

FARM AND FOREIGN AGRICULTURAL SERVICES ACQUISITION MANAGEMENT DIVISION

NOTICE AMD-07-001

November 20, 2006

Revision 1, March 1, 2007

CONTRACTING OFFICER'S TECHNICAL REPRESENTATIVE (COTR) APPOINTMENT, CERTIFICATION AND TRAINING

A GENERAL

The Contracting Officer (CO) shall appoint one (1) person to act as the Contracting Officer's Technical Representative (COTR) for every service contract valued in excess of \$100,000 and for any other contract where the CO determines a need for a COTR. The program office sponsoring the requirement is responsible for providing someone to serve as COTR that the CO determines to be qualified. Selection is to be based on the technical expertise and experience of the individual as described below. Nothing in this notice shall be construed to limit the ability of the appointed COTR to seek advice and counsel from other members of the program office or any other subject matter experts in the exercise of the COTR duties.

B TRAINING CONTRACTING OFFICER REPRESENTATIVES

Employees designated as COTRs must demonstrate an ability to perform selected pre-award and post-award administrative functions on behalf of the Contracting Officer. COTRs will be provided a copy of FAI's *Contracting Officer's Representative (COR) Training Blueprints*, including the Government-wide training curricula for COTRs, at the time of appointment.

Designated COTRs are required to complete the basic COTR training course. In lieu of formal classroom instruction, COTRs may obtain basic training from the FAI's On-Line University.

C COTR CERTIFICATION PROGRAM

Employees will be noted as certified COTRs in the Acquisition Workforce Tracking System (AWTS) upon completion of the training requirement. The Contracting Officer shall assure that COTR training information is included into the AWTS after appointment.

D COTR AUTHORITY

The Contracting Officer shall delegate limited COTR authority, in writing, for the administration of various technical aspects of a contract. A sample COTR appointment letter is included as Attachment 1 to this Notice. Authority to bind the government stays with the Contracting Officer.

E COMPLIANCE WITH COTR TRAINING REQUIREMENTS

Employees scheduled for designation as COTRs must complete all training requirements within six months after assuming COTR duties.

During unusual and compelling emergencies when it is certain that a properly trained COTR is needed but not available, the HCAD, on a one-time, non-delegable basis, may waive the COTR training requirements. Waivers shall document why the designated individual(s) will not have an opportunity to obtain the necessary training.

F ATTACHMENTS

Attachment 1: Sample COTR Appointment Letter

Attachment 2: Standards of Conduct (from the FAR)

G EXPIRATION DATE

This policy will be incorporated into the AMD Policy Handbook, at which time this notice will become obsolete.



United States
Department of
Agriculture

Farm and Foreign
Agricultural
Service

Farm Service
Agency

1400 Independence
Ave, SW
Stop 0580
Washington, DC
20250-0580

ATTACHMENT 1

Date

To: (COTR's Name)

From: Mr. (Contracting Officer's name) _____
Contracting Officer

Subject: Appointment as the Contracting Officer's Technical Representative (COTR)
For Contract Number (enter Contract number)

You are hereby appointed as the Contracting Officer's Technical Representative (COTR) under Contract No. (enter contract number) with (enter Contractor's Name) for (enter type of services). As the COTR, your primary duty is to monitor the contractor's performance to ensure that all of the technical requirements under the contract are met by the delivery date or within the period of performance, and at the price or within the estimated cost stipulated in the contract.

In the performance of the duties delegated to you in this letter, you are cautioned that you could be held personally liable for actions taken or directions given by you to the contractor that are beyond the authorities given to you in this letter. The duties or authorities in this letter are not delegable; therefore, you must advise the Contracting Officer, (enter CO's name) at 202-(CO's telephone number) or the Contract Administrator/ Specialist, (enter name) at 202-(telephone number) immediately when you are unable to perform these duties.

Your duties and limitations, as applicable to the contract you will be monitoring, are as follows:

MONITORING PERFORMANCE.

Ensure that the contractor complies with all of the requirements of the statement of work, specifications, or performance work statement, and when requested by the contractor, provide technical direction to the contractor's technical manager. This technical assistance must be within the scope of the contract (e.g., interpreting specifications, statement of work, performance work statement, etc.). When a difference of opinion between you and the contractor occurs, notify the contracting officer or the contract administrator/specialist immediately for resolution.

