

Appendix G

“Procurement and Grant Fraud: Legislative and Regulatory Reform Proposals,”  
by National Procurement Fraud Task Force Legislation Committee

July 9, 2007

# **Procurement and Grant Fraud: Legislative and Regulatory Reform Proposals**

## **National Procurement Fraud Task Force Legislation Committee**

### **Committee Chairs**

Inspector General Brian D. Miller, General Services Administration  
Inspector General Richard L. Skinner, Department of Homeland Security

**July 9, 2007**



*This white paper does not represent the views of the Department of Justice or any other Federal Agency. It only represents the views of the National Procurement Fraud Task Force Legislation Committee.*

## **Introduction**

On October 10, 2006, Deputy Attorney General Paul J. McNulty announced the formation of the National Procurement Fraud Task Force (NPFTF), a partnership among Federal agencies charged with the investigation and prosecution of illegal acts in connection with government contracting and grant activities. Task Force principals include the Federal law enforcement community, the Inspector General (IG) community, and the litigating arms of the United States Department of Justice (DOJ) and United States Attorneys offices (USAOs). DOJ has strongly encouraged the formation of smaller regional task forces to ensure greater coordination and focus of resources across the Federal districts. Assistant Attorney General for the DOJ Criminal Division, Alice Fisher, is the chair of the NPFTF.

Seven committees operate under the NPFTF including: Grant Fraud, Information Sharing, Intelligence, International, Legislation, Private Sector Outreach, and Training. Each committee formulated a strategic plan describing their consensual mission and goals.

The Legislation Committee is co-chaired by General Services Administration (GSA) Inspector General Brian D. Miller (also the vice-chair of the NPFTF) and Department of Homeland Security (DHS) Inspector General Richard L. Skinner. The Committee established a clear mission and four key goals:

**Mission: To improve the Federal Government's ability to detect, prevent, and prosecute procurement and grant fraud through legislative modifications and/or changes in policies and practices.**

**Goal 1:** To conduct a systematic review of statutes and Federal regulations utilized in procurement and grant fraud criminal and civil litigation;

**Goal 2:** To consider potential legislative/regulatory amendments or new legislation/regulations to improve the capacity to review, investigate, and prosecute procurement and grant fraud offenses and to ensure an appropriate penalty system;

**Goal 3:** To review the adequacy of current legislative and audit protocols and prosecution standards and practices to facilitate thorough and timely responses to procurement and grant fraud; and,

**Goal 4:** To memorialize recommendations for changes in statutes, regulations, or practices for addressing procurement and grant fraud in a "white paper" for consideration by policy-makers and the Congress.

## Examining Federal Procurement Practices

The Federal procurement system consists of those processes, procedures, and personnel with the responsibility to distribute more than \$415 billion of appropriated funds for the purchase of goods and services. During Fiscal Years 2000-2006, Federal outlays increased about 51%, from \$1.8 trillion to more than \$2.7 trillion. Over the same period, the value of procurement actions has grown 89%, from \$219.3 billion to \$415.5 billion. The average value of a contract more than doubled over the same years, from just over \$22,000 in Fiscal Year 2000 to nearly \$50,000 in Fiscal Year 2006. In Fiscal Year 2000, about 1 in 8 dollars of Federal spending went to contractors for procurements; in Fiscal Year 2006, about 1 in 6 dollars went for procurement.

The rapid increase in procurement spending has not been offset by a growth in the number of procurement officials to supervise the process. The Federal Acquisition Institute estimates that the Federal procurement workforce has declined by 50% since the mid-1990s. In addition, it is estimated that the proportion of contracting conducted non-competitively has been growing as a fraction of all procurement spending. Federal Procurement Data System – Next Generation (FPDS-NG) data for Fiscal Year 2000 indicates that approximately 33% of contract actions were the result of a competitive process; in Fiscal Year 2005, FPDS-NG indicates about 20% of contract actions were competitively procured.

Beginning in 1996 with the Clinger-Cohen Act and continuing through the Services Acquisition Reform Act of 2003, there have been a wide variety of legislative and regulatory reforms aimed at ensuring a more effective Federal procurement system. A recent study by the Office of Federal Procurement Policy indicates that there has been enormous change in the types of purchases by the government with a major shift toward services. At the end of 2006, it is estimated that 60% of Federal procurement dollars were used for the acquisition of services. The General Accountability Office (GAO) recently reported a 72% increase in Department of Defense (DOD) spending on services between 1999 and 2005. Likewise, grants and cooperative agreements have grown dramatically over the past twenty years, accounting for \$450 billion dollars in expenditures across the federal government in 2006.

The combination of rapidly increased procurement and grant spending, few personnel to award and administer contracts and grants, the greater reliance on contractors to perform essential services including drafting statements of work, and more non competitive procurements have contributed to major concerns across Federal agencies in the ability to avert fraud. The Legislation Committee concluded that three areas of reform were needed to address what appears to be an increasingly vulnerable environment: 1) improved ethics and internal controls among contractors and grantees, 2) improvements in the government's ability to prevent and detect procurement and grant fraud, and 3) upgraded prosecution and adjudication resources.

## **Proposals for Reform**

### ***Improving Ethics and Internal Controls among Contractors and Grantees***

This white paper contains two specific proposals that require contractors and grantees to provide codified procedures governing the conduct of their employees and subcontractors performing work under government procurements and grants. The Committee believes that contractor/grantee-managed ethics and internal controls programs should include elements such as periodic compliance reviews, employee avenues for reporting suspicious conduct, such as posting of an applicable OIG hotline number, regular and recurring internal audits, a schedule of disciplinary penalties for misconduct while working on government-funded activities, mandatory reporting of law or regulatory violations to the contracts or grant management office and cognizant Office of Inspector General (OIG), and assurances of full cooperation with government audits and investigations.

These initiatives can largely be implemented through modification of the Federal Acquisition Regulations (FAR) and applicable OMB Circulars governing grants administration, making the proposed regulatory reforms mandatory items for contract/grant officer review prior to execution of a contract or grant. In addition, some new legislative requirements may be needed to ensure the enforceability of mandatory reporting provisions and assistance in investigations and audits conducted by the Federal government.

### ***Improvements in the Government's Ability to Prevent and Detect Procurement Fraud***

There are four proposals for enhancing the capacity of Federal agencies to better identify opportunities to reduce vulnerabilities. These include:

- 1) Amending the FAR and applicable OMB Circulars to require notification by the contractor/grantee to the Federal government of overpayments;
- 2) Extending criminal conflict of interest requirements to contractors performing acquisition guidance or services on behalf of the government;
- 3) Reinstating audit rights for GSA OIG over negotiations pricing information in the GSA MAS Program; and
- 4) Establishing a National Procurement Fraud Database that integrates contractor performance information from all Federal agencies with State and local procurement data on contractor performance and ensuring full background checks or suitability determinations, as appropriate, for contractors before granting access to sensitive facilities and information.

