GOOD GOVERNANCE FOR PUBLIC PROCUREMENT: LINKING ISLANDS OF INTEGRITY
ANNEXES

Expert Meeting on Integrity in Public Procurement

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This document, prepared by Wayne A. Wittig, contains annexes to the document “Good Governance for Public Procurement: Linking Islands of Integrity” [GOV/PGC/ETH(2005)2] and illustrates the frameworks for controlling corruption in public procurement.

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Framework for Good Governance

This Supplement provides examples of law and regulation of existing public procurement systems to illustrate how corruption may be identified, controlled and prevented. Good governance has as its objective the overall benefit of the people being governed through properly executed actions by government officials. Clear policies and trained people help assure that proper execution occurs consistently and predictably. Once it is clear what corruption is, it can be more easily exposed and corrective or remedial actions applied to sanction those who perpetuated it. But it is even more important that we avoid corrupt activities and their costly effects as much as possible. In order to do this, we can concentrate on the means of preventing corruption and abuse of the procurement system. This is where the goals of strengthening the professional capacity of individuals and institutions are emphasized.

The framework for controlling corruption in public procurement involves five topic areas to prevent problems through:

- Professional Independence:
- Professional Standing And Training:
- Challenge and Review Systems:
- Quality Control And Review Systems:
- System Management:

Each of these areas for preventive policies is examined through applicable of United States law and regulation and other selected governments. These examples of how the need for accountability and integrity are balanced with efficiency and effectiveness are summarized in the following Table. This framework may be used for reviewing other countries’ means of controlling corruption in public procurement to support individual procurement officials.
The United States Example of
A FRAMEWORK FOR CONTROLLING CORRUPTION
IN PUBLIC PROCUREMENT

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ANNEX 1 - PROFESSIONAL INDEPENDENCE

PROFESSIONAL INDEPENDENCE:
Approaches used to assure the professional independence of officials in charge of procurement to make properly balanced decisions on the basis of merit and shield them from improper pressure of higher ranking politically designated officials. (Integrity)

1.A. United States’ Example

To help control the supply side of the corruption equation, the United States in 1977 enacted The Foreign Corrupt Practices Act that made it illegal for U.S. nationals to pay bribes to obtain business abroad when those bribes are against local laws in the foreign country. The record-keeping provisions of the Act require that all publicly held companies must keep records that clearly indicate how their assets are used. The government audits the books when unethical practices are suspected.

The United States also has similar procedures in its law to guide the actions of all civil servants. In general, an employee of government, no matter the rank or method of appointment, should not misuse their office for private gain. Detailed prescriptions of behavior are contained in the Federal Acquisition Regulation (FAR). The FAR System is authorized by the Office of Federal Procurement Policy (OFPP) Act of 1974 (Public. Law. 93-400 as amended). The FAR is prepared, issued, and maintained, jointly by the Secretary of Defense, the Administrator of General Services, and the Administrator, National Aeronautics and Space Administration, under their statutory authorities.

The most significant provisions involve the prohibition of gratuities and contingent fees (fees paid to an agent when a contract is awarded), and procurement integrity controls. Each of these tries to closely define how contractors and government officials can avoid problems in their conduct. Contractors are restricted by criminal statutes and contracting regulations from providing goods and services to the personal benefit of federal employees. These restrictions apply to anything of monetary value -- including gifts, entertainment, loans, travel, favors, hospitality, lodging, discounts, and meals. Many of the activities a contractor may undertake with its commercial customers (e.g., taking a prospective client to dinner) are prohibited when dealing with federal government employees. Some exceptions to the gratuities rules do exist, however. For example, contractors may provide federal employees (a) modest items of food and refreshments offered other than as part of a meal; (b) favorable rates/discounts available to the public or all Government employees; and (c) greeting cards and items with little intrinsic value (e.g., plaques, trophies). Federal employees may also accept non-cash gifts of $20 or less, not to exceed $50 annually from any one person or company. Because of these stringent rules, contractors must train employees who deal with the federal government so they understand these restrictions and avoid even the suspicion of wrongdoing. If there is a suspicion of improper behavior, the procedures set out how the contracting officials should deal with it and what sanctions are appropriate.
Outline Of U.S. Regulations On Procurement Integrity

Disclosing and Obtaining Contractor Bid or Proposal Information or Source Selection Information

A present or former employee of, or person acting on behalf of or advising, the U.S. on a procurement, who has or had access to such information shall not disclose it before the award of the contract to which the information relates. (48 CFR 3.104-4(a))

No person shall knowingly obtain such information before the award of the contract to which the information relates. (48 CFR 3.104-4(b))

Offers of Non-Federal Employment

An official participating personally and substantially in a procurement for a contract in excess of the simplified acquisition threshold ($100,000) who is contacted by a bidder regarding non-federal employment during the conduct of the procurement shall:

- Report the contact to his supervisor and the DAEO in writing; and
- Reject the offer; or
- Disqualify himself in writing to the Head of the Contracting Activity in accordance with 18 U.S.C. § 208 until authorized to resume on grounds that:
  - the offeror is no longer a bidder; or
  - all discussions have terminated without an agreement for employment. (48 CFR 3.104-4(c))

This requirement does not apply after the award of the contract or after the procurement has been canceled, although 18 U.S.C. § 208 would still require disqualification on the part of an employee who is administering a contract.

Accepting Compensation from a Contractor

A former official may not accept compensation from a contractor within a year after he served as the procuring contracting officer, the source selection authority, a member of the source selection evaluation board or the chief of a financial or technical evaluation team for a procurement for a contract in excess of $10 million awarded to that contractor.

The above restriction also applies to a former official who served as program manager, deputy program manager or administrative contracting officer for a contract over $10 million.

It applies to a former official who made a decision to:

- Award a contract, modification, subcontract, task order or delivery order, in excess of $10 million.
- Establish overhead or other rates applicable to a contract in excess of $10 million; or
- Approve issuance of a contract payment or payments in excess of $10 million, or pay or settle a claim in excess of $10 million. (48 CFR 3.104-4(d))

Note that this restriction can apply to decisions made after the award of the contract which need not be competitively awarded. The restriction does not apply to accepting compensation from a division or affiliate of the contractor that does not produce the same or similar product or service.

The one-year prohibition on accepting compensation begins:

- On the date of selection of the contractor for a former official who served in a position listed in paragraph A at that time, but not on the date of the award of the contract.
- On the date of the award of the contract for a official who served in a position listed in paragraph A at that time whether or not he was serving at the time of selection.
- On the last date an official served in a position listed in paragraph B; or
1. A.1. Contingent Fees

In regards to members of Congress, there is a long-standing provision in US law (United States Code Title 41 Section 22) which prohibits any member of Congress from “any share or part of the contract, or to any benefit that may arise there from”. The complete language follows:

Sec. 22. Interest of Member of Congress

“No Member of Congress shall be admitted to any share or part of any contract or agreement made, entered into, or accepted by or on behalf of the United States, or to any benefit to arise thereupon. The provisions of this section shall not apply to any contracts or agreements heretofore or hereafter entered into under the Agricultural Adjustment Act (7 U.S.C. 601 et seq.), the Federal Farm Loan Act, the Emergency Farm Mortgage Act of 1933, the Federal

Definitions

Contractor bid or proposal information means information not made available to the public and includes:

- Cost or pricing data.
- Indirect costs and direct labor rates.
- Proprietary information about manufacturing processes, operations or techniques; and
- Information marked by the contractor as “contractor bid or proposal information.”

Source selection information means information not made available to the public and includes:

- Bid prices.
- Proposed costs or prices from bidders;
- Source selection and technical evaluation plans.
- Technical evaluations, cost or price evaluations, competitive range determinations, rankings of bids, reports of source selection panels; and
- Other information marked as “source selection” based on a determination that its disclosure would jeopardize the procurement.

Application

The prohibitions on disclosing and obtaining procurement information and on handling offers of non-federal employment apply on January 1, 1997 with respect to every federal agency procurement using competitive procedures.

The post-employment restrictions apply to any former official whose federal employment ended on or after January 1, 1997. Those whose employment ended before January 1, 1997 are subject to the prior restrictions. However, an official who made key pre-award decisions on a contract before January 1, 1997 but who did not leave government until after January 1, 1997 is not covered by either the old or the new restrictions, although the provisions of 18 U.S.C. § 207(a) would apply.

An official who serves in a post-award position or makes post-award decisions after January 1, 1997 would be subject to the one-year bar even on a contract that was awarded before January 1, 1997.

Source: Department of Justice (http://www.usdoj.gov/jmd/ethics/text/procuretxtb.htm)
Farm Mortgage Corporation Act, the Farm Credit Act of 1933, and the Home Owners' Loan Act of 1933 (12 U.S.C. 1461 et seq.), and shall not apply to contracts or agreements of a kind which the Secretary of Agriculture may enter into with farmers: Provided, That such exemption shall be made a matter of public record."

1. A.2. Office of Government Ethics

In addition to the provisions covering procurement integrity, there has been established in the United States an Office of Government Ethics (OGE). The OGE is the supervising ethics office for the executive branch of the Federal Government. OGE provides advice and guidance to departments and agencies and their employees on Government ethics matters. The Office answers inquiries from government employees and the public on ethics. In addition, the Office writes regulations on financial disclosure, standards of ethical conduct, outside employment, financial interests, ethics training and post-Government employment restrictions. OGE also provides ethics training and produces educational brochures, videos and posters for the executive branch. The Office periodically reviews ethics programs throughout the executive branch. The Office has various organizational units, including an education and program services division, a financial disclosure division, a program review division, a legal office and an information resources office.

In addition, OGE and the agencies maintain a separate public disclosure system for Standard Form (SF) 278 Public Financial Disclosure Reports filed by high-level executive branch officials. The reports of Presidential appointees subject to Senate confirmation, designated agency ethics officials, and certain other officials are available from OGE directly by filing the appropriate access form, OGE Form 201. SF 278 reports of those officials and all other public filers are also available from the officials' own employing departments and agencies throughout the executive branch. These records are available under the Ethics in Government Act of 1978 (5 U.S.C. appendix, § 105), subject to certain restrictions on use (including a general prohibition on commercial use, except for dissemination to the general public by news and communications media). The Ethics Act access procedures also apply to certain other "covered records", including certificates of divestiture and some qualified trust documents. Under a separate procedure requiring a simple request, OGE also makes available semiannual agency reports of gifts of travel from non-Federal sources under a special statutory provision, 31 U.S.C. § 1353.

1. A.3 Federal Acquisition Regulation

Part 3--Improper business practices and personal conflicts of interest

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 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.

(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 (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 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 (b)(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 (b)(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. 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


"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.

3.104-4 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(h).

(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 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 section 27 of the Act;

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 subsection 27(d) of the Act (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 subsection 27(d) of the Act.

(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 subsection 27(d) of the Act. 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 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.

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.
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.
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.

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.

3.303 Reporting suspected antitrust violations.

(a) Agencies are required by 41 U.S.C. 253b(i) 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) of this section 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 let by certain agencies, or for contracts in certain geographical areas, or on certain products, and bid high on all other jobs;

(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.

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 permitted by 10 U.S.C. 2306(b) and 41 U.S.C. 254(a).
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.

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. 254(a), 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 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.

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.

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).

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) of this section, 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.

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.

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.

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 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).

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, directly or indirectly, 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" 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 services 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 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.

3.502-2 Subcontractor kickbacks.

The Anti-Kickback Act of 1986 (41 U.S.C. 51-58) 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 Act-

(a) Prohibits any person from-

(1) Providing, attempting to provide, or offering to provide any kickback;

(2) Soliciting, accepting, or attempting to accept any kickback; 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 subcontractor under a subcontract of the prime contract the amount of any kickback which was or may be offset against the prime contractor under paragraph (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 the Contract Disputes Act of 1978.

(e) Authorizes contracting officers to order that sums withheld under paragraph (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 paragraph (d)(2) of this subsection has been accomplished unless the amount withheld has been paid to the Government.

(g) Requires a prime contractor or subcontractor to report in writing to the inspector general of the contracting agency, the head of the contracting agency if the agency does not have an inspector general, or the Department of Justice any possible violation of the Act when the prime contractor or subcontractor has reasonable grounds to believe such violation may have occurred.

(h) Provides that, for the purpose of ascertaining whether there has been a violation of the Act with respect to any prime contract, the General Accountability Office (GAO) and the inspector general of the contracting agency, or a representative of such contracting agency designated by the head of the 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 $100,000 for other than commercial items (see Part 12), a requirement that the prime contractor shall-

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

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

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

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).

3.503 Unreasonable restrictions on subcontractor sales.

3.503-1 Policy.

10 U.S.C. 2402 and 41 U.S.C. 253g 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.

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.

Subpart 3.6- Contracts with Government Employees or Organizations Owned or Controlled by Them

3.601 Policy.

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

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

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

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

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

3.700 Scope of subpart.

(a) This subpart prescribes Government wide 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.

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.

3.702 Definition.

"Final conviction" means a conviction, whether entered on a verdict or plea, including a plea of nolo contendere, for which a sentence has been imposed.

3.703 Authority.

(a) Section 1(e) of Public Law 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) Subsection 27(e)(3) of the Office of Federal Procurement Policy Act (41 U.S.C. 423) (the OFPP Act), as amended, requires a Federal agency, upon receiving information that a contractor or a person has engaged in conduct constituting a violation of subsection 27(a) or (b) of the OFPP Act, 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 subsection 27(e)(1) of the OFPP Act; 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.

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 effect at the time the final conviction is entered.

(c) If there is a final conviction for an offense punishable under subsection 27(e) of the OFPP Act, 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.

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 the 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 practicable, consistent with the principles of fundamental fairness. As a minimum, however, agencies shall provide the following:

(1) A notice of 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 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 therefore, 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 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 therefore, is not a claim within the meaning of the Contract Disputes Act of 1978 (CDA), 41 U.S.C. 801-813, or Part 32. Therefore, the procedures required by the CDA 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.

Subpart 3.8- Limitation on the Payment of Funds to Influence Federal Transactions

3.800 Scope of subpart.

This subpart prescribes policies and procedures implementing section 319 of the Department of Interior and Related Agencies Appropriations Act, Pub. L. 101-121, which added a new section 1352 to title 31, United States Code, entitled "Limitation on use of appropriated funds to influence certain Federal contracting and financial transactions" (the Act).

3.801 Definitions.

"Agency," as used in this section, means an executive agency as defined in 2.101.

"Covered Federal action," as used in this section, means any of the following Federal actions:

(a) The awarding of any Federal contract.

(b) The making of any Federal grant.

(c) The making of any Federal loan.

(d) The entering into of any cooperative agreement.

(e) The extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

"Indian tribe" and "tribal organization," as used in this section, 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," as used in this section, 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," as used in this section, 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," as used in this section, includes the following individuals who are employed by an agency:

(a) An individual who is appointed to a position in the Government under title 5, United States Code, including a position under a temporary appointment.

(b) A member of the uniformed services, as defined in subsection 101(3), title 37, United States Code.

(c) A special Government employee, as defined in section 202, title 18, United States Code.

(d) 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," as used in this section, 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 with respect to expenditures specifically permitted by other Federal law.

"Reasonable compensation," as used in this section, 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," as used in this section, 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," as used in this section, includes the contractor and all subcontractors. This term excludes an Indian tribe, tribal organization, or any other Indian organization with respect to expenditures specifically permitted by other Federal law.

"Regularly employed," as used in this section, 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," as used in this section, 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.

3.802 Prohibitions.

(a) Section 1352 of title 31, United States Code, among other things, 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 of the
following covered Federal actions: the awarding of any Federal contract; the making of any Federal grant;
the making of any Federal loan; the entering into of any cooperative agreement; or, the modification of any
Federal contract, grant, loan, or cooperative agreement.

(b) The Act also requires offerors to furnish a declaration consisting of both a certification and a
disclosure. 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.

(1) By signing its offer, an offeror certifies that no appropriated funds have been paid or will be paid

(2) The disclosure shall identify if any funds other than Federal appropriated funds (including profit or
fee received under a covered Federal action) have been paid, or will be paid, to 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 a Federal contract,
grant, loan, or cooperative agreement.

(c) The prohibitions of the Act do not apply under the following conditions:

(1) Agency and legislative liaison by own employees.

(i) The prohibition on the use of appropriated funds, in paragraph (a) of this section, does not apply in
the case of a 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.

(ii) For purposes of paragraph (c)(1)(i) of this section, providing any information specifically
requested by an agency or Congress is permitted at any time.

(iii) The following agency and legislative liaison activities are permitted at any time where they are
not related to a specific solicitation for any covered Federal action:

(A) Discussing with an agency the qualities and characteristics (including individual demonstrations)
of the person's products or services, conditions or terms of sale, and service capabilities.

(B) Technical discussions and other activities regarding the application or adaptation of the person's
products or services for an agency's use.

(iv) The following agency and legislative liaison activities are permitted where they are prior to
formal solicitation of any covered Federal action:

(A) Providing any information not specifically requested but necessary for an agency to make an
informed decision about initiation of a covered Federal action.

(B) Technical discussions regarding the preparation of an unsolicited proposal prior to its official submission.

(C) Capability presentations by persons seeking awards from an agency pursuant to the provisions of the Small Business Act, as amended by Pub. L. 95-507, and subsequent amendments.

(v) Only those activities expressly authorized by paragraph (c)(1) of this section are permitted under this section.

(2) Professional and technical services.

(i) The prohibition on the use of appropriated funds, in paragraph (a) of this section, does not apply in the case of-

(A) Payment of reasonable compensation made to an officer or employee of a person requesting or receiving a covered Federal action or an extension, continuation, renewal, amendment, or modification of 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;

(B) 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.

(ii) For purposes of paragraph (c)(2)(i) of this section, “professional and technical services” shall be 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 (such as a licensed lawyer) or a technical person (such as a licensed accountant) 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.

(iii) 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.

(iv) Only those services expressly authorized by paragraphs (c)(2)(i)(A) and (B) of this section are permitted under this section.
(v) The reporting requirements of 3.803(a) shall not apply with respect to payments of reasonable compensation made to regularly employed officers or employees of a person.

3.803 Certification and disclosure.

(a) Any contractor who requests or receives a Federal contract exceeding $100,000 shall submit the certification and disclosures required by the provision at 52.203-11, Certification and Disclosure Regarding Payments to Influence Certain Federal Transactions, with its offer. Disclosures under this section shall be submitted to the contracting officer using OMB standard form LLL, Disclosure of Lobbying Activities.

(b) The contractor shall file a disclosure form at the end of each calendar quarter in which there occurs any event that materially affects the accuracy of the information contained in any disclosure form previously filed by such person under paragraph (a) of this section. An event that materially affects the accuracy of the information reported includes:

(1) A cumulative increase of $25,000 or more in the amount paid or expected to be paid for influencing or attempting to influence a covered Federal action; or

(2) A change in the person(s) or individual(s) influencing or attempting to influence a covered Federal action; or

(3) A change in the officer(s), employee(s), or Member(s) of Congress contacted to influence or attempt to influence a covered Federal action.

(c) The contractor shall require the submittal of a certification, and if required, a disclosure form, by any person who requests or receives any subcontract exceeding $100,000 under the Federal contract.

(d) All subcontractor disclosure forms (but not certifications), shall be forwarded from tier to tier until received by the prime contractor. The prime contractor shall submit all disclosure forms to the contracting officer at the end of the calendar quarter in which the disclosure form is submitted by the subcontractor. Each subcontractor certification shall be retained in the subcontract file of the awarding contractor.

3.804 Policy.

(a) 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 Transactions, prior to the award of any contract exceeding $100,000.

(b) The contracting officer shall forward a copy of all contractor disclosures furnished pursuant to the clause at 52.203-12, Limitation on Payments to Influence Certain Federal Transactions, to the official designated in accordance with agency procedures, for subsequent submission to Congress. The original of the disclosure shall be retained in the contract file.

3.805 Exemption.

The Secretary of Defense may exempt, on a case-by-case basis, a covered Federal action from the prohibitions of this section whenever the Secretary determines, in writing, that such an exemption is in the national interest. The Secretary shall transmit a copy of such exemption to Congress immediately after making such a determination.
3.806 Processing suspected violations.

Suspected violations of the requirements of the Act shall be referred to the official designated in agency procedures.

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.

3.808 Solicitation provision and contract clause.

(a) The provision at 52.203-11, Certification and Disclosure Regarding Payments to Influence Certain Federal Transactions, shall be included in solicitations expected to exceed $100,000.

(b) The clause at 52.203-12, Limitation on Payments to Influence Certain Federal Transactions, shall be included in solicitations and contracts expected to exceed $100,000.


Acceptance of travel and related expenses from non-Federal sources

(a) Notwithstanding any other provision of law, the Administrator of General Services, in consultation with the Director of the Office of Government Ethics, shall prescribe by regulation the conditions under which an agency in the executive branch (including an independent agency) may accept payment, or authorize an employee of such agency to accept payment on the agency’s behalf, from non-Federal sources for travel, subsistence, and related expenses with respect to attendance of the employee (or the spouse of such employee) at any meeting or similar function relating to the official duties of the employee. Any cash payment so accepted shall be credited to the appropriation applicable to such expenses. In the case of a payment in kind so accepted, a pro rata reduction shall be made in any entitlement of the employee to payment from the Government for such expenses.

(b) Except as provided in this section or section 4111 or 7342 of title 5, an agency or employee may not accept payment for expenses referred to in subsection (a). An employee who accepts any payment in violation of the preceding sentence.

(1) may be required, in addition to any penalty provided by law, to repay, for deposit in the general fund of the Treasury, an amount equal to the amount of the payment so accepted; and

(2) in the case of a repayment under paragraph (1), shall not be entitled to any payment from the Government for such expenses.

(c) As used in this section.

(1) the term “executive branch” means all executive agencies (as such term is defined in section 105 of title 5); and

(2) the term “employee in the executive branch” means—

(A) an appointed officer or employee in the executive branch; and
(B) an expert or consultant in the executive branch, under section 3109 of title 5; and

(3) the term “payment” means a payment or reimbursement, in cash or in kind.

(d)

(1) The head of each agency of the executive branch shall, in the manner provided in paragraph (2), submit to the Director of the Office of Government Ethics reports of payments of more than $250 accepted under this section with respect to employees of the agency. The Director shall make such reports available for public inspection and copying.

(2) The reports required by paragraph (1) shall, with respect to each payment.

(A) specify the amount and method of payment, the name of the person making the payment, the name of the employee, the nature of the meeting or similar function, the time and place of travel, the nature of the expenses, and such other information as the Administrator of General Services may prescribe by regulation under subsection (a);

(B) be submitted not later than May 31 of each year with respect to payments in the preceding period beginning on October 1 and ending on March 31; and

(C) be submitted not later than November 30 of each year with respect to payments in the preceding period beginning on April 1 and ending on September 30.

1. B. Other States’ Example -- Switzerland

In a brochure\(^2\) prepared by the Swiss State Secretariat for Economic Affairs (seco) in collaboration with The Federal Office of Justice and other bodies, the Swiss Government gives an overview of the changes to its criminal law since changes to implement the OECD Convention of 1997. Whoever bribes a foreign official commits a criminal act punishable by up to five years of imprisonment and companies can be fined up to five million Swiss francs. Below are excerpts from this brochure (pages 8 – 11).

Why combat corruption?

Up until recently in most countries, the fight against the corruption of public officials was solely a domestic issue. The bribery of foreign public officials was either ignored or seen as a necessary evil in order to be able to hold one's own against competition. In various countries, including Switzerland, such expenditures were even tax-deductible. The opening up and liberalization of markets and growing pressure from certain quarters of society changed this perception during the 1990's. And so combating foreign corruption has become an important topic in the international community. Corruption gives rise to substantial economic and social costs. Thus it needs to be combated worldwide, in spite of differences in cultures and traditions. For this reason, Switzerland has taken measures to fight corruption, including in its policies and activities concerning official development assistance.

Social and political reasons

Corruption distorts access to public services and leads to the unlawful enrichment of individuals, thereby causing tensions in the social fabric. Corruption undermines the rule of law and provides fertile

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\(^2\) “Preventing corruption – information for Swiss businesses operating abroad” published by seco in 2003. For more information, see: http://www.seco.admin.ch/publikationen/00196/index.html?lang=en
Ground for organized crime. Corruption leads to a general loss of confidence in public institutions. This in turn gives rise to a sense of powerlessness, indifference, and cynicism, which can jeopardize the basis of democracy.

**Economic reasons**

Corruption leads to wasting funds that have been earmarked for public services or works (e.g., through uneconomic infrastructure projects, which offer many opportunities for corruption). Corruption shakes the confidence of investors and means that long-term investments in particular will be transacted elsewhere. Corruption distorts competition, hampers transparency, and thus leads to an inefficient distribution of resources (e.g., businesses do not concentrate on offering the best and most reasonably priced products possible, but rather on cultivating useful political contacts).

**Business reasons**

A Swiss company that bribes a foreign public official is committing an offence that is (also) punishable as a felony in Switzerland. Some governments and international organizations such as the World Bank publish lists of companies that have been involved with corruption. These companies may be excluded from public services and international projects. In addition, since 1998 all contracts signed as part of Swiss official development assistance have contained anticorruption clauses that provide if the termination of the contract and the exclusion from future contracts in the event of a breach. The reputation of a company can be seriously damaged in the eyes of business partners and the public at large if it becomes known that the company has conducted itself in a corrupt manner. It takes years to build up a good reputation, but it may only take one corruption scandal to ruin it. A company that corrupts others encourages corruption within its own ranks. Individuals who corrupt public officials on behalf of a company may themselves be tempted to misappropriate money for their own ends or to be bribed. Once a company or an individual has made one corrupt payment, they may themselves open to blackmail.

**Revised Swiss criminal law on corruption**

**Overview:**

Switzerland revised its criminal law on corruption in 2000. The amendments included the introduction of a new criminal offence: Corrupting foreign public officials. Swiss criminal law on corruption makes a distinction between active and passive corruption on the one hand and the granting or the acceptance of an advantage on the other.

Active corruption, or bribery, in terms of Article 322 ter Swiss Penal Code (StGB), arises when a person “offers, promises, or gives a public official an advantage which is not due to him or her, or offers, promises, or gives such an advantage to a third party, in order to cause the public official to carry out or fail to carry out an act relating to his or her official activity that is contrary to his or her duty or dependent on his or her discretion” . Active corruption is the offering of an advantage in return for a specific act or omission. Conversely, a public official “who asks for, lets him- or herself be promised, or accepts an advantage in return for an official service” is guilty of passive corruption, or the acceptance of bribes (Art. 322 quarter StGB).

The granting and the acceptance of an advantage, concern, prohibited advantages (gifts), not specifically relating to a specific transaction, but which are provided or accepted with a view to the conduct of official duties in the future (Art. 322 quinque and Art. 322 sephi StGB).

In respect of the active corruption of public officials who “are employed by a foreign state or an international organization” (Art. 322 septies StGB), what holds true for Swiss public officials basically
applies as well. However, in Switzerland, only in the case of Swiss public officials are the granting and the acceptance of advantages as well as passive corruption criminal offences.

In minor cases of corruption (bribery and the granting and the acceptance of advantages as defined in Art. 322 ter – 322 septies StGB), a decision may be taken neither to prosecute, nor bring the matter to court, nor impose a penalty (Art. 322 octies 1 StGB). In addition, there are no undue advantages within the meaning of Article 322 ter – 322 septies if these are permitted in the course of duties or if they are small, customary advantages (Art. 322 octies 2 StGB)

Under the criminal law on corruption, a public official is defined as a “member of a judicial or other official body, a civil servant, an officially employed expert, translator or interpreter, arbitrator, or member of the armed forces” (Art. 322 ter StGB), but also a private individual who performs public duties “ (Art. 322 octies 3 StGB).
ANNEX 2. - PROFESSIONAL STANDING AND TRAINING

PROFESSIONAL STANDING AND TRAINING: Approaches used to enhance the professional skills of the officials in charge of procurement and approaches used to train the officials in charge of procurement to prevent corruption and to enhance efficiency. (Professionalism)

2 A. United States’ Example

It is instructive to look at the standing of procurement officials and their training in the U.S. to get insight into how a well-integrated system could look.

Contracting authority is passed through the President to the political heads of Executive Branch agencies in the United States. Over the last 30 years, there has been sustained pressure from within the agencies and within Congress to improve the management of the system through which about $200 billion is obligated each year. This has resulted in a public procurement infrastructure of agencies and people accountable and responsible for spending procurement dollars. Contracting employees as well as other civil servants are covered by the President’s Executive Order 12674 of April 12, 1989 re “Principles Of Ethical Conduct For Government Officers And Employees”.

2. A. 1. Senior Procurement Executive Responsibilities

As required by law (OFPP Act Title 41 United States Code Section 414) each agency head is to appoint a “senior procurement executive” 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. This individual is also responsible for the career development, and use of contracting authority within the agency. (Title 41 United States Code Section 433).

As set out in the FAR, 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 are selected and appointed after considering their integrity and experience. 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, which they receive in writing from the appointing authority. Information on the limits of the contracting officers’ authority is to be readily available to the public.

Contracting officers are responsible for ensuring that all requirements of law, executive orders, regulations, and all other applicable procedures have been met. They 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 are asked to exercise their best business judgment.

To promote fair dealing with contractors, contracting officers are to ensure that sufficient funds are available for obligation under the contract, that contractors receive impartial, fair, and equitable treatment;
and that they request and consider the advice of specialists in audit, law, engineering, transportation, and other fields, as appropriate. 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...Contracting officers normally head a team of contract specialists, assistants and clerks to prepare the document for signature. This preparation often involves issuing the solicitations, evaluation of offers received and negotiation of the contract terms if necessary.

2. A.1. (a) OFPP Act Title 41 Chapter 7 Section 414

Sec. 414. Executive agency responsibilities

To further achieve effective, efficient, and economic administration of the Federal procurement system, the head of each executive agency shall, in accordance with applicable laws, Government-wide policies and regulations, and good business practices -

(1) increase the use of full and open competition in the procurement of property or services by the executive agency by establishing policies, procedures, and practices that assure that the executive agency receives a sufficient number of sealed bids or competitive proposals from responsible sources to fulfill the Government's requirements (including performance and delivery schedules) at the lowest reasonable cost considering the nature of the property or service procured;

(2) establish clear lines of authority, accountability, and responsibility for procurement decisionmaking within the executive agency, including placing the procurement function at a sufficiently high level in the executive agency to provide -

(A) direct access to the head of the major organizational element of the executive agency served; and

(B) comparative equality with organizational counterparts;

(3) designate a senior procurement executive who shall be responsible for management direction of the procurement system of the executive agency, including implementation of the unique procurement policies, regulations, and standards of the executive agency; and

(4) develop and maintain a procurement career management program in the executive agency to assure an adequate professional work force.

2.2 Acquisition Workforce

OFPP Act Title 41 Chapter 7 Section 433

Sec. 433. - Acquisition workforce

(a) Applicability

This section does not apply to an executive agency that is subject to chapter 87 of title 10.

(b) Management policies

(1) Policies and procedures

The head of each executive agency, after consultation with the Administrator for Federal Procurement
Policy, shall establish policies and procedures for the effective management (including accession, education, training, career development, and performance incentives) of the acquisition workforce of the agency. The development of acquisition workforce policies under this section shall be carried out consistent with the merit system principles set forth in section 2301(b) of title 5.

(2) Uniform implementation

The head of each executive agency shall ensure that, to the maximum extent practicable, acquisition workforce policies and procedures established are uniform in their implementation throughout the agency.

(3) Government-wide policies and evaluation

The Administrator shall issue policies to promote uniform implementation of this section by executive agencies, with due regard for differences in program requirements among agencies that may be appropriate and warranted in view of the agency mission. The Administrator shall coordinate with the Deputy Director for Management of the Office of Management and Budget to ensure that such policies are consistent with the policies and procedures established and enhanced system of incentives provided pursuant to section 5051(c) of the Federal Acquisition Streamlining Act of 1994 (41 U.S.C. 263 note). The Administrator shall evaluate the implementation of the provisions of this section by executive agencies.

(c) Senior procurement executive authorities and responsibilities

Subject to the authority, direction, and control of the head of an executive agency, the senior procurement executive of the agency shall carry out all powers, functions, and duties of the head of the agency with respect to implementation of this section. The senior procurement executive shall ensure that the policies of the head of the executive agency established in accordance with this section are implemented throughout the agency.

(d) Management information systems

The Administrator shall ensure that the heads of executive agencies collect and maintain standardized information on the acquisition workforce related to implementation of this section. To the maximum extent practicable, such data requirements shall conform to standards established by the Office of Personnel Management for the Central Personnel Data File.

(e) Applicability to acquisition workforce

The programs established by this section shall apply to the acquisition workforce of each executive agency. For purposes of this section, the acquisition workforce of an agency consists of all employees serving in acquisition positions listed in subsection (g)(1)(A) of this section.

(f) Career development

(1) Career paths

The head of each executive agency shall ensure that appropriate career paths for personnel who desire to pursue careers in acquisition are identified in terms of the education, training, experience, and assignments necessary for career progression to the most senior acquisition positions. The head of each executive agency shall make information available on such career paths.

(2) Critical duties and tasks
For each career path, the head of each executive agency shall identify the critical acquisition-related duties and tasks in which, at minimum, employees of the agency in the career path shall be competent to perform at full performance grade levels. For this purpose, the head of the executive agency shall provide appropriate coverage of the critical duties and tasks identified by the Director of the Federal Acquisition Institute.

