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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 3, 4, and 52

[FAR Case 2015-012; Docket No. 2015-0012; Sequence No. 1]

RIN 9000-AN04

**Federal Acquisition Regulation: Contractor Employee
Internal Confidentiality Agreements**

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule.

SUMMARY: DoD, GSA, and NASA are proposing to amend the Federal Acquisition Regulation (FAR) to implement a section of the Consolidated and Further Continuing Appropriations Act, 2015, that prohibits the use of funds, appropriated or otherwise made available, for a contract with an entity that requires employees or subcontractors to sign an internal confidentiality agreement that restricts such employees or subcontractors from lawfully reporting waste, fraud, or abuse to a designated Government representative authorized to receive such information.

DATES: Interested parties should submit written comments to the Regulatory Secretariat at one of the addresses shown

below on or before **[Insert date 60 days after date of publication in the FEDERAL REGISTER]** to be considered in the formation of the final rule.

ADDRESSES: Submit comments in response to FAR Case 2015-012 by any of the following methods:

- Regulations.gov: <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by searching for "FAR Case 2015-012". Select the link "Comment Now" that corresponds with FAR Case 2015-012. Follow the instructions provided on the screen. Please include your name, company name (if any), and "FAR Case 2015-012" on your attached document(s).
- Mail: General Services Administration, Regulatory Secretariat (MVCB), ATTN: Ms. Flowers, 1800 F Street NW., 2nd Floor, Washington, DC 20405-0001.

Instructions: Please submit comments only and cite "FAR Case 2015-012" in all correspondence related to this case. All comments received will be posted without change to <http://www.regulations.gov>, including any personal and/or business confidential information provided. To confirm receipt of your comment(s), please check www.regulations.gov, approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

FOR FURTHER INFORMATION CONTACT: Ms. Cecelia L. Davis, Procurement Analyst, at 202-219-0202 for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at 202-501-4755. Please cite FAR Case 2015-012.

SUPPLEMENTARY INFORMATION:

I. Background: This proposed rule revises the FAR to implement section 743 of Division E, Title VII, of the Consolidated and Further Continuing Appropriations Act, 2015 (Pub. L. 113-235) and successor provisions in subsequent appropriations acts (and as extended in continuing resolutions). Section 743 prohibits the use of funds appropriated or otherwise made available by Division E or any other Act for a contract, grant, or cooperative agreement with an entity that requires employees or subcontractors of such entity seeking to report waste, fraud, or abuse to sign internal confidentiality agreements or statements prohibiting or otherwise restricting such employees or subcontractors from lawfully reporting such waste, fraud, or abuse to a designated investigative or law enforcement representative of a Federal department or agency authorized to receive such information.

II. Discussion and Analysis

A. FAR changes. This proposed rule implements section 743 by adding a new FAR section 3.909, Prohibition on contracting with entities that require certain internal confidentiality agreements. The proposed rule is written to also cover future successor provisions in subsequent appropriations acts and perpetuation of the requirement through continuing resolutions. This allows more seamless implementation. If at any point an appropriations act does not include a similar prohibition, the FAR will be modified accordingly.

The proposed rule requires that each offeror, in order to be eligible for award, represent, by submission of its offer, that it does not require employees or subcontractors to sign or comply with such internal confidentiality agreements. The representation is in a new provision at FAR section 52.203-XX, Prohibition on Contracting with Entities that Require Certain Internal Confidentiality Agreements—Representation, which must be included in all solicitations, except solicitations for personal services contracts with an individual, using funds subject to the prohibition, except that this requirement is implemented for commercial item solicitations by the part 12 provision at FAR section 52.212-3, paragraph (q). Contracting officers shall not insert this provision in solicitations

for personal services contracts with an individual if the services are to be performed entirely by the individual, rather than by an employee of the contractor or a subcontractor.

The new FAR clause 52.203-YY, Prohibition on Contracting with Entities that Require Certain Internal Confidentiality Agreements, notifies the contractor of the prohibition on use of funds for the contract, if the contractor is in noncompliance with the requirements of the clause. The clause also requires that contractors notify employees that any such agreements in pre-existing confidentiality agreements are no longer in effect. This notice could be accomplished through normal business communication channels, such as email. This clause must be included in all solicitations and resultant contracts, except for personal services contracts with individuals.