### ***Improvements in the Prosecution and Adjudication of Procurement and Grant Fraud Defendants***

The Committee identified four improvements which, if implemented, would ensure more systematic decision-making in the handling of procurement and grant fraud cases. These include:

- 1) Amending Federal Sentencing guidelines to better define economic loss in procurement and grant fraud cases;
- 2) Expanding OIG subpoena authority to include compelled interviews and clarifying that current authority includes electronic and physical evidence;
- 3) Authorizing OIG Counsel staff to be detailed to DOJ to assist in prosecuting procurement and grant fraud cases; and
- 4) Extending the applicability of the Program Fraud Civil Remedies Act (PFCRA) Amendments to the Inspector General Act of 1978 to all IG offices.

### **Additional Ideas**

In addition to the recommendations previewed above, the Legislation Committee has discussed several additional proposals in general. Although the Committee believes these general proposals would be beneficial to detecting and prosecuting procurement and grant fraud, the Committee expects to examine them further in the future, the Committee has not provided specific legislative language in this white paper.

The first general proposal has to do with improving audit access rights to government contractors' records for the Federal Government. The National Reconnaissance Office (NRO) has implemented enhanced audit authorities recently through contractual language; it is understood that this has enhanced the NRO's ability to prevent and detect procurement fraud.

The Legislation Committee is also examining the Procurement Integrity Act, 41 U.S.C. § 423, for possible changes – particularly with respect to its remedies provisions. This important statute, which mandates appropriate treatment and access to proprietary and source selection information and regulates negotiating for employment by government procurement officials, appears to be underused in the procurement fraud area. Also, the Legislation Committee is examining how to extend the False Claims Act statute of limitations, 31 U.S.C. § 3731(b), to 10 years in criminal cases and to 15 years in civil cases.

Finally, the Legislation Committee is examining ways to provide agencies with better resources, within reasonable limits, to pursue procurement and grant fraud activities. The Legislation Committee has considered general proposals to amend appropriations-related statutes in order to allow closed or expired funds to be credited back to the accounts of agencies which experienced a procurement or grant-related loss. This would make those agencies whole. Currently, these recoveries often are deposited in Treasury's

miscellaneous receipts fund. A related proposal would involve establishing a working capital fund – possibly located at DOJ and comprised of a portion of procurement and grant fraud-related recoveries – which would be available to various OIGs for certain limited purposes in connection with funding future procurement and grant fraud investigations and activities. The Legislation Committee looks forward to refining these ideas and reporting on them in the future.

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The Committee offers these specific recommendations as a set of ideas to reduce identified gaps in current practice. A number of bills could easily be modified to incorporate these proposed changes. Other committees of the Task Force are likely to have additional ideas for improving the administration of Federal procurement.

Procurement and grant fraud adversely affects essentially every aspect of government, such as national defense, homeland security, health care, transportation, and education. This report represents only a first step toward ensuring the improved ability of the Federal Government to protect taxpayer funds used for so many important purposes across the Federal government.

Respectfully submitted,  
Brian D. Miller, GSA IG, Co-Chair  
Richard L. Skinner, DHS IG, Co-Chair

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# **Legislative and Regulatory Proposals to Improve the Administration of Procurement and Grants in the Federal Government**

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## **IMPROVE ETHICS AND INTERNAL CONTROLS**

### **I. Requirement for Ethics Compliance Program for Government Contractors**

#### **A. Language (41 U.S.C. for civilian agencies; 10 U.S.C. for defense agencies)**

##### *Section 1. Requiring Ethics Codes and Internal Control Systems.*

- (a) Prohibition on new awards. A contracting officer shall not determine a government contractor to be responsible, for purposes of award of a new contract, unless the contractor has an internal compliance program, including an ethics code and internal controls to facilitate the timely detection and disclosure of improper conduct in connection with the award or performance of its government contracts, and measures to ensure that related corrective action is taken.
- (b) Contents of program.
  - (1) The contents of such a program shall include, at a minimum –
    - (A) periodic reviews to ensure compliance with Government contracting requirements, including laws, regulations, and guidelines;
    - (B) an internal reporting mechanism, such as a hotline, for employees to report suspicious conduct;
    - (C) internal audits ;
    - (D) disciplinary action for improper conduct by individual employees and, to the extent possible, exclusion of such individuals from the exercise of substantial authority;
    - (E) timely reporting to appropriate Government officials, including the contracting officer and OIG of the relevant agency, of any suspected violations of law, regulations, or other requirements, including contractual provisions, in connection with such contracts; and
    - (F) full cooperation with any Government agencies responsible for investigations or corrective actions.
  - (2) Reporting requirements to Government officials.
    - (A) The reports referenced in subsection (b)(1)(E) of this section shall include, but are not limited to, all instances where violations of criminal law may have occurred in connection with the possible corruption of a federal official or person acting on behalf of the federal Government; (B) To be deemed timely, reports of violations to Government officials must be made no later than 30 days after discovery of the conduct by responsible contractor officials;
- (c) Training. Government contractors shall conduct training on the ethics code and Government contracting requirements on a regular basis.

- (d) Oversight. The vendor must ensure high-level oversight of its compliance program.
- (e) Implementation of Program. A proposed awardee shall not be deemed to have a compliance program sufficient to meet the requirements of this section unless the program has been implemented within 30 days after award of the contract.
- (f) Determination Regarding Compliance Program. The contracting officer shall determine the existence and sufficiency of a vendor's compliance program.
- (g) Applicability. The requirements of this section apply to all Government contractors with aggregate sales under Government contracts, in the year prior to potential award, which exceed \$5 million.
- (h) Implementing Regulations. The FAR Council shall promulgate regulations to implement this section within 180 days of enactment of this Act.

*Section 2. Remedies for Failure to Report Suspected Violations of Law, Regulation or Other Requirements*

- (a) Government contractors subject to the requirements of Section 1 of this Act who knowingly fail to report suspected improper conduct in connection with the award of performance of a Government contract may be subject to suspension or debarment.
- (b) Within 180 days of enactment of this bill, the FAR Council shall promulgate proposed regulations to implement this section.

*Section 3. Requirement to Report Overpayments; Related Remedies*

- (a) Government contractors must provide timely written notification to the contracting officer of any overpayments received under its federal Government contracts.
- (b) Applicability.
  - (1) The requirement to timely notify regarding overpayments is applicable to all Government contractors with aggregate sales under its Government contracts which exceed \$5 million in the year prior to receipt of any overpayment.
  - (2) Such contractors are also required to include a provision requiring notification of overpayments in any relevant subcontracts.
- (c) Knowing Failures to Report. Any knowing failure to timely report an overpayment on the part of a contractor or subcontractor shall be
  - (1) referred to the relevant agency OIG; and
  - (2) constitute sufficient cause for suspension or debarment.