(3) Mandatory training and education

For each career path, the head of each executive agency shall establish requirements for the completion of course work and related on-the-job training in the critical acquisition-related duties and tasks of the career path. The head of each executive agency shall also encourage employees to maintain the currency of their acquisition knowledge and generally enhance their knowledge of related acquisition management disciplines through academic programs and other self-developmental activities.

(4) Performance incentives

The head of each executive agency shall provide for an enhanced system of incentives for the encouragement of excellence in the acquisition workforce which rewards performance of employees that contribute to achieving the agency's performance goals. The system of incentives shall include provisions that -

(A) relate pay to performance (including the extent to which the performance of personnel in such workforce contributes to achieving the cost goals, schedule goals, and performance goals established for acquisition programs pursuant to section 263(b) of this title); and

(B) provide for consideration, in personnel evaluations and promotion decisions, of the extent to which the performance of personnel in such workforce contributes to achieving such cost goals, schedule goals, and performance goals.

(g) Qualification requirements

(1) In general

(A) Subject to paragraph (2), the Administrator shall establish qualification requirements, including education requirements, for the following positions:

(i) Entry-level positions in the General Schedule Contracting series (GS-1102).

(ii) Senior positions in the General Schedule Contracting series (GS-1102).

(iii) All positions in the General Schedule Purchasing series (GS-1105).

(iv) Positions in other General Schedule series in which significant acquisition-related functions are performed.

(B) Subject to paragraph (2), the Administrator shall prescribe the manner and extent to which such qualification requirements shall apply to any person serving in a position described in subparagraph (A) at the time such requirements are established.

(2) Relationship to requirements applicable to defense acquisition workforce

The Administrator shall establish qualification requirements and make prescriptions under paragraph
(1) that are comparable to those established for the same or equivalent positions pursuant to chapter 87 of title 10 with appropriate modifications.

(3) Approval of requirements

The Administrator shall submit any requirement established or prescription made under paragraph (1) to the Director of the Office of Personnel Management for approval. If the Director does not disapprove a requirement or prescription within 30 days after the date on which the Director receives it, the requirement or prescription is deemed to be approved by the Director.

(h) Education and training

(1) Funding levels

(A) The head of an executive agency shall set forth separately the funding levels requested for education and training of the acquisition workforce in the budget justification documents submitted in support of the President's budget submitted to Congress under section 1105 of title 31.

(B) Funds appropriated for education and training under this section may not be obligated for any other purpose.

(2) Tuition assistance

The head of an executive agency may provide tuition reimbursement in education (including a full-time course of study leading to a degree) in accordance with section 4107 of title 5 for personnel serving in acquisition positions in the agency.

2.3 Defense Acquisition

TITLE 10 Subtitle A PART II CHAPTER 87

§ 1702. Under Secretary of Defense for Acquisition, Technology, and Logistics: authorities and responsibilities

Subject to the authority, direction, and control of the Secretary of Defense, the Under Secretary of Defense for Acquisition, Technology, and Logistics shall carry out all powers, functions, and duties of the Secretary of Defense with respect to the acquisition workforce in the Department of Defense. The Under Secretary shall ensure that the policies of the Secretary of Defense established in accordance with this chapter are implemented throughout the Department of Defense. The Under Secretary shall prescribe policies and requirements for the educational programs of the defense acquisition university structure established under section 1746 of this title.

1703. Director of Acquisition Education, Training, and Career Development

The Under Secretary of Defense for Acquisition, Technology, and Logistics shall appoint a Director of Acquisition Education, Training, and Career Development within the office of the Under Secretary to assist the Under Secretary in the performance of his duties under this chapter.

1704. Service acquisition executives: authorities and responsibilities

Subject to the authority, direction, and control of the Secretary of the military department concerned, the service acquisition executive for each military department shall carry out all powers, functions, and
duties of the Secretary concerned with respect to the acquisition workforce within the military department concerned and shall ensure that the policies of the Secretary of Defense established in accordance with this chapter are implemented in that department.

1705. Directors of Acquisition Career Management in the military departments

There shall be a Director of Acquisition Career Management for each military department within the office of the service acquisition executive to assist the executive in the performance of his duties under this chapter. The Secretary of the Navy, acting through the service acquisition executive, may appoint separate directors for the Navy and the Marine Corps.

1706. Acquisition career program boards

(a) Establishment.-- The Secretary of each military department, acting through the service acquisition executive, shall establish an acquisition career program board to advise the service acquisition executive in managing the accession, training, education, and career development of military and civilian personnel in the acquisition workforce and in selecting individuals for an Acquisition Corps under section 1731 of this title.

(b) Composition of Board.-- Each acquisition career program board shall include the Director of Acquisition Career Management (or his representative), the Assistant Secretary with responsibility for manpower (or his representative), and the military and civilian senior officials with responsibility for personnel development in the various acquisition career fields. The service acquisition executive (or his representative) shall be the head of the board.

(c) Subordinate Boards -- The Secretary of a military department may establish a subordinate board structure in the department to which functions of the acquisition career program board may be delegated.

1707. Personnel in the Office of the Secretary of Defense and in the Defense Agencies

(a) Policies.-- The Secretary of Defense, acting through the Under Secretary of Defense for Acquisition, Technology, and Logistics, shall establish and implement, in such manner as the Secretary considers appropriate, policies and procedures for the effective management, including accession, education, training, and career development, of persons serving in acquisition positions in the Office of the Secretary of Defense and the Defense Agencies. Such policies and procedures shall include

(1) The establishment of one or more Acquisition Corps with respect to such persons, and

(2) The establishment of an acquisition career program board (and any appropriate subordinate board structure) with respect to such persons. The Secretary shall ensure that, to the maximum extent practicable, such policies and procedures are as uniform as practicable with the policies established under this chapter for the military departments.

(b) Management -- The Director of Acquisition Education, Training, and Career Development appointed under section 1703 of this title shall serve as the Director of Acquisition Career Management for the Office of the Secretary of Defense and for the Defense Agencies.

1721. Designation of acquisition positions

(a) Designation.-- The Secretary of Defense shall designate in regulations those positions in the Department of Defense that are acquisition positions for purposes of this chapter.
(b) Required Positions.-- In designating the positions under subsection (a), the Secretary shall include, at a minimum, all acquisition-related positions in the following areas:

(1) Program management.
(2) Systems planning, research, development, engineering, and testing.
(3) Procurement, including contracting.
(4) Industrial property management.
(5) Logistics.
(6) Quality control and assurance.
(7) Manufacturing and production.
(8) Business, cost estimating, financial management, and auditing.
(9) Education, training, and career development.
(10) Construction.
(11) Joint development and production with other government agencies and foreign countries.

(c) Management Headquarters Activities.-- The Secretary also shall designate as acquisition positions under subsection (a) those acquisition-related positions which are in management headquarters activities and in management headquarters support activities. For purposes of this subsection, the terms “management headquarters activities” and “management headquarters support activities” have the meanings given those terms in Department of Defense Directive 5100.73, entitled “Department of Defense Management Headquarters and Headquarters Support Activities”, dated November 12, 1996.

1722. Career development

(a) Career Paths -- The Secretary of Defense, acting through the Under Secretary of Defense for Acquisition, Technology, and Logistics, shall ensure that appropriate career paths for civilian and military personnel who wish to pursue careers in acquisition are identified in terms of the education, training, experience, and assignments necessary for career progression of civilians and members of the armed forces to the most senior acquisition positions. The Secretary shall make available published information on such career paths.

(b) Limitation on Preference for Military Personnel.

(1) The Secretary of Defense shall ensure that no requirement or preference for a member of the armed forces is used in the consideration of persons for acquisition positions, except as provided in the policy established under paragraph (2).

(2) The Secretary shall establish a policy permitting a particular acquisition position to be specified as available only to members of the armed forces if a determination is made, under criteria specified in the policy, that a member of the armed forces is required for that position by law, is essential for performance of the duties of the position, or is necessary for another compelling reason.

(B) Not later than December 15 of each year, the Under Secretary of Defense for Acquisition, Technology, and Logistics shall submit to the Secretary a report that lists each acquisition position that is restricted to members of the armed forces under such policy and the recommendation of the Under
Secretary as to whether such position should remain so restricted.

(c) Opportunities for Civilians To Qualify. The Secretary of Defense shall ensure that civilian personnel are provided the opportunity to acquire the education, training, and experience necessary to qualify for senior acquisition positions.

(d) Best Qualified.—The Secretary of Defense shall ensure that the policies established under this chapter are designed to provide for the selection of the best qualified individual for a position, consistent with other applicable law.


(f) Assignments Policy.

(1) The Secretary of Defense shall establish a policy on assigning military personnel to acquisition positions that provides for a balance between

(A) The need for personnel to serve in career broadening positions, and

(B) The need for requiring service in each such position for sufficient time to provide the stability necessary to effectively carry out the duties of the position and to allow for the establishment of responsibility and accountability for actions taken in the position.

(2) In implementing the policy established under paragraph (1), the Secretaries of the military departments shall provide, as appropriate, for longer lengths of assignments to acquisition positions than assignments to other positions.

(g) Performance Appraisals.—The Secretary of each military department, acting through the service acquisition executive for that department, shall provide an opportunity for review and inclusion of any comments on any appraisal of the performance of a person serving in an acquisition position by a person serving in an acquisition position in the same acquisition career field.

(h) Balanced Workforce Policy.—In the development of defense acquisition workforce policies under this chapter with respect to any civilian employees or applicants for employment, the Secretary of Defense or the Secretary of a military department (as applicable) shall, consistent with the merit system principles set out in paragraphs (1) and (2) of section 2301(b) of title 5, take into consideration the need to maintain a balanced workforce in which women and members of racial and ethnic minority groups are appropriately represented in Government service.

Search this title:

1723. General education, training, and experience requirements

(a) Qualification Requirements.—The Secretary of Defense shall establish education, training, and experience requirements for each acquisition position, based on the level of complexity of duties carried out in the position. In establishing such requirements for positions other than critical acquisition positions designated pursuant to section 1733 of this title, the Secretary may state the requirements by categories of positions.

(b) Limitation on Credit for Training or Education.—Not more than one year of a period of time spent pursuing a program of academic training or education in acquisition may be counted toward fulfilling any requirement established under this chapter for a certain period of experience.
1724. Contracting positions: qualification requirements

(a) Contracting Officers.-- The Secretary of Defense shall require that, in order to qualify to serve in an acquisition position as a contracting officer with authority to award or administer contracts for amounts above the simplified acquisition threshold referred to in section 2304 (g) of this title, an employee of the Department of Defense or member of the armed forces (other than the Coast Guard) must, except as provided in subsections (c) and (d)

(1) have completed all contracting courses required for a contracting officer

(A) in the case of an employee, serving in the position within the grade of the General Schedule in which the employee is serving, and

(B) in the case of a member of the armed forces, in the member’s grade;

(2) have at least two years of experience in a contracting position;

(A) have received a baccalaureate degree from an accredited educational institution authorized to grant baccalaureate degrees, and

(B) have completed at least 24 semester credit hours (or the equivalent) of study from an accredited institution of higher education in any of the following disciplines: accounting, business, finance, law, contracts, purchasing, economics, industrial management, marketing, quantitative methods, and organization and management; and

(4) meet such additional requirements, based on the dollar value and complexity of the contracts awarded or administered in the position, as may be established by the Secretary of Defense for the position.

(b) GS-1102 Series Positions and Similar Military Positions.

(1) The Secretary of Defense shall require that in order to qualify to serve in a position in the Department of Defense that is in the GS–1102 occupational series an employee or potential employee of the Department of Defense meet the requirements set forth in paragraph (3) of subsection (a). The Secretary may not require that in order to serve in such a position an employee or potential employee meet any of the requirements of paragraphs (1) and (2) of that subsection.

(2) The Secretary of Defense shall require that in order for a member of the armed forces to be selected for an occupational specialty within the armed forces that (as determined by the Secretary) is similar to the GS-1102 occupational series a member of the armed forces meet the requirements set forth in paragraph (3) of subsection (a). The Secretary may not require that in order to be selected for such an occupational specialty a member meet any of the requirements of paragraphs (1) and (2) of that subsection.

(c) Exceptions.-- The qualification requirements imposed by the Secretary of Defense pursuant to subsections (a) and (b) shall not apply to an employee of the Department of Defense or member of the armed forces who:

(1) served as a contracting officer with authority to award or administer contracts in excess of the simplified acquisition threshold on or before September 30, 2000;

(2) served, on or before September 30, 2000, in a position either as an employee in the GS–1102 series or as a member of the armed forces in a similar occupational specialty;
(3) is in the contingency contracting force; or

(4) is described in subsection (e)(1)(B).

(d) Waiver.-- The acquisition career program board concerned may waive any or all of the requirements of subsections (a) and (b) with respect to an employee of the Department of Defense or member of the armed forces if the board certifies that the individual possesses significant potential for advancement to levels of greater responsibility and authority, based on demonstrated job performance and qualifying experience. With respect to each waiver granted under this subsection, the board shall set forth in a written document the rationale for its decision to waive such requirements. Such document shall be submitted to and retained by the Director of Acquisition Education, Training, and Career Development.

(e) Developmental Opportunities.

(1) The Secretary of Defense may

(A) establish or continue one or more programs for the purpose of recruiting, selecting, appointing, educating, qualifying, and developing the careers of individuals to meet the requirements in subparagraphs (A) and (B) of subsection (a)(3);

(B) appoint individuals to developmental positions in those programs; and

(C) separate from the civil service after a three-year probationary period any individual appointed under this subsection who fails to meet the requirements described in subsection (a)(3).

(2) To qualify for any developmental program described in paragraph (1)(B), an individual shall have:

(A) been awarded a baccalaureate degree, with a grade point average of at least 3.0 (or the equivalent), from an accredited institution of higher education authorized to grant baccalaureate degrees; or

(B) completed at least 24 semester credit hours or the equivalent of study from an accredited institution of higher education in any of the disciplines of accounting, business, finance, law, contracts, purchasing, economics, industrial management, marketing, quantitative methods, or organization and management.

(f) Contingency Contracting Force.-- The Secretary shall establish qualification requirements for the contingency contracting force consisting of members of the armed forces whose mission is to deploy in support of contingency operations and other operations of the Department of Defense, including:

(1) completion of at least 24 semester credit hours or the equivalent of study from an accredited institution of higher education or similar educational institution in any of the disciplines of accounting, business, finance, law, contracts, purchasing, economics, industrial management, marketing, quantitative methods, or organization and management; or

(2) passing an examination that demonstrates skills, knowledge, or abilities comparable to that of an individual who has completed at least 24 semester credit hours or the equivalent of study in any of the disciplines described in paragraph (1).

1725. Office of Personnel Management approval

(a) Qualification Requirements.— The Secretary of Defense shall submit any requirement with respect to civilian employees that is established under section 1723 or under section 1724 (a)(4) of this title
to the Director of the Office of Personnel Management for approval. If the Director does not disapprove the requirement within 30 days after the date on which the Director receives the requirement, the requirement is deemed to be approved by the Director.

(b) Examinations.— The Secretary of Defense shall submit examinations to be given to civilian employees under subsection (a)(3) or (b) of section 1724 of this title to the Director of the Office of Personnel Management for approval. If the Director does not disapprove an examination within 30 days after the date on which the Director receives the examination, the examination is deemed to be approved by the Director.

Search this title:

1731. Acquisition Corps: in general

(a) Acquisition Corps.-- The Secretary of Defense shall ensure that an Acquisition Corps is established for each of the military departments and one or more Corps, as he considers appropriate, for the other components of the Department of Defense. A separate Acquisition Corps may be established for each of the Navy and the Marine Corps.

(b) Promotion Rate for Officers in Acquisition Corps.-- The Secretary of Defense shall ensure that the qualifications of commissioned officers selected for an Acquisition Corps are such that those officers are expected, as a group, to be promoted at a rate not less than the rate for all line (or the equivalent) officers of the same armed force (both in the zone and below the zone) in the same grade.

(c) OPM Approval.-- The Secretary of Defense shall submit any requirement with respect to civilian employees established under section 1732 of this title to the Director of the Office of Personnel Management for approval. If the Director does not disapprove the requirement within 30 days after the date on which the Director receives the requirement, the requirement is deemed to be approved by the Director.

1732. Selection criteria and procedures

(a) Selection Criteria and Procedures.-- Selection for membership in an Acquisition Corps shall be made in accordance with criteria and procedures established by the Secretary of Defense.

(b) Eligibility Criteria.-- Except as provided in subsections (c) and (d), only persons who meet all of the following requirements may be considered for service in the Corps:

(A) In the case of an employee, the person must be currently serving in a position within grade GS–13 or above of the General Schedule.

(B) In the case of a member of the armed forces, the person must be currently serving in the grade of major or, in the case of the Navy, lieutenant commander, or a higher grade.

(C) In the case of an applicant for employment, the person must have experience in government or industry equivalent to the experience of a person in a position described in subparagraph (A) or (B), as validated by the appropriate career program management board.

(2) The person must meet the educational requirements prescribed by the Secretary of Defense. Such requirements, at a minimum, shall include both of the following:

(A) A requirement that the person
(i) has received a baccalaureate degree at an accredited educational institution authorized to grant baccalaureate degrees, or

(ii) has been certified by the acquisition career program board of the employing military department as possessing significant potential for advancement to levels of greater responsibility and authority, based on demonstrated analytical and decisionmaking capabilities, job performance, and qualifying experience.

(B) A requirement that the person has completed

(i) at least 24 semester credit hours (or the equivalent) of study from an accredited institution of higher education from among the following disciplines: accounting, business finance, law, contracts, purchasing, economics, industrial management, marketing, quantitative methods, and organization and management; or

(ii) at least 24 semester credit hours (or the equivalent) from an accredited institution of higher education in the person’s career field and 12 semester credit hours (or the equivalent) from such an institution from among the disciplines listed in clause (i) or equivalent training as prescribed by the Secretary to ensure proficiency in the disciplines listed in clause (i).

(3) The person must meet experience requirements prescribed by the Secretary of Defense. Such requirements shall, at a minimum, include a requirement for at least four years of experience in an acquisition position in the Department of Defense or in a comparable position in industry or government.

(4) The person must meet such other requirements as the Secretary of Defense or the Secretary of the military department concerned prescribes by regulation.

(c) Exceptions.

(1) The requirements of subsections (b)(2)(A) and (b)(2)(B) shall not apply to any employee who, on October 1, 1991, has at least 10 years of experience in acquisition positions or in comparable positions in other government agencies or the private sector.

(2) The requirements of subsections (b)(2)(A) and (b)(2)(B) shall not apply to any employee who is serving in an acquisition position on October 1, 1991, and who does not have 10 years of experience as described in paragraph (1) if the employee passes an examination considered by the Secretary of Defense to demonstrate skills, knowledge, or abilities comparable to that of an individual who has completed at least 24 semester credit hours (or the equivalent) of study from an accredited institution of higher education from among the following disciplines: accounting, business, finance, law, contracts, purchasing, economics, industrial management, marketing, quantitative methods, and organization and management. The Secretary of Defense shall submit examinations to be given to civilian employees under this paragraph to the Director of the Office of Personnel Management for approval. If the Director does not disapprove an examination within 30 days after the date on which the Director receives the examination, the examination is deemed to be approved by the Director.

(3) Paragraph (1) of subsection (b) shall not apply to an employee who

(A) having previously served in a position within a grade referred to in subparagraph (A) of that paragraph, is currently serving in the same position within a grade below GS–13 of the General Schedule, or in another position within that grade, by reason of a reduction in force or the closure or realignment of a military installation, or for any other reason other than by reason of an adverse personnel action for cause; and
(B) except as provided in paragraphs (1) and (2), satisfies the educational, experience, and other requirements prescribed under paragraphs (2), (3), and (4) of that subsection.

(d) Waiver.

(1) Except as provided in paragraph (2), the acquisition career program board of a military department may waive any or all of the requirements of subsection (b) with respect to an employee of that military department if the board certifies that the employee possesses significant potential for advancement to levels of greater responsibility and authority, based on demonstrated analytical and decisionmaking capabilities, job performance, and qualifying experience. With respect to each waiver granted under this subsection, the board shall set forth in a written document the rationale for its decision to waive such requirements. The document shall be submitted to and retained by the Director of Acquisition Education, Training, and Career Development.

(2) The acquisition career program board of a military department may not waive the requirements of subsection (b)(2)(A)(ii).

(e) Mobility Statements.

(1) The Secretary of Defense is authorized to require civilians in an Acquisition Corps to sign mobility statements.

(2) The Secretary of Defense shall identify which categories of civilians in an Acquisition Corps, as a condition of serving in the Corps, shall be required to sign mobility statements. The Secretary shall make available published information on such identification of categories.

1733. Critical acquisition positions

(a) Requirement for Corps Member. A critical acquisition position may be filled only by a member of an Acquisition Corps.

(b) Designation of Critical Acquisition Positions.

(1) The Secretary of Defense shall designate the acquisition positions in the Department of Defense that are critical acquisition positions. Such positions shall include the following:

(A) Any acquisition position which

(i) in the case of employees, is required to be filled by an employee in a position within grade GS–14 or above of the General Schedule, or in the Senior Executive Service; or

(ii) in the case of members of the armed forces, is required to be filled by a commissioned officer of the Army, Navy, Air Force, or Marine Corps who is serving in the grade of lieutenant colonel, or, in the case of the Navy, commander, or a higher grade.

(B) Other selected acquisition positions not covered by subparagraph (A), including the following:

(i) Program executive officer.

(ii) Program manager of a major defense acquisition program (as defined in section 2430 of this title) or of a significant non major defense acquisition program (as defined in section 1737 (a)(3) of this title).
(iii) Deputy program manager of a major defense acquisition program.

(C) Any other acquisition position of significant responsibility in which the primary duties are supervisory or management duties.

(2) The Secretary shall periodically publish a list of the positions designated under this subsection.

1734. Career development

(a) Three-Year Assignment Period.

(1) Except as provided under subsection (b) and paragraph (3), the Secretary of each military department, acting through the service acquisition executive for that department, shall provide that any person who is assigned to a critical acquisition position shall be assigned to the position for not fewer than three years. Except as provided in subsection (d), the Secretary concerned may not reassign a person from such an assignment before the end of the three-year period.

(2) A person may not be assigned to a critical acquisition position unless the person executes a written agreement to remain on active duty (in the case of a member of the armed forces) or to remain in Federal service (in the case of an employee) in that position for at least three years. The service obligation contained in such a written agreement shall remain in effect unless and until waived by the Secretary concerned under subsection (b).

(3) The assignment period requirement of the first sentence of paragraph (1) is waived for any individual serving as a deputy program manager if the individual is assigned to a critical acquisition position upon completion of the individual’s assignment as a deputy program manager.

(b) Assignment Period for Program Managers.

(1) The Secretary of Defense shall prescribe in regulations

(A) a requirement that a program manager and a deputy program manager (except as provided in paragraph (3)) of a major defense acquisition program be assigned to the position at least until completion of the major milestone that occurs closest in time to the date on which the person has served in the position for four years; and

(B) a requirement that, to the maximum extent practicable, a program manager who is the replacement for a reassigned program manager arrive at the assignment location before the reassigned program manager leaves.

Except as provided in subsection (d), the Secretary concerned may not reassign a program manager or deputy program manager from such an assignment until after such major milestone has occurred.

(2) A person may not be assigned to a critical acquisition position as a program manager or deputy program manager of a major defense acquisition program unless the person executes a written agreement to remain on active duty (in the case of a member of the armed forces) or to remain in Federal service (in the case of an employee) in that position at least until completion of the first major milestone that occurs closest in time to the date on which the person has served in the position for four years. The service obligation contained in such a written agreement shall remain in effect unless and until waived by the Secretary concerned under subsection (d).

(3) The assignment period requirement under subparagraph (A) of paragraph (1) is waived for any
individual serving as a deputy program manager if the individual is assigned to a critical acquisition position upon completion of the individual’s assignment as a deputy program manager.

(c) Major Milestone Regulations.

(1) The Secretary of Defense shall issue regulations defining what constitutes major milestones for purposes of this section. The service acquisition executive of each military department shall establish major milestones at the beginning of a major defense acquisition program consistent with such regulations and shall use such milestones to determine the assignment period for program managers and deputy program managers under subsection (b).

(2) The regulations shall require that major milestones be clearly definable and measurable events that mark the completion of a significant phase in a major defense acquisition program and that such milestones be the same as the milestones contained in the baseline description established for the program pursuant to section 2435 (a) of this title. The Secretary shall require that the major milestones as defined in the regulations be included in the Selected Acquisition Report required for such program under section 2432 of this title.

(d) Waiver of Assignment Period.

(1) With respect to a person assigned to a critical acquisition position, the Secretary concerned may waive the prohibition on reassignment of that person (in subsection (a)(1) or (b)(1)) and the service obligation in an agreement executed by that person (under subsection (a)(2) or (b)(2)), but only in exceptional circumstances in which a waiver is necessary for reasons permitted in regulations prescribed by the Secretary of Defense.

(2) The authority to grant such waivers may be delegated by the service acquisition executive of a military department only to the Director of Acquisition Career Management for the military department.

(3) With respect to each waiver granted under this subsection, the service acquisition executive (or his delegate) shall set forth in a written document the rationale for the decision to grant the waiver. The document shall be submitted to the Director of Acquisition Education, Training, and Career Development.

(e) Rotation Policy.

(1) The Secretary of Defense shall establish a policy encouraging the rotation of members of an Acquisition Corps serving in critical acquisition positions to new assignments after completion of five years of service in such positions, or, in the case of a program manager, after completion of a major program milestone, whichever is longer. Such rotation policy shall be designed to ensure opportunities for career broadening assignments and an infusion of new ideas into critical acquisition positions.

(2) The Secretary of Defense shall establish a procedure under which the assignment of each person assigned to a critical acquisition position shall be reviewed on a case-by-case basis, by the acquisition career program board of the department concerned, for the purpose of determining whether the Government and such person would be better served by a reassignment to a different position. Such a review shall be carried out with respect to each such person not later than five years after that person is assigned to a critical position.

(f) Centralized Job Referral System. The Secretary of Defense shall prescribe regulations providing for the use of centralized lists to ensure that persons are selected for critical positions without regard to geographic location of applicants for such positions.
(g) Exchange Program.

(1) The Secretary of Defense shall establish, for purposes of broadening the experience of members of each Acquisition Corps, a test program in which members of a Corps serving in a military department or Defense Agency are assigned or detailed to an acquisition position in another department or agency. Under the test program, the Secretary of Defense shall ensure that, to the maximum extent practicable, at least 5 percent of the members of the Acquisition Corps shall serve in such exchange assignments each year. The test program shall operate for not less than a period of three years.

(2) The Secretary of Defense shall submit the portion of the test program applicable to civilian employees to the Director of the Office of Personnel Management for approval. If the Director does not disapprove that portion of the test program within 30 days after the date on which the Director receives it, that portion of the test program is deemed to be approved by the Director.

(h) Responsibility for Assignments. The Secretary of each military department, acting through the service acquisition executive for that department, is responsible for making assignments of civilian and military members of the Acquisition Corps of that military department to critical acquisition positions.

1735. Education, training, and experience requirements for critical acquisition positions

(a) Qualification Requirements.-- In establishing the education, training, and experience requirements under section 1723 of this title for critical acquisition positions, the Secretary of Defense shall, at a minimum, include the requirements set forth in subsections (b) through (e).

(b) Program Managers and Deputy Program Managers.-- Before being assigned to a position as a program manager or deputy program manager of a major defense acquisition program or a significant nonmajor defense acquisition program, a person

(1) must have completed the program management course at the Defense Systems Management College or a management program at an accredited educational institution determined to be comparable by the Secretary of Defense;

(2) must have executed a written agreement as required in section 1734(b)(2); and

(3) in the case of

(A) a program manager of a major defense acquisition program, must have at least eight years of experience in acquisition, at least two years of which were performed in a systems program office or similar organization;

(B) a program manager of a significant nonmajor defense acquisition program, must have at least six years of experience in acquisition;

(C) a deputy program manager of a major defense acquisition program, must have at least six years of experience in acquisition, at least two years of which were performed in a systems program office or similar organization; and

(D) a deputy program manager of a significant nonmajor defense acquisition program, must have at least four years of experience in acquisition.

(c) Program Executive Officers.-- Before being assigned to a position as a program executive officer, a person.
(1) must have completed the program management course at the Defense Systems Management College or a management program at an accredited educational institution in the private sector determined to be comparable by the Secretary of Defense, acting through the Under Secretary of Defense for Acquisition, Technology, and Logistics;

(2) must have at least 10 years experience in an acquisition position, at least four years of which were performed while assigned to a critical acquisition position; and

(3) must have held a position as a program manager or a deputy program manager.

(d) General and Flag Officers and Civilians in Equivalent Positions.-- Before a general or flag officer, or a civilian serving in a position equivalent in grade to the grade of such an officer, may be assigned to a critical acquisition position, the person must have at least 10 years experience in an acquisition position, at least four years of which were performed while assigned to a critical acquisition position.

(e) Senior Contracting Officials.-- Before a person may be assigned to a critical acquisition position as a senior contracting official, the person must have at least four years experience in contracting.


1737. Definitions and general provisions

(a) Definitions.-- In this subchapter:

(1) The term “program manager” means, with respect to a defense acquisition program, the member of an Acquisition Corps responsible for managing the program, regardless of the title given the member.

(2) The term “deputy program manager” means the person who has authority to act on behalf of the program manager in the absence of the program manager.

(3) The term “significant non major defense acquisition program” means a Department of Defense acquisition program that is not a major defense acquisition program (as defined in section 2430 of this title) and that is estimated by the Secretary of Defense to require an eventual total expenditure for research, development, test, and evaluation of more than the dollar threshold set forth in section 2302 (5)(A) of this title for such purposes for a major system or an eventual total expenditure for procurement of more than the dollar threshold set forth in section 2302 (5)(A) of this title for such purpose for a major system.

(4) The term “program executive officer” has the meaning given such term in regulations prescribed by the Secretary of Defense.

(5) The term “senior contracting official” means a director of contracting, or a principal deputy to a director of contracting, serving in the office of the Secretary of a military department, the headquarters of a military department, the head of a Defense Agency, a subordinate command headquarters, or in a major systems or logistics contracting activity in the Department of Defense.

(b) Limitation.-- Any civilian or military member of the Corps who does not meet the education, training, and experience requirements for a critical acquisition position established under this subchapter may not carry out the duties or exercise the authorities of that position, except for a period not to exceed six months, unless a waiver of the requirements is granted under subsection (c).
(c) Waiver.

(1) The Secretary of each military department (acting through the service acquisition executive for that department) or the Secretary of Defense (acting through the Under Secretary of Defense for Acquisition, Technology, and Logistics) for Defense Agencies and other components of the Department of Defense may waive, on a case-by-case basis, the requirements established under this subchapter with respect to the assignment of an individual to a particular critical acquisition position. Such a waiver may be granted only if unusual circumstances justify the waiver or if the Secretary concerned (or official to whom the waiver authority is delegated) determines that the individual’s qualifications obviate the need for meeting the education, training, and experience requirements established under this subchapter.

(2) The authority to grant such waivers may be delegated

(A) in the case of the service acquisition executives of the military departments, only to the Director of Acquisition Career Management for the military department concerned; and

(B) in the case of the Under Secretary of Defense for Acquisition, Technology, and Logistics, only to the Director of Acquisition Education, Training, and Career Development.

(d) OPM Approval.-- The Secretary of Defense shall submit any requirement with respect to civilian employees established under this subchapter to the Director of the Office of Personnel Management for approval. If the Director does not disapprove the requirement within 30 days after the date on which the Director receives the requirement, the requirement is deemed to be approved by the Director.

1746. Defense acquisition university structure

(a) Defense Acquisition University Structure. The Secretary of Defense, acting through the Under Secretary of Defense for Acquisition, Technology, and Logistics, shall establish and maintain a defense acquisition university structure to provide for

(1) the professional educational development and training of the acquisition workforce; and

(2) research and analysis of defense acquisition policy issues from an academic perspective.

(b) Civilian Faculty Members.

(1) The Secretary of Defense may employ as many civilians as professors, instructors, and lecturers in the defense acquisition university structure as the Secretary considers necessary.

(2) The compensation of persons employed under this subsection shall be as prescribed by the Secretary.

(3) In this subsection, the term “defense acquisition university” includes the Defense Systems Management College.

1747. Acquisition fellowship program

(a) Establishment.-- The Secretary of Defense shall establish and carry out an acquisition fellowship program in accordance with this section in order to enhance the ability of the Department of Defense to recruit employees who are highly qualified in fields of acquisition.

(b) Number of Fellowships.-- The Secretary of Defense may designate up to 25 prospective
employees of the Department of Defense as acquisition fellows.

(c) Eligibility.-- In order to be eligible for designation as an acquisition fellow, an employee—

(1) must complete at least 2 years of Federal Government service as an employee in an acquisition position in the Department of Defense; and

(2) must be serving in an acquisition position in the Department of Defense that involves the performance of duties likely to result in significant restrictions under law on the employment activities of that employee after leaving Government service.

(d) Two-Year Period of Research and Teaching.-- Under the fellowship program, the Secretary of Defense shall pay designated acquisition fellows to engage in research or teaching for a 2-year period in a field related to Federal Government acquisition policy. Such research or teaching may be conducted in the defense acquisition university structure of the Department of Defense, any other institution of professional education of the Federal Government, or a nonprofit institution of higher education. Each fellow shall be paid at a rate equal to the rate of pay payable for the level of the position in which the fellow served in the Department of Defense before undertaking such research or teaching.

