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**Parent topic:** Federal Acquisition Regulation

## **9.000 Scope of part.**

This part prescribes policies, standards, and procedures pertaining to prospective contractors' responsibility; *debarment*, *suspension*, and ineligibility; qualified *products*; *first article testing* and approval; contractor team arrangements; defense production pools and research and development pools; and organizational conflicts of interest.

## **Subpart 9.1 - Responsible Prospective Contractors**

### **9.100 Scope of subpart.**

This subpart prescribes policies, standards, and procedures for determining whether prospective contractors and subcontractors are responsible.

### **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 connections 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.

*Surveying activity*, as used in this subpart, means the cognizant *contract administration office* or, if there is no such office, another organization designated by the agency to conduct preaward surveys.

### **9.102 Applicability.**

(a) This subpart applies to all proposed contracts with any prospective contractor that is located-

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

(2) Elsewhere, unless application of the 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 [subpart 8.7](#)).

### **9.103 Policy.**

(a) Purchases *shall* be made from, and contracts *shall* be awarded to, *responsible prospective contractors* only.

(b) No purchase or award *shall* be made unless the *contracting officer* makes an affirmative determination of responsibility. In the absence of information clearly indicating that the prospective contractor is responsible, the *contracting officer shall* make a determination of nonresponsibility. If the prospective contractor is a small business concern, the *contracting officer shall* comply with [subpart 19.6](#), Certificates of Competency and Determinations of Responsibility. (If Section 8(a) of the Small Business Act (15 U.S.C. 637) applies, see [subpart 19.8](#).)

(c) The award of a contract to a supplier based on lowest evaluated price alone can be false economy if there is subsequent default, late deliveries, or other unsatisfactory performance resulting in additional contractual or administrative costs. While it is important that Government purchases be made at the lowest price, this does not require an award to a supplier solely because that supplier submits the lowest *offer*. 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 be determined responsible, 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 [subpart 42.15](#)). A prospective contractor *shall* not be determined responsible or nonresponsible solely on the basis of a lack of relevant performance history, except as provided in [9.104-2](#);

(d) Have a satisfactory record of integrity and business ethics (for example, see [subpart 42.15](#));

(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 Special standards.**

(a) When it is necessary for a particular *acquisition* or class of *acquisitions*, the *contracting officer shall* develop, with the assistance of appropriate specialists, special standards of responsibility. Special standards *may* be particularly desirable when experience has demonstrated that unusual expertise or specialized facilities are needed for adequate contract performance. The special standards *shall* be set forth in the *solicitation* (and so identified) and *shall* apply to all *offerors*.

(b) *Contracting officers shall* award contracts for subsistence only to those prospective contractors that meet the general standards in [9.104-1](#) and are approved in accordance with agency sanitation standards and procedures.

### **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, the *contracting officer shall* require acceptable evidence of the prospective contractor's ability to obtain required resources (see [9.104-1\(a\)](#), (e), and (f)). Acceptable evidence normally consists of a commitment or explicit arrangement, that will be in existence at the time of contract award, to rent, purchase, or otherwise acquire the needed facilities, equipment, other resources, or personnel. Consideration of a prime contractor's compliance with limitations on subcontracting *shall* take into account the time period covered by the contract base period or quantities plus *option* periods or quantities, if such *options* are considered when evaluating *offers* for award.

(b) *Satisfactory performance record.* A prospective contractor that is or recently has been seriously deficient in contract performance *shall* be presumed to be nonresponsible, unless the *contracting officer* determines that the circumstances were properly beyond the contractor's control, or that the contractor has taken appropriate corrective action. Past failure to apply sufficient tenacity and perseverance to perform acceptably is strong evidence of nonresponsibility. Failure to meet the quality requirements of the contract is a significant factor to consider in determining satisfactory performance. The *contracting officer shall* consider the number of contracts involved and the extent of deficient performance in each contract when making this determination. If the pending contract requires a subcontracting plan pursuant to [subpart 19.7](#), The Small Business Subcontracting Program, the *contracting officer shall* also consider the prospective contractor's compliance with subcontracting plans under recent contracts.