Ensure that the personnel being used by the contractor are of the same caliber that was

originally proposed by the contractor to the Government. The experienced personnel contracted for and/or approved by the Government should not be diluted by the use of personnel with less experience. You may not authorize changes, substitutions, or additions to personnel. Any decrease in or lack of performance shall be brought to the attention of the contracting officer or contract administrator/specialist.

MONITORING COSTS.

Review and evaluate the contractor's progress in relation to the expenditures. When the costs expended by the contractor are not commensurate with the contractor's progress, bring this to the attention of the contracting officer or contract administrator/specialist for immediate action.

Review the contractor's invoices/vouchers for reasonableness and applicability to the contract and recommend to the contracting officer approval, conditional approval, or disapproval for payment. The review must be completed within five (5) days after receipt of the invoice or voucher. If you cannot meet the required review time, advise the contracting officer or contract administrator/specialist so that action can be taken to ensure Government compliance with the Prompt Payment Act, thereby avoiding the payment of interest and penalties to the contractor.

CHANGES TO THE CONTRACT.

You cannot authorize the contractor to stop work, and you are not authorized to delete, change, waive, or negotiate any of the technical requirements or other terms and conditions of the contract. Should a change (monetary or otherwise) to the contract become necessary, it must be made by a contract modification issued by the contracting officer. When in doubt, contact the contracting officer or contract administrator/specialist.

Any contract change requested by the contractor must be put in writing by the contractor to the contracting officer for action; however, you should immediately advise the contracting officer or contract administrator/specialist of the proposed change since it may affect the contract price, cost, or delivery/performance schedule. When the proposed change is received by the contracting officer, you will be required to provide the contracting officer with a written analysis and rationale for the change and to evaluate any costs associated with the change.

You must also recognize and report to the contracting officer any Government required changes to the contract (e.g., items or work no longer required, changes in the specifications, etc.).

VISITS AND MEETINGS WITH THE CONTRACTOR.

When appropriate, make arrangements with the contractor for periodic visits to the contractor's plant to: (1) evaluate the contractor's performance; (2) evaluate changes in

the technical performance affecting personnel, the schedule, deliverables, and price or costs; (3) inspect and monitor the use of Government property, if applicable; and (4) ensure that contractor employees being charged to the contract are actually performing the work under the contract. A trip report fully documenting all activities during the visit must be written and a copy provided to the contracting officer within three working days after the visit.

Document the file to record each meeting and telephone conversation with the contractor. A daily log book is recommended which should reflect the date, time, name, and title of individual(s) involved, the subject matter, and the details of the meeting or conversation.

INSPECTION OF CONTRACT ITEMS.

When notified by the contractor or the contracting officer, perform, in accordance with the terms of the contract, inspection, acceptance or rejection of the supplies, services, or construction. Immediately notify the contracting officer of all rejections and the reason for the action.

Review progress reports from the contractor and advise the contracting officer of any contractor problems or action required to be taken by the Government.

STANDARDS OF CONDUCT AND CONFLICT OF INTEREST.

Attachment "B" Standards of Conduct" FAR 3., which identifies Improper Business Practices and Personal Conflict of Interest, provides guidance to avoid improper business practices and personal conflicts of interest and to deal with their apparent or actual occurrences. Please read this attachment very carefully and contact the contracting officer should you require further information or clarification on this subject matter.

CONTRACT FILE CONTENT AND MAINTENANCE.

Establish and maintain an organized contract administration file to record all contractor and Government actions pertaining to the contract. The COTR's file is of particular importance since the documentation of your interaction with the contractor may be used in the event of litigation. In addition, an organized file facilitates an easy transition from one COTR to another if reassignment becomes necessary. The file(s) should be organized as follows:

- (1) File 1 - The contract instrument (i.e., contract modifications, task orders, delivery orders, and the contractor's proposals applicable to these documents).
- (2) File 2 - The COTR's delegation letter, and all correspondence between the contractor and the contracting officer, filed in chronological order.
- (3) File 3 - A copy of the contractor's invoices/vouchers and any correspondence pertaining to the payments.

(4) File 4 - The COTR's trip reports and written memoranda to the file on telephone conversations or other meetings with the contractor.

(5) File 5 - A copy of the contractor's progress reports and other contract deliverables, and all correspondence pertaining to these documents.

The size of the contract may not warrant a separate folder for each file. If less than five folders are used, the sections must be tabbed to segregate each file.