1763. Reassignment of authority

The Secretary of Defense may assign the responsibilities under this chapter of the Under Secretary of Defense for Acquisition, Technology, and Logistics to any other civilian official in the Office of the Secretary of Defense who is appointed by the President by and with the advice and consent of the Senate. If the Secretary takes action under the preceding sentence, he may authorize the Secretaries of the military departments to assign the responsibilities of a senior acquisition executive under this chapter to any other civilian official in the military department who is appointed by the President by and with the advice and consent of the Senate.

2.A.2 FEDERAL ACQUISITION REGULATION

PART 2--DEFINITIONS OF WORDS AND TERMS

2.101 Definitions.

"Senior procurement executive" means the individual appointed pursuant to section 16(3) of the Office of Federal Procurement Policy Act (41 U.S.C. 414(3)) 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.

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.

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 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; and

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

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

(3) The ratification authority in paragraph (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 GAO for resolution. (See 1.602-3(d).)

(5) Unauthorized commitments that would involve claims subject to resolution under the Contract Disputes Act of 1978 should be processed in accordance with Subpart 33.2, Disputes and Appeals.

(c) Limitations. The authority in paragraph (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) Non ratifiable commitments. Cases that are not ratifiable under this subsection may be subject to resolution as recommended by the GAO under its claim procedure (GAO Policy and Procedures Manual for Guidance of Federal Agencies, Title 4, Chapter 2), or as authorized by FAR Part 50. Legal advice should be obtained in these cases.

1.603 Selection, appointment, and termination of appointment.

1.603-1 General.

Subsection 414(4) of title 41, United States Code, 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.

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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.

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.

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.

2.A.3. Creating a Professional Workforce

Over the last decade, the federal acquisition workforce has had to adapt to changes in staffing levels, workloads, and the need for new skill sets. Procurement reforms have placed unprecedented demands on the acquisition workforce. For example, contracting specialists are required to have a greater knowledge of market conditions, industry trends, and the technical details of the commodities and services they procure. Changes in the acquisition workforce have been accompanied by changes in the types of actions being managed. Acquisition personnel need to analyze business problems and help develop strategies in the early stages of the acquisition process.

The need for a comprehensive Federal strategy for the procurement workforce was validated by the
survey of government contracting personnel in the contract specialist occupational series (1102) conducted by the Merit Systems Protection Board (MSPB). The MSPB undertook this survey as part of its broad organizational charter to oversee trends in the Federal workforce. Contracting officials had often been subjected to criticism for questionable procurement actions. A key question that MSPB tried to address in the survey was the quality of the Federal procurement workforce.

The reaction was that while Federal contracting officials are basically knowledgeable and fair, they felt the procurement system did not serve the best interests of the government. There was general agreement that the system involved too much "red tape" with contracting officials unresponsive to the needs of their customers. Responses also indicated that the procurement process was viewed as slow and cumbersome and possibly not in the public interest. Contracting officials were considered to be easy to get along with and courteous, but less well trained and knowledgeable than many contractors would like.

The MSPB survey documented that both procurement people and the procurement process must be addressed to improve public procurement.

2.A.4. Professional Training

Under Division D of the Federal Acquisition Reform Act (FARA) of 1996, the OFPP was granted explicit authority for the Federal acquisition workforce in a new section 433. The head of each executive agency, after consultation with the Administrator for Federal Procurement Policy, is required to establish policies and procedures for the effective management (including accession, education, training, career development, and performance incentives) of the acquisition workforce of the agency. The senior procurement executive of the agency is to implement this authority, including constructing a plan for the career development of the agency’s workforce. For each career path, the head of each executive agency is required to establish requirements for the completion of course work and related on-the-job training in the critical acquisition-related duties and tasks of the career path. The head of each executive agency is also to encourage employees to maintain the currency of their acquisition knowledge and generally enhance their knowledge of related acquisition management disciplines through academic programs and other self-developmental activities.

To help encourage improvements in performance, each agency head is to provide for a system of incentives to reward performance of employees that contribute to achieving the agency’s performance goals. These incentives include higher pay and faster promotions. The agency head, through the Senior Procurement Executive is also responsible for establishing qualification requirements for entry into the workforce and to set aside funds for training the workforce.

The Department of Defense established its Defense Acquisition University (DAU) in 1991 as a consortium of 16 Defense colleges, schools, and agencies to provide its education and training. Title XII of Public Law 101-510 added a new chapter 87 on Defense Acquisition Workforce Improvement to Title 10, United States Code in 1990. The Secretary of Defense was required to establish policies and procedures for the effective and uniform management of the workforce in the Department of Defense. The Act applied only to Defense acquisition personnel. Some key features of the Act:

Required specific qualifications in terms of education, experience, degree requirements, and


5. Within the Department of Defense, the "acquisition" workforce includes program managers and other personnel involved in developing military systems as well as contracting personnel normally covered by the term "procurement" in civilian agencies.
mandated training, for acquisition jobs;

Created new acquisition corps for more senior acquisition personnel with special qualification requirements for acquisition managers;

Established new education and training authorities for cooperative education opportunities, a scholarship program, an intern program for career development and a new Defense Acquisition University;

Required a database to assess progress and mandates annual reports on the program.

The passage of the Defense Acquisition Workforce Improvement Act stimulated action to provide civilian agencies like authorities so that career management rules would be consistent in Defense and civilian agencies. Under the leadership of OFPP and its Federal Acquisition Institute, Congress set the requirements in law, thus assuring that what many agency heads were already doing, would now be done universally and consistently.

Although many millions of dollars were spent annually on procurement training, Procurement Executives had provided little guidance for forecasting and budgeting procurement-training requirements. This problem was not addressed satisfactorily until 2003 when the Acquisition workforce training fund was established by Congress. Section 37 of the Office of Federal Procurement Policy Act (41 U.S.C. 433) was amended to establish within the General Services Administration an acquisition workforce-training fund to be managed by the Federal Acquisition Institute (FAI). The fund is financed by depositing 5 percent of the fees collected by various executive agencies under their government-wide contracts for common items. This approach provides the funding for FAI to develop training resources needed to support new acquisition initiatives. The fund is used for acquisition workforce training across civilian government agencies. This provision does not apply to the Department of Defense (DOD) which has separate funding for acquisition training of its employees.

2.B Other Examples

Most States address public procurement in law or regulation as an administrative function. Two States which give it the highest standing by specifically referring to the process in their Constitutions are Mexico and South Africa.

2.B.1 South Africa:

Section 217 of the Constitution of the Republic of South Africa, 1996 (Act no. 108 of 1996) reads as follows:

When an organ of the state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost effective. Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for:- categories of preference in the allocation of contracts; and the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination. (3) National legislation must prescribe a framework within which the policy referred to in subsection (2) may be implemented.

2.B.2 Canada:

An estimated 10,000 public servants and uniformed personnel in 1,200 locations in Canada and abroad are directly or indirectly involved on a full-time or part-time basis in the life-cycle management of
federal government assets. The community is made up of three functional specialties: procurement, materiel management, and real property. They comprise a diverse group of occupations, including contracting, procurement, engineering, inventory control, warehousing, disposal and materiel, asset, supply, project and fleet management, and occupational classifications, as well as other related classifications and uniformed personnel).

The Treasury Board of Canada (akin to a government management board, and headed by a Minister) has been working on the development of a professional procurement certification program for the Canadian public service covering a range of different procurement, materiel management and real property functions. This is known as the Professional Development and Certification Program (PDAC).6

Over the years, the Auditor General and others have identified long-standing deficiencies in the government's materiel management practices. Departmental initiatives since 1995 have attempted to reduce excess inventory and address other shortcomings.

In 1998, the Modern Comptrollership Learning Advisory Panel approved the creation of a Materiel and Supply Management Steering Committee (MSMSC) - comprising senior members of the community across government - to develop and implement a professional development program. Its aim was to provide advice and assistance to the Treasury Board Secretariat in moving the community from a transaction-based process to one that adds value within the context of the strategic needs of departments and agencies. To do so, new skills and knowledge would be required.

In response to these and other challenges, the Government of Canada has recognized the need to reconstitute the professional development and certification of the community and to develop a cadre of practitioners who have the learning tools needed to work effectively in this new environment.

In September 2000, a Treasury Board Secretariat Program Office was established to bring a full-time dedicated focus to develop and implement the Professional Development and Certification Program. In the spring of 2001, the Treasury Board Secretariat Program Office commissioned a study to solicit the views of stakeholders on their challenges. The overriding conclusion of the study was that the community is faced with a widening gap between the work required and the skills and capacity available. Specific challenges and suggested solutions were offered regarding community management, individual learning, recruitment and retention, and an environment of increasing complexity and rate of change. An action plan was subsequently developed in collaboration with the PDAC to develop the core learning tools of the program.

The objectives of the Professional Development and Certification Program are:

- to provide employees with the tools to acquire the skills, knowledge and expertise to meet evolving and complex business needs, government priorities and management initiatives; and
- to ensure that departments have the capacity to implement modernized management policies and practices and associated delegated authorities.

The Learning Framework focuses on the learning solutions offered through the PDAC Program for community members. It addresses the common, government-wide core competencies and learning

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6 This discussion relies on information found at the Treasury Board of Canada Secretariat at: http://www.tbs-sct.gc.ca/pd-pp/lt-ta/tk2_e.asp
solutions, but does not attempt to provide all of the solutions for an employee's learning needs. The Treasury Board Secretariat PDAC Program Office has been working closely with its advisory committees to determine the type of certification that will best meet the needs of the community and the objectives and guiding principles of the Professional Development and Certification Program.
ANNEX 3 - CHALLENGE AND REVIEW SYSTEMS

CHALLENGE AND REVIEW SYSTEMS: Approaches used to resolve challenges to the rules promulgated and actions taken within the public procurement system.

3. A. United States’ Example

In the United States, there are several fora to review protests. A protester can protest a solicitation before the contracting agency, the GAO, the Court of Federal Claims, or U.S. District Courts. Protests to the contracting officer at the contracting agency are less costly and do not necessarily involve significant delays, but they carry a perception that the contracting officer is not impartial in reviewing a challenge to his or her decision. The various protest fora provide a choice of venue for contractors depending on the standards that they think should apply to their complaints. These are set forth in Table 3.

<table>
<thead>
<tr>
<th>Forum</th>
<th>Standard of Review</th>
<th>Remarks</th>
</tr>
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<tbody>
<tr>
<td>Contracting Agency</td>
<td>Administrative reviews to assure actions were in keeping with policies, laws &amp; regulations.</td>
<td>Allows higher level management to have feedback on how contracting officials are performing. May not be seen as objective.</td>
</tr>
<tr>
<td>GAO</td>
<td>Review to determine whether there is a violation of law or regulation, with presumption of correctness of the agency action and acceptance of agency's version of facts unless disproved.</td>
<td>GAO has moved toward more formal proceedings, with the possibility of hearings.</td>
</tr>
<tr>
<td>District Courts</td>
<td>Review to determine whether there was a clear violation of applicable law or regulation, or no rational basis for the government action.</td>
<td>Protester must show that the government violated a statute that was created to protect their interests (e.g. Small Business Act).</td>
</tr>
<tr>
<td>Court of Federal Claims</td>
<td>Review to determine whether there was a clear violation of statute or regulation or whether there was no rational basis for the government action.</td>
<td>Has nation-wide jurisdiction, can conduct hearings around the country, and is more experienced in government contract issues as a result of its jurisdiction to resolve contract performance controversies.</td>
</tr>
</tbody>
</table>

The vast majority of protests are filed in the administrative forum of GAO. If a protest is filed before
award, the government must suspend work on the procurement except in urgent and compelling situations. A protest generally can be filed at any time prior to the closing date for receipt of offers (e.g., challenging the fairness of a solicitation document, or within 10 days of contract award (e.g., challenging the award). If the protester wins, the government may be required to re-solicit the requirement, reevaluate the offers, cancel the contract (if already awarded), or take other appropriate action. In many instances the protester is entitled to recover his bid or proposal preparation costs as well as attorney fees.

Disputes are handled under special procedures set out in all US Government contracts under rules established in the FAR under authority of the Contract Disputes Act of 1978 (Title 41 United States Code Sections 601-613). The clause describes the actions that the contractor and the contracting officer must take to resolve the problem. The essential requirement for the government is that performance proceeds toward completion of the contract even when there is a disagreement. The contractor agrees to this condition and the government agrees to pay the contractor the adjudicated amount with interest. While the contracting officer is the first level of review in any dispute, the contractor can pursue his claim through the agency before an independent Board of Contract Appeals and even to the Federal Courts.

### 3.A.1 Protests

**FEDERAL ACQUISITION REGULATION**

33.000 Scope of part.

This part prescribes policies and procedures for filing protests and for processing contract disputes and appeals.

**Subpart 33.1- Protests**

33.101 Definitions.

As used in this subpart-

"Day" means a calendar day, unless otherwise specified. In the computation of any period-

(1) The day of the act, event, or default from which the designated period of time begins to run is not included; and

(2) The last day after the act, event, or default is included unless-

(i) The last day is a Saturday, Sunday, or Federal holiday; or

(ii) In the case of a filing of a paper at any appropriate administrative forum, the last day is a day on which weather or other conditions cause the closing of the forum for all or part of the day, in which event the next day on which the appropriate administrative forum is open is included.

"Filed" means the complete receipt of any document by an agency before its close of business. Documents received after close of business are considered filed as of the next day. Unless otherwise stated, the agency close of business is presumed to be 4:30 p.m., local time.

"Interested party for the purpose of filing a protest" means an actual or prospective offeror whose direct economic interest would be affected by the award of a contract or by the failure to award a contract.

"Protest" means a written objection by an interested party to any of the following:
(1) A solicitation or other request by an agency for offers for a contract for the procurement of property or services.

(2) The cancellation of the solicitation or other request.

(3) An award or proposed award of the contract.

(4) A termination or cancellation of an award of the contract, if the written objection contains an allegation that the termination or cancellation is based in whole or in part on improprieties concerning the award of the contract.

33.102 General.

(a) Contracting officers shall consider all protests and seek legal advice, whether protests are submitted before or after award and whether filed directly with the agency or the GAO. (See 19.302 for protests of small business status, 19.305 for protests of disadvantaged business status, and 19.307 for protests of service-disabled veteran-owned small business status.)

(b) If, in connection with a protest, the head of an agency determines that a solicitation, proposed award, or award does not comply with the requirements of law or regulation, the head of the agency may—

(1) Take any action that could have been recommended by the Comptroller General had the protest been filed with the GAO; and

(2) Pay appropriate costs as stated in 33.104(h).

(3) Require the awardee to reimburse the Government's costs, as provided in this paragraph, where a postaward protest is sustained as the result of an awardee's intentional or negligent misstatement, misrepresentation, or miscertification. In addition to any other remedy available, and pursuant to the requirements of Subpart 32.6, the Government may collect this debt by offsetting the amount against any payment due the awardee under any contract between the awardee and the Government.

(i) When a protest is sustained by GAO under circumstances that may allow the Government to seek reimbursement for protest costs, the contracting officer will determine whether the protest was sustained based on the awardee's negligent or intentional misrepresentation. If the protest was sustained on several issues, protest costs shall be apportioned according to the costs attributable to the awardee's actions.

(ii) The contracting officer shall review the amount of the debt, degree of the awardee's fault, and costs of collection, to determine whether a demand for reimbursement ought to be made. If it is in the best interests of the Government to seek reimbursement, the contracting officer shall notify the contractor in writing of the nature and amount of the debt, and the intention to collect by offset if necessary. Prior to issuing a final decision, the contracting officer shall afford the contractor an opportunity to inspect and copy agency records pertaining to the debt to the extent permitted by statute and regulation, and to request review of the matter by the head of the contracting activity.

(iii) When appropriate, the contracting officer shall also refer the matter to the agency debarment official for consideration under Subpart 9.4.

(c) In accordance with 31 U.S.C. 1558, with respect to any protest filed with the GAO, if the funds available to the agency for a contract at the time a protest is filed in connection with a solicitation for, proposed award of, or award of such a contract would otherwise expire, such funds shall remain available for obligation for 100 days after the date on which the final ruling is made on the protest. A ruling is
considered final on the date on which the time allowed for filing an appeal or request for reconsideration has expired, or the date on which a decision is rendered on such appeal or request, whichever is later.

(d) Protest likely after award. The contracting officer may stay performance of a contract within the time period contained in paragraph 33.104(c)(1) if the contracting officer makes a written determination that-

(1) A protest is likely to be filed; and

(2) Delay of performance is, under the circumstances, in the best interests of the United States.

(e) An interested party wishing to protest is encouraged to seek resolution within the agency (see 33.103) before filing a protest with the GAO, but may protest to the GAO in accordance with GAO regulations (4 CFR part 21).

(f) No person may file a protest at GAO for a procurement integrity violation unless that person reported to the contracting officer the information constituting evidence of the violation within 14 days after the person first discovered the possible violation (41 U.S.C. 423(g)).

33.103 Protests to the agency.

(a) Reference. Executive Order 12979, Agency Procurement Protests, establishes policy on agency procurement protests.

(b) Prior to submission of an agency protest, all parties shall use their best efforts to resolve concerns raised by an interested party at the contracting officer level through open and frank discussions.

(c) The agency should provide for inexpensive, informal, procedurally simple, and expeditious resolution of protests. Where appropriate, the use of alternative dispute resolution techniques, third party neutrals, and another agency's personnel are acceptable protest resolution methods.

(d) The following procedures are established to resolve agency protests effectively, to build confidence in the Government's acquisition system, and to reduce protests outside of the agency:

(1) Protests shall be concise and logically presented to facilitate review by the agency. Failure to substantially comply with any of the requirements of paragraph (d)(2) of this section may be grounds for dismissal of the protest.

(2) Protests shall include the following information:

(i) Name, address, and fax and telephone numbers of the protester.

(ii) Solicitation or contract number.

(iii) Detailed statement of the legal and factual grounds for the protest, to include a description of resulting prejudice to the protester.

(iv) Copies of relevant documents.

(v) Request for a ruling by the agency.

(vi) Statement as to the form of relief requested.
(vii) All information establishing that the protester is an interested party for the purpose of filing a protest.

(viii) All information establishing the timeliness of the protest.

(3) All protests filed directly with the agency will be addressed to the contracting officer or other official designated to receive protests.

(4) In accordance with agency procedures, interested parties may request an independent review of their protest at a level above the contracting officer; solicitations shall advise potential bidders and offerors that this review is available. Agency procedures and/or solicitations shall notify potential bidders and offerors whether this independent review is available as an alternative to consideration by the contracting officer of a protest or is available as an appeal of a contracting officer decision on a protest. Agencies shall designate the official(s) who are to conduct this independent review, but the official(s) need not be within the contracting officer's supervisory chain. When practicable, officials designated to conduct the independent review should not have had previous personal involvement in the procurement. If there is an agency appellate review of the contracting officer's decision on the protest, it will not extend GAO's timeliness requirements. Therefore, any subsequent protest to the GAO must be filed within 10 days of knowledge of initial adverse agency action (4 CFR 21.2(a)(3)).

(e) Protests based on alleged apparent improprieties in a solicitation shall be filed before bid opening or the closing date for receipt of proposals. In all other cases, protests shall be filed no later than 10 days after the basis of protest is known or should have been known, whichever is earlier. The agency, for good cause shown, or where it determines that a protest raises issues significant to the agency's acquisition system, may consider the merits of any protest which is not timely filed.

(f) Action upon receipt of protest.

(1) Upon receipt of a protest before award, a contract may not be awarded, pending agency resolution of the protest, unless contract award is justified, in writing, for urgent and compelling reasons or is determined, in writing, to be in the best interest of the Government. Such justification or determination shall be approved at a level above the contracting officer, or by another official pursuant to agency procedures.

(2) If award is withheld pending agency resolution of the protest, the contracting officer will inform the offerors whose offers might become eligible for award of the contract. If appropriate, the offerors should be requested, before expiration of the time for acceptance of their offers, to extend the time for acceptance to avoid the need for resolicitation. In the event of failure to obtain such extension of offers, consideration should be given to proceeding with award pursuant to paragraph (f)(1) of this section.

(3) Upon receipt of a protest within 10 days after contract award or within 5 days after a debriefing date offered to the protester under a timely debriefing request in accordance with 15.505 or 15.506, whichever is later, the contracting officer shall immediately suspend performance, pending resolution of the protest within the agency, including any review by an independent higher level official, unless continued performance is justified, in writing, for urgent and compelling reasons or is determined, in writing, to be in the best interest of the Government. Such justification or determination shall be approved at a level above the contracting officer, or by another official pursuant to agency procedures.

(4) Pursuing an agency protest does not extend the time for obtaining a stay at GAO. Agencies may include, as part of the agency protest process, a voluntary suspension period when agency protests are denied and the protester subsequently files at GAO.
(g) Agencies shall make their best efforts to resolve agency protests within 35 days after the protest is filed. To the extent permitted by law and regulation, the parties may exchange relevant information.

(h) Agency protest decisions shall be well-reasoned, and explain the agency position. The protest decision shall be provided to the protester using a method that provides evidence of receipt.

33.104 Protests to GAO.

Procedures for protests to GAO are found at 4 CFR part 21 (GAO Bid Protest Regulations). In the event guidance concerning GAO procedure in this section conflicts with 4 CFR part 21, 4 CFR part 21 governs.

(a) General procedure.

(1) A protester is required to furnish a copy of its complete protest to the official and location designated in the solicitation or, in the absence of such a designation, to the contracting officer, so it is received no later than 1 day after the protest is filed with the GAO. The GAO may dismiss the protest if the protester fails to furnish a complete copy of the protest within 1 day.

(2) Immediately after receipt of the GAO's written notice that a protest has been filed, the agency shall give notice of the protest to the contractor if the award has been made, or, if no award has been made, to all parties who appear to have a reasonable prospect of receiving award if the protest is denied. The agency shall furnish copies of the protest submissions to such parties with instructions to (i) communicate directly with the GAO, and (ii) provide copies of any such communication to the agency and to other participating parties when they become known. However, if the protester has identified sensitive information and requests a protective order, then the contracting officer shall obtain a redacted version from the protester to furnish to other interested parties, if one has not already been provided.

(3)(i) Upon notice that a protest has been filed with the GAO, the contracting officer shall immediately begin compiling the information necessary for a report to the GAO. The agency shall submit a complete report to the GAO within 30 days after the GAO notifies the agency by telephone that a protest has been filed, or within 20 days after receipt from the GAO of a determination to use the express option, unless the GAO-

(A) Advises the agency that the protest has been dismissed; or

(B) Authorizes a longer period in response to an agency's request for an extension. Any new date is documented in the agency's file.

(ii) When a protest is filed with the GAO, and an actual or prospective offeror so requests, the procuring agency shall, in accordance with any applicable protective orders, provide actual or prospective offerors reasonable access to the protest file. However, if the GAO dismisses the protest before the documents are submitted to the GAO, then no protest file need be made available. Information exempt from disclosure under 5 U.S.C. 552 may be redacted from the protest file. The protest file shall be made available to non-intervening actual or prospective offerors within a reasonable time after submittal of an agency report to the GAO. The protest file shall include an index and as appropriate-

(A) The protest;

(B) The offer submitted by the protester;

(C) The offer being considered for award or being protested;
(D) All relevant evaluation documents;

(E) The solicitation, including the specifications or portions relevant to the protest;

(F) The abstract of offers or relevant portions; and

(G) Any other documents that the agency determines are relevant to the protest, including documents specifically requested by the protester.

(iii) At least 5 days prior to the filing of the report, in cases in which the protester has filed a request for specific documents, the agency shall provide to all parties and the GAO a list of those documents, or portions of documents, that the agency has released to the protester or intends to produce in its report, and those documents that the agency intends to withhold from the protester and the reasons for the proposed withholding. Any objection to the scope of the agency's proposed disclosure or nondisclosure of the documents must be filed with the GAO and the other parties within 2 days after receipt of this list.

(iv) The agency report to the GAO shall include-

(A) A copy of the documents described in 33.104(a)(3)(ii);

(B) The contracting officer's signed statement of relevant facts, including a best estimate of the contract value, and a memorandum of law. The contracting officer's statement shall set forth findings, actions, and recommendations, and any additional evidence or information not provided in the protest file that may be necessary to determine the merits of the protest; and

(C) A list of parties being provided the documents.

(4)(i) At the same time the agency submits its report to the GAO, the agency shall furnish copies of its report to the protester and any intervenors. A party shall receive all relevant documents, except-

(A) Those that the agency has decided to withhold from that party for any reason, including those covered by a protective order issued by the GAO. Documents covered by a protective order shall be released only in accordance with the terms of the order. Examples of documents the agency may decide to exclude from a copy of the report include documents previously furnished to or prepared by a party; classified information; and information that would give the party a competitive advantage; and

(B) Protester's documents which the agency determines, pursuant to law or regulation, to withhold from any interested party.

(ii)(A) If the protester requests additional documents within 2 days after the protester knew the existence or relevance of additional documents, or should have known, the agency shall provide the requested documents to the GAO within 2 days of receipt of the request.

(B) The additional documents shall also be provided to the protester and other interested parties within this 2-day period unless the agency has decided to withhold them for any reason (see subdivision (a)(4)(i) of this section). This includes any documents covered by a protective order issued by the GAO. Documents covered by a protective order shall be provided only in accordance with the terms of the order.

(C) The agency shall notify the GAO of any documents withheld from the protester and other interested parties and shall state the reasons for withholding them.

(5) The GAO may issue protective orders which establish terms, conditions, and restrictions for the
provision of any document to an interested party. Protective orders prohibit or restrict the disclosure by the party of procurement sensitive information, trade secrets or other proprietary or confidential research, development or commercial information that is contained in such document. Protective orders do not authorize withholding any documents or information from the United States Congress or an executive agency.

(i) Requests for protective orders. Any party seeking issuance of a protective order shall file its request with the GAO as soon as practicable after the protest is filed, with copies furnished simultaneously to all parties.

(ii) Exclusions and rebuttals. Within 2 days after receipt of a copy of the protective order request, any party may file with the GAO a request that particular documents be excluded from the coverage of the protective order, or that particular parties or individuals be included in or excluded from the protective order. Copies of the request shall be furnished simultaneously to all parties.

(iii) Additional documents. If the existence or relevance of additional documents first becomes evident after a protective order has been issued, any party may request that these additional documents be covered by the protective order. Any party to the protective order also may request that individuals not already covered by the protective order be included in the order. Requests shall be filed with the GAO, with copies furnished simultaneously to all parties.

(iv) Sanctions and remedies. The GAO may impose appropriate sanctions for any violation of the terms of the protective order. Improper disclosure of protected information will entitle the aggrieved party to all appropriate remedies under law or equity. The GAO may also take appropriate action against an agency which fails to provide documents designated in a protective order.

(6) The protester and other interested parties are required to furnish a copy of any comments on the agency report directly to the GAO within 10 days, or 5 days if express option is used, after receipt of the report, with copies provided to the contracting officer and to other participating interested parties. If a hearing is held, these comments are due within 5 days after the hearing.

(7) Agencies shall furnish the GAO with the name, title, and telephone number of one or more officials (in both field and headquarters offices, if desired) whom the GAO may contact who are knowledgeable about the subject matter of the protest. Each agency shall be responsible for promptly advising the GAO of any change in the designated officials.

(b) Protests before award.

(1) When the agency has received notice from the GAO of a protest filed directly with the GAO, a contract may not be awarded unless authorized, in accordance with agency procedures, by the head of the contracting activity, on a nondelegable basis, upon a written finding that-

(i) Urgent and compelling circumstances which significantly affect the interest of the United States will not permit awaiting the decision of the GAO; and

(ii) Award is likely to occur within 30 days of the written finding.

(2) A contract award shall not be authorized until the agency has notified the GAO of the finding in paragraph (b)(1) of this section.

(3) When a protest against the making of an award is received and award will be withheld pending disposition of the protest, the contracting officer should inform the offerors whose offers might become
eligible for award of the protest. If appropriate, those offerors should be requested, before expiration of the
time for acceptance of their offer, to extend the time for acceptance to avoid the need for resolicitation. In
the event of failure to obtain such extensions of offers, consideration should be given to proceeding under
paragraph (b)(1) of this section.

(c) Protests after award.

(1) When the agency receives notice of a protest from the GAO within 10 days after contract award or
within 5 days after a debriefing date offered to the protester for any debriefing that is required by 15.505 or
15.506, whichever is later, the contracting officer shall immediately suspend performance or terminate the
awarded contract, except as provided in paragraphs (c)(2) and (3) of this section.

(2) In accordance with agency procedures, the head of the contracting activity may, on a nondelegable
basis, authorize contract performance, notwithstanding the protest, upon a written finding that-

(i) Contract performance will be in the best interests of the United States; or

(ii) Urgent and compelling circumstances that significantly affect the interests of the United States
will not permit waiting for the GAO's decision.

(3) Contract performance shall not be authorized until the agency has notified the GAO of the finding
in paragraph (c)(2) of this section.

(4) When it is decided to suspend performance or terminate the awarded contract, the contracting
officer should attempt to negotiate a mutual agreement on a no-cost basis.

(5) When the agency receives notice of a protest filed with the GAO after the dates contained in
paragraph (c)(1), the contracting officer need not suspend contract performance or terminate the
awarded contract unless the contracting officer believes that an award may be invalidated and a delay in receiving
the supplies or services is not prejudicial to the Government's interest.

(d) Findings and notice. If the decision is to proceed with contract award, or continue contract
performance under paragraphs (b) or (c) of this section, the contracting officer shall include the written
findings or other required documentation in the file. The contracting officer also shall give written notice
of the decision to the protester and other interested parties.

(e) Hearings. The GAO may hold a hearing at the request of the agency, a protester, or other
interested party who has responded to the notice in paragraph (a)(2) of this section. A recording or
transcription of the hearing will normally be made, and copies may be obtained from the GAO. All parties
may file comments on the hearing and the agency report within 5 days of the hearing.

(f) GAO decision time. GAO issues its recommendation on a protest within 100 days from the date of
filing of the protest with the GAO, or within 65 days under the express option. The GAO attempts to issue
its recommendation on an amended protest that adds a new ground of protest within the time limit of the
initial protest. If an amended protest cannot be resolved within the initial time limit, the GAO may resolve
the amended protest through an express option.

(g) Notice to GAO. If the agency has not fully implemented the GAO recommendations with respect
to a solicitation for a contract or an award or a proposed award of a contract within 60 days of receiving the
GAO recommendations, the head of the contracting activity responsible for that contract shall report the
failure to the GAO not later than 5 days after the expiration of the 60-day period. The report shall explain
the reasons why the GAO's recommendation, exclusive of costs, has not been followed by the agency.
(h) Award of costs.

(1) If the GAO determines that a solicitation for a contract, a proposed award, or an award of a contract does not comply with a statute or regulation, the GAO may recommend that the agency pay to an appropriate protestor the cost, exclusive of profit, of filing and pursuing the protest, including reasonable attorney, consultant, and expert witness fees, and bid and proposal preparation costs. The agency shall use funds available for the procurement to pay the costs awarded.

(2) The protestor shall file its claim for costs with the contracting agency within 60 days after receipt of the GAO’s recommendation that the agency pay the protestor its costs. Failure to file the claim within that time may result in forfeiture of the protestor’s right to recover its costs.

(3) The agency shall attempt to reach an agreement on the amount of costs to be paid. If the agency and the protestor are unable to agree on the amount to be paid, the GAO may, upon request of the protestor, recommend to the agency the amount of costs that the agency should pay.

(4) Within 60 days after the GAO recommends the amount of costs the agency should pay the protestor, the agency shall notify the GAO of the action taken by the agency in response to the recommendation.

(5) No agency shall pay a party, other than a small business concern within the meaning of section 3(a) of the Small Business Act (see 19.001, "Small business concern”), costs under paragraph (h)(2) of this section-

(i) For consultant and expert witness fees that exceed the highest rate of compensation for expert witnesses paid by the Government pursuant to 5 U.S.C. 3109 and 5 CFR 304.105; or

(ii) For attorneys' fees that exceed $150 per hour, unless the agency determines, based on the recommendation of the Comptroller General on a case-by-case basis, that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee. The cap placed on attorneys' fees for businesses, other than small businesses, constitutes a benchmark as to a "reasonable" level for attorneys' fees for small businesses.

(6) Before paying a recommended award of costs, agency personnel should consult legal counsel. Section 33.104(h) applies to all recommended awards of costs that have not yet been paid.

(7) Any costs the contractor receives under this section shall not be the subject of subsequent proposals, billings, or claims against the Government, and those exclusions should be reflected in the cost agreement.

(8) If the Government pays costs, as provided in paragraph (h)(1) of this section, where a postaward protest is sustained as the result of an awardee's intentional or negligent misstatement, misrepresentation, or miscertification, the Government may require the awardee to reimburse the Government the amount of such costs. In addition to any other remedy available, and pursuant to the requirements of Subpart 32.6, the Government may collect this debt by offsetting the amount against any payment due the awardee under any contract between the awardee and the Government.

33.105 [Reserved]

33.106 Solicitation provision and contract clause.

(a) The contracting officer shall insert the provision at 52.233-2, Service of Protest, in solicitations for
contracts expected to exceed the simplified acquisition threshold.

