential Memorandum is really a shot across the bow -- a warning to agency procurement executives that actual reform will be coming in proposed legislation and regulation that may actually result in changes such as:

- Limits on, elimination, or revision of the statutory bases for exceptions to full and open competition
- Limited defined conditions under which cost reimbursement contracts can be awarded
- Specified services that may not be performed by contractors because they are deemed inherently governmental

In the last year or two, Congress has focused on funding additional positions for auditors and investigators who are reviewing the work of the small acquisition workforce. The government contractor community is most anxious to see if

the administration will fund additional positions for contracting officers, program managers, and others who carry out acquisitions and fund additional training. The Memorandum implies this is an administration goal, but additional spending could be politically risky.

We will look for the OMB's guidance, but will pay particular attention to the authorization bills in Congress to see what changes make it through the political process and provide further reports.

Should you have any questions about any of the issues described above or any aspect of government contracts, we would welcome your call.

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February 2009

Executive Order To Reduce Disruption of Service Contract Performance -- Is It De Facto Unionization

On January 30, 2009, President Obama signed Executive Order No. 13495, "Nondisplacement of Qualified Workers Under Service Contracts." This order essentially requires a successor to an existing service contract to give all the incumbent organization's employees working on the existing service contract first right of refusal for employment by the new awardee organization in order to continue performing the service contract work. Failure to comply with an order from the enforcing agency, the Department of Labor, or a willful violation can result in debarment from further government contracts for three years.

Implementing Regulations And History

The executive order requires the Federal Acquisition Regulatory Council to issue implementing regulations within 180 days. Because the executive order goes so far as to include the specific language in the clause to be incorporated in all service contracts, the time to actual implementation should be brief.

This executive order has an interesting history. On October 20, 1994, President Clinton signed Executive Order 12933, "Nondisplacement of Qualified Workers Under Certain Contracts." President Clinton's E.O. 12933 applied only to service contracts for the maintenance of public buildings. It was narrowed further by excluding large categories, such as building on military installations, buildings in foreign countries, power projects, NASA buildings, and VA hospitals. Otherwise E.O. 12933 is very similar to the new E.O. 13495. Implementing regulations were published on May 7, 1997 at 29 CFR Part 9. It appears only one case was decided and dismissed by the Department of Labor Administrative Review Board because the work was being performed on a military installation before February 17, 2001, when President George W. Bush, by E.O. 13204, revoked President Clinton's E.O. 12933 and all implementing and enforcing regulations.

So fifteen years later, is it simply a matter of dÉjà vu all over again? Not at all. In 2000, the first year data is available on www.usaspending.gov, contracts for maintenance, repair, and alteration of all real property -- which encompasses a broader scope than only public building maintenance services contracts covered by the Clinton Executive Order comprised $7.5 billion of a total procurement budget of $208 billion or only 3.6% of procurement dollars. In contrast, E.O. 13495 covers ALL services contracts, which in FY 08 comprised 37% of all procurement spending, or $170 billion. So while the mechanism may be nearly the same, the impact of this executive order will be astounding.

Practical Effect

For decades, federal agencies were frustrated by the civil service rules that make it extraordinarily difficult to replace workers determined to be ineffective. The use of service contractors gave those federal agencies more control over the quality of personnel performing the work. E.O. 13495 appears to be intended to frustrate that practice. To be clear, E.O. 13495 does not require the new contract awardee to offer a first right of refusal to employees that it "reasonably believes, based on the particular employee's past performance, has failed to perform suitably on the job." To reduce the risk of being found in violation, however, contractors will now need to even more carefully document the problems in the performance of their employees in the same way required by the civil service rules, to demonstrate a basis for its "reasonable belief" before refusing an incumbent a position on the new contract.

The prime contractor must flow down the clause implementing E.O. 13495 to its subcontractors. The E.O. does assist a prime contractor that is threatened with or finds itself the defendant in litigation brought by a subcontractor attempting

not to comply by permitting the prime contractor to request the United States government to enter into the litigation on its behalf.

E.O. 13495 applies to all prime contractors and subcontractors to which the Service Contract Act of 1965 applies except for contracts under $100,000 and other limited exclusions. Ten days before contract performance is complete, the losing contractor must provide a list of names of all prime and subcontractor employees and their anniversary dates of employment to the Contracting Officer, who will in turn, present this list to the gaining contractor. Interestingly, no wage, salary, or benefit information is required to be provided. This places the burden on the gaining contractor to contact all the incumbent's employees individually and request documents showing this financial information. This information may or may not be consistent with the wages, salaries, and benefits contained in the gaining contractor's proposal and soon-to-be-performed contract.

