

## SUBCHAPTER A—GENERAL

### PART 1—FEDERAL ACQUISITION REGULATIONS SYSTEM

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AUTHORITY: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

SOURCE: 48 FR 42103, Sept. 19, 1983, unless otherwise noted.

#### 1.000 Scope of part.

This part sets forth basic policies and general information about the Federal Acquisition Regulations System including purpose, authority, applicability, issuance, arrangement, numbering, dissemination, implementation, supplementation, maintenance, administration, and deviation. Subparts 1.2, 1.3, and 1.4 prescribe administrative procedures for maintaining the FAR System.

#### Subpart 1.1—Purpose, Authority, Issuance

##### 1.101 Purpose.

The Federal Acquisition Regulations System is established for the codification and publication of uniform policies and procedures for acquisition by

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all executive agencies. The Federal Acquisition Regulations System consists of the Federal Acquisition Regulation (FAR), which is the primary document, and agency acquisition regulations that implement or supplement the FAR. The FAR System does not include internal agency guidance of the type described in 1.301(a)(2).

[48 FR 42103, Sept. 19, 1983, as amended at 51 FR 27116, July 29, 1986]

### **1.102 Statement of guiding principles for the Federal Acquisition System.**

(a) The vision for the Federal Acquisition System is to deliver on a timely basis the best value product or service to the customer, while maintaining the public's trust and fulfilling public policy objectives. Participants in the acquisition process should work together as a team and should be empowered to make decisions within their area of responsibility.

(b) The Federal Acquisition System will—

(1) Satisfy the customer in terms of cost, quality, and timeliness of the delivered product or service by, for example—

(i) Maximizing the use of commercial products and services;

(ii) Using contractors who have a track record of successful past performance or who demonstrate a current superior ability to perform; and

(iii) Promoting competition;

(2) Minimize administrative operating costs;

(3) Conduct business with integrity, fairness, and openness; and

(4) Fulfill public policy objectives.

(c) The Acquisition Team consists of all participants in Government acquisition including not only representatives of the technical, supply, and procurement communities but also the customers they serve, and the contractors who provide the products and services.

(d) The role of each member of the Acquisition Team is to exercise personal initiative and sound business judgment in providing the best value product or service to meet the customer's needs. In exercising initiative, Government members of the Acquisition Team may assume if a specific strategy, practice, policy or procedure is in the best interests of the Govern-

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ment and is not addressed in the FAR nor prohibited by law (statute or case law), Executive order or other regulation, that the strategy, practice, policy or procedure is a permissible exercise of authority.

[60 FR 34733, July 3, 1995]

### **1.102-1 Discussion.**

(a) *Introduction.* The statement of Guiding Principles for the Federal Acquisition System (System) represents a concise statement designed to be user-friendly for all participants in Government acquisition. The following discussion of the principles is provided in order to illuminate the meaning of the terms and phrases used. The framework for the System includes the Guiding Principles for the System and the supporting policies and procedures in the FAR.

(b) *Vision.* All participants in the System are responsible for making acquisition decisions that deliver the best value product or service to the customer. Best value must be viewed from a broad perspective and is achieved by balancing the many competing interests in the System. The result is a system which works better and costs less.

[60 FR 34733, July 3, 1995]

### **1.102-2 Performance standards.**

(a) *Satisfy the customer in terms of cost, quality, and timeliness of the delivered product or service.* (1) The principal customers for the product or service provided by the System are the users and line managers, acting on behalf of the American taxpayer.

(2) The System must be responsive and adaptive to customer needs, concerns, and feedback. Implementation of acquisition policies and procedures, as well as consideration of timeliness, quality and cost throughout the process, must take into account the perspective of the user of the product or service.

(3) When selecting contractors to provide products or perform services the Government will use contractors who have a track record of successful past performance or who demonstrate a current superior ability to perform.

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(4) The Government must not hesitate to communicate with the commercial sector as early as possible in the acquisition cycle to help the Government determine the capabilities available in the commercial marketplace. The Government will maximize its use of commercial products and services in meeting Government requirements.

(5) It is the policy of the System to promote competition in the acquisition process.

(6) The System must perform in a timely, high quality, and cost-effective manner.

(7) All members of the Team are required to employ planning as an integral part of the overall process of acquiring products or services. Although advance planning is required, each member of the Team must be flexible in order to accommodate changing or unforeseen mission needs. Planning is a tool for the accomplishment of tasks, and application of its discipline should be commensurate with the size and nature of a given task.

(b) *Minimize administrative operating costs.* (1) In order to ensure that maximum efficiency is obtained, rules, regulations, and policies should be promulgated only when their benefits clearly exceed the costs of their development, implementation, administration, and enforcement. This applies to internal administrative processes, including reviews, and to rules and procedures applied to the contractor community.

(2) The System must provide uniformity where it contributes to efficiency or where fairness or predictability is essential. The System should also, however, encourage innovation, and local adaptation where uniformity is not essential.

(c) *Conduct business with integrity, fairness, and openness.* (1) An essential consideration in every aspect of the System is maintaining the public's trust. Not only must the System have integrity, but the actions of each member of the Team must reflect integrity, fairness, and openness. The foundation of integrity within the System is a competent, experienced, and well-trained, professional workforce. Accordingly each member of the Team is responsible and accountable for the

wise use of public resources as well as acting in a manner which maintains the public's trust. Fairness and openness require open communication among team members, internal and external customers, and the public.

(2) To achieve efficient operations, the System must shift its focus from "risk avoidance" to one of "risk management." The cost to the taxpayer of attempting to eliminate all risk is prohibitive. The Executive Branch will accept and manage the risk associated with empowering local procurement officials to take independent action based on their professional judgment.

(3) The Government shall exercise discretion, use sound business judgment, and comply with applicable laws and regulations in dealing with contractors and prospective contractors. All contractors and prospective contractors shall be treated fairly and impartially but need not be treated the same.

(d) *Fulfill public policy objectives.* The System must support the attainment of public policy goals adopted by the Congress and the President. In attaining these goals, and in its overall operations, the process shall ensure the efficient use of public resources.

[60 FR 34734, July 3, 1995, as amended at 62 FR 51229, Sept. 30, 1997]

### 1.102-3 Acquisition team.

The purpose of defining the Federal Acquisition Team (Team) in the Guiding Principles is to ensure that participants in the System are identified—beginning with the customer and ending with the contractor of the product or service. By identifying the team members in this manner, teamwork, unity of purpose, and open communication among the members of the Team in sharing the vision and achieving the goal of the System are encouraged. Individual team members will participate in the acquisition process at the appropriate time.

[60 FR 34734, July 3, 1995]

### 1.102-4 Role of the acquisition team.

(a) Government members of the Team must be empowered to make acquisition decisions within their areas of responsibility, including selection,

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negotiation, and administration of contracts consistent with the Guiding Principles. In particular, the contracting officer must have the authority to the maximum extent practicable and consistent with law, to determine the application of rules, regulations, and policies, on a specific contract.

(b) The authority to make decisions and the accountability for the decision made will be delegated to the lowest level within the System, consistent with law.

(c) The Team must be prepared to perform the functions and duties assigned. The Government is committed to provide training, professional development, and other resources necessary for maintaining and improving the knowledge, skills, and abilities for all Government participants on the Team, both with regard to their particular area of responsibility within the System, and their respective role as a team member. The contractor community is encouraged to do likewise.

(d) The System will foster cooperative relationships between the Government and its contractors consistent with its overriding responsibility to the taxpayers.

(e) The FAR outlines procurement policies and procedures that are used by members of the Acquisition Team. If a policy or procedure, or a particular strategy or practice, is in the best interest of the Government and is not specifically addressed in the FAR, nor prohibited by law (statute or case law), Executive order or other regulation, Government members of the Team should not assume it is prohibited. Rather, absence of direction should be interpreted as permitting the Team to innovative and use sound business judgment that is otherwise consistent with law and within the limits of their authority. Contracting officers should take the lead in encouraging business process innovations and ensuring that business decisions are sound.

[60 FR 34734, July 3, 1995, as amended at 62 FR 44804, Aug. 22, 1997]

### 1.103 Authority.

(a) The development of the FAR System is in accordance with the requirements of 41 U.S.C. chapter 13, Acquisition Councils.

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(b) The FAR is prepared, issued, and maintained, and the FAR System is prescribed, jointly by the Secretary of Defense, the Administrator of General Services, and the Administrator, National Aeronautics and Space Administration, under their several statutory authorities.

[48 FR 42103, Sept. 19, 1983, as amended at 51 FR 27116, July 29, 1986. Redesignated at 60 FR 34733, July 3, 1995, as amended at 65 FR 36014, June 6, 2000; 79 FR 24194, Apr. 29, 2014]

### 1.104 Applicability.

The FAR applies to all acquisitions as defined in part 2 of the FAR, except where expressly excluded.

[48 FR 42103, Sept. 19, 1983. Redesignated at 60 FR 34733, July 3, 1995]

### 1.105 Issuance.

#### 1.105–1 Publication and code arrangement.

(a) The FAR is published in (1) the daily issue of the FEDERAL REGISTER, (2) cumulated form in the Code of Federal Regulations (CFR), and (3) a separate loose-leaf edition.

(b) The FAR is issued as Chapter 1 of Title 48, CFR. Subsequent chapters are reserved for agency acquisition regulations that implement or supplement the FAR (see subpart 1.3). The CFR Staff will assign chapter numbers to requesting agencies.

(c) Each numbered unit or segment (e.g., part, subpart, section, etc.) of an agency acquisition regulation that is codified in the CFR shall begin with the chapter number. However, the chapter number assigned to the FAR will not be included in the numbered units or segments of the FAR.

[48 FR 42103, Sept. 19, 1983. Redesignated at 60 FR 34733, July 3, 1995]

#### 1.105–2 Arrangement of regulations.

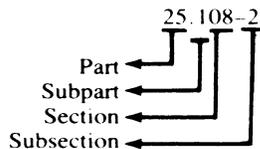
(a) *General.* The FAR is divided into subchapters, parts (each of which covers a separate aspect of acquisition), subparts, sections, and subsections.

(b) *Numbering.* (1) The numbering system permits the discrete identification of every FAR paragraph. The digits to the left of the decimal point represent the part number. The numbers to the right of the decimal point and to the

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left of the dash, represent, in order, the subpart (one or two digits), and the section (two digits). The number to the right of the dash represents the subsection. Subdivisions may be used at the section and subsection level to identify individual paragraphs. The following example illustrates the make-up of a FAR number citation (note that subchapters are not used with citations):



(2) Subdivisions below the section or subsection level consist of parenthetical alpha numerics using the following sequence: (a)(1)(i)(A)(I)(i).

(c) *References and citations.* (1) Unless otherwise stated, cross-references indicate parts, subparts, sections, subsections, paragraphs, subparagraphs, or subdivisions of this regulation.

(2) This regulation may be referred to as the Federal Acquisition Regulation or the FAR.

(3) Using the FAR coverage at 9.106-4(d) as a typical illustration, reference to the—

(i) Part would be “FAR part 9” outside the FAR and “part 9” within the FAR.

(ii) Subpart would be “FAR subpart 9.1” outside the FAR and “subpart 9.1” within the FAR.

(iii) Section would be “FAR 9.106” outside the FAR and “9.106” within the FAR.

(iv) Subsection would be “FAR 9.106-4” outside the FAR and “9.106-4” within the FAR.

(v) Paragraph would be “FAR 9.106-4(d)” outside the FAR and “9.106-4(d)” within the FAR.

(4) Citations of authority (e.g., statutes or executive orders) in the FAR shall follow the FEDERAL REGISTER form guides.

[48 FR 42103, Sept. 19, 1983. Redesignated at 60 FR 34733, July 3, 1995, as amended at 65 FR 36015, June 6, 2000; 77 FR 44065, July 26, 2012]

**1.105-3 Copies.**

Copies of the FAR in FEDERAL REGISTER, loose-leaf, CD-ROM and CFR form may be purchased from the Superintendent of Documents, Government Printing Office (GPO), Washington, DC 20402.

[48 FR 42103, Sept. 19, 1983. Redesignated at 60 FR 34733, July 3, 1995, as amended at 62 FR 40236, July 25, 1997]

**1.106 OMB approval under the Paperwork Reduction Act.**

The Paperwork Reduction Act of 1980 (44 U.S.C. chapter 35) imposes a requirement on Federal agencies to obtain approval from the Office of Management and Budget (OMB) before collecting information from 10 or more members of the public. The information collection and recordkeeping requirements contained in this regulation have been approved by the OMB. The following OMB control numbers apply:

FAR segment	OMB control No.
3.103 .....	9000-0018
3.11 .....	9000-0183
4.102 .....	9000-0033
4.7 .....	9000-0034
4.9 .....	9000-0097
4.14 .....	9000-0177
4.17 .....	9000-0179
4.605 .....	9000-0145
4.607 .....	9000-0145
5.405 .....	9000-0036
7.2 .....	9000-0082
8.5 .....	9000-0113
9.1 .....	9000-0011
9.2 .....	9000-0083
14.201 .....	9000-0034
14.202-4 .....	9000-0040
14.202-5 .....	9000-0039
14.205 .....	9000-0037
14.407 .....	9000-0038
14.5 .....	9000-0041
15.2 .....	9000-0037
15.209 .....	9000-0034
15.4 .....	9000-0013
15.404-1(f) .....	9000-0080
15.407-2 .....	9000-0078
15.408 .....	9000-0115
19.7 .....	9000-0006 and 9000-0007
22.103 .....	9000-0065
22.5 .....	9000-0175
22.8 .....	1250-0003
22.11 .....	9000-0066
22.12 .....	1235-0007 and 1235-0025
22.14 .....	1250-0005
22.16 .....	1245-0004
22.17 .....	9000-0188
23.602 .....	9000-0107

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FAR segment	OMB control No.	FAR segment	OMB control No.
25.302	9000-0184	52.212-3(h)	9000-0094
27.2	9000-0096	52.212-4(t)	9000-0159
27.3	9000-0095	52.212-5	9000-0034
27.4	9000-0090	52.214-14	9000-0047
28.1	9000-0045	52.214-15	9000-0044
28.2	9000-0045	52.214-16	9000-0044
29.304	9000-0059	52.214-21	9000-0039
30.6	9000-0129	52.214-26	9000-0034
31.205-46	9000-0079	52.214-28	9000-0013
31.205-46(a)(3)	9000-0088	52.215-1(c)(2)(iv)	9000-0048
32.000	9000-0138	52.215-1(d)	9000-0044
32.1	9000-0070	52.215-2	9000-0034
	and	52.215-6	9000-0047
	9000-0138	52.215-9	9000-0078
32.2	9000-0138	52.215-12	9000-0013
32.4	9000-0073	52.215-13	9000-0013
32.5	9000-0010	52.215-14	9000-0080
	and	52.215-19	9000-0115
	9000-0138	52.215-20	9000-0013
32.7	9000-0074	52.215-21	9000-0013
32.9	9000-0102	52.215-22	9000-0173
32.10	9000-0138	52.215-23	9000-0173
33	9000-0035	52.216-2	9000-0068
36.213-2	9000-0037	52.216-3	9000-0068
36.603	9000-0157	52.216-4	9000-0068
41.202(c)	9000-0125	52.216-5	9000-0071
42.7	9000-0013	52.216-6	9000-0071
42.12	9000-0076	52.216-7	9000-0069
42.13	9000-0076	52.216-10	9000-0067
42.15	9000-0142	52.216-15	9000-0069
43.205(f)	9000-0026	52.216-16	9000-0067
44.305	9000-0132	52.216-17	9000-0067
45	9000-0075	52.219-9	9000-0006
46	9000-0077		and 9000-
47	9000-0061		0007
47.208	9000-0056	52.219-10	9000-0006
48	9000-0027	52.219-28	9000-0163
49	9000-0028	52.219-29	3245-0374
50	9000-0029	52.219-30	3245-0374
51.1	9000-0031	52.222-2	9000-0065
51.2	9000-0032	52.222-4	1235-0023
52.203-2	9000-0018	52.222-6	1235-0023
52.203-7	9000-0091	52.222-8	1235-0008
52.203-13	9000-0164		and
52.203-16	9000-0183		1235-0018
52.204-3	9000-0097	52.222-11	9000-0014
52.204-6	9000-0145	52.222-17	1235-0007
52.204-7	9000-0159		and
52.204-10	9000-0177		1235-0025
52.204-12	9000-0145	52.222-18	9000-0155
52.204-13	9000-0159	52.222-21	1250-0003
52.204-14	9000-0179	52.222-22	1250-0003
52.204-15	9000-0179	52.222-23	1250-0003
52.204-16	9000-0185	52.222-25	1250-0003
52.204-17	9000-0185	52.222-26	1250-
52.204-18	9000-0185		0001,1250-
52.204-20	9000-0189		0003
52.207-3	9000-0114		1250-0008
52.207-4	9000-0082	52.222-27	1250-0003
52.209-1	9000-0083	52.222-32	9000-0154
52.209-2	9000-0190	52.222-35	1250-0004
52.209-5	9000-0094	52.222-36	1250-0005
52.209-6	9000-0094	52.222-37	1250-0004
52.209-7	9000-0174	52.222-38	1293-0005
52.209-9	9000-0174	52.222-40	1245-0004
52.209-10	9000-0190	52.222-41	1235-0018
52.209-11	9000-0193		and
52.209-12	9000-0193		1235-0007
52.211-7	9000-0153	52.222-46	9000-0066
52.211-8	9000-0043	52.222-50	9000-0188
52.211-9	9000-0043	52.222-54	1615-0092
52.212-1(k)	9000-0159	52.222-55	1235-0018
52.212-3	9000-0136	52.222-56	9000-0188

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FAR segment	OMB control No.	FAR segment	OMB control No.
52.223-2	9000-0180	52.237-10	9000-0152
52.223-4	9000-0134	52.241-1	9000-0126
52.223-5	9000-0147	52.241-3	9000-0122
52.223-6(b)(5)	9000-0101	52.241-7	9000-0123
52.223-7	9000-0107	52.241-13	9000-0124
52.223-9	9000-0134	52.242-13	9000-0108
52.223-11	9000-0191	52.243-1	9000-0026
52.223-12	9000-0191	52.243-2	9000-0026
52.225-2	9000-0024	52.243-3	9000-0026
52.225-4	9000-0024	52.243-4	9000-0026
52.225-6	9000-0024	52.243-6	9000-0026
52.225-8	9000-0022	52.243-7	9000-0026
52.225-9	9000-0024	52.244-2	9000-0149
52.225-10	9000-0024	52.244-2(i)	9000-0132
52.225-11	9000-0024	52.245-1	9000-0075
52.225-12	9000-0024	52.245-9	9000-0075
52.225-18	9000-0161	52.246-2	9000-0077
52.225-21	9000-0024	52.246-3	9000-0077
52.225-23	9000-0024	52.246-4	9000-0077
52.225-26	9000-0184	52.246-5	9000-0077
52.227-2	9000-0096	52.246-6	9000-0077
52.227-6	9000-0096	52.246-7	9000-0077
52.227-9	9000-0096	52.246-8	9000-0077
52.227-11	9000-0095	52.246-12	9000-0077
52.227-13	9000-0095	52.246-15	9000-0077
52.227-14	9000-0090	52.247-2	9000-0053
52.227-15	9000-0090	52.247-6	9000-0061
52.227-16	9000-0090	52.247-29	9000-0061
52.227-17	9000-0090	52.247-30	9000-0061
52.227-18	9000-0090	52.247-31	9000-0061
52.227-19	9000-0090	52.247-32	9000-0061
52.227-20	9000-0090	52.247-33	9000-0061
52.227-21	9000-0090	52.247-34	9000-0061
52.227-22	9000-0090	52.247-35	9000-0061
52.227-23	9000-0090	52.247-36	9000-0061
52.228-1	9000-0045	52.247-37	9000-0061
52.228-2	9000-0045	52.247-38	9000-0061
52.228-12	9000-0135	52.247-39	9000-0061
52.228-13	9000-0045	52.247-40	9000-0061
52.228-14	9000-0045	52.247-41	9000-0061
52.228-15	9000-0045	52.247-42	9000-0061
52.228-16	9000-0045	52.247-43	9000-0061
52.229-2	9000-0059	52.247-44	9000-0061
52.230-6	9000-0129	52.247-48	9000-0061
52.232-1	9000-0070	52.247-51	9000-0057
52.232-2	9000-0070	52.247-52	9000-0061
52.232-3	9000-0070	52.247-53	9000-0055
52.232-4	9000-0070	52.247-57	9000-0061
52.232-5	9000-0102	52.247-63	9000-0054
52.232-6	9000-0070	52.247-64	9000-0061
52.232-7	9000-0070	52.247-68	9000-0056
52.232-8	9000-0070	52.248-1	9000-0027
52.232-9	9000-0070	52.248-2	9000-0027
52.232-10	9000-0070	52.248-3	9000-0027
52.232-11	9000-0070	52.249-2	9000-0028
52.232-12	9000-0073	52.249-3	9000-0028
52.232-13	9000-0010	52.249-5	9000-0028
52.232-14	9000-0010	52.249-6	9000-0028
52.232-15	9000-0010	52.250-1	9000-0029
52.232-16	9000-0010	52.251-2	9000-0032
52.232-20	9000-0074	SF 24	9000-0045
52.232-22	9000-0074	SF 25	9000-0045
52.232-27	9000-0102	SF 25-A	9000-0045
52.232-29	9000-0138	SF 28	9000-0001
52.232-30	9000-0138	SF 34	9000-0045
52.232-31	9000-0138	SF 35	9000-0045
52.232-32	9000-0138	SF 273	9000-0045
52.232-33	9000-0144	SF 274	9000-0045
52.232-34	9000-0144	SF 275	9000-0045
52.233-1	9000-0035	SF 294	9000-0006
52.236-5	9000-0062	SF 295	9000-0007
52.236-15	9000-0058	SF 330	9000-0157
52.236-19	9000-0064	SF 1403	9000-0011

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FAR segment	OMB control No.
SF 1404 .....	9000-0011
SF 1405 .....	9000-0011
SF 1406 .....	9000-0011
SF 1407 .....	9000-0011
SF 1408 .....	9000-0011
SF 1413 .....	9000-0014
SF 1416 .....	9000-0045
SF 1418 .....	9000-0045
SF 1428 .....	9000-0075
SF 1429 .....	9000-0075
SF 1435 .....	9000-0012
SF 1436 .....	9000-0012
SF 1437 .....	9000-0012
SF 1438 .....	9000-0012
SF 1439 .....	9000-0012
SF 1440 .....	9000-0012
SF 1443 .....	9000-0010
SF 1444 .....	9000-0089
SF 1445 .....	9000-0089
SF 1446 .....	9000-0089

[59 FR 67065, Dec. 28, 1994. Redesignated at 60 FR 34733, 34736, July 3, 1995]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting section 1.106, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at [www.fdsys.gov](http://www.fdsys.gov).

EFFECTIVE DATE NOTES: 1. At 81 FR 58638, Aug. 25, 2016, 1.106 was amended in the table following the introductory text, by adding in numerical sequence, FAR segments “52.222-57”, “52.222-58”, 52.222-59”, and 52.222-60” and their corresponding OMB Control Number “9000-0195”, effective Oct. 25, 2016.

2. At 81 FR 45843, July 14, 2016, 1.106 was amended by removing from the table, FAR segments “19.7” and “52.219-9” and their corresponding OMB control numbers “9000-0006 and 9000-0007” and adding, in numerical sequence, FAR segments “19.7” and “52.219-9” and their corresponding OMB control numbers “9000-0192, 9000-0006, and 9000-0007” in their places.

**1.107 Certifications.**

In accordance with 41 U.S.C. 1304, a new requirement for a certification by a contractor or offeror may not be included in this chapter unless—

(a) The certification requirement is specifically imposed by statute; or

(b) Written justification for such certification is provided to the Administrator for Federal Procurement Policy by the Federal Acquisition Regulatory Council, and the Administrator approves in writing the inclusion of such certification requirement.

[62 FR 44813, Aug. 22, 1997, as amended at 79 FR 24194, Apr. 29, 2014]

**1.108 FAR conventions.**

The following conventions provide guidance for interpreting the FAR:

(a) *Words and terms.* Definitions in Part 2 apply to the entire regulation unless specifically defined in another part, subpart, section, provision, or clause. Words or terms defined in a specific part, subpart, section, provision, or clause have that meaning when used in that part, subpart, section, provision, or clause. Undefined words retain their common dictionary meaning.

(b) *Delegation of authority.* Each authority is delegable unless specifically stated otherwise (see 1.102-4(b)).

(c) *Dollar thresholds.* Unless otherwise specified, a specific dollar threshold for the purpose of applicability is the final anticipated dollar value of the action, including the dollar value of all options. If the action establishes a maximum quantity of supplies or services to be acquired or establishes a ceiling price or establishes the final price to be based on future events, the final anticipated dollar value must be the highest final priced alternative to the Government, including the dollar value of all options.

(d) *Application of FAR changes to solicitations and contracts.* Unless otherwise specified—

(1) FAR changes apply to solicitations issued on or after the effective date of the change;

(2) Contracting officers may, at their discretion, include the FAR changes in solicitations issued before the effective date, provided award of the resulting contract(s) occurs on or after the effective date; and

(3) Contracting officers may, at their discretion, include the changes in any existing contract with appropriate consideration.

(e) *Citations.* When the FAR cites a statute, Executive order, Office of Management and Budget circular, Office of Federal Procurement Policy policy letter, or relevant portion of the Code of Federal Regulations, the citation includes all applicable amendments, unless otherwise stated.

(f) *Imperative sentences.* When an imperative sentence directs action, the contracting officer is responsible for

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the action, unless another party is expressly cited.

[65 FR 36015, June 6, 2000]

**1.109 Statutory acquisition-related dollar thresholds—adjustment for inflation.**

(a) 41 U.S.C. 1908 requires that the FAR Council periodically adjust all statutory acquisition-related dollar thresholds in the FAR for inflation, except as provided in paragraph (c) of this section. This adjustment is calculated every 5 years, starting in October 2005, using the Consumer Price Index (CPI) for all-urban consumers, and supersedes the applicability of any other provision of law that provides for the adjustment of such acquisition-related dollar thresholds.

(b) The statute defines an acquisition-related dollar threshold as a dollar threshold that is specified in law as a factor in defining the scope of the applicability of a policy, procedure, requirement, or restriction provided in that law to the procurement of supplies or services by an executive agency, as determined by the FAR Council.

(c) The statute does not permit escalation of acquisition-related dollar thresholds established by:

(1) 40 U.S.C. chapter 31, subchapter IV, Wage Rate Requirements (Construction);

(2) 41 U.S.C. chapter 67, Service Contract Labor Standards; or

(3) The United States Trade Representative pursuant to the authority of the Trade Agreements Act of 1979 (19 U.S.C. 2511 *et seq.*).

(d) A matrix showing calculation of the most recent escalation adjustments of statutory acquisition-related dollar thresholds is available via the Internet at <http://www.regulations.gov> (search FAR case 2014-022).

[71 FR 57365, Sept. 28, 2006, as amended at 75 FR 53131, Aug. 30, 2010; 79 FR 24194, Apr. 29, 2014; 80 FR 38295, July 2, 2015]

**1.110 Positive law codification.**

(a) Public Law 107-217 revised, codified, and enacted as title 40, United States Code, Public Buildings, Property, and Works, certain general and permanent laws of the United States.

(b) Public Law 111-350 revised, codified, and enacted as title 41, United States Code, Public Contracts, certain general and permanent laws of the United States.

(c) The following table provides cross references between the historical titles of the acts, and the current reference in title 40 or title 41.

Historical title of act	Division/chapter/subchapter	Title
Anti-Kickback Act .....	41 U.S.C. chapter 87 .....	Kickbacks.
Brooks Architect-Engineer Act .....	40 U.S.C. chapter 11 .....	Selection of Architects and Engineers.
Buy American Act .....	41 U.S.C. chapter 83 .....	Buy American.
Contract Disputes Act of 1978 .....	41 U.S.C. chapter 71 .....	Contract Disputes.
Contract Work Hours and Safety Standards Act .....	40 U.S.C. chapter 37 .....	Contract Work Hours and Safety Standards.
Davis-Bacon Act .....	40 U.S.C. chapter 31, Subchapter IV.	Wage Rate Requirements (Construction).
Drug-Free Workplace Act .....	41 U.S.C. chapter 81 .....	Drug-Free Workplace.
Federal Property and Administrative Services Act of 1949, Title III.	41 U.S.C. Div. C of sub-title 1 <sup>1</sup> .	Procurement.
Javits-Wagner-O'Day Act .....	41 U.S.C. chapter 85 .....	Committee for Purchase from People Who Are Blind or Severely Disabled.
Miller Act .....	40 U.S.C. chapter 31, subchapter III.	Bonds.
Office of Federal Procurement Policy Act .....	41 U.S.C. Div. B of sub-title 1 <sup>2</sup> .	Office of Federal Procurement Policy.
Procurement Integrity Act .....	41 U.S.C. chapter 21 .....	Restrictions on Obtaining and Disclosing Certain Information.
Service Contract Act of 1965 .....	41 U.S.C. chapter 67 .....	Service Contract Labor Standards.
Truth in Negotiations Act .....	41 U.S.C. chapter 35 .....	Truthful Cost or Pricing Data.
Walsh-Healey Public Contracts Act .....	41 U.S.C. chapter 65 .....	Contracts for Materials, Supplies, Articles, and Equipment Exceeding \$15,000.

<sup>1</sup> Except sections 3302, 3501(b), 3509, 3906, 4710, and 4711.

<sup>2</sup> Except sections 1704 and 2303.

[79 FR 24194, Apr. 29, 2014]

### Subpart 1.2—Administration

#### 1.201 Maintenance of the FAR.

##### 1.201-1 The two councils.

(a) Subject to the authorities discussed in 1.103, revisions to the FAR will be prepared and issued through the coordinated action of two councils, the Defense Acquisition Regulations Council (DAR Council) and the Civilian Agency Acquisition Council (CAA Council). Members of these councils shall—

(1) Represent their agencies on a full-time basis;

(2) Be selected for their superior qualifications in terms of acquisition experience and demonstrated professional expertise; and

(3) Be funded by their respective agencies.

(b) The chairperson of the CAA Council shall be the representative of the Administrator of General Services. The other members of this council shall be one each representative from the (1) Departments of Agriculture, Commerce, Energy, Health and Human Services, Homeland Security, Interior, Labor, State, Transportation, and Treasury, and (2) Environmental Protection Agency, Social Security Administration, Small Business Administration, and Department of Veterans Affairs.

(c) The Director of the DAR Council shall be the representative of the Secretary of Defense. The operation of the DAR Council will be as prescribed by the Secretary of Defense. Membership shall include representatives of the military departments, the Defense Logistics Agency, the Defense Contract Management Agency, and the National Aeronautics and Space Administration.

(d) Responsibility for processing revisions to the FAR is apportioned by the two councils so that each council has cognizance over specified parts or subparts.

(e) Each council shall be responsible for—

(1) Agreeing on all revisions with the other council;

(2) Submitting to the FAR Secretariat (see 1.201-2) the information re-

quired under paragraphs 1.501-2(b) and (e) for publication in the FEDERAL REGISTER of a notice soliciting comments on a proposed revision to the FAR;

(3) Considering all comments received in response to notice of proposed revisions;

(4) Arranging for public meetings;

(5) Preparing any final revision in the appropriate FAR format and language; and

(6) Submitting any final revision to the FAR Secretariat for publication in the FEDERAL REGISTER and printing for distribution.

[48 FR 42103, Sept. 19, 1983, as amended at 50 FR 2269, Jan. 15, 1985; 50 FR 26903, June 28, 1985; 51 FR 2649, Jan. 17, 1986; 54 FR 29280, July 11, 1989; 62 FR 64940, Dec. 9, 1997; 63 FR 9069, Feb. 23, 1998; 65 FR 16286, Mar. 27, 2000; 68 FR 69258, Dec. 11, 2003; 77 FR 23370, Apr. 18, 2012]

##### 1.201-2 FAR Secretariat.

(a) The General Services Administration is responsible for establishing and operating the FAR Secretariat to print, publish, and distribute the FAR through the Code of Federal Regulations system (including a loose-leaf edition with periodic updates).

(b) Additionally, the FAR Secretariat shall provide the two councils with centralized services for—

(1) Keeping a synopsis of current FAR cases and their status;

(2) Maintaining official files;

(3) Assisting parties interested in reviewing the files on completed cases; and

(4) Performing miscellaneous administrative tasks pertaining to the maintenance of the FAR.

[48 FR 42103, Sept. 19, 1983, as amended at 62 FR 40236, July 25, 1997]

##### 1.202 Agency compliance with the FAR.

Agency compliance with the FAR (see 1.304) is the responsibility of the Secretary of Defense (for the military departments and defense agencies), the Administrator of General Services (for civilian agencies other than NASA), and the Administrator of NASA (for NASA activities).

**Subpart 1.3—Agency Acquisition Regulations****1.301 Policy.**

(a)(1) Subject to the authorities in paragraph (c) below and other statutory authority, an agency head may issue or authorize the issuance of agency acquisition regulations that implement or supplement the FAR and incorporate, together with the FAR, agency policies, procedures, contract clauses, solicitation provisions, and forms that govern the contracting process or otherwise control the relationship between the agency, including any of its suborganizations, and contractors or prospective contractors.

(2) Subject to the authorities in (c) below and other statutory authority, an agency head may issue or authorize the issuance of internal agency guidance at any organizational level (e.g., designations and delegations of authority, assignments of responsibilities, work-flow procedures, and internal reporting requirements).

(b) Agency heads shall establish procedures to ensure that agency acquisition regulations are published for comment in the FEDERAL REGISTER in conformance with the procedures in subpart 1.5 and as required by 41 U.S.C. 1707, and other applicable statutes, when they have a significant effect beyond the internal operating procedures of the agency or have a significant cost or administrative impact on contractors or offerors. However, publication is not required for issuances that merely implement or supplement higher level issuances that have previously undergone the public comment process, unless such implementation or supplementation results in an additional significant cost or administrative impact on contractors or offerors or effect beyond the internal operating procedures of the issuing organization. Issuances under 1.301(a)(2) need not be publicized for public comment.

(c) When adopting acquisition regulations, agencies shall ensure that they comply with the Paperwork Reduction Act (44 U.S.C. 3501, *et seq.*) as implemented in 5 CFR part 1320 (see 1.105) and the Regulatory Flexibility Act (5 U.S.C. 601, *et seq.*). Normally, when a law requires publication of a proposed

regulation, the Regulatory Flexibility Act applies and agencies must prepare written analyses or certifications as provided in the law.

(d) Agency acquisition regulations implementing or supplementing the FAR are, for—

(1) The military departments and defense agencies, issued subject to the authority of the Secretary of Defense;

(2) NASA activities, issued subject to the authorities of the Administrator of NASA; and

(3) The civilian agencies other than NASA, issued by the heads of those agencies subject to the overall authority of the Administrator of General Services or independent authority the agency may have.

[48 FR 42103, Sept. 19, 1983, as amended at 50 FR 2269, Jan. 15, 1985; 54 FR 5054, Jan. 31, 1989; 79 FR 24195, Apr. 29, 2014]

**1.302 Limitations.**

Agency acquisition regulations shall be limited to—

(a) Those necessary to implement FAR policies and procedures within the agency; and

(b) Additional policies, procedures, solicitation provisions, or contract clauses that supplement the FAR to satisfy the specific needs of the agency.

**1.303 Publication and codification.**

(a) Agency-wide acquisition regulations shall be published in the FEDERAL REGISTER as required by law, shall be codified under an assigned chapter in Title 48, Code of Federal Regulations, and shall parallel the FAR in format, arrangement, and numbering system (but see 1.104-1(c)). Coverage in an agency acquisition regulation that implements a specific part, subpart, section, or subsection of the FAR shall be numbered and titled to correspond to the appropriate FAR number and title. Supplementary material for which there is no counterpart in the FAR shall be codified using chapter, part, subpart, section, or subsection numbers of 70 and up (e.g., for the Department of Interior, whose assigned chapter number in Title 48 is 14, part 1470, subpart 1401.70, section 1401.370, or subsection 1401.301-70.)

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(b) Issuances under 1.301(a)(2) need not be published in the FEDERAL REGISTER.

[48 FR 42103, Sept. 19, 1983, as amended at 50 FR 2269, Jan. 15, 1985]

### 1.304 Agency control and compliance procedures.

(a) Under the authorities of 1.301(d), agencies shall control and limit issuance of agency acquisition regulations and, in particular, local agency directives that restrain the flexibilities found in the FAR, and shall establish formal procedures for the review of these documents to assure compliance with this part 1.

