

# Subpart 3.1 - Safeguards

**Parent topic:** [Part 3 - Improper Business Practices and Personal Conflicts of Interest](#)

## 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](#).

## 3.102 [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.

### **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 paragraph (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.
- (iv) Participating in a *reverse auction* (see subpart 17.8).

(2) For the purpose of paragraph (b)(2) of the certificate, an individual *may* use a blanket authorization to act as an agent for the person(s) responsible 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 paragraph (a)(1) or (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 paragraph (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 paragraph (b)(1) or (2) of this section, or the certificate is suspected of being false, the *contracting officer shall* report the situation to the Attorney General in accordance with 3.303.

(4) The determination made under paragraph (2) of this section *shall* not prevent or inhibit the prosecution of any criminal or civil actions involving the occurrences or transactions to which the certificate relates.

### **3.103-3 The need for further certifications.**

A contractor that properly executed the certificate before award does not have to submit a separate certificate with each proposal to perform a work order or similar ordering instrument issued pursuant to the terms of the contract, where the Government's requirements cannot be met from another source.

## **3.104 Procurement integrity.**

### **3.104-1 Definitions.**

As used in this section—

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

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

(2) *Alternate* designated *agency ethics officials* described in 5 CFR 2638.202(b).

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

*Contractor bid or proposal information* means any of the following information submitted to a *Federal agency* as part of or in connection with a bid or proposal to enter into a *Federal agency procurement* contract, if that information has not been previously made available to the public or disclosed publicly:

(1) *Cost or pricing data* (as defined by [10 U.S.C. 3701\(1\)](#) with respect to *procurements* subject to that section, and 41 U.S.C. 3501(a)(1), with respect to *procurements* subject to that section.

(2) *Indirect costs* and direct labor rates.

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

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

(5) Information marked in accordance with [52.215-1\(e\)](#).

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

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

(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 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. 4651](#). 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(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. 2104](#) 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 ( [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 prohibit a former *official* of a *Federal agency* from accepting *compensation* from any division or affiliate of a contractor that does not produce the same or similar *products* or services as the entity of the contractor that is responsible for the contract referred to in paragraph (d)(1) of this subsection.

### **3.104-4 Disclosure, protection, and marking of contractor bid or proposal information and source selection information.**

(a) Except as specifically provided for in this subsection, no person or other entity *may* disclose *contractor bid or proposal information* or *source selection information* to any person other than a person authorized, in accordance with applicable agency regulations or procedures, by the *agency head* or the *contracting officer* to receive such information.

(b) *Contractor bid or proposal information* and *source selection information* must be protected from unauthorized disclosure in accordance with [14.401](#), [15.207](#), applicable law, and agency regulations.

(c) Individuals unsure if particular information is *source selection information*, as defined in [2.101](#), *should* consult with agency *officials* as necessary. Individuals responsible for preparing material that *may* be *source selection information* as described at paragraph (10) of the "*source selection information*" definition in [2.101](#) *must* mark the cover page and each page that the individual believes contains *source selection information* with the legend "*Source Selection Information-See FAR 2.101 and 3.104.*" Although the information in paragraphs (1) through (9) of the definition in [2.101](#) is considered to be *source selection information* whether or not marked, all reasonable efforts *must* be made to mark such material with the same legend.

(d) Except as provided in paragraph (d)(3) of this subsection, the *contracting officer* *must* notify the contractor *in writing* if the *contracting officer* believes that proprietary information, *contractor bid or proposal information*, or information marked in accordance with [52.215-1\(e\)](#) has been



inappropriately marked. The contractor that has affixed the marking *must* be given an opportunity to justify the marking.

(1) If the contractor agrees that the marking is not justified, or does not respond within the time specified in the notice, the *contracting officer may* remove the marking and release the information.

(2) If, after reviewing the contractor's justification, the *contracting officer* determines that the marking is not justified, the *contracting officer must* notify the contractor *in writing* before releasing the information.

(3) For *technical data* marked as proprietary by a contractor, the *contracting officer must* follow the procedures in [27.404-5](#).

(e) This section does not restrict or prohibit-

(1) A contractor from disclosing its own bid or proposal information or the recipient from receiving that information. During *reverse auctions*, agencies *may* reveal to all *offerors* the offered price(s), but *shall* not reveal any *offeror's* identity except for the awardee's identity subsequent to an award resulting from the auction (see [subpart 17.8](#));

(2) The disclosure or receipt of information, not otherwise protected, relating to a *Federal agency procurement* after it has been canceled by the *Federal agency*, before contract award, unless the *Federal agency* plans to resume the *procurement*;

(3) Individual meetings between a *Federal agency official* and an *offeror* or potential *offeror* for, or a recipient of, a contract or *subcontract* under a *Federal agency procurement*, provided that unauthorized disclosure or receipt of *contractor bid or proposal information* or *source selection information* does not occur; or

(4) The Government's use of *technical data* in a manner consistent with the Government's rights in the data.