Existing contracts must be modified to include the clause before obligating Fiscal Year (FY) 2015 or subsequent FY funds that are subject to the same prohibition on confidentiality agreements, except for personal services contracts with individuals.

There are also conforming changes at FAR sections 3.900, 4.1202, 52.204-8, and 52.212-5.

B. Applicability. DoD, GSA, and NASA are proposing to apply this rulemaking to all solicitations and resultant contracts that are funded with FY 2015 funds or subsequent FY funds that are subject to the same prohibition on confidentiality agreements, including contracts and subcontracts for acquisitions in amounts not greater than the simplified acquisition threshold, and contracts and subcontracts for the acquisition of commercial items, (including commercially available off-the-shelf items).

Because the emphasis of section 743 is to prohibit restrictions on the ability of employees and subcontractors to report waste, fraud, or abuse to appropriate Government authorities, it is not in the best interest of the Federal Government to waive the applicability of section 743 to contracts and subcontracts in amounts not greater than the simplified acquisition threshold, or for the acquisition of commercial items (including commercially available off-the-shelf items).

In making the initial determination to prohibit restrictions on the ability of employees and subcontractors to report waste, fraud, or abuse to appropriate Government authorities, it is not in the best interest of the Federal Government to waive the applicability of section 743 to contracts and subcontracts in amounts not greater than the

simplified acquisition threshold, or for the acquisition of commercial items (including commercially available off-the-shelf items), since it would exclude a significant number of acquisitions and thereby further limit the number of contractor and subcontractor employees affected by section 743.

The FAR Council considered the following factors: 1) the benefits of the policy in furthering Administration goals, 2) the extent to which the benefits of the policy would be reduced if an exemption is provided for acquisitions in amounts not greater than the simplified acquisition threshold, or for the acquisition of commercial items (including commercially available off-the-shelf items), and 3) the burden on contractors if the policy is applied to acquisitions in amounts not greater than the simplified acquisition threshold, or for the acquisition of commercial items (including commercially available off-the-shelf items).

With respect of the first factor, the Administration is committed to implementing policy that ensures reducing waste, fraud, or abuse in all Federal acquisitions is achieved. This proposed rule makes certain that there are no restrictions that prevent contractors and subcontractors

from reporting these types of situations to a designated Government representative.

With respect to the second factor (the impact of excluding acquisitions in amounts not greater than the simplified acquisition threshold, and contracts and subcontracts for the acquisition of commercial items, (including commercially available off-the-shelf items) on the overall benefits of the underlying policy), the FAR Council believes impact on these benefits may inhibit contractor employees and subcontractors subject to such internal confidentiality agreements from reporting of waste, fraud, or abuse to appropriate Government authorities, thus allowing the perpetuation of such waste, fraud, or abuse.

With respect to the third factor, this proposed rule imposes a minimal burden on offerors and contractors, requiring only that offerors represent by submission of the offer that they do not require certain internal confidentiality agreements, and contractors must notify employees that the prohibition and restrictions of any internal confidentiality agreements covered by the clause are no longer in effect. This proposed rule does not contain any information collection requirements.

Public feedback is welcomed on the analysis and preliminary determination to cover acquisitions in amounts not greater than the simplified acquisition threshold, and contracts and subcontracts for the acquisition of commercial items, (including commercially available off-the-shelf items). After receipt and analysis of public comments, and in accordance with 41 U.S.C. 1905, 1906, and 1907, the FAR Council and the Administrator for Federal Procurement Policy will determine whether to incorporate in the final rule this proposed applicability to all solicitations and resultant contracts, including contracts and subcontracts for acquisitions in amounts not greater than the simplified acquisition threshold, and contracts and subcontracts for the acquisition of commercial items, (including commercially available off-the-shelf items).

III. Executive Orders 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing

rules, and of promoting flexibility. This is a significant regulatory action and, therefore, was subject to review under section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This proposed rule is not a major rule under 5 U.S.C. 804.

