



CONTRACT LAW DIVISION

Office of the Assistant General Counsel for Finance and Litigation

A Lawyer's View of Procurement Integrity Changes

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Lawyer's View - The "New and Improved" Procurement Integrity Provisions

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Among the many changes to emerge from the Clinger-Cohen Act of 1996 (a.k.a. Federal Acquisition Reform Act or the FY1996 Defense Authorization Act) are revisions to the Procurement Integrity Act, 41 U.S.C. §423 (the "Act"). Congress, in its attempt to enact simpler and clearer legislation, has scrapped the old procurement integrity provisions and replaced them with requirements which can generally fit into four separate categories – just as they did before, except that now the titles to the categories are different. Details to follow. The new rules went into effect on January 2, 1997, with the publication in the Federal Register (FAC 90-45) of the final rules implementing the changes and therefore are applicable today.

Before describing the new requirements individually, some important highlights – the certification requirements associated with Procurement Integrity are – gone! No longer does the Contracting Officer have to run around collecting signatures from participants and offerors certifying that they are familiar with the rules, are unaware of violations, will report violations, etc. Gone also are terms such as "*during the conduct of any Federal agency procurement of property or services*" or "*competing contractor*." In its place are terms which hopefully are more easily understood, but potentially much broader – such as "*before the award of a Federal agency procurement contract*" and "*persons*."

Prior provisions of the act were divided into prohibited conduct by competing contractors, prohibited conduct by procurement officials, disclosure to unauthorized persons, and post-employment restrictions. The new provisions have seemingly re-arranged the deck chairs and given us four "new" general categories: prohibition on disclosing procurement information, prohibition on obtaining procurement information, actions required when contacted re: post-Federal employment and post-Federal employment restrictions. This impression of re-arranging deck chairs notwithstanding, there are important and subtle changes of which you should be aware.

(1) Prohibition on Disclosing Procurement Information

New FAR §3.104-4(a) states:

A person described in paragraph (a)(2) of this subsection shall not 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.

Key points to consider: a "*person*" is no longer defined simply as a "*procurement official*." "*Persons*" may include not only present or former Government officials, but any "*person*" who advised or acted on behalf of a Federal agency procurement who by virtue of his or her office or employment has had access to proposal or source selection information. This can therefore include consultants and contractor personnel. Another point: the term, "*before the award*," is not defined. Whereas the old provisions delineated when a procurement began as "*the earliest date upon which an identifiable, specific action is taken for a particular procurement*," due to a lack of definition of "*before award*," the time period can potentially cover a longer period of time. Final key point: "*Federal agency procurement*" is defined as "acquisitions using competitive procedures." This would seemingly exclude sole-source procurements such as 8(a) acquisitions.

(2) Prohibition on obtaining procurement information

New FAR §3.104-4(b) states:

A person shall not, other than as provided by law, knowingly obtain contractor bid or proposal information or source selection information before the award of a Federal procurement contract to which the information relates.

Although seemingly straightforward, this is a change from the old provision in that *soliciting* proprietary or source selection information is no longer prohibited, just *obtaining* the information. Therefore, vendors may presumably ask reasonable questions regarding source selection information and not be in violation of the Act. As noted above in (1), "*person*" is no longer defined as a "*competing contractor*." Thus, the prohibition applies to any vendor or vendor employees whether they plan to compete in a particular procurement or not, a much broader application.

(3) Actions required of agency officials when contacted by offerors regarding non-Federal employment

New FAR §3.104-4(c) provides:

If an agency official who is participating personally and substantially in a Federal agency procurement for a

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contract in excess of the simplified acquisition threshold contacts or is contacted by a person who is a bidder or offeror in that Federal agency procurement regarding possible non-Federal employment for that official, the official shall—

(1) promptly report the contact in writing to the official's supervisor and to the designated agency ethics official (or designee) of the agency in which the official is employed; and

(2)(i) reject the possibility of non-Federal employment; or

(ii) disqualify himself or herself from further personal and substantial participation in that Federal agency procurement until such time as the agency has authorized the official to resume participation in such procurement, in accordance with the requirements of 18 U.S.C. §208 and applicable agency regulations, on the grounds that –

(A) the person is no longer a bidder or offeror in that Federal agency procurement; or

(B) all discussions with the bidder or offeror regarding possible non-Federal employment have terminated without an agreement or arrangement for employment.

Similar to the old FAR §3.104-6, this provision deals with discussions on employment between competing contractors and procurement officials. The difference is that this new provision is specifically directed towards actions required of Government personnel only and the definitions contained within the provision itself have changed. For instance, the term “*agency official*” rather than “*procurement official*” is used. The provision only applies to procurements which are over the simplified acquisition threshold. Finally, “*participating personally and substantially*” has a more detailed definition under the new provisions. A list of activities considered to fall into the “participating personally and substantially” category is at new FAR §3.104-3.

(4) Prohibition on former officials' acceptance of compensation from a contractor.

See new FAR §3.104-4(d) for full text.

Finally, this last provision deals with post-Federal employment restrictions. There is a one year prohibition on accepting compensation (i.e. wages) from a contractor if the official served in the capacity of contracting officer, source selection official, etc. (there is a list) in a procurement in which that contractor was selected for an award of a contract in excess of \$10 million. The interesting part of this section and perhaps more helpful than the old provision which merely prohibited non-Federal employment for a two year period and only if one had “*personally and substantially participated in a procurement*” is that new FAR §3.104-4(d) provides a rather comprehensive list of agency officials who are prohibited from going to work for a contractor if they served in a particular capacity. This list is as follows:

- procuring contracting officer
- source selection official
- member of a source evaluation board
- chief of a cost or technical evaluation team
- program manager
- deputy program manager
- task order manager for task order or delivery orders in excess of \$10,000,000
- one who establishes overhead rates
- one who approves payments in excess of \$10 million
- one who decides to settle a claim in excess of \$10 with that contractor

One specific and perhaps important exception is provided under the new provision. The post-Federal employment prohibition does not apply to a division or affiliate of a contractor which does not produce the same or similar products or services.

Penalties for violation of the Act include civil (up to \$50,000 for individuals and up to \$500,000 for organizations), criminal (up to five years) and administrative sanctions (including, cancellation of procurement, disqualification of offeror).

Finally, under the new Procurement Integrity Act there is a time limit –14 days – in which to bring a protest alleging a violation of any of the above provisions. As the statutory language does not specifically say “GAO protest,” one wonders whether this limitation will apply in the Court of Federal Claims where there is no timeliness rule.

A final note, regardless of all of these changes, procurement personnel are reminded as FAR §3.104-1(b) itself “reminds” us that other traditional ethics and procurement integrity statutes and regulations still exist, i.e. those dealing with bribes, Privacy Act considerations and protection of information.