(f) This section does not authorize-

(1) The withholding of any information pursuant to a proper request from the Congress, any committee or subcommittee thereof, a *Federal agency*, the Comptroller General, or an Inspector General of a *Federal agency*, except as otherwise authorized by law or regulation. Any release containing *contractor bid or proposal information* or *source selection information must* clearly identify the information as *contractor bid or proposal information* or *source selection information* related to the conduct of a *Federal agency procurement* and notify the recipient that the disclosure of the information is restricted by [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](#).)

### **3.104-5 Disqualification.**

(a) *Contacts through agents or other intermediaries.* Employment contacts between the employee and the *offeror*, that are conducted through agents, or other intermediaries, *may* require disqualification under 3.104-3(c)(1). These contacts *may* also require disqualification under other statutes and regulations. (See 3.104-2(b)(2).)

(b) *Disqualification notice.* In addition to submitting the contact report required by 3.104-3(c)(1), an agency *official* who *must* disqualify himself or herself pursuant to 3.104-3(c)(1)(ii) *must* promptly submit written notice of disqualification from further participation in the *procurement* to the *contracting officer*, the source selection authority if other than the *contracting officer*, and the agency *official's* immediate supervisor. As a minimum, the notice *must*-

(1) Identify the *procurement*;

(2) Describe the nature of the agency *official's* participation in the *procurement* and specify the approximate dates or time period of participation; and

(3) Identify the *offeror* and describe its interest in the *procurement*.

(c) Resumption of participation in a *procurement*.

(1) The *official* *must* remain disqualified until such time as the agency, at its sole and exclusive discretion, authorizes the *official* to resume participation in the *procurement* in accordance with 3.104-3(c)(1)(ii).

(2) After the conditions of 3.104-3(c)(1)(ii)(A) or (B) have been met, the *head of the contracting activity* (HCA), after consultation with the *agency ethics official*, *may* authorize the disqualified *official* to resume participation in the *procurement*, or *may* determine that an additional disqualification period is necessary to protect the integrity of the *procurement* process. In determining the disqualification period, the HCA *must* consider any factors that create an appearance that the disqualified *official* acted without complete impartiality in the *procurement*. The HCA's reinstatement decision *should* be *in writing*.

(3) Government officer or employee *must* also comply with the provisions of 18 U.S.C.208 and 5 CFR part 2635 regarding any resumed participation in a *procurement* matter. Government officer or employee *may* not be reinstated to participate in a *procurement* matter affecting the financial interest of someone with whom the individual is seeking employment, unless the individual receives-

(i) A waiver pursuant to 18 U.S.C. 208(b)(1) or (b)(3); or

(ii) An authorization in accordance with the requirements of subpart F of 5 CFR part 2635.

### **3.104-6 Ethics advisory opinions regarding prohibitions on a former official's acceptance of compensation from a contractor.**

(a) An *official* or former *official* of a *Federal agency* who does not know whether he or she is or would be precluded by 41 U.S.C. 2104 (see 3.104-3(d)) from accepting *compensation* from a particular contractor *may* request advice from the appropriate *agency ethics official* before

accepting such *compensation*.

(b) The request for an advisory opinion *must be in writing*, include all relevant information reasonably available to the *official* or former *official*, and be dated and signed. The request *must* include information about the-

(1) *Procurement(s)*, or decision(s) on matters under 3.104-3(d)(1)(iii), involving the particular contractor, in which the individual was or is involved, including contract or *solicitation* numbers, dates of *solicitation* or award, a description of the *supplies* or services procured or to be procured, and contract amount;

(2) Individual's participation in the *procurement* or decision, including the dates or time periods of that participation, and the nature of the individual's duties, responsibilities, or actions; and

(3) Contractor, including a description of the *products* or services produced by the division or affiliate of the contractor from whom the individual proposes to accept *compensation*.

(c) Within 30 days after receipt of a request containing complete information, or as soon thereafter as practicable, the *agency ethics official* should issue an opinion on whether the proposed conduct would violate 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 the requester or the contractor has actual knowledge or reason to believe that the opinion is based upon fraudulent, misleading, or otherwise incorrect information, their reliance upon the opinion will not be deemed to be in good faith.

### **3.104-7 Violations or possible violations.**

(a) A *contracting officer* who receives or obtains information of a violation or possible violation of 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.

(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 [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.

### **3.104-9 Contract clauses.**

In *solicitations* and contracts that exceed the *simplified acquisition threshold*, other than those for *commercial products* or *commercial services*, 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.