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Subpart 9.1 - Responsible Prospective Contractors

9.101 Definitions.

Administrative proceeding means a non-judicial process that is adjudicatory in nature in order to make a determination of fault or liability (e.g., Securities and Exchange Commission Administrative Proceedings, Civilian Board of Contract Appeals Proceedings, and Armed Services Board of Contract Appeals Proceedings). This includes administrative proceedings at the Federal and state level but only in connection with performance of a Federal contract or grant. It does not include agency actions such as contract audits, site visits, corrective plans, or inspection of deliverables.

9.102 Applicability.

(a) This subpart applies to all proposed contracts with any prospective contractor located—

(1) In the United States or its outlying areas; or

(2) Elsewhere, unless application of this subpart would be inconsistent with the laws or customs where the contractor is located.

(b) This subpart does not apply to proposed contracts with—

(1) Foreign, State, or local governments;

(2) Other U.S. Government agencies or their instrumentalities; or

(3) Agencies for people who are blind or severely disabled (see part 8).

9.103 Policy.

(a) Award contracts to responsible prospective contractors only.

(b) Do not award a contract award before making an affirmative determination of contractor responsibility. Without a clear indication of responsibility, make a determination of nonresponsibility. If the prospective contractor is a small business

concern, comply with the subpart, Certificates of Competency and Determinations of Responsibility, at part 19.

(c) A prospective contractor must affirmatively demonstrate its responsibility, including, when necessary, the responsibility of its proposed subcontractors.

9.104 Standards.

9.104-1 General standards.

To demonstrate responsibility, a prospective contractor must—

(a) Have adequate financial resources to perform the contract, or the ability to obtain them (see 9.104-3(a));

(b) Be able to comply with the required or proposed delivery or performance schedule, taking into consideration all existing commercial and governmental business commitments;

(c) Have a satisfactory performance record (see 9.104-3(b) and part 42). Do not determine a prospective contractor responsible or nonresponsible based solely on a lack of relevant performance history;

(d) Have a satisfactory record of integrity and business ethics (see part 42);

(e) Have the necessary organization, experience, accounting and operational controls, and technical skills, or the ability to obtain them (including, as appropriate, such elements as production control procedures, property control systems, quality assurance measures, and safety programs applicable to materials to be produced or services to be performed by the prospective contractor and subcontractors) (see 9.104-3(a));

(f) Have the necessary production, construction, and technical equipment and facilities, or the ability to obtain them (see 9.104-3(a)); and

(g) Be otherwise qualified and eligible to receive an award under applicable laws and regulations (see also inverted domestic corporation prohibition at 9.108).

9.104-2 [Reserved]

9.104-3 Application of standards.

(a) *Ability to obtain resources.* Except to the extent that a prospective contractor has sufficient resources or proposes to perform the contract by subcontracting, require evidence of the prospective contractor's ability to obtain required resources (see 9.104-1(a), (e), and (f)).

(b) *Satisfactory performance record.* Presume a prospective contractor is nonresponsible if it is or recently been deficient in contract performance, unless the circumstances were beyond the contractor's control, or the contractor has taken corrective action.

(c) (1) *Affiliated concerns.* Treat a prospective contractor's affiliated concerns as separate entities. However, consider the affiliate's past performance and integrity when these factors may adversely affect the prospective contractor's responsibility.

(2) *Joint ventures.* For a prospective contractor that is a joint venture, consider the past performance of the joint venture. If the joint venture lacks past performance, consider the past performance of each party to the joint venture.

(d) (1) *Small business concerns.* Upon determining a small business concern is nonresponsible, refer the matter to the Small Business Administration, which will decide whether to issue a Certificate of Competency (see part 19).

(2) *Limitations on subcontracting.* A small business that does not agree to or is unable to comply with the limitations on subcontracting may be nonresponsible (see 52.219-3, Notice of HUBZone Set-Aside or Sole-Source Award; 52.219-4, Notice of Price Evaluation Preference for HUBZone Small Business Concerns; 52.219-14, Limitations on Subcontracting; 52.219-27, Notice of Set-Aside for, or Sole-Source Award to, Service-Disabled Veteran-Owned Small Business (SDVOSB) Concerns Eligible Under the SDVOSB Program; 52.219-29, Notice of Set-Aside for, or Sole-Source Award to, Economically Disadvantaged Women-Owned Small Business Concerns; and 52.219-30, Notice of Set-Aside for, or Sole-Source Award to, Women-Owned Small Business Concerns Eligible Under the Women-Owned Small Business Program).

9.104-4 Subcontractor responsibility.

(a) Generally, prospective prime contractors are responsible for determining the responsibility of their prospective subcontractors (but see 9.405 and 9.405-2 regarding

debarred, ineligible, or suspended firms). Determinations of prospective subcontractor responsibility may affect determination of the prospective prime contractor's responsibility. Require a prospective contractor to provide written evidence of a proposed subcontractor's responsibility, as necessary to determine responsibility.

(b) When in the Government's interest, the contracting officer may directly determine a prospective subcontractor's responsibility (e.g., when the prospective contract involves medical supplies, urgent requirements, or substantial subcontracting). Apply the same standards for prime contractor responsibility to determine subcontractor responsibility.

9.104-5 Representation and certifications regarding responsibility matters.

(a) When an offeror provides an affirmative response in paragraph (a)(1) of the provision at 52.209-5, Certification Regarding Responsibility Matters, or paragraph (h) of provision 52.212-3—

(1) Promptly, upon receipt of offers, request the offeror submit additional information to demonstrate the offeror's responsibility to the contracting officer (but see 9.405); and

(2) Notify, prior to proceeding with award, in accordance with agency procedures (see 9.406-3(a) and 9.407-3(a)), the agency official responsible for initiating debarment or suspension action, where an offeror indicates the existence of an indictment, charge, conviction, or civil judgment, or Federal tax delinquency in an amount that exceeds \$15,000.

(b) The provision at 52.209-11, Representation by Corporations Regarding Delinquent Tax Liability or a Felony Conviction under any Federal Law, implements sections 744 and 745 of Division E of the Consolidated and Further Continuing Appropriations Act, 2015 (Pub. L. 113-235) (and similar provisions in subsequent appropriations acts). When an offeror provides an affirmative response in paragraph (b)(1) or (2) of the provision at 52.209-11 or paragraph (q)(2)(i) or (ii) of provision 52.212-3—

(1) Promptly, upon receipt of offers, request the offeror submit additional information to demonstrate the offeror's responsibility to the contracting officer (but see 9.405);

(2) Notify, in accordance with agency procedures (see 9.406-3(a) and 9.407-3(a)), the agency official responsible for initiating debarment or suspension action; and

(3) Not award to the offeror unless an agency suspending and debarring official has considered suspension or debarment of the corporation and made a determination that suspension or debarment is not necessary to protect the interests of the Government.

(c) If the provision at 52.209-12, Certification Regarding Tax Matters, is applicable (see 9.104-7(e)), do not award any contract in an amount greater than \$7 million, unless the offeror affirmatively certified in its offer, as required by paragraph (b)(1), (2), and (3) of the provision.

(d) Give offerors who do not furnish the representation or certifications or other requested information an opportunity to remedy the deficiency. Failure to furnish the representation or certifications or other requested information may render the offeror nonresponsible.

9.104-6 Federal Awardee Performance and Integrity Information System.

(a) (1) Before awarding a contract exceeding the simplified acquisition threshold, review the performance and integrity information available in the Federal Awardee Performance and Integrity Information System (FAPIS), (available at <https://www.cpars.gov>, including FAPIS information from the System for Award Management (SAM) Exclusions and the Contractor Performance Assessment Reporting System (CPARS).

(2) FAPIS also identifies—

(i) An affiliate that is an immediate owner or subsidiary of the offeror, if any; and

(ii) All predecessors of the offeror that held a Federal contract or grant within the last three years.

(b) (1) When making a responsibility determination, consider all the information available through FAPIS regarding the offeror and any immediate owner, predecessor, or subsidiary identified for that offeror in FAPIS, as well as other past performance information on the offeror (see part 42).

(2) For evaluation of information available through FAPIIS relating to an affiliate of the offeror, see 9.104-3(c).

(3) For source selection evaluations of past performance, see 15.305(a)(2). Use sound judgment in determining the weight and relevance of the information contained in FAPIIS and how it relates to the present acquisition.

(4) Since FAPIIS may contain information on any of the offeror's previous contracts and information covering a 5-year period, some of that information might be irrelevant to a determination of present responsibility. For example, a prior administrative action such as debarment, suspension, voluntary exclusion, or administrative agreement, that has expired or otherwise been resolved, or information relating to contracts for completely different products or services, might be irrelevant.

(5) Because FAPIIS is a database that provides information about prime contractors, the contracting officer posts information about a subcontractor, such as trafficking in persons violations, to the record of the prime contractor (see 42.1503(h)(1)(v)). The prime contractor may post in FAPIIS any mitigating factors. Consider any mitigating factors posted in FAPIIS by the prime contractor, such as degree of compliance by the prime contractor with the terms of FAR clause 52.222-50.

(c) Upon obtaining relevant information from FAPIIS regarding criminal, civil, or administrative proceedings in connection with the award or performance of a Government contract; terminations for default or cause; determinations of nonresponsibility because the contractor does not have a satisfactory performance record or a satisfactory record of integrity and business ethics; or comparable information relating to a grant, unless the contractor has already been debarred, suspended, or has agreed to a voluntary exclusion—

(1) Promptly request from the offeror additional information to demonstrate the offeror's responsibility (but see 9.405); and

(2) Notify, prior to proceeding with award, in accordance with agency procedures (see 9.406-3(a) and 9.407-3(a)), the agency official responsible for initiating debarment or suspension action, if the information appears appropriate for the official's consideration.

(d) Document the contract file for each contract exceeding the simplified acquisition threshold to indicate how the information in FAPIIS was considered in any responsibility determination, as well as the action that was taken as a result of the information. Document nonresponsibility determinations in FAPIIS in accordance with 9.105-2 (b)(2).

9.104-7 Solicitation provisions and contract clauses.

(a) Insert the provision at 52.209-5, Certification Regarding Responsibility Matters, in solicitations where the contract value is expected to exceed the simplified acquisition threshold.

(b) Insert the provision at 52.209-7, Information Regarding Responsibility Matters, in solicitations where the resultant contract value is expected to exceed \$750,000.

(c) Insert the clause at 52.209-9, Updates of Publicly Available Information Regarding Responsibility Matters—

(1) In solicitations where the resultant contract value is expected to exceed \$750,000; and

(2) In contracts in which the offeror checked “has” in paragraph (b) of the provision at 52.209-7.

(d) Insert the provision at 52.209-11, Representation by Corporations Regarding Delinquent Tax Liability or a Felony Conviction under any Federal Law, in all solicitations.

(e) For agencies receiving funds subject to section 523 of Division B of the Consolidated and Further Continuing Appropriations Act, 2015 (Pub. L. 113-235) and similar provisions in subsequent appropriations acts, insert the provision at 52.209-12, Certification Regarding Tax Matters, in solicitations where the resultant contract value (including options) might exceed \$7 million.

9.105 Procedures.

9.105-1 Obtaining information.

(a) Before determining responsibility, obtain information establishing that a prospective contractor currently meets the standards in 9.104.

(b) (1) Generally, obtain information regarding responsibility promptly after a bid opening or receipt of offers.

(2) For negotiated contracting, especially for research and development, consider obtaining information regarding responsibility before issuing the request for proposals. Limit such requests to information concerning the low bidder or those offerors in range for award.

(3) To the extent feasible, obtain or update information regarding financial resources and performance capability up to the date of award.

(c) When determining responsibility, consider information available through FAPIIS (see 9.104-6) regarding the offeror and any immediate owner, predecessor, or subsidiary identified for that offeror in FAPIIS. This includes information linked to FAPIIS such as from SAM, and CPARS, as well as any other relevant past performance information on the offeror (see 9.104-1(c) and part 42). In addition, consider using the following sources of information to support such determinations:

(1) Records and experience data, including verifiable knowledge of personnel within the contracting office, audit offices, contract administration offices, and other contracting offices.

(2) The prospective contractor, including bid or proposal information (including the certification at 52.209-5 or 52.212-3(h) (see 9.104-5)), questionnaire replies, financial data, information on production equipment, and personnel information.

(3) Commercial sources of supplier information of a type offered to buyers in the private sector.

(4) Other sources, such as publications; suppliers, subcontractors, and customers of the prospective contractor; financial institutions; Government agencies; and business and trade associations.

(d) Contracting offices and cognizant contract administration offices that become aware of circumstances casting doubt on a contractor's ability to perform contracts successfully must promptly exchange relevant information.

9.105-2 Determinations and documentation.

(a) Determinations.

(1) The contracting officer's signing of a contract constitutes a determination that the prospective contractor is responsible with respect to that contract. Upon rejecting an offer that would otherwise generate an award because the prospective contractor is nonresponsible, sign a determination of nonresponsibility, stating the grounds for nonresponsibility.

(2) If the contracting officer determines that a responsive small business lacks certain elements of responsibility, comply with the procedures in part 19. If, in response, the Small Business Administration issues a Certificate of Competency for the small business concern (see part 19), award the contract to the concern.

(b) Support documentation.

(1) Include in the contract file documents and reports supporting a determination of responsibility or nonresponsibility, including the use of FAPIIS information (see 9.104-6) and any applicable Certificate of Competency.

(2) (i) Document the determination of nonresponsibility in FAPIIS (available at <https://www.cpars.gov>) if—

(A) The contract is valued at more than the simplified acquisition threshold;

(B) The determination of nonresponsibility is based on lack of satisfactory performance record or satisfactory record of integrity and business ethics; and

(C) The Small Business Administration does not issue a Certificate of Competency.

(ii) Submit documentation regarding the nonresponsibility determination within three working days of making the determination.

(iii) All information posted in FAPIIS on or after April 15, 2011, except past performance reviews, will be publicly available (see section 3010 of Pub. L. 111-212). FAPIIS consists of two segments—

(A) The non-public segment, into which Government officials and contractors post information, which can only be viewed by—

(1) Government personnel and authorized users performing business on behalf of the Government; or

(2) An offeror or contractor, when viewing data on itself;
and

(B) The publicly-available segment, to which all data in the non-public segment of FAPIIS is automatically transferred after a waiting period of 14 calendar days, except for—

(1) Past performance reviews required by part 42;

(2) Information that was entered prior to April 15, 2011;

or

(3) Information that is withdrawn during the 14-calendar-day waiting period by the Government official who posted it in accordance with paragraph (b)(2)(iv) of this section.

(iv) Do not post any information in the non-public segment of FAPIIS covered by a disclosure exemption under the Freedom of Information Act. If the contractor asserts within 7 calendar days, to the Government official who posted the information, that some of the information posted to the non-public segment of FAPIIS is covered by a disclosure exemption under the Freedom of Information Act, the Government official who posted the information must, within 7 calendar days, remove the posting from FAPIIS. Resolve the issue in accordance with agency Freedom of Information Act procedures prior to reposting the releasable information.

9.105-3 Disclosure of preaward information.

Except as provided in part 24 concerning the Freedom of Information Act, do not release or disclose outside the Government information gathered for purposes of determining the responsibility of a prospective contractor.

9.106 [Reserved]

9.107 [Reserved]

9.108 Prohibition on contracting with inverted domestic corporations.

9.108-1 Definitions.

As used in this section-

Inverted domestic corporation means a foreign incorporated entity that meets the definition of an inverted domestic corporation under 6 U.S.C. 395(b), applied in accordance with the rules and definitions of 6 U.S.C. 395(c).

Subsidiary means an entity in which more than 50 percent of the entity is owned—

- (1) Directly by a parent corporation; or
- (2) Through another subsidiary of a parent corporation.

9.108-2 Authority.

Section 9.108 implements section 745 of Division D of the Consolidated Appropriations Act, 2008 (Pub. L. 110-161) and its successor provisions in subsequent appropriations acts (and as extended in continuing resolutions).

9.108-3 Prohibition.

(a) Do not use appropriated funds, or funds otherwise made available, for contracts with either an inverted domestic corporation, or a subsidiary of such a corporation, except as provided in paragraph (b) of this section and in 9.108-5, Waiver.

(b) This prohibition does not apply to any contract entered into before December 26, 2007, or to any task order issued pursuant to such a contract.

(c) Consult with legal counsel if, during the performance of a contract, a contractor becomes an inverted domestic corporation or a subsidiary of one.

9.108-4 Representation by the offeror.

(a) To be eligible for contract award, an offeror must represent that it is neither an inverted domestic corporation, nor a subsidiary of an inverted domestic corporation. Any offeror that cannot so represent is ineligible for award of a contract, unless waived in accordance with the procedures at 9.108-5.

(b) The contracting officer may rely on an offeror's representation that it is not an inverted domestic corporation unless reason exists to question the representation.

9.108-5 Waiver.

