

Subpart 3.7 - Voiding and Rescinding Contracts

3.700 Scope of subpart.

(a) This subpart prescribes Governmentwide 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) 41 U.S.C. 2105(c) requires a *Federal agency*, upon receiving information that a contractor or a person has violated 41 U.S.C. 2102, 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 41 U.S.C. 2105(a); 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 41 U.S.C. 2105, 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 therefor, 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 therefor, is not a *claim* within the meaning of 41 U.S.C. chapter 71, Contract Disputes, or part 32. Therefore, the procedures required by the statute 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.