(b) Agency acquisition regulations shall not—

(1) Unnecessarily repeat, paraphrase, or otherwise restate material contained in the FAR or higher-level agency acquisition regulations; or

(2) Except as required by law or as provided in subpart 1.4, conflict or be inconsistent with FAR content.

(c) Agencies shall evaluate all regulatory coverage in agency acquisition regulations to determine if it could apply to other agencies. Coverage that is not peculiar to one agency shall be recommended for inclusion in the FAR.

[48 FR 42103, Sept. 19, 1983, as amended at 61 FR 39190, July 26, 1996; 65 FR 16286, Mar. 27, 2000]

## Subpart 1.4—Deviations from the FAR

### 1.400 Scope of subpart.

This subpart prescribes the policies and procedures for authorizing deviations from the FAR. Exceptions pertaining to the use of forms prescribed by the FAR are covered in part 53 rather than in this subpart.

### 1.401 Definition.

*Deviation* means any one or combination of the following:

(a) The issuance or use of a policy, procedure, solicitation provision (see definition in 2.101), contract clause (see definition in 2.101), method, or practice of conducting acquisition actions of any kind at any stage of the acquisition process that is inconsistent with the FAR.

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(b) The omission of any solicitation provision or contract clause when its prescription requires its use.

(c) The use of any solicitation provision or contract clause with modified or alternate language that is not authorized by the FAR (see definition of “modification” in 52.101(a) and definition of “alternate” in 2.101(a)).

(d) The use of a solicitation provision or contract clause prescribed by the FAR on a *substantially as follows* or *substantially the same as* basis (see definitions in 2.101 and 52.101(a)), if such use is inconsistent with the intent, principle, or substance of the prescription or related coverage on the subject matter in the FAR.

(e) The authorization of lesser or greater limitations on the use of any solicitation provision, contract clause, policy, or procedure prescribed by the FAR.

(f) The issuance of policies or procedures that govern the contracting process or otherwise control contracting relationships that are not incorporated into agency acquisition regulations in accordance with 1.301(a).

[48 FR 42103, Sept. 19, 1983, as amended at 66 FR 2118, Jan. 10, 2001]

### 1.402 Policy.

Unless precluded by law, executive order, or regulation, deviations from the FAR may be granted as specified in this subpart when necessary to meet the specific needs and requirements of each agency. The development and testing of new techniques and methods of acquisition should not be stifled simply because such action would require a FAR deviation. The fact that deviation authority is required should not, of itself, deter agencies in their development and testing of new techniques and acquisition methods. Refer to 31.101 for instructions concerning deviations pertaining to the subject matter of part 31, Contract Cost Principles and Procedures. Deviations are not authorized with respect to 30.201–3 and 30.201–4, or the requirements of the Cost Accounting Standards Board (CASB) rules and regulations (48 CFR Chapter 99 (FAR Appendix)). Refer to 30.201–5 for instructions concerning

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waivers pertaining to Cost Accounting Standards.

[48 FR 42103, Sept. 19, 1983, as amended at 52 FR 35612, Sept. 22, 1987; 62 FR 64914, Dec. 9, 1997]

### 1.403 Individual deviations.

Individual deviations affect only one contract action, and, unless 1.405(e) is applicable, may be authorized by the agency head. The contracting officer must document the justification and agency approval in the contract file.

[67 FR 13053, Mar. 20, 2002]

### 1.404 Class deviations.

Class deviations affect more than one contract action. When an agency knows that it will require a class deviation on a permanent basis, it should propose a FAR revision, if appropriate. Civilian agencies, other than NASA, must furnish a copy of each approved class deviation to the FAR Secretariat.

(a) For civilian agencies except NASA, class deviations may be authorized by agency heads or their designees, unless 1.405(e) is applicable. Delegation of this authority shall not be made below the head of a contracting activity. Authorization of class deviations by agency officials is subject to the following limitations:

(1) An agency official who may authorize a class deviation, before doing so, shall consult with the chairperson of the Civilian Agency Acquisition Council (CAA Council), unless that agency official determines that urgency precludes such consultation.

(2) Recommended revisions to the FAR shall be transmitted to the FAR Secretariat by agency heads or their designees for authorizing class deviations.

(b) For DOD, class deviations shall be controlled, processed, and approved in accordance with the Defense FAR Supplement.

(c) For NASA, class deviations shall be controlled and approved by the Assistant Administrator for Procurement. Deviations shall be processed in accordance with agency regulations.

[48 FR 42103, Sept. 19, 1983, as amended at 56 FR 15148, Apr. 15, 1991; 59 FR 11387, Mar. 10, 1994; 61 FR 67411, Dec. 20, 1996; 67 FR 13053, 13068, Mar. 20, 2002]

### 1.405 Deviations pertaining to treaties and executive agreements.

(a) *Executive agreements*, as used in this section, means Government-to-Government agreements, including agreements with international organizations, to which the United States is a party.

(b) Any deviation from the FAR required to comply with a treaty to which the United States is a party is authorized, unless the deviation would be inconsistent with FAR coverage based on a law enacted after the execution of the treaty.

(c) Any deviation from the FAR required to comply with an executive agreement is authorized unless the deviation would be inconsistent with FAR coverage based on law.

(d) For civilian agencies other than NASA, a copy of the text deviation authorized under paragraph (b) or (c) of this section shall be transmitted to the FAR Secretariat through a central agency control point.

(e) For civilian agencies other than NASA, if a deviation required to comply with a treaty or an executive agreement is not authorized by paragraph (b) or (c) of this section, then the request for deviation shall be processed through the FAR Secretariat to the Civilian Agency Acquisition Council.

[48 FR 42103, Sept. 19, 1983, as amended at 61 FR 67411, Dec. 20, 1996]

## Subpart 1.5—Agency and Public Participation

SOURCE: 50 FR 2269, Jan. 15, 1985, unless otherwise noted.

### 1.501 Solicitation of agency and public views.

#### 1.501-1 Definition.

*Significant revisions*, as used in this subpart, means revisions that alter the substantive meaning of any coverage in the FAR System and which have a significant cost or administrative impact on contractors or offerors, or a significant effect beyond the internal operating procedures of the issuing agency. This expression, for example, does not include editorial, stylistic, or other revisions that have no impact on the

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basic meaning of the coverage being revised.

[50 FR 2269, Jan. 15, 1985, as amended at 79 FR 24195, Apr. 29, 2014]

### 1.501-2 Opportunity for public comments.

(a) Views of agencies and nongovernmental parties or organizations will be considered in formulating acquisition policies and procedures.

(b) The opportunity to submit written comments on proposed significant revisions shall be provided by placing a notice in the FEDERAL REGISTER. Each of these notices shall include—

(1) The text of the revision or, if it is impracticable to publish the full text, a summary of the proposal;

(2) The address and telephone number of the individual from whom copies of the revision, in full text, can be requested and to whom comments thereon should be addressed; and

(3) When 1.501-3(b) is applicable, a statement that the revision is effective on a temporary basis pending completion of the public comment period.

(c) A minimum of 30 days and, normally, at least 60 days will be given for the receipt of comments.

### 1.501-3 Exceptions.

(a) Comments need not be solicited when the proposed coverage does not constitute a significant revision.

(b) Advance comments need not be solicited when urgent and compelling circumstances make solicitation of comments impracticable prior to the effective date of the coverage, such as when a new statute must be implemented in a relatively short period of time. In such case, the coverage shall be issued on a temporary basis and shall provide for at least a 30 day public comment period.

### 1.502 Unsolicited proposed revisions.

Consideration shall also be given to unsolicited recommendations for revisions that have been submitted in writing with sufficient data and rationale to permit their evaluation.

### 1.503 Public meetings.

Public meetings may be appropriate when a decision to adopt, amend, or delete coverage is likely to benefit from

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significant additional views and discussion.

## Subpart 1.6—Career Development, Contracting Authority, and Responsibilities

### 1.601 General.

(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. Contracting officers below the level of a head of a contracting activity shall be selected and appointed under 1.603.

(b) Agency heads may mutually agree to—

(1) Assign contracting functions and responsibilities from one agency to another; and

(2) Create joint or combined offices to exercise acquisition functions and responsibilities.

[60 FR 49721, Sept. 26, 1995]

### 1.602 Contracting officers.

#### 1.602-1 Authority.

(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

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orders, regulations, and all other applicable procedures, including clearances and approvals, have been met.

### 1.602-2 Responsibilities.

Contracting officers are responsible for ensuring performance of all necessary actions for effective contracting, ensuring compliance with the terms of the contract, and safeguarding the interests of the United States in its contractual relationships. In order to perform these responsibilities, contracting officers should be allowed wide latitude to exercise business judgment. Contracting officers shall—

(a) Ensure that the requirements of 1.602-1(b) have been met, and that sufficient funds are available for obligation;

(b) Ensure that contractors receive impartial, fair, and equitable treatment;

(c) Request and consider the advice of specialists in audit, law, engineering, information security, transportation, and other fields, as appropriate; and

(d) Designate and authorize, in writing and in accordance with agency procedures, a contracting officer's representative (COR) on all contracts and orders other than those that are firm-fixed price, and for firm-fixed-price contracts and orders as appropriate, unless the contracting officer retains and executes the COR duties. See 7.104(e). A COR—

(1) Shall be a Government employee, unless otherwise authorized in agency regulations;

(2) Shall be certified and maintain certification in accordance with the current Office of Management and Budget memorandum on the Federal Acquisition Certification for Contracting Officer Representatives (FAC-COR) guidance, or for DoD, in accordance with the current applicable DoD policy guidance;

(3) Shall be qualified by training and experience commensurate with the responsibilities to be delegated in accordance with agency procedures;

(4) May not be delegated responsibility to perform functions that have been delegated under 42.202 to a contract administration office, but may be assigned some duties at 42.302 by the contracting officer;

(5) Has no authority to make any commitments or changes that affect price, quality, quantity, delivery, or other terms and conditions of the contract nor in any way direct the contractor or its subcontractors to operate in conflict with the contract terms and conditions;

(6) Shall be nominated either by the requiring activity or in accordance with agency procedures; and

(7) Shall be designated in writing, with copies furnished to the contractor and the contract administration office—

(i) Specifying the extent of the COR's authority to act on behalf of the contracting officer;

(ii) Identifying the limitations on the COR's authority;

(iii) Specifying the period covered by the designation;

(iv) Stating the authority is not re-delegable; and

(v) Stating that the COR may be personally liable for unauthorized acts.

[48 FR 42103, Sept. 19, 1983, as amended at 70 FR 57451, Sept. 30, 2005; 76 FR 14545, Mar. 16, 2011; 77 FR 12926, Mar. 2, 2012; 78 FR 37676, June 21, 2013]

### 1.602-3 Ratification of unauthorized commitments.

#### (a) Definitions.

*Ratification*, as used in this subsection, means the act of approving an unauthorized commitment by an official who has the authority to do so.

*Unauthorized commitment*, as used in this subsection, means an agreement that is not binding solely because the Government representative who made it lacked the authority to enter into that agreement on behalf of the Government.

(b) *Policy*. (1) Agencies should take positive action to preclude, to the maximum extent possible, the need for ratification actions. Although procedures are provided in this section for use in those cases where the ratification of an unauthorized commitment is necessary, these procedures may not be used in a manner that encourages such commitments being made by Government personnel.

(2) Subject to the limitations in paragraph (c) of this subsection, the head of

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the contracting activity, unless a higher level official is designated by the agency, may ratify an unauthorized commitment.

(3) The ratification authority in subparagraph (b)(2) of this subsection may be delegated in accordance with agency procedures, but in no case shall the authority be delegated below the level of chief of the contracting office.

(4) Agencies should process unauthorized commitments using the ratification authority of this subsection instead of referring such actions to the Government Accountability Office for resolution. (See 1.602-3(d).)

(5) Unauthorized commitments that would involve claims subject to resolution under 41 U.S.C. chapter 71, Contract Disputes, should be processed in accordance with subpart 33.2, Disputes and Appeals.

(c) *Limitations.* The authority in subparagraph (b)(2) of this subsection may be exercised only when—

(1) Supplies or services have been provided to and accepted by the Government, or the Government otherwise has obtained or will obtain a benefit resulting from performance of the unauthorized commitment;

(2) The ratifying official has the authority to enter into a contractual commitment;

(3) The resulting contract would otherwise have been proper if made by an appropriate contracting officer;

(4) The contracting officer reviewing the unauthorized commitment determines the price to be fair and reasonable;

(5) The contracting officer recommends payment and legal counsel concurs in the recommendation, unless agency procedures expressly do not require such concurrence;

(6) Funds are available and were available at the time the unauthorized commitment was made; and

(7) The ratification is in accordance with any other limitations prescribed under agency procedures.

(d) *Nonratifiable commitments.* Cases that are not ratifiable under this subsection may be subject to resolution as recommended by the Government Accountability Office under its claim procedure (GAO Policy and Procedures Manual for Guidance of Federal Agen-

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cies, Title 4, Chapter 2), or as authorized by FAR Subpart 50.1. Legal advice should be obtained in these cases.

[53 FR 3689, Feb. 8, 1988, as amended at 60 FR 48225, Sept. 18, 1995; 71 FR 57380, Sept. 28, 2006, 72 FR 63029, Nov. 7, 2007; 79 FR 24195, Apr. 29, 2014]

### 1.603 Selection, appointment, and termination of appointment for contracting officers.

#### 1.603-1 General.

41 U.S.C. 1702(b)(3)(G), requires agency heads to establish and maintain a procurement career management program and a system for the selection, appointment, and termination of appointment of contracting officers. Agency heads or their designees may select and appoint contracting officers and terminate their appointments. These selections and appointments shall be consistent with Office of Federal Procurement Policy's (OFPP) standards for skill-based training in performing contracting and purchasing duties as published in OFPP Policy Letter No. 05-01, Developing and Managing the Acquisition Workforce, April 15, 2005.

[59 FR 67015, Dec. 28, 1994, as amended at 73 FR 21800, Apr. 22, 2008; 79 FR 24195, Apr. 29, 2014; 81 FR 67781, Sept. 30, 2016]

#### 1.603-2 Selection.

In selecting contracting officers, the appointing official shall consider the complexity and dollar value of the acquisitions to be assigned and the candidate's experience, training, education, business acumen, judgment, character, and reputation. Examples of selection criteria include—

(a) Experience in Government contracting and administration, commercial purchasing, or related fields;

(b) Education or special training in business administration, law, accounting, engineering, or related fields;

(c) Knowledge of acquisition policies and procedures, including this and other applicable regulations;

(d) Specialized knowledge in the particular assigned field of contracting; and

(e) Satisfactory completion of acquisition training courses.

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### 1.603-3 Appointment.

(a) Contracting officers shall be appointed in writing on an SF 1402, Certificate of Appointment, which shall state any limitations on the scope of authority to be exercised, other than limitations contained in applicable law or regulation. Appointing officials shall maintain files containing copies of all appointments that have not been terminated.

(b) Agency heads are encouraged to delegate micro-purchase authority to individuals who are employees of an executive agency or members of the Armed Forces of the United States who will be using the supplies or services being purchased. Individuals delegated this authority are not required to be appointed on an SF 1402, but shall be appointed in writing in accordance with agency procedures.

[61 FR 39190, July 26, 1996]

### 1.603-4 Termination.

Termination of a contracting officer appointment will be by letter, unless the Certificate of Appointment contains other provisions for automatic termination. Terminations may be for reasons such as reassignment, termination of employment, or unsatisfactory performance. No termination shall operate retroactively.

### 1.604 Contracting Officer's Representative (COR).

A contracting officer's representative (COR) assists in the technical monitoring or administration of a contract (see 1.602-2(d)). The COR shall maintain a file for each assigned contract. The file must include, at a minimum—

(a) A copy of the contracting officer's letter of designation and other documents describing the COR's duties and responsibilities;

(b) A copy of the contract administration functions delegated to a contract administration office which may not be delegated to the COR (see 1.602-2(d)(4)); and

(c) Documentation of COR actions taken in accordance with the delegation of authority.

[76 FR 14545, Mar. 16, 2011]

## Subpart 1.7—Determinations and Findings

SOURCE: 50 FR 1726, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985, unless otherwise noted.

### 1.700 Scope of subpart.

This subpart prescribes general policies and procedures for the use of determinations and findings (D&F's). Requirements for specific types of D&F's can be found with the appropriate subject matter.

### 1.701 Definition.

*Determination and Findings* (D&F) means a special form of written approval by an authorized official that is required by statute or regulation as a prerequisite to taking certain contract actions. The *determination* is a conclusion or decision supported by the *findings*. The findings are statements of fact or rationale essential to support the determination and must cover each requirement of the statute or regulation.

[50 FR 1726, Jan. 11, 1985, and 50 FR 52429, Dec. 23, 1985, as amended at 67 FR 13053, Mar. 20, 2002]

### 1.702 General.

(a) A D&F shall ordinarily be for an individual contract action. Unless otherwise prohibited, class D&F's may be executed for classes of contract action (see 1.703). The approval granted by a D&F is restricted to the proposed contract action(s) reasonably described in that D&F. D&F's may be provided for a reasonable degree of flexibility. Furthermore, in their application, reasonable variations in estimated quantities or prices are permitted, unless the D&F specifies otherwise.

(b) When an option is anticipated, the D&F shall state the approximate quantity to be awarded initially and the extent of the increase to be permitted by the option.

### 1.703 Class determinations and findings.

(a) A class D&F provides authority for a class of contract actions. A class may consist of contract actions for the same or related supplies or services or

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other contract actions that require essentially identical justification.

(b) The findings in a class D&F shall fully support the proposed action either for the class as a whole or for each action. A class D&F shall be for a specified period, with the expiration date stated in the document.

(c) The contracting officer shall ensure that individual actions taken pursuant to the authority of a class D&F are within the scope of the D&F.

[50 FR 1726, Jan. 11, 1985, and 50 FR 52429, Dec. 23, 1985, as amended at 67 FR 13053, Mar. 20, 2002]

### 1.704 Content.

Each D&F shall set forth enough facts and circumstances to clearly and convincingly justify the specific determination made. As a minimum, each D&F shall include, in the prescribed agency format, the following information:

(a) Identification of the agency and of the contracting activity and specific identifications of the document as a *Determination and Findings*.

(b) Nature and/or description of the action being approved.

(c) Citation of the appropriate statute and/or regulation upon which the D&F is based.

(d) Findings that detail the particular circumstances, facts, or reasoning essential to support the determination. Necessary supporting documentation shall be obtained from appropriate requirements and technical personnel.

(e) A determination, based on the findings, that the proposed action is justified under the applicable statute or regulation.

(f) Expiration date of the D&F, if required (see 1.706(b)).

(g) The signature of the official authorized to sign the D&F (see 1.706) and the date signed.

### 1.705 Supersession and modification.

(a) If a D&F is superseded by another D&F, that action shall not render invalid any action taken under the original D&F prior to the date of its supersession.

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(b) The contracting officer need not cancel the solicitation if the D&F, as modified, supports the contract action.

[50 FR 1726, Jan. 11, 1985, and 50 FR 52429, Dec. 23, 1985, as amended at 67 FR 13053, Mar. 20, 2002]

### 1.706 Expiration.

Expiration dates are required for class D&F's and are optional for individual D&F's. Authority to act under an individual D&F expires when it is exercised or on an expiration date specified in the document, whichever occurs first. Authority to act under a class D&F expires on the expiration date specified in the document. When a solicitation has been furnished to prospective offerors before the expiration date, the authority under the D&F will continue until award of the contract(s) resulting from that solicitation.

### 1.707 Signatory authority.

When a D&F is required, it shall be signed by the appropriate official in accordance with agency regulations. Authority to sign or delegate signature authority for the various D&F's is as shown in the applicable FAR part.

## PART 2—DEFINITIONS OF WORDS AND TERMS

Sec.  
2.000 Scope of part.

### Subpart 2.1—Definitions

2.101 Definitions.

### Subpart 2.2—Definitions Clause

2.201 Contract clause.

AUTHORITY: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

SOURCE: 48 FR 42107, Sept. 19, 1983, unless otherwise noted.

### 2.000 Scope of part.

- (a) This part—
- (1) Defines words and terms that are frequently used in the FAR;
  - (2) Provides cross-references to other definitions in the FAR of the same word or term; and
  - (3) Provides for the incorporation of these definitions in solicitations and contracts by reference.

(b) Other parts, subparts, and sections of this regulation (48 CFR chapter 1) may define other words or terms and those definitions only apply to the part, subpart, or section where the word or term is defined.

[66 FR 2118, Jan. 10, 2001, as amended at 78 FR 6191, Jan. 29, 2013]

### Subpart 2.1—Definitions

#### 2.101 Definitions.

(a) A word or a term, defined in this section, has the same meaning throughout this regulation (48 CFR chapter 1), unless—

(1) The context in which the word or term is used clearly requires a different meaning; or

(2) Another FAR part, subpart, or section provides a different definition for the particular part or portion of the part.

(b) If a word or term that is defined in this section is defined differently in another part, subpart, or section of this regulation (48 CFR chapter 1, the definition in—

(1) This section includes a cross-reference to the other definitions; and

(2) That part, subpart, or section applies to the word or term when used in that part, subpart, or section.

*Acquisition* means the acquiring by contract with appropriated funds of supplies or services (including construction) by and for the use of the Federal Government through purchase or lease, whether the supplies or services are already in existence or must be created, developed, demonstrated, and evaluated. Acquisition begins at the point when agency needs are established and includes the description of requirements to satisfy agency needs, solicitation and selection of sources, award of contracts, contract financing, contract performance, contract administration, and those technical and management functions directly related to the process of fulfilling agency needs by contract.

*Acquisition planning* means the process by which the efforts of all personnel responsible for an acquisition are coordinated and integrated through a comprehensive plan for fulfilling the agency need in a timely manner and at a reasonable cost. It includes devel-

oping the overall strategy for managing the acquisition.

*Activity Address Code (AAC)* means a distinct six-position code consisting of a combination of alpha and/or numeric characters assigned to identify specific agency offices, units, activities, or organizations by the General Services Administration for civilian agencies and by the Department of Defense for defense agencies.

*Adequate evidence* means information sufficient to support the reasonable belief that a particular act or omission has occurred.

*Advisory and assistance services* means those services provided under contract by nongovernmental sources to support or improve: organizational policy development; decision-making; management and administration; program and/or project management and administration; or R&D activities. It can also mean the furnishing of professional advice or assistance rendered to improve the effectiveness of Federal management processes or procedures (including those of an engineering and technical nature). In rendering the foregoing services, outputs may take the form of information, advice, opinions, alternatives, analyses, evaluations, recommendations, training and the day-to-day aid of support personnel needed for the successful performance of ongoing Federal operations. All advisory and assistance services are classified in one of the following definitional subdivisions:

(1) Management and professional support services, *i.e.*, contractual services that provide assistance, advice or training for the efficient and effective management and operation of organizations, activities (including management and support services for R&D activities), or systems. These services are normally closely related to the basic responsibilities and mission of the agency originating the requirement for the acquisition of services by contract. Included are efforts that support or contribute to improved organization of program management, logistics management, project monitoring and reporting, data collection, budgeting, accounting, performance auditing, and administrative technical support for conferences and training programs.

(2) Studies, analyses and evaluations, *i.e.*, contracted services that provide organized, analytical assessments/evaluations in support of policy development, decision-making, management, or administration. Included are studies in support of R&D activities. Also included are acquisitions of models, methodologies, and related software supporting studies, analyses or evaluations.

(3) Engineering and technical services, *i.e.*, contractual services used to support the program office during the acquisition cycle by providing such services as systems engineering and technical direction (see 9.505-1(b)) to ensure the effective operation and maintenance of a weapon system or major system as defined in OMB Circular No. A-109 or to provide direct support of a weapon system that is essential to research, development, production, operation or maintenance of the system.

*Affiliates* means associated business concerns or individuals if, directly or indirectly—

(1) Either one controls or can control the other; or

(2) A third party controls or can control both.

*Agency head or head of the agency* means the Secretary, Attorney General, Administrator, Governor, Chairperson, or other chief official of an executive agency, unless otherwise indicated, including any deputy or assistant chief official of an executive agency.

*Alternate* means a substantive variation of a basic provision or clause prescribed for use in a defined circumstance. It adds wording to, deletes wording from, or substitutes specified wording for a portion of the basic provision or clause. The alternate version of a provision or clause is the basic provision or clause as changed by the addition, deletion, or substitution (see 52.105(a)).

*Architect-engineer services*, as defined in 40 U.S.C. 1102, means—

(1) Professional services of an architectural or engineering nature, as defined by State law, if applicable, that are required to be performed or approved by a person licensed, registered, or certified to provide those services;

(2) Professional services of an architectural or engineering nature performed by contract that are associated with research, planning, development, design, construction, alteration, or repair of real property; and

(3) Those other professional services of an architectural or engineering nature, or incidental services, that members of the architectural and engineering professions (and individuals in their employ) may logically or justifiably perform, including studies, investigations, surveying and mapping, tests, evaluations, consultations, comprehensive planning, program management, conceptual designs, plans and specifications, value engineering, construction phase services, soils engineering, drawing reviews, preparation of operating and maintenance manuals, and other related services.

*Assignment of claims* means the transfer or making over by the contractor to a bank, trust company, or other financing institution, as security for a loan to the contractor, of its right to be paid by the Government for contract performance.

*Assisted acquisition* means a type of interagency acquisition where a servicing agency performs acquisition activities on a requesting agency's behalf, such as awarding and administering a contract, task order, or delivery order.

*Basic research* means that research directed toward increasing knowledge in science. The primary aim of basic research is a fuller knowledge or understanding of the subject under study, rather than any practical application of that knowledge.

*Best value* means the expected outcome of an acquisition that, in the Government's estimation, provides the greatest overall benefit in response to the requirement.

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

*Biobased product* means a product determined by the U.S. Department of Agriculture to be a commercial or industrial product (other than food or

feed) that is composed, in whole or in significant part, of biological products, including renewable domestic agricultural materials and forestry materials.

*Broad agency announcement* means a general announcement of an agency's research interest including criteria for selecting proposals and soliciting the participation of all offerors capable of satisfying the Government's needs (see 6.102(d)(2)).

*Building or work* means construction activity as distinguished from manufacturing, furnishing of materials, or servicing and maintenance work. The terms include, without limitation, buildings, structures, and improvements of all types, such as bridges, dams, plants, highways, parkways, streets, subways, tunnels, sewers, mains, power lines, pumping stations, heavy generators, railways, airports, terminals, docks, piers, wharves, ways, lighthouses, buoys, jetties, breakwaters, levees, canals, dredging, shoring, rehabilitation and reactivation of plants, scaffolding, drilling, blasting, excavating, clearing, and landscaping. The manufacture or furnishing of materials, articles, supplies, or equipment (whether or not a Federal or State agency acquires title to such materials, articles, supplies, or equipment during the course of the manufacture or furnishing, or owns the materials from which they are manufactured or furnished) is not "building" or "work" within the meaning of this definition unless conducted in connection with and at the site of such building or work as is described in the foregoing sentence, or under the United States Housing Act of 1937 and the Housing Act of 1949 in the construction or development of the project.

*Bundled contract* means a contract where the requirements have been consolidated by bundling. (See the definition of *bundling*.)

*Bundling* means—

(1) Consolidating two or more requirements for supplies or services, previously provided or performed under separate smaller contracts, into a solicitation for a single contract that is likely to be unsuitable for award to a small business concern due to—

(i) The diversity, size, or specialized nature of the elements of the performance specified;

(ii) The aggregate dollar value of the anticipated award;

(iii) The geographical dispersion of the contract performance sites; or

(iv) Any combination of the factors described in paragraphs (1)(i), (ii), and (iii) of this definition.

(2) "Separate smaller contract" as used in this definition, means a contract that has been performed by one or more small business concerns or that was suitable for award to one or more small business concerns.

(3) Single contract, as used in this definition, includes—

(i) Multiple awards of indefinite-quantity contracts under a single solicitation for the same or similar supplies or services to two or more sources (see FAR 16.504(c)); and

(ii) An order placed against an indefinite quantity contract under a—

(A) Federal Supply Schedule contract; or

(B) Task-order contract or delivery-order contract awarded by another agency (*i.e.*, Governmentwide acquisition contract or multi-agency contract).

(4) This definition does not apply to a contract that will be awarded and performed entirely outside of the United States.

*Business unit* means any segment of an organization, or an entire business organization that is not divided into segments.

*Certified cost or pricing data* means "cost or pricing data" that were required to be submitted in accordance with FAR 15.403-4 and 15.403-5 and have been certified, or are required to be certified, in accordance with 15.406-2. This certification states that, to the best of the person's knowledge and belief, the cost or pricing data are accurate, complete, and current as of a date certain before contract award. Cost or pricing data are required to be certified in certain procurements (10 U.S.C. 2306a and 41 U.S.C. chapter 35).

*Change-of-name agreement* means a legal instrument executed by the contractor and the Government that recognizes the legal change of name of the contractor without disturbing the

original contractual rights and obligations of the parties.

*Change order* means a written order, signed by the contracting officer, directing the contractor to make a change that the Changes clause authorizes the contracting officer to order without the contractor's consent.

*Chief Acquisition Officer* means an executive level acquisition official responsible for agency performance of acquisition activities and acquisition programs created pursuant to 41 U.S.C. 1702.

*Chief of mission* means the principal officer in charge of a diplomatic mission of the United States or of a United States office abroad which is designated by the Secretary of State as diplomatic in nature, including any individual assigned under section 502(c) of the Foreign Service Act of 1980 (Public Law 96-465) to be temporarily in charge of such a mission or office.

*Claim* means a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract. However, a written demand or written assertion by the contractor seeking the payment of money exceeding \$100,000 is not a claim under 41 U.S.C. chapter 71, Contract Disputes, until certified as required by the statute. A voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim. The submission may be converted to a claim, by written notice to the contracting officer as provided in 33.206(a), if it is disputed either as to liability or amount or is not acted upon in a reasonable time.

*Classified acquisition* means an acquisition in which offerors must have access to classified information to properly submit an offer or quotation, to understand the performance requirements, or to perform the contract.

*Classified contract* means any contract in which the contractor or its employees must have access to classified information during contract performance. A contract may be a classified contract even though the contract document itself is unclassified.

*Classified information* means any knowledge that can be communicated or any documentary material, regardless of its physical form or characteristics, that—

(1)(i) Is owned by, is produced by or for, or is under the control of the United States Government; or

(ii) Has been classified by the Department of Energy as privately generated restricted data following the procedures in 10 CFR 1045.21; and

(2) Must be protected against unauthorized disclosure according to Executive Order 12958, Classified National Security Information, April 17, 1995, or classified in accordance with the Atomic Energy Act of 1954.

*Cognizant Federal agency* means the Federal agency that, on behalf of all Federal agencies, is responsible for establishing final indirect cost rates and forward pricing rates, if applicable, and administering cost accounting standards for all contracts in a business unit.

*Combatant commander* means the commander of a unified or specified combatant command established in accordance with 10 U.S.C. 161.

*Commercial component* means any component that is a commercial item.

*Commercial computer software* means any computer software that is a commercial item.

*Commercial item* means—

(1) Any 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—

(i) Has been sold, leased, or licensed to the general public; or

(ii) Has been offered for sale, lease, or license to the general public;

(2) Any item that evolved from an item described in paragraph (1) of this definition through advances in technology or performance and that is not yet available in the commercial marketplace, but will be available in the commercial marketplace in time to satisfy the delivery requirements under a Government solicitation;

(3) Any item that would satisfy a criterion expressed in paragraphs (1) or (2) of this definition, but for—

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(i) Modifications of a type customarily available in the commercial marketplace; or

(ii) Minor modifications of a type not customarily available in the commercial marketplace made to meet Federal Government requirements. Minor modifications means modifications that do not significantly alter the non-governmental function or essential physical characteristics of an item or component, or change the purpose of a process. Factors to be considered in determining whether a modification is minor include the value and size of the modification and the comparative value and size of the final product. Dollar values and percentages may be used as guideposts, but are not conclusive evidence that a modification is minor;

(4) Any combination of items meeting the requirements of paragraphs (1), (2), (3), or (5) of this definition that are of a type customarily combined and sold in combination to the general public;

(5) Installation services, maintenance services, repair services, training services, and other services if—

(i) Such services are procured for support of an item referred to in paragraph (1), (2), (3), or (4) of this definition, regardless of whether such services are provided by the same source or at the same time as the item; and

(ii) The source of such services provides similar services contemporaneously to the general public under terms and conditions similar to those offered to the Federal Government;

(6) Services of a type offered and sold competitively in substantial quantities in the commercial marketplace based on established catalog or market prices for specific tasks performed or specific outcomes to be achieved and under standard commercial terms and conditions. For purposes of these services—

(i) *Catalog price* means a price included in a catalog, price list, schedule, or other form that is regularly maintained by the manufacturer or vendor, is either published or otherwise available for inspection by customers, and states prices at which sales are currently, or were last, made to a significant number of buyers constituting the general public; and

(ii) *Market prices* means current prices that are established in the course of ordinary trade between buyers and sellers free to bargain and that can be substantiated through competition or from sources independent of the offerors.

(7) Any item, combination of items, or service referred to in paragraphs (1) through (6) of this definition, notwithstanding the fact that the item, combination of items, or service is transferred between or among separate divisions, subsidiaries, or affiliates of a contractor; or

(8) A nondevelopmental item, if the procuring agency determines the item was developed exclusively at private expense and sold in substantial quantities, on a competitive basis, to multiple State and local governments.

*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 46 U.S.C. 40102(4), such as agricultural products and petroleum products.

*Common item* means material that is common to the applicable Government contract and the contractor's other work.

*Component* means any item supplied to the Government as part of an end item or of another component, except that for use in—

(1) Part 25, see the definition in 25.003;

(2) 52.225-1 and 52.225-3, see the definition in 52.225-1(a) and 52.225-3(a);

(3) 52.225-9 and 52.225-11, see the definition in 52.225-9(a) and 52.225-11(a); and

(4) 52.225-21 and 52.225-23, see the definition in 52.225-21(a) and 52.225-23(a).

*Computer database* or *database* means a collection of recorded information in a form capable of, and for the purpose

of, being stored in, processed, and operated on by a computer. The term does not include computer software.

*Computer software*—(1) Means (i) Computer programs that comprise a series of instructions, rules, routines, or statements, regardless of the media in which recorded, that allow or cause a computer to perform a specific operation or series of operations; and

(ii) Recorded information comprising source code listings, design details, algorithms, processes, flow charts, formulas, and related material that would enable the computer program to be produced, created, or compiled.

(2) Does not include computer databases or computer software documentation.

*Computer software documentation* means owner's manuals, user's manuals, installation instructions, operating instructions, and other similar items, regardless of storage medium, that explain the capabilities of the computer software or provide instructions for using the software.

*Consent to subcontract* means the contracting officer's written consent for the prime contractor to enter into a particular subcontract.

*Construction* means construction, alteration, or repair (including dredging, excavating, and painting) of buildings, structures, or other real property. For purposes of this definition, the terms "buildings, structures, or other real property" include, but are not limited to, improvements of all types, such as bridges, dams, plants, highways, parkways, streets, subways, tunnels, sewers, mains, power lines, cemeteries, pumping stations, railways, airport facilities, terminals, docks, piers, wharves, ways, lighthouses, buoys, jetties, breakwaters, levees, canals, and channels. Construction does not include the manufacture, production, furnishing, construction, alteration, repair, processing, or assembling of vessels, aircraft, or other kinds of personal property (except that for use in subpart 22.5, see the definition at 22.502).

*Contiguous United States (CONUS)* means the 48 contiguous States and the District of Columbia.

*Contingency operation* (10 U.S.C. 101(a)(13)) means a military operation that—

(1) Is designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force; or

(2) Results in the call or order to, or retention on, active duty of members of the uniformed services under sections 688, 12301(a), 12302, 12304, 12304a, 12305, or 12406 of title 10 of the United States Code, Chapter 15 of title 10 of the United States Code, or any other provision of law during a war or during a national emergency declared by the President or Congress.

*Continued portion of the contract* means the portion of a contract that the contractor must continue to perform following a partial termination.

*Contract* means a mutually binding legal relationship obligating the seller to furnish the supplies or services (including construction) and the buyer to pay for them. It includes all types of commitments that obligate the Government to an expenditure of appropriated funds and that, except as otherwise authorized, are in writing. In addition to bilateral instruments, contracts include (but are not limited to) awards and notices of awards; job orders or task letters issued under basic ordering agreements; letter contracts; orders, such as purchase orders, under which the contract becomes effective by written acceptance or performance; and bilateral contract modifications. Contracts do not include grants and cooperative agreements covered by 31 U.S.C. 6301, *et seq.* For discussion of various types of contracts, see part 16.

*Contract administration office* means an office that performs—

(1) Assigned postaward functions related to the administration of contracts; and

(2) Assigned preaward functions.

*Contract clause* or *clause* means a term or condition used in contracts or in both solicitations and contracts, and applying after contract award or both before and after award.