(b) The contracting officer shall insert the clause at 52.233-3, Protest After Award, in all solicitations and contracts. If a cost reimbursement contract is contemplated, the contracting officer shall use the clause with its Alternate I.

3.A.2 Disputes and Appeals

FEDERAL ACQUISITION REGULATION

Subpart 33.2- Disputes and Appeals

33.201 Definitions.

As used in this subpart-

"Accrual of a claim" means the date when all events, that fix the alleged liability of either the Government or the contractor and permit assertion of the claim, were known or should have been known. For liability to be fixed, some injury must have occurred. However, monetary damages need not have been incurred.

"Alternative dispute resolution (ADR)" means any type of procedure or combination of procedures voluntarily used to resolve issues in controversy. These procedures may include, but are not limited to, conciliation, facilitation, mediation, fact-finding, minitrials, arbitration, and use of ombudsmen.

"Defective certification" means a certificate which alters or otherwise deviates from the language in 33.207(c) or which is not executed by a person duly authorized to bind the contractor with respect to the claim. Failure to certify shall not be deemed to be a defective certification.

"Issue in controversy" means a material disagreement between the Government and the contractor that-

1. (1) May result in a claim or
2. (2) Is all or part of an existing claim.

"Misrepresentation of fact" means a false statement of substantive fact, or any conduct which leads to the belief of a substantive fact material to proper understanding of the matter in hand, made with intent to deceive or mislead.


The Contract Disputes Act of 1978, as amended (41 U.S.C. 601-613) (the Act), establishes procedures and requirements for asserting and resolving claims subject to the Act. In addition, the Act provides for-

(a) The payment of interest on contractor claims;
(b) Certification of contractor claims; and
(c) A civil penalty for contractor claims that are fraudulent or based on a misrepresentation of fact.
33.203 Applicability.

(a) Except as specified in paragraph (b) of this section, this part applies to any express or implied contract covered by the Federal Acquisition Regulation.

(b) This subpart does not apply to any contract with:

(1) A foreign government or agency of that government, or

(2) An international organization or a subsidiary body of that organization, if the agency head determines that the application of the Act to the contract would not be in the public interest.

(c) This part applies to all disputes with respect to contracting officer decisions on matters "arising under" or "relating to" a contract. Agency Boards of Contract Appeals (BCA's) authorized under the Act continue to have all of the authority they possessed before the Act with respect to disputes arising under a contract, as well as authority to decide disputes relating to a contract. The clause at 52.233-1, Disputes, recognizes the "all disputes" authority established by the Act and states certain requirements and limitations of the Act for the guidance of contractors and contracting agencies. The clause is not intended to affect the rights and obligations of the parties as provided by the Act or to constrain the authority of the statutory agency BCA's in the handling and deciding of contractor appeals under the Act.

33.204 Policy.

The Government's policy is to try to resolve all contractual issues in controversy by mutual agreement at the contracting officer's level. Reasonable efforts should be made to resolve controversies prior to the submission of a claim. Agencies are encouraged to use ADR procedures to the maximum extent practicable. Certain factors, however, may make the use of ADR inappropriate (see 5 U.S.C. 572(b)). Except for arbitration conducted pursuant to the Administrative Dispute Resolution Act (ADRA), (5 U.S.C. 571, et seq.) agencies have authority which is separate from that provided by the ADRA to use ADR procedures to resolve issues in controversy. Agencies may also elect to proceed under the authority and requirements of the ADRA.

33.205 Relationship of the Act to Public Law 85-804.

(a) Requests for relief under Public Law 85-804 (50 U.S.C. 1431-1435) are not claims within the Contract Disputes Act of 1978 or the Disputes clause at 52.233-1, Disputes, and shall be processed under Part 50, Extraordinary Contractual Actions. However, relief formerly available only under Public Law 85-804; i.e., legal entitlement to rescission or reformation for mutual mistake, is now available within the authority of the contracting officer under the Contract Disputes Act of 1978 and the Disputes clause. In case of a question whether the contracting officer has authority to settle or decide specific types of claims, the contracting officer should seek legal advice.

(b) A contractor's allegation that it is entitled to rescission or reformation of its contract in order to correct or mitigate the effect of a mistake shall be treated as a claim under the Act. A contract may be reformed or rescinded by the contracting officer if the contractor would be entitled to such remedy or relief under the law of Federal contracts. Due to the complex legal issues likely to be associated with allegations of legal entitlement, contracting officers shall make written decisions, prepared with the advice and assistance of legal counsel, either granting or denying relief in whole or in part.

(c) A claim that is either denied or not approved in its entirety under paragraph (b) of this section may be cognizable as a request for relief under Public Law 85-804 as implemented by Part 50. However, the claim must first be submitted to the contracting officer for consideration under the Contract Disputes Act.
of 1978 because the claim is not cognizable under Public Law 85-804, as implemented by Part 50, unless other legal authority in the agency concerned is determined to be lacking or inadequate.

33.206 Initiation of a claim.

(a) Contractor claims shall be submitted, in writing, to the contracting officer for a decision within 6 years after accrual of a claim, unless the contracting parties agreed to a shorter time period. This 6-year time period does not apply to contracts awarded prior to October 1, 1995. The contracting officer shall document the contract file with evidence of the date of receipt of any submission from the contractor deemed to be a claim by the contracting officer.

(b) The contracting officer shall issue a written decision on any Government claim initiated against a contractor within 6 years after accrual of the claim, unless the contracting parties agreed to a shorter time period. The 6-year period shall not apply to contracts awarded prior to October 1, 1995, or to a Government claim based on a contractor claim involving fraud.

33.207 Contractor certification.

(a) Contractors shall provide the certification specified in paragraph (c) of this section when submitting any claim exceeding $100,000.

(b) The certification requirement does not apply to issues in controversy that have not been submitted as all or part of a claim.

(c) The certification shall state as follows:

I certify that the claim is made in good faith; that the supporting data are accurate and complete to the best of my knowledge and belief; that the amount requested accurately reflects the contract adjustment for which the contractor believes the Government is liable; and that I am duly authorized to certify the claim on behalf of the contractor.

(d) The aggregate amount of both increased and decreased costs shall be used in determining when the dollar thresholds requiring certification are met (see example in 15.403-4(a)(1)(iii) regarding cost or pricing data).

(e) The certification may be executed by any person duly authorized to bind the contractor with respect to the claim.

(f) A defective certification shall not deprive a court or an agency BCA of jurisdiction over that claim. Prior to the entry of a final judgment by a court or a decision by an agency BCA, however, the court or agency BCA shall require a defective certification to be corrected.

33.208 Interest on claims.

(a) The Government shall pay interest on a contractor's claim on the amount found due and unpaid from the date that-

(1) The contracting officer receives the claim (certified if required by 33.207(a)); or

(2) Payment otherwise would be due, if that date is later, until the date of payment.

(b) Simple interest on claims shall be paid at the rate, fixed by the Secretary of the Treasury as
provided in the Act, which is applicable to the period during which the contracting officer receives the claim and then at the rate applicable for each 6-month period as fixed by the Treasury Secretary during the pendency of the claim. (See 32.614 for the right of the Government to collect interest on its claims against a contractor.)

(c) With regard to claims having defective certifications, interest shall be paid from either the date that the contracting officer initially receives the claim or October 29, 1992, whichever is later. However, if a contractor has provided a proper certificate prior to October 29, 1992, after submission of a defective certificate, interest shall be paid from the date of receipt by the Government of a proper certificate.

33.209 Suspected fraudulent claims.

If the contractor is unable to support any part of the claim and there is evidence that the inability is attributable to misrepresentation of fact or to fraud on the part of the contractor, the contracting officer shall refer the matter to the agency official responsible for investigating fraud.

33.210 Contracting officer's authority.

Except as provided in this section, contracting officers are authorized, within any specific limitations of their warrants, to decide or resolve all claims arising under or relating to a contract subject to the Act. In accordance with agency policies and 33.214, contracting officers are authorized to use ADR procedures to resolve claims. The authority to decide or resolve claims does not extend to-

(a) A claim or dispute for penalties or forfeitures prescribed by statute or regulation that another Federal agency is specifically authorized to administer, settle, or determine; or

(b) The settlement, compromise, payment, or adjustment of any claim involving fraud.

33.211 Contracting officer's decision.

(a) When a claim by or against a contractor cannot be satisfied or settled by mutual agreement and a decision on the claim is necessary, the contracting officer shall-

(1) Review the facts pertinent to the claim;

(2) Secure assistance from legal and other advisors;

(3) Coordinate with the contract administration office or contracting office, as appropriate; and

(4) Prepare a written decision that shall include a-

(i) Description of the claim or dispute;

(ii) Reference to the pertinent contract terms;

(iii) Statement of the factual areas of agreement and disagreement;

(iv) Statement of the contracting officer's decision, with supporting rationale;

(v) Paragraph substantially as follows:

This is the final decision of the Contracting Officer. You may appeal this decision to the agency board
of contract appeals. If you decide to appeal, you must, within 90 days from the date you receive this
decision, mail or otherwise furnish written notice to the agency board of contract appeals and provide a
copy to the Contracting Officer from whose decision this appeal is taken. The notice shall indicate that an
appeal is intended, reference this decision, and identify the contract by number. With regard to appeals to
the agency board of contract appeals, you may, solely at your election, proceed under the board's small
claim procedure for claims of $50,000 or less or its accelerated procedure for claims of $100,000 or less.
Instead of appealing to the agency board of contract appeals, you may bring an action directly in the United
States Court of Federal Claims (except as provided in the Contract Disputes Act of 1978, 41 U.S.C. 603,
regarding Maritime Contracts) within 12 months of the date you receive this decision; and

(vi) Demand for payment prepared in accordance with 32.610(b) in all cases where the decision
results in a finding that the contractor is indebted to the Government.

(b) The contracting officer shall furnish a copy of the decision to the contractor by certified mail,
return receipt requested, or by any other method that provides evidence of receipt. This requirement shall
apply to decisions on claims initiated by or against the contractor.

(c) The contracting officer shall issue the decision within the following statutory time limitations:

(1) For claims of $100,000 or less, 60 days after receiving a written request from the contractor that a
decision be rendered within that period, or within a reasonable time after receipt of the claim if the
contractor does not make such a request.

(2) For claims over $100,000, 60 days after receiving a certified claim; provided, however, that if a
decision will not be issued within 60 days, the contracting officer shall notify the contractor, within that
period, of the time within which a decision will be issued.

(d) The contracting officer shall issue a decision within a reasonable time, taking into account-

(1) The size and complexity of the claim;

(2) The adequacy of the contractor's supporting data; and

(3) Any other relevant factors.

(e) The contracting officer shall have no obligation to render a final decision on any claim exceeding
$100,000 which contains a defective certification, if within 60 days after receipt of the claim, the
contracting officer notifies the contractor, in writing, of the reasons why any attempted certification was
found to be defective.

(f) In the event of undue delay by the contracting officer in rendering a decision on a claim, the
contractor may request the tribunal concerned to direct the contracting officer to issue a decision in a
specified time period determined by the tribunal.

(g) Any failure of the contracting officer to issue a decision within the required time periods will be
deemed a decision by the contracting officer denying the claim and will authorize the contractor to file an
appeal or suit on the claim.

(h) The amount determined payable under the decision, less any portion already paid, should be paid,
if otherwise proper, without awaiting contractor action concerning appeal. Such payment shall be without
prejudice to the rights of either party.
33.212 Contracting officer's duties upon appeal.

To the extent permitted by any agency procedures controlling contacts with agency BCA personnel, the contracting officer shall provide data, documentation, information, and support as may be required by the agency BCA for use on a pending appeal from the contracting officer's decision.

33.213 Obligation to continue performance.

(a) In general, before passage of the Act, the obligation to continue performance applied only to claims arising under a contract. However, the Act, at 41 U.S.C. 605(b), authorizes agencies to require a contractor to continue contract performance in accordance with the contracting officer's decision pending a final resolution of any claim arising under, or relating to, the contract. (A claim arising under a contract is a claim that can be resolved under a contract clause, other than the clause at 52.233-1, Disputes, that provides for the relief sought by the claimant; however, relief for such claim can also be sought under the clause at 52.233-1. A claim relating to a contract is a claim that cannot be resolved under a contract clause other than the clause at 52.233-1.) This distinction is recognized by the clause with its Alternate I (see 33.215).

(b) In all contracts that include the clause at 52.233-1, Disputes, with its Alternate I, in the event of a dispute not arising under, but relating to, the contract, the contracting officer shall consider providing, through appropriate agency procedures, financing of the continued performance; provided, that the Government's interest is properly secured.

33.214 Alternative dispute resolution (ADR).

(a) The objective of using ADR procedures is to increase the opportunity for relatively inexpensive and expeditious resolution of issues in controversy. Essential elements of ADR include-

(1) Existence of an issue in controversy;

(2) A voluntary election by both parties to participate in the ADR process;

(3) An agreement on alternative procedures and terms to be used in lieu of formal litigation; and

(4) Participation in the process by officials of both parties who have the authority to resolve the issue in controversy.

(b) If the contracting officer rejects a contractor's request for ADR proceedings, the contracting officer shall provide the contractor a written explanation citing one or more of the conditions in 5 U.S.C. 572(b) or such other specific reasons that ADR procedures are inappropriate for the resolution of the dispute. In any case where a contractor rejects a request of an agency for ADR proceedings, the contractor shall inform the agency in writing of the contractor's specific reasons for rejecting the request.

(c) ADR procedures may be used at any time that the contracting officer has authority to resolve the issue in controversy. If a claim has been submitted, ADR procedures may be applied to all or a portion of the claim. When ADR procedures are used subsequent to the issuance of a contracting officer's final decision, their use does not alter any of the time limitations or procedural requirements for filing an appeal of the contracting officer's final decision and does not constitute a reconsideration of the final decision.

(d) When appropriate, a neutral person may be used to facilitate resolution of the issue in controversy using the procedures chosen by the parties.
(e) The confidentiality of ADR proceedings shall be protected consistent with 5 U.S.C. 574.

(f)(1) A solicitation shall not require arbitration as a condition of award, unless arbitration is otherwise required by law. Contracting officers should have flexibility to select the appropriate ADR procedure to resolve the issues in controversy as they arise.

(2) An agreement to use arbitration shall be in writing and shall specify a maximum award that may be issued by the arbitrator, as well as any other conditions limiting the range of possible outcomes.

(g) Binding arbitration, as an ADR procedure, may be agreed to only as specified in agency guidelines. Such guidelines shall provide advice on the appropriate use of binding arbitration and when an agency has authority to settle an issue in controversy through binding arbitration.

33.215 Contract clauses.

(a) Insert the clause at 52.233-1, Disputes, in solicitations and contracts, unless the conditions in 33.203(b) apply. If it is determined under agency procedures that continued performance is necessary pending resolution of any claim arising under or relating to the contract, the contracting officer shall use the clause with its Alternate I.

(b) Insert the clause at 52.233-4 in all solicitations and contracts.

3.B. Other States’ Example

Many other countries have procedures for the review of protests. Having challenge procedures for the review of meritorious grievances is an important obligation for signatories to the WTO Government Procurement Agreement (Article XX). These challenge procedures will provide for an unsuccessful domestic or foreign bidder to have a fair review of their complaint that award has been made in violation of the Agreement.

In that vein of supranational procedures, the European Union, a signatory to the Agreement, requires its member states to have procedures in their national laws to permit grievances of supply and service contracts to be adjudicated quickly.7 Also, the European Commission may take direct action if it is necessary.

The Directives seek to ensure that the review procedures are available at least to any person having or having had an interest in obtaining a given public contract and having been or likely to be injured by an alleged infringement. Decisions of the contracting authorities which are in breach of the law must be subject to effective and rapid remedies. In all Member States, such remedies must include, in particular, the possibility of taking interim measures (such as suspension of the award procedure in question), the setting aside of unlawful decisions and discriminatory technical, economic and financial specifications in the invitation to tender, and the compensation of injured parties.

corrected. The Member State is obliged to reply within 21 days. If the Commission is not satisfied with the reply from the Member State it may initiate the infringement procedure provided for by Article 169 of the Treaty and apply to the Court of Justice to take interim measures where appropriate.

3.B.1 World Trade Organization Agreement on Government Procurement Article XX

Challenge Procedures

Consultations

1. In the event of a complaint by a supplier that there has been a breach of this Agreement in the context of a procurement, each Party shall encourage the supplier to seek resolution of its complaint in consultation with the procuring entity. In such instances the procuring entity shall accord impartial and timely consideration to any such complaint, in a manner that is not prejudicial to obtaining corrective measures under the challenge system.

Challenge

2. Each Party shall provide non-discriminatory, timely, transparent and effective procedures enabling suppliers to challenge alleged breaches of the Agreement arising in the context of procurements in which they have, or have had, an interest.

3. Each Party shall provide its challenge procedures in writing and make them generally available.

4. Each Party shall ensure that documentation relating to all aspects of the process concerning procurements covered by this Agreement shall be retained for three years.

5. The interested supplier may be required to initiate a challenge procedure and notify the procuring entity within specified time-limits from the time when the basis of the complaint is known or reasonably should have been known, but in no case within a period of less than 10 days.

6. Challenges shall be heard by a court or by an impartial and independent review body with no interest in the outcome of the procurement and the members of which are secure from external influence during the term of appointment. A review body which is not a court shall either be subject to judicial review or shall have procedures which provide that:

(a) participants can be heard before an opinion is given or a decision is reached;

(b) participants can be represented and accompanied;

(c) participants shall have access to all proceedings;

(d) proceedings can take place in public;

(e) opinions or decisions are given in writing with a statement describing the basis for the opinions or decisions;

(f) witnesses can be presented;

(g) documents are disclosed to the review body.
7. Challenge procedures shall provide for:

(a) rapid interim measures to correct breaches of the Agreement and to preserve commercial opportunities. Such action may result in suspension of the procurement process. However, procedures may provide that overriding adverse consequences for the interests concerned, including the public interest, may be taken into account in deciding whether such measures should be applied. In such circumstances, just cause for not acting shall be provided in writing;

(b) an assessment and a possibility for a decision on the justification of the challenge;

(c) correction of the breach of the Agreement or compensation for the loss or damages suffered, which may be limited to costs for tender preparation or protest.

8. With a view to the preservation of the commercial and other interests involved, the challenge procedure shall normally be completed in a timely fashion.

3.B.2. European Union - Review procedures: supply, works and service contracts


COUNCIL DIRECTIVE of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (89/665/EEC) THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 100a thereof, Having regard to the proposal from the Commission (1), In cooperation with the European Parliament (2), Having regard to the opinion of the Economic and Social Committee


Whereas the existing arrangements at both national and Community levels for ensuring their application are not always adequate to ensure compliance with the relevant Community provisions particularly at a stage when infringements can be corrected;

Whereas the opening-up of public procurement to Community competition necessitates a substantial increase in the guarantees of transparency and non-discrimination; whereas, for it to have tangible effects, effective and rapid remedies must be available in the case of infringements of Community law in the field of public procurement or national rules implementing that law;

Whereas in certain Member States the absence of effective remedies or inadequacy of existing remedies deter

Community undertakings from submitting tenders in the Member State in which the contracting authority is established; whereas, therefore, the Member States concerned must remedy this situation;
Whereas, since procedures for the award of public contracts are of such short duration, competent review bodies must, among other things, be authorized to take interim measures aimed at suspending such a procedure or the implementation of any decisions which may be taken by the contracting authority; whereas the short duration of the procedures means that the aforementioned infringements need to be dealt with urgently;

Whereas it is necessary to ensure that adequate procedures exist in all the Member States to permit the setting aside of decisions taken unlawfully and compensation of persons harmed by an infringement;

Whereas, when undertakings do not seek review, certain infringements may not be corrected unless a specific mechanism is put in place;

Whereas, accordingly, the Commission, when it considers that a clear and manifest infringement has been committed during a contract award procedure, should be able to bring it to the attention of the competent authorities of the Member State and of the contracting authority concerned so that appropriate steps are taken for the rapid correction of any alleged infringement;

Whereas the application in practice of the provisions of this Directive should be re-examined within a period of four years of its implementation on the basis of information to be supplied by the Member States concerning the functioning of the national review procedures,

HAD ADOPTED THIS DIRECTIVE:

Article 1

1. The Member States shall take the measures necessary to ensure that, as regards contract award procedures falling within the scope of Directives 71/305/EEC and 77/62/EEC, decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in the following Articles, and, in particular, Article 2 (7) on the grounds that such decisions have infringed Community law in the field of public procurement or national rules implementing that law.

2. Member States shall ensure that there is no discrimination between undertakings claiming injury in the context of a procedure for the award of a contract as a result of the distinction made by this Directive between national rules implementing Community law and other national rules.

3. The Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular public supply or public works contract and who has been or risks being harmed by an alleged infringement. In particular, the Member States may require that the person seeking the review must have previously notified the contracting authority of the alleged infringement and of his intention to seek review.

Article 2

1. The Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for the powers to:

(a) take, at the earliest opportunity and by way of interlocutory procedures, interim measures with the aim of correcting the alleged infringement or preventing further damage to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a public contract or the implementation of any decision taken by the contracting authority;
(b) either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminative technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure;

(c) award damages to persons harmed by an infringement.

2. The powers specified in paragraph 1 may be conferred on separate bodies responsible for different aspects of the review procedure.

3. Review procedures need not in themselves have an automatic suspensive effect on the contract award procedures to which they relate.

4. The Member States may provide that when considering whether to order interim measures the body responsible may take into account the probable consequences of the measures for all interests likely to be harmed, as well as the public interest, and may decide not to grant such measures where their negative consequences could exceed their benefits. A decision not to grant interim measures shall not prejudice any other claim of the person seeking these measures.

5. The Member States may provide that where damages are claimed on the grounds that a decision was taken unlawfully, the contested decision must first be set aside by a body having the necessary powers.

6. The effects of the exercise of the powers referred to in paragraph 1 on a contract concluded subsequent to its award shall be determined by national law.

Furthermore, except where a decision must be set aside prior to the award of damages, a Member State may provide that, after the conclusion of a contract following its award, the powers of the body responsible for the review procedures shall be limited to awarding damages to any person harmed by an infringement.

7. The Member States shall ensure that decisions taken by bodies responsible for review procedures can be effectively enforced.

8. Where bodies responsible for review procedures are not judicial in character, written reasons for their decisions shall always be given. Furthermore, in such a case, provision must be made to guarantee procedures whereby any allegedly illegal measure taken by the review body or any alleged defect in the exercise of the powers conferred on it can be the subject of judicial review or review by another body which is a court or tribunal within the meaning of Article 177 of the EEC Treaty and independent of both the contracting authority and the review body.

The members of such an independent body shall be appointed and leave office under the same conditions as members of the judiciary as regards the authority responsible for their appointment, their period of office, and their removal. At least the President of this independent body shall have the same legal and professional qualifications as members of the judiciary. The independent body shall take its decisions following a procedure in which both sides are heard, and these decisions shall, by means determined by each Member State, be legally binding.

Article 3

1. The Commission may invoke the procedure for which this Article provides when, prior to a contract being concluded, it considers that a clear and manifest infringement of Community provisions in the field of public procurement has been committed during a contract award procedure falling within the
scope of Directives 71/305/EEC and 77/62/EEC.

2. The Commission shall notify the Member State and the contracting authority concerned of the reasons which have led it to conclude that a clear and manifest infringement has been committed and request its correction.

3. Within 21 days of receipt of the notification referred to in paragraph 2, the Member State concerned shall communicate to the Commission:

(a) its confirmation that the infringement has been corrected; or
(b) a reasoned submission as to why no correction has been made;

or(c) a notice to the effect that the contract award procedure has been suspended either by the contracting authority on its own initiative or on the basis of the powers specified in Article 2 (1) (a).

4. A reasoned submission in accordance with paragraph 3 (b) may rely among other matters on the fact that the alleged infringement is already the subject of judicial or other review proceedings or of a review as referred to in Article 2 (8). In such a case, the Member State shall inform the Commission of the result of those proceedings as soon as it becomes known. 5. Where notice has been given that a contract award procedure has been suspended in accordance with paragraph 3 (c), the Member State shall notify the Commission when the suspension is lifted or another contract procedure relating in whole or in part to the same subject matter is begun. That notification shall confirm that the alleged infringement has been corrected or include a reasoned submission as to why no correction has been made.

Article 4 1. Not later than four years after the implementation of this Directive, the Commission, in consultation with the Advisory Committee for Public Contracts, shall review the manner in which the provisions of this Directive have been implemented and, if necessary, make proposals for amendments.

2. By 1 March each year the Member States shall communicate to the Commission information on the operation of their national review procedures during the preceding calendar year. The nature of the information shall be determined by the Commission in consultation with the Advisory Committee for Public Contracts.

Article 5 Member States shall bring into force, before 1 December 1991, the measures necessary to comply with this Directive. They shall communicate to the Commission the texts of the main national laws, regulations and administrative provisions which they adopt in the field governed by this Directive.

Article 6 This Directive is addressed to the Member States. Done at Brussels, 21 December 1989.
ANNEX 4 - QUALITY CONTROL AND REVIEW SYSTEMS

QUALITY CONTROL AND REVIEW SYSTEMS: Approaches to conduct pre and post award reviews and establish internal and external controls and process evaluation on the procurement process.

4.A. United States’ Example

Within the United States, contracting officers rely on internal auditors to help establish negotiating target prices and monitor contract performance. These auditors are specially trained for this purpose and reside primarily in the Defense Contract Audit Agency, providing their services to defense and civilian agencies as required.


Defense Contract Audit Agency (DCAA) provides a wide variety of products and services to contracting officers8: during the pre award and post award phases of the procurement process as well as oversight at contractor facilities when the size of the contract warrants it or as requested by the contracting officer.

In the pre-award phase, contract audit services include the review of:

- Price Proposals
- Pre-award Surveys
- Forward Pricing Labor & Overhead Rates
- In the post-award phase, contract audit services include the review of:
  - Incurred Costs/Annual Overhead Rates
  - Truth in Negotiation Act Compliance
  - CAS (Cost Accounting Standards) Compliance & Adequacy
  - Claims
  - Financial Capability

When required by contracting regulations and the contract provisions, DCAA auditors review a contractor’s internal control system in the following areas to ensure there is adequate information for understanding the basis of individual contract proposals and other contract actions:

- Accounting
- Estimating
- EDP (Electronic Data Processing)

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8 This information is taken from the DCAA website at: http://www.dcaa.mil/
In addition to performing formal audit activities, Agency auditors provide negotiation assistance to contracting officers, including fact-finding and analysis of contractor information.

4. A.2. Inspectors General

In addition to these contract auditors, there are special internal auditors assigned to the Inspector General’s office in each major agency. Congress passed the Inspector General Act of 1978, which created independent audit and investigative offices within 12 Federal agencies. Before that time, most Federal audit and investigative resources were in the program offices they were reviewing. Currently, 57 statutory IGs provide oversight to 59 federal agencies. The term “Inspector General” derives from the military’s independent review of the combat readiness of troops. Today’s civilian IGs are charged with detecting and preventing fraud, waste, and abuse and promoting economy, effectiveness, and efficiency so that their agencies can best serve the public.

The major way IGs are different from other Federal officials is their independence. The Inspector General Act authorizes IGs to:

- conduct such investigations and issue such reports as they believe appropriate (with limited national security and law enforcement exceptions);
- issue subpoenas for information and documents outside the agency (with same limited exceptions);
- have direct access to all records and information of the agency;
- have ready access to agency heads;
- administer oaths for taking testimony;
- hire and control their own staff and contract resources; and
- request assistance from any Federal, State, or local government;

In simple terms, the IGs have two basic roles; to find and report on current problems and to foster good program management to prevent future problems. Their statutory mission is to:

- conduct and supervise audits and investigations relating to the programs and operations of their agencies;

Refer to the site at http://www.ignet.gov/
• review existing and proposed legislation and regulations relating to the programs and operations of their agencies;

• provide leadership for activities designed to promote economy, effectiveness, and efficiency and fight fraud, waste; and abuse in their agencies programs; and

• inform their agency heads and the Congress of problems in their agencies’ programs.

• The IGs serving at the cabinet-level departments and major sub-cabinet agencies are nominated by the President and confirmed by the Senate. Only the President can remove these IGs. IGs at smaller independent agencies and corporations are appointed by their agency heads, who can also remove them from office. In either case, both houses of Congress must be notified of the reasons for removal.

4.A.2.a INSPECTOR GENERAL ACT OF 1978

(5 USCS Appx § 1)

Current Through 12/31/98

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§ 1. Short title

This Act may be cited as the "Inspector General Act of 1978".

§ 2. Purpose and establishment of Offices of Inspector General; departments and agencies involved in order to create independent and objective units

(1) to conduct and supervise audits and investigations relating to the programs and operations of the establishments listed in section 11(2); (2) to provide leadership and coordination and recommend policies for activities designed

(A) to promote economy, efficiency, and effectiveness in the administration of, and

(B) to prevent and detect fraud and abuse in, such programs and operations; and

(3) to provide a means for keeping the head of the establishment and the Congress fully and currently informed about problems and deficiencies relating to the administration of such programs and operations and the necessity for and progress of corrective action; there is established

(A) in each of such establishments an office of Inspector General, subject to subparagraph (B); and

(B) in the establishment of the Department of the Treasury-2

(i) an Office of Inspector General of the Department of the Treasury; and

(ii) an Office of Treasury Inspector General for Tax Administration.

§ 3. Appointment of Inspectors General; supervision; removal; political activities; appointment of Assistant Inspector General for Auditing and Assistant Inspector General for Investigations

(a) There shall be at the head of each Office an Inspector General who shall be appointed by the President, by and with the advice and consent of the Senate, without regard to political affiliation and solely on the basis of integrity and demonstrated ability in accounting, auditing, financial analysis, law, management analysis, public administration, or investigations.

Each Inspector General shall report to and be under the general supervision of the head of the establishment involved or, to the extent such authority is delegated, the officer next in rank below such head, but shall not report to, or be subject to supervision by, any other officer of such establishment.

Neither the head of the establishment nor the officer next in rank below such head shall prevent or prohibit the Inspector General from initiating, carrying out, or completing any audit or investigation, or
from issuing any subpoena during the course of any audit or investigation.

(b) An Inspector General may be removed from office by the President. The President shall communicate the reasons for any such removal to both Houses of Congress.

(c) For the purposes of section 7324 of title 5, United States Code, no Inspector General shall be considered to be an employee who determines policies to be pursued by the United States in the nationwide administration of Federal laws.

(d) Each Inspector General shall, in accordance with applicable laws and regulations governing the civil service--

(1) appoint an Assistant Inspector General for Auditing who shall have the responsibility for supervising the performance of auditing activities relating to programs and operations of the establishment, and

(2) appoint an Assistant Inspector General for Investigations who shall have the responsibility for supervising the performance of investigative activities relating to such programs and operations.

§ 4. Duties and responsibilities; report of criminal violations to Attorney General

(a) It shall be the duty and responsibility of each Inspector General, with respect to the establishment within which his Office is established--

(1) to provide policy direction for and to conduct, supervise, and coordinate audits and investigations relating to the programs and operations of such establishment;

(2) to review existing and proposed legislation and regulations relating to programs and operations of such establishment and to make recommendations in the semiannual reports required by section 5(a) concerning the impact of such legislation or regulations on the economy and efficiency in the administration of programs and operations administered or financed by such establishment or the prevention and detection of fraud and abuse in such programs and operations;

(3) to recommend policies for, and to conduct, supervise, or coordinate other activities carried out or financed by such establishment for the purpose of promoting economy and efficiency in the administration of, or preventing and detecting fraud and abuse in, its programs and operations;

(4) to recommend policies for, and to conduct, supervise, or coordinate relationships between such establishment and other Federal agencies, State and local governmental agencies, and nongovernmental entities with respect to

(A) all matters relating to the promotion of economy and efficiency in the administration of, or the prevention and detection of fraud and abuse in, programs and operations administered or financed by such establishment, or

(B) the identification and prosecution of participants in such fraud or abuse; and

(5) to keep the head of such establishment and the Congress fully and currently informed, by means of the reports required by section 5 and otherwise, concerning fraud and other serious problems, abuses, and deficiencies relating to the administration of programs and operations administered or financed by such establishment, to recommend corrective action concerning such problems, abuses, and deficiencies, and to report on the progress made in implementing such corrective action. (b)(1) In carrying out the
responsibilities specified in subsection (a)(1), each Inspector General shall--

(A) comply with standards established by the Comptroller General of the United States for audits of Federal establishments, organizations, programs, activities, and functions;

(B) establish guidelines for determining when it shall be appropriate to use non-Federal auditors; and

(C) take appropriate steps to assure that any work performed by non-Federal auditors complies with the standards established by the Comptroller General as described in paragraph (1).

(2) For purposes of determining compliance with paragraph (1)(A) with respect to whether internal quality controls are in place and operating and whether established audit standards, policies, and procedures are being followed by Offices of Inspector General of establishments defined under section 11(2), Offices of Inspector General of designated Federal entities defined under section 8F(a)(2), and any audit office established within a Federal entity defined under section 8F(a)(1), reviews shall be performed exclusively by an audit entity in the Federal Government, including the GAO or the Office of Inspector General of each establishment defined under section 11(2), or the Office of Inspector General of each designated Federal entity defined under section 8F(a)(2).

(c) In carrying out the duties and responsibilities established under this Act, each Inspector General shall give particular regard to the activities of the Comptroller General of the United States with a view toward avoiding duplication and insuring effective coordination and cooperation.