An agency head may waive the prohibition in subsection 9.108-3 and the requirement of subsection 9.108-4 for a specific contract if the agency head determines in writing that the waiver is required in the interest of national security and reports the waiver issuance to Congress.

9.108-6 Solicitation provision and contract clause.

(a) Include the provision at 52.209-2, Prohibition on Contracting with Inverted Domestic Corporations—Representation, in each solicitation for the acquisition of products or services (including construction).

(b) Include the clause at 52.209-10, Prohibition on Contracting with Inverted Domestic Corporations, in each solicitation and contract for the acquisition of products or services (including construction).

9.109 Prohibition on contracting with an entity involved in activities that violate arms control treaties or agreements with the United States.

9.109-1 Authority.

This section implements [22 U.S.C. 2593e](#).

9.109-2 Prohibition.

Do not award, renew, or extend a contract with an entity identified as excluded in the System for Award Management, specifically for this subpart, based on involvement in activities that violate arms control treaties or agreements with the United States.

9.109-3 Exception.

The prohibition in 9.109-2 does not apply to contracts for the procurement of products or services along a major route of supply to a zone of active combat or major contingency operation, as specified in statute or by the cognizant Combatant Commander, in consultation with the Chief of Mission. As of May 10, 2018, countries along the major route of supply to support operations in Afghanistan are Afghanistan, Georgia, the Kyrgyz

Republic, Pakistan, the Republic of Armenia, the Republic of Azerbaijan, the Republic of Kazakhstan, the Republic of Tajikistan, the Republic of Uzbekistan, and Turkmenistan.

9.109-4 Certification by the offeror.

(a) To be eligible for contract award, an offeror must—

(1) Certify that it does not engage and has not engaged in any activity that contributed to or was a significant factor in the President's or Secretary of State's determination that a foreign country is—

(i) In violation of its obligations undertaken in any arms control, nonproliferation, or disarmament agreement to which the United States is a party; or

(ii) Not adhering to its arms control, nonproliferation, or disarmament commitments in which the United States is a participating state; and

(2) Similarly certify regarding any entity owned or controlled by the offeror; or

(3) Provide with its offer information that the President of the United States has—

(i) Waived application under [22 U.S.C. 2593e\(d\)](#) or (e); or

(ii) Determined under [22 U.S.C. 2593e\(g\)\(2\)](#) that the entity has ceased all activities for which measures were imposed under [22 U.S.C. 2593e\(b\)](#).

(b) If certifying in accordance with 52.209-13(b)(1), the Offeror is required to submit the certification with the offer. It is not included in the annual representations and certifications in the System for Award Management.

(c) The contracting officer may rely on an offeror's certification unless reason exists to question the certification.

(d) Upon the determination of a false certification under 52.209-13, an offeror will be subject to such remedies as suspension or debarment under subpart 9.4, or termination of any contract resulting from the false certification. Debarments pursued as a remedy under subpart 9.4 are for a period of not less than 2 years, inclusive of any suspension period, if suspension precedes a debarment (see 9.406-4(a)(1)(iii) and (a)(2)).

(e) The determinations referenced in 9.109-4(a)(1) are described in the most recent unclassified annual report provided to Congress pursuant to section 403 of the Arms Control and Disarmament Act (22 U.S.C. 2593a). The report is available at <https://www.state.gov/bureaus-offices/under-secretary-for-arms-control-...>;

9.109-5 Solicitation provision.

Unless the exception at 9.109-3 applies, include the provision at 52.209-13, Violation of Arms Control Treaties or Agreements—Certification, in each solicitation for the acquisition of products or services (including construction) that exceeds the simplified acquisition threshold, other than solicitations for the acquisition of commercial products or commercial services.

9.110 Reserve Officer Training Corps and military recruiting on campus.

9.110-1 Definitions.

As used in this section—

Covered agency means—

- (1) The Department of Defense;
- (2) Any department or agency for which regular appropriations are made in a Department of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act;
- (3) The Department of Homeland Security;
- (4) The National Nuclear Security Administration of the Department of Energy;
- (5) The Department of Transportation; or
- (6) The Central Intelligence Agency.

Institution of higher education means an institution that meets the requirements of [20 U.S.C. 1001](#) and includes all sub-elements of such an institution.

9.110-2 Authority

This section implements [10 U.S.C. 983](#).

9.110-3 Policy.

(a) Except as provided in paragraph (b) of this section, 10 U.S.C. 983 prohibits a covered agency from providing funds by contract to an institution of higher education if the Secretary of Defense determines that the institution has a policy or practice that prohibits or in effect prevents—

(1) The Secretary of a military department from maintaining, establishing, or operating a unit of the Senior Reserve Officer Training Corps (ROTC) at that institution;

(2) A student at that institution from enrolling in a unit of the Senior ROTC at another institution of higher education;

(3) The Secretary of a military department or the Secretary of Homeland Security from gaining access to campuses, or access to students (who are 17 years of age or older) on campuses, for purposes of military recruiting in a manner that is at least equal in quality and scope to the access to campuses and to students that is provided to any other employer; or

(4) Military recruiters from accessing certain information pertaining to students (who are 17 years of age or older) enrolled at that institution:

(i) Name, address, and telephone listings.

(ii) Date and place of birth, educational level, academic majors, degrees received, and the most recent educational institution enrolled in by the student.

(b) The prohibition in paragraph (a) of this section does not apply to an institution of higher education if the Secretary of Defense determines that—

(1) The institution has ceased the policy or practice described in paragraph (a) of this section; or

(2) The institution has a long-standing policy of pacifism based on historical religious affiliation.

9.110-4 Procedures.

(a) If the Secretary of Defense determines, pursuant to the procedures at 32 CFR part 216, that an institution of higher education is ineligible to receive funds from a covered

agency because of a policy or practice described in 9.110-3, then the Secretary of Defense will create an active exclusion record for the institution in the System for Award Management.

(b) Upon a determination described in paragraph (a), a covered agency must not solicit offers from, award contracts to, or consent to subcontracts with the institution. This prohibition does not apply to acquisitions at or below the simplified acquisition threshold or to acquisitions of commercial products and commercial services, including commercially available off-the-shelf items.

9.110-5 Contract clause.

Insert the clause at 52.209-14, Reserve Officer Training Corps and Military Recruiting on Campus, in solicitations and contracts expected to exceed the simplified acquisition threshold, with institutions of higher education, when using funds from a covered agency. Do not insert the clause in solicitations and contracts using part 12 for the acquisition of commercial products and commercial services.

Subpart 9.2 - Qualifications Requirements

9.200 Scope of subpart.

This subpart implements [10 U.S.C. 3243](#) and [41 U.S.C.3311](#).

9.201 Definitions.

As used in this subpart-

Qualified bidders list (QBL) means a list of bidders who have had their products examined and tested and who have satisfied all applicable qualification requirements for that product or have otherwise satisfied all applicable qualification requirements.

Qualified manufacturers list (QML) means a list of manufacturers who have had their products examined and tested and who have satisfied all applicable qualification requirements for that product.

9.202 Policy.

- (a) (1) Before establishing a qualification requirement, the head of the agency must prepare a written justification—

(i) Stating the necessity for the qualification requirement and specifying why the qualification requirement must be demonstrated before contract award;

(ii) Estimating the likely costs for testing and evaluation which will be incurred by the potential offeror to become qualified; and

(iii) Specifying all requirements that a potential offeror (or its product) must satisfy to become qualified.

(2) Specify only the least restrictive qualification requirements necessary to meet agency purposes.

(3) Upon request, provide potential offerors—

(i) All requirements that they or their products must satisfy to become qualified; and

(ii) At their expense (but see 9.204(a)(2) with regard to small businesses), a prompt opportunity to demonstrate their abilities to meet the standards specified for qualification using qualified personnel and facilities of the agency concerned, or of another agency obtained through interagency agreements or under contract, or other methods approved by the agency (including use of approved testing and evaluation services not provided under contract to the agency).

(4) If the services in (a)(3)(ii) of this section are under contract, select only those contractors to provide testing and evaluation services that are—

(i) Not expected to benefit from an absence of additional qualified sources; and

(ii) Required by their contracts to adhere to any restriction on technical data asserted by the potential offeror seeking qualification.

(5) Promptly inform a potential offeror seeking qualification whether it attained qualification and, in the event it has not, promptly furnish them specific reasons why it did attain qualification.

(b) (1) When justified under the circumstances, the agency activity responsible for establishing a qualification requirement must submit to the advocate for competition for the procuring activity responsible for purchasing the item subject to

the qualification requirement, a determination that specifying a qualification requirement is unreasonable.

(2) After considering any comments from the advocate for competition reviewing the determination, the head of the procuring activity may waive the requirements of 9.202(a)(1)(ii) through (5) of this section for up to 2 years with respect to the item subject to the qualification requirement. The waiver authority provided in this paragraph does not apply with respect to qualification requirements contained in a QPL, QML, or QBL.

(3) The head of the procuring activity must furnish a copy of the waiver to the head of the agency or other official responsible for actions under paragraph (a)(1) of this section).

(c) If a potential offeror can demonstrate to the satisfaction of the contracting officer that the potential offeror (or its product) meets qualification standards, or can meet them before the date specified for award of the contract, do not deny the potential offeror the opportunity to submit and have considered an offer for a contract solely because the potential offeror—

(1) Is not on a QPL, QML, or QBL maintained by the Department of Defense (DoD) or the National Aeronautics and Space Administration (NASA); or

(2) Has not been identified as meeting a qualification requirement established after October 19, 1984, by DoD or NASA; or

(3) Has not been identified as meeting a qualification requirement established by a civilian agency (not including NASA).

(d) The procedures in part 19 for referring matters to the Small Business Administration are not mandatory on the contracting officer when the basis for a referral would involve a challenge by the offeror to either the validity of the qualification requirement or the offeror's compliance with such requirement.

(e) The contracting officer need not delay a proposed award to provide a potential offeror with an opportunity to demonstrate its ability to meet qualification standards. In addition, when approved by the head of an agency or designee, a procurement need not be delayed in order to comply with paragraph (a) of this section.

(f) Within 7 years following enforcement of a QPL, QML, or QBL by DoD or NASA, or within 7 years after any qualification requirement was originally established by a civilian

agency other than NASA, the qualification requirement must be examined and revalidated in accordance with the requirements of paragraph (a) of this section. For DoD and NASA, qualification requirements, other than QPL's, QML's, and QBL's, must be examined and revalidated within 7 years after establishment of the requirement under paragraph (a) of this section. Any periods for which a waiver under paragraph (b) of this section is in effect must be excluded in computing the 7 years within which review and revalidation must occur.

9.203 QPL's, QML's, and QBL's.

(a) Qualification and listing in a QPL, QML, or QBL is the process by which products are obtained from manufacturers or distributors, examined and tested for compliance with specification requirements, or manufacturers or potential offerors, are provided an opportunity to demonstrate their abilities to meet the standards specified for qualification. The names of successful products, manufacturers, or potential offerors are included on lists evidencing their status. Generally, qualification is performed in advance and independently of any specific acquisition action. After qualification, the products, manufacturers, or potential offerors are included in a Federal or Military QPL, QML, or QBL. (See 9.202(a)(2) regarding any product, manufacturer, or potential offeror not yet included on an applicable list.)

(b) Specifications requiring a qualified product are included—

(1) In the General Services Administration Index of Federal Specifications, Standards and Commercial Item Descriptions; and

(2) On the Department of Defense Acquisition Streamlining and Standardization Information System (ASSIST) website at <https://assist.dla.mil>.

(c) Instructions concerning qualification procedures are included in the following publications:

(1) Federal Standardization Manual, FSPM-0001.

(2) Department of Defense Manual 4120.24, Defense Standardization Program (DSP) Procedures, (www.esd.whs.mil/Directives/Issuances/dodm) as amended by Military Standards 961 and 962 (<https://assist.dla.mil>).

(d) The publications in paragraphs (b)(1) and (c)(1) of this section may be obtained from the address in 11.201(d)(1).

9.204 Responsibilities when establishing qualification requirements.

(a) *Arranging publicity.* If active competition on anticipated future qualification requirements is likely to be fewer than two manufacturers or the products of two manufacturers, the activity responsible for establishment of the qualification requirements must—

(1) Periodically furnish through the Governmentwide point of entry (GPE) a notice seeking additional sources or products for qualification unless the contracting officer determines that such publication would compromise the national security.

(2) Bear the cost of conducting the specified testing and evaluation (excluding the costs associated with producing the item or establishing the production, quality control, or other system to be tested and evaluated) for a small business concern or a product manufactured by a small business concern which has met the standards specified for qualification and which could reasonably be expected to compete for a contract for that requirement. However, such costs may be borne only upon a determination in accordance with agency procedures that such additional qualified sources or products are likely to result in cost savings from increased competition for future requirements sufficient to amortize the costs incurred by the agency within a reasonable period, considering the duration and dollar value of anticipated future requirements. A prospective contractor requesting the United States to bear testing and evaluation costs must certify as to its status as a small business concern under section 3 of the Small Business Act in order to receive further consideration.

(b) *Other responsibilities when establishing qualification requirements.*

(1) Qualifying products that meet specification requirements.

(2) Listing manufacturers and suppliers whose products are qualified in accordance with agency procedures.

(3) Furnishing QPL's, OML's, or QBL's or the qualification requirements themselves to prospective offerors and the public upon request (see 9.202(a)(2)(i)).

(4) Clarifying, as necessary, qualification requirements.

(5) In appropriate cases, when requested by the contracting officer, providing concurrence in a decision not to enforce a qualification requirement for a solicitation.

(6) Withdrawing or omitting qualification of a listed product, manufacturer or offeror, as necessary.

(7) Advising persons that furnished any list of products, manufacturers or offerors meeting a qualification requirement and suppliers whose products are on any such list that—

(i) The list does not constitute endorsement of the product, manufacturer, or other source by the Government;

(ii) The products or sources listed have been qualified under the latest applicable specification;

(iii) The list may be amended without notice;

(iv) The listing of a product or source does not release the supplier from compliance with the specification; and

(v) Use of the list for advertising or publicity is permitted. However, the list must not state or imply that a particular product or source is the only product or source of that type qualified, or that the Government in any way recommends or endorses the products or the sources listed.

(8) Reexamining a qualified product or manufacturer when-

(i) The manufacturer has modified its product, or changed the material or the processing sufficiently so that the validity of previous qualification is questionable;

(ii) The requirements in the specification have been amended or revised sufficiently to affect the character of the product; or

(iii) Circumstances require confirmation that the product conforms with the specification.

9.205 Opportunity for qualification before award.

(a) If an agency determines that a qualification requirement is necessary, the agency activity responsible for establishing the requirement must—

(1) Urge manufacturers and other potential sources to demonstrate their ability to meet the standards specified for qualification;

(2) When possible, give sufficient time to arrange for qualification before award; and

(3) Before establishing any qualification requirement, furnish notice through the GPE. The notice must include—

(i) A statement of the intent to establish a qualification requirement;

(ii) The specification number and name of the product;

(iii) The name and address of the activity to which to submit a request for the information and opportunity;

(iv) The anticipated date that the agency will begin awarding contracts subject to the qualification requirement;

(v) A precautionary notice that when a product is submitted for qualification testing, the applicant must furnish any specific information that may be requested of the manufacturer before testing will begin; and

(vi) The approximate time period following submission of a product for qualification testing within which the applicant will be notified whether the product passed or failed the qualification testing (see 9.202(a)(5)).

(b) The activity responsible for establishing a qualification requirement must keep any list maintained of those already qualified open for inclusion of additional products, manufacturers, or other potential sources.

9.206 Acquisitions subject to qualification requirements.

9.206-1 General.

(a) Do not enforce any QPL, QML, or QBL without first complying with the requirements of 9.202(a). However, qualification requirements themselves, whether or not previously embodied in a QPL, QML, or QBL, in either of the following categories are enforceable:

(1) Any qualification requirement established by statute prior to October 30, 1984, for civilian agencies (not including NASA).

(2) Any qualification requirement established by statute or administrative action prior to October 19, 1984, for DOD or NASA. Qualification requirements established after the above dates must comply with 9.202(a) to be enforceable.

(b) Except when the agency head determines that an emergency exists, whenever an agency elects not to enforce a qualification requirement, the agency may not thereafter enforce that qualification requirement unless the agency complies with 9.202(a).

(c) If a qualification requirement applies, consider only those offers identified as meeting the requirement or included on the applicable QPL, QML, or QBL, unless an offeror can satisfactorily demonstrate that it or its product, or its subcontractor or its product, can meet the qualification standards before the date specified for award.

(d) If a component of an end item is subject to a qualification requirement, assure that all such components and their qualification requirements are properly identified in the solicitation.

(e) In acquisitions subject to qualification requirements, take the following steps:

(1) Use presolicitation notices as appropriate to advise potential suppliers before issuing solicitations involving qualification requirements. The notices must identify the specification containing the qualification requirement and establish an allowable time period, consistent with delivery requirements, for prospective offerors to demonstrate their abilities to meet the qualification standards.