Time to Panic

In those last ten days of the incumbent's contract term, the winning contractor will need to work furiously to contact the incumbent's employees, determine if they will exercise their rights of refusal, negotiate wages, salaries, and benefits with the incumbent's employees, and then fill the slots where the incumbent's employees decide not to exercise their rights of refusal. This process must also be carefully documented in order to protect the gaining contractor from allegations it violated the Nondisplacement rule.

Concluding Thoughts

This change will in effect give union-like job protection to a vast number of federal government service contract employees. Service contracting companies will lose a tremendous amount of flexibility to be more efficient. Some questions that time may answer:

- Is the Executive Order in conflict with state law in many at-will employment states?
- How will the Department of Labor handle situations where employees complain they are being offered lower wages, salaries, and benefits for the same work they performed in prior contracts? (The gaining contractor based it proposal price on the lower wages, salaries, and benefits.)
- How similar must a successor contract be to be considered a "follow-on" contract to which E.O. 13495 applies?
- What are the obligations of the successor organization if the follow-on contract has only 2/3 the slots of the predecessor contract because of management or technology efficiencies?
- Was E.O. 13495 really intended to cover professional services, such as legal and medical services and other exempt labor categories, as well as non-exempt labor categories of services?

Should you have any questions about the contents of this alert, please feel free to contact Jim Kearney (JKearney@wcsr.com; 703-394-2214) or Holly Emrick Svetz (HSvetz@wcsr.com; 703-394-2261).

Bad News and Good News for Government Contractors: Mandatory Disclosures and COTS Exemptions

The procurement policy of the Democratic Congress, now supported by a Democratic administration, appears to be to make things even easier for contractors that traditionally don't do business with the federal government, while "closing loopholes" and clamping down on enforcement for all other contractors. The bad news is that most government contractors now have a mandatory obligation to disclose to an agency Office of the Inspector General ("OIG") certain violations of which the organization has "credible evidence." The good news is that government contractors that provide Commercially Available Off-the-Shelf ("COTS") items are now exempt from the domestic components test of the Buy American Act. This article summarizes these two developments.

MANDATORY DISCLOSURE

Effective December 12, 2008, a new version of FAR 52.203-13, the Contractor Code of Business Ethics and Conduct clause, must be incorporated in contracts valued over $5 million that will have over 120 days of performance. The new clause will impose on federal government contractors the mandatory disclosure requirement. The specific requirement of the clause is:

The Contractor shall timely disclose, in writing, to the agency Office of Inspector General (OIG), with a copy to the Contracting Officer, whenever, in connection with the award, performance, or closeout of this contract or any subcontract thereunder, the Contractor has credible evidence that a principal, employee, agent, or subcontractor of the Contractor has committed--(A) A violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code; or (B) A violation of the civil False Claims Act (31 U.S.C. 3729-3733).

FAR 52.203-13(b)(3)(i).

There are no exceptions for this mandatory disclosure requirement for small businesses, commercial item contractors, or contracts performed entirely outside the United States. Prime contractors are obligated to flow this clause down in subcontracts valued over $5 million and over 120 days of performance, but when the names of the parties are changed in the subcontract clause, it should still state that disclosures by subcontractors should be made directly to the Government, not to the prime contractor. This disclosure obligation survives for three years after final payment is made on a contract.

The preamble accompanying the final rule attempts to allay contractors' fears by emphasizing that internal investigations to determine whether a reportable violation has occurred are encouraged, saying that is the reason the relatively high "credible evidence" standard was selected (compared to the "reasonable grounds to believe" in the proposed rule). While cooperation is a factor listed for consideration of sanctions, the clause also says that government contractors are not obligated to waive the attorney-client privilege. In addition, the clause does limit the violations requiring disclosure to those within the knowledge of the contractor's principals. "Principal" is defined as "an officer, director, owner, partner, or a person having primary management or supervisory responsibilities within a business entity (e.g., general manager; plant manager; head of a subsidiary, division, or business segment; and similar positions."