(d) In carrying out the duties and responsibilities established under this Act, each Inspector General shall report expeditiously to the Attorney General whenever the Inspector General has reasonable grounds to believe there has been a violation of Federal criminal law.

§ 5. Semiannual reports; transmittal to Congress; availability to public; immediate report on serious or flagrant problems

(a) Each Inspector General shall, not later than April 30 and October 31 of each year, prepare semiannual reports summarizing the activities of the Office during the immediately preceding six-month periods ending March 31 and September 30. Such reports shall include, but need not be limited to--

(1) a description of significant problems, abuses, and deficiencies relating to the administration of programs and operations of such establishment disclosed by such activities during the reporting period;

(2) a description of the recommendations for corrective action made by the Office during the reporting period with respect to significant problems, abuses, or deficiencies identified pursuant to paragraph (1);

(3) an identification of each significant recommendation described in previous semiannual reports on which corrective action has not been completed;

(4) a summary of matters referred to prosecutive authorities and the prosecutions and convictions which have resulted;

(5) a summary of each report made to the head of the establishment under section 6(b)(2) during the reporting period;

(6) a listing, subdivided according to subject matter, of each audit report issued by the Office during the reporting period and for each audit report, where applicable, the total dollar value of questioned costs (including a separate category for the dollar value of unsupported costs) and the dollar value of
recommendations that funds be put to better use;

(7) a summary of each particularly significant report;

(8) statistical tables showing the total number of audit reports and the total dollar value of questioned costs (including a separate category for the dollar value of unsupported costs), for audit reports--

(A) for which no management decision had been made by the commencement of the reporting period;

(B) which were issued during the reporting period;

(C) for which a management decision was made during the reporting period, including--

(i) the dollar value of disallowed costs; and

(ii) the dollar value of costs not disallowed; and

(D) for which no management decision has been made by the end of the reporting period;

(9) statistical tables showing the total number of audit reports and the dollar value of recommendations that funds be put to better use by management, for audit reports--

(A) for which no management decision had been made by the commencement of the reporting period;

(B) which were issued during the reporting period;

(C) for which a management decision was made during the reporting period, including--

(i) the dollar value of recommendations that were agreed to by management; and

(ii) the dollar value of recommendations that were not agreed to by management; and

(D) for which no management decision has been made by the end of the reporting period;

(10) a summary of each audit report issued before the commencement of the reporting period for which no management decision has been made by the end of the reporting period (including the date and title of each such report), an explanation of the reasons such management decision has not been made, and a statement concerning the desired timetable for achieving a management decision on each such report;

(11) a description and explanation of the reasons for any significant revised management decision made during the reporting period;

(12) information concerning any significant management decision with which the Inspector General is in disagreement; and

(13) the information described under section 05(b) of the Federal Financial Management Improvement Act of 1996.

[Reports by the Inspector General--Each Inspector General who prepares a report under section 5(a) of the Inspector General Act of 1978 (5 U.S.C. App.) shall report to Congress instances and reasons when an agency has not met the intermediate target dates established in the remediation plan required under section 3(c).]
SEC. 803. (c) (3) Remediation plan.--(A) If the Head of an agency determines that the agency's financial management systems do not comply with the requirements of subsection (a), the head of the agency, in consultation with the Director, shall establish a remediation plan that shall include resources, remedies, and intermediate target dates necessary to bring the agency's financial management systems into substantial compliance. (B) If the determination of the head of the agency differs from the audit compliance findings required in subsection (b), the Director shall review such determinations and provide a report on the findings to the appropriate committees of the Congress.

Specifically the report shall include--

(1) the entity or organization responsible for the non-compliance;

(2) the facts pertaining to the failure to comply with the requirements of subsection (a), including the nature and extent of the non-compliance, the primary reason or cause for the failure to comply, and any extenuating circumstances; and

(3) a statement of the remedial actions needed to comply.

(b) Semiannual reports of each Inspector General shall be furnished to the head of the establishment involved not later than April 30 and October 31 of each year and shall be transmitted by such head to the appropriate committees or subcommittees of the Congress within thirty days after receipt of the report, together with a report by the head of the establishment containing--

(1) any comments such head determines appropriate;

(2) statistical tables showing the total number of audit reports and the dollar value of disallowed costs, for audit reports--

(A) for which final action had not been taken by the commencement of the reporting period;

(B) on which management decisions were made during the reporting period;

(C) for which final action was taken during the reporting period, including—

(i) the dollar value of disallowed costs that were recovered by management through collection, offset, property in lieu of cash, or otherwise; and

(ii) the dollar value of disallowed costs that were written off by management; and

(D) for which no final action has been taken by the end of the reporting period;

(3) statistical tables showing the total number of audit reports and the dollar value of recommendations that funds be put to better use by management agreed to in a management decision, for audit reports--

(A) for which final action had not been taken by the commencement of the reporting period;

(B) on which management decisions were made during the reporting period;

(C) for which final action was taken during the reporting period, including--
(i) the dollar value of recommendations that were actually completed; and

(ii) the dollar value of recommendations that management has subsequently concluded should not or could not be implemented or completed; and

(D) for which no final action has been taken by the end of the reporting period; and

(4) a statement with respect to audit reports on which management decisions have been made but final action has not been taken, other than audit reports on which a management decision was made within the preceding year, containing--

(A) a list of such audit reports and the date each such report was issued;

(B) the dollar value of disallowed costs for each report;

(C) the dollar value of recommendations that funds be put to better use agreed to by management for each report; and

(D) an explanation of the reasons final action has not been taken with respect to each such audit report, except that such statement may exclude such audit reports that are under formal administrative or judicial appeal or upon which management of an establishment has agreed to pursue a legislative solution, but shall identify the number of reports in each category so excluded.

(c) Within sixty days of the transmission of the semiannual reports of each Inspector General to the Congress, the head of each establishment shall make copies of such report available to the public upon request and at a reasonable cost. Within 60 days after the transmission of the semiannual reports of each establishment head to the Congress, the head of each establishment shall make copies of such report available to the public upon request and at a reasonable cost.

(d) Each Inspector General shall report immediately to the head of the establishment involved whenever the Inspector General becomes aware of particularly serious or flagrant problems, abuses, or deficiencies relating to the administration of programs and operations of such establishment. The head of the establishment shall transmit any such report to the appropriate committees or subcommittees of Congress within seven calendar days, together with a report by the head of the establishment containing any comments such head deems appropriate.

(e)(1) Nothing in this section shall be construed to authorize the public disclosure of information which is--

(A) specifically prohibited from disclosure by any other provision of law;

(B) specifically required by Executive order to be protected from disclosure in the interest of national defense or national security or in the conduct of foreign affairs; or

(C) a part of an ongoing criminal investigation.

(2) Notwithstanding paragraph (1)(C), any report under this section may be disclosed to the public in a form which includes information with respect to a part of an ongoing criminal investigation if such information has been included in a public record.

(3) Except to the extent and in the manner provided under section 6103(f) of the Internal Revenue Code of 1986, nothing in this section or in any other provision of this Act shall be construed to authorize or
permit the withholding of information from the Congress, or from any committee or subcommittee thereof.

(f) As used in this section--

(1) the term "questioned cost" means a cost that is questioned by the Office because of--

(A) an alleged violation of a provision of a law, regulation, contract, grant, cooperative agreement, or other agreement or document governing the expenditure of funds;

(B) a finding that, at the time of the audit, such cost is not supported by adequate documentation; or

(C) a finding that the expenditure of funds for the intended purpose is unnecessary or unreasonable;

(2) the term "unsupported cost" means a cost that is questioned by the Office because the Office found that, at the time of the audit, such cost is not supported by adequate documentation;

(3) the term "disallowed cost" means a questioned cost that management, in a management decision, has sustained or agreed should not be charged to the Government;

(4) the term "recommendation that funds be put to better use" means a recommendation by the Office that funds could be used more efficiently if management of an establishment took actions to implement and complete the recommendation, including--

(A) reductions in outlays;

(B) deobligation of funds from programs or operations;

(C) withdrawal of interest subsidy costs on loans or loan guarantees, insurance, or bonds;

(D) costs not incurred by implementing recommended improvements related to the operations of the establishment, a contractor or grantee;

(E) avoidance of unnecessary expenditures noted in preaward reviews of contract or grant agreements; or

(F) any other savings which are specifically identified;

(5) the term "management decision" means the evaluation by the management of an establishment of the findings and recommendations included in an audit report and the issuance of a final decision by management concerning its response to such findings and recommendations, including actions concluded to be necessary; and

(6) the term "final action" means--

(A) the completion of all actions that the management of an establishment has concluded, in its management decision, are necessary with respect to the findings and recommendations included in an audit report; and

(B) in the event that the management of an establishment concludes no action is necessary, final action occurs when a management decision has been made.

§ 6. Authority of Inspector Generals; information and assistance from Federal agencies; unreasonable
refusal; office space and equipment (a) In addition to the authority otherwise provided by this Act, each Inspector General, in carrying out the provisions of this Act, is authorized--

(1) to have access to all records, reports, audits, reviews, documents, papers, recommendations, or other material available to the applicable establishment which relate to programs and operations with respect to which that Inspector General has responsibilities under this Act;

(2) to make such investigations and reports relating to the administration of the programs and operations of the applicable establishment as are, in the judgment of the Inspector General, necessary or desirable;

(3) to request such information or assistance as may be necessary for carrying out the duties and responsibilities provided by this Act from any Federal, State, or local governmental agency or unit thereof;

(4) to require by subpoena the production of all information, documents, reports, answers, records, accounts, papers, and other data and documentary evidence necessary in the performance of the functions assigned by this Act, which subpoena, in the case of contumacy or refusal to obey, shall be enforceable by order of any appropriate United States district court: Provided, That procedures other than subpoenas shall be used by the Inspector General to obtain documents and information from Federal agencies;

(5) to administer to or take from any person an oath, affirmation, or affidavit, whenever necessary in the performance of the functions assigned by this Act, which oath, affirmation, or affidavit when administered or taken by or before an employee of an Office of Inspector General designated by the Inspector General shall have the same force and effect as if administered or taken by or before an officer having a seal;

(6) to have direct and prompt access to the head of the establishment involved when necessary for any purpose pertaining to the performance of functions and responsibilities under this Act;

(7) to select, appoint, and employ such officers and employees as may be necessary for carrying out the functions, powers, and duties of the Office subject to the provisions of title 5, United States Code, governing appointments in the competitive service, and the provisions of chapter 51 and subchapter III of chapter 53 of such title relating to classification and General Schedule pay rates;

(8) to obtain services as authorized by section 3109 of title 5, United States Code, at daily rates not to exceed the equivalent rate prescribed for grade GS-18 of the General Schedule by section 5332 of title 5, United States Code; and

(9) to the extent and in such amounts as may be provided in advance by appropriations Acts, to enter into contracts and other arrangements for audits, studies, analyses, and other services with public agencies and with private persons, and to make such payments as may be necessary to carry out the provisions of this Act.

(b)(1) Upon request of an Inspector General for information or assistance under subsection (a)(3), the head of any Federal agency involved shall, insofar as is practicable and not in contravention of any existing statutory restriction or regulation of the Federal agency from which the information is requested, furnished to such Inspector General, or to an authorized designee, such information or assistance.

(2) Whenever information or assistance requested under subsection (a)(1) or (a)(3) is, in the judgment of an Inspector General, unreasonably refused or not provided, the Inspector General shall report the circumstances to the head of the establishment involved without delay.
(c) Each head of an establishment shall provide the Office within such establishment with appropriate and adequate office space at central and field office locations of such establishment, together with such equipment, office supplies, and communications facilities and services as may be necessary for the operation of such offices, and shall provide necessary maintenance services for such offices and the equipment and facilities located therein.

(d) For purposes of the provisions of title 5, United States Code, governing the Senior Executive Service, any reference in such provisions to the "appointing authority" for a member of the Senior Executive Service or for a Senior Executive Service position shall, if such member or position is or would be within the Office of an Inspector General, be deemed to be a reference to such Inspector General.

§ 7. Complaints by employees; disclosure of identity; reprisals

(a) The Inspector General may receive and investigate complaints or information from an employee of the establishment concerning the possible existence of an activity constituting a violation of law, rules, or regulations, or mismanagement, gross waste of funds, abuse of authority or a substantial and specific danger to the public health and safety.

(b) The Inspector General shall not, after receipt of a complaint or information from an employee, disclose the identity of the employee without the consent of the employee, unless the Inspector General determines such disclosure is unavoidable during the course of the investigation.

(c) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority, take or threaten to take any action against any employee as a reprisal for making a complaint or disclosing information to an Inspector General, unless the complaint was made or the information disclosed with the knowledge that it was false or with willful disregard for its truth or falsity.

§ 8. Additional provisions with respect to the Inspector General of the Department of Defense

(a) No member of the Armed Forces, active or reserve, shall be appointed Inspector General of the Department of Defense.

(b)(1) Notwithstanding the last two sentences of section 3(a), the Inspector General shall be under the authority, direction, and control of the Secretary of Defense with respect to audits or investigations, or the issuance of subpoenas, which require access to information concerning--

(A) sensitive operational plans;

(B) intelligence matters;

(C) counter intelligence matters;

(D) ongoing criminal investigations by other administrative units of the Department of Defense related to national security; or

(E) other matters the disclosure of which would constitute a serious threat to national security.

(2) With respect to the information described in paragraph (1) the Secretary of Defense may prohibit the Inspector General from initiating, carrying out, or completing any audit or investigation, or from issuing any subpoena, after the Inspector General has decided to initiate, carry out or complete such audit or investigation or to issue such subpoena, if the Secretary determines that such prohibition is necessary to
preserve the national security interests of the United States.

(3) If the Secretary of Defense exercises any power under paragraph (1) or (2), the Inspector General shall submit a statement concerning such exercise within thirty days to the Committees on Armed Services and Governmental Affairs of the Senate and the Committee on National Security and the Committee on Government Reform and Oversight of the House of Representatives and to other appropriate committees or subcommittees of the Congress.

(4) The Secretary shall, within thirty days after a submission of a statement under paragraph (3), transmit a statement of the reasons for the exercise of power under paragraph (1) or (2) to the congressional committees specified in paragraph (3) and to other appropriate committees or subcommittees.

(c) In addition to the other duties and responsibilities specified in this Act, the Inspector General of the Department of Defense shall:

(1) be the principal adviser to the Secretary of Defense for matters relating to the prevention and detection of fraud, waste, and abuse in the programs and operations of the Department;

(2) initiate, conduct, and supervise such audits and investigations in the Department of Defense (including the military departments) as the Inspector General considers appropriate;

(3) provide policy direction for audits and investigations relating to fraud, waste, and abuse and program effectiveness;

(4) investigate fraud, waste, and abuse uncovered as a result of other contract and internal audits, as the Inspector General considers appropriate;

(5) develop policy, monitor and evaluate program performance, and provide guidance with respect to all Department activities relating to criminal investigation programs;

(6) monitor and evaluate the adherence of Department auditors to internal audit, contract audit, and internal review principles, policies, and procedures;

(7) develop policy, evaluate program performance, and monitor actions taken by all components of the Department in response to contract audits, internal audits, internal review reports, and audits conducted by the Comptroller General of the United States;

(8) request assistance as needed from other audit, inspection, and investigative units of the Department of Defense (including military departments); and

(9) give particular regard to the activities of the internal audit, inspection, and investigative units of the military departments with a view toward avoiding duplication and insuring effective coordination and cooperation.

(d) Notwithstanding section 4(d), the Inspector General of the Department of Defense shall expeditiously report suspected or alleged violations of chapter 47 of title 10, United States Code (Uniform Code of Military Justice), to the Secretary of the military department concerned or the Secretary of Defense.

(e) For the purposes of section 7, a member of the Armed Forces shall be deemed to be an employee of the Department of Defense, except that, when the Coast Guard operates as a service of another
department or agency of the Federal Government, a member of the Coast Guard shall be deemed to be an employee of such department or agency.

(f)(1) Each semiannual report prepared by the Inspector General of the Department of Defense under section 5(a) shall include information concerning the numbers and types of contract audits conducted by the Department during the reporting period. Each such report shall be transmitted by the Secretary of Defense to the Committees on Armed Services and Governmental Affairs of the Senate and the Committee on National Security and the Committee on Government Reform and Oversight of the House of Representatives and to other appropriate committees or subcommittees of the Congress.

(2) Any report required to be transmitted by the Secretary of Defense to the appropriate committees or subcommittees of the Congress under section 5(d) shall also be transmitted, within the seven-day period specified in such section, to the congressional committees specified in paragraph (1).

(g) The provisions of section 1385 of title 18, United States Code, shall not apply to audits and investigations conducted by, under the direction of, or at the request of the Inspector General of the Department of Defense to carry out the purposes of this Act.

§ 8A. Special provisions relating to the Agency for International Development [AID]

(a) In addition to the other duties and responsibilities specified in this Act, the Inspector General of the Agency for International Development--

(1) shall supervise, direct, and control all security activities relating to the programs and operations of that Agency, subject to the supervision of the Administrator of that Agency; and

(2) to the extent requested by the Director of the United States International Development Cooperation Agency (after consultation with the Administrator of the Agency for International Development), shall supervise, direct, and control all audit, investigative, and security activities relating to programs and operations within the United States International Development Cooperation Agency.

(b) In addition to the Assistant Inspector Generals provided for in section 3(d) of this Act, the Inspector General of the Agency for International Development shall, in accordance with applicable laws and regulations governing the civil service, appoint an Assistant Inspector General for Security who shall have the responsibility for supervising the performance of security activities relating to programs and operations of the Agency for International Development.

(c) The semiannual reports required to be submitted to the Administrator of the Agency for International Development pursuant to section 5(b) of this Act shall also be submitted to the Director of the United States International Development Cooperation Agency.

(d) In addition to the officers and employees provided for in section 6(a)(6) of this Act, members of the Foreign Service may, at the request of the Inspector General of the Agency for International Development, be assigned as employees of the Inspector General. Members of the Foreign Service so assigned shall be responsible solely to the Inspector General and the Inspector General (or his or her designee) shall prepare the performance evaluation reports for such members.

(e) In establishing and staffing field offices pursuant to section 6(c) of this Act, the Administrator of the Agency for International Development shall not be bound by overseas personnel ceilings established under the Monitoring Overseas Direct Employment policy.

(f) The reference in section 7(a) of this Act to an employee of the establishment shall, with respect to
the Inspector General of the Agency for International Development, be construed to include an employee of or under the United States International Development Cooperation Agency.

(g) The Inspector General of the Agency for International Development shall be in addition to the officers provided for in section 624(a) of the Foreign Assistance Act of 1961. (h) As used in this Act, the term "Agency for International Development" includes any successor agency primarily responsible for administering part I of the Foreign Assistance Act of 1961.

§ 8B. Special provisions concerning the Nuclear Regulatory Commission [NRC]

(a) The Chairman of the Commission may delegate the authority specified in the second sentence of section 3(a) to another member of the Nuclear Regulatory Commission, but shall not delegate such authority to any other officer or employee of the Commission.

(b) Notwithstanding sections 6(a)(7) and (8), the Inspector General of the Nuclear Regulatory Commission is authorized to select, appoint, and employ such officers and employees as may be necessary for carrying out the functions, powers and duties of the Office of Inspector General and to obtain the temporary or intermittent services of experts or consultants or an organization thereof, subject to the applicable laws and regulations that govern such selections, appointments and employment, and the obtaining of such services, within the Nuclear Regulatory Commission.

§ 8C. Special provisions concerning the Federal Deposit Insurance Corporation [FDIC]

(a) Delegation. The Chairperson of the Federal Deposit Insurance Corporation may delegate the authority specified in the second sentence of section 3(a) to the Vice Chairperson of the Board of Directors of the Federal Deposit Insurance Corporation, but may not delegate such authority to any other officer or employee of the Corporation.

(b) Personnel. Notwithstanding paragraphs (7) and (8) of section 6(a), the Inspector General of the Federal Deposit Insurance Corporation may select, appoint, and employ such officers and employees as may be necessary for carrying out the functions, powers, and duties of the Office of Inspector General and to obtain the temporary or intermittent services of experts or consultants or an organization of experts or consultants, subject to the applicable laws and regulations that govern such selections, appointments, and employment, and the obtaining of such services, within the Federal Deposit Insurance Corporation.

§ 8D. Special provisions concerning the Department of the Treasury [DoT] (a)(1) Notwithstanding the last two sentences of section 3(a), the Inspector General of the Department of the Treasury shall be under the authority, direction, and control of the Secretary of the Treasury with respect to audits or investigations, or the issuance of subpoenas, which require access to sensitive information concerning--

(A) ongoing criminal investigations or proceedings;

(B) undercover operations;

(C) the identity of confidential sources, including protected witnesses;

(D) deliberations and decisions on policy matters, including documented information used as a basis for making policy decisions, the disclosure of which could reasonably be expected to have a significant influence on the economy or market behavior;

(E) intelligence or counterintelligence matters; or
(F) other matters the disclosure of which would constitute a serious threat to national security or to the protection of any person or property authorized protection by section 3056 of title 18, United States Code, section 202 of title 3, United States Code, or any provision of the Presidential Protection Assistance Act of 1976.

(2) With respect to the information described under paragraph (1), the Secretary of the Treasury may prohibit the Inspector General of the Department of the Treasury from carrying out or completing any audit or investigation, or from issuing any subpoena, after such Inspector General has decided to initiate, carry out, or complete such audit or investigation or to issue such subpoena, if the Secretary determines that such prohibition is necessary to prevent the disclosure of any information described under paragraph (1) or to prevent significant impairment to the national interests of the United States.

(3) If the Secretary of the Treasury exercises any power under paragraph (1) or (2), the Secretary of the Treasury shall notify the Inspector General of the Department of the Treasury in writing stating the reasons for such exercise. Within 30 days after receipt of any such notice, the Inspector General of the Department of the Treasury shall transmit a copy of such notice to the Committees on Governmental Affairs and Finance of the Senate and the Committees on Government Operations and Ways and Means of the House of Representatives, and to other appropriate committees or subcommittees of the Congress.

(4) The Secretary of the Treasury may not exercise any power under paragraph (1) or (2) with respect to the Treasury Inspector General for Tax Administration.

(b)(1) In carrying out the duties and responsibilities specified in this Act, the Inspector General of the Department of the Treasury shall have oversight responsibility for the internal investigations performed by the Office of Internal Affairs of the Bureau of Alcohol, Tobacco and Firearms, the Office of Internal Affairs of the United States Customs Service, and the Office of Inspections of the United States Customs Service, and the Office of Inspections of the United States Secret Service[]. The head of each such office shall promptly report to the Inspector General of the Department of the Treasury the significant activities being carried out by such office.

(2) The Inspector General of the Department of the Treasury shall exercise all duties and responsibilities of an Inspector General for the Department of the Treasury other than the duties and responsibilities exercised by the Treasury Inspector General for Tax Administration.

(3) The Secretary of the Treasury shall establish procedures under which the Inspector General of the Department of the Treasury and the Treasury Inspector General for Tax Administration will--

(A) determine how audits and investigations are allocated in cases of overlapping jurisdiction; and

(B) provide for coordination, cooperation, and efficiency in the conduct of such audits and investigations.

(c) Notwithstanding subsection (b), the Inspector General of the Department of the Treasury may initiate, conduct and supervise such audits and investigations in the Department of the Treasury (including the bureaus and services referred to in subsection (b)) as the Inspector General of the Department of the Treasury considers appropriate.

(d) If the Inspector General of the Department of the Treasury initiates an audit or investigation under subsection (c) concerning a bureau or service referred to in subsection (b), the Inspector General of the Department of the Treasury may provide the head of the office of such bureau or service referred to in subsection (b) with written notice that the Inspector General of the Department of the Treasury has initiated such an audit or investigation. If the Inspector General of the Department of the Treasury issues a
notice under the preceding sentence, no other audit or investigation shall be initiated into the matter under audit or investigation by the Inspector General of the Department of the Treasury and any other audit or investigation of such matter shall cease.

(e)(1) The Treasury Inspector General for Tax Administration shall have access to return information, as defined in section 6103(b) of the Internal Revenue Code of 1986, only in accordance with the provisions of section 6103 of such Code and this Act.

(2) The Internal Revenue Service shall maintain the same system of standardized records or accountings of all requests from the Treasury Inspector General for Tax Administration for inspection or disclosure of returns and return information (including the reasons for and dates of such requests), and of returns and return information inspected or disclosed pursuant to such requests, as described under section 6103(p)(3)(A) of the Internal Revenue Code of 1986. Such system of standardized records or accountings shall also be available for examination in the same manner as provided under section 6103(p)(3) of the Internal Revenue Code of 1986.

(3) The Treasury Inspector General for Tax Administration shall be subject to the same safeguards and conditions for receiving returns and return information as are described under section 6103(p)(4) of the Internal Revenue Code of 1986.

(f) An audit or investigation conducted by the Inspector General of the Department of the Treasury or the Treasury Inspector General for Tax Administration shall not affect a final decision of the Secretary of the Treasury or his delegate under section 6406 of the Internal Revenue Code of 1986.

(g)(1) Any report required to be transmitted by the Secretary of the Treasury to the appropriate committees or subcommittees of the Congress under section 5(d) shall also be transmitted, within the seven-day period specified under such section, to the Committees on Governmental Affairs and Finance of the Senate and the Committees on Government Reform and Oversight and Ways and Means of the House of Representatives.

(2) Any report made by the Treasury Inspector General for Tax Administration that is required to be transmitted by the Secretary of the Treasury to the appropriate committees or subcommittees of Congress under section 5(d) shall also be transmitted, within the 7-day period specified under such subsection, to the Internal Revenue Service Oversight Board and the Commissioner of Internal Revenue.

(h) The Treasury Inspector General for Tax Administration shall exercise all duties and responsibilities of an Inspector General of an establishment with respect to the Department of the Treasury and the Secretary of the Treasury on all matters relating to the Internal Revenue Service. The Treasury Inspector General for Tax Administration shall have sole authority under this Act to conduct an audit or investigation of the Internal Revenue Service Oversight Board and the Chief Counsel for the Internal Revenue Service.

(i) In addition to the requirements of the first sentence of section 3(a), the Treasury Inspector General for Tax Administration should have demonstrated ability to lead a large and complex organization.

(1) during the 2-year period preceding the date of appointment to such position; or

(2) during the 5-year period following the date such individual ends service in such position.

(k)(1) In addition to the duties and responsibilities exercised by an inspector general of an establishment, the Treasury Inspector General for Tax Administration--

(A) shall have the duty to enforce criminal provisions under section 7608(b) of the Internal Revenue Code of 1986;

(B) in addition to the functions authorized under section 7608(b)(2) of such Code, may carry firearms;

(C) shall be responsible for protecting the Internal Revenue Service against external attempts to corrupt or threaten employees of the Internal Revenue Service, but shall not be responsible for the conducting of background checks and the providing of physical security; and

(D) may designate any employee in the Office of the Treasury Inspector General for Tax Administration to enforce such laws and perform such functions referred to under subparagraphs (A), (B), and (C).

(2)(A) In performing a law enforcement function under paragraph (1), the Treasury Inspector General for Tax Administration shall report any reasonable grounds to believe there has been a violation of Federal criminal law to the Attorney General at an appropriate time as determined by the Treasury Inspector General for Tax Administration, notwithstanding section 4(d).

(B) In the administration of section 5(d) and subsection (g)(2) of this section, the Secretary of the Treasury may transmit the required report with respect to the Treasury Inspector General for Tax Administration at an appropriate time as determined by the Secretary, if the problem, abuse, or deficiency relates to--

(i) the performance of a law enforcement function under paragraph (1); and

(ii) sensitive information concerning matters under subsection

(a)(1)(A) through (F).

(3) Nothing in this subsection shall be construed to affect the authority of any other person to carry out or enforce any provision specified in paragraph (1).

(l)(1) The Commissioner of Internal Revenue or the Internal Revenue Service Oversight Board may request, in writing, the Treasury Inspector General for Tax Administration to conduct an audit or investigation relating to the Internal Revenue Service. If the Treasury Inspector General for Tax Administration determines not to conduct such audit or investigation, the Inspector General shall timely provide a written explanation for such determination to the person making the request.

(2)(A) Any final report of an audit conducted by the Treasury Inspector General for Tax Administration shall be timely submitted by the Inspector General to the Commissioner of Internal Revenue and the Internal Revenue Service Oversight Board.

(B) The Treasury Inspector General for Tax Administration shall periodically submit to the Commissioner and Board a list of investigations for which a final report has been completed by the Inspector General and shall provide a copy of any such report upon request of the Commissioner or Board.
(C) This paragraph applies regardless of whether the applicable audit or investigation is requested under paragraph (1).

§ 8E. Special provisions concerning the Department of Justice [DOJ]

(a)(1) Notwithstanding the last two sentences of section 3(a), the Inspector General shall be under the authority, direction, and control of the Attorney General with respect to audits or investigations, or the issuance of subpoenas, which require access to sensitive information concerning--

(A) ongoing civil or criminal investigations or proceedings;

(B) undercover operations;

(C) the identity of confidential sources, including protected witnesses;

(D) intelligence or counterintelligence matters; or

(E) other matters the disclosure of which would constitute a serious threat to national security.

(2) With respect to the information described under paragraph (1), the Attorney General may prohibit the Inspector General from carrying out or completing any audit or investigation, or from issuing any subpoena, after such Inspector General has decided to initiate, carry out, or complete such audit or investigation or to issue such subpoena, if the Attorney General determines that such prohibition is necessary to prevent the disclosure of any information described under paragraph (1) or to prevent the significant impairment to the national interests of the United States.

(3) If the Attorney General exercises any power under paragraph (1) or (2), the Attorney General shall notify the Inspector General in writing stating the reasons for such exercise. Within 30 days after receipt of any such notice, the Inspector General shall transmit a copy of such notice to the Committees on Governmental Affairs and Judiciary of the Senate and the Committees on Government Operations and Judiciary of the House of Representatives, and to other appropriate committees or subcommittees of the Congress.

(b) In carrying out the duties and responsibilities specified in this Act, the Inspector General of the Department of Justice

(1) may initiate, conduct and supervise such audits and investigations in the Department of Justice as the Inspector General considers appropriate;

(2) shall give particular regard to the activities of the Counsel, Office of Professional Responsibility of the Department and the audit, internal investigative, and inspection units outside the Office of Inspector General with a view toward avoiding duplication and insuring effective coordination and cooperation; and

(3) shall refer to the Counsel, Office of Professional Responsibility of the Department for investigation, information or allegations relating to the conduct of an officer or employee of the Department of Justice employed in an attorney, criminal investigative, or law enforcement position that is or may be a violation of law, regulation, or order of the Department or any other applicable standard of conduct, except that no such referral shall be made if the officer or employee is employed in the Office of Professional Responsibility of the Department.

(c) Any report required to be transmitted by the Attorney General to the appropriate committees or subcommittees of the Congress under section 5(d) shall also be transmitted, within the seven-day period
specified under such section, to the Committees on the Judiciary and Governmental Affairs of the Senate and the Committees on the Judiciary and Government Operations of the House of Representatives.

§ 8F. Special provisions concerning the Corporation for National and Community Service [CNCS]

(a) Notwithstanding the provisions of paragraphs (7) and (8) of section 6(a), it is within the exclusive jurisdiction of the Inspector General of the Corporation for National and Community Service to--

(1) appoint and determine the compensation of such officers and employees in accordance with section 195(b) of the National and Community Service Trust Act of 1993; and (2) procure the temporary and intermittent services of and compensate such experts and consultants, in accordance with section 3109(b) of title 5, United States Code, as may be necessary to carry out the functions, powers, and duties of the Inspector General.

(b) No later than the date on which the Chief Executive Officer of the Corporation for National and Community Service transmits any report to the Congress under subsection (a) or (b) of section 5, the Chief Executive Officer shall transmit such report to the Board of Directors of such Corporation.

(c) No later than the date on which the Chief Executive Officer of the Corporation for National and Community Service transmits a report described under section 5(b) to the Board of Directors as provided under subsection (b) of this section, the Chief Executive Officer shall also transmit any audit report which is described in the statement required under section 5(b)(4) to the Board of Directors. All such audit reports shall be placed on the agenda for review at the next scheduled meeting of the Board of Directors following such transmittal. The Chief Executive Officer of the Corporation shall be present at such meeting to provide any information relating to such audit reports.

(d) No later than the date on which the Inspector General of the Corporation for National and Community Service reports a problem, abuse, or deficiency under section 5(d) to the Chief Executive Officer of the Corporation, the Chief Executive Officer shall report such problem, abuse, or deficiency to the Board of Directors.

