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

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

3.800 Scope of subpart.

This subpart prescribes policies and procedures implementing [31 U.S.C. 1352](#), "Limitation on use of appropriated funds to influence certain Federal *contracting* and financial transactions."

3.801 Definitions.

As used in this subpart-

Agency means "*executive agency*" as defined in [2.101](#).

Covered Federal action means any of the following actions:

- (1) Awarding any Federal contract.
- (2) Making any Federal grant.
- (3) Making any Federal loan.
- (4) Entering into any cooperative agreement.
- (5) Extending, continuing, renewing, amending, or modifying any Federal contract, grant, loan, or cooperative agreement.

Indian tribe and "tribal organization" have the meaning provided in section 4 of the Indian Self-Determination and Education Assistance Act ([25 U.S.C. 450b](#)) and include Alaskan Natives.

Influencing or attempting to influence means making, with the intent to influence, any communication to or appearance before an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with any *covered Federal action*.

Local government means a unit of government in a *State* and, if chartered, established, or otherwise recognized by a *State* for the performance of a governmental duty, including a local public authority, a special district, an intrastate district, a council of governments, a sponsor group representative organization, and any other instrumentality of a *local government*.

Officer or employee of an agency includes the following individuals who are employed by an agency:

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

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

(3) A special Government employee, as defined in section 202, Title 18, *United States Code*.

(4) An individual who is a member of a Federal advisory committee, as defined by the Federal Advisory Committee Act, Title 5, *United States Code*, appendix 2.

Person means an individual, corporation, company, association, authority, firm, partnership, society, *State*, and *local government*, regardless of whether such entity is operated for profit or not for profit. This term excludes an *Indian tribe*, tribal organization, or any other Indian organization eligible to receive Federal contracts, grants, cooperative agreements, or loans from an agency, but only with respect to expenditures by such tribe or organization that are made for purposes specified in paragraph [3.802\(a\)](#) and are permitted by other Federal law.

Reasonable compensation means, with respect to a *regularly employed* officer or employee of any *person*, compensation that is consistent with the normal compensation for such officer or employee for work that is not furnished to, not funded by, or not furnished in cooperation with the Federal Government.

Reasonable payment means, with respect to professional and other technical services, a payment in an amount that is consistent with the amount normally paid for such services in the private sector.

Recipient includes the contractor and all subcontractors. This term excludes an *Indian tribe*, tribal organization, or any other Indian organization eligible to receive Federal contracts, grants, cooperative agreements, or loans from an agency, but only with respect to expenditures by such tribe or organization that are made for purposes specified in paragraph [3.802\(a\)](#) and are permitted by other Federal law.

Regularly employed means, with respect to an officer or employee of a *person* requesting or receiving a Federal contract, an officer or employee who is employed by such *person* for at least 130 working days within 1 year immediately preceding the date of the submission that initiates agency consideration of such *person* for receipt of such contract. An officer or employee who is employed by such *person* for less than 130 working days within 1 year immediately preceding the date of the submission that initiates agency consideration of such *person* shall be considered to be *regularly employed* as soon as he or she is employed by such *person* for 130 working days.

State means a *State* of the *United States*, the District of Columbia, an outlying area of the *United States*, an agency or instrumentality of a *State*, and multi-*State*, regional, or interstate entity having governmental duties and powers.

3.802 Statutory prohibition and requirement.

(a) [31 U.S.C.1352](#) prohibits a *recipient* of a Federal contract, grant, loan, or cooperative agreement from using appropriated funds to pay any *person* for *influencing or attempting to influence* an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with any *covered Federal actions*.

(1) For purposes of this subpart the term "appropriated funds" does not include profit or fee from a *covered Federal action*.

(2) To the extent a *person* can demonstrate that the *person* has sufficient monies, other than Federal appropriated funds, the Government *shall* assume that these other monies were spent for any influencing activities that would be unallowable if paid for with Federal appropriated funds.

(b) [31 U.S.C.1352](#) also requires *offerors* to furnish a declaration consisting of both a certification and a disclosure, with periodic updates of the disclosure after contract award. These requirements are contained in the provision at [52.203-11](#), Certification and Disclosure Regarding Payments to Influence Certain Federal Transactions, and the clause at [52.203-12](#), Limitation on Payments to Influence Certain Federal Transactions.