(2) Distribute solicitations to prospective contractors whether or not they have been identified as meeting applicable qualification requirements.

(3) When appropriate, request in accordance with agency procedures that a qualification requirement not be enforced in a particular acquisition and, if granted, so specify in the solicitation (see 9.206-1(b)).

(4) Forward requests from potential suppliers for information on a qualification requirement to the agency activity responsible for establishing the requirement.

(5) Allow the maximum time, consistent with delivery requirements, between issuing the solicitation and the contract award. As a minimum, comply with the time frames specified in part 5 when applicable.

9.206-2 Contract clause.

Insert the clause at 52.209-1, Qualification Requirements, in solicitations and contracts when the acquisition is subject to a qualification requirement.

9.206-3 Competition.

(a) *Presolicitation.* If a qualification requirement applies to an acquisition, review the applicable QPL, QML, or QBL or other identification of those sources meeting the requirement before issuing a solicitation to ascertain whether the number of sources is adequate for competition. If the number of sources is inadequate, request the agency activity which established the requirement to—

(1) Indicate the anticipated date on which any sources presently undergoing evaluation will have demonstrated their abilities to meet the qualification to allow for rescheduling; or

(2) Indicate whether a means other than the qualification requirement is feasible for testing or demonstrating quality assurance.

(b) *Postsolicitation.* Submit to the agency activity that established the qualification requirement the names and addresses of concerns that expressed interest in the acquisition but are not included on the applicable QPL, QML, or QBL or identified as meeting the qualification requirement. The activity will then assist interested concerns in meeting the standards specified for qualification (see 9.202(a)(3) and (5)).

9.207 Changes in status regarding qualification requirements.

(a) Promptly report to the agency activity that established the qualification requirement any conditions meriting removal or omission from a QPL, QML, or QBL or that affect whether a source should continue as identified as meeting the requirement. These conditions exist when—

(1) Products or services are submitted for inspection or acceptance that do not meet the qualification requirement;

(2) Products or services were previously rejected and the defects were not corrected when resubmitted for inspection or acceptance;

(3) A supplier fails to request reevaluation following change of location or ownership of the plant where the product which met the qualification requirement was manufactured (see the clause at 52.209-1, Qualification Requirements);

(4) A manufacturer of a product which met the qualification requirement has discontinued manufacture of the product;

(5) A source requests removal from a QPL, QML, or QBL;

(6) A condition of meeting the qualification requirement was violated; e.g., advertising or publicity contrary to 9.204(b)(7)(v);

(7) A revised specification imposes a new qualification requirement;

(8) Manufacturing or design changes have been incorporated in the qualification requirement;

(9) The source is listed in the System for Award Management Exclusions (see subpart 9.4); or

(10) Performance of a contract subject to a qualification requirement is otherwise unsatisfactory.

(b) After considering these or other conditions related to whether a product or source continues to meet the standards specified for qualification, an agency may take appropriate action without advance notification. The agency must, however, promptly notify the affected parties if a product or source is removed from a QPL, QML, or QBL, or will no longer be identified as meeting the standards specified for qualification. This notice must contain specific information why the product or source no longer meets the qualification requirement.

Subpart 9.3 - First Article Testing and Approval

9.301 Definition.

As used in this subpart—

Approval means the contracting officer's written notification to the contractor accepting the test results of the first article.

9.302 General.

First article testing and approval (testing and approval) ensures that the contractor can furnish a product conforming to all contract requirements for acceptance. Before requiring testing and approval, consider the—

- (a) Impact on cost or time of delivery;
- (b) Risk to the Government of foregoing such test; and
- (c) Availability of other, less costly, methods of ensuring the desired quality.

9.303 Use.

Testing and approval may be appropriate when-

- (a) The contractor has not previously furnished the product to the Government;
- (b) The contractor previously furnished the product to the Government, but-
 - (1) Subsequent changes in processes or specifications have occurred;
 - (2) Production has been discontinued for an extended period of time; or
 - (3) The product acquired under a previous contract developed a problem during its life.
- (c) The product is described by a performance specification; or
- (d) An approved first article is essential to serve as a manufacturing standard.

9.304 Exceptions.

Normally, do not require testing and approval in contracts for—

- (a) Research or development;
- (b) Products requiring qualification before award (e.g., when an applicable qualified products list exists (see subpart 9.2));
- (c) Products normally sold in the commercial market; or
- (d) Products covered by complete and detailed technical specifications, unless the requirements are so novel or exacting that the products might not meet the requirements without testing and approval.

9.305 Risk.

(a) To minimize contractor risk, provide sufficient time in the delivery schedule for acquisition of materials and components as well as for production after receipt of first article approval.

(b) Notwithstanding paragraph (a), the contracting officer may, before approval of the first article, authorize the contractor to acquire specific materials or components or commence production to the extent necessary to meet the delivery schedule (see Alternate II of the clause at 52.209-3, First Article Approval—Contractor Testing, and Alternate II of the clause at 52.209-4, First Article Approval—Government Testing. Costs incurred based on this authorization are allocable to the contract for—

(1) Progress payments; and

(2) Termination settlements if the contract is terminated for the convenience of the Government.

9.306 Solicitation requirements.

Solicitations including a testing and approval requirement must—

(a) Provide, where the contractor is responsible for the first article approval testing—

(1) The performance or other characteristics that the first article must meet for approval;

(2) The detailed technical requirements for the tests necessary for approval;
and

(3) The data the contractor must submit in the first article approval test report;

(b) Provide, where the Government is responsible for the first article approval testing—

(1) The performance or other characteristics that the first article must meet for approval; and

(2) The tests to which the first article will be subjected for approval;

(c) Inform offerors that the requirement may be waived when supplies identical or similar to those called for have previously been delivered by the offeror and accepted by the Government (see 52.209-3(h) and 52.209-4(i));

(d) Permit the submission of alternative offers, i.e., one including and the other excluding testing and approval (if eligible under paragraph (c) of this section);

(e) State clearly the first article's relationship to the contract quantity (see paragraph (e) of the clause at 52.209-3, First Article Approval—Contractor Testing, or 52.209-4, First Article Approval—Government Testing);

(f) Contain a delivery schedule for the production quantity (see 11.403). The delivery schedule may—

(1) Be the same whether or not testing and approval is waived; or

(2) Provide for earlier delivery when testing and approval is waived and the Government requires earlier delivery. In the latter case, any resulting difference in delivery schedules must not be an evaluation factor for award. The clause at 52.209-4, First Article Approval—Government Testing, must contain the delivery schedule for the first article;

(g) Provide for the submission of contract numbers, if any, to document the offeror's eligibility under paragraph (c) of this section;

(h) State whether the approved first article will serve as a manufacturing standard;

(i) Include the Government's estimated testing costs as an evaluation factor, if appropriate, when the Government is responsible for first article testing; and

(j) Inform offerors that the prices for first articles and first article tests in relation to production quantities must not be materially unbalanced (see 15.404-1(g)) if first article test items or tests are to be separately priced.

9.307 Administrative procedures.

(a) Before the contractor ships the first article, or the first article test report, to the Government laboratory or other activity responsible for approval, the contract administration office must provide that activity with as much advance notification as is feasible of the forthcoming shipment, and—

(1) Advise that activity of the contractual requirements for testing and approval, or evaluation, as appropriate;

(2) Call attention to the notice requirement in paragraph (b) of the clause at 52.209-3, First Article Approval—Contractor Testing, or 52.209-4, First Article Approval—Government Testing; and

(3) Request that the activity inform the contract administration office of the date when testing or evaluation will be completed.

(b) The Government laboratory or other activity responsible for first article testing or evaluation must inform the contracting office whether to approve, conditionally approve, or disapprove the first article. The contracting officer must then notify the contractor of the action taken and furnish a copy of the notice to the contract administration office. The notice must include the first article shipment number, when available, and the applicable line item number. Make any necessary changes in the drawings, designs, or specifications only under the Changes clause.

9.308 Contract clauses.

9.308-1 Testing performed by the contractor.

(a) (1) Insert the clause at 52.209-3, First Article Approval—Contractor Testing, in solicitations and contracts when intending a fixed-price contract that requires—

(i) First article approval; and

(ii) The contractor to conduct the first article testing.

(2) Use the clause with its Alternate I where the contract requires the contractor to produce the first article and the production quantity at the same facility.

(3) Use the clause with its Alternate II where necessary to authorize the contractor to purchase material or to commence production before first article approval.

(b) (1) Insert a clause substantially the same as the clause at 52.209-3, First Article Approval—Contractor Testing, in solicitations and contracts when intending a cost-reimbursement contract that requires—

(i) First article approval; and

(ii) The contractor to conduct the first article test.

(2) Insert the clause in paragraph (1) with its Alternate I where the contract requires the contractor to produce the first article and the production quantity at the same facility.

(3) Insert the clause in paragraph (1) with its Alternate II where necessary to authorize the contractor to purchase material or to commence production before first article approval.

9.308-2 Testing performed by the Government.

(a) (1) Insert the clause at 52.209-4, First Article Approval—Government Testing, in solicitations and contracts when intending a fixed-price contract that requires first article approval and the Government will conduct the first article test.

(2) Use the clause with its Alternate I where the contract requires the contractor to produce the first article and the production quantity at the same facility.

(3) Use the clause with its Alternate II where necessary to authorize the contractor to purchase material or to commence production before first article approval.

(b) (1) Insert a clause substantially the same as the clause at 52.209-4, First Article Approval—Government Testing, in solicitations and contracts when intending a cost-reimbursement contract that requires—

(i) First article approval; and

(ii) The Government to conduct the first article test.

(2) Use a clause substantially the same as the clause at 52.209-4, First Article Approval—Government Testing, with its Alternate I where the contract requires the contractor to produce the first article and the production quantity at the same facility.

(3) Use a clause substantially the same as the clause at 52.209-4, First Article Approval—Government Testing, with its Alternate II where necessary to

authorize the contractor to purchase material or to commence production before first article approval.

Subpart 9.4 - Debarment, Suspension, and Ineligibility

9.400 Scope of subpart.

(a) This subpart-

(1) Prescribes policies and procedures governing the debarment and suspension of contractors by agencies for the causes given in 9.406-2 and 9.407-2;

(2) Provides for the listing of contractors debarred, suspended, proposed for debarment, and declared ineligible (see the definition of "ineligible" in 2.101); and

(3) Sets forth the consequences of this listing.

(b) Although this subpart does cover the listing of ineligible contractors (9.404) and the effect of this listing (9.405), it does not prescribe policies and procedures governing declarations of ineligibility except for contractors that have been declared ineligible pursuant to 10 U.S.C. 983 (see 9.110, and 9.405-1(b)).

(c) For Federal Acquisition Supply Chain Security Act (FASCSA) orders, see part 40.

9.401 Applicability.

In accordance with Public Law 103-355, Section 2455 (31 U.S.C. 6101, note), and Executive Order 12689, any debarment, suspension or other Governmentwide exclusion initiated under the Nonprocurement Common Rule implementing Executive Order 12549 on or after August 25, 1995, must be recognized by and effective for Executive Branch agencies as a debarment or suspension under this subpart. Similarly, any debarment, suspension, proposed debarment or other Governmentwide exclusion initiated on or after August 25, 1995, under this subpart must also be recognized by and effective for those agencies and participants as an exclusion under the Nonprocurement Common Rule.

9.402 Policy.

(a) Agencies must solicit offers from, award contracts to, and consent to subcontracts with responsible contractors only. Debarment and suspension are

discretionary actions that, taken in accordance with this subpart, are appropriate means to effectuate this policy.

(b) The serious nature of debarment and suspension requires that these remedies be imposed only in the public interest for the Government's protection and not for purposes of punishment. Agencies must impose debarment or suspension to protect the Government's interest and only for the causes and in accordance with the procedures in this subpart.

(c) Agencies are encouraged to establish methods and procedures for coordinating their debarment or suspension actions.

(d) When more than one agency has an interest in the debarment or suspension of a contractor, the Interagency Suspension and Debarment Committee, established under Executive Order 12549, and authorized by section 873 of the National Defense Authorization Act for Fiscal Year 2009 (Pub. L. 110-417) (31 U.S.C. 6101 note), must resolve the lead agency issue and coordinate such resolution among all interested agencies prior to the initiation of any suspension, debarment, or related administrative action by any agency.

(e) Agencies must establish appropriate procedures to implement the policies and procedures of this subpart.

9.403 Definitions.

As used in this subpart—

Administrative agreement means an agreement between an agency suspending and debarring official and the contractor used to resolve a suspension or debarment proceeding, or a potential suspension or debarment proceeding.

Affiliates.—

(1) Business concerns, organizations, or individuals are affiliates of each other if, directly or indirectly—

(i) Either one controls or has the power to control the other; or

(ii) A third party controls or has the power to control both.

(2) Indicia of control include, but are not limited to, interlocking management or ownership, identity of interests among family members, shared facilities and

equipment, common use of employees, or a business entity organized following the debarment, suspension, or proposed debarment of a contractor which has the same or similar management, ownership, or principal employees as the contractor that was debarred, suspended, or proposed for debarment.

Agency means any executive department, military department or defense agency, or other agency or independent establishment of the executive branch.

Civil judgment means the disposition of a civil action by any court of competent jurisdiction, whether by verdict, decision, settlement, stipulation, other disposition that creates a civil liability for the complained of wrongful acts, or a final determination of liability under the Program Fraud Civil Remedies Act of 1986 (31 U.S.C. 3801-3812).

Contractor means any individual or other legal entity that—

(1) Directly or indirectly (e.g., through an affiliate), submits offers for or is awarded, or reasonably may be expected to submit offers for or be awarded, a Government contract, including a contract for carriage under Government or commercial bills of lading, or a subcontract under a Government contract; or

(2) Conducts business, or reasonably may be expected to conduct business, with the Government as an agent or representative of another contractor.

Conviction means—

(1) A judgment or any other determination of guilt of a criminal offense by any court of competent jurisdiction, whether entered upon a verdict or plea, including a plea of nolo contendere; or

(2) Any other resolution that is the functional equivalent of a judgment establishing a criminal offense by a court of competent jurisdiction, including probation before judgment and deferred prosecution. A disposition without the participation of the court is the functional equivalent of a judgment only if it includes an admission of guilt.

Indictment means indictment for a criminal offense. An information or other filing by competent authority charging a criminal offense is given the same effect as an indictment.

Legal proceedings means any civil judicial proceeding to which the Government is a party or any criminal proceeding. The term includes appeals from such proceedings.

Nonprocurement Common Rule means the procedures used by Federal Executive Agencies to suspend, debar, or exclude individuals or entities from participation in

nonprocurement transactions under Executive Order 12549. Examples of nonprocurement transactions are grants, cooperative agreements, scholarships, fellowships, contracts of assistance, loans, loan guarantees, subsidies, insurance, payments for specified use, and donation agreements. See 2 CFR part 180 and agency enacting regulations in 2 CFR subtitle B.

Pre-notice letter means a written correspondence issued to a contractor in a suspension or debarment matter, which does not immediately result in an exclusion or ineligibility. The letter is issued at the discretion of the suspending and debarring official. The letter is not a mandatory step in the suspension or debarment process.

Unfair trade practices means the commission of any of the following acts by a contractor:

(1) A violation of section 337 of the Tariff Act of 1930 (19 U.S.C. 1337) as determined by the International Trade Commission.

(2) A violation, as determined by the Secretary of Commerce, of any agreement of the group known as the “Coordination Committee” for purposes of the Export Administration Act of 1979 (50 U.S.C. App. 2401, et seq.) or any similar bilateral or multilateral export control agreement.

(3) A knowingly false statement regarding a material element of a certification concerning the foreign content of an item of supply, as determined by the Secretary of the Department or the head of the agency to which such certificate was furnished.

Voluntary exclusion means a contractor's written agreement to be excluded for a period under the terms of a settlement between the contractor and the suspending and debarring official of one or more agencies. A voluntary exclusion must have Governmentwide effect.

9.404 Exclusions in the System for Award Management.

(a) The General Services Administration—

(1) Operates the web-based System for Award Management (SAM) at <https://www.sam.gov>, which contains exclusion records; and

(2) Provides technical assistance to Federal agencies in the use of SAM.

(b) An exclusion record in SAM contains the—

(1) Legal business name and physical address of the entities debarred, suspended, proposed for debarment, voluntarily excluded, declared ineligible, or

excluded or disqualified under the nonprocurement common rule, with cross-references when more than one name is involved in a single action;

(2) Name of the agency or other authority taking the action;

(3) Cause for the action (see 9.406-2 and 9.407-2 for causes authorized under this subpart) or other statutory or regulatory authority;

(4) Effect of the action;

(5) Termination date for each listing;

(6) Unique Entity Identifier;

(7) Social Security Number (SSN), Employer Identification Number (EIN), or other Taxpayer Identification Number (TIN), if available; and

(8) Name and telephone number of the agency point of contact for the action.