§ 8G. Requirements for Federal entities and designated Federal entities

(a) Notwithstanding section 11 of this Act, as used in this section--

(1) the term "Federal entity" means any Government corporation (within the meaning of section 103(1) of title 5, United States Code), any Government controlled corporation (within the meaning of section 103(2) of such title), or any other entity in the Executive branch of the Government, or any independent regulatory agency, but does not include--

(A) an establishment (as defined under section 11(2) of this Act) or part of an establishment;

(B) a designated Federal entity (as defined under paragraph (2) of this subsection) or part of a designated Federal entity;

(C) the Executive Office of the President;

(D) the Central Intelligence Agency;

(E) the GAO; or
(F) any entity in the judicial or legislative branches of the Government, including the Administrative Office of the United States Courts and the Architect of the Capitol and any activities under the direction of the Architect of the Capitol;

(2) the term "designated Federal entity" means Amtrak, the Appalachian Regional Commission, the Board of Governors of the Federal Reserve System, the Board for International Broadcasting, the Commodity Futures Trading Commission, the Consumer Product Safety Commission, the Corporation for Public Broadcasting, the Equal Employment Opportunity Commission, the Farm Credit Administration, the Federal Communications Commission, the Federal Deposit Insurance Corporation, the Federal Election Commission, the Federal Housing Finance Board, the Federal Labor Relations Authority, the Federal Maritime Commission, the Federal Trade Commission, the Legal Services Corporation, the National Archives and Records Administration, the National Credit Union Administration, the National Endowment for the Arts, the National Endowment for the Humanities, the National Labor Relations Board, the National Science Foundation, the Panama Canal Commission, the Peace Corps, the Pension Benefit Guaranty Corporation, the Securities and Exchange Commission, the Smithsonian Institution, the Tennessee Valley Authority, the United States International Trade Commission, and the United States Postal Service;

(3) the term "head of the Federal entity" means any person or persons designated by statute as the head of a Federal entity, and if no such designation exists, the chief policymaking officer or board of a Federal entity as identified in the list published pursuant to subsection (h)(1) of this section;

(4) the term "head of the designated Federal entity" means any person or persons designated by statute as the head of a designated Federal entity and if no such designation exists, the chief policymaking officer or board of a designated Federal entity as identified in the list published pursuant to subsection (h)(1) of this section, except that--

(A) with respect to the National Science Foundation, such term means the National Science Board; and

(B) with respect to the United States Postal Service, such term means the Governors (within the meaning of section 102(3) of title 39, United States Code);

(5) the term "Office of Inspector General" means an Office of Inspector General of a designated Federal entity; and

(6) the term "Inspector General" means an Inspector General of a designated Federal entity.

(b) No later than 180 days after the date of the enactment of this section [enacted Oct. 18, 1988], there shall be established and maintained in each designated Federal entity an Office of Inspector General. The head of the designated Federal entity shall transfer to such office the offices, units, or other components, and the functions, powers, or duties thereof, that such head determines are properly related to the functions of the Office of Inspector General and would, if so transferred, further the purposes of this section. There shall not be transferred to such office any program operating responsibilities.

(c) Except as provided under subsection (f) of this section, the Inspector General shall be appointed by the head of the designated Federal entity in accordance with the applicable laws and regulations governing appointments within the designated Federal entity.

(d) Each Inspector General shall report to and be under the general supervision of the head of the designated Federal entity, but shall not report to, or be subject to supervision by, any other officer or employee of such designated Federal entity. The head of the designated Federal entity shall not prevent or
prohibit the Inspector General from initiating, carrying out, or completing any audit or investigation, or from issuing any subpoena during the course of any audit or investigation.

(e) If an Inspector General is removed from office or is transferred to another position or location within a designated Federal entity, the head of the designated Federal entity shall promptly communicate in writing the reasons for any such removal or transfer to both Houses of the Congress.

(f)(1) For purposes of carrying out subsection (c) with respect to the United States Postal Service, the appointment provisions of section 202(e) of title 39, United States Code, shall be applied.

(2) In carrying out the duties and responsibilities specified in this Act, the Inspector General of the United States Postal Service (hereinafter in this subsection referred to as the "Inspector General") shall have oversight responsibility for all activities of the Postal Inspection Service, including any internal investigation performed by the Postal Inspection Service. The Chief Postal Inspector shall promptly report the significant activities being carried out by the Postal Inspection Service to such Inspector General.

(3)(A)(i) Notwithstanding subsection (d), the Inspector General shall be under the authority, direction, and control of the Governors with respect to audits or investigations, or the issuance of subpoenas, which require access to sensitive information concerning--

(I) ongoing civil or criminal investigations or proceedings;

(II) undercover operations;

(III) the identity of confidential sources, including protected witnesses;

(IV) intelligence or counterintelligence matters; or

(V) other matters the disclosure of which would constitute a serious threat to national security.

(ii) With respect to the information described under clause (i), the Governors may prohibit the Inspector General from carrying out or completing any audit or investigation, or from issuing any subpoena, after such Inspector General has decided to initiate, carry out, or complete such audit or investigation or to issue such subpoena, if the Governors determine that such prohibition is necessary to prevent the disclosure of any information described under clause (i) or to prevent the significant impairment to the national interests of the United States.

(iii) If the Governors exercise any power under clause (i) or (ii), the Governors shall notify the Inspector General in writing stating the reasons for such exercise. Within 30 days after receipt of any such notice, the Inspector General shall transmit a copy of such notice to the Committee on Governmental Affairs of the Senate and the Committee on Government Reform and Oversight of the House of Representatives, and to other appropriate committees or subcommittees of the Congress.

(B) In carrying out the duties and responsibilities specified in this Act, the Inspector General--

(i) may initiate, conduct and supervise such audits and investigations in the United States Postal Service as the Inspector General considers appropriate; and

(ii) shall give particular regard to the activities of the Postal Inspection Service with a view toward avoiding duplication and insuring effective coordination and cooperation.
(C) Any report required to be transmitted by the Governors to the appropriate committees or subcommittees of the Congress under section 5(d) shall also be transmitted, within the seven-day period specified under such section, to the Committee on Governmental Affairs of the Senate and the Committee on Government Reform and Oversight of the House of Representatives.

(3) Nothing in this Act shall restrict, eliminate, or otherwise adversely affect any of the rights, privileges, or benefits of either employees of the United States Postal Service, or labor organizations representing employees of the United States Postal Service, under chapter 12 of title 39, United States Code, the National Labor Relations Act, any handbook or manual affecting employee labor relations with the United States Postal Service, or any collective bargaining agreement. (4) As used in this subsection, the term "Governors" has the meaning given such term by section 102(3) of title 39, United States Code.

(g)(1) Sections 4, 5, 6 (other than subsections (a)(7) and (a)(8) thereof), and 7 of this Act shall apply to each Inspector General and Office of Inspector General of a designated Federal entity and such sections shall be applied to each designated Federal entity and head of the designated Federal entity (as defined under subsection (a)) by substituting--

(A) "designated Federal entity" for "establishment"; and

(B) "head of the designated Federal entity" for "head of the establishment".

(2) In addition to the other authorities specified in this Act, an Inspector General is authorized to select, appoint, and employ such officers and employees as may be necessary for carrying out the functions, powers, and duties of the Office of Inspector General and to obtain the temporary or intermittent services of experts or consultants or an organization thereof, subject to the applicable laws and regulations that govern such selections, appointments, and employment, and the obtaining of such services, within the designated Federal entity.

(3) Notwithstanding the last sentence of subsection (d) of this section, the provisions of subsection (a) of section 8C (other than the provisions of subparagraphs (A), (B), (C), and (E) of subsection (a)(1)) shall apply to the Inspector General and Office of Inspector General of the Federal Reserve System and the Chairman of the Board of Governors of the Federal Reserve System in the same manner as such provisions apply to the Inspector General of the Department of the Treasury and the Secretary of the Treasury, respectively.

(h)(1) No later than April 30, 1989, and annually thereafter, the Director of the Office of Management and Budget, after consultation with the Comptroller General of the United States, shall publish in the Federal Register a list of the Federal entities and designated Federal entities and the head of each such entity (as defined under subsection (a) of this section).

(2) Beginning on October 31, 1989, and on October 31 of each succeeding calendar year, the head of each Federal entity (as defined under subsection (a) of this section) shall prepare and transmit to the Director of the Office of Management and Budget and to each House of the Congress a report which--

(A) states whether there has been established in the Federal entity an office that meets the requirements of this section;

(B) specifies the actions taken by the Federal entity otherwise to ensure that audits are conducted of its programs and operations in accordance with the standards for audit of governmental organizations, programs, activities, and functions issued by the Comptroller General of the United States, and includes a list of each audit report completed by a Federal or non-Federal auditor during the reporting period and a summary of any particularly significant findings; and

(C) summarizes any matters relating to the personnel, programs, and operations of the Federal entity
referred to prosecutive authorities, including a summary description of any preliminary investigation conducted by or at the request of the Federal entity concerning these matters, and the prosecutions and convictions which have resulted.

§ 9. Transfer of functions

(a) There shall be transferred--

(1) to the Office of Inspector General--

(A) of the Department of Agriculture [DOA], the offices of that department referred to as the "Office of Investigation" and the "Office of Audit";

(B) of the Department of Commerce [DOC], the offices of that department referred to as the "Office of Audits" and the "Investigations and Inspections Staff" and that portion of the office referred to as the "Office of Investigations and Security" which has responsibility for investigation of alleged criminal violations and program abuse;

(C) of the Department of Defense [DOD], the offices of that department referred to as the "Defense Audit Service" and the "Office of Inspector General, Defense Logistics Agency", and that portion of the office of that department referred to as the "Defense Investigative Service" which has responsibility for the investigation of alleged criminal violations;


(E) of the Department of Energy [DOE], the Office of Inspector General (as established by section 208 of the Department of Energy Organization Act;

(F) of the Department of Health and Human Services [HHS], the Office of Inspector General (as established by title II of Public Law 94-505;

(G) of the Department of Housing and Urban Development [HUD], the office of that department referred to as the "Office of Inspector General";

(H) of the Department of the Interior [DOI], the office of that department referred to as the "Office of Audit and Investigation";

(i) of the Department of Justice [DOJ], the offices of that Department referred to as

(i) the "Audit Staff, Justice Management Division",

(ii) the "Policy and Procedures Branch, Office of the Comptroller, Immigration and Naturalization Service", the "Office of Professional Responsibility, Immigration and Naturalization Service", and the "Office of Program Inspections, Immigration and Naturalization Service",

(iii) the "Office of Internal Inspection, United States Marshals Service",

(iv) the "Financial Audit Section, Office of Financial Management, Bureau of Prisons" and the "Office of Inspections, Bureau of Prisons", and (v) from the Drug Enforcement Administration, that portion of the "Office of Inspections" which is engaged in internal audit activities, and that portion of the
"Office of Planning and Evaluation" which is engaged in program review activities,

   (J) of the Department of Labor [DOL], the office of that department referred to as the "Office of Special Investigations";

   (K) of the Department of Transportation [DOT], the offices of that department referred to as the "Office of Investigations and Security" and the "Office of Audit" of the Department, the "Offices of Investigations and Security, Federal Aviation Administration", and "External Audit Divisions, Federal Aviation Administration", the "Investigations Division and the External Audit Division of the Office of Program Review and Investigation, Federal Highway Administration", and the "Office of Program Audits, Urban Mass Transportation Administration";

   (L)(i) of the Department of the Treasury, the office of that department referred to as the "Office of Inspector General", and, notwithstanding any other provision of law, that portion of each of the offices of that department referred to as the "Office of Internal Affairs, Bureau of Alcohol, Tobacco, and Firearms", the "Office of Internal Affairs, United States Customs Service", and the "Office of Inspections, United States Secret Service" which is engaged in internal audit activities; and

   (ii) of the Treasury Inspector General for Tax Administration, effective 180 days after the date of the enactment of the Internal Revenue Service Restructuring and Reform Act of 1998 [enacted July 22, 1998], the Office of Chief Inspector of the Internal Revenue Service; (M) of the Environmental Protection Agency [EPA], the offices of that agency referred to as the "Office of Audit" and the "Security and Inspection Division";

   (N) of the Federal Emergency Management Agency [FEMA], the office of that agency referred to as the "Office of Inspector General";

   (O) of the General Services Administration [GSA], the offices of that agency referred to as the "Office of Audits" and the "Office of Investigations";

   (P) of the National Aeronautics and Space Administration [NASA], the offices of that agency referred to as the "Management Audit Office" and the "Office of Inspections and Security";

   (Q) of the Nuclear Regulatory Commission [NRC], the office of that commission referred to as the "Office of Inspector and Auditor";

   (R) of the Office of Personnel Management [OPM], the offices of that agency referred to as the "Office of Inspector General", the "Insurance Audits Division, Retirement and Insurance Group", and the "Analysis and Evaluation Division, Administration Group";

   (S) of the Railroad Retirement Board [RRB], the Office of Inspector General (as established by section 23 of the Railroad Retirement Act of 1974);

   (T) of the Small Business Administration [SBA], the office of that agency referred to as the "Office of Audits and Investigations";

   (U) of the Veterans' Administration [VA], the offices of that agency referred to as the "Office of Audits" and the "Office of Investigations"; [and]

   (V) of the Corporation for National and Community Service [CNCS], the Office of Inspector General of ACTION;
(W) of the Social Security Administration [SSA], the functions of the Inspector General of the Department of Health and Human Services which are transferred to the Social Security Administration by the Social Security Independence and Program Improvements Act of 1994 (other than functions performed pursuant to section 105(a)(2) of such Act, except that such transfers shall be made in accordance with the provisions of such Act and shall not be subject to subsections (b) through (d) of this section; and

(2) such other offices or agencies, or functions, powers, or duties thereof, as the head of the establishment involved may determine are properly related to the functions of the Office and would, if so transferred, further the purposes of this Act, except that there shall not be transferred to an Inspector General under paragraph (2) program operating responsibilities.

(b) The personnel, assets, liabilities, contracts, property, records, and unexpended balances of appropriations, authorization, allocations, and other funds employed, held, used, arising from, available or to be made available, of any office or agency the functions, powers, and duties of which are transferred under subsection (a) are hereby transferred to the applicable Office of Inspector General.

(c) Personnel transferred pursuant to subsection (b) shall be transferred in accordance with applicable laws and regulations relating to the transfer of functions except that the classification and compensation of such personnel shall not be reduced for one year after such transfer.

(d) In any case where all the functions, powers, and duties of any office or agency are transferred pursuant to this subsection, such office or agency shall lapse. Any person who, on the effective date of this Act [effective Oct. 1, 1978], held a position compensated in accordance with the General Schedule, and who, without a break in service, is appointed in an Office of Inspector General to a position having duties comparable to those performed immediately preceding such appointment shall continue to be compensated in the new position at not less than the rate provided for the previous position, for the duration of service in the new position.

§ 10. Conforming and technical amendments

[This section amended 5 USCS §§ 5315 and 5316 and 42 USCS § 3522, which amendments have been executed.]

§ 11. Definitions

As used in this Act--

(1) the term "head of the establishment" means the Secretary of Agriculture, Commerce, Defense, Education, Energy, Health and Human Services, Housing and Urban Development, the Interior, Labor, State, Transportation, or the Treasury; the Attorney General; the Administrator of the Agency for International Development, Environmental Protection, General Services, National Aeronautics and Space, Small Business, or Veterans' Affairs; the Director of the Federal Emergency Management Agency, the Office of Personnel Management or the United States Information Agency; the Chairman of the Nuclear Regulatory Commission or the Railroad Retirement Board;[;] the Chairperson of the Thrift Depositor Protection Oversight Board; the Chief Executive Officer of the Corporation for National and Community Service;[;] the Administrator of the Community Development Financial Institutions Fund; and the chief executive officer of the Resolution Trust Corporation; and the Chairperson of the Federal Deposit Insurance Corporation; or the Commissioner of Social Security, Social Security Administration; as the case may be;

(2) the term "establishment" means the Department of Agriculture, Commerce, Defense, Education, Energy, Health and Human Services, Housing and Urban Development, the Interior, Justice, Labor, State,
Transportation, or the Treasury; the Agency for International Development, the Community Development Financial Institutions Fund, the Environmental Protection Agency, the Federal Emergency Management Agency, the General Services Administration, the National Aeronautics and Space Administration, the Nuclear Regulatory Commission, the Office of Personnel Management, the Railroad Retirement Board, the Resolution Trust Corporation, the Federal Deposit Insurance Corporation, the Small Business Administration, the United States Information Agency, the Corporation for National and Community Service, or the Veterans' Administration, or the Social Security Administration; as the case may be;

(3) a the term "Inspector General" means the Inspector General of an establishment;

(4) the term "Office" means the Office of Inspector General of an establishment; and

(5) the term "Federal agency" means an agency as defined in section 552(e) of title 5 (including an establishment as defined in paragraph (2), United States Code, but shall not be construed to include the GAO.

§ 12. Effective date

The provisions of this Act and the amendments made by this Act shall take effect October 1, 1978.


The Department of Defense Supplement to the Federal Acquisition Regulation imposes additional requirements on defense contractors, as follows:

SUBPART 203.70--CONTRACTOR STANDARDS OF CONDUCT

203.7000 Policy.

Government contractors must conduct themselves with the highest degree of integrity and honesty. Contractors should have standards of conduct and internal control systems that:

1. Are suitable to the size of the company and the extent of their involvement in Government contracting,

2. Promote such standards,

3. Facilitate timely discovery and disclosure of improper conduct in connection with Government contracts, and

4. Ensure corrective measures are promptly instituted and carried out.

203.7001 Procedures.

(a) A contractor's system of management controls should provide for—

(1) A written code of business ethics and conduct and an ethics training program for all employees;

(2) Periodic reviews of company business practices, procedures, policies, and internal controls for compliance with standards of conduct and the special requirements of Government contracting;

(3) A mechanism, such as a hotline, by which employees may report suspected instances of improper
conduct, and instructions that encourage employees to make such reports;

(4) Internal and/or external audits, as appropriate;

(5) Disciplinary action for improper conduct;

(6) Timely reporting to appropriate Government officials of any suspected or possible violation of law in connection with Government contracts or any other irregularities in connection with such contracts; and

(7) Full cooperation with any Government agencies responsible for either investigation or corrective actions.

(b) Contractors who are awarded a DoD contract of $5 million or more must display DoD Hotline Posters prepared by the DoD Office of the Inspector General unless

(1) The contract will be performed in a foreign country; or

(2) The contractor has established an internal reporting mechanism and program, as described in paragraph (a) of this section.

203.7002 Contract clause.

Use the clause at 252.203-7002, Display of DoD Hotline Poster, in solicitations and contracts expected to exceed $5 million, except when performance will take place in a foreign country.

252.203-7002 Display of DoD Hotline Poster.

As prescribed in 203.7002, use the following clause:

DISPLAY OF DOD HOTLINE POSTER (DEC 1991)

(a) The Contractor shall display prominently in common work areas within business segments performing work under Department of Defense (DoD) contracts, DoD Hotline Posters prepared by the DoD Office of the Inspector General.

(b) DoD Hotline Posters may be obtained from the DoD Inspector General, ATTN: Defense Hotline, 400 Army Navy Drive, Washington, DC 22202-2884.

(c) The Contractor need not comply with paragraph (a) of this clause if it has established a mechanism, such as a hotline, by which employees may report suspected instances of improper conduct, and instructions that encourage employees to make such reports.

(End of clause)


The external audit review body in the United States is the GAO, the investigative arm of Congress. GAO's mission is to help the Congress oversee federal programs and operations to assure proper accountability. To do this, GAO has a staff of evaluators, auditors, lawyers, economists, public policy analysts, information technology specialists, and other professionals. GAO performs a variety of services, the most prominent of which are audits and evaluations of Government programs and activities. The majority of these reviews are made in response to specific congressional requests. The Office is required to
perform work requested by committee chairpersons and, as a matter of policy, assigns equal status to requests from ranking minority Members (that is, the senior member of the opposition party on a Congressional committee) for a bipartisan audit approach.

The GAO was established by the Budget and Accounting Act of 1921 (31 U.S.C. 702), to independently audit Government agencies. Over the years, the Congress has expanded GAO's audit authority, added new responsibilities and duties, and strengthened GAO's ability to perform independently. The Office is under the control and direction of the Comptroller General of the United States, who is appointed by the President with the advice and consent of the Senate for a term of 15 years. The Office is organized so that staff members concentrate on specific subject areas, enabling them to develop a detailed level of knowledge. When an assignment requires specialized experience not available within GAO, outside experts assist the permanent staff. GAO's staff goes wherever necessary on assignments, working onsite to gather data, test transactions, and observe firsthand how Government programs and activities are carried out.

GAO performs financial audits, program reviews, investigations, legal support, and policy/program analyses and is charged with examining all matters relating to the receipt and disbursement of public funds.

Organization and Mission

Description and Background

The GAO is the investigative arm of the Congress and is charged with examining all matters relating to the receipt and disbursement of public funds.

The GAO (GAO) was established by the Budget and Accounting Act of 1921 (31 U.S.C. 702), to independently audit Government agencies. Over the years, the Congress has expanded GAO's audit authority, added new responsibilities and duties, and strengthened GAO's ability to perform independently.

The Office is under the control and direction of the Comptroller General of the United States, who is appointed by the President with the advice and consent of the Senate for a term of 15 years.

Activities: Audits and Evaluations

Supporting the Congress is GAO's fundamental responsibility. In meeting this objective, GAO performs a variety of services, the most prominent of which are audits and evaluations of Government programs and activities. The majority of these reviews are made in response to specific congressional requests. The Office is required to perform work requested by committee chairpersons and, as a matter of policy, assigns equal status to requests from ranking minority Members. GAO also responds to individual Member requests, as possible. Other assignments are initiated pursuant to standing commitments to congressional committees, and some reviews are specifically required by law. Finally, some assignments are independently undertaken in accordance with GAO's basic legislative responsibilities.

The ability to review practically any Government function requires a multidisciplined staff able to conduct assignments wherever needed. GAO's staff has expertise in a variety of disciplines - accounting, law, public and business administration, economics, the social and physical sciences, and others.

The Office is organized so that staff members concentrate on specific subject areas, enabling them to develop a detailed level of knowledge. When an assignment requires specialized experience not available within GAO, outside experts assist the permanent staff. GAO's staff goes wherever necessary on assignments, working onsite to gather data, test transactions, and observe firsthand how Government programs and activities are carried out.
Accounting and Information Management Policy

The Office ensures that the Congress has available for its use current, accurate, and complete financial management data. To do this, GAO:

- Prescribes accounting principles and standards for the executive branch;
- Advises other Federal agencies on fiscal and related policies and procedures; and
- Prescribes standards for auditing and evaluating Government programs.

In addition, the Comptroller General, the Secretary of the Treasury, and the Director of the Office of Management and Budget develop standardized information and data processing systems. This includes standard terminology, definitions, classifications, and codes for fiscal, budgetary, and program-related data and information.

Legal Services

The Office provides various legal services to the Congress. In response to inquiries from committees and Members, the Comptroller General provides advice on legal issues involving Government programs and activities. GAO is also available to assist in drafting legislation and reviewing legislative proposals before the Congress. In addition, GAO reviews and reports to the Congress on proposed rescissions and deferrals of Government funds.

Other legal services include resolving bid protests that challenge Government contract awards, assisting Government agencies in interpreting the laws governing the expenditure of public funds, and adjudicating claims for and against the Government.

In addition, GAO's staff of trained investigators conducts special investigations and assists auditors and evaluators when they encounter possible criminal and civil misconduct. When warranted, GAO refers the results of its investigations to the Department of Justice and other law enforcement authorities.

Reporting Authorities

The Office offers a range of products to communicate the results of its work. The type of product depends on the assignment's objectives and the needs of the intended user. Product types include testimony, oral briefings, and written reports. All of GAO's unclassified reports are available to the public; however, GAO will honor a requester's desire to postpone release of a report for up to 30 days. The report will be made public automatically following the requester's release or public disclosure of the report's contents.

A list of GAO reports issued or released during the previous month is furnished monthly to Congress, its Members, and committees. Copies of GAO reports are also furnished to interested congressional parties; Federal, State, local, and foreign governments; members of the press; college faculty, students, and libraries; and nonprofit organizations.

Copies of unclassified reports are available from the U.S. GAO, P.O. Box 37050, Washington, DC 20013. Phone, 202-512-6000. [Printed Copy Order Information] [Electronic Access Information]

For further information, contact the Office of Public Affairs, GAO, 441 G Street NW., Washington, DC 20548. Phone, 202-512-4800.
A.4. Freedom of Information Act

Another area of relevant law involves the availability of public information. The control of information can itself be a path to corrupt behavior since certain government information (e.g., Census Data) can be sold as a commodity. Clear policies on what information should be released to the public and under what conditions can help promote more public access to government decisions and policies. One primary means of access to government records is through the Freedom of Information Act (FOIA).

The Freedom of Information Act, 5 U.S.C. § 552, allows persons to request copies of records not normally prepared for public distribution or otherwise publicly available. The FOIA applies to existing records only and does not require agencies to create new records to comply with a request. It also does not require agencies to collect information they do not have or to do research or analyze data for a requester. Moreover, FOIA requests must be specific enough to permit an employee who is familiar with the subject matter to locate records in a reasonable period of time.

Under the FOIA, certain records may be withheld in whole or in part from the requester if they fall within one of nine FOIA exemptions or certain exclusions. In some cases, the agency is able to provide copies of all of the records requested. However, in other instances, a portion or all of the information requested is sensitive and is therefore withheld as permitted under the FOIA. The FOIA exemptions for withholding at least some information fall in the following categories:

- Exemption to protect information that is prohibited from disclosure by other laws, such as Confidential Financial Disclosure Reports.
- Exemption to protect trade secrets and privileged or confidential commercial or financial information.
- Exemption to protect certain interagency and intra-agency pre-decisional deliberative communications.
- Exemption to protect information about individuals when disclosure would constitute a clearly unwarranted invasion of personal privacy.
- Exemption to protect records or information compiled for law enforcement purposes, if certain interests would be harmed by release, including when disclosure could reasonably be expected to interfere with enforcement proceedings or to constitute an unwarranted invasion of personal privacy.
- Exemption to protect information on regulated financial institutions.
- Exemption to protect information on geological and geophysical information and data, including maps, concerning wells.
- Exemption to protect information which is classified.

In the event that an agency relies on one or more FOIA exemptions to deny a requester access to records, the response letter will so inform the requester. The letter will also notify the requester of the right to administratively appeal the initial denial determination to the agency.

A.5. Whistleblowers

The general public can also help identify and correct contractor abuses under qui tam proceedings.
This Latin phrase refers to a legal procedure meaning “who sues for the king as well as for himself in the matter”. Under the 1986 amendments to the False Claims Act, any person may bring a civil action under the Act “for the person and for the United States”. The action is brought in the name of the United States. (31 USC 3730 b). Qui tam plaintiffs are given a share of the Government’s monetary recovery against the contractor and are granted whistleblower protection under the law. Violators of the False Claims Act are liable for three times the dollar amount that the government is defrauded and civil penalties of $5,000 to $10,000 for each false claim. A qui tam plaintiff can receive between 15 and 30 percent of the total recovery from the defendant, whether through a favorable judgment or settlement. To be eligible to recover money under the Act, a qui tam lawsuit must be filed. Merely informing the government about the violation is not enough. An award is received only if, and after, the government recovers money from the defendant as a result of the suit.

This helps to incentivize knowledgeable employees to file civil complaints against an employer or contractor which has cheated the government. If the Department of Justice intervenes in the case, it bears primary responsibility for prosecuting the action. However, even where the Department of justice declines or fails to intervene, the qui tam plaintiff may continue the suit to conclusion. A “bounty system” of this type can be very effective in turning contractor employees into informants on the misdeeds of their employer. But this incentive may cause suits to be filed even where there is inadequate cause. The use or abuse of this right is ultimately for the courts to sort out as the suit proceeds through the legal process.

There is no comprehensive federal law that prohibits employers from retaliating against employees who disclose potential corporate or governmental violations of law. Instead, over the past fifty years there has been a steady growth of specific statutory protections for employee whistleblowers. These statutory remedies cover a significant cross section of the American workforce, but are riddled with loopholes.

Although the creation of federal rights for whistleblowers has enhanced the ability of employees to disclose employer violations of law, the patchwork nature of these remedies has hindered aggressive litigation and enforcement of whistleblower protection provisions. For example, only employees who engage in certain specific whistleblower conduct in certain specifically protected industries are covered under federal law. Each federal whistleblower statute has its own filing provisions, its own statute of limitations, and its own administrative or judicial remedies. Thus, each potential whistleblower case must be evaluated on the basis of who the employer is, what the disclosure concerns, and in which state the whistleblowing occurred. On the basis of these variables, an attorney must review various federal laws to determine if the employee is protected and exactly what procedures should be followed in filing a claim for redress.

Each federal statute generally includes its own definition of what type of speech rights the statute protects, the statute of limitations for filing an action under the law, and its own administrative or judicial rules for adjudication of the claim. Although each statute is different, courts and administrative agencies regularly apply the case law and legal analysis developed under one statute in interpreting other statutes. This has occurred because the basic elements in a retaliatory discharge claim tend to be identical.

The following is an outline of federal statutes and constitutional protections for employee whistleblowers.11

1. Constitutional Protection- Under the First and Fourteenth Amendments to the U.S. Constitution,

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11 http://whistleblowerlaws.com/protection.htm
state and local government officials are prohibited from retaliating against whistleblowers.


3. Conspiracies to Intimidate Witnesses and Obstruct Justice in Federal Court Proceedings [42 U.S.C. 1985(2)]-This clause, which was passed as part of the Reconstruction era, anti-Ku Klux Klan civil rights legislation, contains very broad provisions prohibiting conspiracies to intimidate parties or witnesses in proceedings before courts of the United States.

4. False Claims Act- The whistle blower protection provision of the False Claims Act [33 U.S.C. 3730(h)] is extremely liberal and protects "any employee" who is discharged or discriminated against on the basis of assisting in the preparation of litigation or in filing an action under this Act.

5. Surface Transportation Assistance Act- This Act [49 U.S.C. 2305 [Appendix 13]] protects employee whistleblowers (generally truck drivers) who file a complaint, testify in or cause to be instituted proceedings to enforce a commercial motor vehicle safety rule, regulation or standard.

6. Occupational Safety and Health Act- OSHA [29 U.S.C. 660(c)] protects employees from any form of retaliation for raising complaints concerning workplace health and safety. This has been interpreted to include a right to refuse hazardous work under certain specified and limited circumstances.

7. Federal Mine Health and Safety Act- This Act, 30 U.S.C. 815(c) (1977), provides for an administrative remedy for any miner, miner's representative or applicant for employment in a mine, who files or makes a complaint regarding a potential violation of the Act.


4.A.5.a Federal Acquisition Regulation Subpart 3.9- Whistleblower Protections for Contractor Employees

3.900 Scope of subpart.


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 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.

3.902 Applicability.

This subpart applies to all Government contracts.

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 activity. 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.
4.B. Other States’ Example

4.B.1 European Union Suspension and Debarment

In the area of suspension and debarment policies, the European Union recently issued the following example to promote accountability among bidders subject to its rules.

“Excerpts from the New Public Sector Procurement Directive Article 45”

Criteria for qualitative selection

Personal situation of the candidate or tenderer

MANDATORY

"1. Any candidate or tenderer who has been the subject of a conviction by final judgment of which the contracting authority is aware for one or more of the reasons listed below shall be excluded from participation in a public contract:

(a) participation in a criminal organisation, as defined in Article 2(1) of Council Joint Action 98/733/JHA (1);

(b) corruption, as defined in Article 3 of the Council Act of 26 May 1997 (2) and Article 3(1) of Council Joint Action 98/742/JHA (3) respectively;

(c) fraud within the meaning of Article 1 of the Convention relating to the protection of the financial interests of the European Communities (4); (d) money laundering, as defined in Article 1 of Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering (5). Member States shall specify, in accordance with their national law and having regard for Community law, the implementing conditions for this paragraph.

EXCEPTIONS

"They may provide for derogation from the requirement referred to in the first subparagraph for overriding requirements in the general interest.”

INFORMATION FIRST FROM THE TENDERER AND THEN FROM COMPETENT AUTHORITY

"For the purposes of this paragraph, the contracting authorities shall, where appropriate, ask candidates or tenderers to supply the documents referred to in paragraph 3 and may, where they have doubts concerning the personal situation of such candidates or tenderers, also apply to the competent authorities to obtain any information they consider necessary on the personal situation of the candidates or tenderers concerned. Where the information concerns a candidate or tenderer established in a State other than that of the contracting authority, the contracting authority may seek the cooperation of the competent

Source is the excerpt (page 8) from the paper prepared by Kristine Drew, UNICORN: Global Trade Unions Anti-Corruption Project, University of Greenwich, United Kingdom. This background paper was presented at the OECD Global Forum on Governance, November 2004. The Directive is at page 134/144 at: http://europa.eu.int/eur-lex/pri/en/oj/dat/2004/l_134/l_1342004040430en01140240.pdf
authorities. Having regard for the national laws of the Member State where the candidates or tenderers are established, such requests shall relate to legal and/or natural persons, including, if appropriate, company directors and any person having powers of representation, decision or control in respect of the candidate or tenderer."

PROOF

(a) as regards paragraphs 1 and 2(a), (b) and (c), the production of an extract from the 'judicial record' or, failing that, of an equivalent document issued by a competent judicial or administrative authority in the country of origin or the country whence that person comes showing that these requirements have been met; (b) as regards paragraph 2(e) and (f), a certificate issued by the competent authority in the Member State concerned. Where the country in question does not issue such documents or certificates, or where these do not cover all the cases specified in paragraphs 1 and 2(a), (b) and (c), they may be replaced by a declaration on oath or, in Member States where there is no provision for declarations on oath, by a solemn declaration made by the person concerned before a competent judicial or administrative authority, a notary or a competent professional or trade body, in the country of origin or in the country whence that person comes.

4. Member States shall designate the authorities and bodies competent to issue the documents, certificates or declarations referred to in paragraph 3 and shall inform the Commission thereof. Such notification shall be without prejudice to data protection law.

