



# **LEGAL CONSIDERATIONS CONTRACTING WITH NAVFAC PACIFIC FOR U.S. MILITARY CONSTRUCTION PROJECTS IN AUSTRALIA**

**FOR INFORMATIONAL PURPOSES ONLY.**

**DOES NOT CONSTITUTE LEGAL ADVICE – CONSULT YOUR ATTORNEY FOR FURTHER QUESTIONS**

# WELCOME

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# TOPICS



- FAR Provisions and Clauses of Interest
- Two Agreements between the Government of the United States and Australia of Potential Interest/Relevance

# *FAR PROVISIONS*



FEDERAL  
ACQUISITION  
REGULATION

- FAR Part 3, Improper Business Practices
- FAR Part 9, Contractor Qualifications

# *FAR Part 3, Improper Business Practices*

- Subpart 3.1, Safeguards
- Subpart 3.2, Contractor Gratuities to Government Personnel
- Subpart 3.4, Contingent Fees
- Subpart 3.5, Other Improper Business Practices
- Subpart 3.7, Voiding and Rescinding Contracts
- Subpart 3.8, Limitation on Payment of Funds to Influence Federal Transactions
- Subpart 3.9, Whistleblower Protections for Contractor Employees,
- Subpart 3.10, Contractor Code of Business Ethics and

# *FAR 3.101, Standards of Conduct*

- FAR 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.

# *FAR 3.101, Standards of Conduct*



- 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.

# *FAR 3.101, Standards of Conduct*

- 3.101-3, Agency Regulation
  - DoD 5500.07-R (the Joint Ethics Reg.), and DoD Directive 5500.07 prescribe DoD Standards of Conduct
  - JER 3-209, Endorsement; Endorsement of a non-Federal entity, product, service or enterprise maybe neither stated nor implied by DoD or DoD employees
    - A letter of appreciation and/or other form of recommendation will not be provided (quality of work is assessed in CPARs and reward for good work is payment for services).
    - Do not state or imply DoD endorsement of your services or organization on, e.g., a company website.



# *FAR 37.114(c), Contractor Identification*



- Contract personnel are required to identify themselves as such to avoid creating an impression in the minds of members of the public or Congress that they are Government officials; (i.e., distinct badging, identification on email address and when answering phones (as applicable))
- All documents or reports produced by contractors must be suitably marked as contractor products or such that contractor participation is appropriately disclosed.

## *FAR 3.103, Independent Pricing*

- 3.103-1, Solicitation Provision, FAR 52.203-2, Certificate of Independent Price Determination
  - “(a) The offeror certifies that --(1) The prices in this offer have been arrived at independently, without, for the purpose of restricting competition, any consultation, communication, or agreement with any other offeror or competitor relating to --(i) Those prices; (ii) The intention to submit an offer; or (iii) The methods or factors used to calculate the prices offered. (2) The prices in this offer have not been and will not be knowingly disclosed by the offeror, directly or indirectly, to any other offeror or competitor before bid opening (in the case of a sealed bid solicitation) or contract award (in the case of a negotiated solicitation) unless otherwise required by law; and (3) No attempt has been made or will be made by the offeror to induce any other concern to submit or not to submit an offer for the purpose of restricting competition ...”

# *FAR 3.103, Independent Pricing (cont.)*



- 3.103-2(b), Rejection of Suspected Collusive Offers
  - The contracting officer shall reject the offeror's proposal
  - The situation shall be reported to the Attorney General in accordance with 3.303 ("Reports of Suspected Antitrust Violations").

## *FAR 3.104, Procurement Integrity*

- FAR 3.104-2(b)(1), The offer of a bribe or gratuity is prohibited by 18 U.S.C. 201 and 10 U.S.C. 2207.
- FAR 3.104-3(b), Prohibition On Obtaining Procurement Information: 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. (41 U.S.C. 2102)
- Contract Clauses: FAR 52.203-8, Cancellation, Rescission, and Recovery of Funds for Illegal or Improper Activity; FAR 52.203-10, Price Adjustment for Illegal or Improper Activity

## *Subpart 3.2, Gratuities to Gov't Personnel*



- FAR Clause 52.203-3, Gratuities
- The right of the Contractor to proceed may be terminated if the Contractor, its agent, or another representative --(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.
- If this contract is terminated, the Government is entitled -- (1) To pursue the same remedies as in a breach of the contract; and (2) In addition to any other damages provided by law, to exemplary damages of not less than 3 nor more than 10 times the cost incurred by the Contractor in giving gratuities to the person concerned.

## *Subpart 3.3, Antitrust Violations*

- 3.301, General
  - 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.
- 3.303, Reporting of Suspected Antitrust Violations
  - Agencies are required by 41 U.S.C. 3707 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.