(c)

(1) *Affiliated concerns.* Affiliated concerns (see "Concern" in [19.001](#) and "Small business concern" in [2.101](#) ) are normally considered separate entities in determining whether the concern that is to perform the contract meets the applicable standards for responsibility. However, the *contracting officer shall* consider the affiliate's *past performance* and integrity when they *may* adversely affect

the prospective contractor's responsibility.

(2) *Joint ventures.* For a prospective contractor that is a joint venture, the *contracting officer shall* consider the *past performance* of the joint venture. If the joint venture does not demonstrate past performance for award, the *contracting officer shall* consider the *past performance* of each party to the joint venture.

(d)

(1) *Small business concerns.* Upon making a determination of nonresponsibility with regard to a small business concern, the *contracting officer shall* refer the matter to the Small Business Administration, which will decide whether to issue a Certificate of Competency (see subpart [19.6](#)).

(2) *Limitations on subcontracting.* A small business that is unable to comply with the limitations on subcontracting *may* be considered 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). A small business that has not agreed to comply with the limitations on subcontracting *may* be considered nonresponsive.

#### **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 the Government's determination of the prospective prime contractor's responsibility. A prospective contractor *may* be required to provide written evidence of a proposed subcontractor's responsibility.

(b) When it is in the Government's interest to do so, 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). In this case, the same standards used to determine a prime contractor's responsibility *shall* be used by the Government 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](#), the *contracting officer shall*-

(1) Promptly, upon receipt of *offers*, request such additional information from the *offeror* as the *offeror* deems necessary in order 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 \$10,000.

(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, the *contracting officer shall-*

(1) Promptly, upon receipt of *offers*, request such additional information from the *offeror* as the *offeror* deems necessary in order 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 corporation unless an agency suspending or 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)), then the *contracting officer shall* not award any contract in an amount greater than \$5.5 million, unless the *offeror* affirmatively certified in its *offer*, as required by paragraph (b)(1), (2), and (3) of the provision.

(d) *Offerors* who do not furnish the representation or certifications or such information as *may* be requested by the *contracting officer shall* be given an opportunity to remedy the deficiency. Failure to furnish the representation or certifications or such information *may* render the *offeror* nonresponsible.

#### **9.104-6 Federal Awardee Performance and Integrity Information System.**

(a)

(1) Before awarding a contract in excess of the *simplified acquisition threshold*, the *contracting officer shall* 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) In accordance with 41 U.S.C. 2313(d)(3), FAPIS also identifies-

(i) An affiliate that is an immediate owner or subsidiary of the *offeror*, if any (see 52.204-17, Ownership or Control of *Offeror*); and

(ii) All predecessors of the *offeror* that held a Federal contract or grant within the last three years (see 52.204-20, Predecessor of *Offeror*).

(b)

(1) When making a responsibility determination, the *contracting officer shall* consider all the information available through FAPIIS with regard to the *offeror* and any immediate owner, predecessor, or subsidiary identified for that *offeror* in FAPIIS, as well as other *past performance* information on the *offeror* (see [subpart 42.15](#)).

(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\(a\)\(2\)](#). *Contracting officers shall* 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 five-year period, some of that information *may* not be relevant to a determination of present responsibility, e.g., a prior administrative action such as *debarment* or *suspension* that has expired or otherwise been resolved, or information relating to contracts for completely different *products* or *services*.

(5) Because FAPIIS is a database that provides information about prime contractors, the *contracting officer* posts information required to be posted 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 has the opportunity to post in FAPIIS any mitigating factors. The *contracting officer shall* 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) If the *contracting officer* obtains 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, the *contracting officer shall*, unless the contractor has already been debarred or suspended-

(1) Promptly request such additional information from the *offeror* as the *offeror* deems necessary in order 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, if the information appears appropriate for the official's consideration.

(d) The *contracting officer shall* document the contract file for each contract in excess of 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. A *contracting officer* who makes a nonresponsibility determination is required to document that information in FAPIIS in accordance with [9.105-2\(b\)\(2\)](#).