Please acknowledge receipt and acceptance of this appointment by signing and returning the attached sheet to the contracting officer or contract administrator/specialist. Your appointment as the COTR under the above numbered contract is terminated upon receipt of a written notice of termination from the appointing contracting officer, the contracting officer's successor, or a higher level of authority. Please direct any questions you may have on this delegation to the contracting officer or contract administrator/specialist.

EVALUATING PERFORMANCE.

Within 30 days after the contractor has met all terms and conditions of the contract, you must [evaluate the contractor's performance](#) using the attached evaluation form which must be returned to me.

COTRs DO NOT have the authority to:

1. Award, agree to or sign any contract, delivery order or task order. All contractual agreements, commitments or modifications shall be made only by the CO.
 2. Make any commitments or otherwise obligate the Government to make any changes to the contract.
 3. Grant deviations from or waive any terms and conditions of the contract.
 4. Impose or place a demand upon the Contractor to perform any task or permit any substitution not specifically provided for in the contract.
 5. Increase the dollar limit of the contract or authorize work beyond the dollar limit of the contract or authorize the expenditure of funds.
 6. Give direction to the Contractor or to the employees of the Contractor except as provided for in the contract.
 7. Change the period of performance.
 8. Authorize the purchase of equipment, except as authorized under the contract.
 9. Authorize the furnishing of Government property, except as required under the contract.
 10. Authorize subcontracting or the use of consultants.
 11. Approve shifts of funding between line items of the budget.
 12. Approve travel and relocation expenses over and above that provided for in the contract.
 13. Authorize the use of overtime.
-

John Smith, Contracting Officer

(Date)

Acceptance of all terms and conditions by the COTR

I understand and accept my assignment as the Contracting Officer's Technical Representative (COTR) under Contract No. *(Insert contract number)* as outlined in your letter to me dated *(insert date of contracting officer's letter)*.

(Signature of COTR)

(Typed Name and Title of COTR)

(Effective Date)

ATTACHMENT 2

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 nonperformance 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 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.

(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.

3.104 Procurement integrity.

3.104-1 Definitions.

As used in this section—

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

- (1) Deputy ethics officials described in 5 CFR 2638.204, to whom authority under 3.104-6 has been delegated by the designated agency ethics official; and
- (2) Alternate designated agency ethics officials described in 5 CFR 2638.202(b).

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

"Contractor bid or proposal information" means any of the following information submitted to a Federal agency as part of or in connection with a bid or proposal to enter into a Federal agency

procurement contract, if that information has not been previously made available to the public or disclosed publicly:

(1) Cost or pricing data (as defined by 10 U.S.C. 2306a(h)) with respect to procurements subject to that section, and section 304A(h) of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 254b(h)), with respect to procurements subject to that section.

(2) Indirect costs and direct labor rates.

(3) Proprietary information about manufacturing processes, operations, or techniques marked by the contractor in accordance with applicable law or regulation.

(4) Information marked by the contractor as “contractor bid or proposal information” in accordance with applicable law or regulation.

(5) Information marked in accordance with 52.215-1(e).

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

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

“In excess of \$10,000,000” means—

(1) The value, or estimated value, at the time of award, of the contract, including all options;

(2) The total estimated value at the time of award of all orders under an indefinite-delivery, indefinite-quantity, or requirements contract;

(3) Any multiple award schedule contract, unless the contracting officer documents a lower estimate;

(4) The value of a delivery order, task order, or an order under a Basic Ordering Agreement;

(5) The amount paid or to be paid in settlement of a claim; or

(6) The estimated monetary value of negotiated overhead or other rates when applied to the Government portion of the applicable allocation base.

“Official” means—

(1) An officer, as defined in 5 U.S.C. 2104;

(2) An employee, as defined in 5 U.S.C. 2105;

(3) A member of the uniformed services, as defined in 5 U.S.C. 2101(3); or

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

“Participating personally and substantially in a Federal agency procurement” means—

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

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

(ii) Preparing or developing the solicitation.

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

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

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

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

(3) “Participating substantially” means that the official’s involvement is of significance to the matter. Substantial participation requires more than official responsibility, knowledge, perfunctory involvement, or involvement on an administrative or peripheral issue. Participation may be

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

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

(i) Agency-level boards, panels, or other advisory committees that review program milestones or evaluate and make recommendations regarding alternative technologies or approaches for satisfying broad agency-level missions or objectives.