(c) Each agency must—

(1) Identify the individual(s) responsible for entering and updating exclusions data in SAM and assign the appropriate roles;

(2) Remove the exclusion roles in SAM when the individual leaves the organization or changes functions;

(3) For each exclusion, including each voluntary exclusion, accomplished by the agency—

(i) Enter the information required by paragraph (b) of this section within 3 business days after the action becomes effective;

(ii) Determine whether it is legally permitted to enter the SSN, EIN, or other TIN, under agency authority to suspend or debar; and

(iii) Update the exclusion record in SAM, generally within 5 business days after modifying or rescinding an action;

(4) In accordance with internal retention procedures, maintain records relating to each debarment, suspension, proposed debarment, or voluntary exclusion taken or entered into by the agency;

(5) Establish procedures to ensure that the agency does not solicit offers from, award contracts to, or consent to subcontracts with contractors who have an active exclusion record in SAM, except as otherwise provided in this subpart; and

(6) Direct inquiries concerning listed contractors and other entities to the agency or other authority that took the action.

9.405 Effect of listing.

(a) Contractors debarred, suspended, proposed for debarment, or voluntarily excluded, are excluded from receiving contracts, and agencies must not solicit offers from, award contracts to, or consent to subcontracts with these contractors, unless the agency head determines that a compelling reason exists for such action (see 9.405-1(a)(2), 9.405-2, 9.406-1(d), 9.407-1(d), and 26.505(e)). Contractors debarred, suspended, proposed for debarment, or voluntarily excluded, are also excluded from conducting business with the Government as agents or representatives of other contractors.

(b) Contractors and other entities that have an active exclusion record in SAM because they have been declared ineligible based on statutory or other regulatory procedures are excluded from receiving contracts, and if applicable, subcontracts, under the conditions and for the period set forth in the statute or regulation. Do not solicit offers from, award contracts to, or consent to subcontracts with these contractors under those conditions and for that period.

(c) Do not enter into, renew, or extend contracts with contractors that have been declared ineligible pursuant to 22 U.S.C. 2593e.

(d) Contractors debarred, suspended, proposed for debarment, or voluntarily excluded, are excluded from acting as individual sureties (see part 28).

(e) (1) After the opening of bids or receipt of proposals or quotes, review the exclusion records in SAM.

(2) Bids received from any listed contractor in response to an invitation for bids must be entered on the abstract of bids and then rejected unless the agency head determines in writing that compelling reason exists to consider the bid.

(3) Unless the agency head determines in writing that a compelling reason exists otherwise, do not evaluate for award or include in the competitive range proposals, quotations, or offers received from, and do not conduct discussions

with, a listed offeror during a period of ineligibility. If the period of ineligibility expires or is terminated prior to award, the contracting officer may, but is not required to, consider such proposals, quotations, or offers.

4) Immediately prior to award, review again the exclusion records in SAM to ensure that no award is made to a listed contractor.

9.405-1 Continuation of current contracts.

(a) Contractors debarred, suspended, proposed for debarment, or voluntarily excluded .

(1) Notwithstanding the debarment, suspension, proposed debarment, or voluntary exclusion, of a contractor, agencies may continue contracts or subcontracts in existence at the time the contractor was debarred, suspended, proposed for debarment, or voluntarily excluded, unless the agency head directs otherwise. A decision as to the type of termination action, if any, to be taken should be made only after review by agency contracting and technical personnel and by counsel to ensure the propriety of the proposed action.

(2) For contractors debarred, suspended, proposed for debarment, or voluntarily excluded, unless the agency head makes a written determination of the compelling reasons for doing so, ordering activities must not—

(i) Place orders exceeding the guaranteed minimum under indefinite quantity contracts;

(ii) Place orders under Federal Supply Schedule contracts, blanket purchase agreements, or basic ordering agreements; or

(iii) Add new work, exercise options, or otherwise extend the duration of current contracts or orders.

(b) Ineligible contractors. A covered agency, as defined in 9.110-1, must terminate existing contracts and must not place new orders or award new contracts with contractors that have been declared ineligible pursuant to 10 U.S.C. 983 (see 9.110), except for contracts at or below the simplified acquisition threshold or contracts for the acquisition of commercial products and commercial services.

9.405-2 Restrictions on subcontracting.

(a) If an offeror proposes a contractor debarred, suspended, proposed for debarment, or voluntarily excluded, as a subcontractor for any subcontract subject to Government consent (see part 44), do not consent to such subcontracts unless the agency head states in writing the compelling reasons for this approval action. (See 9.405 concerning declarations of ineligibility affecting subcontracting.)

(b) The Government suspends or debars contractors to protect the Government's interests. Contractors are prohibited from entering into any subcontract in excess of \$45,000, other than a subcontract for a commercially available off-the-shelf item, with a contractor that has been debarred, suspended, proposed for debarment, or voluntarily excluded, unless a compelling reason exists to do so. If a contractor intends to enter into a subcontract in excess of \$45,000, other than a subcontract for a commercially available off-the-shelf item, with a party that is debarred, suspended, proposed for debarment, or voluntarily excluded, as evidenced by the party's having an active exclusion record in SAM (see 9.404), a corporate officer or designee of the contractor is required by operation of the clause at 52.209-6, Protecting the Government's Interest when Subcontracting with Contractors Debarred, Suspended, Proposed for Debarment, or Voluntarily Excluded, to notify the contracting officer, in writing, before entering into such subcontract. For contracts for the acquisition of commercial products, the notification requirement applies only for first-tier subcontracts. For all other contracts, the notification requirement applies to subcontracts at any tier. The notice must provide the following:

(1) The name of the subcontractor;

(2) The contractor's knowledge of the reasons for the subcontractor having an active exclusion record in SAM;

(3) The compelling reason(s) for doing business with the subcontractor notwithstanding its having an active exclusion record in SAM; and

(4) The systems and procedures the contractor has established to ensure that it is fully protecting the Government's interests when dealing with such subcontractor in view of the specific basis for the party's debarment, suspension, proposed debarment, or voluntary exclusion.

(c) The contractor's compliance with the requirements of 52.209-6 will be reviewed during Contractor Purchasing System Reviews (see part 44).

9.406 Debarment.

9.406-1 General.

(a) The suspending and debarring official is responsible for determining whether debarment is in the Government's interest. The suspending and debarring official may, in the public interest, debar a contractor for any of the causes in 9.406-2, using the procedures in 9.406-3. The existence of a cause for debarment, however, does not necessarily require that the contractor be debarred; the seriousness of the contractor's acts or omissions and any remedial measures, mitigating factors, or aggravating factors should be considered in making any debarment decision. Before arriving at any debarment decision, the suspending and debarring official should consider factors such as the following (some of the factors below could apply to individuals such as contractors that are individuals, and are so marked):

(1) Whether the contractor had effective standards of conduct and internal control systems in place at the time of the activity which constitutes cause for debarment or had adopted such procedures prior to any Government investigation of the activity cited as a cause for debarment.

(2) Whether the contractor (including an individual) brought the activity cited as a cause for debarment to the attention of the appropriate Government agency in a timely manner.

(3) Whether the contractor has fully investigated the circumstances surrounding the cause for debarment (or the individual cooperated with the investigation) and, if so, made the result of the investigation available to the suspending and debarring official.

(4) Whether the contractor (including an individual) cooperated fully with Government agencies during the investigation and any court or administrative action.

(5) Whether the contractor (including an individual) has paid or has agreed to pay all criminal, civil, and administrative liability for the improper activity, including any investigative or administrative costs incurred by the Government, and has made or agreed to make full restitution.

(6) Whether the contractor has taken appropriate disciplinary action against the individuals responsible for the activity which constitutes cause for debarment.

(7) Whether the contractor (including an individual) has implemented or agreed to implement remedial measures, including any identified by the Government.

(8) (i) Whether the contractor has instituted or agreed to institute new or revised review and control procedures, ethics training, or other relevant training programs.

(ii) For an individual, whether the individual has attended relevant remediation training.

(9) Whether the contractor (including an individual) has had adequate time to eliminate the circumstances that led to the cause for debarment.

(10) (i) Whether the contractor's management recognizes, accepts, and understands the seriousness of the misconduct giving rise to the cause for debarment and has implemented programs to prevent recurrence.

(ii) For an individual, whether the individual recognizes, accepts, and understands the seriousness of the misconduct giving rise to the cause for debarment and has adopted practices to prevent recurrence.

(11) Whether the contractor (including an individual) has a pattern or prior history of wrongdoing, the frequency of incidents and/or duration of the wrongdoing, and the actual or potential harm or impact that results, or may result, from the wrongdoing.

(12) Whether and to what extent the contractor (including an individual) planned, initiated, or carried out the wrongdoing, and the kind of positions within the contractor's organization held by the individual involved in the wrongdoing.

(13) Whether the wrongdoing was pervasive within the contractor's organization.

(14) Whether the individual or the contractor's principals tolerated the offense.

(15) Whether the contractor (including an individual) is or has been excluded or disqualified by an agency of the Federal Government or has not been allowed to participate in State or local contracts or assistance agreements on a basis of

conduct similar to one or more of the causes for debarment specified in this subpart.

(16) Whether the contractor (including an individual) has entered into an administrative agreement with a Federal agency or a similar agreement with a State or local government that is not Governmentwide but is based on conduct similar to one or more of the causes for debarment specified in this subpart.

(17) Whether any other factors meriting consideration exist for the contractor (including an individual) under the circumstances.

(b) The existence or nonexistence of any aggravating or mitigating factors or remedial measures such as set forth in paragraph (a) of this section is not necessarily determinative of a contractor's present responsibility. Accordingly, if a cause for debarment exists, the contractor has the burden of demonstrating, to the satisfaction of the suspending and debarring official, its present responsibility and that debarment is not necessary.

(c) Debarment constitutes debarment of all divisions or other organizational elements of the contractor, unless the debarment decision is limited by its terms to specific divisions, organizational elements, or commodities. The suspending and debarring official may extend the debarment decision to include any affiliates of the contractor if they are—

(1) Specifically named; and

(2) Given written notice of the proposed debarment and an opportunity to respond (see 9.406-3(c)).

(d) A contractor's debarment, or proposed debarment, is effective throughout the executive branch of the Government, unless the agency head or a designee (except see 26.505(e)) states in writing the compelling reasons justifying continued business dealings between that agency and the contractor.

(e) (1) When the suspending and debarring official has authority to debar contractors from both contracts pursuant to the Federal Acquisition Regulation in this chapter and contracts for the purchase of Federal personal property pursuant to the Federal Management Regulation (FMR) in 41 CFR part 102-38, that official must consider simultaneously debarring the contractor from the award of acquisition contracts and from the purchase of Federal personal property.

(2) A notice debaring a contractor from the award of acquisition contracts and from the purchase of Federal personal property must include the appropriate FAR and FMR citations.

9.406-2 Causes for debarment.

The suspending and debaring official may debar-

(a) A contractor for a conviction of or civil judgment for-

(1) Commission of fraud or a criminal offense in connection with-

(i) Obtaining;

(ii) Attempting to obtain; or

(iii) Performing a public contract or subcontract.

(2) Violation of Federal or State antitrust statutes relating to the submission of offers;

(3) Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, violating Federal criminal tax laws, or receiving stolen property;

(4) Intentionally affixing a label bearing a "Made in America" inscription (or any inscription having the same meaning) to a product sold in or shipped to the United States or its outlying areas, when the product was not made in the United States or its outlying areas (see Section 202 of the Defense Production Act (Public Law 102-558)); or

(5) Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a Government contractor or subcontractor.

(b) (1) A contractor, based upon a preponderance of the evidence, for any of the following—

(i) Violation of the terms of a Government contract or subcontract so serious as to justify debarment, such as—

(A) Willful failure to perform in accordance with the terms of one or more contracts; or

(B) A history of failure to perform, or of unsatisfactory performance of, one or more contracts.

(ii) Violations of 41 U.S.C. chapter 81, Drug-Free Workplace, as indicated by—

(A) Failure to comply with the requirements of the clause at 52.226-7, Drug-Free Workplace; or

(B) Such a number of contractor employees convicted of violations of criminal drug statutes occurring in the workplace as to indicate that the contractor has failed to make a good faith effort to provide a drug-free workplace (see 26.504).

(iii) Intentionally affixing a label bearing a “Made in America” inscription (or any inscription having the same meaning) to a product sold in or shipped to the United States or its outlying areas, when the product was not made in the United States or its outlying areas (see Section 202 of the Defense Production Act (Public Law 102-558)).

(iv) Commission of an unfair trade practice as defined in 9.403 (see Section 201 of the Defense Production Act (Public Law 102-558)).

(v) Delinquent Federal taxes in an amount that exceeds the threshold at 9.104-5(a)(2). Federal taxes are considered delinquent for purposes of this provision if both of the following criteria apply:

(A) *The tax liability is finally determined.* The liability is finally determined if it has been assessed. A liability is not finally determined if a pending administrative or judicial challenge remains. In the case of a judicial challenge to the liability, the liability is not finally determined until all judicial appeal rights have been exhausted.

(B) *The taxpayer is delinquent in making payment.* A taxpayer is delinquent if the taxpayer has failed to pay the tax liability when full payment was due and required. A taxpayer is not delinquent in cases where enforced collection action is precluded.

(vi) Knowing failure by a principal, until 3 years after final payment on any Government contract awarded to the contractor, to timely disclose to

the Government, in connection with the award, performance, or closeout of the contract or a subcontract thereunder, credible evidence of—

(A) Violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code;

(B) Violation of the civil False Claims Act (31 U.S.C. 3729-3733); or

(C) Significant overpayment(s) on the contract, other than overpayments resulting from contract financing payments as defined in 32.001.

(vii) Determination of a false certification under 52.209-13, Violation of Arms Control Treaties or Agreements-Certification.

(viii) Failure to comply with the requirements of clause 52.222-90, Addressing DEI Discrimination by Federal Contractors.

(2) A contractor, based on a determination by the Secretary of Homeland Security or the Attorney General of the United States, that the contractor is not in compliance with Immigration and Nationality Act employment provisions (see Executive Order 12989, as amended by Executive Order 13286). Such determination is not reviewable in the debarment proceedings.

(c) A contractor or subcontractor based on any other cause of so serious or compelling a nature that it affects the present responsibility of the contractor or subcontractor.

9.406-3 Procedures.

(a) *Investigation and referral.* Agencies must establish procedures for the prompt reporting, investigation, and referral to the suspending and debarment official of matters appropriate for that official's consideration.

(b) *Decision-making process*

(1) Agencies must establish procedures governing the debarment decision-making process that are as informal as is practicable, consistent with principles of fundamental fairness. These procedures must afford the contractor (and any

specifically named affiliates) an opportunity to submit, in person, in writing, or through a representative, information and argument in opposition to the proposed debarment. If the suspending and debarring official extends the opportunity for the contractor to submit material in opposition, then the official should also give a deadline for submission of materials. The suspending and debarring official may use flexible procedures to allow a contractor to present matters in opposition in person or remotely through appropriate technology; if so, the suspending and debarring official should change the notice in paragraph (c)(3)(iv) of this section to include those flexible procedures.

(2) In actions not based upon a conviction or civil judgment, if the contractor's submission in opposition raises a genuine dispute over facts material to the proposed debarment, agencies must also—

(i) Afford the contractor an opportunity to appear with counsel, submit documentary evidence, present witnesses, and confront any person the agency presents; and

(ii) Make a transcribed record of the proceedings and make it available at cost to the contractor upon request, unless the contractor and the agency, by mutual agreement, waive the requirement for a transcript.

(c) *Notice of proposal to debar.* The suspending and debarring official must issue the notice of proposed debarment to the contractor and any specifically named affiliates.

(1) The written notice must be sent—

(i) By U.S. mail or private delivery service to the last known street address, with delivery notification service;

(ii) By email to the point of contact email address in the contractor's SAM registration, if any, or to the last known email address as confirmed by the agency; or

(iii) By certified mail to the last known street address with return receipt requested.

(2) The notice must be sent—

(i) To the contractor, the contractor's identified counsel for purposes of the administrative proceedings, or the contractor's agent for service of process; and

(ii) For each specifically named affiliate, to the affiliate itself, the affiliate's identified counsel for purposes of the administrative proceedings, or the affiliate's agent for service of process.