4.B.2. BOTSWANA G3A CORRUPTION AND ECONOMIC CRIME ACT, 1994

No. 13 of 1994

An Act to provide for the establishment of a Directorate on Corruption and Economic Crime; to make comprehensive provision for the prevention of corruption; and confer power on the Directorate to investigate suspected cases of corruption and economic crime and matters connected or incidental thereto.

Date of Assent: 13.8.94.

Date of Commencement: 19.8.94.

ENACTED by the Parliament of Botswana.

PART I - Preliminary

Short title

1. This Act may be cited as the Corruption and Economic Crime Act, 1994.

Interpretation

2. In this Act, unless the context otherwise requires - "agent" includes any person employed by or acting for another, "Deputy Director" means a person appointed under the Public Service Act as Deputy Director;

"Director" means the person appointed under section 4;

"Directorate" means the Directorate established under section 3;

"Principal" includes an employer,
"public body" means any office, organisation, establishment or body created by or under any enactment or under powers conferred by any enactment; and includes any company in which 51 per cent or more of the equity shares are owned by the Government of Botswana;

"public officer" includes any person holding an office by election or appointment under any enactment or under powers conferred by any enactment, or in a company in which 51 per cent or more of the equity shares are owned by the Government of Botswana;

"valuable consideration" has the meaning assigned to it under section 23.

PART II - Establishment of Directorate

Establishment of Directorate

3. (1) There is hereby established a Directorate to be known as the Directorate on Corruption and Economic Crime (in this Act referred to as "the Directorate") which shall consist of a Director, Deputy Director and such other officers of the Directorate as may be appointed.

(2) The Directorate shall be a public office; and accordingly, the provisions of the Public Service Act shall, with such modifications as may be necessary, apply to the Directorate and the officers thereof.

Appointment of Director

4. (1) The President may appoint a Director on such terms and conditions as he thinks fit.

(2) The Director shall be responsible for the direction and administration of the Directorate.

5. (1) If the office of the Director is vacant or the Director is absent from duty for any reason, the Deputy Director shall, except where the President otherwise directs, act as Director.

(2) If both the Director and the Deputy Director are absent from duty, the President may appoint another person to act as Director until the return to duty of either the Director or the Deputy Director.

PART III - Functions of Directorate

Functions of Directorate

6. The functions of the Directorate shall be -

(a) to receive and investigate any complaints alleging corruption in any public body;

(b) to investigate any alleged or suspected offences under this Act, or any other offence disclosed during such an investigation;

(c) to investigate any alleged or suspected contravention of any of the provisions of the fiscal and revenue laws of the country;

(d) to investigate any conduct of any person, which in the opinion of the Director, may be connected with or conducive to corruption;

(e) to assist any law enforcement agency of the Government in the investigation of offences involving dishonesty or cheating of the public revenue;
(f) to examine the practices and procedures of public bodies in order to facilitate the discovery of corrupt practices and to secure the revision of methods of work or procedures which, in the opinion of the Director, may be conducive to corrupt practices;

(g) to instruct, advise and assist any person, on the latter's request, on ways in which corrupt practices may be eliminated by such person;

(h) to advise heads of public bodies of changes in practices or procedures compatible with the effective discharge of the duties of such public bodies which the Director thinks necessary to reduce the likelihood of the occurrence of corrupt practices;

(i) to educate the public against the evils of corruption; and

(j) to enlist and foster public support in combating corruption.

Powers of Director

7. (1) For the performance of the functions of the Directorate, the Director may -

(a) authorise any officer of the Directorate to conduct an inquiry or investigation into any alleged or suspected offences under this Act;

(b) require any person in writing to produce, within a specified time, all books, records, returns, reports, data stored electronically on computer or otherwise and any other documents relating to the functions of any public or private body;

(c) require any person, within a specified time, to provide any information or to answer any questions which the Director considers necessary in connection with any inquiry or investigation which the Director is empowered to conduct under this Act.

(2) Any person who fails -

(a) to produce any matter required under subsection (1) (b); or

(b) to provide any information, or to answer any questions, or willfully provides any false information or makes any false statement in answer to a question, under subsection (1) (c), shall be guilty of an offence and shall be liable to the penalty prescribed under section 18 (2).

Power of Director to obtain information

8. (1) If, in the course of any investigation into any offence under Part IV, the Director is satisfied that it would assist or expedite such investigation, he may, by notice in writing, require -

(a) any suspected person to furnish a statement in writing -

(i) enumerating all movable or immovable property belonging to or possessed by him in Botswana or elsewhere or held in trust for him in Botswana or elsewhere, and specifying the date on which every such property was acquired and the consideration paid therefore, and explaining whether it was acquired by way of purchase, gift, bequest, inheritance or otherwise;

(ii) specifying any moneys or other property acquired in Botswana or elsewhere or sent out of Botswana by him or on his behalf during such period as may be specified in such notice;
(b) any other person with whom the Director believes that the suspected person had any financial
transactions or other business dealing, relating to an offence under Part IV, to furnish a statement in writing
enumerating all movable or immovable property acquired in Botswana and elsewhere or belonging to or
possessed by such other person at the material time;

(c) any person to furnish, notwithstanding the provisions of any other enactment to the contrary, all
information in his possession relating to the affairs of any suspected person and to produce or furnish any
document or a certified true copy of any document relating to such suspected person, which is in the
possession or under the control of the person required to furnish the information;

(d) the manager of any bank, in addition to furnishing any information specified in paragraph (c), to
furnish any information or the originals, or certified true copies, of the accounts or the statements of
account at the bank of any suspected person.

(2) Every person on whom a notice is served by the Director under subsection (1) shall,
notwithstanding any oath of secrecy, comply with the requirements of the notice within such time as may
be specified therein, and any person who without reasonable excuse fails to so comply shall be guilty of an
offence and shall be liable to the penalty prescribed under section 18 (2).

(3) Where in any proceedings for an offence under Part IV, it is proved that the person charged with
the offence refused to furnish a statement required under paragraph (a) of subsection (1) when requested to
do so, his refusal shall, unless reasonable cause thereof is shown, be treated as supporting any evidence
given on behalf of the prosecution, or as rebutting any evidence given on behalf of the defence as regards
the manner of his acquisition of the properties mentioned in the said paragraph (a).

Special identity card

9. The Director may issue to an officer of the Directorate a special identity card which shall be prima
facie evidence of appointment as an officer of the Directorate.

Power of arrest

10. (1) An officer authorised in that behalf by the Director may, without warrant, arrest a person if he
reasonably suspects that that person has committed or is about to commit an offence under this Act.

(2) Where, during an investigation by an officer of the Directorate of a suspected offence under this
Act, another offence is disclosed, the officer may, without warrant, arrest a person if he reasonably
suspects that that person is guilty of that other offence, and he reasonably suspects that such other offence
was connected with, or that either directly or indirectly its commission was facilitated by the suspected
offence under this Act.

(3) An officer referred to in this section may -

(a) use such force as is reasonable in the circumstance in effecting an arrest under this section; and

(b) for the purpose of effecting an arrest, enter and search any premises or place if he has reason to
believe that there is in the premises or place a person who is to be arrested.

(4) No premises or place shall be entered under subsection (3) unless the officer has first stated that he
is an officer and the purpose for which he seeks entry and produced his identity card to any person
requesting its production.
(5) On compliance with the provisions of subsection (4), the officer may enter the premises or place by force, if necessary.

Power of search and seizure

11. (1) Where an officer has arrested a person under section 10, he may -(a) search that person and the premises or place in which he was arrested;

(b) seize and detain anything which such officer has reason to believe to be or to contain evidence of any of the offences referred to in Part IV.

Procedure after arrest Cap.08:02 Search with warrants

(2) A person shall not be searched under subsection (1) except by a person of the same sex.

12. A person arrested under section 10 shall be taken as soon as practicable to a police station to be dealt with in accordance with the provisions of the Criminal Procedure and Evidence Act.

13. (1) If it appears to the Directorate that there is reasonable cause to believe that there is in any premises, place, vessel, boat, aircraft or other vehicle anything which is or contains evidence of the commission of any offence under Part IV, the Director or any officer of the Directorate may make an application on oath to a magistrate for a warrant to search such premises, place, vessel, boat, aircraft or other vehicle.

(2) If a magistrate to whom an application is made under subsection (1) is satisfied that there are reasonable grounds for suspecting that there is in the premises, place, vessel, boat, aircraft or other vehicle referred to in subsection (1) anything which is or contains evidence of the commission of any of the offences referred to in Part IV, he may by warrant direct the Director, or any officer authorised by him under section 7(1) (a), to enter and search such premises, place, vessel, boat, aircraft or other vehicle and seize and detain anything which the Director, or the officer authorised by the Director, has reason to believe to be or to contain evidence of any of the offences referred to in Part IV.

Search without warrant in certain cases

14. Whenever the Director, or an officer authorised by him under section 7(1) (a), has reasonable cause to believe that there is in any premises, place, vessel, boat, aircraft or other vehicle anything which is evidence of the commission of an offence, or in respect of which an offence has been, is being, or about to be committed, under Part IV, is being conveyed, or is concealed or contained in any package in the premises, place, vessel, boat, aircraft or other vehicle, for the purpose of being conveyed, then and in any such case, if the Director or the officer authorised by him under section 7(1) considers that the special exigencies of the case so require, he may without a warrant enter the premises, place, vessel, boat, aircraft or other vehicle, and search, seize and detain such article, document or package.

Exercise of powers of search and seizure

15. (1) In the exercise of the powers of search, seizure and detention under section 13 (2) or 14, the Director or any other officer of the Directorate may use such reasonable force as is necessary in the circumstances, and may be accompanied or assisted by such other persons as he deems necessary to assist him to enter into or upon any premises, or upon any vessel, boat, aircraft or other vehicle, as the case may be.

(2) Notwithstanding the provisions of sections 7, 13 and 14, the Director, or any other officer of the
Directorate shall not have access to any books, records, returns, reports or other documents, or data stored electronically, or to enter upon any premises, place, vessel, boat, aircraft or other vehicle if in the opinion of the President in writing such access or entry is likely to prejudice national security.

Surrender of travel document

16. (1) A magistrate may, on the application ex parte of the Director, by written notice require a person who is the subject of an investigation in respect of an offence alleged or suspected to have been committed by him under Part IV to surrender to the Director any travel document in his possession.

(2) If a person on whom a notice under subsection (1) has been served fails to comply with the notice forthwith, he may thereupon be arrested and taken before a magistrate.

(3) Where a person is taken before a magistrate under subsection (2), the magistrate shall, unless such person thereupon complies with the notice under subsection (1) or satisfies the magistrate that he does not possess a travel document, by warrant commit him to prison there to be safely kept until he complies with the notice.

Return of travel document

17. (1) A person who has surrendered a travel document under section 16 may at any time make a written application to the Director for its return, and every such application shall contain a statement of the grounds on which it is made.

(2) The Director may -

(a) grant the application either without conditions or subject to such conditions as to the further surrender of the travel document and the appearance of the applicant at any time and place in Botswana as may be specified by the Director in a written notice served personally on the applicant; or

(b) refuse the application.

(3) A person aggrieved by the refusal of the Director to return his travel document to him may appeal to a magistrate.

Resisting or obstructing officers

18. (1) Any person who resists or obstructs an officer in the execution of his duty shall be guilty of an offence.

(2) Any person guilty of an offence under this section or section 7 (2) or 8 (2) shall be liable on conviction to imprisonment for a term not exceeding five years, or to a fine not exceeding P10 000, or to both.

False reports to officers

19. Any person who knowingly -

(a) makes or causes to be made to an officer a false report of the commission of any offence; or

(b) misleads an officer by giving false information or by making false statements or accusations, shall be guilty of an offence and shall be liable on conviction to a term of imprisonment not exceeding three
years.

Falsely pretending to be officer

20. Any person who falsely pretends -

(a) that he is an officer of the Directorate or has any of the powers of an officer under this Act or under any authorisation or warrant issued under this Act; or

(b) that he is able to procure an officer of the Directorate or to do or refrain from doing anything in connection with the duty of such officer, shall be guilty of an offence and shall be liable on conviction to a term of imprisonment not exceeding three years.

Immunity of officers of Directorate

21. No action shall be brought against the Director or any other officer of the Directorate (or any other person authorised by the Director to perform any act under this Act), in respect of any act or thing done or omitted to be done in good faith in the exercise of his duties under this Act.

Annual report

22. (1) The Director shall, on or before 31 March in each year, or by such later date as the President may allow, submit to the President a report on the activities of the Directorate in the previous year.

4.B.3 Germany

Federal Government Directive concerning the Prevention of Corruption in the Federal Administration

The present Directive is adopted under Article 86 sentence 1 of the Basic Law:

1. Scope

The measures taken by all government offices for the prevention of corruption are governed by the present Directive; deemed government offices for this purpose are the supreme federal authorities, authorities of direct and indirect federal administration, the federal courts, the federal special funds and institutional beneficiaries supported predominantly by the Federation. Account shall be taken of any special characteristics of these offices connected with their organisation and specific tasks.

2. Identifying sensitive fields of activity; Risk analysis; Work routines

Sensitive and particularly sensitive fields of activities, that is fields that are vulnerable and particularly vulnerable to corruption, shall be identified in all government offices. Whether to carry out risk analysis in particularly sensitive areas shall be care-fully considered. Work routines shall be adapted in line with the risk analysis findings.

3. Greater scrutiny and transparency

Greater scrutiny shall be ensured in sensitive areas of activity through the involvement of more staff or organisational units in second checks. If this is not possible owing to legal provisions or to insuperable practical difficulties, the system of second checks may be restricted to random checks or, by way of compensation, other precautionary measures (e.g. more intensive administrative and substantive supervision) shall be envisaged. Additionally, transparent decision-making shall be ensured (e.g. by clearly
assigning competencies, by a reporting system, IT-based monitoring of transactions and operations, complete and accurate documentation [minutes, notes, reports, proper records]).

4. Rotation of staff

The precautionary measure of staff rotation shall be the aim in particularly sensitive areas and in the channels overseeing these areas. As a general rule, the term of office shall be specified. Where the term is extended for compelling reasons, these reasons shall be placed on record and other preventive action taken by way of compensation.

5. Contact person for the prevention of corruption

Contact persons for the prevention of corruption shall be appointed, their number depending on the tasks and size of the offices concerned. One such person may be responsible for several offices. Contact persons may be charged with the following tasks:

- Acting as a point of contact, someone with whom staff, private individuals and office management can talk, without going through the official channels, if need be;
- advising office management, and advising and informing staff (e.g. in seminars and presentations);
- looking out for signs of corruption;
- submitting proposals to office management on internal investigations, on anti-collusion measures and on informing the public prosecutor’s office upon suspicion of corruption warranted by facts;
- assisting in public relations by publishing sanctions as imposed under civil service and criminal law, heeding the right to privacy of the persons concerned in doing so (preventive aspect).

If a contact person becomes aware of facts warranting the suspicion of a disciplinary offence by a civil servant (Section 26 (1) sentence 1 of the Federal Disciplinary Code), they shall inform office management who shall initiate the investigations required to clear up the matter. No disciplinary powers according to Section 15 (1) of the Federal Disciplinary Code may be conferred on contact persons; they may not act as preliminary investigators, nor may they head investigations in any disciplinary proceedings on account of corruption. The given office shall provide the contact person promptly and comprehensively with the necessary information to enable them to carry out their duties, in particular in incidents in which corruption is suspected.

Contact persons shall maintain silence about the personal circumstances of staff that have become known to them, even after completion of their term of office; this shall not apply in relation to office management and staff management when there is any suspicion of corruption that is warranted by facts.

6. Internal review

Office management shall charge an organisational unit with carrying out internal reviews, for a limited period or on a permanent basis, whenever risk analysis findings or special occasions require such; the staff in such units shall be given suitable training for this task. The object of internal reviews is the random checking and monitoring of current and completed transactions and operations and of decisions
taken. In the event of flaws in corruption prevention it shall recommend suitable changes to the organisation section and the organisational unit concerned. Under internal reviews, office management and the contact person for corruption prevention shall be informed accordingly upon any suspicion of corruption.

7. Selection of staff

Special care shall be taken in appointing staff to sensitive organisational units.

8. Alerting and informing staff

Staff shall be made aware of the risk of corruption when they take their oath of office or are placed under obligation, and instructed of the consequences of corrupt behaviour. In addition, staff shall be given a generally valid Code of Conduct enabling them to respond appropriately to any incidents in which corruption is suspected to have occurred.

9. Training

All basic and further training schemes shall be examined with a view to establishing whether participants have been adequately informed of corruption in all its manifestations, of risk situations, of corruption prevention measures and of the consequences - in terms of criminal law, civil service law and labour law - arising in cases of corruption.

10. Systematic administrative and substantive supervision

Superiors shall be systematic in the exercise of their administrative and substantive supervision and look out for any signs of corruption. They shall regularly alert their staff to the risk of corruption.

11. Full-time investigators

In order to accelerate disciplinary proceedings, the highest administrative authorities may appoint full-time investigators for one or more offices.

12. Notification and action upon suspicion of corruption

Where there is suspicion, warranted by facts, of a criminal offence involving corruption (most notably Sections 331 to 338 of the Criminal Code), office management shall notify the public prosecutor’s office and the highest administrative authority without delay; furthermore, internal investigations shall be started and preventive action taken against any collusion to conceal the facts.

13. Separation of planning, award and billing

In connection with the procurement of public works, supplies and services within the meaning of the German Code for Awarding Public Works Contracts (VOB), the German Code for Awarding Public Services Contracts (VOL) and the German Code for Awarding Contracts for Professional Services (VOF) preparation, planning and specification of requirements on the one hand and implementation of the award procedure on the other should be entrusted in principle to separate organisational units. Billing for construction work performed should be the responsibility of a third organisational unit.

14. Principle of public tender

The provisions of the German Codes for Awarding Public Works Contracts, Public Services Contracts
and Contracts for Professional Services relating to contract award shall be strictly adhered to in the interest of preventing corruption. The office concerned shall ensure that the reasons justifying any divergence from the norm of public tender or open procedure are placed on record in each given instance (Sections 3, 3a and 30 of the VOB/A and VOL/A respectively and Section 18 of the VOF);

In respect of public contracts worth more than the amount set forth in Section 3 no 4 sub-paragraph p of the VOL/A the reasons shall be examined by a superior or by an organisational unit not taking part in the actual procurement. Public procurement shall be regularly monitored for inadmissible influencing factors as part of supervisory and substantive supervision.

15. Exclusion of companies from participation in the competition

Offices shall investigate whether a bidder or candidate is guilty of any serious misconduct which compromises their reliability and which may lead to exclusion from participation in the competition (Section 8 of the VOB/A, Section 7 of the VOL/A and Section 11 of the VOF). A bidder or candidate is deemed guilty of such serious misconduct most notably when they are proven to have offered, promised or granted an advantage to a member of staff of an office engaged in the preparation or implementation of the award procedure or to a third party. In their investigation, offices shall apply the federal government decision on the uniform application of the rules concerning the exclusion of unreliable companies from public contracts and on the introduction of a register for companies with proven unreliability.

16. Anti-corruption clause

In suitable cases, anti-corruption clauses shall be incorporated in contracts on the purchase of public works, services or other supplies and services which, in the event of conduct justifying the exclusion of the contractor from participation in the competition under Section 7 no 5 sub-paragraph c of the VOL/A, Section 8 no 5 para 1 sub-paragraph c of the VOB/A or Section 11 sub-paragraph c of the VOF and leading to a substantial disadvantage for the contracting entity, provide for payment by the contractor of a reasonable contractual penalty according to Section 11 of the VOB/B or VOL/B.

17. Placing contractors under an obligation as provided for by the Act on the Engagement of Persons placed under an Obligation

Where private companies (e.g. main contractors, architects’ or engineering consultants’ offices) assist in the discharge of public functions, the individual members of staff of these companies - where appropriate - shall undertake in accordance with Section 1 (1) of the said Act to conscientiously perform the duties incumbent upon them arising from the contract. They shall be given a copy of the directive concerning prohibition of the acceptance of rewards or gifts and shall acknowledge receipt of the same.

18. Gifts and hospitality for events and facilities; Sponsoring

The prior consent of the highest administrative authority shall be obtained for the acceptance of any gifts or hospitality from third parties outside the office concerned for staff events or facilities. This shall also apply to any voluntary material promotion (sponsoring) for the benefit of activities, events and facilities of the office concerned.

19. Special measures

If the particular circumstances of any office require additional arrangements for the prevention of corruption, it shall notify the highest administrative authority through the official channels of all measures taken.
20. Recipients of subsidies

Where government offices give subsidies to offices outside the federal administration for purposes of promoting these offices, they shall oblige the recipients to apply this Directive when they require the recipient to apply the VOL/A and VOB/A in accordance with the provisional administrative rules pertaining to Section 44 of the federal budgetary regulations.

21. Entry into force

The present Directive shall enter into force on the day of its promulgation in the Federal Gazette[1].

ANNEX 5 - SYSTEM MANAGEMENT

SYSTEM MANAGEMENT: Approaches to maintain the procurement infrastructure and keep permanent contact with operational officials.

5. A. United States’ Example

In the United States, the central supervisory body for the Federal contracting is the Office of Federal Procurement Policy (OFPP). Congress established OFPP in 1974 as an integral part of the Office of Management and Budget in the Office of the President. The OFPP Act states that OFPP is "to provide overall direction of Government-wide procurement policies, regulations, procedures, and forms for executive agencies and to promote economy, efficiency and effectiveness in the procurement of property and services by the executive branch of the Federal government." (41 U.S.C. 404.) OFPP is headed by an Administrator who is appointed by the President and confirmed by the Senate, and has a staff of approximately 20 people.

In recent years, OFPP’s primary goal has been to reform the procurement process to provide better support for agency missions and obtain better value for the dollars spent. In pursuing reform, OFPP has sought to make competitive procurement procedures more flexible and easy to use, contracting strategies more effective, oversight mechanisms less intrusive, and government contracting more like commercial practice overall. OFPP pursues reform by working closely with Congress and Federal agencies.

OFPP has helped to bring about enactment of three major acquisition reform laws working closely with the Office of the Vice President: the Federal Acquisition Streamlining Act (FASA) of 1994, the Federal Acquisition Reform Act (FARA) of 1996 and the Information Technology Management Reform Act (ITMRA) of 1996. These laws, which represent the most significant legislative actions affecting U.S. procurement in more than a decade, enable the procurement system to rely less on bureaucracy and more on streamlined, customer-oriented practices to deliver better value to the taxpayer as recommended by the National Performance Review.

OFPP seeks direct input from front-line professionals at periodic (about every two months) meetings with a group of about 35 reform-minded individuals nominated by their agencies. The forum, which was established in January 1995, allows the procurement reform leaders to obtain quick, frank reactions as to the impact particular reforms are likely to have, new ideas for practical ways to improve the acquisition process, and timely feedback on whether reforms are reaching the front-line.

OFPP also frequently takes the lead to coordinate the resolution of issues that arise when Congress or the President seek to use the procurement process to achieve larger socio-economic goals, e.g., promote small and minority business enterprises, buy U.S. made products, or maintain wage levels.

OFPP oversees the formulation of the executive branch position on all legislation relating to procurement. In close consultation with the major procuring agencies, OFPP develops legislative proposals and formulates positions on bills to reform the acquisition process. OFPP staff also works closely with Congressional committees to explain and refine the legislation as it proceeds to final passage. The Administrator testifies frequently before Congress on pending legislative proposals and in support of
the Administration's procurement reform agenda. Once the President signs legislation, OFPP ensures that effective implementing regulations are issued.

Under the leadership of the OFPP Administrator, the Federal Acquisition Regulation Council oversees the development and maintenance of the FAR, the government wide regulation that governs all agency acquisitions. OFPP staff participates either directly as liaisons, or as members of interagency regulation writing teams. The OFPP Administrator can issue policy letters stating principles that must be incorporated in the FAR and followed by the agencies. Staff reviews all significant FAR rules prior to their issuance and the Administrator resolves differences among the agencies.

Both the Administration and Congress recognized a need to improve the management of large acquisitions. Too many agencies encountered significant cost overruns, schedule delays and performance reductions. In the Federal Acquisition Streamlining Act of 1994, Title V mandated that agencies establish cost, schedule and performance goals for all large acquisitions and manage the acquisitions to achieve at least 90 percent of the baseline goals. The OFPP Administrator is required to provide Congress with an annual assessment of the progress civilian agencies are making in achieving acquisition goals. The Secretary of Defense reports separately.

OFPP helps implement with OMB an integrated program to plan for and monitor fixed asset acquisitions under the umbrella of the Government Performance and Results Act (GPRA). Acquisition goals are incorporated into the annual GPRA performance plans so that a unified picture of agency management activities is presented and acquisition performance goals are linked to the achievement of mission goals.

OFPP worked with key Federal agencies to establish performance measures to bring agencies up to the level of a world class procurement system. A menu of possible measures was developed that agencies could use to assess progress in improving the performance of their operations in terms of quality, timeliness, price, and productivity. Agencies have selected those measures that are most pertinent to their overall mission, internal organizational structure, types of contracts awarded, and data collection systems. The measures are integrated with the agency strategic plans and annual performance plans that are required by the Government Performance and Results Act.

OFPP encourages individual agencies to test new ideas for reform, with OFPP staff acting as expert consultants in designing the tests, endorsing those considered promising, and providing waivers of laws in those circumstances where necessary and OFPP is empowered to do so. Recent legislation has given OFPP limited authority to waive laws in order to allow agencies to conduct tests of innovative procurement procedures. However, section 6 of the OFPP Act, 41 U.S.C. 405, specifically states that the OFPP Administrator's authority "shall not be construed to interfere with the determination by executive agencies of specific actions in the award or administration of procurement contracts."

Other OFPP functions include:

- conducting and reporting on Congressionally mandated studies;
- providing for and directing the activities of the computer-based Federal Procurement Data System to measure the output of procurement entities; and
- directing the activities of the Federal Acquisition Institute, which develops training materials to enhance the competence and professionalism of the procurement workforce.
5.A.1 OFFICE OF FEDERAL PROCUREMENT POLICY

Sec. 403. Definitions

As used in this chapter:

(1) The term "executive agency" means -

(A) an executive department specified in section 101 of title 5;

(B) a military department specified in section 102 of such title;

(C) an independent establishment as defined in section 104(1) of such title; and

(D) a wholly owned Government corporation fully subject to the provisions of chapter 91 of title 31.

(2) The term "procurement" includes all stages of the process of acquiring property or services, beginning with the process for determining a need for property or services and ending with contract completion and closeout.

(3) The term "procurement system" means the integration of the procurement process, the professional development of procurement personnel, and the management structure for carrying out the procurement function.

(4) The term "standards" means the criteria for determining the effectiveness of the procurement system by measuring the performance of the various elements of such system.

(5) The term "competitive procedures" means procedures under which an agency enters into a contract pursuant to full and open competition.

(6) The term "full and open competition", when used with respect to a procurement, means that all responsible sources are permitted to submit sealed bids or competitive proposals on the procurement.

(7) The term "responsible source" means a prospective contractor who -

(A) has adequate financial resources to perform the contract or the ability to obtain such resources;

(B) is able to comply with the required or proposed delivery or performance schedule, taking into consideration all existing commercial and Government business commitments;

(C) has a satisfactory performance record;

(D) has a satisfactory record of integrity and business ethics;

(E) has the necessary organization, experience, accounting and operational controls, and technical skills, or the ability to obtain such organization, experience, controls, and skills;

(F) has the necessary production, construction, and technical equipment and facilities, or the ability to obtain such equipment and facilities; and

(G) is otherwise qualified and eligible to receive an award under applicable laws and regulations.
(8) The term "technical data" means recorded information (regardless of the form or method of the recording) of a scientific or technical nature (including computer software documentation) relating to supplies procured by an agency. Such term does not include computer software or financial, administrative, cost or pricing, or management data or other information incidental to contract administration.

(9)

(A) The term "major system" means a combination of elements that will function together to produce the capabilities required to fulfill a mission need, which elements may include hardware, equipment, software or any combination thereof, but excludes construction or other improvements to real property; and

(B) a system shall be considered a major system if (i) 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 $75,000,000 (based on fiscal year 1980 constant dollars) or the eventual total expenditure for procurement of more than $300,000,000 (based on fiscal year 1980 constant dollars); (ii) a civilian agency is responsible for the system and total expenditures for the system are estimated to exceed $750,000 (based on fiscal year 1980 constant dollars) or the dollar threshold for a "major system" established by the agency pursuant to Office of Management and Budget (OMB) Circular A-109, entitled "Major Systems Acquisitions", whichever is greater; or (iii) the system is designated a "major system" by the head of the agency responsible for the system.

(10) The term "item", "item of supply", or "supplies" means any individual part, component, subassembly, assembly, or subsystem integral to a major system, and other property which may be replaced during the service life of the system, and includes spare parts and replenishment spare parts, but does not include packaging or labeling associated with shipment or identification of an "item".

(11) The term "simplified acquisition threshold" means $100,000.

(12) The term "commercial item" means any of the following:

(A) Any item, other than real property, that is of a type customarily used by the general public or by nongovernmental entities for purposes other than governmental purposes, and that -

(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.

(B) Any item that evolved from an item described in subparagraph (A) 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 Federal Government solicitation.

(C) Any item that, but for -

(i) modifications of a type customarily available in the commercial marketplace, or

(ii) minor modifications made to meet Federal Government requirements, would satisfy the criteria in subparagraph (A) or (B).

(D) Any combination of items meeting the requirements of subparagraph (A), (B), (C), or (E) that are of a type customarily combined and sold in combination to the general public.
(E) Installation services, maintenance services, repair services, training services, and other services if such services are procured for support of an item referred to in subparagraph (A), (B), (C), or (D) and if the source of such services

(i) offers such services to the general public and the Federal Government contemporaneously and under similar terms and conditions; and

(ii) offers to use the same work force for providing the Federal Government with such services as the source uses for providing such services to the general public.

(F) Services offered and sold competitively, in substantial quantities, in the commercial marketplace based on established catalog or market prices for specific tasks performed and under standard commercial terms and conditions.

(G) Any item, combination of items, or service referred to in subparagraphs (A) through (F) notwithstanding the fact that the item, combination of items, or service is transferred between or among separate divisions, subsidiaries, or affiliates of a contractor.

(H) A nondevelopmental item, if the procuring agency determines, in accordance with conditions set forth in the Federal Acquisition Regulation, that the item was developed exclusively at private expense and has been sold in substantial quantities, on a competitive basis, to multiple State and local governments.

(13) The term "nondevelopmental item" means any of the following:

(A) Any commercial item.

(B) Any previously developed item of supply that is in use by a department or agency of the United States, a State or local government, or a foreign government with which the United States has a mutual defense cooperation agreement.

(C) Any item of supply described in subparagraph (A) or (B) that requires only minor modification or modification of the type customarily available in the commercial marketplace in order to meet the requirements of the procuring department or agency.

(D) Any item of supply currently being produced that does not meet the requirements of subparagraph (A), (B), or (C) solely because the item is not yet in use.

(14) The term "component" means any item supplied to the Federal Government as part of an end item or of another component.

(15) The term "commercial component" means any component that is a commercial item.

Sec. 404. Establishment of Office of Federal Procurement Policy; appointment of Administrator

(a) There is in the Office of Management and Budget an Office of Federal Procurement Policy (hereinafter referred to as the "Office") to provide overall direction of Government-wide procurement policies, regulations, procedures, and forms for executive agencies and to promote economy, efficiency, and effectiveness in the procurement of property and services by the executive branch of the Federal Government.

(b) There shall be at the head of the Office an Administrator for Federal Procurement Policy (hereinafter referred to as the "Administrator"), who shall be appointed by the President, by and with the
advice and consent of the Senate.

US Code as of: 01/26/98

Sec. 405. Authority and functions of the Administrator

(a) Development of procurement policy; leadership

The Administrator shall provide overall direction of procurement policy and leadership in the development of procurement systems of the executive agencies. To the extent that the Administrator considers appropriate, in carrying out the policies and functions set forth in this chapter, and with due regard for applicable laws and the program activities of the executive agencies, the Administrator may prescribe Government-wide procurement policies. These policies shall be implemented in a single Government-wide procurement regulation called the Federal Acquisition Regulation and shall be followed by executive agencies in the procurement of:

(1) property other than real property in being;

(2) services, including research and development; and

(3) construction, alteration, repair, or maintenance of real property.

(b) Government-wide procurement regulations

In any instance in which the Administrator determines that the Department of Defense, the National Aeronautics and Space Administration, and the General Services Administration are unable to agree on or fail to issue Government-wide regulations, procedures and forms in a timely manner, including any such regulations, procedures, and forms as are necessary to implement prescribed policy initiated by the Administrator under subsection (a) of this section, the Administrator shall, with due regard for applicable laws and the program activities of the executive agencies and consistent with the policies and functions set forth in this chapter, prescribe Government-wide regulations, procedures and forms which shall be followed by executive agencies in the procurement of:

(1) property other than real property in being;

(2) services, including research and development; and

(3) construction, alteration, repair, or maintenance of real property.

(c) Noninterference with executive agencies

The authority of the Administrator under this chapter shall not be construed to -

(1) impair or interfere with the determination by executive agencies of their need for, or their use of, specific property, services, or construction, including particular specifications therefore; or

(2) interfere with the determination by executive agencies of specific actions in the award or administration of procurement contracts.