- (d) **Implementing Regulations.** Within 180 days of enactment of this Act, the FAR Council shall promulgate proposed regulations implementing this requirement.

#### *Section 4. Savings Provision*

Nothing in this Act shall supersede, preempt or otherwise limit any other provision of law.

#### **B. Explanation/Justification**

This legislative proposal focuses on two areas of concern, and imposes related compliance and reporting requirements. First, the proposal would require all vendors with significant Government sales<sup>1</sup> to implement a more formalized compliance program, with attendant requirements to report any suspicious conduct to the Government. Failure to establish such a program would make an offeror ineligible for new federal contract awards, including task and delivery orders. Further, knowing failure to report suspicious conduct in a timely fashion would constitute a basis for suspension or debarment. Currently, the FAR provides that timely self-reporting of internal problems and violations can be considered as a mitigating factor in a debarment. FAR § 9.406-1(a)(2). Next, the proposal would require vendors to report any overpayments to the Government. Again, knowing failures to report overpayments would be a basis for suspension and debarment.

The proliferation of government contractors, including services contractors, and the significant increase in federal procurement spending since the events of September 11, 2001<sup>2</sup>, have led to an increased need for more efficient oversight mechanisms to ensure compliance with Government contracting requirements. In particular, mechanisms, like internal compliance programs, which put some responsibility on contractors to self-police, are called for. There are currently no Governmentwide requirements in the FAR that require contractors to establish formal compliance programs, including codes of ethics or internal controls relating to their award and performance on Government contracts. A recently issued proposed FAR rule would impose requirements similar to those in this proposal; however, the proposed rule would not apply to commercial items vendors (a large part of the contractor community) and would provide chiefly only for withholding payments or loss of an award fee as a remedy for noncompliance. 32 Federal Register 7588, 2/16/07 (FAR Case 2006-007).

## **II. Requirement for Ethics Compliance Program for Recipients of Federal Financial Assistance**

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<sup>1</sup> The proposal would apply to vendors with Government sales that exceed \$ 5 million in the year prior to the year in which a new award is sought. At GSA, in the context for example of the MAS program, the chief commercial items acquisition program, this threshold would encompass 1,108 vendors out of a total of 17,820 vendors (6%). This threshold seems appropriate in that it would impose meaningful internal compliance requirements without unduly burdening smaller businesses. We also suspect that many government contractors have similar systems in place already as a matter of good practice.

<sup>2</sup> The Section 1423 Panel, for example, noted that federal procurement spending has increased by nearly 75% from fiscal year 2001 to fiscal year 2005. Acquisition Advisory Panel Draft Report, 12/06, Page 2.

A. Language

*Section 1. Definitions.*

- (a) AWARD -- The term "award" means financial assistance, in the form of a grant or cooperative agreement, that provides support or stimulation to accomplish a public purpose.
- (b) COOPERATIVE AGREEMENT -- The term "cooperative agreement" is a type of assistance award that may be used when the project being supported requires substantial agency involvement during the project performance period.
- (c) FEDERAL AGENCY -- The term "federal agency" means any agency as defined under section 551(1) of title 5, United States Code.
- (d) GRANT -- The term "grant" refers to any type of assistance award or a legal instrument that permits a Federal agency to transfer money, property, services or other things of value to a grantee when no substantial involvement is anticipated between the agency and the recipient during the performance of the contemplated activity.
- (e) RECIPIENT -- The term "recipient" means an organization receiving financial assistance, in the form of a grant or cooperative agreement, directly from Federal awarding agencies to carry out a project or program. The term includes public and private institutions of higher education, public and private hospitals, and other quasi-public and private non-profit organizations such as, but not limited to, community action agencies, research institutes, educational associations, and health centers. It also includes state, local, and federally recognized Indian tribal governments. The term may include commercial organizations, foreign or international organizations (such as agencies of the United Nations) which are recipients, subrecipients, or recipients or subrecipients at the discretion of the Federal awarding agency. The term does not include government-owned contractor-operated facilities or research centers providing continued support for mission-oriented, large-scale programs that are government-owned or controlled, or are designated as federally-funded research and development centers.
- (f) SUBRECIPIENT -- The term "subrecipient" means the legal entity to which a subaward is made and which is accountable to the recipient for the use of the funds provided. The term may include foreign or international organizations (such as agencies of the United Nations) at the discretion of the Federal awarding agency.

*Section 2. Requiring Ethics Codes and Internal Control Systems.*

- (a) Internal Compliance Program. As a condition to a grant award, each federal agency shall require recipients to have an internal compliance program, which

includes an ethics code and an internal control system to facilitate the timely detection and disclosure of improper conduct in connection with the award, and measures to ensure that related corrective action is taken.

(b) Internal Control System.

(1) The recipient's internal control system shall, at a minimum, provide for --

- (A) periodic reviews to ensure compliance with applicable laws, regulations, and terms and conditions of an award;
- (B) an internal reporting mechanism, such as a hotline, for employees to report suspicious conduct;
- (C) display of an agency OIG fraud hotline poster in all common work areas within which work is being performed under the award;
- (D) internal audits;
- (E) disciplinary action, as appropriate, for improper conduct by individual employees and students, and, to the extent possible, exclusion of such individuals from the exercise of substantial authority with respect to the award;
- (F) timely reporting to appropriate Government officials, including the program or grants officer and OIG of the relevant agency of: (i) any suspected problems regarding the administrative or financial aspects of the award; or (ii) in the case of research grants, any allegation of research misconduct that the recipient concludes has substance and requires further investigation; and
- (G) full cooperation with any Government agency responsible for audits, investigations or corrective actions.

(2) Reporting requirements to Government officials. To be deemed timely, reports of violations to Government officials must be made no later than 30 days after discovery of the conduct by responsible recipient officials.

(3) Fraud Hotline Posters. Agency Inspectors General are responsible for determining content of their respective agency OIG fraud hotline poster(s).

- (c) Training. Recipients shall conduct training on the ethics code and Government requirements pertaining to grants/agreements on a regular basis. Such training shall, as appropriate, include agency-specific requirements.
- (d) Oversight. Recipients must ensure high-level oversight of their compliance programs.
- (e) Implementation of Program. A recipient shall not be deemed to have a compliance program sufficient to meet the requirements of this section unless the program has been implemented within 30 days after award of the grant/agreement.