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*Contract modification* means any written change in the terms of a contract (see 43.103).

*Contracting* means purchasing, renting, leasing, or otherwise obtaining supplies or services from nonfederal sources. Contracting includes description (but not determination) of supplies and services required, selection and solicitation of sources, preparation and award of contracts, and all phases of contract administration. It does not include making grants or cooperative agreements.

*Contracting activity* means an element of an agency designated by the agency head and delegated broad authority regarding acquisition functions.

*Contracting office* means an office that awards or executes a contract for supplies or services and performs postaward functions not assigned to a contract administration office (except for use in part 48, see also 48.001).

*Contracting officer* means a person with the authority to enter into, administer, and/or terminate contracts and make related determinations and findings. The term includes certain authorized representatives of the contracting officer acting within the limits of their authority as delegated by the contracting officer. “Administrative contracting officer (ACO)” refers to a contracting officer who is administering contracts. “Termination contracting officer (TCO)” refers to a contracting officer who is settling terminated contracts. A single contracting officer may be responsible for duties in any or all of these areas. Reference in this regulation (48 CFR chapter 1) to administrative contracting officer or termination contracting officer does not—

(1) Require that a duty be performed at a particular office or activity; or

(2) Restrict in any way a contracting officer in the performance of any duty properly assigned.

*Contracting officer’s representative (COR)* means an individual, including a contracting officer’s technical representative (COTR), designated and authorized in writing by the contracting officer to perform specific technical or administrative functions.

*Conviction* means a judgment or conviction of a criminal offense by any

court of competent jurisdiction, whether entered upon a verdict or a plea, and includes a conviction entered upon a plea of *nolo contendere*. For use in subpart 23.5, see the definition at 23.503.

*Cost or pricing data* (10 U.S.C. 2306a(h)(1) and 41 U.S.C. chapter 35) means all facts that, as of the date of price agreement, or, if applicable, an earlier date agreed upon between the parties that is as close as practicable to the date of agreement on price, prudent buyers and sellers would reasonably expect to affect price negotiations significantly. Cost or pricing data are factual, not judgmental; and are verifiable. While they do not indicate the accuracy of the prospective contractor’s judgment about estimated future costs or projections, they do include the data forming the basis for that judgment. Cost or pricing data are more than historical accounting data; they are all the facts that can be reasonably expected to contribute to the soundness of estimates of future costs and to the validity of determinations of costs already incurred. They also include, but are not limited to, such factors as—

(1) Vendor quotations;

(2) Nonrecurring costs;

(3) Information on changes in production methods and in production or purchasing volume;

(4) Data supporting projections of business prospects and objectives and related operations costs;

(5) Unit-cost trends such as those associated with labor efficiency;

(6) Make-or-buy decisions;

(7) Estimated resources to attain business goals; and

(8) Information on management decisions that could have a significant bearing on costs.

*Cost realism* means that the costs in an offeror’s proposal—

(1) Are realistic for the work to be performed;

(2) Reflect a clear understanding of the requirements; and

(3) Are consistent with the various elements of the offeror’s technical proposal.

*Cost sharing* means an explicit arrangement under which the contractor bears some of the burden of reasonable, allocable, and allowable contract cost.

*Customs territory of the United States* means the 50 States, the District of Columbia, and Puerto Rico.

*Data other than certified cost or pricing data* means pricing data, cost data, and judgmental information necessary for the contracting officer to determine a fair and reasonable price or to determine cost realism. Such data may include the identical types of data as certified cost or pricing data, consistent with Table 15-2 of 15.408, but without the certification. The data may also include, for example, sales data and any information reasonably required to explain the offeror's estimating process, including, but not limited to—

(1) The judgmental factors applied and the mathematical or other methods used in the estimate, including those used in projecting from known data; and

(2) The nature and amount of any contingencies included in the proposed price.

*Data Universal Numbering System (DUNS) number* means the 9-digit number assigned by Dun and Bradstreet, Inc. (D&B), to identify unique business entities, which is used as the identification number for Federal contractors.

*Data Universal Numbering System + 4 (DUNS + 4) number* means the DUNS number assigned by D&B plus a 4-character suffix that may be assigned by a business concern. (D&B has no affiliation with this 4-character suffix.) This 4-character suffix may be assigned at the discretion of the business concern to establish additional System for Award Management records for identifying alternative Electronic Funds Transfer (EFT) accounts (see subpart 32.11) for the same concern.

*Day* means, unless otherwise specified, a calendar day.

*Debarment* means action taken by a debarring official under 9.406 to exclude a contractor from Government contracting and Government-approved subcontracting for a reasonable, specified period; a contractor that is excluded is "debarred."

*Delivery order* means an order for supplies placed against an established contract or with Government sources.

*Depreciation* means a charge to current operations that distributes the

cost of a tangible capital asset, less estimated residual value, over the estimated useful life of the asset in a systematic and logical manner. It does not involve a process of valuation. Useful life refers to the prospective period of economic usefulness in a particular contractor's operations as distinguished from physical life; it is evidenced by the actual or estimated retirement and replacement practice of the contractor.

*Descriptive literature* means information provided by an offeror, such as cuts, illustrations, drawings, and brochures, that shows a product's characteristics or construction of a product or explains its operation. The term includes only that information needed to evaluate the acceptability of the product and excludes other information for operating or maintaining the product.

*Design-to-cost* means a concept that establishes cost elements as management goals to achieve the best balance between life-cycle cost, acceptable performance, and schedule. Under this concept, cost is a design constraint during the design and development phases and a management discipline throughout the acquisition and operation of the system or equipment.

*Designated operational area* means a geographic area designated by the combatant commander or subordinate joint force commander for the conduct or support of specified military operations.

*Direct acquisition* means a type of interagency acquisition where a requesting agency places an order directly against a servicing agency's indefinite-delivery contract. The servicing agency manages the indefinite-delivery contract but does not participate in the placement or administration of an order.

*Direct cost* means any cost that is identified specifically with a particular final cost objective. Direct costs are not limited to items that are incorporated in the end product as material or labor. Costs identified specifically with a contract are direct costs of that contract. All costs identified specifically with other final cost objectives of the contractor are direct costs of those cost objectives.

*Disaster Response Registry* means a voluntary registry of contractors who are willing to perform debris removal, distribution of supplies, reconstruction, and other disaster or emergency relief activities established in accordance with 6 U.S.C. 796, Registry of Disaster Response Contractors. The Registry contains information on contractors who are willing to perform disaster or emergency relief activities within the United States and its outlying areas. The Registry is accessed via <https://www.acquisition.gov> and alternately through the FEMA Web site at <http://www.fema.gov/business/index.shtm>. (See 26.205.)

*Drug-free workplace* means the site(s) for the performance of work done by the contractor in connection with a specific contract where employees of the contractor are prohibited from engaging in the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance.

*Earned value management system* means a project management tool that effectively integrates the project scope of work with cost, schedule and performance elements for optimum project planning and control. The qualities and operating characteristics of an earned value management system are described in American National Standards Institute/Electronics Industries Alliance (ANSI/EIA) Standard-748, Earned Value Management Systems. (See OMB Circular A-11, Part 7.)

*Economically disadvantaged women-owned small business (EDWOSB) concern*—(see definition of *Women-Owned Small Business (WOSB) Program* in this section).

*Effective date of termination* means the date on which the notice of termination requires the contractor to stop performance under the contract. If the contractor receives the termination notice after the date fixed for termination, then the effective date of termination means the date the contractor receives the notice.

*Electronic and information technology (EIT)* has the same meaning as “information technology” except EIT also includes any equipment or interconnected system or subsystem of equipment that is used in the creation, conversion, or duplication of data or

information. The term EIT, includes, but is not limited to, telecommunication products (such as telephones), information kiosks and transaction machines, worldwide websites, multimedia, and office equipment (such as copiers and fax machines).

*Electronic commerce* means electronic techniques for accomplishing business transactions including electronic mail or messaging, World Wide Web technology, electronic bulletin boards, purchase cards, electronic funds transfer, and electronic data interchange.

*Electronic data interchange (EDI)* means a technique for electronically transferring and storing formatted information between computers utilizing established and published formats and codes, as authorized by the applicable Federal Information Processing Standards.

*Electronic Funds Transfer (EFT)* means any transfer of funds, other than a transaction originated by cash, check, or similar paper instrument, that is initiated through an electronic terminal, telephone, computer, or magnetic tape, for the purpose of ordering, instructing, or authorizing a financial institution to debit or credit an account. The term includes Automated Clearing House transfers, Fedwire transfers, and transfers made at automatic teller machines and point-of-sale terminals. For purposes of compliance with 31 U.S.C. 3332 and implementing regulations at 31 CFR part 208, the term “electronic funds transfer” includes a Governmentwide commercial purchase card transaction.

*End product* means supplies delivered under a line item of a Government contract, except for use in part 25 and the associated clauses at 52.225-1, 52.225-3, and 52.225-5, see the definitions in 25.003, 52.225-1(a), 52.225-3(a), and 52.225-5(a).

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

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

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

(2) As used in this definition, the term “product” does not include any energy-consuming product or system designed or procured for combat or combat-related missions (42 U.S.C. 8259b).

*Energy-efficient standby power devices* means products that use—

(1) External standby power devices, or that contain an internal standby power function; and

(2) No more than one watt of electricity in their standby power consuming mode or meet recommended low standby levels as designated by the Department of Energy Federal Energy Management Program.

*Energy-savings performance contract* means a contract that requires the contractor to—

(1) Perform services for the design, acquisition, financing, installation, testing, operation, and where appropriate, maintenance and repair, of an identified energy conservation measure or series of measures at one or more locations;

(2) Incur the costs of implementing the energy savings measures, including at least the cost (if any) incurred in making energy audits, acquiring and installing equipment, and training personnel in exchange for a predetermined share of the value of the energy savings directly resulting from implementation of such measures during the term of the contract; and

(3) Guarantee future energy and cost savings to the Government.

*Environmentally preferable* means products or services that have a lesser or reduced effect on human health and the environment when compared with competing products or services that serve the same purpose. This comparison may consider raw materials acquisition, production, manufacturing, packaging, distribution, reuse, operation, maintenance, or disposal of the product or service.

*Excess personal property* means any personal property under the control of a Federal agency that the agency head determines is not required for its needs or for the discharge of its responsibilities.

*Executive agency* means an executive department, a military department, or any independent establishment within

the meaning of 5 U.S.C. 101, 102, and 104(1), respectively, and any wholly owned Government corporation within the meaning of 31 U.S.C. 9101.

*Facilities capital cost of money* means “cost of money as an element of the cost of facilities capital” as used at 48 CFR 9904.414—Cost Accounting Standard—Cost of Money as an Element of the Cost of Facilities Capital.

*Federal agency* means any executive agency or any independent establishment in the legislative or judicial branch of the Government (except the Senate, the House of Representatives, the Architect of the Capitol, and any activities under the Architect’s direction).

*Federally-controlled facilities* means—

(1) Federally-owned buildings or leased space, whether for single or multi-tenant occupancy, and its grounds and approaches, all or any portion of which is under the jurisdiction, custody or control of a department or agency;

(2) Federally-controlled commercial space shared with non-government tenants. For example, if a department or agency leased the 10th floor of a commercial building, the Directive applies to the 10th floor only;

(3) Government-owned, contractor-operated facilities, including laboratories engaged in national defense research and production activities; and

(4) Facilities under a management and operating contract, such as for the operation, maintenance, or support of a Government-owned or Government-controlled research, development, special production, or testing establishment.

*Federally-controlled information system* means an information system (44 U.S.C. 3502(8) used or operated by a Federal agency, or a contractor or other organization on behalf of the agency (44 U.S.C. 3544(a)(1)(A)).

*Federally Funded Research and Development Centers (FFRDC’s)* means activities that are sponsored under a broad charter by a Government agency (or agencies) for the purpose of performing, analyzing, integrating, supporting, and/or managing basic or applied research and/or development, and that receive 70 percent or more of their

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financial support from the Government; and—

(1) A long-term relationship is contemplated;

(2) Most or all of the facilities are owned or funded by the Government; and

(3) The FFRDC has access to Government and supplier data, employees, and facilities beyond that common in a normal contractual relationship.

*Final indirect cost rate* means the indirect cost rate established and agreed upon by the Government and the contractor as not subject to change. It is usually established after the close of the contractor's fiscal year (unless the parties decide upon a different period) to which it applies. For cost-reimbursement research and development contracts with educational institutions, it may be predetermined; that is, established for a future period on the basis of cost experience with similar contracts, together with supporting data.

*First article* means a preproduction model, initial production sample, test sample, first lot, pilot lot, or pilot models.

*First article testing* means testing and evaluating the first article for conformance with specified contract requirements before or in the initial stage of production.

*F.o.b.* means free on board. This term is used in conjunction with a physical point to determine—

(1) The responsibility and basis for payment of freight charges; and

(2) Unless otherwise agreed, the point where title for goods passes to the buyer or consignee.

*F.o.b. destination* means free on board at destination; *i.e.*, the seller or consignor delivers the goods on seller's or consignor's conveyance at destination. Unless the contract provides otherwise, the seller or consignor is responsible for the cost of shipping and risk of loss. For use in the clause at 52.247-34, see the definition at 52.247-34(a).

*F.o.b. origin* means free on board at origin; *i.e.*, the seller or consignor places the goods on the conveyance. Unless the contract provides otherwise, the buyer or consignee is responsible for the cost of shipping and risk of loss. For use in the clause at 52.247-29, see the definition at 52.247-29(a).

*F.o.b. \* \* \** (For other types of *F.o.b.*, see 47.303).

*Forward pricing rate agreement* means a written agreement negotiated between a contractor and the Government to make certain rates available during a specified period for use in pricing contracts or modifications. These rates represent reasonable projections of specific costs that are not easily estimated for, identified with, or generated by a specific contract, contract end item, or task. These projections may include rates for such things as labor, indirect costs, material obsolescence and usage, spare parts provisioning, and material handling.

*Forward pricing rate recommendation* means a rate set unilaterally by the administrative contracting officer for use by the Government in negotiations or other contract actions when forward pricing rate agreement negotiations have not been completed or when the contractor will not agree to a forward pricing rate agreement.

*Freight* means supplies, goods, and transportable property.

*Full and open competition*, when used with respect to a contract action, means that all responsible sources are permitted to compete.

*General and administrative (G&A) expense* means any management, financial, and other expense which is incurred by or allocated to a business unit and which is for the general management and administration of the business unit as a whole. G&A expense does not include those management expenses whose beneficial or causal relationship to cost objectives can be more directly measured by a base other than a cost input base representing the total activity of a business unit during a cost accounting period.

*Global warming potential* means how much a given mass of a chemical contributes to global warming over a given time period compared to the same mass of carbon dioxide. Carbon dioxide's global warming potential is defined as 1.0.

*Governmentwide acquisition contract (GWAC)* means a task-order or delivery-order contract for information technology established by one agency for Governmentwide use that is operated—

(1) By an executive agent designated by the Office of Management and Budget pursuant to 40 U.S.C. 11302(e); or

(2) Under a delegation of procurement authority issued by the General Services Administration (GSA) prior to August 7, 1996, under authority granted GSA by former section 40 U.S.C. 759, repealed by Pub. L. 104–106. The Economy Act does not apply to orders under a Governmentwide acquisition contract.

*Governmentwide point of entry (GPE)* means the single point where Government business opportunities greater than \$25,000, including synopses of proposed contract actions, solicitations, and associated information, can be accessed electronically by the public. The GPE is located at <http://www.fedbizopps.gov>.

*Head of the agency* (see “agency head”).

*Head of the contracting activity* means the official who has overall responsibility for managing the contracting activity.

*High global warming potential hydrofluorocarbons* means any hydrofluorocarbons in a particular end use for which EPA’s Significant New Alternatives Policy (SNAP) program has identified other acceptable alternatives that have lower global warming potential. The SNAP list of alternatives is found at 40 CFR part 82, subpart G, with supplemental tables of alternatives available at <http://www.epa.gov/snap/>.

*Historically black college or university* means an institution determined by the Secretary of Education to meet the requirements of 34 CFR 608.2.

*HUBZone* means a historically underutilized business zone that is an area located within one or more qualified census tracts, qualified nonmetropolitan counties, lands within the external boundaries of an Indian reservation, qualified base closure areas, or redesignated areas, as defined in 13 CFR 126.103.

*HUBZone contract* means a contract awarded to a “HUBZone small business” concern through any of the following procurement methods:

(1) A sole source award to a HUBZone small business concern.

(2) Set-aside awards based on competition restricted to HUBZone small business concerns.

(3) Awards to HUBZone small business concerns through full and open competition after a price evaluation preference in favor of HUBZone small business concerns.

*HUBZone small business concern* means a small business concern that appears on the List of Qualified HUBZone Small Business Concerns maintained by the Small Business Administration (13 CFR 126.103).

*Humanitarian or peacekeeping operation* means a military operation in support of the provision of humanitarian or foreign disaster assistance or in support of a peacekeeping operation under chapter VI or VII of the Charter of the United Nations. The term does not include routine training, force rotation, or stationing (10 U.S.C. 2302(8) and 41 U.S.C. 153(2)).

*Hydrofluorocarbons* means compounds that contain only hydrogen, fluorine, and carbon.

*In writing, writing, or written* means any worded or numbered expression that can be read, reproduced, and later communicated, and includes electronically transmitted and stored information.

*Indirect cost* means any cost not directly identified with a single final cost objective, but identified with two or more final cost objectives or with at least one intermediate cost objective.

*Indirect cost rate* means the percentage or dollar factor that expresses the ratio of indirect expense incurred in a given period to direct labor cost, manufacturing cost, or another appropriate base for the same period (see also “final indirect cost rate”).

*Ineligible* means excluded from Government contracting (and subcontracting, if appropriate) pursuant to statutory, Executive order, or regulatory authority other than this regulation (48 CFR chapter 1) and its implementing and supplementing regulations; for example, pursuant to—

(1) 40 U.S.C. chapter 31, subchapter IV, Wage Rate Requirements (Construction), and its related statutes and implementing regulations;

(2) 41 U.S.C. chapter 67, Service Contract Labor Standards;

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(3) The Equal Employment Opportunity Acts and Executive orders;

(4) 41 U.S.C. chapter 65, Contracts for Material, Supplies, Articles, and Equipment Exceeding \$15,000;

(5) 41 U.S.C. chapter 83, Buy American; or

(6) The Environmental Protection Acts and Executive orders.

*Information security* means protecting information and information systems from unauthorized access, use, disclosure, disruption, modification, or destruction in order to provide—

(1) Integrity, which means guarding against improper information modification or destruction, and includes ensuring information nonrepudiation and authenticity;

(2) Confidentiality, which means preserving authorized restrictions on access and disclosure, including means for protecting personal privacy and proprietary information; and

(3) Availability, which means ensuring timely and reliable access to, and use of, information.

*Information technology* means any equipment, or interconnected system(s) or subsystem(s) of equipment, that is used in the automatic acquisition, storage, analysis, evaluation, manipulation, management, movement, control, display, switching, interchange, transmission, or reception of data or information by the agency.

(1) For purposes of this definition, equipment is used by an agency if the equipment is used by the agency directly or is used by a contractor under a contract with the agency that requires—

(i) Its use; or

(ii) To a significant extent, its use in the performance of a service or the furnishing of a product.

(2) The term “information technology” includes computers, ancillary equipment (including imaging peripherals, input, output, and storage devices necessary for security and surveillance), peripheral equipment designed to be controlled by the central processing unit of a computer, software, firmware and similar procedures, services (including support services), and related resources.

(3) The term “information technology” does not include any equipment that—

(i) Is acquired by a contractor incidental to a contract; or

(ii) Contains imbedded information technology that is used as an integral part of the product, but the principal function of which is not the acquisition, storage, analysis, evaluation, manipulation, management, movement, control, display, switching, interchange, transmission, or reception of data or information. For example, HVAC (heating, ventilation, and air conditioning) equipment, such as thermostats or temperature control devices, and medical equipment where information technology is integral to its operation, are not information technology.

*Inherently governmental function* means, as a matter of policy, a function that is so intimately related to the public interest as to mandate performance by Government employees. This definition is a policy determination, not a legal determination. An inherently governmental function includes activities that require either the exercise of discretion in applying Government authority, or the making of value judgments in making decisions for the Government. Governmental functions normally fall into two categories: the act of governing, *i.e.*, the discretionary exercise of Government authority, and monetary transactions and entitlements.

(1) An inherently governmental function involves, among other things, the interpretation and execution of the laws of the United States so as to—

(i) Bind the United States to take or not to take some action by contract, policy, regulation, authorization, order, or otherwise;

(ii) Determine, protect, and advance United States economic, political, territorial, property, or other interests by military or diplomatic action, civil or criminal judicial proceedings, contract management, or otherwise;

(iii) Significantly affect the life, liberty, or property of private persons;

(iv) Commission, appoint, direct, or control officers or employees of the United States; or

(v) Exert ultimate control over the acquisition, use, or disposition of the property, real or personal, tangible or intangible, of the United States, including the collection, control, or disbursement of Federal funds.

(2) Inherently governmental functions do not normally include gathering information for or providing advice, opinions, recommendations, or ideas to Government officials. They also do not include functions that are primarily ministerial and internal in nature, such as building security, mail operations, operation of cafeterias, housekeeping, facilities operations and maintenance, warehouse operations, motor vehicle fleet management operations, or other routine electrical or mechanical services.

*Inspection* means examining and testing supplies or services (including, when appropriate, raw materials, components, and intermediate assemblies) to determine whether they conform to contract requirements.

*Insurance* means a contract that provides that for a stipulated consideration, one party undertakes to indemnify another against loss, damage, or liability arising from an unknown or contingent event.

*Interagency acquisition* means a procedure by which an agency needing supplies or services (the requesting agency) obtains them from another agency (the servicing agency), by an assisted acquisition or a direct acquisition. The term includes—

(1) Acquisitions under the Economy Act (31 U.S.C. 1535); and

(2) Non-Economy Act acquisitions completed under other statutory authorities (e.g., General Services Administration Federal Supply Schedules in subpart 8.4 and Governmentwide acquisition contracts (GWACs)).

*Invoice* means a contractor's bill or written request for payment under the contract for supplies delivered or services performed (see also "proper invoice").

*Irrevocable letter of credit* means a written commitment by a federally insured financial institution to pay all or part of a stated amount of money, until the expiration date of the letter, upon the Government's (the beneficiary) presentation of a written de-

mand for payment. Neither the financial institution nor the offeror/contractor can revoke or condition the letter of credit.

*Labor surplus area* means a geographical area identified by the Department of Labor in accordance with 20 CFR part 654, subpart A, as an area of concentrated unemployment or underemployment or an area of labor surplus.

*Labor surplus area concern* means a concern that together with its first-tier subcontractors will perform substantially in labor surplus areas. Performance is substantially in labor surplus areas if the costs incurred under the contract on account of manufacturing, production, or performance of appropriate services in labor surplus areas exceed 50 percent of the contract price.

*Latent defect* means a defect that exists at the time of acceptance but cannot be discovered by a reasonable inspection.

*Major system* means that combination of elements that will function together to produce the capabilities required to fulfill a mission need. The elements may include hardware, equipment, software, or any combination thereof, but exclude construction or other improvements to real property. A system is a major system if—

(1) The Department of Defense is responsible for the system and the total expenditures for research, development, test, and evaluation for the system are estimated to be more than \$185 million based on Fiscal Year 2014 constant dollars or the eventual total expenditure for the acquisition exceeds \$835 million based on Fiscal Year 2014 constant dollars (or any update of these thresholds based on a more recent fiscal year, as specified in the DoD Instruction 5000.02, "Operation of the Defense Acquisition System");

(2) A civilian agency is responsible for the system and total expenditures for the system are estimated to exceed \$ 2 million or the dollar threshold for a "major system" established by the agency pursuant to Office of Management and Budget Circular A-109, entitled "Major System Acquisitions," whichever is greater; or

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(3) The system is designated a “major system” by the head of the agency responsible for the system (10 U.S.C. 2302 and 41 U.S.C. 109).

*Make-or-buy program* means that part of a contractor’s written plan for a contract identifying those major items to be produced or work efforts to be performed in the prime contractor’s facilities and those to be subcontracted.

*Manufactured end product* means any end product in product and service codes (PSC) 1000–9999, except—

- (1) PSC 5510, Lumber and Related Basic Wood Materials;
- (2) Product or service group (PSG) 87, Agricultural Supplies;
- (3) PSG 88, Live Animals;
- (4) PSG 89, Subsistence;
- (5) PSC 9410, Crude Grades of Plant Materials;
- (6) PSC 9430, Miscellaneous Crude Animal Products, Inedible;
- (7) PSC 9440, Miscellaneous Crude Agricultural and Forestry Products;
- (8) PSC 9610, Ores;
- (9) PSC 9620, Minerals, Natural and Synthetic; and
- (10) PSC 9630, Additive Metal Materials.

*Market research* means collecting and analyzing information about capabilities within the market to satisfy agency needs.

*Master solicitation* means a document containing special clauses and provisions that have been identified as essential for the acquisition of a specific type of supply or service that is acquired repetitively.

*May* denotes the permissive. However, the words “no person may \* \* \*” mean that no person is required, authorized, or permitted to do the act described.

*Micro-purchase* means an acquisition of supplies or services using simplified acquisition procedures, the aggregate amount of which does not exceed the micro-purchase threshold.

*Micro-purchase threshold* means \$3,500, except it means—

- (1) For acquisitions of construction subject to 40 U.S.C. chapter 31, subchapter IV, Wage Rate Requirements (Construction), \$2,000;
- (2) For acquisitions of services subject to 41 U.S.C. chapter 67, Service Contract Labor Standards, \$2,500; and

(3) For acquisitions of supplies or services that, as determined by the head of the agency, are to be used to support a contingency operation or to facilitate defense against or recovery from nuclear, biological, chemical or radiological attack as described in 13.201(g)(1), except for construction subject to 40 U.S.C. chapter 31, subchapter IV, Wage Rate Requirements (Construction) (41 U.S.C. 1903)—

- (i) \$20,000 in the case of any contract to be awarded and performed, or purchase to be made, inside the United States; and
- (ii) \$30,000 in the case of any contract to be awarded and performed, or purchase to be made, outside the United States.

*Minority Institution* means an institution of higher education meeting the requirements of Section 365(3) of the Higher Education Act of 1965 (20 U.S.C. 1067k), including a Hispanic-serving institution of higher education, as defined in Section 502(a) of the Act (20 U.S.C. 1101a).

*Multi-agency contract (MAC)* means a task-order or delivery-order contract established by one agency for use by Government agencies to obtain supplies and services, consistent with the Economy Act (see 17.502-2). Multi-agency contracts include contracts for information technology established pursuant to 40 U.S.C. 11314(a)(2).

*Multiple-award contract* means a contract that is—

- (1) A Multiple Award Schedule contract issued by GSA (*e.g.*, GSA Schedule Contract) or agencies granted Multiple Award Schedule contract authority by GSA (*e.g.*, Department of Veterans Affairs) as described in FAR part 38;
- (2) A multiple-award task-order or delivery-order contract issued in accordance with FAR subpart 16.5, including Governmentwide acquisition contracts; or
- (3) Any other indefinite-delivery, indefinite-quantity contract entered into with two or more sources pursuant to the same solicitation.

*Must* (see “shall”).

*National defense* means any activity related to programs for military or atomic energy production or construction, military assistance to any foreign

nation, stockpiling, or space, except that for use in Subpart 11.6, see the definition in 11.601.

*Neutral person* means an impartial third party, who serves as a mediator, fact finder, or arbitrator, or otherwise functions to assist the parties to resolve the issues in controversy. A neutral person may be a permanent or temporary officer or employee of the Federal Government or any other individual who is acceptable to the parties. A neutral person must have no official, financial, or personal conflict of interest with respect to the issues in controversy, unless the interest is fully disclosed in writing to all parties and all parties agree that the neutral person may serve (5 U.S.C. 583).

*Nondevelopmental item* means—

(1) Any previously developed item of supply used exclusively for governmental purposes by a Federal agency, a State or local government, or a foreign government with which the United States has a mutual defense cooperation agreement;

(2) Any item described in paragraph (1) of this definition that requires only minor modification or modifications of a type customarily available in the commercial marketplace in order to meet the requirements of the procuring department or agency; or

(3) Any item of supply being produced that does not meet the requirements of paragraphs (1) or (2) solely because the item is not yet in use.

*Novation agreement* means a legal instrument—

(1) Executed by the—

(i) Contractor (transferor);

(ii) Successor in interest (transferee); and

(iii) Government; and

(2) By which, among other things, the transferor guarantees performance of the contract, the transferee assumes all obligations under the contract, and the Government recognizes the transfer of the contract and related assets.

*Offer* means a response to a solicitation that, if accepted, would bind the offeror to perform the resultant contract. Responses to invitations for bids (sealed bidding) are offers called “bids” or “sealed bids”; responses to requests for proposals (negotiation) are offers called “proposals”; however, responses

to requests for quotations (simplified acquisition) are “quotations”, not offers. For unsolicited proposals, see subpart 15.6.

*Offeror* means offeror or bidder.

*Office of Small and Disadvantaged Business Utilization* means the Office of Small Business Programs when referring to the Department of Defense.

*OMB Uniform Guidance at 2 CFR part 200* is the abbreviated title for Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards (2 CFR part 200), which supersedes OMB Circulars A-21, A-87, A-89, A-102, A-110, A-122, and A-133, and the guidance in Circular A-50 on Audit Followup.

*Option* means a unilateral right in a contract by which, for a specified time, the Government may elect to purchase additional supplies or services called for by the contract, or may elect to extend the term of the contract.

*Organizational conflict of interest* means that because of other activities or relationships with other persons, a person is unable or potentially unable to render impartial assistance or advice to the Government, or the person's objectivity in performing the contract work is or might be otherwise impaired, or a person has an unfair competitive advantage.

*Outlying areas* means—

(1) *Commonwealths.* (i) Puerto Rico.

(ii) The Northern Mariana Islands;

(2) *Territories.* (i) American Samoa.

(ii) Guam.

(iii) U.S. Virgin Islands; and

(3) *Minor outlying islands.* (i) Baker Island.

(ii) Howland Island.

(iii) Jarvis Island.

(iv) Johnston Atoll.

(v) Kingman Reef.

(vi) Midway Islands.

(vii) Navassa Island.

(viii) Palmyra Atoll.

(ix) Wake Atoll.

*Overtime* means time worked by a contractor's employee in excess of the employee's normal workweek.

*Overtime premium* means the difference between the contractor's regular rate of pay to an employee for the shift involved and the higher rate paid for overtime. It does not include shift premium, *i.e.*, the difference between

the contractor's regular rate of pay to an employee and the higher rate paid for extra-pay-shift work.

*Ozone-depleting substance* means any substance the Environmental Protection Agency designates in 40 CFR part 82 as—

(1) Class I, including, but not limited to, chlorofluorocarbons, halons, carbon tetrachloride, and methyl chloroform; or

(2) Class II, including, but not limited to, hydrochlorofluorocarbons.

*Partial termination* means the termination of a part, but not all, of the work that has not been completed and accepted under a contract.

*Past performance* means an offeror's or contractor's performance on active and physically completed contracts (see 4.804-4).

*Performance-based acquisition (PBA)* means an acquisition structured around the results to be achieved as opposed to the manner by which the work is to be performed.

*Performance Work Statement (PWS)* means a statement of work for performance-based acquisitions that describes the required results in clear, specific and objective terms with measurable outcomes.

*Personal property* means property of any kind or interest in it except real property, records of the Federal Government, and naval vessels of the following categories:

- (1) Battleships;
- (2) Cruisers;
- (3) Aircraft carriers;
- (4) Destroyers; and
- (5) Submarines.

*Personal services contract* means a contract that, by its express terms or as administered, makes the contractor personnel appear to be, in effect, Government employees (see 37.104).

*Plant clearance officer* means an authorized representative of the contracting officer, appointed in accordance with agency procedures, responsible for screening, redistributing, and disposing of contractor inventory from a contractor's plant or work site. The term "Contractor's plant" includes, but is not limited to, Government-owned contractor-operated plants, Federal installations, and Federal and non-Federal industrial operations, as may

be required under the scope of the contract.

*Pollution prevention* means any practice that—

(1)(i) Reduces the amount of any hazardous substance, pollutant, or contaminant entering any waste stream or otherwise released into the environment (including fugitive emissions) prior to recycling, treatment, or disposal; and

(ii) Reduces the hazards to public health and the environment associated with the release of such substances, pollutants, and contaminants;

(2) Reduces or eliminates the creation of pollutants through increased efficiency in the use of raw materials, energy, water, or other resources; or

(3) Protects natural resources by conservation.

*Power of attorney* means the authority given one person or corporation to act for and obligate another, as specified in the instrument creating the power; in corporate suretyship, an instrument under seal that appoints an attorney-in-fact to act in behalf of a surety company in signing bonds (see also "attorney-in-fact" at 28.001).

*Preaward survey* means an evaluation of a prospective contractor's capability to perform a proposed contract.

*Preponderance of the evidence* means proof by information that, compared with that opposing it, leads to the conclusion that the fact at issue is more probably true than not.

*Pricing* means the process of establishing a reasonable amount or amounts to be paid for supplies or services.

*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).

*Procurement* (see "acquisition").

*Procuring activity* means a component of an executive agency having a significant acquisition function and designated as such by the head of the agency. Unless agency regulations specify otherwise, the term "procuring activity" is synonymous with "contracting activity."

*Products* has the same meaning as *supplies*.

*Projected average loss* means the estimated long-term average loss per period for periods of comparable exposure to risk of loss.

*Proper invoice* means an invoice that meets the minimum standards specified in 32.905(b).

*Purchase order*, when issued by the Government, means an offer by the Government to buy supplies or services, including construction and research and development, upon specified terms and conditions, using simplified acquisition procedures.

*Qualification requirement* means a Government requirement for testing or other quality assurance demonstration that must be completed before award of a contract.

*Qualified products list (QPL)* means a list of products that have been examined, tested, and have satisfied all applicable qualification requirements.

*Receiving report* means written evidence that indicates Government acceptance of supplies delivered or services performed (see subpart 46.6). Receiving reports must meet the requirements of 32.905(c).

*Recovered material* means waste materials and by-products recovered or diverted from solid waste, but the term does not include those materials and by-products generated from, and commonly reused within, an original manufacturing process. For use in subpart 11.3 for paper and paper products, see the definition at 11.301.

*Registered in the System for Award Management (SAM) database* means that—

(1) The Contractor has entered all mandatory information, including the DUNS number or the DUNS + 4 number, the Contractor and Government Entity (CAGE) code, as well as data required by the Federal Funding Accountability and Transparency Act of 2006 (see subpart 4.14), into the SAM database;

(2) The Contractor has completed the Core, Assertions, Representations and Certifications, and Points of Contact sections of the registration in the SAM database;

(3) The Government has validated all mandatory data fields, to include vali-

dation of the Taxpayer Identification Number (TIN) with the Internal Revenue Service (IRS). The contractor will be required to provide consent for TIN validation to the Government as a part of the SAM registration process; and

(4) The Government has marked the record “Active”.

*Renewable energy* means energy produced by solar, wind, geothermal, biomass, landfill gas, ocean (including tidal, wave, current, and thermal), municipal solid waste, or new hydroelectric generation capacity achieved from increased efficiency or additions of new capacity at an existing hydroelectric project (Energy Policy Act of 2005, 42 U.S.C. 15852).

*Renewable energy technology* means—

(1) Technologies that use renewable energy to provide light, heat, cooling, or mechanical or electrical energy for use in facilities or other activities; or

(2) The use of integrated whole-building designs that rely upon renewable energy resources, including passive solar design.

*Residual value* means the proceeds, less removal and disposal costs, if any, realized upon disposition of a tangible capital asset. It usually is measured by the net proceeds from the sale or other disposition of the asset, or its fair value if the asset is traded in on another asset. The estimated residual value is a current forecast of the residual value.

*Responsible audit agency* means the agency that is responsible for performing all required contract audit services at a business unit.

*Responsible prospective contractor* means a contractor that meets the standards in 9.104.

*Requesting agency* means the agency that has the requirement for an inter-agency acquisition.

*Scrap* means personal property that has no value except its basic metallic, mineral, or organic content.

*Segment* means one of two or more divisions, product departments, plants, or other subdivisions of an organization reporting directly to a home office, usually identified with responsibility for profit and/or producing a product or service. The term includes—

(1) Government-owned contractor-operated (GOCO) facilities; and

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(2) Joint ventures and subsidiaries (domestic and foreign) in which the organization has—

- (i) A majority ownership; or
- (ii) Less than a majority ownership, but over which it exercises control.