IV. Regulatory Flexibility Act

DoD, GSA, and NASA do not expect this rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq. However, an Initial Regulatory Flexibility Analysis (IRFA) has been performed and is summarized as follows:

This action is necessary to implement section 743 of Division E, Title VII, of the Consolidated and Further Continuing Appropriations Act, 2015 (Pub. L. 113-235) and successor provisions in subsequent appropriations acts (and as extended in continuing resolutions). Section 743 prohibits the use of funds appropriated or otherwise made available by Division E or any other Act for a contract, grant, or cooperative agreement with an entity that requires employees or subcontractors of such entity seeking to report waste, fraud, or abuse to sign internal confidentiality agreements or statements prohibiting or otherwise restricting such employees or subcontractors from lawfully reporting such waste, fraud, or abuse to a designated investigative or law enforcement representative of a Federal department or agency authorized to receive such information.

The objective of the rule is to remove restrictions on the ability of employees and subcontractors to report waste, fraud, or abuse to the appropriate Government authorities. The legal basis for the rule is the above cited statute.

This rule will apply to all small entities that receive Government contracts awarded using funds subject to the restriction of section 743, or successor provisions in subsequent appropriations acts with the same prohibition (and as extended in continuing resolutions). Based on FPDS

data for Fiscal Year 2014, this rule may affect up to 108,500 small entities per year (75,000 small entities receiving new awards, 33,500 modifications). However, it is doubtful that most small entities have any such prohibited internal confidentiality agreements with their employees and subcontractors.

The rule has no significant economic impact on small entities. DoD, GSA, and NASA did not identify any significant alternatives that would reduce the impact on small entities and still meet the objectives of the statute.

The Regulatory Secretariat has submitted a copy of the IRFA to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the IRFA may be obtained from the Regulatory Secretariat. DoD, GSA, and NASA invite comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD, GSA, and NASA will also consider comments from small entities concerning the existing regulations in subparts affected by the rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C 610 (FAR Case 2015-012), in correspondence.

V. Paperwork Reduction Act

The proposed rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subject in 48 CFR Parts 3, 4, and 52

Government procurement.

Dated: January 11, 2016.

William F. Clark,
Director,
Office of Government-wide
Acquisition Policy,
Office of Acquisition Policy,
Office of Government-wide Policy.

Therefore, DoD, GSA, and NASA are proposing to amend 48 CFR parts 3, 4, and 52 as set forth below:

1. The authority citation for 48 CFR parts 3, 4, and 52 continues to read as follows:

AUTHORITY: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

PART 3—IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST

2. Amend section 3.900 by-

a. Removing from the introductory paragraph "three different" and adding "various" in its place;

b. Redesignating paragraph (c) as paragraph (d);
and

c. Adding new paragraph (c) to read as follows:

3.900 Scope of subpart.

* * * * *

(c) Section 743 of Division E, Title VII, of the Consolidated and Further Continuing Appropriations Act, 2015 (Pub. L. 113-235) and successor provisions in subsequent appropriations acts (and as extended in continuing resolutions), implemented in 3.909, applicable to all agencies.

* * * * *

3. Add section 3.909 to Subpart 3.9—Whistleblower Protections for Contractor Employees to read as follows:

3.909 Prohibition on contracting with entities that require certain internal confidentiality agreements.

3.909-1 Prohibition.

(a) The Government is prohibited from using certain appropriated funds for a contract with an entity that requires employees or subcontractors of such entity seeking to report waste, fraud, or abuse to sign internal confidentiality agreements or statements prohibiting or otherwise restricting such employees or subcontractors from lawfully reporting such waste, fraud, or abuse to a designated investigative or law enforcement representative of a Federal department or agency authorized to receive such information. See section 743 of Division E, Title VII, of the Consolidated and Further Continuing Appropriations Act, 2015 (Pub. L. 113-235) and its successor provisions in subsequent appropriations acts (and as extended in continuing resolutions.)

(b) The prohibition in paragraph (a) of this section does not contravene requirements applicable to Standard Form 312 (Classified Information Nondisclosure Agreement), Form 4414 (Sensitive Compartmented Information Nondisclosure Agreement), or any other form issued by a

Federal department or agency governing the nondisclosure of classified information.

3.909-2 Representation by the offeror.

(a) In order to be eligible for contract award, an offeror must represent that it does not require employees or subcontractors of such entity seeking to report waste, fraud, or abuse to sign internal confidentiality agreements or statements prohibiting or otherwise restricting such employees or subcontractors from lawfully reporting such waste, fraud, or abuse to a designated investigative or law enforcement representative of a Federal department or agency authorized to receive such information. Any offeror that cannot so represent is ineligible for award of a contract.

