

(2) The contracting officer may direct a prime contractor to withhold from any sums owed to a subcontractor under a subcontractor of the prime contract the amount of any kickback which was or may be offset against the prime contractor under subparagraph (d)(1) of this subsection; and

(3) An offset under subparagraph (d)(1) or a direction under subparagraph (d)(2) of this subsection is a claim by the Government for the purposes of the Contract Disputes Act of 1978.

(e) Authorizes contracting officers to order that sums withheld under subparagraph (d)(2) of this subsection be paid to the contracting agency, or if the sum has already been offset against the prime contractor, that it be retained by the prime contractor.

(f) Requires the prime contractor to notify the contracting officer when the withholding under subparagraph (d)(2) of this subsection has been accomplished unless the amount withheld has been paid to the Government.

(g) Requires a prime contractor or subcontractor to report in writing 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 any possible violation of the Act when the prime contractor or subcontractor has reasonable grounds to believe such violation may have occurred.

(h) Provides that, for the purpose of ascertaining whether there has been a violation of the Act with respect to any prime contract, the Government Accountability Office and the inspector general of the contracting agency, or a representative of such contracting agency designated by the head of such agency if the agency does not have an inspector general, shall have access to and may inspect the facilities and audit the books and records, including any electronic data or records, of any prime contractor or subcontractor under a prime contract awarded by such agency.

(i) Requires each contracting agency to include in each prime contract exceeding \$150,000 for other than commercial items (see part 12), a requirement that the prime contractor shall—

(1) Have in place and follow reasonable procedures designed to prevent and detect violations of the Act in its own operations and direct business relationships (e.g., company ethics rules prohibiting kickbacks by employees, agents, or subcontractors; education programs for new employees and subcontractors, explaining policies about kickbacks, related company procedures and the consequences of detection; procurement procedures to minimize the opportunity for kickbacks; audit procedures designed to detect kickbacks; periodic surveys of subcontractors to elicit information about kickbacks; procedures to report kickbacks to law enforcement officials; annual declarations by employees of gifts or gratuities received from subcontractors; annual employee declarations that they have violated no company ethics rules; personnel practices that document unethical or illegal behavior and make such information available to prospective employers); and

(2) Cooperate fully with any Federal agency investigating a possible violation of the Act.

(j) Notwithstanding paragraph (i) of this subsection, a prime contractor shall cooperate fully with any Federal government agency investigating a violation of Section 3 of the Anti-Kickback Act of 1986 (41 U.S.C. 51-58).

[52 FR 6121, Feb. 27, 1987; 52 FR 9989, Mar. 27, 1987, as amended at 53 FR 34226, Sept. 2, 1988; 60 FR 48235, Sept. 18, 1995; 61 FR 39191, July 26, 1996; 62 FR 235, Jan. 2, 1997; 71 FR 57380, Sept. 28, 2006; 75 FR 53131, Aug. 30, 2010]

3.502-3 Contract clause.

The contracting officer shall insert the clause at 52.203-7, Anti-Kickback Procedures, in solicitations and contracts exceeding the simplified acquisition threshold, other than those for commercial items (see part 12).

[60 FR 48235, Sept. 18, 1995, as amended at 61 FR 39190, July 26, 1996]

3.503 Unreasonable restrictions on subcontractor sales.

3.503-1 Policy.

10 U.S.C. 2402 and 41 U.S.C. 253(g) require that subcontractors not be unreasonably precluded from making direct

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sales to the Government of any supplies or services made or furnished under a contract. However, this does not preclude contractors from asserting rights that are otherwise authorized by law or regulation.

[50 FR 35475, Aug. 30, 1985, and 51 FR 27116, July 29, 1986]

3.503-2 Contract clause.

The contracting officer shall insert the clause at 52.203-6, Restrictions on Subcontractor Sales to the Government, in solicitations and contracts exceeding the simplified acquisition threshold. For the acquisition of commercial items, the contracting officer shall use the clause with its Alternate I.

[74 FR 11832, Mar. 19, 2009]

Subpart 3.6—Contracts With Government Employees or Organizations Owned or Controlled by Them

3.601 Policy.

(a) Except as specified in 3.602, a contracting officer shall not knowingly award a contract to a Government employee or to a business concern or other organization owned or substantially owned or controlled by one or more Government employees. This policy is intended to avoid any conflict of interest that might arise between the employees' interests and their Government duties, and to avoid the appearance of favoritism or preferential treatment by the Government toward its employees.

(b) For purposes of this subpart, special Government employees (as defined in 18 U.S.C. 202) performing services as experts, advisors, or consultants, or as members of advisory committees, are not considered Government employees unless—

(1) The contract arises directly out of the individual's activity as a special Government employee;

(2) In the individual's capacity as a special Government employee, the individual is in a position to influence the award of the contract; or

(3) Another conflict of interest is determined to exist.

[55 FR 34864, Aug. 24, 1990]

3.602 Exceptions.

The agency head, or a designee not below the level of the head of the contracting activity, may authorize an exception to the policy in 3.601 only if there is a most compelling reason to do so, such as when the Government's needs cannot reasonably be otherwise met.

3.603 Responsibilities of the contracting officer.

(a) Before awarding a contract, the contracting officer shall obtain an authorization under 3.602 if—

(1) The contracting officer knows, or has reason to believe, that a prospective contractor is one to which award is otherwise prohibited under 3.601; and

(2) There is a most compelling reason to make an award to that prospective contractor.

(b) The contracting officer shall comply with the requirements and guidance in subpart 9.5 before awarding a contract to an organization owned or substantially owned or controlled by Government employees.

Subpart 3.7—Voiding and Rescinding Contracts

SOURCE: 51 FR 27116, July 29, 1986, unless otherwise noted.

3.700 Scope of subpart.

(a) This subpart prescribes Governmentwide policies and procedures for exercising discretionary authority to declare void and rescind contracts in relation to which—

(1) There has been a final conviction for bribery, conflict of interest, disclosure or receipt of contractor bid or proposal information or source selection information in exchange for a thing of value or to give anyone a competitive advantage in the award of a Federal agency procurement contract, or similar misconduct; or

(2) There has been an agency head determination that contractor bid or proposal information or source selection