*Self-insurance* means the assumption or retention of the risk of loss by the contractor, whether voluntarily or involuntarily. Self-insurance includes the deductible portion of purchased insurance.

*Senior procurement executive* means the individual appointed pursuant to 41 U.S.C. 1702(c) who is responsible for management direction of the acquisition system of the executive agency, including implementation of the unique acquisition policies, regulations, and standards of the executive agency.

*Service-disabled veteran-owned small business concern*—

- (1) Means a small business concern—
  - (i) Not less than 51 percent of which is owned by one or more service-disabled veterans or, in the case of any publicly owned business, not less than 51 percent of the stock of which is owned by one or more service-disabled veterans; and
  - (ii) The management and daily business operations of which are controlled by one or more service-disabled veterans or, in the case of a service-disabled veteran with permanent and severe disability, the spouse or permanent caregiver of such veteran.

(2) Service-disabled veteran means a veteran, as defined in 38 U.S.C. 101(2), with a disability that is service-connected, as defined in 38 U.S.C. 101(16).

*Servicing agency* means the agency that will conduct an assisted acquisition on behalf of the requesting agency.

*Shall* denotes the imperative.

*Shipment* means freight transported or to be transported.

*Shop drawings* means drawings submitted by the construction contractor or a subcontractor at any tier or required under a construction contract, showing in detail either or both of the following:

- (1) The proposed fabrication and assembly of structural elements.

(2) The installation (*i.e.*, form, fit, and attachment details) of materials or equipment.

*Should* means an expected course of action or policy that is to be followed unless inappropriate for a particular circumstance.

*Signature* or *signed* means the discrete, verifiable symbol of an individual which, when affixed to a writing with the knowledge and consent of the individual, indicates a present intention to authenticate the writing. This includes electronic symbols.

*Simplified acquisition procedures* means the methods prescribed in part 13 for making purchases of supplies or services.

*Simplified acquisition threshold* means \$150,000, except for—

- (1) Acquisitions of supplies or services that, as determined by the head of the agency, are to be used to support a contingency operation or to facilitate defense against or recovery from nuclear, biological, chemical, or radiological attack (41 U.S.C. 1903), the term means—

- (i) \$300,000 for any contract to be awarded and performed, or purchase to be made, inside the United States; and
  - (ii) \$1 million for any contract to be awarded and performed, or purchase to be made, outside the United States; and

(2) Acquisitions of supplies or services that, as determined by the head of the agency, are to be used to support a humanitarian or peacekeeping operation (10 U.S.C. 2302), the term means \$300,000 for any contract to be awarded and performed, or purchase to be made, outside the United States.

*Single, Governmentwide point of entry*, means the one point of entry to be designated by the Administrator of OFPP that will allow the private sector to electronically access procurement opportunities Governmentwide.

*Small business concern* means a concern, including its affiliates, that is independently owned and operated, not dominant in the field of operation in which it is bidding on Government contracts, and qualified as a small business under the criteria and size standards in 13 CFR part 121 (see 19.102). Such a concern is “not dominant in its

field of operation” when it does not exercise a controlling or major influence on a national basis in a kind of business activity in which a number of business concerns are primarily engaged. In determining whether dominance exists, consideration must be given to all appropriate factors, including volume of business, number of employees, financial resources, competitive status or position, ownership or control of materials, processes, patents, license agreements, facilities, sales territory, and nature of business activity. (See 15 U.S.C. 632.)

*Small business subcontractor* means a concern, including affiliates, that for subcontracts valued at—

- (1) \$15,000 or less, does not have more than 500 employees; and
- (2) More than \$15,000, does not have employees or average annual receipts exceeding the size standard in 13 CFR part 121 (see 19.102) for the product or service it is providing on the subcontract.

*Small disadvantaged business concern*, consistent with 13 CFR 124.1002, means a small business concern under the size standard applicable to the acquisition, that

- (1) Is at least 51 percent unconditionally and directly owned (as defined at 13 CFR 124.105) by—

- (i) One or more socially disadvantaged (as defined at 13 CFR 124.103) and economically disadvantaged (as defined at 13 CFR 124.104) individuals who are citizens of the United States; and
  - (ii) Each individual claiming economic disadvantage has a net worth not exceeding \$750,000 after taking into account the applicable exclusions set forth at 13 CFR 124.104(c)(2); and

- (2) The management and daily business operations of which are controlled (as defined at 13 CFR 124.106) by individuals who meet the criteria in paragraphs (1)(i) and (ii) of this definition.

*Sole source acquisition* means a contract for the purchase of supplies or services that is entered into or proposed to be entered into by an agency after soliciting and negotiating with only one source.

*Solicitation* means any request to submit offers or quotations to the Government. Solicitations under sealed bid procedures are called “invitations for

bids.” *Solicitations* under negotiated procedures are called “requests for proposals.” Solicitations under simplified acquisition procedures may require submission of either a quotation or an offer.

*Solicitation provision* or *provision* means a term or condition used only in solicitations and applying only before contract award.

*Source selection information* means any of the following information that is prepared for use by an agency for the purpose of evaluating a bid or proposal to enter into an agency procurement contract, if that information has not been previously made available to the public or disclosed publicly:

- (1) Bid prices submitted in response to an agency invitation for bids, or lists of those bid prices before bid opening.
- (2) Proposed costs or prices submitted in response to an agency solicitation, or lists of those proposed costs or prices.
- (3) Source selection plans.
- (4) Technical evaluation plans.
- (5) Technical evaluations of proposals.
- (6) Cost or price evaluations of proposals.
- (7) Competitive range determinations that identify proposals that have a reasonable chance of being selected for award of a contract.
- (8) Rankings of bids, proposals, or competitors.
- (9) Reports and evaluations of source selection panels, boards, or advisory councils.
- (10) Other information marked as “Source Selection Information—See FAR 2.101 and 3.104” based on a case-by-case determination by the head of the agency or the contracting officer, that its disclosure would jeopardize the integrity or successful completion of the Federal agency procurement to which the information relates.

*Special competency* means a special or unique capability, including qualitative aspects, developed incidental to the primary functions of the Federally Funded Research and Development Centers to meet some special need.

*Special test equipment* means either single or multipurpose integrated test units engineered, designed, fabricated,

or modified to accomplish special purpose testing in performing a contract. It consists of items or assemblies of equipment including foundations and similar improvements necessary for installing special test equipment, and standard or general purpose items or components that are interconnected and interdependent so as to become a new functional entity for special testing purposes. Special test equipment does not include material, special tooling, real property, and equipment items used for general testing purposes or property that with relatively minor expense can be made suitable for general purpose use.

*Special tooling* means jigs, dies, fixtures, molds, patterns, taps, gauges, and all components of these items including foundations and similar improvements necessary for installing special tooling, and which are of such a specialized nature that without substantial modification or alteration their use is limited to the development or production of particular supplies or parts thereof or to the performance of particular services. Special tooling does not include material, special test equipment, real property, equipment, machine tools, or similar capital items.

*State and local taxes* means taxes levied by the States, the District of Columbia, outlying areas of the United States, or their political subdivisions.

*Statement of Objectives (SOO)* means a Government-prepared document incorporated into the solicitation that states the overall performance objectives. It is used in solicitations when the Government intends to provide the maximum flexibility to each offeror to propose an innovative approach.

*Substantial evidence* means information sufficient to support the reasonable belief that a particular act or omission has occurred.

*Substantially as follows or substantially the same as*, when used in the prescription and introductory text of a provision or clause, means that authorization is granted to prepare and utilize a variation of that provision or clause to accommodate requirements that are peculiar to an individual acquisition; provided that the variation includes the salient features of the FAR provi-

sion or clause, and is not inconsistent with the intent, principle, and substance of the FAR provision or clause or related coverage of the subject matter.

*Supplemental agreement* means a contract modification that is accomplished by the mutual action of the parties.

*Supplies* means all property except land or interest in land. It includes (but is not limited to) public works, buildings, and facilities; ships, floating equipment, and vessels of every character, type, and description, together with parts and accessories; aircraft and aircraft parts, accessories, and equipment; machine tools; and the alteration or installation of any of the foregoing.

*Supporting a diplomatic or consular mission* means performing outside the United States under a contract administered by Federal agency personnel who are subject to the direction of a Chief of Mission.

*Surety* means an individual or corporation legally liable for the debt, default, or failure of a principal to satisfy a contractual obligation. The types of sureties referred to are as follows:

(1) An individual surety is one person, as distinguished from a business entity, who is liable for the entire penal amount of the bond.

(2) A corporate surety is licensed under various insurance laws and, under its charter, has legal power to act as surety for others.

(3) A cosurety is one of two or more sureties that are jointly liable for the penal sum of the bond. A limit of liability for each surety may be stated.

*Surplus property* means excess personal property not required by any Federal agency as determined by the Administrator of the General Services Administration (GSA). (See 41 CFR 102-36.40).

*Suspension* means action taken by a suspending official under 9.407 to disqualify a contractor temporarily from Government contracting and Government-approved subcontracting; a contractor that is disqualified is "suspended."

*Sustainable acquisition* means acquiring goods and services in order to create and maintain conditions—

(1) Under which humans and nature can exist in productive harmony; and

(2) That permit fulfilling the social, economic, and other requirements of present and future generations.

*System for Award Management (SAM)* means the primary Government repository for prospective Federal awardee and Federal awardee information and the centralized Government system for certain contracting, grants, and other assistance-related processes. It includes—

(1) Data collected from prospective Federal awardees required for the conduct of business with the Government;

(2) Prospective contractor-submitted annual representations and certifications in accordance with FAR subpart 4.12; and

(3) Identification of those parties excluded from receiving Federal contracts, certain subcontracts, and certain types of Federal financial and non-financial assistance and benefits.

*Task order* means an order for services placed against an established contract or with Government sources.

*Taxpayer Identification Number (TIN)* means the number required by the IRS to be used by the offeror in reporting income tax and other returns. The TIN may be either a Social Security Number or an Employer Identification Number.

*Technical data* means recorded information (regardless of the form or method of the recording) of a scientific or technical nature (including computer databases and computer software documentation). This term does not include computer software or financial, administrative, cost or pricing, or management data or other information incidental to contract administration. The term includes recorded information of a scientific or technical nature that is included in computer databases (See 41 U.S.C. 116)).

*Termination for convenience* means the exercise of the Government's right to completely or partially terminate performance of work under a contract when it is in the Government's interest.

*Termination for default* means the exercise of the Government's right to completely or partially terminate a contract because of the contractor's

actual or anticipated failure to perform its contractual obligations.

*Terminated portion of the contract* means the portion of a contract that the contractor is not to perform following a partial termination. For construction contracts that have been completely terminated for convenience, it means the entire contract, notwithstanding the completion of, and payment for, individual items of work before termination.

*Termination inventory* means any property purchased, supplied, manufactured, furnished, or otherwise acquired for the performance of a contract subsequently terminated and properly allocable to the terminated portion of the contract. It includes Government-furnished property. It does not include any facilities, material, special test equipment, or special tooling that are subject to a separate contract or to a special contract requirement governing their use or disposition.

*Unallowable cost* means any cost that, under the provisions of any pertinent law, regulation, or contract, cannot be included in prices, cost-reimbursements, or settlements under a Government contract to which it is allocable.

*Unique and innovative concept*, when used relative to an unsolicited research proposal, means that—

(1) In the opinion and to the knowledge of the Government evaluator, the meritorious proposal—

(i) Is the product of original thinking submitted confidentially by one source;

(ii) Contains new, novel, or changed concepts, approaches, or methods;

(iii) Was not submitted previously by another; and

(iv) Is not otherwise available within the Federal Government.

(2) In this context, the term does not mean that the source has the sole capability of performing the research.

*United States*, when used in a geographic sense, means the 50 States and the District of Columbia, except as follows:

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

(2) For use in subpart 22.8, see the definition at 22.801.

(3) For use in subpart 22.10, see the definition at 22.1001.

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(4) For use in subpart 22.12, see the definition at 22.1201.

(5) For use in subpart 22.13, see the definition at 22.1301.

(6) For use in subpart 22.16, see the definition at 22.1601.

(7) For use in subpart 22.17, see the definition at 22.1702.

(8) For use in Subpart 22.18, see the definition at 22.1801.

(9) For use in part 23, see definition at 23.001.

(10) For use in part 25, see the definition at 25.003.

(11) For use in Part 27, see the definition at 27.001.

(12) For use in subpart 47.4, see the definition at 47.401.

*Unsolicited proposal* means a written proposal for a new or innovative idea that is submitted to an agency on the initiative of the offeror for the purpose of obtaining a contract with the Government, and that is not in response to a request for proposals, Broad Agency Announcement, Small Business Innovation Research topic, Small Business Technology Transfer Research topic, Program Research and Development Announcement, or any other Government-initiated solicitation or program.

*Value engineering* means an analysis of the functions of a program, project, system, product, item of equipment, building, facility, service, or supply of an executive agency, performed by qualified agency or contractor personnel, directed at improving performance, reliability, quality, safety, and life-cycle costs (41 U.S.C. 1711). For use in the clause at 52.248-2, see the definition at 52.248-2(b).

*Value engineering change proposal* (VECP)-(1) means a proposal that—

(i) Requires a change to the instant contract to implement; and

(ii) Results in reducing the overall projected cost to the agency without impairing essential functions or characteristics, provided that it does not involve a change—

(A) In deliverable end item quantities only;

(B) In research and development (R&D) items or R&D test quantities that are due solely to results of previous testing under the instant contract; or

(C) To the contract type only.

(2) For use in the clauses at—

(i) 52.248-2, see the definition at 52.248-2(b); and

(ii) 52.248-3, see the definition at 52.248-3(b).

*Veteran-owned small business concern* means a small business concern—

(1) Not less than 51 percent of which is owned by one or more veterans (as defined at 38 U.S.C. 101(2)) or, in the case of any publicly owned business, not less than 51 percent of the stock of which is owned by one or more veterans; and

(2) The management and daily business operations of which are controlled by one or more veterans.

*Virgin material* means—

(1) Previously unused raw material, including previously unused copper, aluminum, lead, zinc, iron, other metal or metal ore; or

(2) Any undeveloped resource that is, or with new technology will become, a source of raw materials.

*Voluntary consensus standards* means common and repeated use of rules, conditions, guidelines or characteristics for products, or related processes and production methods and related management systems. Voluntary Consensus Standards are developed or adopted by domestic and international voluntary consensus standard making bodies (e.g., International Organization for Standardization (ISO) and ASTM-International). See OMB Circular A-119.

*Warranty* means a promise or affirmation given by a contractor to the Government regarding the nature, usefulness, or condition of the supplies or performance of services furnished under the contract.

*Waste reduction* means preventing or decreasing the amount of waste being generated through waste prevention, recycling, or purchasing recycled and environmentally preferable products.

*Water consumption intensity* means water consumption per square foot of building space.

*Women-owned small business concern* means—

(1) A small business concern—

(i) That is at least 51 percent owned by one or more women; or, in the case of any publicly owned business, at least 51 percent of the stock of which is owned by one or more women; and

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(ii) Whose management and daily business operations are controlled by one or more women; or

(2) A small business concern eligible under the Women-Owned Small Business Program in accordance with 13 CFR part 127 (see subpart 19.15).

Women-Owned Small Business (WOSB) Program. (1) Women-Owned Small Business (WOSB) Program means a program that authorizes contracting officers to limit competition, including award on a sole source basis, to—

(i) Economically disadvantaged women-owned small business (EDWOSB) concerns eligible under the WOSB Program for Federal contracts assigned a North American Industry Classification Systems (NAICS) code in an industry in which the Small Business Administration (SBA) has determined that WOSB concerns are underrepresented in Federal procurement; and

(ii) WOSB concerns eligible under the WOSB Program for Federal contracts assigned a NAICS code in an industry in which SBA has determined that WOSB concerns are substantially underrepresented in Federal procurement.

(2) Economically disadvantaged women-owned small business (EDWOSB) concern means a small business concern that is at least 51 percent directly and unconditionally owned by, and the management and daily business operations of which are controlled by, one or more women who are citizens of the United States and who are economically disadvantaged in accordance with 13 CFR part 127. It automatically qualifies as a women-owned small business (WOSB) concern eligible under the WOSB Program.

(3) Women-owned small business (WOSB) concern eligible under the WOSB Program means a small business concern that is at least 51 percent directly and unconditionally owned by, and the management and daily business operations of which are controlled by, one or more women who are citizens of the United States (13 CFR part 127).

Writing or written (see “in writing”).

[66 FR 2118, Jan. 10, 2001]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting section 2.101, see the List of CFR Sections Affected, which appears in the

48 CFR Ch. 1 (10–1–16 Edition)

Finding Aids section of the printed volume and at [www.fdsys.gov](http://www.fdsys.gov).

EFFECTIVE DATE NOTES: 1. At 81 FR 67737, Sept. 30, 2016, 2.101 was amended in paragraph (b)(2) by—removing the definitions “Data Universal Numbering System (DUNS) number” and “Data Universal Numbering System +4 (DUNS+4) number” adding, in alphabetical order, the definition “Electronic Funds Transfer (EFT) indicator”, revising paragraph (1) of the definition “Registered in the System for Award Management (SAM) database” and adding, in alphabetical order, the definition, “Unique entity identifier”, effective Oct. 31, 2016. For the convenience of the user, the added and revised text is set forth as follows:

2.101 Definitions.

\* \* \* \* \*

(b) \* \* \*  
(2) \* \* \*

Electronic Funds Transfer (EFT) indicator means a four-character suffix to the unique entity identifier. The suffix is assigned at the discretion of the commercial, nonprofit, or Government entity to establish additional System for Award Management records for identifying alternative EFT accounts (see subpart 32.11) for the same entity.

\* \* \* \* \*

Registered in the System for Award Management (SAM) database \* \* \*

(1) The Contractor has entered all mandatory information, including the unique entity identifier and the Electronic Funds Transfer indicator (if applicable), the Commercial and Government Entity (CAGE) code, as well as data required by the Federal Funding Accountability and Transparency Act of 2006 (see subpart 4.14), into the SAM database;

\* \* \* \* \*

Unique entity identifier means a number or other identifier used to identify a specific commercial, nonprofit, or Government entity. See [www.sam.gov](http://www.sam.gov) for the designated entity for establishing unique entity identifiers.

2. At 81 FR 67769, Sept. 30, 2016, 2.101 was amended in (b)(2) by removing the definition of “Bundled contract”, revising the definition of “Bundling”, and adding definitions “Consolidation, or consolidated requirement” and “Small Business Teaming Arrangement”, effective Oct. 31, 2016. For the convenience of the user the revised and added text is set forth as follows:

2.101 Definitions.

\* \* \* \* \*

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(b) \* \* \*
(2) \* \* \*

Bundling—

(1) Means a subset of consolidation that combines two or more requirements for supplies or services, previously provided or performed under separate smaller contracts (see paragraph (2) of this definition), into a solicitation for a single contract, a multiple-award contract, or a task or delivery order that is likely to be unsuitable for award to a small business concern (even if it is suitable for award to a small business with a Small Business Teaming Arrangement) due to—

- (i) The diversity, size, or specialized nature of the elements of the performance specified;
(ii) The aggregate dollar value of the anticipated award;
(iii) The geographical dispersion of the contract performance sites; or
(iv) Any combination of the factors described in paragraphs (1)(i), (ii), and (iii) of this definition.

(2) "Separate smaller contract" as used in this definition, means a contract that has been performed by one or more small business concerns or that was suitable for award to one or more small business concerns.

(3) This definition does not apply to a contract that will be awarded and performed entirely outside of the United States.

\* \* \* \* \*

Consolidation or consolidated requirement—

(1) Means a solicitation for a single contract, a multiple-award contract, a task order, or a delivery order to satisfy—

- (i) Two or more requirements of the Federal agency for supplies or services that have been provided to or performed for the Federal agency under two or more separate contracts, each of which was lower in cost than the total cost of the contract for which offers are solicited; or
(ii) Requirements of the Federal agency for construction projects to be performed at two or more discrete sites.

(2) Separate contract as used in this definition, means a contract that has been performed by any business, including small and other than small business concerns.

\* \* \* \* \*

Small Business Teaming Arrangement—

- (1) Means an arrangement where—
(i) Two or more small business concerns have formed a joint venture; or
(ii) A small business offeror agrees with one or more other small business concerns to have them act as its subcontractors under a specified Government contract. A Small Business Teaming Arrangement between the offeror and its small business subcontractor(s) exists through a written agreement between the parties that—

(A) Is specifically referred to as a "Small Business Teaming Arrangement"; and

(B) Sets forth the different responsibilities, roles, and percentages (or other allocations) of work as it relates to the acquisition;

(2)(i) For civilian agencies, may include two business concerns in a mentor-protégé relationship when both the mentor and the protégé are small or the protégé is small and the concerns have received an exception to affiliation pursuant to 13 CFR 121.103(h)(3)(ii) or (iii).

(ii) For DoD, may include two business concerns in a mentor-protégé relationship in the Department of Defense Pilot Mentor-Protégé Program (see section 831 of the National Defense Authorization Act for Fiscal Year 1991 (Pub. L. 101-510; 10 U.S.C. 2302 note)) when both the mentor and the protégé are small. There is no exception to joint venture size affiliation for offers received from teaming arrangements under the Department of Defense Pilot Mentor-Protégé Program; and

(3) See 13 CFR 121.103(b)(9) regarding the exception to affiliation for offers received from Small Business Teaming Arrangements in the case of a solicitation of offers for a bundled contract with a reserve.

3. At 81 FR 45843, July 14, 2016, 2.101 was amended in paragraph (b)(2) by revising the introductory text of the definition "HUBZone contract" and the definitions "HUBZone small business concern" and "Small business subcontractor", effective Nov. 1, 2016. For the convenience of the user, the revised text is set forth as follows:

2.101 Definitions.

\* \* \* \* \*

HUBZone contract means a contract awarded to a Small Business Administration certified "HUBZone small business concern" through any of the following procurement methods:

\* \* \* \* \*

HUBZone small business concern means a small business concern, certified by the Small Business Administration (SBA), that appears on the List of Qualified HUBZone Small Business Concerns maintained by the SBA (13 CFR 126.103).

\* \* \* \* \*

Small business subcontractor means a concern that does not exceed the size standard for the North American Industry Classification Systems code that the prime contractor determines best describes the product or service being acquired by the subcontract.

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**Subpart 2.2—Definitions Clause**

**2.201 Contract clause.**

Insert the clause at 52.202-1, Definitions, in solicitations and contracts that exceed the simplified acquisition threshold.

[69 FR 34228, June 18, 2004]

**PART 3—IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST**

Sec.

3.000 Scope of part.

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AUTHORITY: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

SOURCE: 48 FR 42108, Sept. 19, 1983, unless otherwise noted.

#### 3.000 Scope of part.

This part prescribes policies and procedures for avoiding improper business practices and personal conflicts of interest and for dealing with their apparent or actual occurrence.

## Subpart 3.1—Safeguards

### 3.101 Standards of conduct.

#### 3.101-1 General.

Government business shall be conducted in a manner above reproach and, except as authorized by statute or regulation, with complete impartiality and with preferential treatment for none. Transactions relating to the expenditure of public funds require the highest degree of public trust and an impeccable standard of conduct. The general rule is to avoid strictly any conflict of interest or even the appearance of a conflict of interest in Government-contractor relationships. While many Federal laws and regulations place restrictions on the actions of Government personnel, their official conduct must, in addition, be such that they would have no reluctance to make a full public disclosure of their actions.

#### 3.101-2 Solicitation and acceptance of gratuities by Government personnel.

As a rule, no Government employee may solicit or accept, directly or indirectly, any gratuity, gift, favor, entertainment, loan, or anything of monetary value from anyone who (a) has or is seeking to obtain Government business with the employee's agency, (b) conducts activities that are regulated by the employee's agency, or (c) has interests that may be substantially affected by the performance or non-performance of the employee's official duties. Certain limited exceptions are authorized in agency regulations.

#### 3.101-3 Agency regulations.

(a) Agencies are required by Executive Order 11222 of May 8, 1965, and 5 CFR part 735 to prescribe *Standards of Conduct*. These agency standards contain—

- (1) Agency-authorized exceptions to 3.101-2; and
- (2) Disciplinary measures for persons violating the standards of conduct.

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(b) Requirements for employee financial disclosure and restrictions on private employment for former Government employees are in Office of Personnel Management and agency regulations implementing Public Law 95-521, which amended 18 U.S.C. 207.

### 3.102 [Reserved]

### 3.103 Independent pricing.

#### 3.103-1 Solicitation provision.

The contracting officer shall insert the provision at 52.203-2, Certificate of Independent Price Determination, in solicitations when a firm-fixed-price contract or fixed-price contract with economic price adjustment is contemplated, unless—

(a) The acquisition is to be made under the simplified acquisition procedures in part 13;

(b) [Reserved]

(c) The solicitation is a request for technical proposals under two-step sealed bidding procedures; or

(d) The solicitation is for utility services for which rates are set by law or regulation.

[48 FR 42108, Sept. 19, 1983, as amended at 50 FR 1727, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985; 55 FR 25526, June 21, 1990; 60 FR 34744, July 3, 1995]

#### 3.103-2 Evaluating the certification.

(a) *Evaluation guidelines.* (1) None of the following, in and of itself, constitutes *disclosure* as it is used in subparagraph (a)(2) of the Certificate of Independent Price Determination (hereafter, the certificate):

(i) The fact that a firm has published price lists, rates, or tariffs covering items being acquired by the Government.

(ii) The fact that a firm has informed prospective customers of proposed or pending publication of new or revised price lists for items being acquired by the Government.

(iii) The fact that a firm has sold the same items to commercial customers at the same prices being offered to the Government.

(2) For the purpose of subparagraph (b)(2) of the certificate, an individual may use a blanket authorization to act as an agent for the person(s) respon-

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sible for determining the offered prices if—

(i) The proposed contract to which the certificate applies is clearly within the scope of the authorization; and

(ii) The person giving the authorization is the person within the offeror's organization who is responsible for determining the prices being offered at the time the certification is made in the particular offer.

(3) If an offer is submitted jointly by two or more concerns, the certification provided by the representative of each concern applies only to the activities of that concern.

(b) *Rejection of offers suspected of being collusive.* (1) If the offeror deleted or modified subparagraph (a)(1) or (a)(3) or paragraph (b) of the certificate, the contracting officer shall reject the offeror's bid or proposal.

(2) If the offeror deleted or modified subparagraph (a)(2) of the certificate, the offeror must have furnished with its offer a signed statement of the circumstances of the disclosure of prices contained in the bid or proposal. The chief of the contracting office shall review the altered certificate and the statement and shall determine, in writing, whether the disclosure was made for the purpose or had the effect of restricting competition. 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 subparagraph (1) or (2) above, 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 subparagraph (2) above shall not prevent or inhibit the prosecution of any criminal or civil actions involving the occurrences or transactions to which the certificate relates.

[48 FR 42108, Sept. 19, 1983, as amended at 55 FR 25526, June 21, 1990]

#### 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

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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 41 U.S.C. 3501(a)(2), 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 de-

cision 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 41 U.S.C. chapter 21.

*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.

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(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

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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.

[67 FR 13059, Mar. 20, 2002, as amended at 75 FR 77745, Dec. 13, 2010; 79 FR 24196, Apr. 29, 2014]

#### 3.104-2 General.

(a) This section implements 41 U.S.C. chapter 21, Restrictions on Obtaining and Disclosing Certain Information. 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

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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.

[67 FR 13059, Mar. 20, 2002, as amended at 79 FR 24196, Apr. 29, 2014]

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

(a) *Prohibition on disclosing procurement information 41 U.S.C. 2102.* (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 41 U.S.C. 2102.* 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 41 U.S.C. 2103* (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 41 U.S.C. 2103 may be prohibited by other criminal statutes and the Standards of

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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 (41 U.S.C. 2104)*. (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 pro-

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hibit 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.

[67 FR 13059, Mar. 20, 2002, as amended at 79 FR 24196, Apr. 29, 2014]

### 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.

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(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 Inspec-

tor 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 41 U.S.C. chapter 21;

(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.)

[67 FR 13059, Mar. 20, 2002, as amended at 72 FR 63049, Nov. 7, 2007; 79 FR 24196, Apr. 29, 2014]

### 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;

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(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.

[67 FR 13059, Mar. 20, 2002]

### **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 41 U.S.C. 2104 (see 3.104-3(d)) from accepting compensation from a particular contractor may request ad-

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vice 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 41 U.S.C. 2104.

(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 41 U.S.C. 2104. If

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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.

[67 FR 13059, Mar. 20, 2002, as amended at 79 FR 24196, Apr. 29, 2014]

### 3.104-7 Violations or possible violations.

(a) A contracting officer who receives or obtains information of a violation or possible violation of 41 U.S.C. 2102, 2103, or 2104 (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 41 U.S.C. 2105,

for the purpose of voiding or rescinding the contract.

(c) Before concluding that an offeror, contractor, or person has violated 41 U.S.C. chapter 21, 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 41 U.S.C. chapter 21 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 41 U.S.C. 2102 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 41 U.S.C. 2105(a); 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.

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(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.

[67 FR 13059, Mar. 20, 2002, as amended at 79 FR 24196, Apr. 29, 2014]

### 3.104-8 Criminal and civil penalties, and further administrative remedies.

Criminal and civil penalties, and administrative remedies, may apply to conduct that violates 41 U.S.C. chapter 21 (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 41 U.S.C. 2105.

(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 41 U.S.C. 2105.

(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.

[67 FR 13059, Mar. 20, 2002, as amended at 79 FR 24196, Apr. 29, 2014]

### 3.104-9 Contract clauses.

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

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(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.

[67 FR 13059, Mar. 20, 2002]

### Subpart 3.2—Contractor Gratuities to Government Personnel

#### 3.201 Applicability.

This subpart applies to all executive agencies, except that coverage concerning exemplary damages applies only to the Department of Defense (10 U.S.C. 2207).

#### 3.202 Contract clause.

The contracting officer shall insert the clause at 52.203-3, Gratuities, in solicitations and contracts with a value exceeding the simplified acquisition threshold, except those for personal services and those between military departments or defense agencies and foreign governments that do not obligate any funds appropriated to the Department of Defense.

[61 FR 39200, July 26, 1996]

#### 3.203 Reporting suspected violations of the Gratuities clause.

Agency personnel shall report suspected violations of the Gratuities clause to the contracting officer or other designated official in accordance with agency procedures. The agency reporting procedures shall be published as an implementation of this section 3.203 and shall clearly specify—

(a) What to report and how to report it; and

(b) The channels through which reports must pass, including the function and authority of each official designated to review them.

#### 3.204 Treatment of violations.

(a) Before taking any action against a contractor, the agency head or a designee shall determine, after notice and hearing under agency procedures, whether the contractor, its agent, or another representative, under a contract containing the Gratuities clause—

(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 (intent generally must be inferred).

(b) Agency procedures shall afford the contractor an opportunity to appear with counsel, submit documentary evidence, present witnesses, and confront any person the agency presents. The procedures should be as informal as practicable, consistent with principles of fundamental fairness.

(c) When the agency head or designee determines that a violation has occurred, the Government may—

(1) Terminate the contractor's right to proceed;

(2) Initiate debarment or suspension measures as set forth in subpart 9.4; and

(3) Assess exemplary damages, if the contract uses money appropriated to the Department of Defense.

### Subpart 3.3—Reports of Suspected Antitrust Violations

#### 3.301 General.

(a) Practices that eliminate competition or restrain trade usually lead to excessive prices and may warrant criminal, civil, or administrative action against the participants. Examples of anticompetitive practices are collusive bidding, follow-the-leader pricing, rotated low bids, collusive price estimating systems, and sharing of the business.

(b) Contracting personnel are an important potential source of investigative leads for antitrust enforcement and should therefore be sensitive to indications of unlawful behavior by offerors and contractors. Agency personnel shall report, in accordance with agency regulations, evidence of suspected antitrust violations in acquisitions for possible referral to (1) the Attorney General under 3.303 and (2) the agency office responsible for contractor debarment and suspension under subpart 9.4.

[48 FR 42108, Sept. 19, 1983, as amended at 50 FR 1727, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985]

#### 3.302 Definitions.

As used in this subpart—

*Identical bids* means bids for the same line item that are determined to be identical as to unit price or total line item amount, with or without the application of evaluation factors (e.g., discount or transportation cost).

*Line item* means an item of supply or service, specified in a solicitation, that the offeror must separately price.

[49 FR 12974, Mar. 30, 1984, as amended at 66 FR 2127, Jan. 10, 2001; 67 FR 13055, Mar. 20, 2002]

#### 3.303 Reporting suspected antitrust violations.

(a) Agencies are required by 41 U.S.C. 3707 and 10 U.S.C. 2305(b)(9) to report to the Attorney General any bids or proposals that evidence a violation of the antitrust laws. These reports are in addition to those required by subpart 9.4.

(b) The antitrust laws are intended to ensure that markets operate competitively. Any agreement or mutual understanding among competing firms that restrains the natural operation of market forces is suspect. Paragraph (c) below identifies behavior patterns that are often associated with antitrust violations. Activities meeting the descriptions in paragraph (c) are not necessarily improper, but they are sufficiently questionable to warrant notifying the appropriate authorities, in accordance with agency procedures.

(c) Practices or events that may evidence violations of the antitrust laws include—

(1) The existence of an *industry price list* or *price agreement* to which contractors refer in formulating their offers;

(2) A sudden change from competitive bidding to identical bidding;

(3) Simultaneous price increases or follow-the-leader pricing;

(4) Rotation of bids or proposals, so that each competitor takes a turn in sequence as low bidder, or so that certain competitors bid low only on some sizes of contracts and high on other sizes;

(5) Division of the market, so that certain competitors bid low only for contracts awarded by certain agencies, or for contracts in certain geographical areas, or on certain products, and bid high on all other jobs;

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(6) Establishment by competitors of a collusive price estimating system;

(7) The filing of a joint bid by two or more competitors when at least one of the competitors has sufficient technical capability and productive capacity for contract performance;

(8) Any incidents suggesting direct collusion among competitors, such as the appearance of identical calculation or spelling errors in two or more competitive offers or the submission by one firm of offers for other firms; and

(9) Assertions by the employees, former employees, or competitors of offerors, that an agreement to restrain trade exists.

(d) Identical bids shall be reported under this section if the agency has some reason to believe that the bids resulted from collusion.

(e) For offers from foreign contractors for contracts to be performed outside the United States and its outlying areas, contracting officers may refer suspected collusive offers to the authorities of the foreign government concerned for appropriate action.

(f) Agency reports shall be addressed to the Attorney General, U.S. Department of Justice, Washington, DC 20530, Attention: Assistant Attorney General, Antitrust Division, and shall include—

(1) A brief statement describing the suspected practice and the reason for the suspicion; and

(2) The name, address, and telephone number of an individual in the agency who can be contacted for further information.

(g) Questions concerning this reporting requirement may be communicated by telephone directly to the Office of the Assistant Attorney General, Antitrust Division.

[48 FR 42108, Sept. 19, 1983, as amended at 49 FR 12974, Mar. 30, 1984; 50 FR 1727, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985; 55 FR 25526, June 21, 1990; 65 FR 36030, June 6, 2000; 68 FR 28080, May 22, 2003; 79 FR 24196, Apr. 29, 2014]

### 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 per-

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mitted by 10 U.S.C. 2306(b) and 41 U.S.C. 3901.

[48 FR 42108, Sept. 19, 1983, as amended at 79 FR 24196, Apr. 29, 2014]

#### 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.

[48 FR 42108, Sept. 19, 1983, as amended at 66 FR 2127, Jan. 10, 2001]

#### 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. 3901, 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

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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.

[48 FR 42108, Sept. 19, 1983, as amended at 79 FR 24196, Apr. 29, 2014]

### 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.

[48 FR 42108, Sept. 19, 1983, as amended at 50 FR 1727, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985]

### 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).

[61 FR 39188, July 26, 1996]

### 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) above, 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.

[48 FR 42108, Sept. 19, 1983. Redesignated at 61 FR 39188, July 26, 1996]

### 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.

[48 FR 42108, Sept. 19, 1983. Redesignated and amended at 61 FR 39188, July 26, 1996]

## Subpart 3.5—Other Improper Business Practices

### 3.501 Buying-in.

#### 3.501-1 Definition.

*Buying-in* as used in this section, means submitting an offer below anticipated costs, expecting to—

(1) Increase the contract amount after award (e.g., through unnecessary or excessively priced change orders); or

(2) Receive follow-on contracts at artificially high prices to recover losses incurred on the buy-in contract.

[48 FR 42108, Sept. 19, 1983, as amended at 66 FR 2127, Jan. 10, 2001]

#### 3.501-2 General.

(a) Buying-in may decrease competition or result in poor contract performance. The contracting officer must take appropriate action to ensure buying-in losses are not recovered by the contractor through the pricing of (1) change orders or (2) follow-on contracts subject to cost analysis.