(ii) The performance of general, technical, engineering, or scientific effort having broad application not directly associated with a particular procurement, notwithstanding that such general, technical, engineering, or scientific effort subsequently may be incorporated into a particular procurement.

(iii) Clerical functions supporting the conduct of a particular procurement.

(iv) For procurements to be conducted under the procedures of OMB Circular A-76, participation in management studies, preparation of in-house cost estimates, preparation of "most efficient organization" analyses, and furnishing of data or technical support to be used by others in the development of performance standards, statements of work, or specifications.

"Source selection evaluation board" means any board, team, council, or other group that evaluates bids or proposals.

3.104-2 General.

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

(b) Agency officials are reminded that there are other statutes and regulations that deal with the same or related prohibited conduct, for example—

(1) The offer or acceptance of a bribe or gratuity is prohibited by 18 U.S.C. 201 and 10 U.S.C. 2207. The acceptance of a gift, under certain circumstances, is prohibited by 5 U.S.C. 7353 and 5 CFR Part 2635;

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

(3) Post-employment restrictions are covered by 18 U.S.C. 207 and 5 CFR parts 2637 and 2641, that prohibit certain activities by former Government employees, including representation of

a contractor before the Government in relation to any contract or other particular matter involving specific parties on which the former employee participated personally and substantially while employed by the Government. Additional restrictions apply to certain senior Government employees and for particular matters under an employee's official responsibility;

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

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

(6) Using nonpublic information to further an employee's private interest or that of another and engaging in a financial transaction using nonpublic information are prohibited by 5 CFR 2635.703.

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

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

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

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

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

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

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

(c) Actions required when an agency official contacts or is contacted by an offeror regarding non-Federal employment (subsection 27(c) of the Act).

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

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

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

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

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

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

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

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

(d) Prohibition on former official's acceptance of compensation from a contractor (subsection 27(d) of the Act).

(1) A former official of a Federal agency may not accept compensation from a contractor that has been awarded a competitive or sole source contract, as an employee, officer, director, or consultant of the contractor within a period of 1 year after such former official—

(i) Served, at the time of selection of the contractor or the award of a contract to that contractor, as the procuring contracting officer, the source selection authority, a member of a source selection evaluation board, or the chief of a financial or technical evaluation team in a procurement in which that contractor was selected for award of a contract in excess of \$10,000,000;

(ii) Served as the program manager, deputy program manager, or administrative contracting officer for a contract in excess of \$10,000,000 awarded to that contractor; or

(iii) Personally made for the Federal agency a decision to—

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

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

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

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

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

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

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

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

(3) Nothing in paragraph (d)(1) of this subsection may be construed to prohibit a former official of a Federal agency from accepting compensation from any division or affiliate of a contractor that does not produce the same or similar products or services as the entity of the contractor that is responsible for the contract referred to in paragraph (d)(1) of this subsection.

3.104-7 Violations or possible violations.

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

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

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

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

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

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

- (1) Advise the contracting officer to continue with the procurement;
- (2) Begin an investigation;
- (3) Refer the information disclosed to appropriate criminal investigative agencies;
- (4) Conclude that a violation occurred; or

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

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

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

(1) If a contract has not been awarded—

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

(2) If a contract has been awarded—

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

(ii) Void or rescind the contract with respect to which—

(A) The contractor or someone acting for the contractor has been convicted for an offense where the conduct constitutes a violation of subsections 27(a) or (b) of the Act for the purpose of either—

- (1) Exchanging the information covered by the subsections for anything of value; or
- (2) Obtaining or giving anyone a competitive advantage in the award of a Federal agency procurement contract; or

(B) The agency head has determined, based upon a preponderance of the evidence, that the contractor or someone acting for the contractor has engaged in conduct constituting an offense punishable under subsection 27(e)(1) of the Act; or

(iii) Take any other appropriate actions in the best interests of the Government.

(3) Refer the matter to the agency suspending or debarring official.

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

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

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

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

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

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

(b) An offeror who engages in employment discussion with an official subject to the restrictions of 3.104-3, knowing that the official has not complied with 3.104-3(c)(1), is subject to the criminal, civil, or administrative penalties set forth in subsection 27(e) of the Act.

(c) An official who refuses to terminate employment discussions (see 3.104-5) may be subject to agency administrative actions under 5 CFR 2635.604(d) if the official's disqualification from participation in a particular procurement interferes substantially with the individual's ability to perform assigned duties.

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.

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.