Small businesses and commercial item contractors remain exempt from the requirement to have business ethics awareness and compliance programs and internal controls. As a practical matter, however, in order to be able to make the required disclosures these exempt organization will still need to set up training, compliance programs, and internal

controls. For covered contractors, the requirements have tightened up. The most troubling new requirement is that the contractor make "[r]easonable efforts not to include an individual as a principal, whom due diligence would have exposed as having engaged in conduct that is in conflict with the Contractor's code of business ethics and conduct." This indicates that even in privately held companies and non-profit organizations, it will be prudent to have background investigations performed on principals.

Separately, the FAR provisions regarding suspension and debarment at FAR 9.406-9.407 have been modified such that failure to disclose these violations -- as well as failure to disclose "significant overpayments" by the Government -- will constitute grounds for suspension and/or debarment.

While the FAR has never imposed new contract clauses on existing contracts without modification, the preamble to the mandatory disclosure final rule indicates that the mandatory disclosure requirement is in effect for all applicable contractors, since it states that contractors should now determine whether disclosures should be made on contracts for which final payment was made within the last three years. The hook is that the new suspension and debarment FAR provision is currently effective, making failure to disclose a basis for suspension or debarment, while the FAR contract clause will be incorporated into new contracts or be added by modification over time. This seems to put the enforcement cart before the notification horse, but government officials have confirmed in discussions with industry that this was their intent.

COTS EXEMPTIONS

The FAR has addressed acquisition of commercial items for over ten years. In that time, however, there has been no special treatment for the COTS subset of commercial items. A new definition for COTS will shortly be included in the FAR:

Commercially available off-the-shelf (COTS) item
(1) Means any item of supply (including construction material) that is --
(i) A commercial item (as defined in paragraph (1) of the definition in this section);
(ii) Sold in substantial quantities in the commercial marketplace; and
(iii) Offered to the Government, under a contract or subcontract at any tier, without modification, in the same form in which it is sold in the commercial marketplace; and
(2) Does not include bulk cargo, as defined in section 3 of the Shipping Act of 1984 (46 U.S.C. App. 1702), such as agricultural products and petroleum products.

FAR 2.101.

There are three main differences between the definition for COTS and the FAR definition of commercial items generally: (i) only supplies can be considered COTS, not services; (ii) any modification to supplies sold to the public disqualifies supplies from COTS treatment; and (iii) the supplies must be offered today.

This rule finalizes some aspects of a rule proposed five long years ago. That proposed rule identified 20 laws to be considered for waiver for COTS contracts. This final rule determines that two will be waived, 10 will not be waived, and the FAR Council found that the other eight were either inapplicable or were already modified sufficiently for all commercial item procurements.

Effective February 17, 2009, COTS products are not subject to the Buy American Act's test that requires that domestic components comprise 50% of the cost of the components of an end product. The domestic manufacturing requirement remains. This means that a government contractor can satisfy the Buy American Act for COTS products if all the components are imported, but the manufacture of the end item must take place in the United States.

Also effective February 17 2009, COTS products will not be subject to the Estimate of Percentage of Recovered Material Act as implemented in FAR 52.223-4, Recovered Material Certification and FAR 52.223-9, Estimate of Percentage of Recovered Material Content.

LAST WORD

President Obama has put new regulatory actions on hold while his administration determines which proposed rules are consistent or inconsistent with its policies. Programs such as E-Verify and the Women-Owned Small Business are in a holding pattern. Now is the time to catch up with the flurry of requirements that have been imposed over the last year.

- Ensure you have a Code of Business Conduct and Ethics, training, compliance programs, and internal controls appropriate to the nature of your organization.
- Investigate and document the investigation into any potential violations of ethics crimes, overpayments, or potential false claims under the False Claims Act.
- Determine if the supplies your organization provides under government contracts or subcontracts qualify as COTS products.
- Review your CCR and ORCA submissions to ensure they are accurate.

Should you have any questions about the contents of this alert, please feel free to contact Jim Kearney (JKearney@wcsr.com; 703-394-2214) or Holly Emrick Svetz (HSvetz@wcsr.com; 703-394-2261).