(b) The Government should minimize the opportunity for buying-in by seeking a price commitment covering as much of the entire program concerned as is practical by using—

(1) Multiyear contracting, with a requirement in the solicitation that a

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price be submitted only for the total multiyear quantity; or

(2) Priced options for additional quantities that, together with the firm contract quantity, equal the program requirements (see subpart 17.2).

(c) Other safeguards are available to the contracting officer to preclude recovery of buying-in losses (e.g., amortization of nonrecurring costs (see 15.408, Table 15-2, paragraph A., column (2) under "Formats for Submission of Line Item Summaries) and treatment of unreasonable price quotations (see 15.405).

[48 FR 42108, Sept. 19, 1983, as amended at 62 FR 51270, Sept. 30, 1997]

### 3.502 Subcontractor kickbacks.

#### 3.502-1 Definitions.

As used in this section—

*Kickback*, means any money, fee, commission, credit, gift, gratuity, thing of value, or compensation of any kind which is provided 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*, means a corporation, partnership, business association of any kind, trust, joint-stock company, or individual.

*Prime contract*, 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*, means a person who has entered into a prime contract with the United States.

*Prime Contractor employee*, as used in this section, means any officer, partner, employee, or agent of a prime contractor.

*Subcontract*, means a contract or contractual action entered into by a prime contractor or subcontractor for the purpose of obtaining supplies, materials, equipment, or service of any kind under a prime contract.

*Subcontractor*, (1) means any person, other than the prime contractor, who offers to furnish or furnishes any supplies, materials, equipment, or services

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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 section, means any officer, partner, employee, or agent of a subcontractor.

[52 FR 6121, Feb. 27, 1987, as amended at 53 FR 34226, Sept. 2, 1988; 66 FR 2127, Jan. 10, 2001; 79 FR 24196, Apr. 29, 2014]

EDITORIAL NOTE: At 66 FR 2127, Jan. 10, 2001, as amended at 66 FR 14260, Mar. 9, 2001, section 3.502-1 was amended by redesignating paragraphs (a) and (b) as (1) and (2). There are no designated paragraphs (a) and (b) in section 3.502-1.

#### 3.502-2 Subcontractor kickbacks.

The Anti-Kickback Act of 1986 (now codified at 41 U.S.C. chapter 87, Kickbacks,) was passed to deter subcontractors from making payments and contractors from accepting payments for the purpose of improperly obtaining or rewarding favorable treatment in connection with a prime contract or a subcontract relating to a prime contract. The Kickbacks statute—

(a) Prohibits any person from—

(1) Providing, attempting to provide, or offering to provide any kickback;

(2) Soliciting, accepting, or attempting to accept any kickbacks; or

(3) Including, directly or indirectly, the amount of any kickback in the contract price charged by a subcontractor to a prime contractor or a higher tier subcontractor or in the contract price charged by a prime contractor to the United States.

(b) Imposes criminal penalties on any person who knowingly and willfully engages in the prohibited conduct addressed in paragraph (a) of this subsection.

(c) Provides for the recovery of civil penalties by the United States from any person who knowingly engages in such prohibited conduct and from any person whose employee, subcontractor, or subcontractor employee provides, accepts, or charges a kickback.

(d) Provides that—

(1) The contracting officer may offset the amount of a kickback against monies owed by the United States to the

prime contractor under the prime contract to which such kickback relates;

(2) The contracting officer may direct a prime contractor to withhold from any sums owed to a subcontract 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 paragraph (d)(1) or a direction under paragraph (d)(2) of this subsection is a claim by the Government for the purposes of 41 U.S.C. chapter 71, Contract Disputes.

(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 Attorney General any possible violation of the Kickbacks statute 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 Kickbacks statute 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 commer-

cial 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 Kickbacks statute 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 Kickbacks statute.

(j) Notwithstanding paragraph (i) of this section, a prime contractor shall cooperate fully with any Federal Government agency investigating a violation of 41 U.S.C. 8702 (see 41 U.S.C. 8703(b)).

[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; 79 FR 24196, Apr. 29, 2014]

### 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

#### **3.503 Unreasonable restrictions on subcontractor sales.**

##### **3.503-1 Policy.**

10 U.S.C. 2402 and 41 U.S.C. 4704 require that subcontractors not be unreasonably precluded from making direct 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; 79 FR 24196, Apr. 29, 2014]

##### **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;

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(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 information has been disclosed or received in exchange for a thing of value, or for the purpose of obtaining or giving anyone a competitive advantage in the award of a Federal agency procurement contract.

(b) This subpart does not prescribe policies or procedures for, or govern the exercise of, any other remedy available to the Government with respect to such contracts, including but not limited to, the common law right of avoidance, rescission, or cancellation.

[51 FR 27116, July 29, 1986, as amended at 62 FR 232, Jan. 2, 1997]

### 3.701 Purpose.

This subpart provides—

(a) An administrative remedy with respect to contracts in relation to which there has been—

(1) A final conviction for bribery, conflict of interest, 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) An agency head determination that contractor bid or proposal information or source selection information has been disclosed or received in exchange for a thing of value, or for the purpose of obtaining or giving anyone a competitive advantage in the award of a Federal agency procurement contract; and

(b) A means to deter similar misconduct in the future by those who are involved in the award, performance, and administration of Government contracts.

[62 FR 232, Jan. 2, 1997]

### 3.702 Definition.

*Final conviction* means a conviction, whether entered on a verdict or plea, including a plea of *nolo contendere*, for which sentence has been imposed.

### 3.703 Authority.

(a) Section 1(e) of Pub. L. 87-849, 18 U.S.C. 218 (*the Act*), empowers the President or the heads of executive agencies acting under regulations prescribed by the President, to declare void and rescind contracts and other transactions enumerated in the Act, in relation to which there has been a final conviction for bribery, conflict of interest, or any other violation of Chapter 11 of Title 18 of the United States Code (18 U.S.C. 201-224). Executive Order 12448, November 4, 1983, delegates the President's authority under the Act to the heads of the executive agencies and military departments.

(b) 41 U.S.C. 2105(c) requires a Federal agency, upon receiving information that a contractor or a person has violated 41 U.S.C. 2102, to consider rescission of a contract with respect to which—

(1) The contractor or someone acting for the contractor has been convicted for an offense punishable under 41 U.S.C. 2105(a); or

(2) The head of the agency, or designee, has determined, based upon a preponderance of the evidence, that the contractor or someone acting for the contractor has engaged in conduct constituting such an offense.

[51 FR 27116, July 29, 1986, as amended at 62 FR 232, Jan. 2, 1997; 79 FR 24197, Apr. 29, 2014]

### 3.704 Policy.

(a) In cases in which there is a final conviction for any violation of 18 U.S.C. 201-224 involving or relating to contracts awarded by an agency, the agency head or designee shall consider the facts available and, if appropriate, may declare void and rescind contracts, and recover the amounts expended and property transferred by the agency in accordance with the policies and procedures of this subpart.

(b) Since a final conviction under 18 U.S.C. 201-224 relating to a contract also may justify the conclusion that the party involved is not presently responsible, the agency should consider initiating debarment proceedings in accordance with subpart 9.4, Debarment, Suspension, and Ineligibility, if debarment has not been initiated or is not in

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effect at the time the final conviction is entered.

(c) If there is a final conviction for an offense punishable under 41 U.S.C. 2105, or if the head of the agency, or designee, has determined, based upon a preponderance of the evidence, that the contractor or someone acting for the contractor has engaged in conduct constituting such an offense, then the head of the contracting activity shall consider, in addition to any other penalty prescribed by law or regulation—

(1) Declaring void and rescinding contracts, as appropriate, and recovering the amounts expended under the contracts by using the procedures at 3.705 (see 3.104-7); and

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

[51 FR 27116, July 29, 1986, as amended at 62 FR 232, Jan. 2, 1997; 67 FR 13063, Mar. 20, 2002; 79 FR 24197, Apr. 29, 2014]

#### 3.705 Procedures.

(a) *Reporting.* The facts concerning any final conviction for any violation of 18 U.S.C. 201-224 involving or relating to agency contracts shall be reported promptly to the agency head or designee for that official's consideration. The agency head or designee shall promptly notify the Civil Division, Department of Justice, that an action is being considered under this subpart.

(b) *Decision.* Following an assessment of the facts, the agency head or designee may declare void and rescind contracts with respect to which a final conviction has been entered, and recover the amounts expended and the property transferred by the agency under the terms of the contracts involved.

(c) *Decision-making process.* Agency procedures governing the voiding and rescinding decision-making process shall be as informal as is practicable, consistent with the principles of fundamental fairness. As a minimum, however, agencies shall provide the following:

(1) A notice of the proposed action to declare void and rescind the contract shall be made in writing and sent by certified mail, return receipt requested.

(2) A thirty calendar day period after receipt of the notice, for the contractor to submit pertinent information before any final decision is made.

(3) Upon request made within the period for submission of pertinent information, an opportunity shall be afforded for a hearing at which witnesses may be presented, and any witness the agency presents may be confronted. However, no inquiry shall be made regarding the validity of a conviction.

(4) If the agency head or designee decides to declare void and rescind the contracts involved, that official shall issue a written decision which—

(i) States that determination;

(ii) Reflects consideration of the fair value of any tangible benefits received and retained by the agency; and

(iii) States the amount due, and the property to be returned, to the agency.

(d) *Notice of proposed action.* The notice of the proposed action, as a minimum shall—

(1) Advise that consideration is being given to declaring void and rescinding contracts awarded by the agency, and recovering the amounts expended and property transferred therefor, under the provisions of 18 U.S.C. 218;

(2) Specifically identify the contracts affected by the action;

(3) Specifically identify the offense or final conviction on which the action is based;

(4) State the amounts expended and property transferred under each of the contracts involved, and the money and the property demanded to be returned;

(5) Identify any tangible benefits received and retained by the agency under the contract, and the value of those benefits, as calculated by the agency;

(6) Advise that pertinent information may be submitted within 30 calendar days after receipt of the notice, and that, if requested within that time, a hearing shall be held at which witnesses may be presented and any witness the agency presents may be confronted; and

(7) Advise that action shall be taken only after the agency head or designee issues a final written decision on the proposed action.

(e) *Final agency decision.* The final agency decision shall be based on the

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information available to the agency head or designee, including any pertinent information submitted or, if a hearing was held, presented at the hearing. If the agency decision declares void and rescinds the contract, the final decision shall specify the amounts due and property to be returned to the agency, and reflect consideration of the fair value of any tangible benefits received and retained by the agency. Notice of the decision shall be sent promptly by certified mail, return receipt requested. Rescission of contracts under the authority of the Act and demand for recovery of the amounts expended and property transferred therefor, is not a claim within the meaning of 41 U.S.C. chapter 71, Contract Disputes, or part 33. Therefore, the procedures required by the statute and the FAR for the issuance of a final contracting officer decision are not applicable to final agency decisions under this subpart, and shall not be followed.

[51 FR 27116, July 29, 1986, as amended at 62 FR 232, Jan. 2, 1997; 79 FR 24197, Apr. 29, 2014]

### Subpart 3.8—Limitations on the Payment of Funds To Influence Federal Transactions

SOURCE: 55 FR 3190, Jan. 30, 1990, unless otherwise noted.

#### 3.800 Scope of subpart.

This subpart prescribes policies and procedures implementing 31 U.S.C. 1352, “Limitation on use of appropriated funds to influence certain Federal contracting and financial transactions.”

[72 FR 46329, Aug. 17, 2007]

#### 3.801 Definitions.

As used in this subpart—

*Agency* means *executive agency* as defined in 2.101.

*Covered Federal action* means any of the following actions:

- (1) Awarding any Federal contract.
- (2) Making any Federal grant.
- (3) Making any Federal loan.
- (4) Entering into any cooperative agreement.
- (5) Extending, continuing, renewing, amending, or modifying any Federal

contract, grant, loan, or cooperative agreement.

*Indian tribe* and *tribal organization* have the meaning provided in section 4 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b) and include Alaskan Natives.

*Influencing or attempting to influence* means 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.

*Local government* means a unit of government in a State and, if chartered, established, or otherwise recognized by a State for the performance of a governmental duty, including a local public authority, a special district, an intrastate district, a council of governments, a sponsor group representative organization, and any other instrumentality of a local government.

*Officer or employee of an agency* includes the following individuals who are employed by an agency:

(1) An individual who is appointed to a position in the Government under Title 5, United States Code, including a position under a temporary appointment.

(2) A member of the uniformed services, as defined in subsection 101(3), Title 37, United States Code.

(3) A special Government employee, as defined in section 202, Title 18, United States Code.

(4) An individual who is a member of a Federal advisory committee, as defined by the Federal Advisory Committee Act, Title 5, United States Code, appendix 2.

*Person* means an individual, corporation, company, association, authority, firm, partnership, society, State, and local government, regardless of whether such entity is operated for profit or not for profit. This term excludes an Indian tribe, tribal organization, or any other Indian organization eligible to receive Federal contracts, grants, cooperative agreements, or loans from

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an agency, but only with respect to expenditures by such tribe or organization that are made for purposes specified in paragraph 3.802(a) and are permitted by other Federal law.

*Reasonable compensation* means, with respect to a regularly employed officer or employee of any person, compensation that is consistent with the normal compensation for such officer or employee for work that is not furnished to, not funded by, or not furnished in cooperation with the Federal Government.

*Reasonable payment* means, with respect to professional and other technical services, a payment in an amount that is consistent with the amount normally paid for such services in the private sector.

*Recipient* includes the contractor and all subcontractors. This term excludes an Indian tribe, tribal organization, or any other Indian organization eligible to receive Federal contracts, grants, cooperative agreements, or loans from an agency, but only with respect to expenditures by such tribe or organization that are made for purposes specified in paragraph 3.802(a) and are permitted by other Federal law.

*Regularly employed* means, with respect to an officer or employee of a person requesting or receiving a Federal contract, an officer or employee who is employed by such person for at least 130 working days within 1 year immediately preceding the date of the submission that initiates agency consideration of such person for receipt of such contract. An officer or employee who is employed by such person for less than 130 working days within 1 year immediately preceding the date of the submission that initiates agency consideration of such person shall be considered to be regularly employed as soon as he or she is employed by such person for 130 working days.

*State* means a State of the United States, the District of Columbia, an outlying area of the United States, an agency or instrumentality of a State, and multi-State, regional, or interstate entity having governmental duties and powers.

[72 FR 46329, Aug. 17, 2007]

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#### 3.802 Statutory prohibition and requirement.

(a) 31 U.S.C. 1352 prohibits a recipient of a Federal contract, grant, loan, or cooperative agreement from using appropriated funds to pay any person for influencing or attempting to influence 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 actions.

(1) For purposes of this subpart the term “appropriated funds” does not include profit or fee from a covered Federal action.

(2) To the extent a person can demonstrate that the person has sufficient monies, other than Federal appropriated funds, the Government shall assume that these other monies were spent for any influencing activities that would be unallowable if paid for with Federal appropriated funds.

(b) 31 U.S.C. 1352 also requires offerors to furnish a declaration consisting of both a certification and a disclosure, with periodic updates of the disclosure after contract award. These requirements are contained in the provision at 52.203-11, Certification and Disclosure Regarding Payments to Influence Certain Federal Transactions, and the clause at 52.203-12, Limitation on Payments to Influence Certain Federal Transactions.

[72 FR 46329, Aug. 17, 2007]

#### 3.803 Exceptions.

(a) The prohibition of paragraph 3.802(a) does not apply under the following conditions:

(1) *Agency and legislative liaison by own employees.* (i) Payment of reasonable compensation made to an officer or employee of a person requesting or receiving a covered Federal action if the payment is for agency and legislative liaison activities not directly related to a covered Federal action. For purposes of this paragraph, providing any information specifically requested by an agency or Congress is permitted at any time.

(ii) Participating with an agency in discussions that are not related to a specific solicitation for any covered Federal action, but that concern—

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(A) The qualities and characteristics (including individual demonstrations) of the person's products or services, conditions or terms of sale, and service capabilities; or

(B) The application or adaptation of the person's products or services for an agency's use.

(iii) Providing prior to formal solicitation of any covered Federal action any information not specifically requested but necessary for an agency to make an informed decision about initiation of a covered Federal action.

(iv) Participating in technical discussions regarding the preparation of an unsolicited proposal prior to its official submission.

(v) Making capability presentations prior to formal solicitation of any covered Federal action when seeking an award from an agency pursuant to the provisions of the Small Business Act, as amended by Pub. L. 95-507, and subsequent amendments.

### (2) *Professional and technical services.*

(i) Payment of reasonable compensation made to an officer or employee of a person requesting or receiving a covered Federal action, if payment is for professional or technical services rendered directly in the preparation, submission, or negotiation of any bid, proposal, or application for that Federal action or for meeting requirements imposed by or pursuant to law as a condition for receiving that Federal action;

(ii) Any reasonable payment to a person, other than an officer or employee of a person requesting or receiving a covered Federal action, if the payment is for professional or technical services rendered directly in the preparation, submission, or negotiation of any bid, proposal, or application for that Federal action, or for meeting requirements imposed by or pursuant to law as a condition for receiving that Federal action. Persons other than officers or employees of a person requesting or receiving a covered Federal action include consultants and trade associations.

(iii) As used in paragraph (a)(2) of this section "professional and technical services" are limited to advice and analysis directly applying any professional or technical discipline. For example, drafting of a legal document

accompanying a bid or proposal by a lawyer is allowable. Similarly, technical advice provided by an engineer on the performance or operational capability of a piece of equipment rendered directly in the negotiation of a contract is allowable. However, communications with the intent to influence made by a professional or a technical person are not allowable under this section unless they provide advice and analysis directly applying their professional or technical expertise and unless the advice or analysis is rendered directly and solely in the preparation, submission or negotiation of a covered Federal action. Thus, for example, communications with the intent to influence made by a lawyer that do not provide legal advice or analysis directly and solely related to the legal aspects of his or her client's proposal, but generally advocate one proposal over another, are not allowable under this section because the lawyer is not providing professional legal services. Similarly, communications with the intent to influence made by an engineer providing an engineering analysis prior to the preparation or submission of a bid or proposal are not allowable under this section since the engineer is providing technical services but not directly in the preparation, submission or negotiation of a covered Federal action.

(iv) Requirements imposed by or pursuant to law as a condition for receiving a covered Federal award include those required by law or regulation and any other requirements in the actual award documents.

(b) Only those communications and services expressly authorized by paragraph (a) of this section are permitted.

(c) The disclosure requirements of paragraph 3.802(b) do not apply with respect to payments of reasonable compensation made to regularly employed officers or employees of a person.

[72 FR 46329, Aug. 17, 2007]

### 3.804 Policy.

The contracting officer shall obtain certifications and disclosures as required by the provision at 52.203-11, Certification and Disclosure Regarding Payments to Influence Certain Federal

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Transactions, prior to the award of any contract exceeding \$150,000.

[72 FR 46330, Aug. 17, 2007, as amended at 75 FR 53131, Aug. 30, 2010]

### 3.805 Exemption.

The Secretary of Defense may exempt, on a case-by-case basis, a covered Federal action from the prohibitions of this subpart whenever the Secretary determines, in writing, that such an exemption is in the national interest. The Secretary shall transmit a copy of the exemption to Congress immediately after making the determination.

[72 FR 46330, Aug. 17, 2007]

### 3.806 Processing suspected violations.

The contracting officer shall report suspected violations of the requirements of 31 U.S.C. 1352 in accordance with agency procedures.

[72 FR 46330, Aug. 17, 2007]

### 3.807 Civil penalties.

Agencies shall impose and collect civil penalties pursuant to the provisions of the Program Fraud and Civil Remedies Act, 31 U.S.C. 3803 (except subsection (c)), 3804–3808, and 3812, insofar as the provisions therein are not inconsistent with the requirements of this subpart.

[55 FR 3190, Jan. 30, 1990, as amended at 67 FR 6120, Feb. 8, 2002]

### 3.808 Solicitation provision and contract clause.

(a) Insert the provision at 52.203–11, Certification and Disclosure Regarding Payments to Influence Certain Federal Transactions, in solicitations expected to exceed \$150,000.

(b) Insert the clause at 52.203–12, Limitation on Payments to Influence Certain Federal Transactions, in solicitations and contracts expected to exceed \$150,000.

[72 FR 46330, Aug. 17, 2007, as amended at 75 FR 53132, Aug. 30, 2010]

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### Subpart 3.9—Whistleblower Protections for Contractor Employees

SOURCE: 60 FR 37776, July 21, 1995, unless otherwise noted.

#### 3.900 Scope of subpart.

This subpart implements three different statutory whistleblower programs. This subpart does not implement 10 U.S.C. 2409, which is applicable only to DoD, NASA, and the Coast Guard.

(a) *41 U.S.C. 4705 (in effect before July 1, 2013 and on or after January 2, 2017).* Sections 3.901 through 3.906 of this subpart implement 41 U.S.C. 4705, applicable to civilian agencies other than NASA and the Coast Guard, except as provided in paragraph (c) of this section. These sections are not in effect for the duration of the pilot program described in paragraph (b) of this section.

(b) *41 U.S.C. 4712 (in effect on July 1, 2013 through January 1, 2017).* Section 3.908 of this subpart implements the pilot program, applicable to civilian agencies other than NASA and the Coast Guard, except as provided in paragraph (c) of this section.

(c) *Contracts funded by the American Recovery and Reinvestment Act.* Section 3.907 of this subpart implements section 1553 of the American Recovery and Reinvestment Act of 2009 (Pub. L. 111–5), and applies to all contracts funded in whole or in part by that Act.

[78 FR 60171, Sept. 30, 2013]

#### 3.901 Definitions.

As used in this subpart—

*Authorized official of an agency* means an officer or employee responsible for contracting, program management, audit, inspection, investigation, or enforcement of any law or regulation relating to Government procurement or the subject matter of the contract.

*Authorized official of the Department of Justice* means any person responsible for the investigation, enforcement, or prosecution of any law or regulation.

*Inspector General* means an Inspector General appointed under the Inspector General Act of 1978, as amended. In the Department of Defense that is the DOD

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Inspector General. In the case of an executive agency that does not have an Inspector General, the duties shall be performed by an official designated by the head of the executive agency.

[48 FR 42108, Sept. 19, 1983, as amended at 66 FR 2127, Jan. 10, 2001]

### 3.902 [Reserved]

### 3.903 Policy.

Government contractors shall not discharge, demote or otherwise discriminate against an employee as a reprisal for disclosing information to a Member of Congress, or an authorized official of an agency or of the Department of Justice, relating to a substantial violation of law related to a contract (including the competition for or negotiation of a contract).

### 3.904 Procedures for filing complaints.

(a) Any employee of a contractor who believes that he or she has been discharged, demoted, or otherwise discriminated against contrary to the policy in 3.903 may file a complaint with the Inspector General of the agency that awarded the contract.

(b) The complaint shall be signed and shall contain—

- (1) The name of the contractor;
- (2) The contract number, if known; if not, a description reasonably sufficient to identify the contract(s) involved;
- (3) The substantial violation of law giving rise to the disclosure;
- (4) The nature of the disclosure giving rise to the discriminatory act; and
- (5) The specific nature and date of the reprisal.

### 3.905 Procedures for investigating complaints.

(a) Upon receipt of a complaint, the Inspector General shall conduct an initial inquiry. If the Inspector General determines that the complaint is frivolous or for other reasons does not merit further investigation, the Inspector General shall advise the complainant that no further action on the complaint will be taken.

(b) If the Inspector General determines that the complaint merits further investigation, the Inspector General shall notify the complainant, contractor, and head of the contracting ac-

tivity. The Inspector General shall conduct an investigation and provide a written report of findings to the head of the agency or designee.

(c) Upon completion of the investigation, the head of the agency or designee shall ensure that the Inspector General provides the report of findings to—

(1) The complainant and any person acting on the complainant's behalf;

(2) The contractor alleged to have committed the violation; and

(3) The head of the contracting activity.

(d) The complainant and contractor shall be afforded the opportunity to submit a written response to the report of findings within 30 days to the head of the agency or designee. Extensions of time to file a written response may be granted by the head of the agency or designee.

(e) At any time, the head of the agency or designee may request additional investigative work be done on the complaint.

### 3.906 Remedies.

(a) If the head of the agency or designee determines that a contractor has subjected one of its employees to a reprisal for providing information to a Member of Congress, or an authorized official of an agency or of the Department of Justice, the head of the agency or designee may take one or more of the following actions:

(1) Order the contractor to take affirmative action to abate the reprisal.

(2) Order the contractor to reinstate the person to the position that the person held before the reprisal, together with the compensation (including back pay), employment benefits, and other terms and conditions of employment that would apply to the person in that position if the reprisal had not been taken.

(3) Order the contractor to pay the complainant an amount equal to the aggregate amount of all costs and expenses (including attorneys' fees and expert witnesses' fees) that were reasonably incurred by the complainant for, or in connection with, bringing the complaint regarding the reprisal.

(b) Whenever a contractor fails to comply with an order, the head of the

agency or designee shall request the Department of Justice to file an action for enforcement of such order in the United States district court for a district in which the reprisal was found to have occurred. In any action brought under this section, the court may grant appropriate relief, including injunctive relief and compensatory and exemplary damages.

(c) Any person adversely affected or aggrieved by an order issued under this section may obtain review of the order's conformance with the law, and this subpart, in the United States Court of Appeals for a circuit in which the reprisal is alleged in the order to have occurred. No petition seeking such review may be filed more than 60 days after issuance of the order by the head of the agency or designee. Review shall conform to Chapter 7 of Title 5, United States Code.

### **3.907 Whistleblower Protections Under the American Recovery and Reinvestment Act of 2009 (the Recovery Act).**

#### **3.907-1 Definitions.**

As used in this section—

*Board* means the Recovery Accountability and Transparency Board established by Section 1521 of the Recovery Act.

*Covered funds* means any contract payment, grant payment, or other payment received by a contractor if—

(1) The Federal Government provides any portion of the money or property that is provided, requested, or demanded; and

(2) At least some of the funds are appropriated or otherwise made available by the Recovery Act.

*Covered information* means information that the employee reasonably believes is evidence of gross mismanagement of the contract or subcontract related to covered funds, gross waste of covered funds, a substantial and specific danger to public health or safety related to the implementation or use of covered funds, an abuse of authority related to the implementation or use of covered funds, or a violation of law, rule, or regulation related to an agency contract (including the competition for or negotiation of a contract) awarded or issued relating to covered funds.

*Inspector General* means an Inspector General appointed under the Inspector General Act of 1978. In the Department of Defense that is the DoD Inspector General. In the case of an executive agency that does not have an Inspector General, the duties shall be performed by an official designated by the head of the executive agency.

*Non-Federal employer*, as used in this section, means any employer that receives Recovery Act funds, including a contractor, subcontractor, or other recipient of funds pursuant to a contract or other agreement awarded and administered in accordance with the Federal Acquisition Regulation.

[74 FR 14634, Mar. 31, 2009, as amended at 75 FR 34259, June 16, 2010]

#### **3.907-2 Policy.**

Non-Federal employers are prohibited from discharging, demoting, or otherwise discriminating against an employee as a reprisal for disclosing covered information to any of the following entities or their representatives:

- (1) The Board.
- (2) An Inspector General.
- (3) The Comptroller General.
- (4) A member of Congress.
- (5) A State or Federal regulatory or law enforcement agency.
- (6) A person with supervisory authority over the employee or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct.
- (7) A court or grand jury.
- (8) The head of a Federal agency.

[74 FR 14634, Mar. 31, 2009]

#### **3.907-3 Procedures for filing complaints.**

(a) An employee who believes that he or she has been subjected to reprisal prohibited by the Recovery Act, Section 1553 as set forth in 3.907-2, may submit a complaint regarding the reprisal to the Inspector General of the agency that awarded the contract.

(b) The complaint shall be signed and shall contain—

- (1) The name of the contractor;
- (2) The contract number, if known; if not, a description reasonably sufficient to identify the contract(s) involved;

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(3) The covered information giving rise to the disclosure;

(4) The nature of the disclosure giving rise to the discriminatory act; and

(5) The specific nature and date of the reprisal.

(c) A contracting officer who receives a complaint of reprisal of the type described in 3.907-2 shall forward it to the Office of Inspector General and to other designated officials in accordance with agency procedures (*e.g.*, agency legal counsel).

[74 FR 14634, Mar. 31, 2009, as amended at 75 FR 34259, June 16, 2010]

### 3.907-4 Procedures for investigating complaints.

Investigation of complaints will be in accordance with section 1553 of the Recovery Act.

[74 FR 14634, Mar. 31, 2009]

### 3.907-5 Access to investigative file of Inspector General.

(a) The employee alleging reprisal under this section shall have access to the investigation file of the Inspector General, in accordance with the Privacy Act, 5 U.S.C. 552a. The investigation of the Inspector General shall be deemed closed for the purposes of disclosure under such section when an employee files an appeal to the agency head or a court of competent jurisdiction.

(b) In the event the employee alleging reprisal brings a civil action under section 1553(c)(3) of the Recovery Act, the employee alleging the reprisal and the non-Federal employer shall have access to the investigative file of the Inspector General in accordance with the Privacy Act.

(c) The Inspector General may exclude from disclosures made under 3.907-5(a) or (b)—

(1) Information protected from disclosure by a provision of law; and

(2) Any additional information the Inspector General determines disclosure of which would impede a continuing investigation, provided that such information is disclosed once such disclosure would no longer impede such investigation, unless the Inspector General determines that the disclosure of law enforcement techniques, proce-

dures, or information could reasonably be expected to risk circumvention of the law or disclose the identity of a confidential source.

(d) An Inspector General investigating an alleged reprisal under this section may not respond to any inquiry or disclose any information from or about any person alleging such reprisal, except in accordance with 5 U.S.C. 552a or as required by any other applicable Federal law.

[74 FR 14634, Mar. 31, 2009]

### 3.907-6 Remedies and enforcement authority.

(a) *Burden of Proof.* (1) Disclosure as contributing factor in reprisal.

(i) An employee alleging a reprisal under this section shall be deemed to have affirmatively established the occurrence of the reprisal if the employee demonstrates that a disclosure described in section 3.907-2 was a contributing factor in the reprisal.

(ii) A disclosure may be demonstrated as a contributing factor in a reprisal for purposes of this paragraph by circumstantial evidence, including—

(A) Evidence that the official undertaking the reprisal knew of the disclosure; or

(B) Evidence that the reprisal occurred within a period of time after the disclosure such that a reasonable person could conclude that the disclosure was a contributing factor in the reprisal.

(2) *Opportunity for rebuttal.* The head of an agency may not find the occurrence of a reprisal with respect to a reprisal that is affirmatively established under section 3.907-6(a)(1) if the non-Federal employer demonstrates by clear and convincing evidence that the non-Federal employer would have taken the action constituting the reprisal in the absence of the disclosure.

(b) No later than 30 days after receiving an Inspector General report in accordance with section 1553 of the Recovery Act, the head of the agency concerned shall determine whether there is sufficient basis to conclude that the non-Federal employer has subjected the complainant to a reprisal prohibited by subsection 3.907-2 and shall either issue an order denying relief in

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whole or in part or shall take one or more of the following actions:

(1) Order the employer to take affirmative action to abate the reprisal.

(2) Order the employer to reinstate the person to the position that the person held before the reprisal, together with the compensation (including back pay), compensatory damages, employment benefits, and other terms and conditions of employment that would apply to the person in that position if the reprisal had not been taken.

(3) Order the employer to pay the complainant an amount equal to the aggregate amount of all costs and expenses (including attorneys' fees and expert witnesses' fees) that were reasonably incurred by the complainant for, or in connection with, bringing the complaint regarding the reprisal.

(c)(1) The complainant shall be deemed to have exhausted all administrative remedies with respect to the complaint, and the complainant may bring a de novo action at law or equity against the employer to seek compensatory damages and other relief available under this section in the appropriate district court of United States, which shall have jurisdiction over such an action without regard to the amount in controversy if

(i) The head of an agency—

(A) Issues an order denying relief in whole or in part under paragraph (a) of this section;

(B) Has not issued an order within 210 days after the submission of a complaint in accordance with section 1553 of the Recovery Act, or in the case of an extension of time in accordance with section 1553 of the Recovery Act, within 30 days after the expiration of the extension of time; or

(C) Decides in accordance with section 1553 of the Recovery Act not to investigate or to discontinue an investigation; and

(ii) There is no showing that such delay or decision is due to the bad faith of the complainant.

(2) Such an action shall, at the request of either party to the action, be tried by the court with a jury.

(d) Whenever an employer fails to comply with an order issued under this section, the head of the agency shall request the Department of Justice to

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file an action for enforcement of such order in the United States district court for a district in which the reprisal was found to have occurred. In any action brought under this section, the court may grant appropriate relief, including injunctive relief, compensatory and exemplary damages, and attorneys fees and costs.

(e) Any person adversely affected or aggrieved by an order issued under paragraph (b) of this subsection may obtain review of the order's conformance with the law, and this section, in the United States Court of Appeals for a circuit in which the reprisal is alleged in the order to have occurred. No petition seeking such review may be filed more than 60 days after issuance of the order by the head of the agency.

[74 FR 14634, Mar. 31, 2009]

#### 3.907-7 Contract Clause.

Use the clause at 52.203-15, Whistleblower Protections Under the American Recovery and Reinvestment Act of 2009 in all solicitations and contracts funded in whole or in part with Recovery Act funds.

[74 FR 14634, Mar. 31, 2009]

#### 3.908 Pilot program for enhancement of contractor employee whistleblower protections.

[78 FR 60171, Sept. 30, 2013]

#### 3.908-1 Scope of section.

(a) This section implements 41 U.S.C. 4712.

(b) This section does not apply to—

(1) DoD, NASA, and the Coast Guard; or

(2) Any element of the intelligence community, as defined in section 3(4) of the National Security Act of 1947 (50 U.S.C. 3003(4)). This section does not apply to any disclosure made by an employee of a contractor or subcontractor of an element of the intelligence community if such disclosure—

(i) Relates to an activity of an element of the intelligence community; or

(ii) Was discovered during contract or subcontract services provided to an element of the intelligence community.

[78 FR 60171, Sept. 30, 2013]

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### 3.908-2 Definitions.

As used in this section—

*Abuse of authority* means an arbitrary and capricious exercise of authority that is inconsistent with the mission of the executive agency concerned or the successful performance of a contract of such agency.

*Inspector General* means an Inspector General appointed under the Inspector General Act of 1978 and any Inspector General that receives funding from, or has oversight over contracts awarded for, or on behalf of, the executive agency concerned.

[78 FR 60171, Sept. 30, 2013]

### 3.908-3 Policy.

(a) Contractors and subcontractors are prohibited from discharging, demoting, or otherwise discriminating against an employee as a reprisal for disclosing, to any of the entities listed at paragraph (b) of this subsection, information that the employee reasonably believes is evidence of gross mismanagement of a Federal contract, a gross waste of Federal funds, an abuse of authority relating to a Federal contract, a substantial and specific danger to public health or safety, or a violation of law, rule, or regulation related to a Federal contract (including the competition for or negotiation of a contract). A reprisal is prohibited even if it is undertaken at the request of an executive branch official, unless the request takes the form of a non-discretionary directive and is within the authority of the executive branch official making the request.

(b) *Entities to whom disclosure may be made.* (1) A Member of Congress or a representative of a committee of Congress.

(2) An Inspector General.

(3) The Government Accountability Office.

(4) A Federal employee responsible for contract oversight or management at the relevant agency.

(5) An authorized official of the Department of Justice or other law enforcement agency.

(6) A court or grand jury.

(7) A management official or other employee of the contractor or subcontractor who has the responsibility to

investigate, discover, or address misconduct.

(c) An employee who initiates or provides evidence of contractor or subcontractor misconduct in any judicial or administrative proceeding relating to waste, fraud, or abuse on a Federal contract shall be deemed to have made a disclosure.

[78 FR 60171, Sept. 30, 2013]

### 3.908-4 Filing complaints.

A contractor or subcontractor employee who believes that he or she has been discharged, demoted, or otherwise discriminated against contrary to the policy in 3.908-3 of this section may submit a complaint with the Inspector General of the agency concerned. Procedures for submitting fraud, waste, abuse, and whistleblower complaints are generally accessible on agency Office of Inspector General Hotline or Whistleblower Internet sites. A complaint by the employee may not be brought under 41 U.S.C. 4712 more than three years after the date on which the alleged reprisal took place.

[78 FR 60171, Sept. 30, 2013]

### 3.908-5 Procedures for investigating complaints.

(a) Investigation of complaints will be in accordance with 41 U.S.C. 4712(b).

(b) Upon completion of the investigation, the head of the agency or designee shall ensure that the Inspector General provides the report of findings to—

(1) The complainant and any person acting on the complainant's behalf;

(2) The contractor alleged to have committed the violation; and

(3) The head of the contracting activity.

