Subpart 3.5 - Other Improper Business Practices

Parent topic: Part 3 - Improper Business Practices and Personal Conflicts of Interest

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 multi-year 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 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, as used in this section, 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 (now codified at 41 U.S.C. chapter 87, *Kickbacks*,) 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 *Kickbacks* statute-

(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 section.

(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 section; and

(3) An offset under paragraph (d)(1) or a direction under paragraph (d)(2) of this section is a *claim* by the Government for the purposes of 41 U.S.C. chapter 71, Contract Disputes.

(e) Authorizes *contracting officers* to order that sums withheld under paragraph (d)(2) of this section 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 section 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 Attorney General any possible violation of the *Kickbacks* statute 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 *Kickbacks* statute with respect to any *prime contract*, the Government Accountability Office 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*, other than for *commercial products* or *commercial services*, exceeding $150,000, a requirement that the *prime contractor shall*–

(1) Have in place and follow reasonable procedures designed to prevent and detect violations of the *Kickbacks* statute 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 *Kickbacks* statute.

(j) Notwithstanding paragraph (i) of this section, a *prime contractor shall* cooperate fully with any Federal Government agency investigating a violation of 41 U.S.C. 8702 (see 41 U.S.C. 8703(b)).

3.502-3 Contract clause.

The *contracting officer shall* insert the clause at 52.203-7, Anti-*Kickback* Procedures, in *solicitations* and contracts exceeding $150,000, other than those for *commercial products* or *commercial services* (see part 12).

3.503 Unreasonable restrictions on subcontractor sales.

3.503-1 Policy.

10 U.S.C. 4655 and 41 U.S.C. 4704 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 products* or *commercial services*, the *contracting officer shall* use the clause with its *Alternate* I.