WOMBLE CARLYLE
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Client Alert

October 2008

Being a Government Contractor With Some of That Rescue Money - Information and Issues

The Emergency Economic Stabilization Act ("EESA") of 2008, which became law on Friday, October 3, 2008, authorizes the Secretary of Treasury, through the newly created Office of Financial Stability, to enter into contracts, including contracts for services, and to designate financial institutions as financial agents. By outsourcing many of the functions required in the economic stabilization plan to contractors and financial agents, the Department of Treasury can quickly get experienced such entities to work. This is an opportunity for existing contractors and financial agents to expand their work and for new entrants to the market.

For a description of the types of opportunities recently announced to be awarded through EESA and their requirements, please click here.

With government contracts usually comes the Federal Acquisition Regulations ("FAR"), and with financial agent agreements comes special Department of Treasury regulations. Both of these regulatory regimes include requirements that exceed normal corporate best practices.

It remains to be seen to what extent the FAR will govern contracting under EESA, notwithstanding the much-touted waiver of FAR requirements under EESA. Moreover, it is uncertain whether existing Treasury regulations governing financial agents may be amended to address the possible differences between the financial agents who will be appointed under EESA and the financial agents historically designated by Treasury.

Highlighted below are key aspects of FAR procurement contracts and Financial Agency Agreements implicated by Treasury's contracting under EESA.

FAR Procurement Contracts

- The Secretary may waive specific FAR requirements for unusual and compelling urgency.
- *What is not new:* Procurement flexibility has been available to government agencies facing crises in the past -- most recently -- contingency contracting for OIF/OEF, disaster recovery for Katrina, authorization for the Department of Homeland Security, and the Federal Aviation Administration procurement regulations.
- ***What is new:*** EESA essentially leaves it to the Secretary of Treasury to define which FAR provisions are necessary to waive, giving potential offerors the opportunity to recommend waiver of provisions it considers barriers to performing this work.
- *What should a contractor ask to be waived?* Under the authority granted in other crises, the competition, intellectual property, and accounting provisions are most commonly waived in whole or in part.

Women- and minority-owned businesses:

- Nothing in the FAR requires women- and minority-owned businesses to receive contracts.
- The federal government has established goals of awarding 23% of its contracting dollars to small businesses, 5% to small, disadvantaged businesses, 5% to women-owned small businesses, 3% to service-disabled veteran-owned small businesses, and 3% to HUBZone businesses and the Small Business Administration provides an annual "report card" to Congress regarding each federal agency's progress in achieving those goals.

- Even though there are no specific requirements for contracting with women- and minority-owned businesses, EESA requires the Secretary to develop and implement standards and procedures to ensure, to the maximum extent practicable the inclusion and utilization of women- and minority-owned businesses. Including qualified women- and minority-owned small business on a contractor's team will likely enhance an offering.

FAR hurdles:

- Requirements for affirmative action plans for minorities, workers with disabilities and veterans for organizations with $50,000 or more in government contracts and subcontractors and 50 or more employees in any one facility. It is uncertain at this point, and perhaps unlikely, that these provisions will be waived, but if they are not, a contractor has 120 days to comply.
- Requirements for contractors that are not small businesses themselves to establish and have approved small business subcontracting plans which set goals for subcontracting spends over $500,000 to be allocated to the small business categories discussed above. The actual expenditure of subcontracting dollars to large and the various categories of small businesses must be reported. The contractor is not required to achieve the federal government's goals, but must make attempt to include these small business groups to the maximum extent practicable.

Treasury Financial Agency Agreements

- Department of Treasury has long had authority to appoint Financial Agents.
- *What are Financial Agency Agreements?* Financial Agency Agreements are not procurement contracts for services or supplies, but instead are agreements under which a qualified financial institution can perform banking services transactions on behalf of the Department of Treasury.
- ***What are financial institutions?*** "Financial institution" includes a complex list of organizations defined by law and regulation.

Financial Agency Agreement hurdles:

- Current regulations require financial agents to comply with the affirmative action requirements which are otherwise required under procurement contracts, grants, cooperative agreements, and any other government funding instrument.
- Remaining terms and conditions are "negotiable," starting with a Department of Treasury standard form agreement.

Other Considerations

- Personnel security requirements will likely exceed standard industry practices, requiring deeper background investigations and screening.
- Information technology security will likely be required to meet the Federal Information Security Management Act ("FISMA") standards.