(c) The complainant and contractor shall be afforded the opportunity to submit a written response to the report of findings within 30 days to the head of the agency or designee. Extensions of time to file a written response may be granted by the head of the agency or designee.

(d) At any time, the head of the agency or designee may request additional investigative work be done on the complaint.

[80 FR 75913, Dec. 4, 2015]

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#### 3.908-6 Remedies.

(a) *Agency response to Inspector General report.* Not later than 30 days after receiving an Inspector General report in accordance with 41 U.S.C. 4712, the head of the agency shall—

(1) Determine whether sufficient basis exists to conclude that the contractor or subcontractor has subjected the employee who submitted the complaint to a reprisal as prohibited by 3.908-3; and

(2) Issue an order denying relief or take one or more of the following actions:

(i) Order the contractor to take affirmative action to abate the reprisal.

(ii) Order the contractor or subcontractor to reinstate the complainant-employee to the position that the person held before the reprisal, together with compensatory damages (including back pay), employment benefits, and other terms and conditions of employment that would apply to the person in that position if the reprisal had not been taken.

(iii) Order the contractor or subcontractor to pay the complainant-employee an amount equal to the aggregate amount of all costs and expenses (including attorneys' fees and expert witnesses' fees) that were reasonably incurred by the complainant for, or in connection with, bringing the complaint regarding the reprisal, as determined by the head of the agency.

(b) *Complainant's right to go to court.* If the head of the agency issues an order denying relief or has not issued an order within 210 days after the submission of the complaint or within 30 days after the expiration of an extension of time granted in accordance with 41 U.S.C. 4712(b)(2)(B) for the submission of the Inspector General's report on the investigative findings of the complaint to the head of the agency, the contractor or subcontractor, and the complainant, and there is no showing that such delay is due to the bad faith of the complainant—

(1) The complainant shall be deemed to have exhausted all administrative remedies with respect to the complaint; and

(2) The complainant may bring a *de novo* action at law or equity against the contractor or subcontractor to

seek compensatory damages and other relief available under 41 U.S.C. 4712 in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy. Such an action shall, at the request of either party to the action, be tried by the court with a jury. An action under this authority may not be brought more than two years after the date on which remedies are deemed to have been exhausted.

(c) *Admissibility in evidence.* An Inspector General determination and an agency head order denying relief under this section shall be admissible in evidence in any *de novo* action at law or equity brought pursuant to 41 U.S.C. 4712.

(d) *No waiver.* The rights and remedies provided for in 41 U.S.C. 4712 may not be waived by any agreement, policy, form, or condition of employment.

[78 FR 60171, Sept. 30, 2013, as amended at 81 FR 75913, Dec. 4, 2015]

#### 3.908-7 Enforcement of orders.

(a) Whenever a contractor or subcontractor fails to comply with an order issued under 3.908-6(a)(2) of this section, the head of the agency concerned shall file an action for enforcement of the order in the U.S. district court for a district in which the reprisal was found to have occurred. In any action brought pursuant to this authority, the court may grant appropriate relief, including injunctive relief, compensatory and exemplary damages, and attorney fees and costs. The complainant-employee upon whose behalf an order was issued may also file such an action or join in an action filed by the head of the agency.

(b) Any person adversely affected or aggrieved by an order issued under 3.908-6(a)(2) may obtain review of the order's conformance with 41 U.S.C. 4712 and its implementing regulations, in the U.S. court of appeals for a circuit in which the reprisal is alleged in the order to have occurred. No petition seeking such review may be filed more than 60 days after issuance of the order by the head of the agency. Filing such an appeal shall not act to stay the enforcement of the order of the head of

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an agency, unless a stay is specifically entered by the court.

[78 FR 60171, Sept. 30, 2013]

### 3.908-8 Classified information.

41 U.S.C. 4712 does not provide any right to disclose classified information not otherwise provided by law.

[78 FR 60171, Sept. 30, 2013]

### 3.908-9 Contract clause.

The contracting officer shall insert the clause at 52.203-17, Contractor Employee Whistleblower Rights and Requirement to Inform Employees of Whistleblower Rights, in all solicitations and contracts that exceed the simplified acquisition threshold.

[78 FR 60171, Sept. 30, 2013]

## Subpart 3.10—Contractor Code of Business Ethics and Conduct

SOURCE: 72 FR 65881, Nov. 23, 2007, unless otherwise noted.

### 3.1000 Scope of subpart.

This subpart—

(a) Implements 41 U.S.C. 3509, Notification of Violations of Federal Criminal Law or Overpayments; and

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

[79 FR 24197, Apr. 29, 2014]

### 3.1001 Definitions.

As used in this subpart—

*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.

[73 FR 67090, Nov. 12, 2008]

### 3.1002 Policy.

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

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

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

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

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

### 3.1003 Requirements.

(a) *Contractor requirements.* (1) Although the policy at 3.1002 applies as guidance to all Government contractors, the contractual requirements set forth in the clauses at 52.203-13, Contractor Code of Business Ethics and Conduct, and 52.203-14, Display of Hotline Poster(s), are mandatory if the contracts meet the conditions specified in the clause prescriptions at 3.1004.

(2) Whether or not the clause at 52.203-13 is applicable, a contractor may be suspended and/or debarred for knowing failure by a principal to timely disclose to the Government, in connection with the award, performance, or closeout of a Government contract performed by the contractor or a subcontract awarded thereunder, credible evidence of 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 a violation of the civil False Claims Act. Knowing failure to timely disclose credible evidence of any of the above violations remains a cause for suspension and/or debarment until 3 years after final payment on a contract (see 9.406-2(b)(1)(vi) and 9.407-2(a)(8)).

(3) The Payment clauses at FAR 52.212-4(i)(5), 52.232-25(d), 52.232-26(c),

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and 52.232–27(1) require that, if the contractor becomes aware that the Government has overpaid on a contract financing or invoice payment, the contractor shall remit the overpayment amount to the Government. A contractor may be suspended and/or debarred for knowing failure by a principal to timely disclose credible evidence of a significant overpayment, other than overpayments resulting from contract financing payments as defined in 32.001 (see 9.406–2(b)(1)(vi) and 9.407–2(a)(8)).

(b) *Notification of possible contractor violation.* If the contracting officer is notified of possible contractor 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, the contracting officer shall—

(1) Coordinate the matter with the agency Office of the Inspector General; or

(2) Take action in accordance with agency procedures.

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

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

[72 FR 65881, Nov. 23, 2007, as amended at 73 FR 67090, Nov. 12, 2008]

### 3.1004 Contract clauses.

(a) Insert the clause at FAR 52.203–13, Contractor Code of Business Ethics and Conduct, in solicitations and contracts if the value of the contract is expected to exceed \$5.5 million and the performance period is 120 days or more.

(b)(1) Unless the contract is for the acquisition of a commercial item or will be performed entirely outside the United States, insert the clause at FAR 52.203–14, Display of Hotline Poster(s), if—

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(i) The contract exceeds \$5.5 million or a lesser amount established by the agency; and

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

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

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

(i) Identify the applicable posters; and

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

(3) In paragraph (d) of the clause, if the agency has established policies and procedures for display of the OIG fraud hotline poster at a lesser amount, the contracting officer shall replace “\$5.5 million” with the lesser amount that the agency has established.

[72 FR 65881, Nov. 23, 2007, as amended at 73 FR 67090, Nov. 12, 2008; 80 FR 38296, July 2, 2015]

### Subpart 3.11—Preventing Personal Conflicts of Interest for Contractor Employees Performing Acquisition Functions

SOURCE: 76 FR 68024, Nov. 2, 2011, unless otherwise noted.

#### 3.1100 Scope of subpart.

This subpart implements policy on personal conflicts of interest by employees of Government contractors as required by 41 U.S.C. 2303.

[79 FR 24197, Apr. 29, 2014]

#### 3.1101 Definitions.

As used in this subpart—

*Acquisition function closely associated with inherently governmental functions* means supporting or providing advice or recommendations with regard to the following activities of a Federal agency:

(1) Planning acquisitions.

(2) Determining what supplies or services are to be acquired by the Government, including developing statements of work.

(3) Developing or approving any contractual documents, to include documents defining requirements, incentive plans, and evaluation criteria.

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- (4) Evaluating contract proposals.
- (5) Awarding Government contracts.
- (6) Administering contracts (including ordering changes or giving technical direction in contract performance or contract quantities, evaluating contractor performance, and accepting or rejecting contractor products or services).
- (7) Terminating contracts.
- (8) Determining whether contract costs are reasonable, allocable, and allowable.

*Covered employee* means an individual who performs an acquisition function closely associated with inherently governmental functions and is—

- (1) An employee of the contractor; or
- (2) A subcontractor that is a self-employed individual treated as a covered employee of the contractor because there is no employer to whom such an individual could submit the required disclosures.

*Personal conflict of interest* means a situation in which a covered employee has a financial interest, personal activity, or relationship that could impair the employee's ability to act impartially and in the best interest of the Government when performing under the contract. (A *de minimis* interest that would not "impair the employee's ability to act impartially and in the best interest of the Government" is not covered under this definition.)

(1) Among the sources of personal conflicts of interest are—

- (i) Financial interests of the covered employee, of close family members, or of other members of the covered employee's household;
- (ii) Other employment or financial relationships (including seeking or negotiating for prospective employment or business); and
- (iii) Gifts, including travel.

(2) For example, financial interests referred to in paragraph (1) of this definition may arise from—

- (i) Compensation, including wages, salaries, commissions, professional fees, or fees for business referrals;
- (ii) Consulting relationships (including commercial and professional consulting and service arrangements, scientific and technical advisory board memberships, or serving as an expert witness in litigation);

(iii) Services provided in exchange for honorariums or travel expense reimbursements;

(iv) Research funding or other forms of research support;

(v) Investment in the form of stock or bond ownership or partnership interest (excluding diversified mutual fund investments);

(vi) Real estate investments;

(vii) Patents, copyrights, and other intellectual property interests; or

(viii) Business ownership and investment interests.

### 3.1102 Policy.

The Government's policy is to require contractors to—

(a) Identify and prevent personal conflicts of interest of their covered employees; and

(b) Prohibit covered employees who have access to non-public information by reason of performance on a Government contract from using such information for personal gain.

### 3.1103 Procedures.

(a) By use of the contract clause at 52.203-16, as prescribed at 3.1106, the contracting officer shall require each contractor whose employees perform acquisition functions closely associated with inherently Government functions to—

(1) Have procedures in place to screen covered employees for potential personal conflicts of interest by—

(i) Obtaining and maintaining from each covered employee, when the employee is initially assigned to the task under the contract, a disclosure of interests that might be affected by the task to which the employee has been assigned, as follows:

(A) Financial interests of the covered employee, of close family members, or of other members of the covered employee's household.

(B) Other employment or financial relationships of the covered employee (including seeking or negotiating for prospective employment or business).

(C) Gifts, including travel; and

(ii) Requiring each covered employee to update the disclosure statement whenever the employee's personal or financial circumstances change in such a

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way that a new personal conflict of interest might occur because of the task the covered employee is performing.

(2) For each covered employee—

(i) Prevent personal conflicts of interest, including not assigning or allowing a covered employee to perform any task under the contract for which the Contractor has identified a personal conflict of interest for the employee that the Contractor or employee cannot satisfactorily prevent or mitigate in consultation with the contracting agency;

(ii) Prohibit use of non-public information accessed through performance of a Government contract for personal gain; and

(iii) Obtain a signed non-disclosure agreement to prohibit disclosure of non-public information accessed through performance of a Government contract.

(3) Inform covered employees of their obligation—

(i) To disclose and prevent personal conflicts of interest;

(ii) Not to use non-public information accessed through performance of a Government contract for personal gain; and

(iii) To avoid even the appearance of personal conflicts of interest;

(4) Maintain effective oversight to verify compliance with personal conflict-of-interest safeguards;

(5) Take appropriate disciplinary action in the case of covered employees who fail to comply with policies established pursuant to this section; and

(6) Report to the contracting officer any personal conflict-of-interest violation by a covered employee as soon as identified. This report shall include a description of the violation and the proposed actions to be taken by the contractor in response to the violation, with follow-up reports of corrective actions taken, as necessary.

(b) If a contractor reports a personal conflict-of-interest violation by a covered employee to the contracting officer in accordance with paragraph (b)(6) of the clause at 52.203-16, Preventing Personal Conflicts of Interest, the contracting officer shall—

(1) Review the actions taken by the contractor;

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(2) Determine whether any action taken by the contractor has resolved the violation satisfactorily; and

(3) If the contracting officer determines that the contractor has not resolved the violation satisfactorily, take any appropriate action in consultation with agency legal counsel.

#### 3.1104 Mitigation or waiver.

(a) In exceptional circumstances, if the contractor cannot satisfactorily prevent a personal conflict of interest as required by paragraph (b)(2)(i) of the clause at 52.203-16, Preventing Personal Conflicts of Interest, the contractor may submit a request, through the contracting officer, for the head of the contracting activity to—

(1) Agree to a plan to mitigate the personal conflict of interest; or

(2) Waive the requirement to prevent personal conflicts of interest.

(b) If the head of the contracting activity determines in writing that such action is in the best interest of the Government, the head of the contracting activity may impose conditions that provide mitigation of a personal conflict of interest or grant a waiver.

(c) This authority shall not be redelegated.

#### 3.1105 Violations.

If the contracting officer suspects violation by the contractor of a requirement of paragraph (b), (c)(3), or (d) of the clause at 52.203-16, Preventing Personal Conflicts of Interest, the contracting officer shall contact the agency legal counsel for advice and/or recommendations on a course of action.

#### 3.1106 Contract clause.

(a) Insert the clause at 52.203-16, Preventing Personal Conflicts of Interest, in solicitations and contracts that—

(1) Exceed the simplified acquisition threshold; and

(2) Include a requirement for services by contractor employee(s) that involve performance of acquisition functions closely associated with inherently governmental functions for, or on behalf of, a Federal agency or department.

(b) If only a portion of a contract is for the performance of acquisition

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functions closely associated with inherently governmental functions, then the contracting officer shall still insert the clause, but shall limit applicability of the clause to that portion of the contract that is for the performance of such services.

(c) Do not insert the clause in solicitations or contracts with a self-employed individual if the acquisition functions closely associated with inherently governmental functions are to be performed entirely by the self-employed individual, rather than an employee of the contractor.

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AUTHORITY: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

SOURCE: 48 FR 42113, Sept. 19, 1983, unless otherwise noted.

#### 4.000 Scope of part.

This part prescribes policies and procedures relating to the administrative aspects of contract execution, contractor-submitted paper documents,

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distribution, reporting, retention, and files.

[60 FR 28493, May 31, 1995]

### Subpart 4.1—Contract Execution

#### 4.001 Definitions.

As used in this part—

*Procurement Instrument Identifier (PIID)* means the Government-unique identifier for each solicitation, contract, agreement, or order. For example, an agency may use as its PIID for procurement actions, such as delivery and task orders or basic ordering agreements, the order or agreement number in conjunction with the contract number (see 4.1602).

*Supplementary procurement instrument identifier* means the non-unique identifier for a procurement action that is used in conjunction with the Government-unique identifier. For example, an agency may use as its PIID for an amended solicitation, the Government-unique identifier for a solicitation number (e.g., N0002309R0009) in conjunction with a non-unique amendment number (e.g., 0001). The non-unique amendment number represents the supplementary PIID.

[76 FR 39235, July 5, 2011]

#### 4.101 Contracting officer's signature.

Only contracting officers shall sign contracts on behalf of the United States. The contracting officer's name and official title shall be typed, stamped, or printed on the contract. The contracting officer normally signs the contract after it has been signed by the contractor. The contracting officer shall ensure that the signer(s) have authority to bind the contractor (see specific requirements in 4.102 of this subpart).

[60 FR 34736, July 3, 1995]

#### 4.102 Contractor's signature.

(a) *Individuals*. A contract with an individual shall be signed by that individual. A contract with an individual doing business as a firm shall be signed by that individual, and the signature shall be followed by the individual's typed, stamped, or printed name and

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the words “, an individual doing business as \_\_\_\_\_” [*insert name of firm*].

(b) *Partnerships*. A contract with a partnership shall be signed in the partnership name. Before signing for the Government, the contracting officer shall obtain a list of all partners and ensure that the individual(s) signing for the partnership have authority to bind the partnership.

(c) *Corporations*. A contract with a corporation shall be signed in the corporate name, followed by the word “by” and the signature and title of the person authorized to sign. The contracting officer shall ensure that the person signing for the corporation has authority to bind the corporation.

(d) *Joint venturers*. A contract with joint venturers may involve any combination of individuals, partnerships, or corporations. The contract shall be signed by each participant in the joint venture in the manner prescribed in paragraphs (a) through (c) above for each type of participant. When a corporation is participating, the contracting officer shall verify that the corporation is authorized to participate in the joint venture.

(e) *Agents*. When an agent is to sign the contract, other than as stated in paragraphs (a) through (d) above, the agent’s authorization to bind the principal must be established by evidence satisfactory to the contracting officer.

[48 FR 42113, Sept. 19, 1983, as amended at 62 FR 235, Jan. 2, 1997]

### 4.103 Contract clause.

The contracting officer shall insert the clause at 52.204-1, Approval of Contract, in solicitations and contracts if required by agency procedures.

[49 FR 26741, June 29, 1984]

## Subpart 4.2—Contract Distribution

### 4.201 Procedures.

Contracting officers shall distribute copies of contracts or modifications within 10 working days after execution by all parties. As a minimum, the contracting officer shall—

(a) Distribute simultaneously one signed copy or reproduction of the

signed contract to the contractor and the paying office;

(b) When a contract is assigned to another office for contract administration (see subpart 42.2), provide to that office—

(1) One copy or reproduction of the signed contract and of each modification; and

(2) A copy of the contract distribution list, showing those offices that should receive copies of modifications, and any changes to the list as they occur;

(c) Distribute one copy to each accounting and finance office (funding office) whose funds are cited in the contract;

(d) When the contract is not assigned for administration but contains a Cost Accounting Standards clause, provide one copy of the contract to the cognizant administrative contracting officer and mark the copy “FOR COST ACCOUNTING STANDARDS ADMINISTRATION ONLY” (see 30.601(b));

(e) Provide one copy of each contract or modification that requires audit service to the appropriate field audit office listed in the “Directory of Federal Contract Audit Offices” (copies of this directory can be ordered from the U.S. Government Printing Office, Superintendent of Documents, Washington, DC 20402, referencing stock numbers 008-007-03189-9 and 008-007-03190-2 for Volumes I and II, respectively); and

(f) Provide copies of contracts and modifications to those organizations required to perform contract administration support functions (e.g., when manufacturing is performed at multiple sites, the contract administration office cognizant of each location).

[48 FR 42113, Sept. 19, 1983, as amended at 60 FR 34736, July 3, 1995]

### 4.202 Agency distribution requirements.

Agencies shall limit additional distribution requirements to the minimum necessary for proper performance of essential functions. When contracts are assigned for administration to a contract administration office located in an agency different from that of the contracting office (see part 42), the two agencies shall agree on any

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necessary distribution in addition to that prescribed in 4.201 above.

#### 4.203 Taxpayer identification information.

(a) If the contractor has furnished a Taxpayer Identification Number (TIN) when completing the solicitation provision at 52.204-3, Taxpayer Identification, or paragraph (1) of the solicitation provision at 52.212-3, Offeror Representations and Certifications—Commercial Items, the contracting officer shall, unless otherwise provided in agency procedures, attach a copy of the completed solicitation provision as the last page of the copy of the contract sent to the payment office.

(b) If the TIN or type of organization is derived from a source other than the provision at 52.204-3 or 52.212-3(1), the contracting officer shall annotate the last page of the contract or order forwarded to the payment office to state the contractor's TIN and type of organization, unless this information is otherwise provided to the payment office in accordance with agency procedures.

(c) If the contractor provides its TIN or type of organization to the contracting officer after award, the contracting officer shall forward the information to the payment office within 7 days of its receipt.

(d) *Federal Supply Schedule contracts.* Each contracting officer that places an order under a Federal Supply Schedule contract (see Subpart 8.4) shall provide the TIN and type of organization information to the payment office in accordance with paragraph (b) of this section.

(e) *Basic ordering agreements and indefinite-delivery contracts (other than Federal Supply Schedule contracts).* (1) Each contracting officer that issues a basic ordering agreement or indefinite-delivery contract (other than a Federal Supply Schedule contract) shall provide to contracting officers placing orders under the agreement or contract (if the contractor is not required to provide this information to the System for Award Management)—

(i) A copy of the agreement or contract with a copy of the completed solicitation provision at 52.204-3 or

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52.212-3(1) as the last page of the agreement or contract; or

(ii) The contractor's TIN and type of organization information.

(2) Each contracting officer that places an order under a basic ordering agreement or indefinite-delivery contract (other than a Federal Supply Schedule contract) shall provide the TIN and type of organization information to the payment office in accordance with paragraph (a) or (b) of this section.

[63 FR 58588, Oct. 30, 1998, as amended at 68 FR 56672, Oct. 1, 2003; 73 FR 33638, June 12, 2008; 78 FR 37677, June 21, 2013]

### Subpart 4.3—Paper Documents

#### 4.300 Scope of subpart.

This subpart provides policies and procedures on contractor-submitted paper documents.

[60 FR 28493, May 31, 1995]

#### 4.301 Definition.

*Printed or copied double-sided*, as used in this subpart, means printing or reproducing a document so that information is on both sides of a sheet of paper.

[65 FR 36017, June 6, 2000]

#### 4.302 Policy.

(a) Section 3(a) of E.O. 13423, Strengthening Federal Environmental, Energy, and Transportation Management, directs agencies to implement waste prevention. In addition, section 2(e) of E.O. 13514, Federal Leadership in Environmental, Energy, and Economic Performance, directs agencies to eliminate waste. Electronic commerce methods (see 4.502) and double-sided printing and copying are best practices for waste prevention.

(b) When electronic commerce methods (see 4.502) are not used, agencies shall require contractors to submit paper documents to the Government relating to an acquisition printed or copied double-sided on at least 30 percent postconsumer fiber paper whenever practicable. If the contractor cannot print or copy double-sided, it shall print or copy single-sided on at least 30 percent postconsumer fiber paper.

[76 FR 31397, May 31, 2011]

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### 4.303 Contract clause.

Insert the clause at 52.204-4, Printed or Copied Double-Sided on Recycled Paper, in solicitations and contracts that exceed the simplified acquisition threshold.

[65 FR 36017, June 6, 2000]

## 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.

[48 FR 42113, Sept. 19, 1983, as amended at 61 FR 31617, June 20, 1996; 73 FR 21781, Apr. 22, 2008]

### 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.

#### 4.404

(2) Contracting officers in agencies not covered by the NISP shall follow agency procedures.

[48 FR 42113, Sept. 19, 1983, as amended at 61 FR 31617, June 20, 1996; 73 FR 21781, Apr. 22, 2008]

#### 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) below 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.

[48 FR 42113, Sept. 19, 1983, as amended at 61 FR 31617, June 20, 1996]

### Subpart 4.5—Electronic Commerce in Contracting

AUTHORITY: 40 U.S.C. 486(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

SOURCE: 63 FR 58592, Oct. 30, 1998, unless otherwise noted.

#### 4.500 Scope of subpart.

This subpart provides policy and procedures for the establishment and use of electronic commerce in Federal acquisition as required by 41 U.S.C. 2301.

[79 FR 24197, Apr. 29, 2014]

#### 4.501 [Reserved]

#### 4.502 Policy.

(a) The Federal Government shall use electronic commerce whenever practicable or cost-effective. The use of

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terms commonly associated with paper transactions (e.g., “copy,” “document,” “page,” “printed,” “sealed envelope,” and “stamped”) shall not be interpreted to restrict the use of electronic commerce. Contracting officers may supplement electronic transactions by using other media to meet the requirements of any contract action governed by the FAR (e.g., transmit hard copy of drawings).

(b) Agencies may exercise broad discretion in selecting the hardware and software that will be used in conducting electronic commerce. However, as required by 41 U.S.C. 2301, the head of each agency, after consulting with the Administrator of OFPP, shall ensure that systems, technologies, procedures, and processes used by the agency to conduct electronic commerce—

(1) Are implemented uniformly throughout the agency, to the maximum extent practicable;

(2) Are implemented only after considering the full or partial use of existing infrastructures;

(3) Facilitate access to Government acquisition opportunities by small business concerns, small disadvantaged business concerns, women-owned, veteran-owned, HUBZone, and service-disabled veteran-owned small business concerns;

(4) Include a single means of providing widespread public notice of acquisition opportunities through the Governmentwide point of entry and a means of responding to notices or solicitations electronically; and

(5) Comply with nationally and internationally recognized standards that broaden interoperability and ease the electronic interchange of information, such as standards established by the National Institute of Standards and Technology.

(c) Before using electronic commerce, the agency head shall ensure that the agency systems are capable of ensuring authentication and confidentiality commensurate with the risk and magnitude of the harm from loss, misuse, or unauthorized access to or modification of the information.

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(d) Agencies may accept electronic signatures and records in connection with Government contracts.

[63 FR 58592, Oct. 30, 1998, as amended at 66 FR 27409, May 16, 2001; 68 FR 28094, May 22, 2003; 70 FR 14954, Mar. 23, 2005; 72 FR 63076, Nov. 7, 2007; 79 FR 24197, Apr. 29, 2014]

### Subpart 4.6—Contract Reporting

SOURCE: 73 FR 21776, Apr. 22, 2008, unless otherwise noted.

#### 4.600 Scope of subpart.

This subpart prescribes uniform reporting requirements for the Federal Procurement Data System (FPDS).

#### 4.601 Definitions.

As used in this subpart—

*Contract action* means any oral or written action that results in the purchase, rent, or lease of supplies or equipment, services, or construction using appropriated dollars over the micro-purchase threshold, or modifications to these actions regardless of dollar value. Contract action does not include grants, cooperative agreements, other transactions, real property leases, requisitions from Federal stock, training authorizations, or other non-FAR based transactions.

*Contract action report (CAR)* means contract action data required to be entered into the Federal Procurement Data System (FPDS).

*Definitive contract* means any contract that must be reported to FPDS other than an indefinite delivery vehicle. This definition is only for FPDS, and is not intended to apply to Part 16.

*Entitlement program* means a Federal program that guarantees a certain level of benefits to persons or other entities who meet requirements set by law, such as Social Security, farm price supports, or unemployment benefits.

*Generic DUNS number* means a DUNS number assigned to a category of vendors not specific to any individual or entity.

*Indefinite delivery vehicle (IDV)* means an indefinite delivery contract or agreement that has one or more of the following clauses:

- (1) 52.216-18, Ordering.
- (2) 52.216-19, Order Limitations.

(3) 52.216-20, Definite Quantity.

(4) 52.216-21, Requirements.

(5) 52.216-22, Indefinite Quantity.

(6) Any other clause allowing ordering.

[73 FR 21776, Apr. 22, 2008, as amended at 74 FR 2713, Jan. 15, 2009; 75 FR 77735, Dec. 13, 2010]

EFFECTIVE DATE NOTE: At 81 FR 67738, Sept. 30, 2016, 4.601 was amended by removing the definition “Generic DUNS number” and adding, in alphabetical order, the definition “Generic entity identifier”, effective Oct. 31, 2016. For the convenience of the user, the added text is set forth as follows:

#### 4.601 Definitions.

\* \* \* \* \*

*Generic entity identifier* means a number or other identifier assigned to a category of vendors and not specific to any individual or entity.

\* \* \* \* \*

#### 4.602 General.

(a) The FPDS provides a comprehensive web-based tool for agencies to report contract actions. The resulting data provides—

(1) A basis for recurring and special reports to the President, the Congress, the Government Accountability Office, Federal executive agencies, and the general public;

(2) A means of measuring and assessing the effect of Federal contracting on the Nation’s economy and the extent to which small, veteran-owned small, service-disabled veteran-owned small, HUBZone small, small disadvantaged, women-owned small business concerns, and AbilityOne nonprofit agencies operating under 41 U.S.C. chapter 85, Committee for Purchase from People Who Are Blind or Severely Disabled, are sharing in Federal contracts;

(3) A means of measuring and assessing the effect of Federal contracting for promoting sustainable technologies, materials, products, and high-performance sustainable buildings. This is accomplished by collecting and reporting agency data on sustainable acquisition, including types of products purchased, the purchase costs, and the exceptions used for other than sustainable acquisition; and

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(4) A means of measuring and assessing the effect of other policy and management initiatives (*e.g.*, performance based acquisitions and competition).

(b) FPDS does not provide reports for certain acquisition information used in the award of a contract action (*e.g.*, subcontracting data, funding data, or accounting data).

(c) The FPDS Web site, <https://www.fpds.gov>, provides instructions for submitting data. It also provides—

(1) A complete list of departments, agencies, and other entities that submit data to the FPDS;

(2) Technical and end-user guidance;

(3) A computer-based tutorial; and

(4) Information concerning reports not generated in FPDS.

[73 FR 21776, Apr. 22, 2008, as amended at 73 FR 53994, Sept. 17, 2008; 76 FR 31397, May 31, 2011; 79 FR 24197, Apr. 29, 2014]

#### 4.603 Policy.

(a) In accordance with the Federal Funding Accountability and Transparency Act of 2006 (Pub. L. 109-282), all unclassified Federal award data must be publicly accessible.

(b) Executive agencies shall use FPDS to maintain publicly available information about all unclassified contract actions exceeding the micro-purchase threshold, and any modifications to those actions that change previously reported contract action report data, regardless of dollar value.

(c) Agencies awarding assisted acquisitions or direct acquisitions must report these actions and identify the Program/Funding Agency and Office Codes from the applicable agency codes maintained by each agency at FPDS. These codes represent the agency and office that has provided the predominant amount of funding for the contract action. For assisted acquisitions, the requesting agency will receive socioeconomic credit for meeting agency small business goals, where applicable. Requesting agencies shall provide the appropriate agency/bureau component code as part of the written interagency agreement between the requesting and servicing agencies (see 17.502-1(b)(1)).

(d) Agencies awarding contract actions with a mix of appropriated and non-appropriated funding shall only re-

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port the full appropriated portion of the contract action in FPDS.

[77 FR 69721, Nov. 20, 2012]

#### 4.604 Responsibilities.

(a) The Senior Procurement Executive in coordination with the head of the contracting activity is responsible for developing and monitoring a process to ensure timely and accurate reporting of contractual actions to FPDS.

(b)(1) The responsibility for the completion and accuracy of the individual contract action report (CAR) resides with the contracting officer who awarded the contract action. CARs in a draft or error status in FPDS are not considered complete.

(2) The CAR must be confirmed for accuracy by the contracting officer prior to release of the contract award. The CAR must then be completed in FPDS within three business days after contract award.

(3) For any action awarded in accordance with 6.302-2 or pursuant to any of the authorities listed at FAR subpart 18.2, the CAR must be completed in FPDS within 30 days after contract award.

(4) When the contracting office receives written notification that a contractor has changed its size status in accordance with the clause at 52.219-28, Post-Award Small Business Program Rerepresentation, the contracting officer shall update the size status in FPDS within 30 days after receipt of contractor's notification of rerepresentation.

(5) If after award of a contract, the contracting officer receives written notification of SBA's final decision on a protest concerning a size determination, the contracting officer shall update FPDS to reflect the final decision.

(c) The chief acquisition officer of each agency required to report its contract actions must submit to the General Services Administration (GSA), in accordance with FPDS guidance, within 120 days after the end of each fiscal year, an annual certification of whether, and to what degree, agency CAR

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data for the preceding fiscal year is complete and accurate.

[73 FR 21776, Apr. 22, 2008, as amended at 76 FR 68044, Nov. 2, 2011; 77 FR 69717, Nov. 20, 2012; 79 FR 43582, July 25, 2014]

### 4.605 Procedures.

(a) *Procurement Instrument Identifier (PIID)*. Agencies shall have in place a process that ensures that each PIID reported to FPDS is unique Government-wide, for all solicitations, contracts, blanket purchase agreements, basic agreements, basic ordering agreements, or orders in accordance with 4.1601 to 4.1603, and will remain so for at least 20 years from the date of contract award. Other pertinent PIID instructions for FPDS reporting can be found at <https://www.fpds.gov>.

(b) *Data Universal Numbering System*. The contracting officer must identify and report a Data Universal Numbering System (DUNS) number (Contractor Identification Number) for the successful offeror on a contract action. The DUNS number reported must identify the successful offeror's name and address as stated in the offer and resultant contract, and as registered in the System for Award Management database in accordance with the provision at 52.204-7, System for Award Management. The contracting officer must ask the offeror to provide its DUNS number by using either the provision at 52.204-6, Data Universal Numbering System Number, the provision at 52.204-7, System for Award Management, or the provision at 52.212-1, Instructions to Offerors—Commercial Items. (For a discussion of the Commercial and Government Entity (CAGE) Code, which is a different identification number, see subpart 4.18.)

(c) *Generic DUNS number*. (1) The use of a generic DUNS number should be limited, and only used in the situations described in paragraph (c)(2) of this section. Use of a generic DUNS number does not supersede the requirements of either provisions 52.204-6 or 52.204-7 (if present in the solicitation) for the contractor to have a DUNS number assigned.

(2) Authorized generic DUNS numbers, maintained by the Integrated Award Environment (IAE) program office (<https://www.acquisition.gov>), may

be used to report contracts in lieu of the contractor's actual DUNS number only for—

(i) Contract actions valued at or below \$30,000 that are awarded to a contractor that is—

(A) A student;

(B) A dependent of either a veteran, foreign service officer, or military member assigned outside the United States and its outlying areas (as defined in 2.101); or

(C) Located outside the United States and its outlying areas for work to be performed outside the United States and its outlying areas and the contractor does not otherwise have a DUNS number;

(ii) Contracts valued above \$30,000 awarded to individuals located outside the United States and its outlying areas for work to be performed outside the United States and its outlying areas; or

(iii) Contracts when specific public identification of the contracted party could endanger the mission, contractor, or recipients of the acquired goods or services. The contracting officer must include a written determination in the contract file of a decision applicable to authority under this paragraph (c)(2)(iii).

(d) *American Recovery and Reinvestment Act actions*. The contracting officer, when entering data in FPDS, shall use the instructions at <https://www.fpds.gov> to identify any action funded in whole or in part by the American Recovery and Reinvestment Act of 2009 (Pub. L. 111-5).

(e) *Office codes*. Agencies shall by March 31, 2016—

(1) Use the Activity Address Code (AAC), as defined in 2.101, assigned to the issuing contracting office as the contracting office code, and

(2) Use the AAC assigned to the program/funding office providing the predominance of funding for the contract action as the program/funding office code.

[73 FR 21776, Apr. 22, 2008, as amended at 74 FR 14638, Mar. 31, 2009; 76 FR 39235, July 5, 2011; 77 FR 69717, Nov. 20, 2012; 78 FR 37677, June 21, 2013; 79 FR 43590, July 25, 2014; 79 FR 31190, May 30, 2014; 79 FR 61740, Oct. 14, 2014; 79 FR 63562, Oct. 24, 2014; 80 FR 53439, Sept. 3, 2015; 80 FR 38296, July 2, 2015]

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EFFECTIVE DATE NOTE: At 81 FR 67738, Sept. 30, 2016, 4.605 was amended by revising paragraph (b), the heading of paragraph (c), and paragraphs (c)(1) and (2) introductory text; and removing from paragraph (c)(2)(i)(C) “DUNS number” and adding “unique entity identifier” in its place, effective Oct.31, 2016. For the convenience of the user, the added and revised text is set forth as follows:

#### 4.605 Procedures.

\* \* \* \* \*

(b) *Unique entity identifier.* The contracting officer shall identify and report a unique entity identifier for the successful offeror on a contract action. The unique entity identifier shall correspond to the successful offeror’s name and address as stated in the offer and resultant contract, and as registered in the System for Award Management database in accordance with the provision at 52.204–7, System for Award Management. The contracting officer shall ask the offeror to provide its unique entity identifier by using either the provision at 52.204–6, Unique Entity Identifier, the provision at 52.204–7, System for Award Management, or the provision at 52.212–1, Instructions to Offerors—Commercial Items. (For a discussion of the Commercial and Government Entity (CAGE) Code, which is a different identifier, see subpart 4.18.)

(c) *Generic entity identifier.* (1) The use of a generic entity identifier should be limited, and only used in the situations described in paragraph (c)(2) of this section. Use of a generic entity identifier does not supersede the requirements of provisions 52.204–6, Unique Entity Identifier or 52.204–7, System for Award Management (if present in the solicitation) for the contractor to have a unique entity identifier assigned.