- (f) Determination Regarding Compliance Program. The grants/program officer shall determine the existence and sufficiency of a recipient's compliance program.
- (g) Subrecipients. The provisions of this section shall be applied by federal agencies to recipients. Recipients shall apply the provisions of this section to subrecipients performing substantive work under grants and agreements that are passed through or awarded by the primary recipient.
- (h) Implementing Regulations. OMB shall promulgate proposed regulations to implement this section within 18 months of enactment of this Act.

### *Section 3. Remedies*

- (a) Recipients who fail to establish a compliance program as required by this Act or knowingly fail to report suspected improper conduct in connection with an award may be subject to grant suspension or termination in addition to other remedies available to the Government.
- (b) Within 180 days of enactment of this bill, OMB shall promulgate proposed regulations to implement this section.

### *Section 4. Savings Provision*

Nothing in this Act shall supersede, preempt or otherwise limit any other provision of law.

### **B. Explanation/Justification**

This legislative proposal requires certain recipients of federal assistance to implement formalized compliance programs, with attendant requirements to report any suspected financial/administrative irregularities and research misconduct allegations (in the case of research grants/agreements) to the Government. Failure to establish such a program or to comply with the reporting requirement in a timely fashion would, in addition to other remedies that may be available to the Government, constitute a basis for grant suspension or termination. There are currently no Governmentwide requirements that require recipients to establish formal compliance programs, including codes of ethics or internal controls relating to their award and performance on federal grants and cooperative agreements. This initiative would complement a proposal to impose ethics compliance programs on government contractors, including a FAR proposal. 32 Federal Register 7588, 2/16/07 (FAR Case 2006-007).

## **IMPROVE PROSECUTION AND ADJUDICATION**

### **I. Amendment of Federal Sentencing Guidelines to Better Define Economic Loss in Procurement and Grant Fraud Cases**

#### **A. Language**

Pursuant to its authority under 28 U.S.C. Section 994(p), the United States Sentencing Commission shall –

- (a) amend existing sentencing guidelines and application notes, including specifically Section 2B1.1 (Theft, Embezzlement, Receipt of Stolen Property, Property Destruction, and Offenses Involving Fraud or Deceit), Application Note 3, to provide for increased penalties for persons convicted of procurement or grant fraud by
  - (1) defining loss to include the value of any impacted federal contract or grant, to include the amount paid by the Federal Government under a contract or grant, as well as the amount of any reprourement costs; and
  - (2) prohibiting credits against loss calculation for the value of the property or services rendered under the tainted contract or grant.
- (b) ensure, in promulgating such guidelines, that they reflect the serious nature of federal procurement and grant fraud offenses; are reasonably consistent with other relevant guidelines; and account for aggravating or mitigating circumstances.

#### **B. Explanation/Justification**

The proposal would require the Federal Sentencing Commission to promulgate specific provisions that would allow the value of any impacted contracts or grants to be considered when assessing loss in procurement or grant fraud cases. Currently, the guidelines at Section 2B1.1 define loss in this context (where there has been no actual pecuniary harm) to include only reprourement costs. We believe these cases, which can involve serious procurement integrity-type violations, financial conflicts violations, or small business-related violations merit more stringent treatment. We would note that this limitation in the sentencing guidelines prevented more severe and appropriate sentencing from being imposed in the matter of high-level DOD official Darlene Druyun's egregious behavior.

With respect to small-business related cases in particular, we would note that the existing sentencing guidelines language stifles effective prosecution and deterrence of cases where contractors or grantees make material false statements to the Government regarding their compliance with Federal requirements such as contract or grant eligibility, but the Government suffers no financial loss. Under the current guidelines, prosecution of these cases will generally result only in a sentence of probation or at most a sentence

of no more than six months. A recurring example relates to bidders' false certifications of their status as a small business or a business that is owned by minorities or other disadvantaged persons. Although there is no direct impact on the quality of the goods or services procured or provided, and no related financial loss, there is a significant societal cost to the fraudulent conduct, including that legitimate contractors or grantees are prevented from obtaining program benefits.

## **II. Expand OIG subpoena authority to include compelled interviews; clarify that the scope of OIG subpoena authority (at 5 U.S.C. § 6(a)(4)) includes tangible things and electronic evidence**

### **A. Language**

Amend 5 U.S.C. App. 3, § 6(a)(4) to provide:

“(4) to require by subpoena the production of all information, documents, reports, answers, records, accounts, papers, and other data in any medium, including electronically stored information and tangible things, and interviews necessary in the performance of the functions assigned by this Act, which subpoena, in the case of contumacy or refusal to obey, shall be enforceable by order of any appropriate United States district court: Provided, that procedures other than subpoenas shall be used by the Inspector General to obtain documents, information or testimony from Federal agencies.”

### **B. Explanation/Justification**

This proposal would clarify that OIG subpoena authority includes electronic evidence and tangible things. It also would expand OIG subpoena authority to authorize compelled interviews in connection with OIG investigations.

Compelled testimony -- IG subpoenas are the most commonly-used and versatile tool in investigating civil fraud cases. They are currently limited to documentary evidence and could be expanded to include interview evidence. Many fraud matters are brought against companies, and being able to compel interviews from employees or customers during investigations would be invaluable in investigating and prosecuting a case.

Electronic & physical evidence -- OIG investigations often involve the requirement to access computers, personal digital assistants (PDAs) and other items with electronically stored information. Procurement and grant fraud investigations often involve sorting through significant amounts of electronic pricing or other business data. The IG Act was enacted thirty years ago, before many of the technological advances taken for granted today had been developed; in addition, various OIGs including DOD have expressed a need to be able to access physical evidence including, for example, handwriting exemplars and defective products. Clarifying the IG Act to unequivocally make clear its scope includes electronic information, and to include physical evidence, would be a useful change to IGs.

### **III. Authority for Details of OIG Counsel Employees to the Department of Justice to Assist in Prosecuting Certain Procurement and Grant Fraud Matters**

#### *Section 1. Detail Authority for Prosecution of Certain Procurement Fraud Cases*

- (a) Offices of Inspectors General shall have the authority to detail attorneys employed in their Offices to the Department of Justice or to United States Attorneys Offices, for a period of time not to exceed one year, for the purpose of prosecuting or assisting in the prosecution of certain minor procurement and grant fraud cases.
- (b) For the purposes of this section, “minor procurement and grant fraud cases” includes only federal procurement or grant-related matters that
  - (1) are civil in nature, including where the federal Government asserts or would assert claims under the civil False Claims Act (31 U.S.C. § 3729 et seq.), and where the federal Government seeks single damages of \$300,000 or less; or
  - (2) are criminal in nature, including in particular where the federal Government asserts or would assert claims under the criminal false statements statute (18 U.S.C. § 1001), the Anti-Kickback Act (41 U.S.C. §§ 51-58), and the criminal false claims statute (18 U.S.C. § 287), and where the offense would be classified as a Class D or E felony, pursuant to 18 U.S.C. § 3559 or other provision of law, or as a misdemeanor.