(b) The contracting officer may rely on an offeror's representation unless the contracting officer has reason to question the representation.

3.909-3 Solicitation provision and contract clause.

When using funding subject to the prohibitions in 3.909-1(a) of this subpart, the contracting officer shall—

(a)(1) Include the provision at 52.203-XX, Prohibition on Contracting with Entities that Require Certain Internal Confidentiality Agreements—Representation,

in all solicitations, except as provided in paragraph (a)(2) of this section; and

(2) Do not insert the provision in solicitations for a personal services contract with an individual if the services are to be performed entirely by the individual, rather than by an employee of the contractor or a subcontractor.

(b)(1) Include the clause at 52.203-YY, Prohibition on Contracting with Entities that Require Certain Internal Confidentiality Agreements, in all solicitations and resultant contracts, other than personal services contracts with individuals.

(2) Modify existing contracts, other than personal services contracts with individuals, to include the clause before obligating FY 2015 or subsequent FY funds that are subject to the same prohibition on confidentiality agreements.

Part 4—ADMINISTRATIVE MATTERS

4. Amend section 4.1202, as amended in 80 FR 75905 (December 4, 2015), effective February 26, 2016, by redesignating paragraphs (a)(3) through (30) as paragraphs (a)(4) through (31), respectively; and adding new paragraph (a)(3) to read as follows:

4.1202 Solicitation provision and contract clause.

(a) * * *

(3) 52.203-XX, Prohibition on Contracting with Entities that Require Certain Internal Confidentiality Agreements—Representation.

* * * * *

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

5. Add sections 52.203-XX and 52.203-YY to read as follows:

52.203-XX Prohibition on Contracting with Entities that Require Certain Internal Confidentiality Agreements—Representation.

As prescribed in 3.909-3(a), insert the following provision:

PROHIBITION ON CONTRACTION WITH ENTITIES THAT REQUIRE CERTAIN INTERNAL
CONFIDENTIALITY AGREEMENTS—REPRESENTATION (DATE)

(a) In accordance with section 743 of Division E, Title VII, of the Consolidated and Further Continuing Appropriations Act, 2015 (Pub. L. 113-235) and its successor provisions in subsequent appropriations acts (and as extended in continuing resolutions), Government agencies are not permitted to use funds appropriated (or otherwise made available) for contracts with an entity that requires employees or subcontractors of such entity seeking to

report waste, fraud, or abuse to sign internal confidentiality agreements or statements prohibiting or otherwise restricting such employees or subcontractors from lawfully reporting such waste, fraud, or abuse to a designated investigative or law enforcement representative of a Federal department or agency authorized to receive such information.

(b) The prohibition in paragraph (a) of this provision does not contravene requirements applicable to Standard Form 312, (Classified Information Nondisclosure Agreement), Form 4414 (Sensitive Compartmented Information Nondisclosure Agreement), or any other form issued by a Federal department or agency governing the nondisclosure of classified information.

(c) Representation. By submission of its offer, the Offeror represents that it does not require employees or subcontractors of such entity seeking to report waste, fraud, or abuse to sign or comply with internal confidentiality agreements or statements prohibiting or otherwise restricting such employees or subcontractors from lawfully reporting such waste, fraud, or abuse to a designated investigative or law enforcement representative

of a Federal department or agency authorized to receive such information.

(End of provision)

52.203-YY Prohibition on Contracting with Entities that Require Certain Internal Confidentiality Agreements.

As prescribed in 3.909-3(b), insert the following clause:

PROHIBITION ON CONTRACTION WITH ENTITIES THAT REQUIRE CERTAIN INTERNAL
CONFIDENTIALITY AGREEMENTS (DATE)

(a) The Contractor shall not require employees or subcontractors of such entity seeking to report waste, fraud, or abuse to sign or comply with internal confidentiality agreements or statements prohibiting or otherwise restricting such employees or subcontractors from lawfully reporting such waste, fraud, or abuse to a designated investigative or law enforcement representative of a Federal department or agency authorized to receive such information.

(b) The Contractor shall notify employees that the prohibitions and restrictions of any internal

confidentiality agreements covered by this clause are no longer in effect.