## *Subpart 3.4, Contingent Fees*

- “Contingent fee” is any commission, percentage, brokerage, or other fee that is contingent upon the success that a person or concern has in securing a Government contract.
- Contract Clause: FAR 52.203-5 (required by 10 U.S.C. 2306(b) and 41 U.S.C. 3901) : The Contractor warrants that no person or agency has been employed or retained to solicit or obtain this contract upon an agreement or understanding for a contingent fee. 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.

# *Subpart 3.5, Other Improper Practices*



- 3.501, Buying-In
  - “Buy-In” 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.
  - The contracting officer will 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.



## *Subpart 3.5, Other Improper Practices*

- 3.502, Subcontractor Kickbacks
  - “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.
  - Anti-Kickback Act of 1986 (41 U.S.C. chapter 87), 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.

## *Subpart 3.5, Other Improper Practices*

- 3.502, Subcontractor Kickbacks (cont.)
  - Anti-Kickback Act of 1986 , Criminal, civil and contractual penalties imposed for violations
  - Contract Clause: 52.203-7, Anti-Kickback Procedures
- 3.503, Unreasonable Restrictions on Subcontractor Sales
  - 10 U.S.C. 2402 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.
  - Contract Clause: FAR 52.203-6, Restrictions on Subcontractor Sales to the Government

## *Subpart 3.7, Voiding & Rescinding*

- 3.7, The Contracting Officer has the 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) 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. (Section 1(e) of Public Law 87-849, 18 U.S.C. 218)

## *Subpart 3.8, Payment to Influence*

- 3.8, Limitations on the Payment of Funds to Influence Federal Transactions
  - 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. Civil penalties for violations
  - Contract Clauses
    - 52.203-11, Certification and Disclosure Regarding Payments to Influence Certain Federal Transactions
    - 52.203-12, Limitation on Payments to Influence Certain Federal Transactions

## *Subpart 3.9, Whistleblower Protection*



- 3.9, Limitations on the Payment of Funds to Influence Federal Transactions,
  - Government contractors shall not discharge, demote or otherwise discriminate against an employee as 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).
  - Contract Clause: 52.203-15

## *Subpart 3.10, Contractor Code of Ethics*

- 3.10, Contractor Code of Business Ethics and Conduct
  - 52.203-13, Contractor Code of Business Ethics and Conduct
  - 52.203-14, Display of Hotline Posters
  - 52.212-4(i)(5), 52.232-25(d), 52.232-26(c), and 52.232-27(l) (payment clauses) require that, if the contractor becomes aware that the Government has overpaid on a contract financing or invoice payment, the contractor shall remit the overpayment amount to the Government. A contractor may be suspended and/or debarred for knowing failure by a principal to timely disclose credible evidence of a significant overpayment, other than overpayments resulting from contract financing payments.

## *FAR Subpart 9.5, "OCI"*

- General Description of Different Types of Organizational Conflicts of Interest (OCIs)
  - Biased ground rules: the contractor set the “ground rules” for the procurement (e.g., writing the statement of work, specifications, etc.), and put itself in the position to be able to skew the competition in favor of the contractor.
  - Impaired objectivity: the contractor’s work under one contract will put the contractor in the position of evaluating itself or a competitor under another contract, calling into question the contractor’s ability to render impartial advice.
  - Unequal access to information: the contractor has access to nonpublic information as part of its performance of a contract, which may provide the contractor (or an affiliate) with an unfair competitive advantage in the current procurement .

## *FAR Subpart 9.5, "OCI"*

- If a potential OCI is identified, it must be evaluated and adequately resolved before the Offeror is eligible for award
- The potential OCI may be resolved if actions can be taken to avoid, neutralize or mitigate the OCI before contract award.
- Before determining to withhold award based on an OCI, the Offeror will be notified and given a reasonable opportunity to respond. At this point, the Offeror usually proposes a "Mitigation Plan" to resolve the OCI.



## *FAR Subpart 9.5, "OCI" (cont.)*

- **NFAS 5252.209-9300, ORGANIZATIONAL CONFLICTS OF INTEREST (JUN 1994)**
- The restrictions described herein shall apply to the Contractor and its affiliates, consultants and subcontracts under this contract. If the Contractor under this contract prepares or assists in preparing a statement of work, specifications and plans, the Contractor and its affiliates shall be ineligible to bid or participate, in any capacity, in any contractual effort which is based on such statement of work or specifications and plans as a prime contractor, subcontractor, consultant or in any similar capacity. The Contractor shall not incorporate its products or services in such statement of work or specification unless so directed in writing by the Contracting Officer, in which case the restriction shall not apply. This contract shall include this clause in its subcontractor's or consultants' agreements concerning the performance of this contract.

# INTERNATIONAL AGREEMENTS



- Two Agreements between the Government of the United States and Australia of Potential Interest/Relevance
  - *Agreement Concerning the Status of United States Forces in Australia*, May 9, 1963, Australian Treaty Series 1963 No 10
  - *The Force Posture Agreement Between the Government of the United States of America and the Government of Australia*, August 12, 2014

THANK YOU