3.104–2 Applicability.

(a) The restrictions at 3.104–4 (a) and (b) apply beginning January 1, 1997, to the conduct of every Federal agency procurement using competitive procedures for the acquisition of supplies or services from non-Federal sources using appropriated funds.

(b) The requirements of 3.104–4(c) apply beginning January 1, 1997, in connection with every Federal agency procurement using competitive procedures, for a contract expected to exceed the simplified acquisition threshold. Such requirements do not apply after the contract has been awarded or the procurement has been canceled.

(c) The post-employment restrictions at 3.104–4(d) apply to any former official of a Federal agency, for services provided or decisions made on or after January 1, 1997.

(d) Former officials of a Federal agency whose employment by a Federal agency ended before January 1, 1997, are subject to the restrictions imposed by 41 U.S.C. 423 as it existed before Public Law 104–106. Solely for the purpose of continuing those restrictions on those officials to the extent they were imposed prior to January 1, 1997, the provisions of 41 U.S.C. 423 as it existed before Public Law 104–106 apply through December 31, 1998.

[62 FR 227, Jan. 2, 1997]

3.104–3 Definitions.

As used in this section—

Agency ethics official means the designated agency ethics official described in 5 CFR 2638.201 and any other designated person, including—

(1) Deputy ethics officials described in 5 CFR 2638.204, to whom authority under 3.104–7 has been delegated by the designated agency ethics official; and

(2) Alternate designated agency ethics officials described in 5 CFR 2638.202(b).

Compensation means wages, salaries, honoraria, commissions, professional fees, and any other form of compensation, provided directly or indirectly for services rendered. Compensation is indirectly provided if it is paid to an entity other than the individual, specifically in exchange for services provided by the individual.

Contract, for purposes of the post-employment restrictions at 3.104–4(d), includes both competitively awarded and non-competitively awarded contracts.

Contractor bid or proposal information means any of the following information submitted to a Federal agency as part of or in connection with a bid or proposal to enter into a Federal agency procurement contract, if that information has not been previously made available to the public or disclosed publicly:

(1) Cost or pricing data (as defined by 10 U.S.C. 2306a(h) with respect to procurements subject to that section, and section 304A(h) of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 254b(h)), with respect to procurements subject to that section).

(2) Indirect costs and direct labor rates.

(3) Proprietary information about manufacturing processes, operations, or techniques marked by the contractor in accordance with applicable law or regulation.

(4) Information marked by the contractor as ''contractor bid or proposal information'' in accordance with applicable law or regulation.

(5) Information marked in accordance with 52.215–1(e).

Decision to award a subcontract or modification of subcontract means a decision to designate award to a particular source.

Federal agency has the meaning provided such term in section 3 of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 472).

Federal agency procurement means the acquisition (by using competitive procedures and awarding a contract) of goods or services (including construction) from non-Federal sources by a Federal agency using appropriated funds. For broad agency announcements and small business innovative research programs, each proposal received by an agency shall constitute a separate procurement for purposes of the Act.

In excess of $10,000,000 means—

(1) The value, or estimated value, at the time of award, of the contract, including all options;

(2) The total estimated value at the time of award of all orders under an indefinite-delivery, indefinite-quantity, or requirements contract;

(3) Any multiple award schedule contract unless the contracting officer documents a lower estimate;

(4) The value of a delivery order, task order, or an order under a Basic Ordering Agreement;

(5) The amount paid or to be paid in settlement of a claim; or

(6) The estimated monetary value of negotiated overhead or other rates when applied to the Government portion of the applicable allocation base.

Official means:

(1) An officer, as defined in 5 U.S.C. 2104.

(2) An employee, as defined in 5 U.S.C. 2105.

(3) A member of the uniformed services, as defined in 5 U.S.C. 2101(3).

(4) A special Government employee, as defined in 18 U.S.C. 202.

Participating personally and substantially in a Federal agency procurement is defined as follows:

(1) *Participating personally and substantially in a Federal agency procurement* means active and significant involvement of the individual in any of the following activities directly related to that procurement:

(i) Drafting, reviewing, or approving the specification or statement of work for the procurement.

(ii) Preparing or developing the solicitation.