#### *Section 2. Appropriations for Facilitating Details of OIG Counsel Personnel to Prosecute Procurement Fraud Cases*

Funds in the amount of \$X are hereby appropriated to the DOJ to facilitate and fund details from OIGs to litigating components of DOJ which are effected under the authority of the prior section. Such funds shall be available for all expenses reasonably associated with such details.

#### Explanation/Justification

This section would provide legal authority for OIGs to detail, on a reimbursable, non-reimbursable, or partially reimbursable basis, lawyers in their Offices to DOJ’s litigating components in order for those lawyers to prosecute or assist in prosecuting criminal or civil procurement and grant fraud cases. The details would be limited to one year, and to matters that are relatively minor in terms of single damages sought or offense classification. Section 2 is intended to provide some funds, at least in the first year, to facilitate details by reimbursing participating OIGs. We note that there is authority currently, for details to DOJ for service under the Special AUSA program. This authority, however, is limited.

Currently, many OIGs are finding that DOJ litigating components decline to prosecute, on a civil or criminal basis, smaller dollar procurement and grant fraud cases due to resource constraints at DOJ. This proposal would capitalize on an available and knowledgeable pool of OIG government attorneys, and set up an arrangement similar to the Special AUSA program currently in use by various USAO. We understand that USAO are generally receptive to such arrangements; as for OIGs, such an arrangement would allow them to pursue otherwise sound procurement and grant fraud cases and at the same time provide a valuable litigation training experience in appropriate circumstances.

#### **IV. Extension of Program Fraud Civil Remedies Act (PFCRA)**

##### **A. Proposed Statutory Language**

###### *31 USCS § 3801. Definitions*

(a) For purposes of this chapter [31 U.S.C. §§ 3801 et seq.]--

(1) "authority" means:

(A) an executive department;

(B) a military department

(C) an establishment (as such term is defined in section 11(2) of the Inspector General Act of 1978) which is not an executive department; and

(D) a designated federal entity (as such term is defined under Section 8G of the Inspector General Act of 1978, as amended);

###### **31 U.S.C. § 3801(a)(4)(A)(i)**

In the case of an authority in which an Office of Inspector General is established by the Inspector General Act of 1978, as amended,<sup>3</sup> or by any other Federal law, is the Inspector

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<sup>3</sup> The Inspector General Act was amended in 1988. The relevant amendments follow: § 8G(a)(2) "the term "designated Federal entity" means Amtrak, the Appalachian Regional Commission, the Board of Governors of the Federal Reserve System, the Board for International Broadcasting, the Commodity Futures Trading Commission, the Consumer Product Safety Commission, the Corporation for Public Broadcasting, the Denali Commission, the Equal Employment Opportunity Commission, the Farm Credit Administration, the Federal Communications Commission, the Federal Election Commission, the Federal Housing Finance Board, the Federal Labor Relations Authority, the Federal Maritime Commission, the Federal Trade Commission, the Legal Services Corporation, the National Archives and Records Administration, the National Credit Union Administration, the National Endowment for the Arts, the National Endowment for the Humanities, the national Labor Relations Board, the National Science Foundation, the Panama Canal Commission, the Peace Corps, the Pension Benefit Guaranty Corporation, the Securities and Exchange Commission, the Smithsonian Institution, the United States International Trade Commission, and the United States Postal Service;" § 8G(a)(5) "the term "Office of Inspector General" means an Office of Inspector of a designated Federal entity;" § 8G(a)(6) "the term "Inspector General" means an Inspector General of a designated Federal entity." and § 8G(b) "No later than 180 days after the date of the enactment of this section [Oct. 18, 1988], there shall be established and maintained in each designated Federal entity an Office of Inspector General. \* \* \* ."

General of that authority or an officer or employee of such Office designated by the Inspector General;

31 U.S.C. § 3801(a)(4)(A)(ii)

In the case of an authority in which an Office of Inspector General is not established by the Inspector General Act of 1978, as amended, or by any other Federal law, is an officer or employee of the authority designated by the authority head to conduct investigations under section 3803(a)(1) of this title;

31 U.S.C. § 3808(c)

If at any time during the course of proceedings brought pursuant to this chapter [31 USCS §§ 3801 et seq.] the authority head receives or discovers any specific information regarding bribery, gratuities, conflict of interest, or other corruption or similar activity in relation to a false claim or statement, the authority head shall immediately report such information to the Attorney General, and in the case of an authority in which an Office of Inspector General is established by the Inspector General Act of 1978, as amended, or by any other Federal law, to the Inspector General of that authority.

**B. Explanation/Justification**

Amending 31 U.S.C. §§ 3801-3812, as highlighted above, will provide all OIG offices with the authority to utilize the provisions of PFCRA. Unlike PCIE OIGs and the United States Postal Service OIG, DFE agencies may not currently utilize PFCRA. Most DFE agencies, however, would benefit from PFCRA because they are confronted with relatively small dollar frauds that are less than \$150,000.00 – the PFCRA threshold. Many times, DOJ can not pursue these smaller frauds due to resource constraints. Congress' intent in 1986, when it enacted PFCRA, was to provide all OIG offices with a tool to address false claims where the dollar amounts are less than \$150,000.00. The proposed amendments to PFCRA, highlighted above, will accomplish the task of including DFE OIG offices under the umbrella of PFCRA and are consistent with Congressional intent.

**IMPROVE THE ABILITY TO PREVENT AND DETECT PROCUREMENT FRAUD**

**I. Requiring Notification of Overpayments and Related Remedies**

**A. Proposed Regulatory Language**

- *FAR Part 32 proposed coverage (Contract Financing; Payments) & accompanying FAR contract clause*

**FAR § 32.008 -- Notification of Overpayments**

- (a) Contractors will timely notify the contracting officer of the relevant agency in writing of any overpayments, including duplicate payments occurring on that contractor's contracts.
- (b) If the contractor notifies the contracting officer of an overpayment, the CO must promptly provide instructions to the contractor, in coordination with the cognizant payment office, regarding timely disposition of the overpayment.
- (c) The contracting officer shall include FAR clause 52.232-XX in all solicitations and contracts (including task and delivery orders) expected to exceed \$5 million in annual sales, and shall require the clause to be included in any subcontracts with expected sales exceeding \$5 million annually.

