

## BACKGROUND PAPER

### The Procurement Integrity Act

The Procurement Integrity Act as codified at 41 U.S.C. § 423 prohibits disclosing or obtaining procurement-sensitive information, to include contractor bid or proposal information and source selection information. It also prohibits employment discussions or relationships with certain current and former government officials and it sets out specific actions required of procurement officials when contacted by offerors regarding non-Federal employment. These statutory prohibitions are incorporated in the Federal Acquisition Regulation (FAR).

### Fundamental Prohibitions and Requirements

There are three fundamental prohibitions in the Act, and one set of statutory actions that are required of procurement officers when they are contacted by offerors regarding non-Federal employment. These four main legal provisions, and the applicable implementing FAR provisions, are:

1. Prohibition on disclosing procurement information. 41 U.S.C. § 423(a); FAR 3.104-3(a). A person must not, other than as provided by law, disclose contractor bid or proposal information or source selection information before the award of a federal agency procurement contract to which the information relates. As set out in 41 U.S.C. § 423(a)(2), this prohibition applies to any present or former U.S. government officials, or persons who act or have acted for, or on behalf of, or who advise or have advised the U.S. with regard to a federal agency procurement; and who by virtue of their office, employment or relationship have or have had access to contractor bid or proposed information or source selection information.

2. Prohibition on obtaining procurement information. 41 U.S.C. § 423(b); FAR 3.104-3(b). A person shall not, other than as provided for in 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. This prohibition applies to any person. The FAR provision limits this to award of competitive Federal agency procurement contracts.

3. Prohibition on former official's acceptance of compensation from a contractor. 41 U.S.C. § 423(d); FAR 3.103-3(d). A former Federal agency official may not accept compensation from a contractor as an employee, officer, director, or consultant within a period of one year after the official has either (a) served in one of a number of source-selection, contracting, or program management positions involving the contractor, or (b) has made anyone of several procurement related decisions set out in the statute, which decision has resulted in a contract award or payment of money to that contractor.

4. Actions required of procurement officers when contacted by offerors regarding non-Federal employment. 41 U.S.C. § 423(c)(1); FAR 3.104-3(c). If an agency official, who has participated personally and substantially in a federal agency procurement for a contract in excess of the simplified acquisition threshold, contacts or is contacted by a person who is an offeror in that procurement regarding non-federal employment, then the agency official must (a) promptly report the contact in writing to the official's supervisor and to the agency ethics official; and

(b) either reject the possibility of that employment or disqualify him/herself from further personal and substantial participation in that federal agency procurement.

### **Definitions**

As set out in FAR 2.101, the term "source selection information" includes all of the following, if the information has not been previously made available to the public or disclosed publicly:

- Bid prices submitted in response to an agency invitation for bids, or lists of those bid prices, before bid opening;
- Proposed costs or prices submitted in response to an agency solicitation, or lists of those proposed costs or prices;
- Source selection plans;
- Technical evaluation plans;
- Technical evaluation of proposals;
- Cost or price evaluations of proposals;
- Competitive range determinations identifying proposals with a reasonable chance of being selected; Rankings of bids, proposals or competitors;
- Reports and evaluations of source selection panels, boards, or advisory councils;
- Other information marked as "Source Selection Information" - See FAR 2.101 and FAR 2.104.

As set out in FAR 3.104-1, the term "contractor bid or proposal information" includes all of the following, if it was submitted to the agency as part of, or in connection with, a bid or proposal, and if the information has not been previously made available to the public or disclosed publicly:

- Cost or pricing data;
- Indirect costs and direct labor rates;
- Proprietary information about manufacturing processes, operations or techniques marked by the contractor in accordance with law or regulation;
- Information marked by the contractor as "contractor bid or proposal information" in accordance with law or regulation
- Information marked in accordance with FAR 52.215-1 (e), which applies to submittal of non-public data in connection with a proposal.

### **Civil and Criminal Penalties and Other Actions**

The Procurement Integrity Act sets out a number of contractual, administrative, civil and criminal penalties. These may be imposed on individuals and contractors who violate the Act.

1. Contractual actions before contract award. The government may: (a) cancel the procurement; (b) disqualify the affected offeror; or (c) take any other appropriate actions that are in the interests of the government. FAR 3.104-7(d) (1)

2. Contractual actions after contract award. The government may: (a) effect appropriate contractual remedies, including profit recapture or forfeiture; (b) void or rescind the contract; or

(c) take any other appropriate actions that are in the interests of the government. FAR 3.104-7(d)(2)

3. Administrative Actions. Violations of the Act, among other things, may result in suspension and/or debarment of an individual, the business unit or the company. 41 U.S.C. § 423(e)(3).

4. Civil Penalties. Any individual who engages in conduct prohibited by the Act is subject to a civil penalty of not more than \$50,000.00 for each violation plus twice the amount of compensation which the individual received or offered for the prohibited conduct. An organization that engages in prohibited conduct is subject to a civil penalty of not more than \$500,000.00 for each violation plus twice the amount of the compensation which the organization received or offered for the prohibited conduct. 41 U.S.C. § 423(e)(2).

5. Criminal Penalties. Criminal penalties include fines and up to five (5) years in prison for exchanging information for anything of value or for obtaining or giving anyone a competitive advantage in the award of a federal agency procurement contract. 41 U.S.C. § 423(e)(1).

### Summary

The penalties are severe for both individuals and contractors. Individuals and contractors who are involved in Government contracting must be acutely aware of the Procurement Integrity Act and its prohibitions and requirements.