(3) The notice must state—

(i) That debarment is being considered;

(ii) The reasons for the proposed debarment in terms sufficient to put the contractor on notice of the conduct or transaction(s) upon which it is based;

(iii) The cause(s) relied upon under 9.406-2 for proposing debarment;

(iv) That, within 30 days after receipt of the notice, the contractor may submit, in person, in writing, or through a representative, information and argument in opposition to the proposed debarment, including any additional specific information that raises a genuine dispute over the material facts;

(v) The agency's procedures governing debarment decision making;

(vi) The effect of the issuance of the notice of proposed debarment;

(vii) The potential effect of an actual debarment;

(viii) That in addition to any information and argument in opposition to a proposed debarment, the contractor must identify—

(A) Specific facts that contradict the statements contained in the notice of proposed debarment. Include any information about any of the factors listed in 9.406-1(a). A general denial is insufficient to raise a genuine dispute over facts material to the proposed debarment;

(B) All existing, proposed, or prior exclusions and all similar actions taken by Federal, State, or local agencies, including administrative agreements that affect only those agencies;

(C) All criminal and civil proceedings not included in the notice of proposed debarment that grew out of facts relevant to the cause(s) stated in the notice; and

(D) All of the contractor's affiliates; and

(ix) That if the contractor fails to disclose the information in paragraph (c)(3)(viii) of this section, or provides false information, the agency taking the action may seek further criminal, civil, or administrative action against the contractor, as appropriate.

(d) *Suspending and debaring official's decision.*

(1) In actions based upon a conviction or civil judgment, or in which no genuine dispute exists over material facts, the suspending and debaring official must decide based on all the information in the administrative record, including any contractor submission. If no suspension is in effect, the suspending and debaring official must make a decision within 45 days from the date that the official administrative record is closed, unless the suspending and debaring official extends this period for good cause. The official record closes upon the expiration of the contractor's time to submit information and argument in opposition, including any extensions (see paragraph (b)(1) of this section).

(2) (i) In actions in which additional proceedings are necessary as to disputed material facts, written findings of fact must be prepared. The suspending and debaring official must base the decision on the facts as found, together with any information and argument submitted by the contractor and any other information in the administrative record.

(ii) The debaring official may refer matters involving disputed material facts to another official for findings of fact. The suspending and debaring official may reject any such findings, in whole or in part, only after specifically determining them to be arbitrary and capricious or clearly erroneous.

(iii) The suspending and debaring official must make a decision after the conclusion of the proceedings with respect to disputed facts.

(3) In any action in which the proposed debarment is not based upon a conviction or civil judgment, the cause for debarment must be established by a preponderance of the evidence.

(e) Notice of suspending and debarring official's decision.

(1) If the suspending and debarring official decides to impose debarment, the contractor and any affiliates involved must be given prompt notice using the procedures in paragraphs (c)(1) and (2) of this section—

(i) Referring to the notice of proposed debarment;

(ii) Specifying the reasons for debarment;

(iii) Stating the period of debarment, including effective dates; and

(iv) Advising that the debarment is effective throughout the executive branch of the Government unless the head of an agency or a designee makes the statement called for by 9.406-1(d).

(2) If debarment is not imposed, the suspending and debarring official must promptly notify the contractor and any affiliates involved, using the procedures in paragraphs (c)(1) and (2) of this section.

(f) Administrative agreements.

(1) If the contractor enters into an administrative agreement with the Government in order to resolve a debarment or potential debarment proceeding, the suspending and debarring official must access the website (available at <https://www.cpars.gov>, then select FAPIIS), enter the requested information, and upload documentation reflecting the administrative agreement.

(2) The suspending and debarring official is responsible for the timely and accurate submission of documentation reflecting the administrative agreement. The submission should be made within 3 working days.

(3) With regard to information that may be covered by a disclosure exemption under the Freedom of Information Act, the suspending and debarring official must follow the procedures at 9.105-2(b)(2)(iv).

(g) Voluntary exclusions.

(1) If the contractor enters into a voluntary exclusion with the Government in order to resolve a debarment or potential debarment matter, the suspending and debarring official must access the website (available at <https://www.sam.gov>) and enter the requested information into the exclusions section of SAM (see 9.404(c)(3)).

(2) The suspending and debarring official is responsible for the timely and accurate submission of documentation reflecting the voluntary exclusion. The submission should be made within 3 working days.

(3) Regarding information that may be covered by a disclosure exemption under the Freedom of Information Act, the suspending and debarring official must follow the procedures at 9.105-2(b)(2)(iv).

(h) *Pre-notice letters.* Prior to initiating a proposed debarment, the suspending and debarring official has discretion to issue a pre-notice letter. A pre-notice letter is not required to initiate debarment under this subpart. (See 9.403.)

9.406-4 Period of debarment.

(a) (1) Debarment must be for a period commensurate with the seriousness of the cause(s). Generally, debarment should not exceed 3 years, except that—

(i) Debarment for violation of the provisions of 41 U.S.C. chapter 81, Drug-Free Workplace (see 26.505) may be for a period not to exceed 5 years;

(ii) Debarments under 9.406-2(b)(2) must be for 1 year unless extended pursuant to paragraph (b) of this section; and

(iii) Debarments under 9.406-2(b)(1)(vii) must be for a period of not less than 2 years, inclusive of any suspension period, if suspension precedes a debarment (see paragraph (a)(2) of this section).

(2) If suspension precedes a debarment, the suspension period factors in determining the debarment period.

(b) The suspending and debarring official may extend the debarment for an additional period, if that official determines that an extension is necessary to protect the Government's interest. However, a debarment may not be extended solely on the basis of the facts and circumstances upon which the initial debarment action was based.

Debarments under 9.406-2(b)(2) may be extended for additional periods of one year if the

Secretary of Homeland Security or the Attorney General determines that the contractor continues to be in violation of the employment provisions of the Immigration and Nationality Act. Upon determining that debarment for an additional period is necessary, the suspending and debarring official must follow the procedures in 9.406-3 to extend the debarment.

(c) The suspending and debarring official may reduce the period or extent of debarment, upon the contractor's request, supported by documentation, for reasons such as—

(1) Newly discovered material evidence;

(2) Reversal of the conviction or civil judgment upon which the debarment was based;

(3) Bona fide change in ownership or management;

(4) Elimination of other causes for which the debarment was imposed; or

(5) Other reasons the suspending and debarring official deems appropriate.

9.406-5 Scope of debarment.

(a) The fraudulent, criminal, or other seriously improper conduct of any officer, director, shareholder, partner, employee, or other individual associated with a contractor may be imputed to the contractor when the conduct occurred in connection with the individual's performance of duties for or on behalf of the contractor, or with the contractor's knowledge, approval, or acquiescence. The contractor's acceptance of the benefits derived from the conduct is evidence of such knowledge, approval, or acquiescence.

(b) The fraudulent, criminal, or other seriously improper conduct of a contractor may be imputed to any officer, director, shareholder, partner, employee, or other individual associated with the contractor who participated in, knew of, or had reason to know of the contractor's conduct.

(c) The fraudulent, criminal, or other seriously improper conduct of one contractor participating in a joint venture or similar arrangement may be imputed to other participating contractors if the conduct occurred for or on behalf of the joint venture or similar arrangement, or with the knowledge, approval, or acquiescence of these

contractors. Acceptance of the benefits derived from the conduct is evidence of such knowledge, approval, or acquiescence.

9.407 Suspension.

9.407-1 General.

(a) The suspending and debarring official may, in the public interest, suspend a contractor for any of the causes in 9.407-2, using the procedures in 9.407-3.

(b) (1) Suspension is a serious action to be imposed based on adequate evidence, pending the completion of an investigation or legal proceedings, when the suspending and debarring official determines that immediate action is necessary to protect the Government's interest. In deciding whether immediate action is necessary to protect the Government's interest, the suspending and debarring official has wide discretion. The suspending and debarring official may infer the necessity for immediate action to protect the Government's interest either from the nature of the circumstances giving rise to a cause for suspension or from potential business relationships or involvement with a program of the Federal Government. In assessing the adequacy of the evidence, agencies should consider how much information is available, how credible it is given the circumstances, whether important allegations are corroborated, and what inferences can reasonably be drawn as a result. This assessment should include an examination of basic documents such as contracts, inspection reports, and correspondence. An indictment or other official findings by Federal, State, or local bodies that determine factual and/or legal matters, constitutes adequate evidence for purposes of suspension actions.

(2) The existence of a cause for suspension does not necessarily require that the contractor be suspended. The suspending and debarring official should consider the seriousness of the contractor's acts or omissions and may, but is not required to, consider remedial measures, mitigating factors, or aggravating factors, such as those in 9.406-1(a). A contractor has the burden of promptly presenting to the suspending and debarring official evidence of remedial measures or mitigating factors when it has reason to know that a cause for suspension exists. The existence or nonexistence of any remedial measures or aggravating or mitigating factors is not necessarily determinative of a contractor's present responsibility.

(c) Suspension constitutes suspension of all divisions or other organizational elements of the contractor, unless the suspension decision is limited by its terms to specific divisions, organizational elements, or commodities. The suspending and debarring official may extend the suspension decision to include any affiliates of the contractor if they are—

(1) Specifically named; and

(2) Given written notice of the suspension and an opportunity to respond (see 9.407-3(c)).

(d) A contractor's suspension is effective throughout the executive branch of the Government, unless the agency head or a designee (except see 26.505(e)) states in writing the compelling reasons justifying continued business dealings between that agency and the contractor.

(e) (1) When the suspending and debarring official has authority to suspend contractors from both contracts pursuant to the Federal Acquisition Regulation in this chapter and contracts for the purchase of Federal personal property pursuant to Federal Management Regulation (FMR) in 41 CFR part 102-38, that official must consider simultaneously suspending the contractor from the award of acquisition contracts and from the purchase of Federal personal property.

(2) A notice suspending a contractor from the award of acquisition contracts and from the purchase of Federal personal property must include the appropriate FAR and FMR citations.

9.407-2 Causes for suspension.

(a) The suspending and debarring official may suspend a contractor suspected, upon adequate evidence, of—

(1) Commission of fraud or a criminal offense in connection with-

(i) Obtaining;

(ii) Attempting to obtain; or

(iii) Performing a public contract or subcontract.

(2) Violation of Federal or State antitrust statutes relating to the submission of offers;

(3) Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, violating Federal criminal tax laws, or receiving stolen property;

(4) Violations of 41 U.S.C. chapter 81, Drug-Free Workplace, as indicated by—

(i) Failure to comply with the requirements of the clause at 52.226-7, Drug-Free Workplace; or

(ii) Such a number of contractor employees convicted of violations of criminal drug statutes occurring in the workplace as to indicate that the contractor has failed to make a good faith effort to provide a drug-free workplace (see 26.504);

(5) Intentionally affixing a label bearing a “Made in America” inscription (or any inscription having the same meaning) to a product sold in or shipped to the United States or its outlying areas, when the product was not made in the United States or its outlying areas (see Section 202 of the Defense Production Act (Public Law 102-558));

(6) Commission of an unfair trade practice as defined in 9.403 (see section 201 of the Defense Production Act (Pub. L. 102-558));

(7) Delinquent Federal taxes in an amount that exceeds the threshold at 9.104-5(a)(2). See the criteria at 9.406-2(b)(1)(v) for determination of when taxes are delinquent;

(8) Knowing failure by a principal, until 3 years after final payment on any Government contract awarded to the contractor, to timely disclose to the Government, in connection with the award, performance, or closeout of the contract or a subcontract thereunder, credible evidence of—

(i) Violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code;

(ii) Violation of the civil False Claims Act (31 U.S.C. 3729-3733); or

(iii) Significant overpayment(s) on the contract, other than overpayments resulting from contract financing payments as defined in 32.001; or

(9) Determination of a false certification under 52.209-13, Violation of Arms Control Treaties or Agreements-Certification.

(10) Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a Government contractor or subcontractor.

(11) Failure to comply with the requirements of clause 52.222-90, Addressing DEI Discrimination by Federal Contractors.

(b) Indictment for any of the causes in paragraph (a) of this section constitutes adequate evidence for suspension.

(c) The suspending and debarring official may upon adequate evidence also suspend a contractor for any other cause of so serious or compelling a nature that it affects the present responsibility of a Government contractor or subcontractor.

9.407-3 Procedures.

(a) *Investigation and referral.* Agencies must establish procedures for the prompt reporting, investigation, and referral to the suspending and debarring official of matters appropriate for that official's consideration.

(b) *Decision-making process.*

(1) Agencies must establish procedures governing the suspension decision-making process that are as informal as is practicable, consistent with principles of fundamental fairness. These procedures must afford the contractor (and any specifically named affiliates) an opportunity, following the imposition of suspension, to submit, in person, in writing, or through a representative, information and argument in opposition to the suspension. If the suspending and debarring official extends the opportunity for the contractor to submit material in opposition, then the official should also give a deadline for submission of materials. The suspending and debarring official may use the flexible procedures in 9.406-3(b)(1); if so, the suspending and debarring official should change the notice in paragraph (c)(5) of this section to include those flexible procedures.

(2) In actions not based on an indictment, if the contractor's submission in opposition raises a genuine dispute over facts material to the suspension and if no determination has been made, on the basis of Department of advice from the

Department of Justice, a U.S. Attorney's office, State attorney general's office, or a State or local prosecutor's office, that substantial interests of the Government in pending or contemplated legal proceedings based on the same facts as the suspension would be prejudiced, agencies must also—

(i) Afford the contractor an opportunity to appear with counsel, submit documentary evidence, present witnesses, and confront any person the agency presents; and

(ii) Make a transcribed record of the proceedings and make it available at cost to the contractor upon request, unless the contractor and the agency, by mutual agreement, waive the requirement for a transcript.

(c) *Notice of suspension.* When a contractor and any specifically named affiliates are suspended, the suspending and debaring official must immediately notify them using the procedures in 9.406-3(c)(1) and (2). While describing any irregularities in terms sufficient to place the contractor on notice without disclosing the Government's evidence, the notice must state—

(1) That they have been suspended and that the suspension is based on an indictment or other adequate evidence that the contractor has committed irregularities—

(i) Of a serious nature in business dealings with the Government; or

(ii) Seriously reflecting on the propriety of further Government dealings with the contractor;

(2) That the suspension is for a temporary period pending the completion of an investigation and such legal proceedings as may ensue;

(3) Of the cause(s) relied upon under 9.407-2 for imposing suspension;

(4) Of the effect of the suspension;

(5) That, within 30 days after receipt of the notice, the contractor may submit, in person, in writing, or through a representative, information and argument in opposition to the suspension, including any additional specific information that raises a genuine dispute over the material facts;

(6) That additional proceedings to determine disputed material facts will be conducted unless—

(i) The action is based on an indictment; or

(ii) A determination is made, on the basis of advice by the Department of Justice, a U.S. Attorney's office, State attorney general's office, or a State or local prosecutor's office, that the substantial interests of the Government in pending or contemplated legal proceedings based on the same facts as the suspension would be prejudiced;

(7) That, in addition to any information and argument in opposition to a suspension, the contractor must identify—

(i) Specific facts that contradict the statements contained in the notice of suspension. Include any information about any of the factors listed in 9.406-1(a). A general denial is insufficient to raise a genuine dispute over facts material to the suspension;

(ii) All existing, proposed, or prior exclusions and all similar actions taken by Federal, State, or local agencies, including administrative agreements that affect only those agencies;

(iii) All criminal and civil proceedings not included in the notice of suspension that grew out of facts relevant to the cause(s) stated in the notice; and

(iv) All of the contractor's affiliates; and

(8) That if the contractor fails to disclose the information in paragraph (c)(7) of this section or provides false information, the agency taking the action may seek further criminal, civil, or administrative action against the contractor, as appropriate.

(d) Suspending and debarring official's decision.

(1) The suspending and debarring official must make a decision based on all the information in the administrative record, including any submission from the contractor, for actions—

(i) Based on an indictment;

(ii) In which the contractor's submission does not raise a genuine dispute over material facts; or

(iii) In which additional proceedings to determine disputed material facts have been denied based on advice from the Department of Justice, a U.S. Attorney's office, State attorney general's office, or a State or local prosecutor's office.

(2) (i) In actions in which additional proceedings are necessary as to disputed material facts, written findings of fact must be prepared. The suspending and debarring official must base the decision on the facts as found, together with any information and argument submitted by the contractor and any other information in the administrative record.

(ii) The suspending and debarring official may refer matters involving disputed material facts to another official for findings of fact. The suspending and debarring official may reject any such findings, in whole or in part, only after specifically determining them to be arbitrary and capricious or clearly erroneous.

(iii) The suspending and debarring official must make a decision after the conclusion of the proceedings with respect to disputed facts.

(3) The suspending and debarring official may modify or terminate the suspension or leave it in force (for example, see 9.406-4(c) for the reasons for reducing the period or extent of debarment). However, a decision to modify or terminate the suspension must be without prejudice to the subsequent imposition of—

(i) Suspension by any other agency; or

(ii) Debarment by any agency.

(4) Prompt written notice of the suspending and debarring official's decision must be sent to the contractor and any affiliates involved, using the procedures in 9.406-3(c)(1) and (2).

(e) *Administrative agreement.*

(1) If the contractor enters into an administrative agreement with the Government to resolve a suspension or potential suspension proceeding, the suspending and debarring official must access the website (available at <https://www.cpars.gov>, then select FAPIIS), enter the requested information, and upload documentation reflecting the administrative agreement.