**FAR Clause § 52.232-XX, Notification of Overpayments**

- (a) The Contractor shall immediately notify the Contracting Officer if he or she becomes aware that the Government has overpaid on a contract, including any duplicate payments; and
  - (b) The Contractor shall include the substance of this clause in all subcontracts that exceed \$ 5 million in annual sales.
- *Proposed FAR Part 9 coverage adding additional suspension & debarment bases*

**FAR § 9.406-2, Causes for Debarment**

[add new subsection (b)(1)(iv)]

The debarring official may debar a contractor based on a preponderance of the evidence for –

- (iv) Knowing failure to timely disclose overpayments as required under FAR § 32.008 & related clause FAR § 52.232-XX.

**FAR § 9.407-2, Causes for Suspension**

[add new subsection (a)(8)]

The suspending official may suspend a contractor suspected, upon adequate evidence, of

(8) Knowing failure to timely disclose overpayments as required under FAR § 32.008 & related clause FAR 52.232.XX.

B. Explanation/Justification:

In recent years, GAO, as well as agency OIGs, have noted that federal agencies have significant problems with improper payments, including in particular with contract overpayments. Congress enacted the Improper Payments Information Act to address improper payments generally. GAO has noted that 19 agencies with significant contracting activity reviewed over \$300 billion in payment activity in fiscal year 2005. Of this amount, these agencies identified over \$557 million in improper payments. GAO Testimony to Senate Governmental Affairs Committee, Subcommittee on Government Management, GAO-06-581, page 12. Although much of this was recovered, a significant amount of contract overpayments remains unidentified and unrecovered. More is needed to solve the problem of recovering overpayments under Government contracts.

This regulatory proposal would impose a requirement (and related contract clause) for all contractors holding government contracts with sales expected to exceed \$5 million to notify in writing and in a timely manner the Contracting Officer (CO) of the relevant agency of any overpayments made to them. The FAR currently imposes such a requirement only for vendors of commercial items. Further, the proposal would provide that any knowing failure to timely disclose overpayments, including in particular repetitive failures to disclose or particularly flagrant failures to disclose, would be a sufficient basis for considering debarring or suspending a vendor.

**II. Extending Criminal Conflict of Interest (18 U.S.C. § 208) provisions to contractors who perform key acquisition functions**

A. Language

Amend 18 U.S.C. § 202 (Definitions), subsections (c) & (f) to provide:

202(c). Except as otherwise provided in such sections, the terms “officer” and “employee”

(1) in sections 203, 205, 207 through 209, and 218 of this title . . . and

(2) for purposes of Section 208, shall include contractors and consultants, and their employees, to the extent they are engaged by the federal Government to perform key acquisition assistance functions including planning, evaluating, or selecting a source in connection with a federal contract.

202(f). For purposes of the financial conflicts prohibition of Section 208, as applied to acquisition contractors and consultants, and their employees, under Section 202(c)(2), an acquisition contractor and consultant engaged by the Government will be deemed to have a prohibited financial interest in a matter if the subject acquisition involves, as an offeror or awardee, an individual or entity that is related to the acquisition contractor and consultant. Such relationship exists where the entity is a subsidiary, parent, affiliate, or joint venture partner of the acquisition contractor and consultant; where the entity has an ongoing significant business relationship with the acquisition contractor and consultant; or where the individual employee has an immediate familial or other close personal relationship with an employee or official of the acquisition contractor and consultant.

**B. Explanation/justification**

This provision would extend the criminal financial conflicts provisions of 18 U.S.C. § 208 to contractors that perform key acquisition advisory functions on the federal Government's behalf by expanding the definitions of "officer", "employee", and "financial interest" in Section 202 of the statute. The proposals would prohibit such acquisition contractors from favoring related entities or individuals.

The Government is increasingly using contractors in the acquisition process to assist in acquisition planning; help define technical requirements; draft Statements of work; and assist in evaluating proposals and source selection. In this environment, the federal Government needs a mechanism to ensure those acquisition contractors are not biased and do not have organizational conflicts of interest. Currently, the FAR has some coverage on conflicts of interest at Part 9.5 regarding recognizing and addressing such conflicts of interest through contractual clauses and restrictions on future work. This coverage, however, puts the entire burden on agency contracting officers; we believe it is appropriate to make contractors primarily responsible for screening for and preventing any such conflicts. This provision would more effectively deter contractors with conflicts from engaging in conduct that benefits a related entity or individual.

The Legislation Committee is considering proposing a contractor self- certification requirement to this effect.

**III. Proposal to Reinstate Audit Rights over Pricing Information in the GSA MAS Program**

**A. Language**

*Section 1.*

GSA will amend the GSAR, including the GSA Examination of Records Clause, within 180 days of enactment of this provision to provide for contractual post award audit authority for all Multiple Award Schedule contracts for a period of 2 years from final payment under each such contract. Such authority shall be for the purpose of checking

whether information offerors or vendors submit for negotiations purposes is accurate, current and complete. For purposes of applying this 2 year time period, each 5 year base or option period shall be considered a separate contract.

#### B. Explanation/justification

This proposal would amend the General Services Administration's acquisition regulation to reinstate the agency's authority to audit pricing information submitted to GSA contracting officers during negotiations in GSA and VA Multiple Award Schedule (MAS) contracts. These audit rights were removed by GSA in 1997 because they were ostensibly not a commercial practice and because GSA pledged to have more pre-award audits performed. Qui tam suits and recoveries, as well as hotline complaints received in recent years have provided evidence that defective pricing conduct exists and may even be increasing among MAS contractors. The MAS program is the premiere commercial items contracting program in the federal Government with sales of over \$35 billion in a recent fiscal year. The important deterrent effect of these audit rights needs to be reestablished.

#### **IV. Establishing a National Procurement Fraud Database**

To provide for the establishment of a national procurement fraud background check system (PICS---Procurement Inquiry Check System) to be utilized by Federal, State, and local procurement officials prior to the authorization of grant or contract actions using Federal funds.

#### Findings:

1. There is overlap between State and Federal suspension and debarment listings of contractors who have failed to perform satisfactorily or have committed frauds against a governmental entity under a procurement or non-procurement program.
2. Procurement fraud results in substantial losses for the taxpayers and those who receive program services.
3. Mobility permits fraudulent contractors and service providers to move between levels of government and across jurisdictions with little fear of detection since a national database does not exist.
4. National databases are commonly used by agencies to ensure public safety and to examine the compliance with licensing restrictions in areas such as the issuance of commercial drivers' licenses, firearms sales, and physician license suspensions.

#### Definitions:

1. Procurement fraud -- Procurement fraud includes, but is not limited to, cost/labor mischarging, defective pricing, defective parts, price fixing and bid rigging, and product substitution.

