

Federal Acquisition Regulation

3.104-8

(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under the clause at 52.203-10, Price or Fee Adjustment for Illegal or Improper Activity, or, if the contract has been rescinded under paragraph(d)(2)(ii) of this subsection, recovery of the amount expended under the contract;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 subsection 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.

[67 FR 13059, Mar. 20, 2002]

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.

3.104-9

(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.

[67 FR 13059, Mar. 20, 2002]

3.104-9 Contract clauses.

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

(a) 52.203-8, Cancellation, Rescission, and Recovery of Funds for Illegal or Improper Activity; and

(b) 52.203-10, Price or Fee Adjustment for Illegal or Improper Activity.

[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

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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.