(iii) Evaluating bids or proposals, or selecting a source.

(iv) Negotiating price or terms and conditions of the contract.

(v) Reviewing and approving the award of the contract.

(2) *Participating ''personally''* means participating directly, and includes the direct and active supervision of a subordinate's participation in the matter.

(3) *Participating ''substantially''* means that the employee's involvement is of significance to the matter. Substantial participation requires more than official responsibility, knowledge, perfunctory involvement, or involvement on an administrative or peripheral issue. Participation may be substantial even though it is not determinative of the outcome of a particular matter. A finding of substantiality should be based not only on the effort devoted to a matter, but on the importance of the effort. While a series of peripheral involvements may be insubstantial, the single act of approving or participating in a critical step may be substantial. However, the review of procurement documents solely to determine compliance with regulatory, administrative, or budgetary procedures, does not constitute substantial participation in a procurement.

(4) Generally, an individual will not be considered to have participated personally and substantially in a procurement solely by participating in the following activities:

(i) Agency level boards, panels, or other advisory committees that review program milestones or evaluate and make recommendations regarding alternative technologies or approaches for satisfying broad agency level missions or objectives;

(ii) The performance of general, technical, engineering, or scientific effort having broad application not directly associated with a particular procurement, notwithstanding that such general, technical, engineering, or scientific effort subsequently may be incorporated into a particular procurement;

(iii) Clerical functions supporting the conduct of a particular procurement; and

(iv) For procurements to be conducted under the procedures of OMB Circular A–76, participation in management studies, preparation of in-house cost estimates, preparation of ''most efficient organization'' analyses, and furnishing of data or technical support to be used by others in the development of performance standards, statements of work, or specifications.

Source selection evaluation board means any board, team, council, or other group that evaluates bids or proposals.

Source selection information means any of the following information which is prepared for use by a Federal agency for the purpose of evaluating a bid or proposal to enter into a Federal agency procurement contract, if that information has not been previously made

available to the public or disclosed publicly:

(1) Bid prices submitted in response to a Federal agency invitation for bids, or lists of those bid prices before bid opening.

(2) Proposed costs or prices submitted in response to a Federal agency solicitation, or lists of those proposed costs or prices.

(3) Source selection plans.

(4) Technical evaluation plans.

(5) Technical evaluations of proposals.

(6) Cost or price evaluations of proposals.

(7) Competitive range determinations that identify proposals that have a reasonable chance of being selected for award of a contract.

(8) Rankings of bids, proposals, or competitors.

(9) Reports and evaluations of source selection panels, boards, or advisory councils.

(10) Other information marked as ''SOURCE SELECTION INFORMATION—SEE FAR 3.104'' based on a case-by-case determination by the head of the agency or designee, or the contracting officer, that its disclosure would jeopardize the integrity or successful completion of the Federal agency procurement to which the information relates.

[62 FR 227, Jan. 2, 1997; 62 FR 10709, Mar. 10, 1997, as amended at 62 FR 51270, Sept. 30, 1997]

3.104–4 Statutory and related prohibitions, restrictions, and requirements.

(a) *Prohibition on disclosing procurement information* (*subsection 27*(*a*) *of the Act*). (1) A person described in paragraph (a)(2) of this subsection shall not, other than as provided by law, 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. (See 3.104–5(a).)

(2) Paragraph (a)(1) of this subsection applies to any person who—

(i) Is a present or former official of the United States, or a person who is acting or has acted for or on behalf of, or who is advising or has advised the United States with respect to, a Federal agency procurement; and

(ii) By virtue of that office, employment, or relationship, has or had access to contractor bid or proposal information or source selection information.

(b) *Prohibition on obtaining procurement information* (*subsection 27*(*b*) *of the Act*). 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 agency procurement contract to which the information relates.

(c) *Actions required of agency officials when contacted by offerors regarding non-Federal employment* (*subsection 27*(*c of the Act*). If an agency official who is participating 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 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 (see 3.104–6) 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.

(d) *Prohibition on former official's acceptance of compensation from a contractor* (*subsection 27*(*d*) *of the Act*).

(1) A former official of a Federal agency may not accept compensation