2. Background check -- A background check, for purposes of this Act, is the examination by a procurement official of the prior suspension or debarment history of contractors and grantees utilizing a national database containing such information.
3. Eligible contributors---To construct the national database to support the PICS, all governmental units engaging in procurement and non-procurement activities using Federal funds are eligible to contribute performance information, including suspensions and debarments, to the national repository at GSA.
4. Performance information---Performance information to be submitted to the PICS database includes identification information for the contractor or grantee (name, address, DUNS number) and detail on the nature of the fraud and the contingencies of the suspension or debarment including date of expiration.

### ***Title I. Establishment of the Procurement Inquiry Check System***

#### ***Section 1: Use of Federal Grant/Revenue-Sharing Funds to Build the National Database---1% Set-Aside***

All Federal grants or assistance programs, including Highway Trust Funds and Medicare funds, will be authorized to permit localities and units of government to set-aside up to 1% of program funds for the development and operation of contractor suspension and debarment programs and to facilitate national sharing of such performance information.

#### ***Section 2: Establishment of National Database***

GSA will develop and maintain the PICS database. GSA will promote the participation of all units of government at the Federal, State, and local levels and will provide for immediate on-line inquiries by authorized Federal, State, and local procurement officials.

### ***Title II. Definition of Procurement Fraud Offenses and Eligible Contributors***

The PICS will rely on the submitting agency's definition of suspension/debarment-eligible contractors and grantees. Offenses may involve civil and criminal instances of a failure to perform, provision of substandard services, use of substandard materials, misrepresentations of contractor capabilities or product quality, a lack of business integrity, and other relevant acts involving fraud, bribery, or public corruption in connection with procurement matters.

The Governor in each State receiving Federal grant or assistance funds will designate an official (the Procurement Official) responsible for the acquisition and compilation of listings of debarred and suspended contractors and who will ensure the timely submission and maintenance of listings from that State to the national database. In addition, the Procurement Official will authorize all users within the State to use the national database prior to procurement decisions.

### ***Title III. Administration of the National Database and Inquiry System***

#### ***Section 1: Administration***

GSA will designate an official (the Director) to implement and administer the PICS System. The Director will establish a steering committee composed of Federal, State, and local procurement officials to assist in securing the participation of governmental entities nationwide.

The Director will define the content of the records system and the means of access for both record importation and record checks. In addition, periodic reviews will be conducted by GSA to ensure the accuracy of the content in the database, particularly with respect to the end-dates of debarments and suspensions.

The Director will also work with Federal granting and assistance agencies to promote the use of the 1% set-aside among governmental units receiving Federal funds.

#### ***Section 2: Updating and Correcting Errors in Records***

The Director will require all States to provide an error correction procedure and will review and approve those proposed procedures.

The Director will provide a monthly listing of those suspended and debarred contractors supplied from a particular State back to the Procurement Official at the State level for verification of the currency of the suspension or debarment status. Contractors denied a contract by any unit of government on the basis of the background check, may request a review and correction of their record through the State Procurement Official.

### **V. Background Check Requirements for Contractors**

To provide for the establishment and maintenance of a Federal contractor personnel security and suitability program that provides for minimum background check requirements for contractor personnel prior to allowing access to Federally controlled facilities or sensitive information.

#### **Findings and Justifications**

1. There is a substantial need to protect Federal information and facilities from access by individuals with questionable backgrounds.
2. The Federal government has a significant interest in ensuring the integrity of individuals and entities with whom it intends to do business, including those who own, control, or manage entities seeking or performing Federal contracts.

3. Contract personnel, including Principals/owners and/or managers of contractors may present a risk or heightened concern to the Federal government by virtue of their access to federally controlled facilities and/or sensitive information or due to prior convictions or civil judgments having been rendered against them for: commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a Federal, state or local government contract or subcontract; violation of Federal or state antitrust statutes relating to the submission of offers; or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, or receiving stolen property; or other unsuitable conduct.
4. This Act supplements the security protection requirements of Homeland Security Presidential Directive (HSPD) 12 implementation guidance by requiring background checks for individuals who have “intermittent access” (rather than just “long-term access”) to federally controlled facilities or individuals who have access to sensitive Federal information (rather than just federally controlled “information systems”).
5. Recent private news agency articles have indicated there has been an enormous growth in the number of individuals performing services for the Federal government through private companies, as well as significant growth in outsourced expenditures. One such article reported that “[t]he number of private federal contractors has now risen to 7.5 million, which is four times greater than the federal workforce itself...” Similarly, another article published several years ago indicated that outsourcing was predicted to be one of the fastest-growing segments of the federal IT budget over the upcoming five years, according to a study by a research agency. The research agency forecasted federal IT outsourcing growth of 55 percent from \$11.7 billion in fiscal year 2004 to \$17.4 billion in fiscal year 2009.

These trends reported by private news agencies are supported by Federal government information. For example, on May 10, 2007, the United States Government Accountability Office (GAO) reported that “[o]ver the past decade, DOD has increasingly relied on contractors to provide a range of mission-critical services from operating information technology to providing logistical support on the battlefield. GAO stated further that “DOD’s obligations on service contracts, expressed in constant fiscal 2006 dollars, rose from \$85.1 billion in fiscal 1996 to more than \$151 billion in fiscal year 2006, a 78 percent increase.”

### ***Contractor Personnel Security and Suitability Program***

#### ***Section 1. Establishment and Maintenance of Contractor Personnel Security and Suitability Program***

- (a) Purpose. Each Federal agency shall establish and maintain a contractor personnel security and suitability program, in order to ensure the safety of “Federally controlled

facilities”, safeguarding of its information and to ensure the integrity of the individuals and entities with which it does business.

(b) Coverage. Contractor personnel covered hereunder shall include employees and principals of the contractor and its subcontractors involved in any capacity with the work to be performed under a Federal contract.

(c) Definitions.

1. “Principals” shall mean officers; directors; owners; partners; members of Limited Liability Companies; and, persons having primary management or supervisory responsibilities within a business entity (e.g., general manager; plant manager; head of a subsidiary, division, or business segment, and similar positions).
2. “Federal agency” means any agency as defined under section 551(1) of title 5, United States Code.
3. “Federally controlled facilities” shall mean:
  - Federally-owned buildings or leased space, whether for single or multi-tenant occupancy, and its grounds and approaches, all or any portion of which is under the jurisdiction, custody or control of a department or agency covered by this Program.
  - Federally controlled commercial space shared with non-government tenants. For example, if a department or agency leased the 10<sup>th</sup> floor of a commercial building, this Program applies to the 10<sup>th</sup> floor only.
  - Government-owned contractor-operated facilities, including laboratories engaged in national defense research and production activities.
  - Facilities under a management and operating contract. Such as for the operation, maintenance, or support of a Government-owned or -controlled research, development, special production, or testing establishment.