(2) Authorized generic entity identifiers, maintained by the Integrated Award Environment (IAE) program office (<http://www.gsa.gov/portal/content/105036>), may be used to report contracts in lieu of the contractor’s actual unique entity identifier only for—

#### 4.606 Reporting Data.

(a) *Actions required to be reported to FPDS.* (1) As a minimum, agencies must report the following contract actions over the micro-purchase threshold, regardless of solicitation process used, and agencies must report any modification to these contract actions that change previously reported contract action data, regardless of dollar value:

(i) Definitive contracts, including purchase orders and imprest fund buys over the micro-purchase threshold awarded by a contracting officer.

(ii) Indefinite delivery vehicle (identified as an “IDV” in FPDS). Examples of IDVs include the following:

(A) Task and Delivery Order Contracts (see Subpart 16.5), including—

(1) Government-wide acquisition contracts.

(2) Multi-agency contracts.

(B) GSA Federal supply schedules.

(C) Blanket Purchase Agreements (see 13.303).

(D) Basic Ordering Agreements (see 16.703).

(E) Any other agreement or contract against which individual orders or purchases may be placed.

(iii) All calls and orders awarded under the indefinite delivery vehicles identified in paragraph (a)(1)(ii) of this section.

(2) The GSA Office of Charge Card Management will provide the Government purchase card data, at a minimum annually, and GSA will incorporate that data into FPDS for reports.

(3) Agencies may use the FPDS Express Reporting capability for consolidated multiple action reports for a vendor when it would be overly burdensome to report each action individually. When used, Express Reporting should be done at least monthly.

(b) *Reporting other actions.* Agencies may submit actions other than those listed at paragraph (a)(1) of this section only if they are able to be segregated from FAR-based actions and this is approved in writing by the FPDS Program Office. Prior to the commencement of reporting, agencies must contact the FPDS Program Office if they desire to submit any of the following types of activity:

(1) Transactions at or below the micro-purchase threshold, except as provided in paragraph (a)(2) of this section.

(2) Any non-appropriated fund (NAF) or NAF portion of a contract action using a mix of appropriated and non-appropriated funding.

(3) Lease and supplemental lease agreements for real property.

(4) Grants and entitlement actions.

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(c) *Actions not reported.* The following types of contract actions are not to be reported to FPDS:

(1) Imprest fund transactions below the micro-purchase threshold, including those made via the Government purchase card (unless specific agency procedures prescribe reporting these actions).

(2) Orders from GSA stock and the GSA Global Supply Program.

(3) Purchases made at GSA or AbilityOne service stores, as these items stocked for resale have already been reported by GSA.

(4) Purchases made using non-appropriated fund activity cards, chaplain fund cards, individual Government personnel training orders, and Defense Printing orders.

(5) Actions that, pursuant to other authority, will not be entered in FPDS (*e.g.*, reporting of the information would compromise national security).

(6) Contract actions in which the required data would constitute classified information.

(7) Resale activity (*i.e.*, commissary or exchange activity).

(8) Revenue generating arrangements (*i.e.*, concessions).

(9) Training expenditures not issued as orders or contracts.

(10) Interagency agreements other than inter-agency acquisitions required to be reported at 4.606(a)(1).

(11) Letters of obligation used in the A-76 process.

(d) *Agencies not subject to the FAR.* Agencies not subject to the FAR may be required by other authority (*e.g.*, statute, OMB, or internal agency policy) to report certain information to FPDS. Those agencies not subject to the FAR must first receive approval from the FPDS Program Office prior to reporting to FPDS.

[73 FR 21776, Apr. 22, 2008, as amended at 73 FR 53994, Sept. 17, 2008; 75 FR 34264, June 16, 2010; 75 FR 82567, Dec. 30, 2010; 77 FR 69717, Nov. 20, 2012]

### 4.607 Solicitation provisions and contract clause.

(a) Insert the provision at 52.204-5, Women-Owned Business (Other Than Small Business), in all solicitations that—

(1) Are not set aside for small business concerns;

(2) Exceed the simplified acquisition threshold; and

(3) Are for contracts that will be performed in the United States or its outlying areas.

(b) Insert the provision at 52.204-6, Data Universal Numbering System Number, in solicitations that do not contain the provision at 52.204-7, System for Award Management, or meet a condition at 4.605(c)(2).

(c) Insert the clause at 52.204-12, Data Universal Numbering System Number Maintenance, in solicitations and resulting contracts that contain the provision at 52.204-6, Data Universal Numbering System.

[73 FR 21776, Apr. 22, 2008, as amended at 77 FR 69717, Nov. 20, 2012; 78 FR 37677, June 21, 2013]

EFFECTIVE DATE NOTE: At 81 FR 67738, Sept. 30, 2016, 4.607 was amended by removing from paragraph (b) “Data Universal Numbering System Number” and adding “Unique Entity Identifier” in its place, and revising paragraph (c), effective Oct. 31, 2016. For the convenience of the user, the revised text is set forth as follows:

### 4.607 Solicitation provisions and contract clause.

\* \* \* \* \*

(c) Insert the clause at 52.204-12, Unique Entity Identifier Maintenance, in solicitations and resulting contracts that contain the provision at 52.204-6, Unique Entity Identifier.

## Subpart 4.7—Contractor Records Retention

### 4.700 Scope of subpart.

This subpart provides policies and procedures for retention of records by contractors to meet the records review requirements of the Government. In this subpart, the terms “contracts” and “contractors” include “subcontracts” and “subcontractors.”

### 4.701 Purpose.

The purpose of this subpart is to generally describe records retention requirements and to allow reductions in the retention period for specific classes

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of records under prescribed circumstances.

##### 4.702 Applicability.

(a) This subpart applies to records generated under contracts that contain one of the following clauses:

(1) Audit and Records—Sealed Bidding (52.214-26).

(2) Audit and Records—Negotiation (52.215-2).

(b) This subpart is not mandatory on Department of Energy contracts for which the Comptroller General allows alternative records retention periods. Apart from this exception, this subpart applies to record retention periods under contracts that are subject to Chapter 137, Title 10, U.S.C., or 40 U.S.C. 101, *et seq.*

[48 FR 42113, Sept. 19, 1983, as amended at 50 FR 1727, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985; 60 FR 42650, Aug. 16, 1995; 60 FR 48211, Sept. 18, 1995; 62 FR 258, Jan. 2, 1997; 70 FR 57454, Sept. 30, 2005]

##### 4.703 Policy.

(a) Except as stated in 4.703(b), contractors shall make available records, which includes books, documents, accounting procedures and practices, and other data, regardless of type and regardless of whether such items are in written form, in the form of computer data, or in any other form, and other supporting evidence to satisfy contract negotiation, administration, and audit requirements of the contracting agencies and the Comptroller General for (1) 3 years after final payment or, for certain records, (2) the period specified in 4.705 through 4.705-3, whichever of these periods expires first.

(b) Contractors shall make available the foregoing records and supporting evidence for a longer period of time than is required in 4.703(a) if—

(1) A retention period longer than that cited in 4.703(a) is specified in any contract clause; or

(2) The contractor, for its own purposes, retains the foregoing records and supporting evidence for a longer period. Under this circumstance, the retention period shall be the period of the contractor's retention or 3 years after final payment, whichever period expires first.

(3) The contractor does not meet the original due date for submission of final indirect cost rate proposals specified in subparagraph (d)(2) of the clause at 52.216-7, Allowable Cost and Payment. Under these circumstances, the retention periods in 4.705 shall be automatically extended one day for each day the proposal is not submitted after the original due date.

(c) Nothing in this section shall be construed to preclude a contractor from duplicating or storing original records in electronic form unless they contain significant information not shown on the record copy. Original records need not be maintained or produced in an audit if the contractor or subcontractor provides photographic or electronic images of the original records and meets the following requirements:

(1) The contractor or subcontractor has established procedures to ensure that the imaging process preserves accurate images of the original records, including signatures and other written or graphic images, and that the imaging process is reliable and secure so as to maintain the integrity of the records.

(2) The contractor or subcontractor maintains an effective indexing system to permit timely and convenient access to the imaged records.

(3) The contractor or subcontractor retains the original records for a minimum of one year after imaging to permit periodic validation of the imaging systems.

(d) If the information described in paragraph (a) of this section is maintained on a computer, contractors shall retain the computer data on a reliable medium for the time periods prescribed. Contractors may transfer computer data in machine readable form from one reliable computer medium to another. Contractors' computer data retention and transfer procedures shall maintain the integrity, reliability, and security of the original computer data. Contractors shall also retain an audit trail describing the data transfer. For the record retention time periods prescribed, contractors shall not destroy,

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discard, delete, or write over such computer data.

[48 FR 42113, Sept. 19, 1983, as amended at 51 FR 2649, Jan. 17, 1986; 53 FR 43388, Oct. 26, 1988; 54 FR 48982, Nov. 28, 1989; 59 FR 67015, Dec. 28, 1994; 60 FR 42650, Aug. 16, 1995; 62 FR 64915, Dec. 9, 1997; 72 FR 27383, May 15, 2007]

### 4.704 Calculation of retention periods.

(a) The retention periods in 4.705 are calculated from the end of the contractor's fiscal year in which an entry is made charging or allocating a cost to a Government contract or subcontract. If a specific record contains a series of entries, the retention period is calculated from the end of the contractor's fiscal year in which the final entry is made. The contractor should cut off the records in annual blocks and retain them for block disposal under the prescribed retention periods.

(b) When records generated during a prior contract are relied upon by a contractor for certified cost or pricing data in negotiating a succeeding contract, the prescribed periods shall run from the date of the succeeding contract.

(c) If two or more of the record categories described in 4.705 are interfiled and screening for disposal is not practical, the contractor shall retain the entire record series for the longest period prescribed for any category of records.

[48 FR 42113, Sept. 19, 1983, as amended at 75 FR 53142, Aug. 30, 2010]

### 4.705 Specific retention periods.

The contractor shall retain the records identified in 4.705-1 through 4.705-3 for the periods designated, provided retention is required under 4.702. Records are identified in this subpart in terms of their purpose or use and not by specific name or form number. Although the descriptive identifications may not conform to normal contractor usage or filing practices, these identifications apply to all contractor records that come within the description.

#### 4.705-1 Financial and cost accounting records.

(a) Accounts receivable invoices, adjustments to the accounts, invoice registers, carrier freight bills, shipping or-

ders, and other documents which detail the material or services billed on the related invoices: Retain 4 years.

(b) Material, work order, or service order files, consisting of purchase requisitions or purchase orders for material or services, or orders for transfer of material or supplies: Retain 4 years.

(c) Cash advance recapitulations, prepared as posting entries to accounts receivable ledgers for amounts of expense vouchers prepared for employees' travel and related expenses: Retain 4 years.

(d) Paid, canceled, and voided checks, other than those issued for the payment of salary and wages: Retain 4 years.

(e) Accounts payable records to support disbursements of funds for materials, equipment, supplies, and services, containing originals or copies of the following and related documents: remittance advices and statements, vendors' invoices, invoice audits and distribution slips, receiving and inspection reports or comparable certifications of receipt and inspection of material or services, and debit and credit memoranda: Retain 4 years.

(f) Labor cost distribution cards or equivalent documents: Retain 2 years.

(g) Petty cash records showing description of expenditures, to whom paid, name of person authorizing payment, and date, including copies of vouchers and other supporting documents: Retain 2 years.

#### 4.705-2 Pay administration records.

(a) Payroll sheets, registers, or their equivalent, of salaries and wages paid to individual employees for each payroll period; change slips; and tax withholding statements: Retain 4 years.

(b) Clock cards or other time and attendance cards: Retain 2 years.

(c) Paid checks, receipts for wages paid in cash, or other evidence of payments for services rendered by employees: Retain 2 years.

[48 FR 42113, Sept. 19, 1983, as amended at 65 FR 36022, June 6, 2000; 67 FR 70517, Nov. 22, 2002]

#### 4.705-3 Acquisition and supply records.

(a) Store requisitions for materials, supplies, equipment, and services: Retain 2 years.

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(b) Work orders for maintenance and other services: Retain 4 years.

(c) Equipment records, consisting of equipment usage and status reports and equipment repair orders: Retain 4 years.

(d) Expendable property records, reflecting accountability for the receipt and use of material in the performance of a contract: Retain 4 years.

(e) Receiving and inspection report records, consisting of reports reflecting receipt and inspection of supplies, equipment, and materials: Retain 4 years.

(f) Purchase order files for supplies, equipment, material, or services used in the performance of a contract; supporting documentation and backup files including, but not limited to, invoices, and memoranda; e.g., memoranda of negotiations showing the principal elements of subcontract price negotiations (see 52.244-2): Retain 4 years.

(g) Production records of quality control, reliability, and inspection: Retain 4 years.

(h) Property records (see FAR 45.101 and 52.245-1): Retain 4 years.

[48 FR 42113, Sept. 19, 1983, as amended at 63 FR 34060, June 22, 1998; 75 FR 38679, July 2, 2010]

#### 4.706 [Reserved]

### Subpart 4.8—Government Contract Files

#### 4.800 Scope of subpart.

This subpart prescribes requirements for establishing, maintaining, and disposing of contract files.

[65 FR 36022, June 6, 2000]

#### 4.801 General.

(a) The head of each office performing contracting, contract administration, or paying functions shall establish files containing the records of all contractual actions.

(b) The documentation in the files (see 4.803) shall be sufficient to constitute a complete history of the transaction for the purpose of—

(1) Providing a complete background as a basis for informed decisions at each step in the acquisition process;

(2) Supporting actions taken;

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(3) Providing information for reviews and investigations; and

(4) Furnishing essential facts in the event of litigation or congressional inquiries.

(c) The files to be established include—

(1) A file for cancelled solicitations;

(2) A file for each contract; and

(3) A file such as a contractor general file, containing documents relating—for example—to (i) no specific contract, (ii) more than one contract, or (iii) the contractor in a general way (e.g., contractor's management systems, past performance, or capabilities).

#### 4.802 Contract files.

(a) A contract file should generally consist of—

(1) The contracting office contract file, that documents the basis for the acquisition and the award, the assignment of contract administration (including payment responsibilities), and any subsequent actions taken by the contracting office;

(2) The contract administration office contract file, that documents actions reflecting the basis for and the performance of contract administration responsibilities; and

(3) The paying office contract file, that documents actions prerequisite to, substantiating, and reflecting contract payments.

(b) Normally, each file should be kept separately; however, if appropriate, any or all of the files may be combined; e.g., if all functions or any combination of the functions are performed by the same office.

(c) Files must be maintained at organizational levels that ensure—

(1) Effective documentation of contract actions;

(2) Ready accessibility to principal users;

(3) Minimal establishment of duplicate and working files;

(4) The safeguarding of classified documents; and

(5) Conformance with agency regulations for file location and maintenance.

(d) If the contract files or file segments are decentralized (e.g., by type or function) to various organizational

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elements or to other outside offices, responsibility for their maintenance must be assigned. A central control and, if needed, a locator system should be established to ensure the ability to locate promptly any contract files.

(e) Contents of contract files that are contractor bid or proposal information or source selection information as defined in 2.101 must be protected from disclosure to unauthorized persons (see 3.104-4).

(f) Agencies may retain contract files in any medium (paper, electronic, microfilm, etc.) or any combination of media, as long as the requirements of this subpart are satisfied.

[48 FR 42113, Sept. 19, 1983, as amended at 54 FR 20496, May 11, 1989; 55 FR 36794, Sept. 6, 1990; 59 FR 67016, Dec. 28, 1994; 62 FR 232, Jan. 2, 1997; 67 FR 13063, Mar. 20, 2002]

### 4.803 Contents of contract files.

The following are examples of the records normally contained, if applicable, in contract files:

(a) *Contracting office contract file.* (1) Purchase request, acquisition planning information, and other presolicitation documents.

(2) Justifications and approvals, determinations and findings, and associated documents.

(3) Evidence of availability of funds.

(4) Synopsis of proposed acquisition as required by part 5 or a reference to the synopsis.

(5) The list of sources solicited, and a list of any firms or persons whose requests for copies of the solicitation were denied, together with the reasons for denial.

(6) Set-aside decision including the type and extent of market research conducted.

(7) Government estimate of contract price.

(8) A copy of the solicitation and all amendments thereto.

(9) Security requirements and evidence of required clearances.

(10) A copy of each offer or quotation, the related abstract, and records of determinations concerning late offers or quotations. Unsuccessful offers or quotations may be maintained separately, if cross-referenced to the contract file. The only portions of the un-

successful offer or quotation that need be retained are—

(i) Completed solicitation sections A, B, and K;

(ii) Technical and management proposals;

(iii) Cost/price proposals;

(iv) Any other pages of the solicitation that the offeror or quoter has altered or annotated.

(11) Contractor's representations and certifications (see 4.1201(c)).

(12) Preaward survey reports or reference to previous preaward survey reports relied upon.

(13) Source selection documentation.

(14) Contracting officer's determination of the contractor's responsibility.

(15) Small Business Administration Certificate of Competency.

(16) Records of contractor's compliance with labor policies including equal employment opportunity policies.

(17) Data and information related to the contracting officer's determination of a fair and reasonable price. This may include—

(i) Certified cost or pricing data;

(ii) Data other than certified cost or pricing data;

(iii) Justification for waiver from the requirement to submit certified cost or pricing data; or

(iv) Certificates of Current Cost or Pricing Data.

(18) Packaging and transportation data.

(19) Cost or price analysis.

(20) Audit reports or reasons for waiver.

(21) Record of negotiation.

(22) Justification for type of contract.

(23) Authority for deviations from this regulation, statutory requirements, or other restrictions.

(24) Required approvals of award and evidence of legal review.

(25) Notice of award.

(26) The original of (i) the signed contract or award, (ii) all contract modifications, and (iii) documents supporting modifications executed by the contracting office.

(27) Synopsis of award or reference thereto.

(28) Notice to unsuccessful quoters or offerors and record of any debriefing.

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(29) Acquisition management reports (see subpart 4.6).

(30) Bid, performance, payment, or other bond documents, or a reference thereto, and notices to sureties.

(31) Report of postaward conference.

(32) Notice to proceed, stop orders, and any overtime premium approvals granted at the time of award.

(33) Documents requesting and authorizing modification in the normal assignment of contract administration functions and responsibility.

(34) Approvals or disapprovals of requests for waivers or deviations from contract requirements.

(35) Rejected engineering change proposals.

(36) Royalty, invention, and copyright reports (including invention disclosures) or reference thereto.

(37) Contract completion documents.

(38) Documentation regarding termination actions for which the contracting office is responsible.

(39) Cross-references to pertinent documents that are filed elsewhere.

(40) Any additional documents on which action was taken or that reflect actions by the contracting office pertinent to the contract.

(41) A current chronological list identifying the awarding and successor contracting officers, with inclusive dates of responsibility.

(42) When limiting competition, or awarding on a sole source basis, to economically disadvantaged women-owned small business (EDWOSB) concerns or women-owned small business (WOSB) concerns eligible under the WOSB Program in accordance with subpart 19.15, include documentation—

(i) Of the type and extent of market research; and

(ii) That the NAICS code assigned to the acquisition is for an industry that SBA has designated as—

(A) Underrepresented for EDWOSB concerns; or

(B) Substantially underrepresented for WOSB concerns.

(b) *Contract administration office contract file.* (1) Copy of the contract and all modifications, together with official record copies of supporting documents executed by the contract administration office.

(2) Any document modifying the normal assignment of contract administration functions and responsibility.

(3) Security requirements.

(4) Certified cost or pricing data, Certificates of Current Cost or Pricing Data, or data other than certified cost or pricing data; cost or price analysis; and other documentation supporting contractual actions executed by the contract administration office.

(5) Preaward survey information.

(6) Purchasing system information.

(7) Consent to subcontract or purchase.

(8) Performance and payment bonds and surety information.

(9) Postaward conference records.

(10) Orders issued under the contract.

(11) Notice to proceed and stop orders.

(12) Insurance policies or certificates of insurance or references to them.

(13) Documents supporting advance or progress payments.

(14) Progressing, expediting, and production surveillance records.

(15) Quality assurance records.

(16) Property administration records.

(17) Documentation regarding termination actions for which the contract administration office is responsible.

(18) Cross reference to other pertinent documents that are filed elsewhere.

(19) Any additional documents on which action was taken or that reflect actions by the contract administration office pertinent to the contract.

(20) Contract completion documents.

(c) *Paying office contract file.* (1) Copy of the contract and any modifications.

(2) Bills, invoices, vouchers, and supporting documents.

(3) Record of payments or receipts.

(4) Other pertinent documents.

[48 FR 42113, Sept. 19, 1983]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting section 4.803, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at [www.fdsys.gov](http://www.fdsys.gov).

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## 4.804-5

### 4.804 Closeout of contract files.

#### 4.804-1 Closeout by the office administering the contract.

(a) Except as provided in paragraph (c) below, time standards for closing out contract files are as follows:

(1) Files for contracts using simplified acquisition procedures should be considered closed when the contracting officer receives evidence of receipt of property and final payment, unless otherwise specified by agency regulations.

(2) Files for firm-fixed-price contracts, other than those using simplified acquisition procedures, should be closed within 6 months after the date on which the contracting officer receives evidence of physical completion.

(3) Files for contracts requiring settlement of indirect cost rates should be closed within 36 months of the month in which the contracting officer receives evidence of physical completion.

(4) Files for all other contracts should be closed within 20 months of the month in which the contracting officer receives evidence of physical completion.

(b) When closing out the contract files at 4.804-1(a)(2), (3), and (4), the contracting officer shall use the closeout procedures at 4.804-5. However, these closeout actions may be modified to reflect the extent of administration that has been performed. Quick closeout procedures (see 42.708) should be used, when appropriate, to reduce administrative costs and to enable deobligation of excess funds.

(c) A contract file shall not be closed if (1) the contract is in litigation or under appeal, or (2) in the case of a termination, all termination actions have not been completed.

[48 FR 42113, Sept. 19, 1983, as amended at 54 FR 34752, Aug. 21, 1989; 60 FR 34746, July 3, 1995]

#### 4.804-2 Closeout of the contracting office files if another office administers the contract.

(a) Contract files for contracts using simplified acquisition procedures should be considered closed when the contracting officer receives evidence of receipt of property and final payment,

unless otherwise specified by agency regulation.

(b) All other contract files shall be closed as soon as practicable after the contracting officer receives a contract completion statement from the contract administration office. The contracting officer shall ensure that all contractual actions required have been completed and shall prepare a statement to that effect. This statement is authority to close the contract file and shall be made a part of the official contract file.

[48 FR 42113, Sept. 19, 1983, as amended at 60 FR 34746, July 3, 1995]

#### 4.804-3 Closeout of paying office contract files.

The paying office shall close the contract file upon issuance of the final payment voucher.

#### 4.804-4 Physically completed contracts.

(a) Except as provided in paragraph (b) below, a contract is considered to be physically completed when—

(1)(i) The contractor has completed the required deliveries and the Government has inspected and accepted the supplies;

(ii) The contractor has performed all services and the Government has accepted these services; and

(iii) All option provisions, if any, have expired; or

(2) The Government has given the contractor a notice of complete contract termination.

(b) Rental, use, and storage agreements are considered to be physically completed when—

(1) The Government has given the contractor a notice of complete contract termination; or

(2) The contract period has expired.

[48 FR 42113, Sept. 19, 1983, as amended at 72 FR 27383, May 15, 2007]

#### 4.804-5 Procedures for closing out contract files.

(a) The contract administration office is responsible for initiating (automated or manual) administrative closeout of the contract after receiving evidence of its physical completion. At the outset of this process, the contract administration office must review the

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contract funds status and notify the contracting office of any excess funds the contract administration office might deobligate. When complete, the administrative closeout procedures must ensure that—

(1) Disposition of classified material is completed;

(2) *Final patent report is cleared.* If a final patent report is required, the contracting officer may proceed with contract closeout in accordance with the following procedures, or as otherwise prescribed by agency procedures:

(i) Final patent reports should be cleared within 60 days of receipt.

(ii) If the final patent report is not received, the contracting officer shall notify the contractor of the contractor's obligations and the Government's rights under the applicable patent rights clause, in accordance with 27.303. If the contractor fails to respond to this notification, the contracting officer may proceed with contract closeout upon consultation with the agency legal counsel responsible for patent matters regarding the contractor's failure to respond.

(3) Final royalty report is cleared;

(4) There is no outstanding value engineering change proposal;

(5) Plant clearance report is received;

(6) Property clearance is received;

(7) All interim or disallowed costs are settled;

(8) Price revision is completed;

(9) Subcontracts are settled by the prime contractor;

(10) Prior year indirect cost rates are settled;

(11) Termination docket is completed;

(12) Contract audit is completed;

(13) Contractor's closing statement is completed;

(14) Contractor's final invoice has been submitted; and

(15) Contract funds review is completed and excess funds deobligated.

(b) When the actions in paragraph (a) above have been verified, the contracting officer administering the contract must ensure that a contract completion statement, containing the following information, is prepared:

(1) Contract administration office name and address (if different from the contracting office).

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(2) Contracting office name and address.

(3) Contract number.

(4) Last modification number.

(5) Last call or order number.

(6) Contractor name and address.

(7) Dollar amount of excess funds, if any.

(8) Voucher number and date, if final payment has been made.

(9) Invoice number and date, if the final approved invoice has been forwarded to a disbursing office of another agency or activity and the status of the payment is unknown.

(10) A statement that all required contract administration actions have been fully and satisfactorily accomplished.

(11) Name and signature of the contracting officer.

(12) Date.

(c) When the statement is completed, the contracting officer must ensure that—

(1) The signed original is placed in the contracting office contract file (or forwarded to the contracting office for placement in the files if the contract administration office is different from the contracting office); and

(2) A signed copy is placed in the appropriate contract administration file if administration is performed by a contract administration office.

[48 FR 42113, Sept. 19, 1983, as amended at 54 FR 34752, Aug. 21, 1989; 64 FR 72445, Dec. 27, 1999; 76 FR 31408, May 31, 2011]

#### 4.805 Storage, handling, and contract files.

(a) Agencies must prescribe procedures for the handling, storing, and disposing of contract files, in accordance with the National Archives and Records Administration (NARA) General Records Schedule 1.1, Financial Management and Reporting Records. The Financial Management and Reporting Records can be found at <http://www.archives.gov/records-mgmt/grs.html>.

These procedures must take into account documents held in all types of media, including microfilm and various electronic media. Agencies may change the original medium to facilitate storage as long as the requirements of Part 4, law, and other regulations are satisfied. The process used to create and

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store records must record and reproduce the original document, including signatures and other written and graphic images completely, accurately, and clearly. Data transfer, storage, and retrieval procedures must protect the original data from alteration. Unless law or other regulations require signed originals to be kept, they may be destroyed after the responsible agency official verifies that record copies on alternate media and copies reproduced from the record copy are accurate, complete, and clear representations of the originals. When original documents have been converted to alternate media for storage, the requirements in Table 4-1 of this section also apply to the record copies in the alternate media.

(b) If administrative records are mixed with program records and cannot be economically segregated, the entire file should be kept for the period of time approved for the program records. Similarly, if documents described in the following table are part of a subject or case file that documents activities that are not described in the table, they should be treated in the same manner as the files of which they are a part.

(c) An agency that requires a shorter retention period than those identified in Table 4-1 shall request approval from NARA through the agency's records officer.

TABLE 4-1—RETENTION PERIODS

Record	Retention period
(1) Contracts (and related records or documents, including successful and unsuccessful proposals, except see paragraph (c)(2) of this section regarding contractor payrolls submitted under construction contracts).	6 years after final payment.
(2) Contractor's payrolls submitted under construction contracts in accordance with Department of Labor regulations (29 CFR 5.5(a)(3)), with related certifications, anti-kickback affidavits, and other related records.	3 years after contract completion unless contract performance is the subject of an enforcement action on that date (see paragraph (c)(8) of this section).
(3) Unsolicited proposals not accepted by a department or agency.	Retain in accordance with agency procedures.
(4) Files for canceled solicitations .....	6 years after cancellation.
(5) Other copies of procurement file records used for administrative purposes.	When business use ceases.
(6) Documents pertaining generally to the contractor as described at 4.801(c)(3).	Until superseded or obsolete.
(7) Data submitted to the Federal Procurement Data System (FPDS). Electronic data file maintained by fiscal year, containing unclassified records of all procurements exceeding the micro-purchase threshold, and information required under 4.603.	6 years after submittal to FPDS.
(8) Investigations, cases pending or in litigation (including protests), or similar matters (including enforcement actions).	Until final clearance or settlement, or, if related to a document identified in paragraphs (c)(1) through (7) of this section, for the retention period specified for the related document, whichever is later.

[80 FR 75914, Dec. 4, 2015]

**Subpart 4.9—Taxpayer Identification Number Information**

AUTHORITY: 40 U.S.C. 486(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

SOURCE: 63 FR 58589, Oct. 30, 1998, unless otherwise noted.

**4.900 Scope of subpart.**

This subpart provides policies and procedures for obtaining—

(a) Taxpayer Identification Number (TIN) information that may be used for debt collection purposes; and

(b) Contract information and payment information for submittal to the payment office for Internal Revenue Service (IRS) reporting purposes.

**4.901 Definition.**

*Common parent*, as used in this subpart, means that corporate entity that owns or controls an affiliated group of corporations that files its Federal income tax returns on a consolidated

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basis, and of which the offeror is a member.

[60 FR 28493, May 31, 1995, as amended at 66 FR 2127, Jan. 10, 2001]

#### 4.902 General.

(a) *Debt collection.* 31 U.S.C. 7701(c) requires each contractor doing business with a Government agency to furnish its TIN to that agency. 31 U.S.C. 3325(d) requires the Government to include, with each certified voucher prepared by the Government payment office and submitted to a disbursing official, the TIN of the contractor receiving payment under the voucher. The TIN may be used by the Government to collect and report on any delinquent amounts arising out of the contractor's relationship with the Government.

(b) *Information reporting to the IRS.* The TIN is also required for Government reporting of certain contract information (see 4.903) and payment information (see 4.904) to the IRS.

#### 4.903 Reporting contract information to the IRS.

(a) 26 U.S.C. 6050M, as implemented in 26 CFR, requires heads of Federal executive agencies to report certain information to the IRS.

(b)(1) The required information applies to contract modifications—

(i) Increasing the amount of a contract awarded before January 1, 1989, by \$50,000 or more; and

(ii) Entered into on or after April 1, 1990.

(2) The reporting requirement also applies to certain contracts and modifications thereto in excess of \$25,000 entered into on or after January 1, 1989.

(c) The information to report is—

(1) Name, address, and TIN of the contractor;

(2) Name and TIN of the common parent (if any);

(3) Date of the contract action;

(4) Amount obligated on the contract action; and

(5) Estimated contract completion date.

(d) Transmit the information to the IRS through the Federal Procurement Data System (see Subpart 4.6 and implementing instructions).

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#### 4.904 Reporting payment information to the IRS.

26 U.S.C. 6041 and 6041A, as implemented in 26 CFR, in part, require payors, including Government agencies, to report to the IRS, on Form 1099, payments made to certain contractors. 26 U.S.C. 6109 requires a contractor to provide its TIN if a Form 1099 is required. The payment office is responsible for submitting reports to the IRS.

#### 4.905 Solicitation provision.

The contracting officer shall insert the provision at 52.204–3, Taxpayer Identification, in solicitations that—

(a) Do not include the provision at 52.204–7, System for Award Management; and

(b) Are not conducted under the procedures of part 12.

[68 FR 56672, Oct. 1, 2003, as amended at 77 FR 69718, Nov. 20, 2012; 78 FR 37678, June 21, 2013; 80 FR 26427, May 7, 2015]

### Subpart 4.10—Administrative Matters

SOURCE: 62 FR 51230, Sept. 30, 1997, unless otherwise noted.

#### 4.1001 Policy.

Contracts may identify the items or services to be acquired as separately identified line items. Contract line items should provide unit prices or lump sum prices for separately identifiable contract deliverables, and associated delivery schedules or performance periods. Line items may be further subdivided or stratified for administrative purposes (e.g., to provide for traceable accounting classification citations).

[62 FR 51230, Sept. 30, 1997]

### Subpart 4.11—System for Award Management

SOURCE: 68 FR 56672, Oct. 1, 2003, unless otherwise noted.

#### 4.1100 Scope.

This subpart prescribes policies and procedures for requiring contractor registration in the System for Award Management (SAM) database to—

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(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.

[68 FR 56672, Oct. 1, 2003, as amended at 77 FR 188, Jan. 3, 2012; 78 FR 37678, June 21, 2013]

### 4.1101 Definition.

As used in this subpart—

*Agreement* means basic agreement, basic ordering agreement, or blanket purchase agreement.

[48 FR 42113, Sept. 19, 1983, as amended at 69 FR 76345, Dec. 20, 2004]

### 4.1102 Policy.

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

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

(2) Classified contracts (*see* 2.101) when registration in the SAM database, or use of SAM 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 peace-keeping operations as defined in 10 U.S.C. 2302(8);

(ii) Contracting officers located outside the United States and its outlying areas, as defined in 2.101, for work to be performed in support of diplomatic or developmental operations, including those performed in support of foreign assistance programs overseas, in an area that has been designated by the Department of State as a danger pay post (*see* [http://aoprals.state.gov/Web920/danger\\_pay\\_all.asp](http://aoprals.state.gov/Web920/danger_pay_all.asp)); or

(iii) 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 Dis-

aster Relief and Emergency Assistance Act (42 U.S.C. 5121);

(4) Contracts with individuals for performance outside the United States and its outlying areas;

(5) Contracts to support unusual or compelling needs (*see* 6.302-2);

(6) Contract actions at or below \$30,000 awarded to foreign vendors for work performed outside the United States, if it is impractical to obtain System for Award Management registration; and

(7) 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) of this section to require SAM 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 SAM 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 (c)(1)(i) of the clause at 52.204-13, System for Award Management Maintenance, or fails to perform the agreement at 52.204-13, paragraph (c)(1)(i)(C), and, in the absence of a properly executed novation or change-of-name agreement, the SAM 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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(2) The contractor shall not change the name or address for electronic funds transfer payments (EFT) or manual payments, as appropriate, in the SAM 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 SAM database. Information provided to the contractor's SAM 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.

[48 FR 42113, Sept. 19, 1983, as amended at 43586, July 27, 2005; 77 FR 69718, Nov. 20, 2012; 78 FR 37678, June 21, 2013; 80 FR 38296, July 2, 2015; 81 FR 30439, May 16, 2016]

#### 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 SAM database (see paragraph (b) of this section) before awarding a contract or agreement. Contracting officers are encouraged to check the SAM 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 <https://www.acquisition.gov>;

(ii) As otherwise provided by agency procedures; and

(3) Need not verify registration before placing an order or call if the contract or agreement includes the provision at 52.204-7, or the clause at 52.212-4, or a similar agency clause, except when use of the Governmentwide commercial purchase card is contemplated as a method of payment. (See 32.1108(b)(2)).

(b) If the contracting officer, when awarding a contract or agreement, determines that a prospective contractor is not registered in the SAM database and an exception to the registration requirements for the award does not

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apply (see 4.1102), the contracting officer shall—

(1) If the needs of the requiring activity allow for a delay, make award after the apparently successful offeror has registered in the SAM database. The contracting officer shall advise the offeror of the number of days it will be allowed to become registered. If the offeror does not become registered by the required date, the contracting officer shall award to the next otherwise successful registered offeror following the same procedures (*i.e.*, if the next apparently successful offeror is not registered, the contracting officer shall advise the offeror of the number of days it will be allowed to become registered, etc.); or

(2) If the needs of the requiring activity do not allow for a delay, proceed to award to the next otherwise successful registered offeror, provided that written approval is obtained at one level above the contracting officer; or

(3) If the contract action is being awarded pursuant to 6.302-2, the contractor must be registered in the System for Award Management within 30 days after contract award, or at least three days prior to submission of the first invoice, whichever occurs first.

(c) Agencies shall protect against improper disclosure of contractor SAM information.

(d) The contracting officer shall, on contractual documents transmitted to the payment office, provide the DUNS number, or, if applicable, the DUNS + 4, in accordance with agency procedures.

[59 FR 67018, Dec. 28, 1994, as amended at 71 FR 36924, June 28, 2006; 74 FR 65604, Dec. 10, 2009; 77 FR 188, Jan. 3, 2012; 77 FR 69718, Nov. 20, 2012; 78 FR 37678, June 21, 2013]

EFFECTIVE DATE NOTE: At 81 FR 67738, Sept. 30, 2016, §4.1103 was amended by removing from paragraph (a)(1) "must register;" and adding "shall register;" in its place, removing from the introductory text of paragraph (a)(2) "DUNS number or, if applicable, the DUNS+4 number," and adding "unique entity identifier" in its place, adding to the end of paragraph (a)(2)(1) "or", revising paragraphs (a)(3) and (d), effective Oct. 31, 2016. For the convenience of the user, the added and revised text is set forth as follows:

#### 4.1103 Procedures.

(a) \* \* \*

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## 4.1201

(3) Need not verify registration before placing an order or call if the contract or agreement includes the provision at 52.204-7, System for Award Management, or the clause at 52.212-4, Contract Terms and Conditions—Commercial Items, or a similar agency clause, except when use of the Government-wide commercial purchase card is contemplated as a method of payment. (See 32.1108(b)(2)).

