

Federal Property Management Regulations

§ 101-45.313-4

§ 101-45.313-3 Representation and covenant.

(a) *Representation.* Except as provided in § 101-45.313-7, each selling agency shall inquire of and secure a written representation from prospective purchasers as to whether they have employed or retained any company or person (other than a full-time employee working solely for the prospective purchaser) to solicit or secure the contract, and shall secure a written agreement to furnish information relating thereto as required by the sales contracting officer. The form of such representation shall be that contained in Standard Form 114, Sale of Government Property—Bid and Award (illustrated in § 101-45.4901-114).

(b) *Covenant.* Selling agencies shall include in every negotiated or advertised contract for the sale of Government-owned personal property the "covenant against contingent fees" as contained in the Standard Form 114C, General Sale Terms and Conditions (illustrated in § 101-45.4901-114C).

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§ 101-45.313-4 General principles and standards applicable to the covenant.

(a) *Use of principles and standards.* The principles and standards set forth in this § 101-45.313-4 are intended to be used as a guide in the negotiation, awarding, administration, or enforcement of Government contracts.

(b) *Contingent character of the fee.* Any fee whether called commission, percentage, brokerage, or contingent fee, or otherwise denominated, is within the purview of the covenant if, in fact, any portion thereof is dependent upon success in obtaining or securing the Government contract or contracts involved. The fact, however, that a fee of a contingent nature is involved does not preclude a relationship which qualifies under the exceptions to the prohibition of the covenant.

(c) *Exceptions to the prohibition.* There are excepted from the prohibition of the covenant "bona fide employees" and "bona fide established commercial or selling agencies maintained by the contractor for the purpose of securing business."

(d) *Bona fide employee.* (1) The term *bona fide employee*, for the purpose of the exception to the prohibition of the covenant, means an individual (including a corporate officer) employed by a concern in good faith to devote his full time to such concern and no other concern and over whom the concern has the right to exercise supervision and control as to time, place, and manner of performance of work.

NOTE: It is recognized that a concern, especially a small business concern, may employ an individual who represents other concerns. The factors set forth in § 101-45.313-4(e)(2), except (iv), shall be applied to determine whether such an individual comes within the exception to the prohibition of the covenant.

(2) The hiring must contemplate some continuity and it may not be related only to the obtaining of one or more specific Government contracts.

(3) An employee is not "bona fide" who seeks to obtain any Government contract or contracts for his employer through the use of improper influence or who holds himself out as being able to obtain any Government contract or contracts through improper influence.

(4) A person may be a bona fide employee whether his compensation is on a fixed salary basis, or when customary in the trade, on a percentage, commission, or other contingent basis or a combination of the foregoing.

(e) *Bona fide established commercial or selling agency maintained by the contractor for the purpose of securing business.* (1) An agency or agent is not "bona fide" which seeks to obtain any Government contract or contracts for its principals through the use of improper influence or which holds itself out as being able to obtain any Government contract or contracts through improper influence.

(2) In determining whether an agency is a "bona fide established commercial or selling agency maintained by the contractor for the purpose of securing business," the factors set forth below shall be considered. They are necessarily incapable of exact measurement or precise definition and it is neither possible nor desirable to prescribe the relative weight to be given any single factor as against any other factor or as against all other factors. The conclusions to be reached in a given case will necessarily depend upon a careful

evaluation of the agreement and other attendant facts and circumstances.

(i) The fees charged should not be inequitable and exorbitant in relation to the services actually rendered. That is, the compensation should be commensurate with the nature and extent of the services and should not be excessive as compared with the fees customarily allowed in the trade concerned for similar services related to commercial (non-Government) business. In evaluating reasonableness of the fee, there should be considered services of the agent other than actual solicitation, as for example, technical, consultant, or managerial services, and assistance in the procurement of essential personnel, facilities, equipment, materials, or subcontractors for performance of the contract.

(ii) The selling agency should have adequate knowledge of the products and the business of the concern represented, as well as other qualifications necessary to sell the products or services on their merits.

(iii) There should ordinarily be a continuity of relationship between the contractor and the agency. The fact that the agency has represented the contractor over a considerable period of time is a factor for favorable consideration. It is not intended, however, to disqualify newly established contractor-agency relationships where a continuing relationship is contemplated by the parties.

(iv) It should appear that the agency is an established concern. The agency may be either one which has been in business for a considerable period of time or a new agency which is a presently going concern and which is likely to continue in business as a commercial or selling agency in the future. The business of the agency should be conducted in the agency name and characterized by the customary indicia of the conduct of a regular business.

(v) The fact that a selling agency confines its selling activities to the field of Government contracts does not, in and of itself, disqualify it under the covenant. The fact, however, that the selling agency is employed to secure business generally, that is, to represent the concern in connection with sales to the Government, as well as regular

commercial sales to non-Government activities, is a factor entitled to favorable consideration in evaluating the case as one coming within the authorized exception. Arrangements confined, however, to obtaining Government contracts, particularly those involving a selling agency organized immediately prior to or during periods of expanded procurement resulting from conditions of national emergency, must be closely scrutinized.

(f) *Fees for "information."* Contingent fees paid for "information" leading to obtaining a Government contract or contracts are included in the prohibition and, accordingly, are in breach of the covenant unless the agent qualified under the exception as a bona fide employee or a bona fide established commercial or selling agency maintained by the contractor for the purpose of securing business.

§ 101-45.313-5 Standard Form 119, Contractor's Statement of Contingent or Other Fees.

Pursuant to the Act and in furtherance of the purpose and objectives stated in sections 1 and 3 thereof, Standard Form 119, shall be used in accordance with the provisions of this § 101-45.313.

§ 101-45.313-6 Use of Standard Form 119, Contractor's Statement of Contingent or Other Fees.

(a) *Required use.* Except as provided in § 101-45.313-7, Standard Form 119 shall be used, without deviation, whenever either part of the inquiry provided for in § 101-45.313-3(a) with respect to contingent fees is answered in the affirmative. The form shall be used also, without deviation, in any other case where an agency desires to obtain such information. When, after use of the form, further information is required, it may be obtained in any appropriate manner. Submission of the form shall be required, normally, only of successful bidders and contractors.

(b) *Statement in lieu of form.* Any bidder who has previously furnished a Standard Form 119 to the office issuing the invitation or negotiating the contract may be permitted to accompany his bid with, or submit in connection with the proposed contract, a signed