(2) The suspending and debarring official is responsible for the timely and accurate submission of documentation reflecting the administrative agreement. The submission should be made within 3 working days.

(3) With regard to information that may be covered by a disclosure exemption under the Freedom of Information Act, the suspending and debarring official must follow the procedures at 9.105-2(b)(2)(iv).

(f) *Voluntary exclusion.*

(1) If the contractor enters into a voluntary exclusion with the Government in order to resolve a suspension or potential suspension proceeding, the suspending and debarring official must access the website (available at <https://www.sam.gov>) and enter the requested information into the exclusions section of SAM (see 9.404(c)(3)).

(2) The suspending and debarring official is responsible for the timely and accurate submission of documentation reflecting the voluntary exclusion. The submission should be made within 3 working days.

(3) Regarding information that may be covered by a disclosure exemption under the Freedom of Information Act, the suspending and debarring official must follow the procedures at 9.105-2(b)(2)(iv).

(g) *Pre-notice letter.* Prior to initiating a suspension, the suspending and debarring official has discretion to issue a pre-notice letter. A pre-notice letter is not required to initiate suspension under this subpart. (See 9.403.)

9.407-4 Period of suspension.

(a) Suspension must be for a temporary period pending the completion of an investigation and any ensuing legal proceedings, unless sooner terminated by the suspending and debarring official or as provided in this section.

(b) If legal proceedings are not initiated within 12 months after the date of the suspension notice, the suspension must be terminated unless an office of a U.S. Assistant Attorney General, U.S. Attorney, or other responsible prosecuting official requests its extension, in which case it may be extended for an additional 6 months. In no event may a suspension extend beyond 18 months, unless legal proceedings have been initiated within that period.

(c) The suspending and debarring official must notify the Department of Justice or other responsible prosecuting official of the proposed termination of the suspension, at least 30 days before the 12-month period expires, to give that official an opportunity to request an extension on the Government's behalf.

9.407-5 Scope of suspension.

The scope of suspension must be the same as that for debarment (see 9.406-5), except that the procedures of 9.407-3 must be used in imposing suspension.

9.408 [Reserved]

9.409 Contract clause.

Insert the clause at 52.209-6, Protecting the Government's Interest when Subcontracting with Contractors Debarred, Suspended, Proposed for Debarment, or Voluntarily Excluded, in solicitations and contracts where the contract value exceeds \$45,000.

Subpart 9.5 - Organizational and Consultant Conflicts of Interest

9.500 Scope of subpart.

This subpart:

(a) Prescribes responsibilities, general rules, and procedures for identifying, evaluating, and resolving organizational conflicts of interest;

(b) Provides examples to assist contracting officers in applying these rules and procedures to individual contracting situations; and

(c) Implements section 8141 of the 1989 Department of Defense Appropriation Act, Pub.L.100-463, 102 Stat.2270-47 (1988).

9.501 Definition.

Marketing consultant, as used in this subpart, means any independent contractor who furnishes advice, information, direction, or assistance to an offeror or any other contractor in support of the preparation or submission of an offer for a Government contract by that offeror. An independent contractor is not a marketing consultant when rendering-

(1) Services excluded in subpart 37.2;

(2) Routine engineering and technical services (such as installation, operation, or maintenance of systems, equipment, software, components, or facilities);

(3) Routine legal, actuarial, auditing, and accounting services; and

(4) Training services.

9.502 Applicability.

(a) This subpart applies to contracts with either profit or nonprofit organizations, including nonprofit organizations created largely or wholly with Government funds.

(b) The applicability of this subpart is not limited to any particular kind of acquisition. However, organizational conflicts of interest are more likely to occur in contracts involving-

(1) Management support services;

(2) Consultant or other professional services;

(3) Contractor performance of or assistance in technical evaluations; or

(4) Systems engineering and technical direction work performed by a contractor that does not have overall contractual responsibility for development or production.

(c) An organizational conflict of interest may result when factors create an actual or potential conflict of interest on an instant contract, or when the nature of the work to be performed on the instant contract creates an actual or potential conflict of interest on a future acquisition. In the latter case, some restrictions on future activities of the contractor may be required.

(d) Acquisitions subject to unique agency organizational conflict of interest statutes are excluded from the requirements of this subpart.

9.503 Waiver.

The agency head or a designee may waive any general rule or procedure of this subpart by determining that its application in a particular situation would not be in the Government's interest. Any request for waiver must be in writing, must set forth the extent of the conflict,

and requires approval by the agency head or a designee. Agency heads must not delegate waiver authority below the level of head of a contracting activity.

9.504 Contracting officer responsibilities.

(a) Using the general rules, procedures, and examples in this subpart, contracting officers must analyze planned acquisitions in order to—

(1) Identify and evaluate potential organizational conflicts of interest as early in the acquisition process as possible; and

(2) Avoid, neutralize, or mitigate significant potential conflicts before contract award.

(b) Contracting officers should obtain the advice of counsel and the assistance of appropriate technical specialists in evaluating potential conflicts and in developing any necessary solicitation provisions and contract clauses (see 9.506).

(c) Before issuing a solicitation for a contract that may involve a significant potential conflict, the contracting officer must recommend to the head of the contracting activity a course of action for resolving the conflict (see 9.506).

(d) In fulfilling their responsibilities for identifying and resolving potential conflicts, contracting officers should avoid creating unnecessary delays, burdensome information requirements, and excessive documentation. The contracting officer's judgment need be formally documented only when a substantive issue concerning potential organizational conflict of interest exists.

(e) The contracting officer must award the contract to the apparent successful offeror unless a conflict of interest is determined to exist that cannot be avoided or mitigated. Before determining to withhold award based on conflict of interest considerations, the contracting officer must notify the contractor, provide the reasons therefor, and allow the contractor a reasonable opportunity to respond. If the contracting officer finds that it is in the best interest of the United States to award the contract notwithstanding a conflict of interest, a request for waiver must be submitted in accordance with 9.503. The waiver request and decision must be included in the contract file.

9.505 General rules.

The general rules in 9.505-1 through 9.505-4 prescribe limitations on contracting as the means of avoiding, neutralizing, or mitigating organizational conflicts of interest that might otherwise exist in the stated situations. Some illustrative examples are provided in 9.508. Conflicts may arise in situations not expressly covered in this section 9.505 or in the examples in 9.508. Each individual contracting situation should be examined on the basis of its particular facts and the nature of the proposed contract. The exercise of common sense, good judgment, and sound discretion is required in both the decision on whether a significant potential conflict exists and, if it does, the development of an appropriate means for resolving it. The two underlying principles are—

(a) Preventing the existence of conflicting roles that might bias a contractor's judgment; and

(b) Preventing unfair competitive advantage. In addition to the other situations described in this subpart, an unfair competitive advantage exists where a contractor competing for award of any Federal contract possesses-

(1) Proprietary information that was obtained from a Government official without proper authorization; or

(2) Source selection information (as defined in 2.101) that is relevant to the contract but is not available to all competitors, and such information would assist that contractor in obtaining the contract.

9.505-1 Providing systems engineering and technical direction.

(a) A contractor that provides systems engineering and technical direction for a system but does not have overall contractual responsibility for its development, its integration, assembly, and checkout, or its production shall not—

(1) Be awarded a contract to supply the system or any of its major components; or

(2) Be a subcontractor or consultant to a supplier of the system or any of its major components.

(b) Systems engineering includes a combination of substantially all of the following activities: determining specifications, identifying and resolving interface problems, developing test requirements, evaluating test data, and supervising design. Technical direction includes a combination of substantially all of the following activities: developing

work statements, determining parameters, directing other contractors' operations, and resolving technical controversies. In performing these activities, a contractor occupies a highly influential and responsible position in determining a system's basic concepts and supervising their execution by other contractors. Therefore this contractor should not be in a position to make decisions favoring its own products or capabilities.

9.505-2 Preparing specifications or work statements.

(a) (1) If a contractor prepares and furnishes complete specifications covering nondevelopmental items, to be used in a competitive acquisition, that contractor shall not be allowed to furnish these items, either as a prime contractor or as a subcontractor, for a reasonable period of time including, at least, the duration of the initial production contract. The restriction in this paragraph (a)(1) must not apply to—

(i) Contractors that furnish at Government request specifications or data regarding a product they provide, even though the specifications or data may have been paid for separately or in the price of the product; or

(ii) Situations in which contractors, acting as industry representatives, help Government agencies prepare, refine, or coordinate specifications, regardless of source, provided this assistance is supervised and controlled by Government representatives.

(2) If a single contractor drafts complete specifications for nondevelopmental equipment, it should be eliminated for a reasonable time from competition for production based on the specifications. This should be done in order to avoid a situation in which the contractor could draft specifications favoring its own products or capabilities. In this way the Government can be assured of getting unbiased advice as to the content of the specifications and can avoid allegations of favoritism in the award of production contracts.

(3) In development work, it is normal to select firms that have done the most advanced work in the field. These firms can be expected to design and develop around their own prior knowledge. Development contractors can frequently start production earlier and more knowledgeably than firms that did not participate in the development, and this can affect the time and quality of production, both of which are important to the Government. In many instances the Government may have

financed the development. Thus, while the development contractor has a competitive advantage, it is an unavoidable one that is not considered unfair; hence no prohibition should be imposed.

(b) (1) If a contractor prepares, or assists in preparing, a work statement to be used in competitively acquiring a system or services-or provides material leading directly, predictably, and without delay to such a work statement-that contractor may not supply the system, major components of the system, or the services unless—

(i) It is the sole source;

(ii) It has participated in the development and design work; or

(iii) More than one contractor has been involved in preparing the work statement.

(2) Agencies should normally prepare their own work statements. When contractor assistance is necessary, the contractor might often be in a position to favor its own products or capabilities. To overcome the possibility of bias, contractors are prohibited from supplying a system or services acquired on the basis of work statements growing out of their services, unless excepted in paragraph (b)(1) of this section.

(3) For the reasons given in paragraph (a)(3) of this section, no prohibitions are imposed on development and design contractors.

9.505-3 Providing evaluation services.

Contracts for the evaluation of offers for products or services must not be awarded to a contractor that will evaluate its own offers for products or services, or those of a competitor, without proper safeguards to ensure objectivity to protect the Government's interests.

9.505-4 Obtaining access to proprietary information.

(a) When a contractor requires proprietary information from others to perform a Government contract and can use the leverage of the contract to obtain it, the contractor may gain an unfair competitive advantage unless restrictions are imposed. These

restrictions protect the information and encourage companies to provide it when necessary for contract performance. They are not intended to protect information—

(1) Furnished voluntarily without limitations on its use; or

(2) Available to the Government or contractor from other sources without restriction.

(b) A contractor that gains access to proprietary information of other companies in performing advisory and assistance services for the Government must agree with the other companies to protect their information from unauthorized use or disclosure for as long as it remains proprietary and refrain from using the information for any purpose other than that for which it was furnished. The contracting officer must obtain copies of these agreements and ensure that they are properly executed.

(c) Contractors also obtain proprietary and source selection information by acquiring the services of marketing consultants which, if used in connection with an acquisition, may give the contractor an unfair competitive advantage. Contractors should make inquiries of marketing consultants to ensure that the marketing consultant has provided no unfair competitive advantage.

9.506 Procedures.

(a) If information concerning prospective contractors is necessary to identify and evaluate potential organizational conflicts of interest or to develop recommended actions, contracting officers should first seek the information from within the Government or from other readily available sources. Government sources include the files and the knowledge of personnel within the contracting office, other contracting offices, the cognizant contract administration and audit activities and offices concerned with contract financing. Non-Government sources include publications and commercial services, such as credit rating services, trade and financial journals, and business directories and registers.

(b) If the contracting officer decides that a particular acquisition involves a significant potential organizational conflict of interest, the contracting officer must, before issuing the solicitation, submit for approval to the chief of the contracting office (unless a higher level official is designated by the agency)—

(1) A written analysis, including a recommended course of action for avoiding, neutralizing, or mitigating the conflict, based on the general rules in 9.505 or on another basis not expressly stated in that section;

(2) A draft solicitation provision (see 9.507-1); and

(3) If appropriate, a proposed contract clause (see 9.507-2).

(c) The approving official must—

(1) Review the contracting officer's analysis and recommended course of action, including the draft provision and any proposed clause;

(2) Consider the benefits and detriments to the Government and prospective contractors; and

(3) Approve, modify, or reject the recommendations in writing.

(d) The contracting officer must—

(1) Include the approved provision(s) and any approved clause(s) in the solicitation or the contract, or both;

(2) Consider additional information provided by prospective contractors in response to the solicitation or during negotiations; and

(3) Before awarding the contract, resolve the conflict or the potential conflict in a manner consistent with the approval or other direction by the head of the contracting activity.

(e) If, during the effective period of any restriction (see 9.507), a contracting office transfers acquisition responsibility for the item or system involved, it must notify the successor contracting office of the restriction, and send a copy of the contract under which the restriction was imposed.

9.507 Solicitation provisions and contract clause.

9.507-1 Solicitation provisions.

As indicated in the general rules in 9.505, significant potential organizational conflicts of interest are normally resolved by imposing some restraint, appropriate to the nature of the conflict, upon the contractor's eligibility for future contracts or subcontracts. Therefore, affected solicitations must contain a provision that—

(a) Invites offerors' attention to this subpart;

(b) States the nature of the potential conflict as seen by the contracting officer;

(c) States the nature of the proposed restraint upon future contractor activities; and

(d) Depending on the nature of the acquisition, states whether or not the terms of any proposed clause and the application of this subpart to the contract are subject to negotiation.

9.507-2 Contract clause.

(a) If, as a condition of award, the contractor's eligibility for future prime contract or subcontract awards will be restricted or the contractor must agree to some other restraint, the solicitation must contain a proposed clause that specifies both the nature and duration of the proposed restraint. The contracting officer must include the clause in the contract, first negotiating the clause's final terms with the successful offeror, if it is appropriate to do so (see 9.506(d)).

(b) The restraint imposed by a clause must be limited to a fixed term of reasonable duration, sufficient to avoid the circumstance of unfair competitive advantage or potential bias. This period varies. It might end, for example, when the first production contract using the contractor's specifications or work statement is awarded, or it might extend through the entire life of a system for which the contractor has performed systems engineering and technical direction. In every case, the restriction must specify termination by a specific date or upon the occurrence of an identifiable event.

9.508 Examples.

The examples in paragraphs (a) through (i) of this section illustrate situations in which questions concerning organizational conflicts of interest may arise. They are not all inclusive, but are intended to help the contracting officer apply the general rules in 9.505 to individual contract situations.

(a) Company A agrees to provide systems engineering and technical direction for the Navy on the powerplant for a group of submarines (*i.e.*, turbines, drive shafts, propellers, etc.). Company A should not be allowed to supply any powerplant components. Company A can, however, supply components of the submarine unrelated to the powerplant (*e.g.*, fire control, navigation, etc.). In this example, the system is the powerplant, not the submarine, and the ban on supplying components is limited to those for the system only.

(b) Company A is the systems engineering and technical direction contractor for system X. After some progress, but before completion, the system is canceled. Later, system Y is developed to achieve the same purposes as system X, but in a fundamentally different fashion. Company B is the systems engineering and technical direction contractor for system Y. Company A may supply system Y or its components.

(c) Company A develops new electronic equipment and, as a result of this development, prepares specifications. Company A may supply the equipment.

(d) XYZ Tool Company and PQR Machinery Company, representing the American Tool Institute, work under Government supervision and control to refine specifications or to clarify the requirements of a specific acquisition. These companies may supply the item.

(e) Before an acquisition for information technology is conducted, Company A is awarded a contract to prepare data system specifications and equipment performance criteria to be used as the basis for the equipment competition. Since the specifications are the basis for selection of commercial hardware, a potential conflict of interest exists. Company A should be excluded from the initial follow-on information technology hardware acquisition.

(f) Company A receives a contract to define the detailed performance characteristics an agency will require for purchasing rocket fuels. Company A has not developed the particular fuels. When the definition contract is awarded, it is clear to both parties that the agency will use the performance characteristics arrived at to choose competitively a contractor to develop or produce the fuels. Company A may not be awarded this follow-on contract.

(g) Company A receives a contract to prepare a detailed plan for scientific and technical training of an agency's personnel. It suggests a curriculum that the agency endorses and incorporates in its request for proposals to institutions to establish and conduct the training. Company A may not be awarded a contract to conduct the training.

(h) Company A is selected to study the use of lasers in communications. The agency intends to ask that firms doing research in the field make proprietary information available to Company A. The contract must require Company A to—

(1) Enter into agreements with these firms to protect any proprietary information they provide; and

(2) Refrain from using the information in supplying lasers to the Government or for any purpose other than that for which it was intended.

(i) An agency that regulates an industry wishes to develop a system for evaluating and processing license applications. Contractor X helps develop the system and process the applications. Contractor X should be prohibited from acting as a consultant to any of the applicants during its period of performance and for a reasonable period thereafter.