Conflicts of interest:

- *What is a conflict of interest?* A situation where the objectivity of the contractor may be impaired because performance of the contract or financial agency agreement under EESA has the potential to affect other interest of the organization. This includes conflicts of affiliates, consultants, or subcontractors, and in identified opportunities, individual employees, on a team.
- *Is there a way around a conflict of interest?* Yes. As is commonly done in procurement contracting, an offeror may propose a "mitigation plan" by which the interests of the organization that conflict with the work under

EESA are walled off. Depending upon the type and degree of conflict, the wall between the part of the organization performing the EESA work and the part of the organization performing the conflicting work may be separated in several ways, including, but not limited to: separate physical locations, controlled physical access, independent groups of employees, separate information technology systems, separate information technology access, and separate back-office or headquarters support groups. The government must approve a proposed mitigation plan.

We believe one of our most important duties as your legal counsel is to keep you informed during these uncertain times. Should you have any questions about any of the issues described above or any aspect of government contracts, we would welcome your call.

Government Contracts Team

Womble Carlyle's Government Contracts team is prepared to assist you in navigating all the challenges of government contracting – from the initial competition to the final close-out of the contract. Our attorneys are uniquely equipped to assist government contractors with the regulatory hurdles faced when selling goods, technologies and services abroad. Our government contracts practice is nationwide in scope, and our attorneys have represented clients in all sectors – defense and aerospace, technology and services, computer and electronics, banking and financial services, universities and non-profits, pharmaceuticals and bio-tech, real estate and construction.

Federal Government Contractors And Subcontractors Now Must Have Codes of Business Ethics and Conduct

While most of the country was digesting turkey, an important Federal Acquisition Regulation rule was made final. As of Friday, November 23, 2007, a contractor code of business ethics and conduct is now required for many government contractors and subcontractors submitting proposals and entering new contracts. While many government contractors and subcontractors have voluntarily adopted codes of business ethics, only the Department of Defense regulations previously recommended a code and no regulation made it mandatory until now.

Contracting officers are required to include the new FAR clause 52.203-13, Contractor Code of Business Ethics and Conduct in all solicitations and contracts going forward except:

- Commercial item contracts under FAR part 12
- Contracts that will be performed entirely outside the United States
- Contracts not expected to exceed $5 million (including all options) and the performance is less than 120 days

The clause requires that the contractor flow down the substance of the clause to all subcontractors except where the three exceptions above apply.

Note that small businesses are not exempt from the clause as either prime or subcontractors. One of the reasons cited in the rule's commentary was the Army Suspension and Debarment Official's statement that the majority of small business he encounters in review of Army contractor misconduct have not implemented contractor compliance programs.

In an effort to keep the regulations from becoming an undue burden on small businesses, the policy guidance is that the code of conduct should be "suitable to the size of the company and extent of its involvement in Government contracting." The commentary to the new rule says that, "[t]he Government will not be reviewing plans unless a problem arises." Of course, these codes of conduct will be scrutinized when something has gone wrong and the scope that seems appropriate then will likely differ from the company's perspective upon commencement of contract performance. The flexibility in the rule presents a challenge for any contractor or subcontractor to demonstrate compliance.

Contractors have 30 days following contract award, unless the contracting officer extends the deadline, to have a written code of business ethics and conduct in place and to provide a copy to each employee engaged in performance of the contract.

While every contractor and subcontractor is required to promote compliance with its code of business ethics and conduct, small businesses are exempt from the requirements for an awareness program and internal control systems, which must be in place within 90 days after contract award, unless the contracting officer extends the deadline. Keeping in mind that the policy guidance also states that the awareness program and internal control systems should also be "suitable to the size of the company and extent of its involvement in Government contracting," the clause says an internal control system *shall* facilitate timely discovery of improper conduct and ensure corrective measures are promptly instituted and carried out. While no specific program is required, the clause offers examples of things that the internal control system "should provide for:" periodic review of business practices, procedures, policies, and internal controls; an internal reporting mechanism such as a hotline; internal and/or external audits; and disciplinary action for improper conduct. No additional guidance or examples are provided to describe the minimally compliant awareness program.

Clearly this effort involves more than simply e-mailing a copy of a code to all employees. The human resources department needs to be involved in distributing the code to existing employees and new hires and should have policies to address disciplinary actions. Inside or outside reviews and audits need to be budgeted, planned, and staffed. The best internal reporting system needs to be considered. Most companies have various elements of a code of business ethics and conduct and related internal controls in place already. In a very short period of time, government contractors and subcontractors must determine how best to ensure they are compliant with this minimum standard established in the new FAR clause.

