

NIH POLICY MANUAL

6003-2/26003-2 - LIMITATION ON THE PAYMENT OF FUNDS TO INFLUENCE FEDERAL TRANSACTIONS

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1. **Explanation of Material Transmitted:** This chapter contains guidance on implementation of the limitation on use of appropriated funds to influence certain Federal contracting and financial transactions, commonly known as the Byrd Anti-Lobbying Provision. It prohibits Federal contractors and subcontractors from using appropriated funds to influence or attempt to influence Congress or a Federal Agency in connection with the award of a contract, grant, loan or cooperative agreement. In addition, it requires disclosure of such activities undertaken with nonappropriated funds, for contracts in excess of \$100,000.

1. **Filing Instructions:**

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A. Purpose:

This chapter provides guidance regarding Section 319 of the Department of the Interior and Related Agencies Appropriations Act (Public Law 101-121), which added a new Section 1352 to Title 31, United States Code, entitled "Limitation on Use of Appropriated Funds to Influence Certain Federal Contracting and Financial

Transactions." Implementing policies and procedures can be found at Federal Acquisition Regulation Subpart 3.8.

B. Background:

On October 23, 1989, the President signed into law the Department of the Interior and Related Agencies Appropriations Act for Fiscal Year 1990. Section 319 of the Act amends Title 31, U.S.C., by adding a new Section 1352, entitled "Limitation on Use of Appropriated Funds to Influence Certain Federal Contracting and Financial Transactions," commonly referred to as the Byrd Anti-Lobbying Amendment. Among other things, Section 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 the awarding of a Federal contract, grant, loan, or cooperative agreement or the modification of a Federal contract, grant, loan, or cooperative agreement. The Act requires certification that no appropriated funds have been used for these purposes and disclosure of such activities undertaken with nonappropriated funds for contracts over \$100,000. The statutory effective date of the guidance for Section 319 of the Public Law was December 23, 1989.

The Federal Acquisition Circular (FAC) 84-55 implemented the law in the Federal Acquisition Regulation (FAR), and added a Provision, 52.203-11, Certification and Disclosure Regarding Payments to Influence Certain Federal Transactions, and a Clause, 52.203-12, Limitations on Payments to Influence Certain Federal Transactions.

Provision 52.203-11 is to be included in all solicitations for non-commercial items expected to exceed \$100,000. Clause 52.203-12 is to be included in solicitations and contracts for non-commercial items that are expected to exceed \$100,000. Disclosures under this section are to be submitted using OMB Standard Form LLL, Disclosure of Lobbying Activities.

The requirements applicable to commercial item acquisitions can be found at Clause 52.212-3, Offeror Representations and Certifications - Commercial Items, which contains the certification required by the Act, and Clause 52.212-4, Contract Terms and Conditions - Commercial Items, which contains the requirement that contractors comply with 31 U.S.C. as it relates to the use of appropriated funds. This includes the requirement for submission of Disclosure Forms in accordance with the conditions stated in FAR Subpart 3.803 except that 31 U.S.C. 1352 is not applicable at any tier to subcontracts for the acquisition of commercial items or commercial components at any tier (see FAR Subsection 12.504(a)(5)).

On March 23, 1990, and June 12, 1990, the OMB issued clarifications to the lobbying restrictions. The Civilian Agency Acquisition Council (CAAC) provided guidance on April 4, 1990, (CAAC Letter 90-04) and again on June 22, 1990, (CAAC Letter 90-05).

This chapter presents a summary of this guidance and additional instructions from HHS.

C. Policy:

1. The DHHS granted a class deviation to FAR Provision 52.203-11, Certification and Disclosure Regarding Certain Federal Transactions. Rather than applying to all Federal transactions, the DHHS certification and disclosure statement applies only to the instant contract action for which it is being obtained. This deviation is shown at Appendix 1 and is to be used instead of the FAR Provision at 52.203-11.

2. Bids, offers and awards submitted or made on or after December 23, 1989, and that exceed \$100,000 are required to contain certifications, and if applicable, disclosures. Awards made before December 23, 1989, but modified, extended, or renewed after that date do not need certifications or disclosure statements, unless they are modified beyond the scope of the award and result in exceeding the \$100,000 threshold. Note that for JOFOCs where no additional funds are required, even where additional effort is approved, the certification and disclosure requirements do not apply. The requirements of the law also do not apply to contract modifications, which involve incremental funding actions, exercise of options, or cost overruns. Finally, the HHS has advised that for indefinite delivery contracts, in particular requirements contracts where the estimated dollar amount of orders to be placed thereunder is not anticipated to exceed \$100,000, the requirements of the law would not apply, regardless of the actual dollar amount finally ordered.