\* \* \* \* \*

(d) The contracting officer shall, on contractual documents transmitted to the payment office, provide the unique entity identifier and, if applicable, the Electronic Funds Transfer indicator, in accordance with agency procedures.

### 4.1104 Disaster Response Registry.

Contracting officers shall consult the Disaster Response Registry via <https://www.acquisition.gov> when contracting for debris removal, distribution of supplies, reconstruction, and other disaster or emergency relief activities inside the United States and outlying areas. (See 26.205).

[74 FR 52849, Oct. 14, 2009, as amended at 77 FR 188, Jan. 3, 2012]

### 4.1105 Solicitation provision and contract clauses.

(a)(1) Except as provided in 4.1102(a), use the provision at 52.204-7, System for Award Management, in solicitations.

(2) If the solicitation is anticipated to be awarded in accordance with 4.1102(a)(5), the contracting officer shall use the provision at 52.204-7, System for Award Management, with its Alternate I.

(b) Insert the clause at 52.204-13, System for Award Management Maintenance, in solicitations that contain the provision at 52.204-7, and resulting contracts.

[77 FR 69718, Nov. 20, 2012, as amended at 78 FR 37678, June 21, 2013]

## Subpart 4.12—Representations and Certifications

SOURCE: 69 FR 76345, Dec. 20, 2004, unless otherwise noted.

### 4.1200 Scope.

This subpart prescribes policies and procedures for requiring submission and maintenance of representations and certifications via the System for Award Management (SAM) to—

(a) Eliminate the administrative burden for contractors of submitting the same information to various contracting offices;

(b) Establish a common source for this information to procurement offices across the Government;

(c) Incorporate by reference the contractor's representations and certifications in the awarded contract.

[69 FR 76345, Dec. 20, 2004, as amended at 72 FR 36854, July 5, 2007; 78 FR 37678, June 21, 2013; 79 FR 70341, Nov. 25, 2014]

### 4.1201 Policy.

(a) Prospective contractors shall complete electronic annual representations and certifications at SAM accessed via <https://www.acquisition.gov> as a part of required registration (see FAR 4.1102).

(b)(1) Prospective contractors shall update the representations and certifications submitted to SAM 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 SAM.

(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 SAM 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 SAM as directed by the clause, if their size status has changed since contract award.

(c) Data in SAM is archived and is electronically retrievable. Therefore, when a prospective contractor has completed representations and certifications electronically via SAM, the contracting officer must reference the

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date of SAM 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 SAM 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.

(d) The contracting officer shall incorporate the representations and certifications by reference in the contract (see 52.204–19, or for acquisitions of commercial items see 52.212–4(v)).

[69 FR 76345, Dec. 20, 2004, as amended at 71 FR 57363, Sept. 28, 2006; 72 FR 36854, July 5, 2007; 72 FR 63078, Nov. 7, 2007; 73 FR 33638, June 12, 2008; 74 FR 2729, Jan. 15, 2009; 74 FR 11825, Mar. 19, 2009; 77 FR 188, Jan. 3, 2012; 78 FR 37678, June 21, 2013; 79 FR 70341, Nov. 25, 2014]

#### 4.1202 Solicitation provision and contract clause.

(a) 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 provision at 52.204–7, System for Award Management, is included in the solicitation, do not include the following representations and certifications:

- (1) 52.203–2, Certificate of Independent Price Determination.
- (2) 52.203–11, Certification and Disclosure Regarding Payments to Influence Certain Federal Transactions.
- (3) 52.204–3, Taxpayer Identification.
- (4) 52.204–5, Women-Owned Business (Other Than Small Business).
- (5) 52.204–17, Ownership or Control of Offeror.
- (6) 52.204–20, Predecessor of Offeror.
- (7) 52.209–2, Prohibition on Contracting with Inverted Domestic Corporations—Representation.
- (8) 52.209–5, Certification Regarding Responsibility Matters.
- (9) 52.209–11, Representation by Corporations Regarding Delinquent Tax Liability or a Felony Conviction under any Federal Law.
- (10) 52.214–14, Place of Performance—Sealed Bidding.

- (11) 52.215–6, Place of Performance.
  - (12) 52.219–1, Small Business Program Representations (Basic & Alternate I).
  - (13) 52.219–2, Equal Low Bids.
  - (14) [Reserved]
  - (15) 52.222–18, Certification Regarding Knowledge of Child Labor for Listed End Products.
  - (16) 52.222–22, Previous Contracts and Compliance Reports.
  - (17) 52.222–25, Affirmative Action Compliance.
  - (18) 52.222–38, Compliance with Veterans' Employment Reporting Requirements.
  - (19) 52.222–48, Exemption from Application of the Service Contract Labor Standards to Contracts for Maintenance, Calibration, or Repair of Certain Equipment—Certification.
  - (20) 52.222–52, Exemption from Application of the Service Contract Labor Standards to Contracts for Certain Services—Certification.
  - (21) 52.223–1, Biobased Product Certification.
  - (22) 52.223–4, Recovered Material Certification.
  - (23) 52.223–9, Estimate of Percentage of Recovered Material Content for EPA-Designated Items (Alternate I only).
  - (24) 52.225–2, Buy American Certificate.
  - (25) 52.225–4, Buy American—Free Trade Agreements—Israeli Trade Act Certificate (Basic, Alternates I, II, and III).
  - (26) 52.225–6, Trade Agreements Certificate.
  - (27) 52.225–20, Prohibition on Conducting Restricted Business Operations in Sudan—Certification.
  - (28) 52.225–25, Prohibition on Contracting with Entities Engaging in Certain Activities or Transactions Relating to Iran—Representation and Certifications.
  - (29) 52.226–2, Historically Black College or University and Minority Institution Representation.
  - (30) 52.227–6, Royalty Information (Basic & Alternate I).
  - (31) 52.227–15, Representation of Limited Rights Data and Restricted Computer Software.
- (b) The contracting officer shall insert the clause at 52.204–19, Incorporation by Reference of Representations

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and Certifications, in solicitations and contracts.

[69 FR 76345, Dec. 20, 2004]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting section 4.1202, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at *www.fdsys.gov*.

EFFECTIVE DATE NOTE: At 81 FR 58638, Aug. 25, 2016, 4.1202 was amended by redesignating paragraphs (a)(21) through (31) as paragraphs (a)(22) through (32), respectively; and adding a new paragraph (a)(21), effective Oct. 25, 2016. For the convenience of the user, the added text is set forth as follows:

### 4.1202 Solicitation provision and contract clause.

(a) \* \* \*

(21) 52.222-57, Representation Regarding Compliance with Labor Laws (Executive Order 13673).

\* \* \* \* \*

### Subpart 4.13—Personal Identity Verification

SOURCE: 72 FR 46335, Aug. 17, 2007, unless otherwise noted.

#### 4.1300 Scope of subpart.

This subpart provides policy and procedures associated with Personal Identity Verification as required by—

(a) Federal Information Processing Standards Publication (FIPS PUB) Number 201, “Personal Identity Verification of Federal Employees and Contractors”; and

(b) Office of Management and Budget (OMB) Guidance M-05-24, dated August 5, 2005, “Implementation of Homeland Security Presidential Directive (HSPD) 12—Policy for a Common Identification Standard for Federal Employees and Contractors.”

#### 4.1301 Policy.

(a) Agencies must follow FIPS PUB Number 201 and the associated OMB implementation guidance for personal identity verification for all affected contractor and subcontractor personnel when contract performance requires contractors to have routine physical access to a Federally-controlled facility and/or routine access to

a Federally-controlled information system.

(b) Agencies must include their implementation of FIPS PUB 201 and OMB Guidance M-05-24 in solicitations and contracts that require the contractor to have routine physical access to a Federally-controlled facility and/or routine access to a Federally-controlled information system.

(c) Agencies must designate an official responsible for verifying contractor employee personal identity.

(d)(1) Agency procedures for the return of Personal Identity Verification (PIV) products shall ensure that Government contractors account for all forms of Government-provided identification issued to Government contractor employees under a contract, *i.e.*, the PIV cards or other similar badges, and shall ensure that contractors return such identification to the issuing agency as soon as any of the following occurs, unless otherwise determined by the agency:

(i) When no longer needed for contract performance.

(ii) Upon completion of a contractor employee’s employment.

(iii) Upon contract completion or termination.

(2) The contracting officer may delay final payment under a contract if the contractor fails to comply with these requirements.

[72 FR 46335, Aug. 17, 2007, as amended at 75 FR 82576, Dec. 30, 2010]

#### 4.1302 Acquisition of approved products and services for personal identity verification.

(a) In order to comply with FIPS PUB 201, agencies must purchase only approved personal identity verification products and services.

(b) Agencies may acquire the approved products and services from the GSA, Federal Supply Schedule 70, Special Item Number (SIN) 132-62, HSPD-12 Product and Service Components, in accordance with ordering procedures outlined in FAR Subpart 8.4.

(c) When acquiring personal identity verification products and services not using the process in paragraph (b) of this section, agencies must ensure that the applicable products and services

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are approved as compliant with FIPS PUB 201 including—

(1) Certifying the products and services procured meet all applicable Federal standards and requirements;

(2) Ensuring interoperability and conformance to applicable Federal standards for the lifecycle of the components; and

(3) Maintaining a written plan for ensuring ongoing conformance to applicable Federal standards for the lifecycle of the components.

(4) For more information on personal identity verification products and services see <http://www.idmanagement.gov>.

#### 4.1303 Contract clause.

The contracting officer shall insert the clause at 52.204-9, Personal Identity Verification of Contractor Personnel, in solicitations and contracts when contract performance requires contractors to have routine physical access to a Federally-controlled facility and/or routine access to a Federally-controlled information system. The clause shall not be used when contractors require only intermittent access to Federally-controlled facilities.

### Subpart 4.14—Reporting Executive Compensation and First-Tier Subcontract Awards

SOURCE: 75 FR 39419, July 8, 2010, unless otherwise noted.

#### 4.1400 Scope of subpart.

This subpart implements section 2 of the Federal Funding Accountability and Transparency Act of 2006 (Pub. L. 109-282), as amended by section 6202 of the Government Funding Transparency Act of 2008 (Pub. L. 110-252), which requires contractors to report subcontract award data and the total compensation of the five most highly compensated executives of the contractor and subcontractor. The public may view first-tier subcontract award data at <https://www.usaspending.gov>.

[75 FR 39419, July 8, 2010, as amended at 81 FR 67781, Sept. 30, 2016]

#### 4.1401 Applicability.

(a) This subpart applies to all contracts with a value of \$30,000 or more.

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Nothing in this subpart requires the disclosure of classified information.

(b) Reporting of subcontract information will be limited to the first-tier subcontractor.

[77 FR 44058, July 26, 2012, as amended at 80 FR 38296, July 2, 2015]

#### 4.1402 Procedures.

(a) Agencies shall ensure that contractors comply with the reporting requirements of 52.204-10, Reporting Executive Compensation and First-Tier Subcontract Awards. Agencies shall review contractor reports on a quarterly basis to ensure the information is consistent with contract information. The agency is not required to address data for which the agency would not normally have supporting information, such as the compensation information required of contractors and first-tier subcontractors. However, the agency shall inform the contractor of any inconsistencies with the contract information and require that the contractor correct the report, or provide a reasonable explanation as to why it believes the information is correct. Agencies may review the reports at <http://www.fsrs.gov>.

(b) When contracting officers report the contract action to the Federal Procurement Data System (FPDS) in accordance with FAR subpart 4.6, certain data will then pre-populate from FPDS, to assist contractors in completing and submitting their reports. If data originating from FPDS is found by the contractor to be in error when the contractor completes the subcontract report, the contractor should notify the Government contracting officer, who is responsible for correcting the data in FPDS. Contracts reported using the generic DUNS number allowed at FAR 4.605(c)(2) will interfere with the contractor's ability to comply with this reporting requirement, because the data will not pre-populate from FPDS.

(c) If the contractor fails to comply with the reporting requirements, the contracting officer shall exercise appropriate contractual remedies. In addition, the contracting officer shall make the contractor's failure to comply with the reporting requirements a

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part of the contractor's performance information under Subpart 42.15.

(d) There is a reporting exception in 52.204-10(g) for contractors and subcontractors who had gross income in the previous tax year under \$300,000.

[75 FR 39419, July 8, 2010, as amended at 77 FR 44058, July 26, 2012; 77 FR 69718, Nov. 20, 2012]

EFFECTIVE DATE NOTE: At 81 FR 67738, Sept. 30, 2016, 4.1402 was amended by removing from paragraph (b), last sentence, "DUNS number" and adding "entity identifier" in its place, effective Oct.31, 2016.

### 4.1403 Contract clause.

(a) Except as provided in paragraph (b) of this section, the contracting officer shall insert the clause at 52.204-10, Reporting Executive Compensation and First-Tier Subcontract Awards, in all solicitations and contracts of \$30,000 or more.

(b) The clause is not prescribed for contracts that are not required to be reported in the Federal Procurement Data System (FPDS) (see subpart 4.6).

[77 FR 44058, July 26, 2012, as amended at 80 FR 38296, July 2, 2015]

## Subpart 4.16—Unique Procurement Instrument Identifiers

SOURCE: 76 FR 39235, July 5, 2011, unless otherwise noted.

### 4.1600 Scope of subpart.

This subpart prescribes policies and procedures for assigning unique Procurement Instrument Identifiers (PIID) for each solicitation, contract, agreement, or order and related procurement instrument.

### 4.1601 Policy.

(a) *Establishment of a Procurement Instrument Identifier (PIID).* Agencies shall have in place a process that ensures that each PIID used to identify a solicitation or contract action is unique Governmentwide, and will remain so for at least 20 years from the date of contract award. The PIID shall be used to identify all solicitation and contract actions. The PIID shall also be used to identify solicitation and contract actions in designated support and reporting systems (e.g., Federal

Procurement Data System, System for Award Management), in accordance with regulations, applicable authorities, and agency policies and procedures.)

(b) *Transition of PIID numbering.* No later than October 1, 2017, agencies shall comply with paragraph (a) of this section and use the requirements in 4.1602 and 4.1603 for all new solicitations and contract awards. Until an agency's transition is complete, it shall maintain its 2013 PIID format that is on record with the General Services Administration's Integrated Award Environment Program Office (which maintains a registry of the agency unique identifier scheme). The 2013 PIID format consisted of alpha characters in the first positions to indicate the agency, followed by alphanumeric characters; the 2017 format instead has the AAC in the beginning 6 positions.

(c) *Change in the Procurement Instrument Identifier after its assignment.* (1) Agencies shall not change the PIID unless one of the following two circumstances apply:

(i) The PIID serial numbering system is exhausted. In this instance, the contracting officer may assign a new PIID by issuing a contract modification.

(ii) Continued use of a PIID is administratively burdensome (e.g., for implementations of new agency contract writing systems). In this instance, the contracting officer may assign a new PIID by issuing a contract modification.

(2) The modification shall clearly identify both the original and the newly assigned PIID. Issuance of a new PIID is an administrative change (see 43.101).

[79 FR 61741, Oct. 14, 2014]

### 4.1602 Identifying the PIID and supplementary PIID.

(a) *Identifying the PIID in solicitation and contract award documentation (including forms and electronic generated formats).* Agencies shall include all PIIDs for all related procurement actions as identified in paragraphs (a)(1) through (5) of this section.

(1) *Solicitation.* Identify the PIID for all solicitations. For amendments to solicitations, identify a supplementary

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PIID, in conjunction with the PIID for the solicitation.

(2) *Contracts and purchase orders.* Identify the PIID for contracts and purchase orders.

(3) *Delivery and task orders.* For delivery and task orders placed by an agency under a contract (e.g., indefinite delivery indefinite quantity (IDIQ) contracts, multi-agency contracts (MAC), Governmentwide acquisition contracts (GWACs), or Multiple Award Schedule (MAS) contracts), identify the PIID for the delivery and task order and the PIID for the contract.

(4) *Blanket purchase agreements and basic ordering agreements.* Identify the PIID for blanket purchase agreements issued in accordance with 13.303, and for basic agreements and basic ordering agreements issued in accordance with subpart 16.7. For blanket purchase agreements issued in accordance with subpart 8.4 under a MAS contract, identify the PIID for the blanket purchase agreement and the PIID for the MAS contract.

(i) *Orders.* For orders against basic ordering agreements or blanket purchase agreements issued in accordance with 13.303, identify the PIID for the order and the PIID for the blanket purchase agreement or basic ordering agreement.

(ii) *Orders under subpart 8.4.* For orders against a blanket purchase agreement established under a MAS contract, identify the PIID for the order, the PIID for the blanket purchase agreement, and the PIID for the MAS contract.

(5) *Modifications.* For modifications to actions described in paragraphs (a)(2) through (4) of this section, and in accordance with agency procedures, identify a supplementary PIID for the modification in conjunction with the PIID for the contract, order, or agreement being modified.

(b) *Placement of the PIID on forms.* When the form (including electronic generated format) does not provide spaces or fields for the PIID or supplementary PIID required in paragraph (a)

of this section, identify the PIID in accordance with agency procedures.

(c) *Additional agency specific identification information.* If agency procedures require additional identification information in solicitations, contracts, or other related procurement instruments for administrative purposes, separate and clearly identify the additional information from the PIID.

[76 FR 39235, July 5, 2011, as amended at 79 FR 61745, Oct. 14, 2014; 79 FR 61741, Oct. 14, 2014]

**4.1603 Procedures.**

(a) *Elements of a PIID.* The PIID consists of a combination of thirteen to seventeen alpha and/or numeric characters sequenced to convey certain information. Do not use special characters (such as hyphens, dashes, or spaces).

(1) *Positions 1 through 6.* The first six positions identify the department/agency and office issuing the instrument. Use the AAC assigned to the issuing office for positions 1 through 6. Civilian agency points of contact for obtaining an AAC are on the AAC Contact list maintained by the General Services Administration and can be found at [http://www.gsa.gov/graphics/fas/Civilian\\_contacts.pdf](http://www.gsa.gov/graphics/fas/Civilian_contacts.pdf). For Department of Defense (DoD) inquiries, contact the service/agency Central Service Point or DoDAAC Monitor, or if unknown, email [DODAADHQ@DLA.MIL](mailto:DODAADHQ@DLA.MIL) for assistance.

(2) *Positions 7 through 8.* The seventh and eighth positions are the last two digits of the fiscal year in which the procurement instrument is issued or awarded. This is the date the action is signed, not the effective date if the effective date is different.

(3) *Position 9.* Indicate the type of instrument by entering one of the following upper case letters in position nine. Departments and independent agencies may assign those letters identified for department use below in accordance with their agency policy; however, any use must be applied to the entire department or agency.

Instrument	Letter designation
(i) Blanket purchase agreements .....	A
(ii) Invitations for bids .....	B

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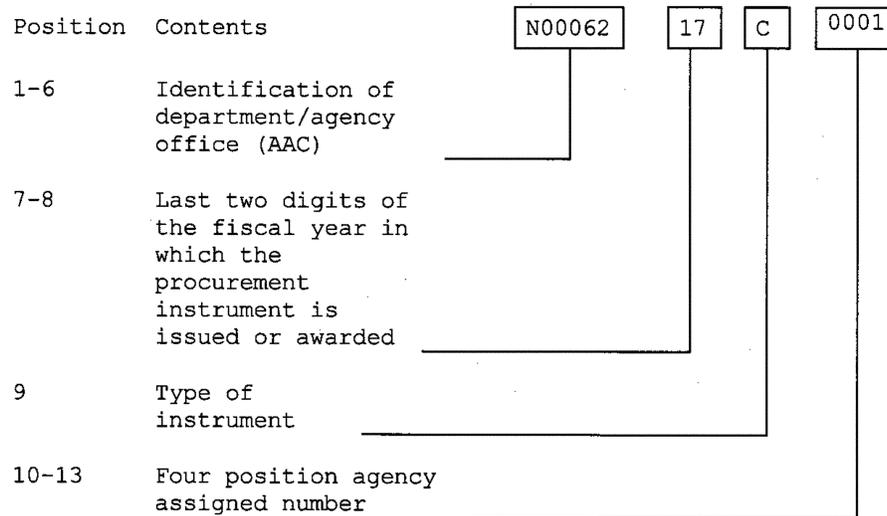
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Instrument	Letter designation
(iii) Contracts of all types except indefinite-delivery contracts (see subpart 16.5) .....	C
(iv) Indefinite-delivery contracts (including Federal Supply Schedules, Governmentwide acquisition contracts (GWACs), and multi-agency contracts) .....	D
(v) Reserved for future Federal Governmentwide use .....	E
(vi) Task orders, delivery orders or calls under— .....	F
• Indefinite-delivery contracts (including Federal Supply Schedules, Governmentwide acquisition contracts (GWACs), and multi-agency contracts);	
• Blanket purchase agreements; or	
• Basic ordering agreements.	
(vii) Basic ordering agreements .....	G
(viii) Agreements, including basic agreements and loan agreements, but excluding blanket purchase agreements, basic ordering agreements, and leases. Do not use this code for contracts or agreements with provisions for orders or calls .....	
(ix) Do not use this letter .....	H
(x) Reserved for future Federal Governmentwide use .....	I
(xi) Reserved for departmental or agency use .....	J
(xii) Lease agreements .....	K
(xiii) Reserved for departmental or agency use .....	L
(xiv) Reserved for departmental or agency use .....	M
(xv) Do not use this letter .....	N
(xvi) Purchase orders (assign V if numbering capacity of P is exhausted during a fiscal year) .....	O
(xvii) Requests for quotations (assign U if numbering capacity of Q is exhausted during a fiscal year) .....	P
(xviii) Requests for proposals .....	Q
(xix) Reserved for departmental or agency use .....	R
(xx) Reserved for departmental or agency use .....	S
(xxi) See Q, requests for quotations .....	T
(xxii) See P, purchase orders .....	U
(xxiii) Reserved for future Federal Governmentwide use .....	V
(xxiv) Reserved for future Federal Governmentwide use .....	W
(xxv) Imprest fund .....	X
(xxvi) Reserved for future Federal Governmentwide use .....	Y
	Z

(4) *Positions 10 through 17.* Enter the number assigned by the issuing agency in these positions. Agencies may choose a minimum of four characters up to a maximum of eight characters to be used, but the same number of characters must be used agency-wide. If a number less than the maximum is used, do not use leading or trailing zeroes to make it equal the maximum in any system or data transmission. A

separate series of numbers may be used for any type of instrument listed in paragraph (a)(3) of this section. An agency may reserve blocks of numbers or alpha-numeric numbers for use by its various components.

(5) *Illustration of PIID.* The following illustrates a properly configured PIID using four characters in the final positions:



(b) *Elements of a supplementary PIID.* Use the supplementary PIID to identify amendments to solicitations and modifications to contracts, orders, and agreements.

(1) *Amendments to solicitations.* Number amendments to solicitations sequentially using a four position numeric serial number added to the 13-17 character PIID beginning with 0001.

(2) *Modifications to contracts, orders, and agreements.* Number modifications to contracts, orders, and agreements using a six position alpha or numeric, or a combination thereof, added to the 13-17 character PIID. For example, a modification could be numbered P00001. This would be added to the end of the 13-17 character PIID illustrated in (a)(5) of this section.

(i) *Position 1.* Identify the office issuing the modification. The letter P shall be designated for modifications issued by the procuring contracting office. The letter A shall be used for modifications issued by the contract administration office (if other than the procuring contracting office).

(ii) *Positions 2 through 6.* These positions may be alpha, numeric, or a combination thereof, in accordance with agency procedures.

(iii) Each office authorized to issue modifications shall assign the supple-

mentary identification numbers in sequence (unless provided otherwise in agency procedures). Do not assign the numbers until it has been determined that a modification is to be issued.

[79 FR 61741, Oct. 14, 2014]

**Subpart 4.17—Service Contracts Inventory**

SOURCE: 78 FR 80374, Dec. 31, 2013, unless otherwise noted.

**4.1700 Scope of subpart.**

This subpart implements section 743(a) of Division C of the Consolidated Appropriations Act, 2010 (Pub. L. 111-117), which requires agencies to report annually to the Office of Management and Budget (OMB) on activities performed by service contractors. Section 743(a) applies to executive agencies, other than the Department of Defense (DoD), covered by the Federal Activities Inventory Reform Act (Pub. L. 105-270) (FAIR Act). The information reported in the inventory will be publicly accessible.

**4.1701 Definitions.**

As used in this subpart—  
*FAIR Act agencies* means the agencies required under the FAIR Act to submit

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inventories annually of the activities performed by Government personnel.

*First-tier subcontract* means a subcontract awarded directly by the contractor for the purpose of acquiring supplies or services (including construction) for performance of a prime contract. It does not include the contractor's supplier agreements with vendors, such as long-term arrangements for materials or supplies that benefit multiple contracts and/or the costs of which are normally applied to a contractor's general and administrative expenses or indirect costs.

### 4.1702 Applicability.

(a) This subpart applies to—

(1) All FAIR Act agencies, except DoD as specified in 4.1705;

(2) Solicitations, contracts, and orders for services (including construction) that meet or exceed the thresholds at 4.1703; and

(3) Contractors and first-tier subcontractors.

(b) Procedures for compiling and submitting agency service contract inventories are governed by section 743(a)(3) of Division C of Pub. L. 111-117 and Office of Federal Procurement Policy (OFPP) guidance. The guidance is available at the following Web site: <http://www.whitehouse.gov/omb/procurement-service-contract-inventories>.

(c) This subpart addresses requirements for obtaining information from, and reporting by, agency service contractors.

### 4.1703 Reporting requirements.

(a) *Thresholds.* (1) Except as exempted by OFPP guidance, service contractor reporting shall be required for contracts and first-tier subcontracts for services based on type of contract and estimated total value. For indefinite-delivery contracts, reporting shall be determined based on the type and estimated total value of each order under the contract. Indefinite-delivery contracts include, but are not limited to, contracts such as indefinite-delivery indefinite-quantity (IDIQ) contracts, Federal Supply Schedule contracts (FSSs), Governmentwide acquisition contracts (GWACs), and multi-agency contracts.

(2) Reporting is required according to the following thresholds:

(i) All cost-reimbursement, time-and-materials, and labor-hour service contracts and orders with an estimated total value above the simplified acquisition threshold.

(ii) All fixed-price service contracts awarded and orders issued according to the following thresholds:

(A) Awarded or issued in Fiscal Year 2014, with an estimated total value of \$2.5 million or greater.

(B) Awarded or issued in Fiscal Year 2015, with an estimated total value of \$1 million or greater.

(C) Awarded or issued in Fiscal Year 2016, and subsequent years, with an estimated total value of \$500,000 or greater.

(3) Reporting is required for all first-tier subcontracts for services as prescribed in paragraphs (a)(2)(i) and (ii) of this section.

(b) *Agency reporting responsibilities.* (1) Agencies shall ensure that contractors comply with the reporting requirements of 52.204-14, Service Contract Reporting Requirements and 52.204-15, Service Contract Reporting Requirements for Indefinite-Delivery Contracts. Agencies shall review contractor reported information for reasonableness and consistency with available contract information. The agency is not required to address data for which the agency would not normally have supporting information. In the event the agency believes that revisions to the contractor reported information are warranted, the agency shall notify the contractor no later than November 15. By November 30, the contractor shall revise the report, or document its rationale for the agency. Authorized agency officials may review the reports at [www.sam.gov](http://www.sam.gov).

(2) Agencies are required to compile annually an inventory of service contracts performed for, or on behalf of, the agency during the prior fiscal year in order to determine the extent of the agency's reliance on service contractors. Agencies shall submit a service contract inventory to OMB by January 15 annually. Then, each agency must post the inventory on its Web site and publish a FEDERAL REGISTER Notice of Availability by February 15 annually.

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(3) Most of the required information is already collected in the Federal Procurement Data System (FPDS). Information not collected in FPDS will be provided by the contractor, as specified in 52.204-14, Service Contract Reporting Requirements and 52.204-15, Service Contract Reporting Requirements for Indefinite-Delivery Contracts.

[78 FR 80374, Dec. 31, 2013, as amended 81 FR 11992, Mar. 7, 2016]

**4.1704 Contracting officer responsibilities.**

(a) For other than indefinite-delivery contracts, the contracting officer shall ensure that 52.204-14, Service Reporting Requirement, is included in solicitations, contracts, and orders as prescribed at 4.1705. For indefinite-delivery contracts, the contracting officer who awarded the contract shall ensure that 52.204-15, Service Contract Reporting Requirements for Indefinite-Delivery Contracts, is included in solicitations and contracts as prescribed at 4.1705. The contracting officer at the order level shall verify the clause's inclusion in the contract.

(b) If the contractor fails to submit a report in a timely manner, the contracting officer shall exercise appropriate contractual remedies. In addition, the contracting officer shall make the contractor's failure to comply with the reporting requirements a part of the contractor's performance information under subpart 42.15.

**4.1705 Contract clauses.**

(a) The contracting officer shall insert the clause at 52.204-14, Service Contract Reporting Requirements, in solicitations and contracts for services (including construction) that meet or exceed the thresholds at 4.1703, except for indefinite-delivery contracts. This clause is not required for actions entirely funded by DoD, contracts awarded with a generic DUNS number, or in classified solicitations, contracts, or orders.

(b) The contracting officer shall insert the clause at 52.204-15, Service Contract Reporting Requirements for Indefinite-Delivery Contracts, in solicitations and indefinite-delivery contracts for services (including construction) where one or more orders issued

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thereunder are expected to each meet or exceed the thresholds at 4.1703. This clause is not required for actions entirely funded by DoD, contracts awarded with a generic DUNS number, or in classified solicitations, contracts, or orders.

EFFECTIVE DATE NOTE: At 81 FR 67738, Sept. 30, 2016, §4.1705 was amended by removing from paragraphs (a) and (b) "DUNS number" and adding "entity identifier" in their places, effective Oct. 31, 2016.

**Subpart 4.18—Commercial and Government Entity Code**

SOURCE: 79 FR 31190, May 30, 2014, unless otherwise noted.

**4.1800 Scope of subpart.**

(a) This subpart prescribes policies and procedures for identification of commercial and government entities. The Commercial and Government Entity (CAGE) code system may be used, among other things, to—

(1) Exchange data with another contracting activity, including contract administration activities and contract payment activities;

(2) Exchange data with another system that requires the unique identification of a contractor entity; or

(3) Identify when offerors are owned or controlled by another entity.

(b) For information on the Data Universal Numbering System (DUNS) number, which is a different identification number, see 4.605 and the provisions at 52.204-6 and 52.204-7.

EFFECTIVE DATE NOTE: At 81 FR 67738, Sept.30, 2016, 4.1800 was amended by revising paragraph (b), effective Oct. 31, 2016. For the convenience of the user, the revised text is set forth as follows:

**4.1800 Scope of subpart.**

\* \* \* \* \*

(b) For information on the unique entity identifier, which is a different identifier, see 4.605 and the provisions at 52.204-6, Unique Entity Identifier, and 52.204-7, System for Award Management.

**4.1801 Definitions.**

As used in this part—  
*Commercial and Government Entity (CAGE) code* means—

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(1) An identifier assigned to entities located in the United States or its outlying areas by the Defense Logistics Agency (DLA) Commercial and Government Entity (CAGE) Branch to identify a commercial or government entity; or

(2) An identifier assigned by a member of the North Atlantic Treaty Organization (NATO) or by the NATO Support and Procurement Agency (NSPA) to entities located outside the United States and its outlying areas that the DLA Commercial and Government Entity (CAGE) Branch records and maintains in the CAGE master file. This type of code is known as a NATO CAGE (NCAGE) code.

*Highest-level owner* means the entity that owns or controls an immediate owner of the offeror, or that owns or controls one or more entities that control an immediate owner of the offeror. No entity owns or exercises control of the highest level owner.

*Immediate owner* means an entity, other than the offeror, that has direct control of the offeror. Indicators of control include, but are not limited to, one or more of the following: Ownership or interlocking management, identity of interests among family members, shared facilities and equipment, and the common use of employees.

[79 FR 31190, May 30, 2014, as amended at 81 FR 45866, July 14, 2016]

### 4.1802 Policy.

(a) *Commercial and Government Entity code.* (1) Offerors shall provide the contracting officer the Commercial and Government Entity (CAGE) code assigned to that offeror's location prior to the award of a contract action above the micro-purchase threshold, when there is a requirement to be registered in SAM or a requirement to have a DUNS Number in the solicitation.

(2) The contracting officer shall include the contractor's CAGE code in the contract and in any electronic transmissions of the contract data to other systems when it is provided in accordance with paragraph (a)(1) of this section.

(b) *Ownership or control of offeror.* Offerors, if owned or controlled by another entity, shall provide the contracting officer with the CAGE code

and legal name of that entity prior to the award of a contract action above the micro-purchase threshold, when there is a requirement to be registered in SAM or a requirement to have a DUNS Number in the solicitation.

EFFECTIVE DATE NOTE: At 81 FR 67738, Sept. 30, 2016, 4.1802 was amended by revising paragraph (a)(1) and removing from paragraph (b) "DUNS Number" and adding "unique entity identifier" in its place, effective Oct. 31, 2016. For the convenience of the user, the revised text is set forth as follows:

### 4.1802 Policy.

(a) \* \* \* (1) Offerors shall provide the contracting officer the CAGE code assigned to that offeror's location prior to the award of a contract action above the micro-purchase threshold, when there is a requirement to be registered in the System for Award Management (SAM) or a requirement to have a unique entity identifier in the solicitation.

### 4.1803 Verifying CAGE codes prior to award.

(a) Contracting officers shall verify the offeror's CAGE code by reviewing the entity's registration in the System for Award Management (SAM). Active registrations in SAM have had the associated CAGE codes verified.

(b) For entities not required to be registered in SAM, the contracting officer shall validate the CAGE code using the CAGE code search feature at <https://cage.dla.mil>.

[79 FR 31190, May 30, 2014, as amended at 81 FR 45867, July 14, 2016]

### 4.1804 Solicitation provisions and contract clause.

(a) Insert the provision at 52.204-16, Commercial and Government Entity Code Reporting, in all solicitations that include—

(1) 52.204-6, Data Universal Numbering System Number; or

(2) 52.204-7, System for Award Management.

(b) Insert the provision at 52.204-17, Ownership or Control of Offeror, in all solicitations that include the provision at 52.204-16, Commercial and Government Entity Code Reporting.

(c) Insert the clause at 52.204-18, Commercial and Government Entity Code Maintenance, in all solicitations and contracts when the solicitation contains the provision at 52.204-16,

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Commercial and Government Entity Code Reporting.

(d) Insert the provision at 52.204-20, Predecessor of Offeror, in all solicitations that include the provision at 52.204-16, Commercial and Government Entity Code Reporting.

[79 FR 31190, May 30, 2014, as amended at 81 FR 11990, Mar. 7, 2016]

EFFECTIVE DATE NOTE: At 81 FR 67738, Sept. 30, 2016, 4.1804 was amended by removing from paragraph (a)(1) “Data Universal Numbering System Number” and adding “Unique Entity Identifier” in its place, effective Oct. 31, 2016.

### Subpart 4.19—Basic Safeguarding of Covered Contractor Information Systems

SOURCE: 81 FR 30445, May 16, 2016, unless otherwise noted.

#### 4.1901 Definitions.

As used in this subpart—

*Covered contractor information system* means an information system that is owned or operated by a contractor that processes, stores, or transmits Federal contract information.

*Federal contract information* means information, not intended for public release, that is provided by or generated for the Government under a contract to develop or deliver a product or service to the Government, but not including information provided by the Government to the public (such as that on

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public Web sites) or simple transactional information, such as that necessary to process payments.

*Information* means any communication or representation of knowledge such as facts, data, or opinions in any medium or form, including textual, numerical, graphic, cartographic, narrative, or audiovisual (Committee on National Security Systems Instruction (CNSSI) 4009).

*Information system* means a discrete set of information resources organized for the collection, processing, maintenance, use, sharing, dissemination, or disposition of information (44 U.S.C. 3502).

*Safeguarding* means measures or controls that are prescribed to protect information systems.

#### 4.1902 Applicability.

This subpart applies to all acquisitions, including acquisitions of commercial items other than commercially available off-the-shelf items, when a contractor's information system may contain Federal contract information.

#### 4.1903 Contract clause.

The contracting officer shall insert the clause at 52.204-21, Basic Safeguarding of Covered Contractor Information Systems, in solicitations and contracts when the contractor or a subcontractor at any tier may have Federal contract information residing in or transiting through its information system.