(d) Enumeration of included functions

The functions of the Administrator shall include -

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(1) providing leadership and ensuring action by the executive agencies in the establishment, development and maintenance of the single system of simplified Government-wide procurement regulations and resolving differences among the executive agencies in the development of simplified Government-wide procurement regulations, procedures and forms;

(2) coordinating the development of Government-wide procurement system standards that shall be implemented by the executive agencies in their procurement systems;

(3) providing leadership and coordination in the formulation of the executive branch position on legislation relating to procurement;

(4)

(A) providing for and directing the activities of the computer-based Federal Procurement Data System (including recommending to the Administrator of General Services a sufficient budget for such activities), which shall be located in the General Services Administration, in order to adequately collect, develop, and disseminate procurement data; and

(B) ensuring executive agency compliance with the record requirements of section 417 of this title;

(5) providing for and directing the activities of the Federal Acquisition Institute (including recommending to the Administrator of General Services a sufficient budget for such activities), which shall be located in the General Services Administration, in order to -

(A) foster and promote the development of a professional acquisition workforce Government-wide;

(B) promote and coordinate Government-wide research and studies to improve the procurement process and the laws, policies, methods, regulations, procedures, and forms relating to acquisition by the executive agencies;

(C) collect data and analyze acquisition workforce data from the Office of Personnel Management, the heads of executive agencies, and, through periodic surveys, from individual employees;

(D) periodically analyze acquisition career fields to identify critical competencies, duties, tasks, and related academic prerequisites, skills, and knowledge;

(E) coordinate and assist agencies in identifying and recruiting highly qualified candidates for acquisition fields;

(F) develop instructional materials for acquisition personnel in coordination with private and public acquisition colleges and training facilities;

(G) evaluate the effectiveness of training and career development programs for acquisition personnel;

(H) promote the establishment and utilization of academic programs by colleges and universities in acquisition fields;

(I) facilitate, to the extent requested by agencies, interagency intern and training programs; and

(J) perform other career management or research functions as directed by the Administrator;

(6) administering the provisions of section 433 of this title;
(7) establishing criteria and procedures to ensure the effective and timely solicitation of the viewpoints of interested parties in the development of procurement policies, regulations, procedures, and forms;

(8) developing standard contract forms and contract language in order to reduce the Government's cost of procuring property and services and the private sector's cost of doing business with the Government;

(9) providing for a Government-wide award to recognize and promote vendor excellence;

(10) providing for a Government-wide award to recognize and promote excellence in officers and employees of the Federal Government serving in procurement-related positions;

(11) developing policies, in consultation with the Administrator of the Small Business Administration, that ensure that small businesses, qualified HUBZone small business concerns (as defined in section 632(p) of title 15), small businesses owned and controlled by socially and economically disadvantaged individuals, and small businesses owned and controlled by women are provided with the maximum practicable opportunities to participate in procurements that are conducted for amounts below the simplified acquisition threshold;

(12) developing policies that will promote achievement of goals for participation by small businesses, qualified HUBZone small business concerns (as defined in section 632(p) of title 15), small businesses owned and controlled by socially and economically disadvantaged individuals, and small businesses owned and controlled by women; and

(13) completing action, as appropriate, on the recommendations of the Commission on Government Procurement.

(e) Consultation; assistance of existing executive agencies; advisory committees and interagency groups. In carrying out the functions set forth in subsection (d) of this section, the Administrator –

(1) shall consult with the affected executive agencies, including the Small Business Administration;

(2) may, with the concurrence of the heads of affected executive agencies, designate an executive agency or executive agencies to assist in the performance of such functions; and

(3) may establish advisory committees or other interagency groups to assist in providing for the establishment, development, and maintenance of a single system of simplified Government-wide procurement regulations and to assist in the performance of any of the other functions which the Administrator considers appropriate.

(f) Oversight of regulations promulgated by other agencies relating to procurement. The Administrator, with the concurrence of the Director of the Office of Management and Budget, and with consultation with the head of the agency or agencies concerned, may deny the promulgation of or rescind any Government-wide regulation or final rule or regulation of any executive agency relating to procurement if the Administrator determines that such rule or regulation is inconsistent with any policies, regulations, or procedures issued pursuant to subsection (a) of this section.

(g) Assignment, delegation, or transfer of functions prohibited. Except as otherwise provided by law, no duties, functions, or responsibilities, other than those expressly assigned by this chapter, shall be assigned, delegated, or transferred to the Administrator.
(h) Automatic data processing and telecommunications equipment; real property procurement; Office of Management and Budget Nothing in this chapter shall be construed to -

(1) impair or affect the authorities or responsibilities conferred by the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 251 et seq.) with respect to the procurement of real property; or

(2) limit the current authorities and responsibilities of the Director of the Office of Management and Budget.

(i) Recipients of Federal grants or assistance

(1) With due regard to applicable laws and the program activities of the executive agencies administering Federal programs of grants or assistance, the Administrator may prescribe Government-wide policies, regulations, procedures, and forms which the Administrator considers appropriate and which shall be followed by such executive agencies in providing for the procurement, to the extent required under such programs, of property or services referred to in clauses (1), (2), and (3) of subsection (a) of this section by recipients of Federal grants or assistance under such programs.

(2) Nothing in paragraph (1) shall be construed to -

(A) permit the Administrator to authorize procurement or supply support, either directly or indirectly, to recipients of Federal grants or assistance; or

(B) authorize any action by such recipients contrary to State and local laws, in the case of programs to provide Federal grants or assistance to States and political subdivisions.

(j) Policy regarding consideration of contractor past performance

(1) The Administrator shall prescribe for executive agencies guidance regarding consideration of the past contract performance of offerors in awarding contracts. The guidance shall include -

(A) standards for evaluating past performance with respect to cost (when appropriate), schedule, compliance with technical or functional specifications, and other relevant performance factors that facilitate consistent and fair evaluation by all executive agencies;

(B) policies for the collection and maintenance of information on past contract performance that, to the maximum extent practicable, facilitate automated collection, maintenance, and dissemination of information and provide for ease of collection, maintenance, and dissemination of information by other methods, as necessary;

(C) policies for ensuring that -

(i) offerors are afforded an opportunity to submit relevant information on past contract performance, including performance under contracts entered into by the executive agency concerned, contracts entered into by other departments and agencies of the Federal Government, contracts entered into by agencies of State and local governments, and contracts entered into by commercial customers; and

(ii) such information submitted by offerors is considered; and

(D) the period for which information on past performance of offerors may be maintained and considered.
(2) In the case of an offeror with respect to which there is no information on past contract performance or with respect to which information on past contract performance is not available, the offeror may not be evaluated favorably or unfavorably on the factor of past contract performance.

(k) Annual reporting requirement

The Administrator shall submit to Congress, on an annual basis, an assessment of the progress made in executive agencies in implementing the policy regarding major acquisitions that is stated in section 263(a) of this title. The Administrator shall use data from existing management systems in making the assessment.

US Code as of: 01/26/98

Sec. 405a. Uniform Federal procurement regulations and procedures

The Administrator of the Office of Federal Procurement Policy is authorized and directed, pursuant to the authority conferred by Public Law 93-400 (41 U.S.C. 401 et seq.) and subject to the procedures set forth in such Public Law, to promulgate a single, simplified, uniform Federal procurement regulation and to establish procedures for insuring compliance with such provisions by all Federal agencies. In formulating such regulations and procedures the Administrator of the Office of Federal Procurement Policy shall, in consultation with the Small Business Administration, conduct analyses of the impact on small business concerns resulting from revised procurement regulations, and incorporate into revised procurement regulations simplified bidding, contract performance, and contract administration procedures for small business concerns.

US Code as of: 01/26/98

Sec. 405b. Conflict of interest standards for individuals providing consulting services

(a) Issuance of policy and regulations. Not later than 90 days after October 1, 1988, the Administrator of the Office of Federal Procurement Policy shall issue a policy, and not later than 180 days thereafter Government-wide regulations shall be issued under the Office of Federal Procurement Policy Act (41 U.S.C. 401 et seq.) which set forth

(1) conflict of interest standards for persons who provide consulting services described in subsection (b) of this section; and

(2) procedures, including such registration, certification, and enforcement requirements as may be appropriate, to promote compliance with such standards.

(b) Services subject to regulations

The regulations required by subsection (a) of this section shall apply to the following types of consulting services:

(1) advisory and assistance services provided to the Government to the extent necessary to identify and evaluate the potential for conflicts of interest that could be prejudicial to the interests of the United States;

(2) services related to support of the preparation or submission of bids and proposals for Federal contracts to the extent that inclusion of such services in such regulations is necessary to identify and evaluate the potential for conflicts of interest that could be prejudicial to the interests of the United States;
and

(3) such other services related to Federal contracts as may be specified in the regulations prescribed under subsection (a) of this section to the extent necessary to identify and evaluate the potential for conflicts of interest that could be prejudicial to the interests of the United States.

(c) Report to Congress by Comptroller General on effectiveness of regulations. The Comptroller General shall report to Congress not later than one year after October 1, 1988, his assessment of the effectiveness of the regulations prescribed under this section.

(d) Intelligence activities exemption; annual report by Director of Central Intelligence Intelligence activities as defined in section 3.4(e) of Executive order 12333 or a comparable definitional section in any successor order may be exempt from the regulations required by subsection (a) of this section: Provided, That the Director of Central Intelligence shall report to the Intelligence and Appropriations Committees of the Congress no later than January 1, 1990, and annually thereafter delineating those activities and organizations which have been exempted from the regulations required by subsection (a) of this section in accordance with the provisions of this subsection.

(e) Adverse effect determination by President prior to issuance of regulations; report to Congressional committees; voiding of regulations requirement. The President shall, before issuance of the regulations required by subsection (a) of this section, determine if the promulgation of such regulations would have a significantly adverse effect on the accomplishment of the mission of the Department of Defense or other Federal Government agencies: Provided, That if the President determines that the regulations required by subsection (a) of this section would have such an adverse effect, the President shall so report to the appropriate committees of the Senate and the House of Representatives, stating in full the reasons for such a determination: Provided further, That in the event of submission of a report to the committees containing an adverse effect determination, the requirement for the regulations prescribed by subsection (a) of this section shall be null and void.

US Code as of: 01/26/98

Sec. 406. Administrative powers

Upon the request of the Administrator, each executive agency is directed to -

(1) make its services, personnel, and facilities available to the Office to the greatest practicable extent for the performance of functions under this chapter; and

(2) except when prohibited by law, furnish to the Administrator and give him access to all information and records in its possession which the Administrator may determine to be necessary for the performance of the functions of the Office.

US Code as of: 01/26/98


110 Stat. 665

S Code as of: 01/26/98

Sec. 408. Applicability of existing laws
The authority of an executive agency under any other law to prescribe policies, regulations, procedures, and forms for procurement is subject to the authority conferred in section 405 of this title.


Sec. 410. Authorization of appropriations

There is authorized to be appropriated for the Office of Federal Procurement Policy each fiscal year such sums as may be necessary for carrying out the responsibilities of that office for such fiscal year.

Sec. 411. Delegation of authority by Administrator

(a) The Administrator may delegate, and authorize successive redelegations of, any authority, function, or power of the Administrator under this chapter (other than the authority to provide overall direction of Federal procurement policy and to prescribe policies and regulations to carry out such policy), to any other executive agency with the consent of the head of such executive agency or at the direction of the President.

(b) The Administrator may make and authorize such delegations within the Office as he determines to be necessary to carry out the provisions of this chapter.

Sec. 412. Comptroller General's access to information from Administrator; rule making procedure

(a) The Administrator and personnel in his Office shall furnish such information as the Comptroller General may require for the discharge of his responsibilities. For this purpose, the Comptroller General or his representatives shall have access to all books, documents, papers, and records of the Office.

(b) The Administrator shall, by regulation, require that formal meetings of the Office, as designated by him, for the purpose of developing procurement policies and regulations shall be open to the public, and that public notice of each such meeting shall be given not less than ten days prior thereto.

Sec. 413. Tests of innovative procurement methods and procedures

(a) The Administrator may develop innovative procurement methods and procedures to be tested by selected executive agencies. In developing any program to test innovative procurement methods and procedures under this subsection, the Administrator shall consult with the heads of executive agencies to:

(1) ascertain the need for and specify the objectives of such program;

(2) develop the guidelines and procedures for carrying out such program and the criteria to be used in
measuring the success of such program;

(3) evaluate the potential costs and benefits which may be derived from the innovative procurement methods and procedures tested under such program;

(4) select the appropriate executive agencies or components of executive agencies to carry out such program;

(5) specify the categories and types of products or services to be procured under such program; and

(6) develop the methods to be used to analyze the results of such program. A program to test innovative procurement methods and procedures may not be carried out unless approved by the heads of the executive agencies selected to carry out such program.

(b) If the Administrator determines that it is necessary to waive the application of any provision of law in order to carry out a proposed program to test innovative procurement methods and procedures under subsection (a) of this section, the Administrator shall transmit notice of the proposed program to the Committee on Government Operations of the House of Representatives and the Committee on Governmental Affairs of the Senate and request that such committees take such action as may be necessary to provide that such provision of law does not apply with respect to the proposed program. The notification to Congress shall include a description of the proposed program (including the scope and purpose of the proposed program), the procedures to be followed in carrying out the proposed program, the provisions of law affected and any provision of law the application of which must be waived in order to carry out the proposed program, and the executive agencies involved in carrying out the proposed program.

US Code as of: 01/26/98

Sec. 414. Executive agency responsibilities

To further achieve effective, efficient, and economic administration of the Federal procurement system, the head of each executive agency shall, in accordance with applicable laws, Government-wide policies and regulations, and good business practices -

(1) increase the use of full and open competition in the procurement of property or services by the executive agency by establishing policies, procedures, and practices that assure that the executive agency receives a sufficient number of sealed bids or competitive proposals from responsible sources to fulfill the Government's requirements (including performance and delivery schedules) at the lowest reasonable cost considering the nature of the property or service procured;

(2) establish clear lines of authority, accountability, and responsibility for procurement decisionmaking within the executive agency, including placing the procurement function at a sufficiently high level in the executive agency to provide -

(A) direct access to the head of the major organizational element of the executive agency served; and

(B) comparative equality with organizational counterparts;

(3) designate a senior procurement executive who shall be responsible for management direction of the procurement system of the executive agency, including implementation of the unique procurement policies, regulations, and standards of the executive agency; and

(4) develop and maintain a procurement career management program in the executive agency to
assure an adequate professional work force.

US Code as of: 01/26/98

Sec. 414a. Personnel evaluation

The head of each executive agency that is subject to the provisions of title III of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 251 et seq.) shall ensure, with respect to the employees of that agency whose primary duties and responsibilities pertain to the award of contracts subject to the provisions of this Act, that the performance appraisal system applicable to such employees affords appropriate recognition to, among other factors, efforts -

(1) to increase competition and achieve cost savings through the elimination of procedures that unnecessarily inhibit full and open competition;

(2) to further the purposes of the Small Business and Federal Procurement Competition Enhancement Act of 1984 and the Defense Procurement Reform Act of 1984; and

(3) to further such other objectives and purposes of the Federal acquisition system as may be authorized by law.

US Code as of: 01/26/98


US Code as of: 01/26/98

Sec. 416. Procurement notice

(a) Covered executive agency activities; publication of notice; time limitations

(1) Except as provided in subsection (c) of this section -

(A) an executive agency intending to -

(i) solicit bids or proposals for a contract for property or services for a price expected to exceed $25,000; or

(ii) place an order, expected to exceed $25,000, under a basic agreement, basic ordering agreement, or similar arrangement, shall furnish for publication by the Secretary of Commerce a notice of solicitation described in subsection (b) of this section;

(B) an executive agency intending to solicit bids or proposals for a contract for property or services for a price expected to exceed $10,000, but not to exceed $25,000, shall post, for a period of not less than ten days, in a public place at the contracting office issuing the solicitation a notice of solicitation described in subsection (b) of this section; and

(C) an executive agency awarding a contract for property or services for a price exceeding $25,000, or placing an order referred to in clause (A)(ii) exceeding $25,000, shall furnish for publication by the Secretary of Commerce a notice announcing the award or order if there is likely to be any subcontract under such contract or order.
(2) The Secretary of Commerce shall publish promptly in the Commerce Business Daily each notice required by paragraph (1).

(3) Whenever an executive agency is required by paragraph (1)(A) to furnish a notice to the Secretary of Commerce, such executive agency may not -

(A) issue the solicitation earlier than 15 days after the date on which the notice is published by the Secretary of Commerce; or

(B) in the case of a contract or order expected to be greater than the simplified acquisition threshold, establish a deadline for the submission of all bids or proposals in response to the notice required by paragraph (1)(A) that -

(i) in the case of an order under a basic agreement, basic ordering agreement, or similar arrangement, is earlier than the date 30 days after the date the notice required by paragraph (1)(A)(ii) is published;

(ii) in the case of a solicitation for research and development, is earlier than the date 45 days after the date the notice required by paragraph (1)(A)(i) is published; or

(iii) any other case, is earlier than the date 30 days after the date the solicitation is issued.

(4) An executive agency intending to solicit offers for a contract for which a notice of solicitation is required to be posted under paragraph (1)(B) shall ensure that contracting officers consider each responsive offer timely received from an offeror.

(5) An executive agency shall establish a deadline for the submission of all bids or proposals in response to a solicitation with respect to which no such deadline is provided by statute. Each deadline for the submission of offers shall afford potential offers a reasonable opportunity to respond.

(6) The Administrator shall prescribe regulations defining limited circumstances in which flexible deadlines can be used under paragraph (3) for the issuance of solicitations and the submission of bids or proposals for the procurement of commercial items.

(b) Contents of notice

Each notice of solicitation required by subparagraph (A) or (B) of subsection (a)(1) shall include:

(1) an accurate description of the property or services to be contracted for, which description (A) shall not be unnecessarily restrictive of competition, and (B) shall include, as appropriate, the agency nomenclature, National Stock Number or other part number, and a brief description of the item's form, fit, or function, physical dimensions, predominant material of manufacture, or similar information that will assist a prospective contractor to make an informed business judgment as to whether a copy of the solicitation should be requested;

(2) provisions that -

(A) state whether the technical data required to respond to the solicitation will not be furnished as part of such solicitation, and identify the source in the Government, if any, from which the technical data may be obtained; and

(B) state whether an offeror, its product, or service must meet a qualification requirement in order to be eligible for award, and, if so, identify the office from which the qualification requirement may be
obtained;

(3) the name, business address, and telephone number of the contracting officer;

(4) a statement that all responsible sources may submit a bid, proposal, or quotation (as appropriate) which shall be considered by the agency;

(5) in the case of a procurement using procedures other than competitive procedures, a statement of the reason justifying the use of such procedures and the identity of the intended source; and

(6) in the case of a contract in an amount estimated to be greater than $25,000 but not greater than the simplified acquisition threshold, or a contract for the procurement of commercial items using special simplified procedures -

(A) a description of the procedures to be used in awarding the contract; and

(B) a statement specifying the periods for prospective offerors and the contracting officer to take the necessary preaward and award actions.

(c) Exempted, etc., activities of executive agency

(1) A notice is not required under subsection (a)(1) of this section if -

(A)the proposed procurement is for an amount not greater than the simplified acquisition threshold and is to be conducted by -

(i) using widespread electronic public notice of the solicitation in a form that allows convenient and universal user access through a single, Government-wide point of entry; and

(ii) permitting the public to respond to the solicitation electronically.

(B) the notice would disclose the executive agency's needs and the disclosure of such needs would compromise the national security;

(C) the proposed procurement would result from acceptance of -

(i) any unsolicited proposal that demonstrates a unique and innovative research concept and the publication of any notice of such unsolicited research proposal would disclose the originality of thought or innovativeness of the proposal or would disclose proprietary information associated with the proposal; or

(ii) a proposal submitted under section 638 of title 15;

(D) the procurement is made against an order placed under a requirements contract, a task order contract, or a delivery order contract;

(E) the procurement is made for perishable subsistence supplies;

(F) the procurement is for utility services, other than telecommunication services, and only one source is available; or

(G) the procurement is for the services of an expert for use in any litigation or dispute (including any reasonably foreseeable litigation or dispute) involving the Federal Government in any trial, hearing, or
proceeding before any court, administrative tribunal, or agency, or in any part of an alternative dispute resolution process, whether or not the expert is expected to testify.

(2) The requirements of subsection (a)(1)(A) of this section do not apply to any procurement under conditions described in paragraph (2), (3), (4), (5), or (7) of section 253(c) of this title or paragraph (2), (3), (4), (5), or (7) of section 2304(c) of title 10.

(3) The requirements of subsection (a)(1)(A) of this section shall not apply in the case of any procurement for which the head of the executive agency makes a determination in writing, after consultation with the Administrator for Federal Procurement Policy and the Administrator of the Small Business Administration, that it is not appropriate or reasonable to publish a notice before issuing a solicitation.

(d) Availability of complete solicitation package; payment of fee

An executive agency shall make available to any business concern, or the authorized representative of such concern, the complete solicitation package for any on-going procurement announced pursuant to a notice of solicitation under subsection (a) of this section. An executive agency may require the payment of a fee, not exceeding the actual cost of duplication, for a copy of such package.

US Code as of: 01/26/98

Sec. 417. Record requirements

(a) Establishment and maintenance of computer file by executive agency; time period coverage

Each executive agency shall establish and maintain for a period of five years a computer file, by fiscal year, containing unclassified records of all procurements greater than the simplified acquisition threshold in such fiscal year.

(b) Contents

The record established under subsection (a) of this section shall include -

(1) with respect to each procurement carried out using competitive procedures -

(A) the date of contract award;

(B) information identifying the source to whom the contract was awarded;

(C) the property or services obtained by the Government under the procurement; and

(D) the total cost of the procurement;

(2) with respect to each procurement carried out using procedures other than competitive procedures -

(A) the information described in clauses (1)(A), (1)(B),

() the information described in clauses (1)(A), (1)(B),

(B) the reason under section 253(c) of this title or section 2304(c) of title 10, as the case may be, for the use of such procedures; and
(C) the identity of the organization or activity which conducted the procurement.

(c) Record categories

The information that is included in such record pursuant to subsection (b)(1) of this section and relates to procurements resulting in the submission of a bid or proposal by only one responsible source shall be separately categorized from the information relating to other procurements included in such record. The record of such information shall be designated "noncompetitive procurements using competitive procedures".

(d) Transmission and data system entry of information

The information included in the record established and maintained under subsection (a) of this section shall be transmitted to the General Services Administration and shall be entered in the Federal Procurement Data System referred to in section 405(d)(4) of this title.

Sec. 417a. Procurement data

Reporting

Each Federal agency shall report to the Office of Federal Procurement Policy the number of qualified HUBZone small business concerns, the number of small businesses owned and controlled by women, and the number of small business concerns owned and controlled by socially and economically disadvantaged businesses, by gender, that are first time recipients of contracts from such agency. The Office of Federal Procurement Policy shall take such actions as may be appropriate to ascertain for each fiscal year the number of such small businesses that have newly entered the Federal market.

(b) Definitions

For purposes of this section the terms "small business concern owned and controlled by women" and "small business concerns owned and controlled by socially and economically disadvantaged individuals" shall be given the same meaning as those terms are given under section 637(d) of title 15 and section 204 of this Act, and the term "qualified HUBZone small business concern" has the meaning given that term in section 632(p) of title 15 (FOOTNOTE 1)

Footnotes
[1] So in original.

5. B. Other States’ Example

In Jamaica, the Contractor General is appointed by the Governor-General under a Commission of Parliament after consultation with the Prime Minister and the Leader of the Opposition with responsibility to provide oversight for all concerned
5.B.1 JAMAICA- CONTRACTOR-GENERAL ACT

PART II-The Contractor-General

Contractor-General Commission.

3. (1) For the purposes of this Act there is hereby constituted a Commission of Parliament to be known as the Contractor-General.

(2) The Commission shall consist of such person or persons as shall be appointed by the Governor-General by instrument under the Broad Seal, after consultation with the Prime Minister and the Leader of the Opposition, and any person so appointed shall be known as a Contractor-General.

Functions of the Contractor-General.

4. (1) Subject to the provisions of this Act, it shall be the function of a Contractor-General, on behalf of Parliament-

(a) to monitor the award and the implementation of government contracts with a view to ensuring that-

(i) such contracts are awarded impartially and on merit;

(ii) the circumstances in which each contract is awarded or, as the case may be, terminated, do not involve impropriety or irregularity;

(iii) without prejudice to the functions of any public body in relation to any contract, the implementation of each such contract conforms to the terms thereof; and

(b) to monitor the grant, issue, suspension or revocation of any prescribed licence, with a view to ensuring that the circumstances of such grant, issue, suspension or revocation do not involve impropriety or irregularity and, where appropriate, to examine whether such licence is used in accordance with the terms and conditions thereof.

(2) For the purpose of the discharge of his functions under this Act a Contractor-General shall be entitled-

(a) to be advised of the award and, where applicable, the variation of any government contract by the public body responsible for such contract;

(b) subject to section 19, to have access to all books, records, documents, stores or other property belonging to government, whether in the possession of any officer of a public body or a contractor or any other person;

(c) to have access to any premises or location where work on a government contract has been, is being or is to be carried out;

(d) to have access to all books, records, documents or other property used in connection with the grant, issue, suspension or revocation of any prescribed licence whether in the possession of any public officer or any other person;

(e) to have access to any premises or location where he has reason to believe that any such books,
records, documents or other property as are referred to in paragraph (d) or any property which is the subject of a prescribed licence, may be found;

(f) to enter any premises occupied by any person in order to make such enquiries or to inspect such document, record or property as he considers necessary to any matter being investigated by him; and

(g) without prejudice to the provisions of sections 18 and 19, to retain any such document, record or other property referred to in paragraph (f).

(3) For the purposes of subsection (2) the Contractor-General shall have power to require any public body to furnish in such manner and at such times as may be specified by the Contractor-General, information with regard to the award of any contract and such other information in relation thereto as the Contractor-General considers desirable.

(4) For the purposes of paragraphs (d) and (e) of subsection (2) the Contractor-General shall have power to require any public officer or any other person to furnish in such manner and at such times as may be specified by the Contractor-General, information with regard to the grant, issue, suspension or revocation of any prescribed licence and such other information in relation thereto as the Contractor-General considers desirable.

Independence of Contractor-General.

5. (1) In the exercise of the powers conferred upon him by this Act, a Contractor-General shall not be subject to the direction or control of any other person or authority.

(2) Nothing in subsection (1) shall be construed as preventing the assignment to a Minister of responsibility for such aspects of the administration of this Act as are necessary or desirable to facilitate liaison between Parliament and a Contractor-General.

Tenure of office.

6. (1) Subject to the provisions of this Act, any person appointed Contractor-General shall hold office for a period of seven years and may be re-appointed for periods not exceeding five years at a time.

2) A person appointed Contractor-General may at his own request be relieved of office by the Governor-General and shall in any case, subject to the provisions of subsections (3) and (4), vacate office on attaining the age of seventy years.

(3) The Governor-General may, after consultation with the Prime Minister and the Leader of the Opposition, permit a Contractor-General to continue in office until he has attained such later age, not exceeding seventy-five years, as may (before the Contractor-General has attained the age of seventy years) have been agreed between the Governor-General and the Contractor-General.

(4) Notwithstanding that he has attained the age at which he is required by or under the provisions of this section to vacate his office, a Contractor-General may continue in office for such period after attaining that age as the Governor-General, after consultation with the Prime Minister and the Leader of the Opposition, may specify, in order to enable the Contractor-General to give his decision or do any other thing in relation to any investigation he was conducting before he attained that age.

(5) Nothing done by a Contractor-General shall be invalid by reason only that he has attained the age at which he is required by this section to vacate his office.
Removal from office.

7. (1) A Contractor-General may be removed from office only for-

(a) inability to discharge the functions of his office (whether arising from infirmity of body or mind or any other cause); or

(b) misbehaviour; or

(c) trading with the Government of Jamaica without the prior approval, by resolution, of each House of Parliament, and shall not be so removed except in accordance with the provisions of this section.

(2) For the purposes of this section a Contractor-General trades with the Government of Jamaica if, while holding office as such, he becomes party to, or is a partner in a firm or a director or manager of a company which to his knowledge becomes a party to any contract with the Government of Jamaica for or on behalf of the public service.

(3) If the question of the removal from office of a Contractor-General has been referred to a tribunal appointed under subsection (4) and the tribunal has recommended to the Governor-General that the Contractor-General ought to be removed from office, the Governor-General shall, by instrument under the Board Seal, remove the Contractor-General from office.

(4) If each House of Parliament by resolution decides that the question of removing a Contractor-General from office ought to be investigated then-

(a) the Governor-General shall appoint a tribunal, which shall consist of a chairman and not less than two or more than five other members from among persons who hold or have held the office of a Judge of a court having unlimited jurisdiction in civil and criminal matters or a court having jurisdiction in appeals from any such court; and

(b) that tribunal shall enquire into the matter and report on the facts thereof to the Governor-General and recommend to the Governor-General whether the Contractor-General ought to be removed from office for inability as aforesaid or for misbehaviour or for trading as aforesaid.

(5) The provisions of sections 8 to 16 (inclusive) of the Commissions of Enquiry Act shall apply mutatis mutandis in like manner in relation to tribunals appointed under subsection (4) or, as the context may require, to the members thereof, as they apply in relation to the Commissions or Commissioners appointed under that Act.

(6) Where the question of removing a Contractor-General from office has been referred to a tribunal the Governor-General, after consultation with the Prime Minister and the Leader of the Opposition, may suspend the Contractor-General from performing the functions of his office and any such suspension may at any time be revoked by the Governor-General after consultation as aforesaid and shall in any case cease to have effect if the tribunal advises the Governor-General that the Contractor-General ought not to be removed from office.

Disqualifications for appointment, etc.

8. (1) No person shall be qualified to be appointed as Contractor-General who-

(a) is a member of the Senate or of the House of Representatives;
(b) is an undischarged bankrupt;

(c) has been convicted of any offence involving dishonesty or moral turpitude; or

(d) is a party to, or partner in a firm, or a director or manager of a company which to his knowledge is a party to any contract with the Government of Jamaica for or on behalf of the public service unless, prior to his appointment, he has disclosed to the Governor-General the nature of such contract and his interest or the interest of such firm or company therein.

(2) A Contractor-General shall vacate his office if any circumstances arise that, if he were not Contractor-General, would, by virtue of subsection (1), cause him to be disqualified for appointment as such.

Restriction on employment.

9. A person appointed Contractor-General shall devote his full time to the appointment and shall not accept paid employment in any other capacity during any period in which he holds office as Contractor-General.

Filling of vacancy.

10. (1) Where a vacancy arises in the office of Contractor-General the Governor-General, after consultation with the Prime Minister and the Leader of the Opposition, may designate someone to act in that office during such vacancy, until an appointment is made.

(2) Where, by reason of illness, absence from the Island or other sufficient cause a person appointed Contractor-General is unable to perform the functions of his office, he may appoint a member of his staff to perform those functions for a period not exceeding two months and shall forthwith inform the Governor-General of the appointment, but if a Contractor-General is unable or fails to appoint such a person or if it is necessary that such a person be appointed for a period exceeding two months, the Governor-General after consultation with the Prime Minister and the Leader of the Opposition, may appoint such person as he thinks fit, being a person qualified under this Act, to perform those functions.

Remuneration of Contractor-General.

11. (1) Subject to subsection (2), a Contractor-General shall receive such emoluments and be subject to such other terms and conditions of service as may from time to time be prescribed by or under any law or by a resolution of the House of Representatives, such emoluments being not less than the emoluments which may, from time to time, be payable to a Puisne Judge.

(2) The emoluments and terms and conditions of service of a Contractor-General, other than allowances that are not taken into account in computing pensions, shall not be altered to his disadvantage during the period of his appointment or reappointment, as the case may be.

(3) The emoluments for the time being payable to a Contractor-General by virtue of this Act shall be charged on and paid out of the Consolidated Fund.

Pensions and gratuities. First Schedule.

12. The provisions of the First Schedule shall have effect with respect to the pension and other benefits to be paid to or in respect of a person who has held the office of Contractor-General.
Appointment of officers, etc.

13. (1) A Contractor-General may appoint and employ for the purposes of this Act, at such remuneration and on such terms and conditions as may be approved by the Commission constituted under subsection (2), such officers and agents as he considers necessary to assist him in the proper performance of his functions under this Act.

(2) The Commission referred to in subsection (1) shall consist of-

(a) the Speaker, as chairman;

(b) the President of the Senate;

(c) the person designated by the Prime Minister as Leader of Government business in the House of Representatives;

(d) the person designated by the Leader of the Opposition as Leader of Opposition business in the House of Representatives; and

(e) the Minister responsible for the public service.

(3) The Governor-General may, subject to such conditions as he may impose, approve of the appointment to the staff of a Contractor-General, of any officer in the service of the Government, provided that in relation to pension, gratuity, allowances and other rights as a public officer, such officer shall be deemed to be in the service of the Government while so employed.

(4) If more than one person is appointed Contractor-General, without prejudice to the independence of any other Contractor-General, the Governor-General may designate one of them to have supervision of the staff and administration of affairs.

Oath of secrecy.

14. Every person appointed to the staff of a Contractor-General shall, before he performs any function assigned to him under or by virtue of this Act, take and subscribe an oath to be administered by the Contractor-General, in the form set out in the Second Schedule.