3. Certain activities are permitted at any time when they are not related to a specific solicitation for any covered Federal action. If they are not considered to be "influencing" with regard to a particular contract, they are, therefore, exempt from the Act and do not need to be disclosed. Examples of such activities include (a) discussions with an agency regarding the qualities and characteristics (including individual demonstrations) of a person's products or services, conditions or terms of sales, and service capabilities, and (b) technical discussions and other activities regarding the application or adaptation of a person's products or services for an agency's use.

4. The prohibition on use of appropriated funds does not apply to professional or technical services rendered directly in the preparation, submission, or negotiation of any bid, proposal, or application for a covered Federal action or for meeting requirements imposed by or pursuant to law as a condition for receiving that Federal action. "Professional and technical services" are limited to advice and analysis directly applying to any professional or technical discipline. Examples of professional and technical services can be found at FAR 3.802(c)(2)(ii).

D. References:

1. Public Law 101-121, Section 1352, Title 31, United States Code
1. FAR Subpart 3.8, Limitation on the Payment of Funds to Influence Federal Transactions
1. FAR Subpart 12.3, Solicitation Provisions and Contract Clauses for the Acquisition of Commercial Items

1. FAR Subpart 12.5, Applicability of Certain Laws to the Acquisition of Commercial Items

E. Procedures:

1. New Awards

a. All new awards for non-commercial items over \$100,000 shall contain the DHHS approved deviation of FAR Provision 52.203-11, as shown in [Appendix 1](#), and FAR Clause 52.203-12. FAR Provision 52.203-11 shown in Appendix 1 is included in the Representations and Certifications for Negotiated contracts and Sealed Bidding. FAR 52.203-12 is included in the General Clause Listings.

b. All new awards for commercial items over \$100,000 shall contain a certification regarding payments to influence Federal transactions, which is included in Clause 52.212-3, Offeror Representations and Certifications - Commercial Items, and a statement of agreement to comply with the limitations on the use of appropriated funds to influence certain Federal transactions, which is included in Clause 52.212-4, Contract Terms and Conditions - Commercial Items.

2. Modifications to Existing Contracts

If new work requiring a JOFOC is added to an existing contract and it increases the contract amount by \$100,000 or more, the certification at FAR 52.203-11, as shown in Appendix 1, and the Disclosure Form, OMB Standard Form LLL, if applicable, must be obtained from the contractor. FAR Clause 52.203-12, if not already in the contract, must be included in the resultant modification.

3. Subcontracts Exceeding \$100,000

For non-commercial acquisitions, the contractor shall require the submission of a certification, and if applicable, a Disclosure Form from any person that requests or receives any subcontract exceeding \$100,000. Subcontractor Disclosure Forms shall be forwarded from tier-to-tier until received by the prime contractor who shall forward them to the contracting officer.

There is no requirement for subcontractor certification or disclosure under contracts for commercial items.

Appendix 1:

FAR PROVISION 52.203-11 AS APPROVED FOR DEVIATION

52.203-11 Certification and Disclosure Regarding Payments to Influence Certain Federal Transactions (JANUARY 1990) (DEVIATION)

(a) The definitions and prohibitions contained in the Clause at FAR 52.203-12, Limitation on Payments to Influence Certain Federal Transactions, included in this solicitation, are hereby incorporated by reference in paragraph (b) of this certification.

(b) The offeror, by signing its offer, hereby certifies to the best of his or her knowledge and belief as of December 23, 1989, that:

(1) No Federal appropriated funds have been paid or will be paid to 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 on his or her behalf in connection with the awarding of a contract resulting from this solicitation.

(2) If any funds other than Federal appropriated funds (including profit or fee received under a covered Federal transaction) have been paid, or will be paid, to 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 on his or her behalf in connection with this solicitation, the offeror shall complete and submit, with its offer, OMB Standard Form LLL, Disclosure of Lobbying Activities, to the contracting officer; and

(3) He or she will include the language of this certification in all subcontract awards at any tier and require that all recipients of subcontract awards in excess of \$100,000 shall certify and disclose accordingly.

(c) Submission of this certification and disclosure is a prerequisite for making or entering into this contract imposed by Section 1352, Title 31, United States Code. Any person who makes an expenditure prohibited under this provision or who fails to file or amend the disclosure form to be filed or amended by this provision, shall be subject to a civil penalty of not less than \$10,000, and not more than \$100,000, for each such failure.

(End of Provision)

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