(c) The prohibition in paragraph (a) of this clause does not contravene requirements applicable to Standard Form 312 (Classified Information Nondisclosure Agreement), Form 4414 (Sensitive Compartmented Information Nondisclosure Agreement), or any other form issued by a Federal department or agency governing the nondisclosure of classified information.

(d) In accordance with section 743 of Division E, Title VII, of the Consolidated and Further Continuing Appropriations Act, 2015, (Pub. L. 113-235), use of funds appropriated (or otherwise made available) under that or any other Act may be prohibited, if the Government determines that the Contractor is not in compliance with the provisions of this clause.

(e) The contractor shall include the substance of this clause, including this paragraph (e), in subcontracts under such contracts.

(End of clause)

6. Amend section 52.204-8, as amended in 80 FR 75906 (December 4, 2015), effective February 26, 2016, by-

- a. Revising the date of the provision;
- b. Redesignating paragraphs (c)(1)(iii) through (xxii) as (c)(1)(iv) through (xxiii), respectively; and
- c. Adding new paragraph (c)(1)(iii).

The revised and added text reads as follows:

52.204-8 Annual Representations and Certifications.

* * * * *

ANNUAL REPRESENTATIONS AND CERTIFICATIONS
(DATE)

* * * * *

(c)(1) * * *

(iii) 52.203-XX, Prohibition on Contracting with Entities that Require Certain Internal Confidentiality Agreements—Representation. This provision applies to all solicitations.

* * * * *

7. Amend section 52.212-3, as amended at 80 FR 75907 (December 4, 2015), effective February 26, 2016, by-

- a. Revising the date of the provision;
- b. Removing from the introductory paragraph and paragraph (b)(2) "through (q)" and adding "through (r)" in its place; and
- c. Adding paragraph (r).

The revised and added text reads as follows:

**52.212-3 Offeror Representations and Certifications—
Commercial Items.**

* * * * *

OFFEROR REPRESENTATIONS AND CERTIFICATIONS—COMMERCIAL ITEMS (DATE)

* * * * *

(r) (1) In accordance with section 743 of Division E, Title VII, of the Consolidated and Further Continuing Appropriations Act, 2015 (Pub. L. 113-235) and its successor provisions in subsequent appropriations acts (and as extended in continuing resolutions), Government agencies are not permitted to use appropriated (or otherwise made available) funds for contracts with an entity that requires employees or subcontractors of such entity seeking to report waste, fraud, or abuse to sign internal confidentiality agreements or statements prohibiting or otherwise restricting such employees or subcontractors from lawfully reporting such waste, fraud, or abuse to a designated investigative or law enforcement representative of a Federal department or agency authorized to receive such information.

(2) The prohibition in paragraph (r) (1) of this provision does not contravene requirements applicable to Standard Form 312 (Classified Information Nondisclosure

Agreement), Form 4414 (Sensitive Compartmented Information Nondisclosure Agreement), or any other form issued by a Federal department or agency governing the nondisclosure of classified information.

(3) Representation. By submission of its offer, the Offeror represents that it does not require employees or subcontractors of such entity seeking to report waste, fraud, or abuse to sign or comply with internal confidentiality agreements or statements prohibiting or otherwise restricting such employees or subcontractors from lawfully reporting such waste, fraud, or abuse to a designated investigative or law enforcement representative of a Federal department or agency authorized to receive such information.

(End of provision)

8. Amend section 52.212-5, as amended at 80 FR 75907 (December 4, 2015), effective February 26, 2016, by-
- a. Revising the date of the clause;
 - b. Redesignating paragraphs (a) (1) through (3) as paragraphs (a) (2) through (4), respectively; and
 - c. Adding new paragraph (a) (1).

The revised and added text reads as follows:

**52.212-5 Contract Terms and Conditions Required to
Implement Statutes or Executive Orders—Commercial Items.**

* * * * *

CONTRACT TERMS AND CONDITIONS REQUIRED TO IMPLEMENT STATUTES OR EXECUTIVE
ORDERS—COMMERCIAL ITEMS (DATE)

(a) * * *

(1) 52.203-YY, Prohibition on Contracting with
Entities that Require Certain Internal Confidentiality
Agreements (DATE) (section 743 of Division E, Title VII, of
the Consolidated and Further Continuing Appropriations Act,
2015 (Pub. L. 113-235) and its successor provisions in
subsequent appropriations acts (and as extended in
continuing resolutions)).

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