## *Section 2. Program Requirements*

(a) Sensitivity designations. Contractor personnel positions must be designated at a level of sensitivity that is commensurate with the responsibilities and other attributes (policy making, fiduciary, public contact or public trust) of the position, as well as risk associated with the position, e.g., whether the individual will have access to Federally controlled facilities, Federally controlled information systems, and sensitive information.

(b) Extensiveness of the background investigation. The extensiveness of background investigations shall be contingent upon the extent of the risk associated with the contractor personnel position.

(c) Presumption of risk. A presumed public trust level of moderate risk shall apply to all contractor personnel that access federally controlled facilities, or who have access to sensitive Federal information in connection with the performance of Federal contracts or who are principals of entities awarded such contracts.

(d) Information requirements and suitability determinations. Contractors shall be required to provide the information required by the government for background checks and shall agree to abide by government personnel security and suitability determinations.

(e) Minimum background investigation requirements. The following personnel security background investigative requirements shall apply for all contractor personnel who are designated at low risk (level 1/1c), moderate risk (level 5/5C) and high-risk (level 6/6c) public trust levels.

(1) A Special Agreement Check (SAC) investigation plus credit check and Social Security Number verification shall be initiated to satisfy the initial investigative requirements for contractor personnel designated at the low risk (level 1/1c), moderate risk (level 5/5C) and high-risk (level 6/6c) public trust levels.

(2) The minimum background investigation shall consist of items a. through g. below; a SAC investigation consisting of a fingerprint classification and a search of the investigative source checks in a-e below, along with a credit check and Social Security Number (SSN) verification check.

- (a) Security/Suitability Investigations Index (SII) and related previous Office of Personnel Management OPM files;
- (b) Federal Bureau of Investigation (FBI) fingerprint classification (FBI National Criminal History Fingerprint Check) and name check of FBI Identification files;
- (c) FBI Information Resource Management (IRM) files and name check at other than FBI headquarters;
- (d) Defense Clearance and Investigations Index (DCII) and any DOD file referenced in DCII;
- (e) Known terrorist database check(s);
- (f) Credit check;
- (g) Social Security Number (SSN) verification check.

(3) Required forms to be completed by contract personnel.

- (a) 2 completed forms FD-258, "Fingerprint Charts" (The contractor will absorb the costs for obtaining fingerprints.)
- (b) 1 completed GSA 176, "Statement of Personal History,"
- (c) 1 completed Optional Form 306, "Declaration for Federal Employment,"
- (d) 1 completed "Fair Credit Reporting Act (FCRA) authorization form\*," and

\* The FCRA, as amended on September 30, 1997, requires that the Government notify each applicant, employee, and contractor (in a document consisting solely of the notice) that a consumer report may be used for employment purposes. The applicant, employee, or contractor must authorize this use in writing before the Government obtains the consumer report. The FCRA also requires that, before taking adverse action relative to an employment decision based on a consumer report, the agency provide the consumer with a copy of the report, and a copy of the Federal Trade Commission's Consumer Rights Notice.

- (e) For a Non-U.S. citizen, documents establishing both employment authorization and identity.

(1) A document described in this subparagraph is an individual's—

- (i) United States passport;
- (ii) resident alien card, alien registration card, or other document designated by the Attorney General, if the document—

(I) contains a photograph of the individual and such other personal identifying information relating to the individual as the Attorney General finds, by regulation, sufficient for purposes of this subsection,

(II) is evidence of authorization of employment in the United States, and

(III) contains security features to make it resistant to tampering, counterfeiting, and fraudulent use.

(2) Documents evidencing employment authorization. A

document described in this subparagraph is an individual's—

(i) social security account number card (other than such a card which specifies on the face that the issuance of the card does not authorize employment in the United States); or

(ii) other documentation evidencing authorization of employment in the United States which the Attorney General finds, by regulation, to be acceptable for purposes of this section.

(3) Documents establishing identity of individual. A document described in this subparagraph is an individual's—

(i) driver's license or similar document issued for the purpose of identification by a State, if it contains a photograph of the individual or such other personal identifying information relating to the individual as the Attorney General finds, by regulation, sufficient for purposes of this section; or

(ii) in the case of individuals under 16 years of age or in a State which does not provide for issuance of an identification document (other than a driver's license) referred to in clause (i), documentation of personal identity of such other type as the Attorney General finds, by regulation, provides a reliable means of identification.

4. Authority to prohibit use of certain documents. If the Attorney General finds, by regulation, that any document described in subparagraph e.1., e.2. or e.3. as establishing employment authorization or identity does not reliably establish such authorization or identity or is being used fraudulently to an unacceptable degree, the Attorney General may prohibit or place conditions on its use for purposes of this subsection.

4. Form completion. Fingerprint Charts (Form FD-258) must be original stock forms and can only be obtained from the appropriate Project Officer or the Protective Security Suitability Program Officer (SPO).

*Section 3. Suitability Assessments.*

(a) Suitability factors: Suitability considerations based on the results of background investigations could include:

- Delinquency or misconduct in prior employment.
- Criminal, dishonest, infamous, or notoriously disgraceful conduct.
- The nature and seriousness of the conduct.
- When the conduct occurred.
- The applicant's or employee's age at the time of the conduct.
- The circumstances surrounding the conduct.
- Intentional false statement, deception, or fraud on application forms.
- Habitual use of intoxicating beverages to excess.
- Abuse of narcotics, drugs, or other controlled substances.
- Reasonable doubt as to the loyalty of the individual to the United States Government.
- The kind of position for which the person is applying or in which the person is employed.
- Contributing social and environmental conditions.
- The absence or presence of rehabilitation or efforts towards rehabilitation.

*Section 4. Existing Suitability Determinations/Programs*

- (a) Notwithstanding the minimum background check requirements contained herein, to the extent that background checks are being conducted within an Agency that meet or exceed the requirements for background checks contained herein, the requirements of this Program shall be satisfied. However, to the extent that an Agency's background checks are less in scope than the minimum requirements under this Program or do not cover the individuals or entities covered by this Program, Agencies shall supplement their programs to comply with the requirements contained herein.

*Section 5. Issuance of Identification*

- (a) Upon satisfactory completion of the background check requirements set forth

in Section 2(e), if no issues of concern are raised during the background check, identification documents shall be issued to the contract personnel consistent with the standards set forth in Federal Information Processing Standards Publication (FIPS PUB) 201-1 for Personal Identity Verification (PIV) of Federal Employees and Contractors.

- (b) A provisional ID shall be provided based on satisfactory results from completion of the National Agency Checks (NAC) set forth in Section 2(e)2.a.-e. with a provisional identity credential being issued if NAC results are not received within 5 business days, based on satisfactory results from the FBI National Criminal History Check. A final ID shall only be issued after satisfactory results from all background check requirements set forth in Section 2(e).