Part 52 - Solicitation Provisions and Contract Clauses

[52.209 \[Reserved\]](#)

[52.209-1 Qualification Requirements.](#)

[52.209-2 Prohibition on Contracting With Inverted Domestic Corporations-Representation.](#)

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[52.209-5 Certification Regarding Responsibility Matters.](#)

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[52.209-7 Information Regarding Responsibility Matters.](#)

[52.209-8 \[Reserved\]](#)

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[52.209-10 Prohibition on Contracting With Inverted Domestic Corporations.](#)

[52.209-11 Representation by Corporations Regarding Delinquent Tax Liability or a Felony Conviction under any Federal Law.](#)

[52.209-12 Certification Regarding Tax Matters.](#)

[52.209-13 Violation of Arms Control Treaties or Agreements-Certification.](#)

[52.209-14 Reserve Officer Training Corps and Military Recruiting on Campus.](#)

52.209 [Reserved]

52.209-1 Qualification Requirements.

As prescribed in 9.206-2 , insert the following clause:

QUALIFICATION REQUIREMENTS (DEVIATION NOV 2025)

(a) *Definition.* As used in this clause—

Qualification requirement means a Government requirement for testing or other quality assurance demonstration that must be completed before award.

(b) One or more qualification requirements apply to the supplies or services covered by this contract. For those supplies or services requiring qualification, whether the covered product or service is an end item under this contract or simply a component of an end item, the product, manufacturer, or source must have demonstrated that it meets the standards prescribed for qualification before award of this contract. The product, manufacturer, or source must be qualified at the time of award whether or not the name of the product, manufacturer, or source is actually included on a qualified products list, qualified manufacturers list, or qualified bidders list. Offerors should contact the agency activity designated below to obtain all requirements that they or their products or services, or their subcontractors or their products or services, must satisfy to become qualified and to arrange for an opportunity to demonstrate their abilities to meet the standards specified for qualification.

(Name) _____

(Address) _____

(c) If an offeror, manufacturer, source, product or service covered by a qualification requirement has already met the standards specified, the relevant information noted below should be provided.

Offeror's Name _____

Manufacturer's Name _____

Source's Name _____

Item Name _____

Service Identification _____

Test Number _____ (to the extent known)

(d) Even though a product or service subject to a qualification requirement is not itself an end item under this contract, the product, manufacturer, or source must nevertheless be qualified at the time of award of this contract. This is necessary whether the Contractor or a subcontractor will ultimately provide the product or service in question. If, after award, the Contracting Officer discovers that an applicable qualification requirement was not in fact met at the time of award, the Contracting Officer may either

terminate this contract for default or allow performance to continue if adequate consideration is offered and the action is determined to be otherwise in the Government's best interests.

(e) If an offeror, manufacturer, source, product or service has met the qualification requirement but is not yet on a qualified products list, qualified manufacturers list, or qualified bidders list, the offeror must submit evidence of qualification prior to award of this contract. Unless determined to be in the Government's interest, award of this contract will not be delayed to permit an offeror to submit evidence of qualification.

(f) Any change in location or ownership of the plant where a previously qualified product or service was manufactured or performed requires reevaluation of the qualification. Similarly, any change in location or ownership of a previously qualified manufacturer or source requires reevaluation of the qualification. The reevaluation must be accomplished before the date of award.

(End of clause)

52.209-2 Prohibition on Contracting With Inverted Domestic Corporations-Representation.

As prescribed in 9.108-6(a), insert the following provision:

PROHIBITION ON CONTRACTING WITH INVERTED DOMESTIC CORPORATIONS- REPRESENTATION (DEVIATION NOV 2025)

(a) *Definitions.* As used in this clause—

Inverted domestic corporation means a foreign incorporated entity that meets the definition of an inverted domestic corporation under 6 U.S.C. 395(b), applied in accordance with the rules and definitions of 6 U.S.C. 395(c).

Subsidiary means an entity in which more than 50 percent of the entity is owned—

- (1) Directly by a parent corporation; or
- (2) Through another subsidiary of a parent corporation.

(b) Government agencies are not permitted to use appropriated (or otherwise made available) funds for contracts with either an inverted domestic corporation, or a subsidiary of an inverted domestic corporation, unless the exception at 9.108-3(b) applies or the requirement is waived in accordance with the procedures at 9.108-5.

(c) *Representation.* The Offeror represents that-

(1) It is, is not an inverted domestic corporation; and

(2) It is, is not a subsidiary of an inverted domestic corporation.

(End of provision)

52.209-3 First Article Approval-Contractor Testing.

As prescribed in 9.308-1(a) and (b), insert the following clause:

FIRST ARTICLE APPROVAL-CONTRACTOR TESTING (DEVIATION NOV 2025)

[Contracting Officer inserts details]

(a) The Contractor shall test _____ unit(s) of Lot/Item _____ as specified in this contract. At least _____ calendar days before the beginning of first article tests, the Contractor shall notify the Contracting Officer, in writing, of the time and location of the testing so that the Government may witness the tests.

(b) The Contractor shall submit the first article test report within _____ calendar days from the date of this contract to _____ *[insert address of the Government activity to receive the report]* marked "FIRST ARTICLE TEST REPORT: Contract No. _____, Lot/Item No. _____." Within _____ calendar days after the Government receives the test report, the Contracting Officer will notify the Contractor, in writing, of the conditional approval, approval, or disapproval of the first article. The notice of conditional approval or approval shall not relieve the Contractor from complying with all requirements of the specifications and all other terms and conditions of this contract. A notice of conditional approval will state any further action required of the Contractor. A notice of disapproval will cite reasons for the disapproval.

(c) If the first article is disapproved, the Contractor, upon Government request, shall repeat any or all first article tests. After each request for additional tests, the Contractor shall make any necessary changes, modifications, or repairs to the first article or select another first article for testing. All costs related to these tests are to be borne by the Contractor, including any and all costs for additional tests following a disapproval. The Contractor shall then conduct the tests and deliver another report to the Government under the terms and conditions and within the time specified by the Government. The Government will take action on this report within the time specified in paragraph (b) above. The Government reserves the right to require an equitable adjustment of the contract price

for any extension of the delivery schedule, or for any additional costs to the Government related to these tests.

(d) If the Contractor fails to deliver any first article report on time, or the Contracting Officer disapproves any first article, the Contractor shall be deemed to have failed to make delivery within the meaning of the Default clause of this contract.

(e) Unless otherwise provided in the contract, and if the approved first article is not consumed or destroyed in testing, the Contractor may deliver the approved first article as part of the contract quantity if it meets all contract requirements for acceptance.

(f) If the Government does not act within the time specified in paragraph (b) or (c) above, the Contracting Officer will, upon timely written request from the Contractor, equitably adjust under the Changes clause of this contract the delivery or performance dates and/or the contract price, and any other contractual term affected by the delay.

(g) Before first article approval, the acquisition of materials or components for, or the commencement of production of, the balance of the contract quantity is at the sole risk of the Contractor. Before first article approval, the costs thereof shall not be allocable to this contract for (1) progress payments, or (2) termination settlements if the contract is terminated for the convenience of the Government.

(h) The Government may waive the requirement for first article approval test where supplies identical or similar to those called for in the schedule have been previously furnished by the offeror/contractor and have been accepted by the Government. The offeror/contractor may request a waiver.

(End of clause)

Alternate I (JAN 1997). As prescribed in 9.308-1(a)(2) and (b)(2), add the following paragraph (i) to the basic clause:

(i) The Contractor shall produce both the first article and the production quantity at the same facility.

Alternate II (Sept 1989). As prescribed in 9.308-1(a)(3) and (b)(3), substitute the following paragraph (g) for paragraph (g) of the basic clause:

(g) Before first article approval, the Contracting Officer may, by written authorization, authorize the Contractor to acquire specific materials or components or to commence production to the extent essential to meet the delivery schedules. Until first article

approval is granted, only costs for the first article and costs incurred under this authorization are allocable to this contract for (1) progress payments, or (2) termination settlements if the contract is terminated for the convenience of the Government. If first article tests reveal deviations from contract requirements, the Contractor shall, at the location designated by the Government, make the required changes or replace all items produced under this contract at no change in the contract price.

52.209-4 First Article Approval-Government Testing.

As prescribed in 9.308-2 (a) and (b), insert the following clause:

FIRST ARTICLE APPROVAL-GOVERNMENT TESTING (DEVIATION NOV 2025)

[Contracting Officer inserts details]

(a) The Contractor shall deliver ___ unit(s) of Lot/Item ___ within ___ calendar days from the date of this contract to the Government at _____ *[insert name and address of the testing facility]* for first article tests. The shipping documentation shall contain this contract number and the Lot/Item identification. This contract elsewhere specifies the characteristics that the first article must meet and the testing requirements.

(b) Within ___ calendar days after the Government receives the first article, the Contracting Officer will notify the Contractor, in writing, of the conditional approval, approval, or disapproval of the first article. The notice of conditional approval or approval shall not relieve the Contractor from complying with all requirements of the specifications and all other terms and conditions of this contract. A notice of conditional approval will state any further action required of the Contractor. A notice of disapproval will cite reasons for the disapproval.

(c) If the Government disapproves the first article, the Contractor, upon Government request, shall submit an additional first article for testing. After each request, the Contractor shall make any necessary changes, modifications, or repairs to the first article or select another first article for testing. All costs related to these tests are to be borne by the Contractor, including any and all costs for additional tests following a disapproval. The Contractor shall furnish any additional first article to the Government under the terms and conditions and within the time the Government specifies. The Government will act on this first article within the time limit specified in paragraph (b) above. The Government reserves the right to require an equitable adjustment of the

contract price for any extension of the delivery schedule or for any additional costs to the Government related to these tests.

(d) If the Contractor fails to deliver any first article on time, or the Contracting Officer disapproves any first article, the Contractor will have failed to make delivery within the meaning of the Default clause of this contract.

(e) Unless otherwise provided in the contract, the Contractor—

(1) May deliver the approved first article as a part of the contract quantity, provided it meets all contract requirements for acceptance and was not consumed or destroyed in testing; and

(2) Shall remove and dispose of any first article from the Government test facility at the Contractor's expense.

(f) If the Government does not act within the time specified in paragraph (b) or (c) above, the Contracting Officer will, upon timely written request from the Contractor, equitably adjust under the Changes clause of this contract the delivery or performance dates, the contract price, or both, and any other contractual term affected by the delay.

(g) The Contractor is responsible for providing operating and maintenance instructions, spare parts support, and repair of the first article during any first article test.

(h) Before first article approval, the acquisition of materials or components for, or the commencement of production of, the balance of the contract quantity is at the sole risk of the Contractor. Before first article approval, the costs thereof shall not be allocable to this contract for (1) progress payments, or (2) termination settlements if the contract is terminated for the convenience of the Government.

(i) The Government may waive the requirement for first article approval test where supplies identical or similar to those called for in the schedule have been previously furnished by the Offeror/Contractor and have been accepted by the Government. The Offeror/Contractor may request a waiver.

(End of clause)

Alternate I (JAN 1997). As prescribed in 9.308-2 (a)(2) and (b)(2), add the following paragraph (j) to the basic clause:

(j) The Contractor shall produce both the first article and the production quantity at the same facility.

Alternate II (SEP 1989). As prescribed in 9.308-2 (a)(3) and (b)(3), substitute the following paragraph (h) for paragraph (h) of the basic clause:

(h) Before first article approval, the Contracting Officer may, by written authorization, authorize the Contractor to acquire specific materials or components or to commence production to the extent essential to meet the delivery schedules. Until first article approval is granted, only costs for the first article and costs incurred under this authorization are allocable to this contract for (1) progress payments, or (2) termination settlements if the contract is terminated for the convenience of the Government. If first article tests reveal deviations from contract requirements, the Contractor shall, at the location designated by the Government, make the required changes or replace all items produced under this contract at no change in the contract price.

52.209-5 Certification Regarding Responsibility Matters.

As prescribed in 9.104-7(a), insert the following provision:

CERTIFICATION REGARDING RESPONSIBILITY MATTERS (DEVIATION NOV 2025)

(a) (1) The Offeror certifies, to the best of its knowledge and belief, that—

(i) The Offeror and/or any of its Principals—

(A) Are are not presently debarred, suspended, proposed for debarment, or declared ineligible for the award of contracts by any Federal agency;

(B) Have have not , within a three-year period preceding this offer, been convicted of or had a civil judgment rendered against them for: commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (Federal, State, or local) 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, violating Federal criminal tax laws, or receiving stolen property (if offeror checks "have", the offeror shall also see 52.209-7, if included in this solicitation);

(C) Are are not presently indicted for, or otherwise criminally or civilly charged by a governmental entity with, commission of any of the offenses enumerated in paragraph (a)(1)(i)(B) of this provision; and

(D) Have , have not , within a three-year period preceding this offer, been notified of any delinquent Federal taxes in an amount that exceeds the threshold at 9.104-5(a)(2) for which the liability remains unsatisfied. Federal taxes are considered delinquent if both of the following criteria apply:

(1) *The tax liability is finally determined.* The liability is finally determined if it has been assessed. A liability is not finally determined if a pending administrative or judicial challenge remains. In the case of a judicial challenge to the liability, the liability is not finally determined until all judicial appeal rights have been exhausted.

(2) *The taxpayer is delinquent in making payment.* A taxpayer is delinquent if the taxpayer has failed to pay the tax liability when full payment was due and required. A taxpayer is not delinquent in cases where enforced collection action is precluded.

(ii) The Offeror has has not , within a 3-year period preceding this offer, had one or more contracts terminated for default by any Federal agency.

(2) "Principal," for the purposes of this certification, means an officer, director, owner, partner, or a person having primary management or supervisory responsibilities within a business entity (e.g., general manager; plant manager; head of a division or business segment; and similar positions).

(b) The Offeror shall provide immediate written notice to the Contracting Officer if, at any time prior to contract award, the Offeror learns that its certification was erroneous when submitted or has become erroneous by reason of changed circumstances.

(c) A certification that any of the items in paragraph (a) of this provision exists will not necessarily result in withholding of an award under this solicitation. However, the Government will consider the certification in connection with a determination of the

Offeror's responsibility. Failure of the Offeror to furnish a certification or provide such additional information as requested by the Contracting Officer may render the Offeror nonresponsible.

(d) This provision does not require establishment of a system of records in order to render, in good faith, the certification required by paragraph (a). The knowledge and information of an Offeror is not required to exceed that which is normally possessed by a prudent person in the ordinary course of business dealings.

(e) The certification in paragraph (a) of this provision is a material representation of fact upon which reliance was placed when making award. If the Government later determines that the Offeror knowingly rendered an erroneous certification, in addition to other remedies available to the Government, the Contracting Officer may terminate the contract resulting from this solicitation for default.

(End of provision)

52.209-6 Protecting the Government's Interest When Subcontracting With Contractors Debarred, Suspended, Proposed for Debarment, or Voluntarily Excluded.

As prescribed in 9.409 , insert the following clause:

PROTECTING THE GOVERNMENT'S INTEREST WHEN SUBCONTRACTING WITH CONTRACTORS DEBARRED, SUSPENDED, PROPOSED FOR DEBARMENT, OR VOLUNTARILY EXCLUDED (DEVIATION NOV 2025)

(a) *Definition.* As used in this clause—

Commercially available off-the-shelf (COTS) item

(1) Means any item of supply (including construction material) that is—

(i) A commercial product (as defined in paragraph (1) of the definition of “commercial product” in Federal Acquisition Regulation (FAR) 2.101);

(ii) Sold in substantial quantities in the commercial marketplace; and

(iii) Offered to the Government, under a contract or subcontract at any tier, without modification, in the same form in which it is sold in the commercial marketplace; and

(2) Does not include bulk cargo, as defined in [46 U.S.C. 40102\(4\)](#), such as agricultural products and petroleum products.

(b) The Government suspends or debars Contractors to protect the Government's interests. Other than a subcontract for a commercially available off-the-shelf item, the Contractor shall not enter into any subcontract, in excess of the threshold specified in FAR 9.405-2(b) on the date of subcontract award, with a Contractor that is debarred, suspended, or proposed for debarment by any executive agency unless a compelling reason exists to do so.

(c) The Contractor shall require each proposed subcontractor whose subcontract will exceed the threshold specified in FAR 9.405-2(b) on the date of subcontract award, other than a subcontractor providing a commercially available off-the-shelf item, to disclose to the Contractor, in writing, whether as of the time of award of the subcontract, the subcontractor, or its principals, is or is not debarred, suspended, proposed for debarment, or voluntarily excluded by the Federal Government.

(d) A corporate officer or a designee of the Contractor shall notify the Contracting Officer, in writing, before entering into a subcontract with a party (other than a subcontractor providing a commercially available off-the-shelf item) that is debarred, suspended, proposed for debarment, or voluntarily excluded (see FAR 9.404 for information on the System for Award Management (SAM) Exclusions). The notice must include the following:

(1) The name of the subcontractor.