Many government contractors and subcontractors have established internal control systems consistent with the United States Sentencing Commission 2005 Federal Sentencing Guidelines. The FAR clause includes some elements of the Sentencing Guidelines' recommended internal control systems, but is a lesser standard. Contractors and subcontractors should be aware that compliance with this new FAR clause may not be sufficient to mitigate the punishment of the organization or its leaders under the Sentencing Guidelines and may consider implementing more stringent internal control systems.

A new FAR clause 52.203-14, Display of Hotline Poster(s) was issued in conjunction with the code of business ethics and conduct rule. The rule is a bit confusing because there are several options and exceptions. Where a company establishes its own internal reporting mechanism, such as its own hotline the contractor or subcontractor need not display an agency fraud hotline poster, except the Department of Homeland Security hotline poster must be displayed, if applicable. The clause may provide information about how to obtain the contracting agency's own required posters. Otherwise, the contractor or subcontractor may display any agency fraud hotline poster.

Should you have any questions about the contents of this alert, please feel free to contact Jim Kearney (JKearney@wcsr.com; 703-394-2214) or Holly Emrick Svetz (HSvetz@wcsr.com; 703-394-2261).

WOMBLE CARLYLE
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Client Alert

April 2007

State and Local Government Contractors Beware: Political Contributions Can Cost You Business

An ever-growing number of states and municipalities are enacting so-called "pay-to-play" laws that bar or severely limit campaign contributions by state and local contractors, their top executives, and in some instances, the executives' spouses and dependents. The stakes for noncompliance are high. Businesses that have (or hope to have) a contract with state or local governments that fail to comply with these laws face the immediate severing of existing contracts, suspension from consideration for future contracts, monetary fines, and even criminal penalties.

The scope and operation of these laws is complex and varies widely from state to state, and city to city. They can differ according to:

- The kinds of contracts covered, which can include construction, furnishing of goods and services, sale or lease of land or buildings, licensing agreements, loans and grants, and investment advisory services to governmental pension plans
- The type of state or local agency with which the current or prospective contractor holds or seeks a contract
- Whether the contract is let on a sole source or competitive bid basis
- Which company officials are covered and whether spouses or dependents are included
- Which candidates, political parties, or state political action committees are covered
- Certification and notification requirements
- "Look back" and "look forward" provisions, which capture contributions by companies or restricted persons for some period of time before and after a decision to contract with them
- Whether there is an opportunity to "cure" an improper contribution

More than a dozen states currently have pay-to-play laws, including Connecticut, Florida, Kentucky, New Jersey, Ohio, South Carolina, and West Virginia. The cities of Houston, Los Angeles, Oakland, Philadelphia, and San Francisco have similar rules in place. In addition to imposing a contribution bar, some of these jurisdictions also require the filing of disclosure reports to prevent a practice called "wheeling" – making a contribution to a permitted recipient that is later transferred to a candidate committee or political party subject to the bar. Several states, including Maryland, Pennsylvania, and Rhode Island, do not have pay-to-play laws prohibiting or restricting campaign contributions, but impose extensive reporting requirements on any person doing business with the state.

Pay-to-play laws make it more important than ever for businesses to adopt effective compliance programs for their political activities. This has been true for some time, as regulation grows more complex and varied, penalties for violations skyrocket, and corporations are increasingly sanctioned for executive fundraising and other volunteer activity that make impermissible use of corporate facilities and staff time. Now the stakes are even higher. Companies that lack appropriate policies and training, or lack diligence in tracking contributions from their PACs, executives, and their executives' families face the loss of contracts, monetary penalties, and reputational harm.

Womble Carlyle attorneys can help companies stay on top of these fast-changing laws and avoid potential problems. Our team of experienced political law attorneys can also assist you to develop and implement an effective compliance program.

Please contact the attorney with whom you usually work or any one of the following attorneys if you have any questions.

Lawrence H. Norton and James A. Kahl - Larry and Jim served as General Counsel and Deputy General Counsel, respectively, of the Federal Election Commission, spanning the period from September 2001 to March 2007. As leaders of the FEC's legal team, Larry and Jim played a critical role in every aspect of implementation and enforcement of the landmark McCain-Feingold law. Larry and Jim also have extensive experience providing training for, and working with, state and local officials who oversee campaign finance, gift, and lobbying laws. Larry and Jim are frequent speakers on corporate political activities and related compliance issues.