3.803 Exceptions.

(a) The prohibition of paragraph [3.802\(a\)](#) does not apply under the following conditions:

(1) *Agency and legislative liaison by own employees.*

(i) Payment of *reasonable compensation* made to an officer or employee of a *person* requesting or receiving a *covered Federal action* if the payment is for agency and legislative liaison activities not directly related to a *covered Federal action*. For purposes of this paragraph, providing any information specifically requested by an agency or Congress is permitted at any time.

(ii) Participating with an agency in discussions that are not related to a specific *solicitation* for any *covered Federal action*, but that concern-

(A) The qualities and characteristics (including individual demonstrations) of the *person's products* or services, conditions or terms of sale, and service capabilities; or

(B) The application or adaptation of the *person's products* or services for an agency's use.

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

(iv) Participating in technical discussions regarding the preparation of an *unsolicited proposal* prior to its official submission.

(v) Making capability presentations prior to formal *solicitation* of any *covered Federal action* when seeking an award from an agency pursuant to the provisions of the Small Business Act, as amended by Pub. L. 95-507, and subsequent amendments.

(2) Professional and technical services.

(i) Payment of *reasonable compensation* made to an officer or employee of a *person* requesting or receiving a *covered Federal action*, if payment is for professional or technical services rendered directly in the preparation, submission, or negotiation of any bid, proposal, or application for that Federal action or for meeting requirements imposed by or pursuant to law as a condition for receiving that Federal action;

(ii) Any *reasonable payment* to a *person*, other than an officer or employee of a *person* requesting or receiving a *covered Federal action*, if the payment is for professional or technical services rendered directly in the preparation, submission, or negotiation of any bid, proposal, or application for that Federal action, or for meeting requirements imposed by or pursuant to law as a condition for receiving that Federal action. *Persons* other than officers or employees of a *person* requesting or receiving a *covered Federal action* include consultants and trade associations.

(iii) As used in paragraph (a)(2) of this section "professional and technical services" are limited to advice and analysis directly applying any professional or technical discipline. For example, drafting of a legal document accompanying a bid or proposal by a lawyer is allowable. Similarly, technical advice provided by an engineer on the performance or operational capability of a piece of equipment rendered directly in the negotiation of a contract is allowable. However, communications with the intent to influence made by a professional or a technical *person* are not allowable under this section unless they provide advice and analysis directly applying their professional or technical expertise and unless the advice or analysis is rendered directly and solely in the preparation, submission or negotiation of a *covered Federal action*. Thus, for example, communications with the intent to influence made by a lawyer that do not provide legal advice or analysis directly and solely related to the legal aspects of his or her client's proposal, but generally advocate one proposal over another, are not allowable under this section because the lawyer is not providing professional legal services. Similarly, communications with the intent to influence made by an engineer providing an engineering analysis prior to the preparation or submission of a bid or proposal are not allowable under this section since the engineer is providing technical services but not directly in the preparation, submission or negotiation of a *covered Federal action*.

(iv) Requirements imposed by or pursuant to law as a condition for receiving a covered Federal award include those required by law or regulation and any other requirements in the actual award documents.

(b) Only those communications and services expressly authorized by paragraph (a) of this section are permitted.

(c) The disclosure requirements of paragraph [3.802\(b\)](#) do not apply with respect to payments of *reasonable compensation* made to *regularly employed* officers or employees of a *person*.

3.804 Policy.

The *contracting officer* shall obtain certifications and disclosures as required by the provision at [52.203-11](#), Certification and Disclosure Regarding Payments to Influence Certain Federal Transactions, prior to the award of any contract exceeding \$150,000.

3.805 Exemption.

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

3.806 Processing suspected violations.

The *contracting officer shall* report suspected violations of the requirements of 31 U.S.C.1352 in accordance with agency procedures.

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) Insert the provision at 52.203-11, Certification and Disclosure Regarding Payments to Influence Certain Federal Transactions, in *solicitations* expected to exceed \$150,000.

(b) Insert the clause at 52.203-12, Limitation on Payments to Influence Certain Federal Transactions, in *solicitations* and contracts expected to exceed \$150,000.