(2) The Contractor's knowledge of the reasons for the subcontractor being listed with an exclusion in SAM.

(3) The compelling reason(s) for doing business with the subcontractor notwithstanding its being listed with an exclusion in SAM.

(4) The systems and procedures the Contractor has established to ensure that it is fully protecting the Government's interests when dealing with such subcontractor in view of the specific basis for the party's debarment, suspension, proposed debarment, or voluntary exclusion.

(e) *Subcontracts*. Unless this is a contract for the acquisition of commercial products or commercial services, the Contractor shall include the requirements of this

clause, including this paragraph (e) (appropriately modified for the identification of the parties), in each subcontract that—

(1) Exceeds the threshold specified in FAR 9.405-2(b) on the date of subcontract award; and

(2) Is not a subcontract for commercially available off-the-shelf items.

(End of clause)

52.209-7 Information Regarding Responsibility Matters.

As prescribed at 9.104-7(b), insert the following provision:

INFORMATION REGARDING RESPONSIBILITY MATTERS (DEVIATION NOV 2025)

(a) *Definitions.* As used in this provision—

Administrative proceeding means a non-judicial process that is adjudicatory in nature in order to make a determination of fault or liability (e.g., Securities and Exchange Commission Administrative Proceedings, Civilian Board of Contract Appeals Proceedings, and Armed Services Board of Contract Appeals Proceedings). This includes administrative proceedings at the Federal and State level but only in connection with performance of a Federal contract or grant. It does not include agency actions such as contract audits, site visits, corrective plans, or inspection of deliverables.

Federal contracts and grants with total value greater than \$10,000,000 means—

(1) The total value of all current, active contracts and grants, including all priced options; and

(2) The total value of all current, active orders including all priced options under indefinite-delivery, indefinite-quantity, 8(a), or requirements contracts (including task and delivery and multiple-award Schedules).

Principal means an officer, director, owner, partner, or a person having primary management or supervisory responsibilities within a business entity (e.g., general manager; plant manager; head of a division or business segment; and similar positions).

(b) The offeror has does not have current active Federal contracts and grants with total value greater than \$10,000,000.

(c) If the offeror checked "has" in paragraph (b) of this provision, the offeror represents, by submission of this offer, that the information it has entered in the Federal Awardee Performance and Integrity Information System (FAPIIS) is current, accurate, and complete as of the date of submission of this offer with regard to the following information:

(1) Whether the offeror, and/or any of its principals, has or has not, within the last five years, in connection with the award to or performance by the offeror of a Federal contract or grant, been the subject of a proceeding, at the Federal or State level that resulted in any of the following dispositions:

(i) In a criminal proceeding, a conviction.

(ii) In a civil proceeding, a finding of fault and liability that results in the payment of a monetary fine, penalty, reimbursement, restitution, or damages of \$5,000 or more.

(iii) In an administrative proceeding, a finding of fault and liability that results in–

(A) The payment of a monetary fine or penalty of \$5,000 or more; or

(B) The payment of a reimbursement, restitution, or damages in excess of \$100,000.

(iv) In a criminal, civil, or administrative proceeding, a disposition of the matter by consent or compromise with an acknowledgment of fault by the Contractor if the proceeding could have led to any of the outcomes specified in paragraphs (c)(1)(i), (c)(1)(ii), or (c)(1)(iii) of this provision.

(2) If the offeror has been involved in the last five years in any of the occurrences listed in (c)(1) of this provision, whether the offeror has provided the requested information with regard to each occurrence.

(d) The offeror shall post the information in paragraphs (c)(1)(i) through (c)(1)(iv) of this provision in FAPIIS as required through maintaining an active registration in the System for Award Management, which can be accessed via <https://www.sam.gov> (see 52.204-7).

(End of provision)

52.209-8 [Reserved]

52.209-9 Updates of Publicly Available Information Regarding Responsibility Matters.

As prescribed at 9.104-7(c), insert the following clause:

UPDATES OF PUBLICLY AVAILABLE INFORMATION REGARDING RESPONSIBILITY MATTERS (DEVIATION NOV 2025)

(a) The Contractor shall update the information in the Federal Awardee Performance and Integrity Information System (FAPIS) on a semi-annual basis, throughout the life of the contract, by posting the required information in the System for Award Management via <https://www.sam.gov>.

(b) All information posted in FAPIS on or after April 15, 2011, except past performance reviews, will be publicly available. FAPIS consists of two segments—

(1) The non-public segment, into which Government officials and the Contractor post information, which can only be viewed by-

(i) Government personnel and authorized users performing business on behalf of the Government; or

(ii) The Contractor, when viewing data on itself; and

(2) The publicly-available segment, to which all data in the non-public segment of FAPIS is automatically transferred after a waiting period of 14 calendar days, except for-

(i) Past performance reviews required by part 42.

(ii) Information that was entered prior to April 15, 2011; or

(iii) Information that is withdrawn during the 14-calendar-day waiting period by the Government official who posted it in accordance with paragraph (c)(1) of this clause.

(c) The Contractor will receive notification when the Government posts new information to the Contractor's record.

(1) If the Contractor asserts in writing within 7 calendar days, to the Government official who posted the information, that some of the information posted to the non-public segment of FAPIS is covered by a disclosure exemption under the Freedom of Information Act, the Government official who posted the

information must within 7 calendar days remove the posting from FAPIIS and resolve the issue in accordance with agency Freedom of Information procedures, prior to reposting the releasable information. The contractor must cite 52.209-9 and request removal within 7 calendar days of the posting to FAPIIS.

(2) The Contractor will also have an opportunity to post comments regarding information that the Government has posted. FAPIIS will retain the comments as long as the associated information is retained, i.e., for a total period of 6 years. Contractor comments will remain a part of the record unless the Contractor revises them.

(3) All information posted in FAPIIS on or after April 15, 2011, except past performance reviews, will be publicly available (section 3010 of Pub. L. 111-212).

(d) The Government will handle public requests for system information posted prior to April 15, 2011, under Freedom of Information Act procedures, including, where appropriate, procedures promulgated under E.O. 12600.

(End of clause)

52.209-10 Prohibition on Contracting With Inverted Domestic Corporations.

As prescribed in 9.108-6(b), insert the following clause:

PROHIBITION ON CONTRACTING WITH INVERTED DOMESTIC CORPORATIONS (DEVIATION Nov 2025)

(a) *Definitions.* As used in this clause-

Inverted domestic corporation means a foreign incorporated entity that meets the definition of an inverted domestic corporation under 6 U.S.C. 395(b), applied in accordance with the rules and definitions of 6 U.S.C. 395(c).

Subsidiary means an entity in which more than 50 percent of the entity is owned—

- (1) Directly by a parent corporation; or
- (2) Through another subsidiary of a parent corporation.

(b) If the contractor reorganizes as an inverted domestic corporation or becomes a subsidiary of an inverted domestic corporation at any time during the period of

performance of this contract, applicable law may prohibit the Government from paying for Contractor activities performed after the date when it becomes an inverted domestic corporation or subsidiary. The Government may seek any available remedies in the event the Contractor fails to perform in accordance with the terms and conditions of the contract as a result of Government action under this clause.

(c) Exceptions to this prohibition are located at 9.108-3.

(d) In the event the Contractor becomes either an inverted domestic corporation, or a subsidiary of an inverted domestic corporation during contract performance, the Contractor shall give written notice to the Contracting Officer within five business days from the date of the inversion event.

(End of clause)

52.209-11 Representation by Corporations Regarding Delinquent Tax Liability or a Felony Conviction under any Federal Law.

As prescribed in 9.104-7(d), insert the following provision:

REPRESENTATION BY CORPORATIONS REGARDING DELINQUENT TAX LIABILITY OR A FELONY CONVICTION UNDER ANY FEDERAL LAW (DEVIATION NOV 2025)

(a) The Government will not enter into a contract with any corporation that—

(1) Has any unpaid Federal tax liability that has been assessed, for which all judicial and administrative remedies have been exhausted or have lapsed, and that is not being paid in a timely manner pursuant to an agreement with the authority responsible for collecting the tax liability, where the awarding agency is aware of the unpaid tax liability, unless an agency has considered suspension or debarment of the corporation and made a determination that suspension or debarment is not necessary to protect the interests of the Government; or

(2) Was convicted of a felony criminal violation under any Federal law within the preceding 24 months, where the awarding agency is aware of the conviction, unless an agency has considered suspension or debarment of the corporation and made a determination that this action is not necessary to protect the interests of the Government.

(b) The Offeror represents that—

(1) It is is not a corporation that has any unpaid Federal tax liability that has been assessed, for which all judicial and administrative remedies have been exhausted or have lapsed, and that is not being paid in a timely manner pursuant to an agreement with the authority responsible for collecting the tax liability; and

(2) It is is not a corporation that was convicted of a felony criminal violation under a Federal law within the preceding 24 months.

(End of provision)

52.209-12 Certification Regarding Tax Matters.

As prescribed in 9.104-7(e), insert the following provision:

CERTIFICATION REGARDING TAX MATTERS (OCT 2025)

(a) This provision implements section 523 of Division B of the Consolidated and Further Continuing Appropriations Act, 2015 (Pub. L. 113-235), and similar provisions, if contained in subsequent appropriations acts.

(b) If the Offeror is proposing a total contract price that will exceed \$7 million (including options), the Offeror shall certify that, to the best of its knowledge and belief, it

(1) Has filed all Federal tax returns required during the three years preceding the certification;

(2) Has not been convicted of a criminal offense under the Internal Revenue Code of 1986; and

(3) Has not , more than 90 days prior to certification, been notified of any unpaid Federal tax assessment for which the liability remains unsatisfied, unless the assessment is the subject of an installment agreement or offer in compromise that has been approved by the Internal Revenue Service and is not in default, or the assessment is the subject of a non-frivolous administrative or judicial proceeding.

(End of provision)

52.209-13 Violation of Arms Control Treaties or Agreements-Certification.

As prescribed in 9.109-5 , insert the following provision:

VIOLATION OF ARMS CONTROL TREATIES OR AGREEMENTS-CERTIFICATION (DEVIATION NOV 2025)

(a) This provision does not apply to acquisitions at or below the simplified acquisition threshold or to acquisitions of commercial products and commercial services as defined in Federal Acquisition Regulation 2.101.

(b) *Certification.* [Offeror shall check either (1) or (2).]

__ (1) The Offeror certifies that–

(i) It does not engage and has not engaged in any activity that contributed to or was a significant factor in the President's or Secretary of State's determination that a foreign country is in violation of its obligations undertaken in any arms control, nonproliferation, or disarmament agreement to which the United States is a party, or is not adhering to its arms control, nonproliferation, or disarmament commitments in which the United States is a participating state. The determinations are described in the most recent unclassified annual report provided to Congress pursuant to section 403 of the Arms Control and Disarmament Act (22 U.S.C. 2593a). The report is available at <https://www.state.gov/bureaus-offices/under-secretary-for-arms-control-and-international-security-affairs/bureau-of-arms-control-verification-and-compliance/>; and

(ii) No entity owned or controlled by the Offeror has engaged in any activity that contributed to or was a significant factor in the President's or Secretary of State's determination that a foreign country is in violation of its obligations undertaken in any arms control, nonproliferation, or disarmament agreement to which the United States is a party, or is not adhering to its arms control, nonproliferation, or disarmament commitments in which the United States is a participating state. The determinations are described in the most recent unclassified annual report provided to Congress pursuant to section 403 of the Arms Control and Disarmament Act (22 U.S.C. 2593a). The report is available at <https://www.state.gov/bureaus-offices/under-secretary-for-arms-control-and-international-security-affairs/bureau-of-arms-control-verification-and-compliance/>; or

__ (2) The Offeror is providing separate information with its offer in accordance with paragraph (d)(2) of this provision.

(c) Procedures for reviewing the annual unclassified report (see paragraph (b)(1) of this provision). For clarity, references to the report in this section refer to the entirety of the annual unclassified report, including any separate reports that are incorporated by reference into the annual unclassified report.

(1) Check the table of contents of the annual unclassified report and the country section headings of the reports incorporated by reference to identify the foreign countries listed there. Determine whether the Offeror or any person owned or controlled by the Offeror may have engaged in any activity related to one or more of such foreign countries.

(2) If such activity might have occurred, review all findings in the report associated with those foreign countries to determine whether or not each such foreign country was determined to be in violation of its obligations undertaken in an arms control, nonproliferation, or disarmament agreement to which the United States is a party, or to be not adhering to its arms control, nonproliferation, or disarmament commitments in which the United States is a participating state. For clarity, in the annual report an explicit certification of non-compliance is equivalent to a determination of violation. However, the following statements in the annual report are not equivalent to a determination of violation:

- (i) An inability to certify compliance.
- (ii) An inability to conclude compliance.
- (iii) A statement about compliance concerns.

(3) If so, determine whether the Offeror or any person owned or controlled by the Offeror has engaged in any activity that contributed to or is a significant factor in the determination in the report that one or more of these foreign countries is in violation of its obligations undertaken in an arms control, nonproliferation, or disarmament agreement to which the United States is a party, or is not adhering to its arms control, nonproliferation, or disarmament commitments in which the United States is a participating state. Review the narrative for any such findings reflecting a determination of violation or non-adherence related to those foreign countries in the report, including the finding itself, and to the extent necessary, the conduct giving rise to the compliance or adherence concerns, the analysis of compliance or adherence concerns, and efforts to resolve compliance or adherence concerns.

(4) The Offeror may submit any questions with regard to this report by email to NDAA1290Cert@state.gov. To the extent feasible, the Department of State will respond to such email inquiries within 3 business days.

(d) Do not submit an offer unless—

(1) A certification is provided in paragraph (b)(1) of this provision and submitted with the offer; or

(2) In accordance with paragraph (b)(2) of this provision, the Offeror provides with its offer information that the President of the United States has

(i) Waived application under [22 U.S.C. 2593e](#)(d) or (e); or

(ii) Determined under [22 U.S.C. 2593e](#)(g)(2) that the entity has ceased all activities for which measures were imposed under [22 U.S.C. 2593e](#)(b).

(e) *Remedies*. The certification in paragraph (b)(1) of this provision is a material representation of fact upon which reliance was placed when making award. If the Government later determines that the Offeror knowingly submitted a false certification, in addition to other remedies available to the Government, such as suspension or debarment, the Contracting Officer may terminate any contract resulting from the false certification.

(End of provision)

52.209-14 Reserve Officer Training Corps and Military Recruiting on Campus.

As prescribed in 9.110-5 , insert the following clause:

RESERVE OFFICER TRAINING CORPS AND MILITARY RECRUITING ON CAMPUS (NOV 2021)

(a) Definitions. As used in this clause—

Covered agency means—

(1) The Department of Defense;

(2) Any department or agency for which regular appropriations are made in a Department of Labor, Health and Human Services; and Education, and Related Agencies Appropriations Act;

(3) The Department of Homeland Security;

(4) The National Nuclear Security Administration of the Department of Energy;

(5) The Department of Transportation; or

(6) The Central Intelligence Agency.

Institution of higher education means an institution that meets the requirements of [20 U.S.C. 1001](#) and includes all sub-elements of such an institution.

(b) *Limitation on contract award.* Except as provided in paragraph (c) of this clause, an institution of higher education is ineligible for contract award if the Secretary of Defense determines that the institution has a policy or practice (regardless of when implemented) that prohibits or in effect prevents—

(1) The Secretary of a military department from maintaining, establishing, or operating a unit of the Senior Reserve Officer Training Corps (ROTC) at that institution (or any sub-element of that institution);

(2) A student at that institution (or any sub-element of that institution) from enrolling in a unit of the Senior ROTC at another institution of higher education;

(3) The Secretary of a military department or the Secretary of Homeland Security from gaining access to campuses, or access to students (who are 17 years of age or older) on campuses, for purposes of military recruiting; or

4) Military recruiters from accessing, for purposes of military recruiting, the following information pertaining to students (who are 17 years of age or older) enrolled at that institution:

(i) Name, address, and telephone listings.

(ii) Date and place of birth, educational level, academic majors, degrees received, and the most recent educational institution enrolled in by the student.

(c) *Exception.* The limitation in paragraph (b) of this clause does not apply to an institution of higher education if the Secretary of Defense determines that—

(1) The institution has ceased the policy or practice described in paragraph (b) of this clause; or

(2) The institution has a long-standing policy of pacifism based on historical religious affiliation.

(d) Notwithstanding any other clause of this contract, if the Secretary of Defense determines that the institution has violated the contract in paragraph (b) of this clause—

(1) The institution will be ineligible for further payments under this and any other contracts with this agency and any other covered agency, except for contracts at or below the simplified acquisition threshold or contracts for the acquisition of commercial products and commercial services; and

(2) The Government will terminate this contract for default for the institution's material failure to comply with the terms and conditions of award.

(End of clause)