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Client Alert

December 2006

New Small Business Administration Regulations Affect Size Reporting

On November 15, 2006, the Small Business Administration issued new final regulations that addressed several small business issues three and one-half years and over 600 comments after its proposed rule was published. The new regulations are effective June 30, 2007 for all new and existing solicitations and contracts. The overall effect of the revised regulations will be to make it more difficult for companies that become no longer small during the course of a long term contract to keep receiving task orders that are set-aside for small businesses or that a federal agency is planning to count toward its small business contracting goals. The major changes are:

- In the case of a merger or acquisition, even if novation or name change is not required, the contractor must recertify its small business size status within 30 days of the transaction becoming final.
- For contracts with durations longer than five years, concerns must re-certify their small business size status prior to the sixth year of performance, and every time an option is exercised thereafter. Currently, contractor must only certify its size in its proposal for the original contract award.
- Each order under a long term contract must be assigned a North American Industry Classification System (NAICS) code, which must correspond to the NAICS code for the underlying long term contract.
- Where an agency exercises its discretion to require recertification of an order under a long term contract even when not required by regulation, the SBA will determine the size as of the date the concern submits its self-representation as part of its response to the solicitation for the order.

Except in the case of certain set-aside contracts, the federal agency is not required to terminate a contract when a company's size changes from small to other than small. The main purpose of these regulatory changes is for the government to assess the true percentage of its contracts that are awarded to small businesses. If the actual numbers are short of the government-wide goals of 23% for small businesses, 5% for small disadvantaged businesses, 5% for women-owned small businesses, 3% for HUBZone businesses and 3% for Service-Disabled Veteran-Owned Small Businesses, then the federal agencies will be pressured to award more contracts to companies that meet the size standards for small businesses.

Should you have any questions about the contents of this alert, please feel free to contact Holly Emrick Svetz (HSvetz@wcsr.com; 703-394-2261).

September 2006

SBIR: You Can Stay In the Program After You've Grown

This article was published in the September 9th edition of Southeast Tech Wire.

Most technology companies know that the Small Business Innovative Research ("SBIR") program requires federal agencies to set aside 2.5% of their budget for research and development contracts for small businesses. Many start-ups begin with several Phase I contracts or grants.

What many technology companies do not know is that after completing Phase I and Phase II agreements and/or growing beyond the 500 employee small business status for SBIR agreement, the Phase III SBIR offers many opportunities. The formal definition of the Phase III SBIR is:

Phase III is the period during which Phase II innovation moves from the laboratory into the marketplace. No SBIR funds support this phase. The small business must find funding in the private sector or other non-SBIR federal agency funding.

Importantly, the last phrase above says that while set-aside SBIR funds cannot be used in Phase III, other federal government funds can. Phase III is much more flexible than Phases I or II in the following ways:

- The small business size limits do not apply to Phase III awards.
- The requirement that the principal investigator is primarily employed by the SBIR contractor does not apply to Phase III.
- The Phase III award process is exempt from the standard public notice requirements.The Phase III award process is exempt from the standard competition requirements because the Phase I and Phase II competitions satisfy the requirements.
- There is no limit to the number, duration, type, or dollar value of Phase III awards made to a business concern.
- A federal agency may enter into a Phase III SBIR agreement at any time with a Phase I or Phase II awardee.
- There is no limit on the time that may elapse between a Phase I or Phase II award and the Phase III award, or between a Phase III award and a subsequent Phase III award
- Phase III SBIR may be for products, production, services, R&D, or any combination.
- If a Phase III SBIR award derives from or is a logical extension from the firm's work under prior SBIR funding agreements, then SBIR data rights apply (meaning the government agency can only use the data for internal purposes and not have other firms use it for government purposes for 4 or 5 years).
- The Phase I and II SBIR contractors have preference, including sole source awards for follow-on R&D or production and the agencies must justify why they continue on with other than the Phase I and II SBIR contractors.

The Phase III SBIR is a vehicle for a federal agency and contractor or grantee to continue work that both parties agree should be commercialized to benefit the public -- a win-win!

Should you have any questions about the contents of this alert, please feel free to contact Holly Emrick Svetz (HSvetz@wcsr.com; 703-394-2261).

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