#### **9.104-7 Solicitation provisions and contract clauses.**

(a) The *contracting officer shall* 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) The *contracting officer shall* insert the provision at 52.209-7, Information Regarding Responsibility Matters, in *solicitations* where the resultant contract value is expected to exceed \$600,000.

(c) The *contracting officer shall* 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 \$600,000; and

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

(d) The *contracting officer shall* insert the provision 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, the *contracting officer shall* insert the provision 52.209-12, Certification Regarding Tax Matters, in *solicitations* for which the resultant contract (including *options*) may have a value greater than \$5.5 million. Division B of the Consolidated and Continuing Further Appropriations Act, 2015 appropriates funds for the following agencies: the Department of Commerce, the Department of Justice, the National Aeronautics and Space Administration, the Office of Science and Technology Policy, the National Science Foundation, the Commission on Civil Rights, the Equal Employment Opportunity Commission, the U.S. International Trade Commission, the Legal Services Corporation, the Marine Mammal Commission, the Office of the *United States* Trade Representative, and the State Justice Institute.

## **9.105 Procedures.**

### **9.105-1 Obtaining information.**

(a) Before making a determination of responsibility, the *contracting officer shall* possess or obtain information sufficient to be satisfied that a prospective contractor currently meets the applicable standards in 9.104.

(b)

(1) Generally, the *contracting officer shall* obtain information regarding the responsibility of prospective contractors, including requesting preaward surveys when necessary (see 9.106), promptly after a bid opening or receipt of *offers*. However, in negotiated *contracting*, especially when research and development is involved, the *contracting officer may* obtain this information before issuing the request for proposals. Requests for information *shall* ordinarily be limited to information concerning-

(i) The low bidder; or

(ii) Those *offerors* in range for award.

(2) Preaward surveys *shall* be managed and conducted by the *surveying activity*.

(i) If the *surveying activity* is a *contract administration office*-

(A) That office *shall* advise the *contracting officer* on prospective contractors' financial competence and credit needs; and

(B) The administrative *contracting officer shall* obtain from the auditor any information required concerning the adequacy of prospective contractors' accounting systems and these systems' suitability for use in administering the proposed type of contract.

(ii) If the *surveying activity* is not a *contract administration office*, the *contracting officer shall* obtain from the auditor any information required concerning prospective contractors' financial competence and credit needs, the adequacy of their accounting systems, and these systems' suitability for use in administering the proposed type of contract.

(3) Information on financial resources and performance capability *shall* be obtained or updated on as current a basis as is feasible up to the date of award.

(c) In making the determination of responsibility, the *contracting officer shall* consider information available through FAPIIS (see [9.104-6](#)) with regard to the *offeror* and any immediate owner, predecessor, or subsidiary identified for that *offeror* in FAPIIS, including information that is 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 [subpart 42.15](#)). In addition, the *contracting officer should* use 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) *Preaward survey* reports (see [9.106](#)).

(5) 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 *shall* 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. When an *offer* on which an award would otherwise be made is rejected because the prospective contractor is found to be nonresponsible, the

*contracting officer shall* make, sign, and place in the contract file a determination of nonresponsibility, which *shall* state the basis for the determination.

(2) If the *contracting officer* determines that a responsive small business lacks certain elements of responsibility, the *contracting officer shall* comply with the procedures in [subpart 19.6](#). When a Certificate of Competency is issued for a small business concern (see [subpart 19.6](#)), the *contracting officer shall* accept the Small Business Administration's decision to issue a Certificate of Competency and award the contract to the concern.

(b) *Support documentation.*

(1) Documents and reports supporting a determination of responsibility or nonresponsibility, including any *preaward survey* reports, the use of FAPIIS information (see [9.104-6](#)), and any applicable Certificate of Competency, *must* be included in the contract file.

(2)

(i) The *contracting officer shall* 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) The *contracting officer* is responsible for the timely submission, within 3 working days, and sufficiency, and accuracy of the documentation regarding the nonresponsibility determination.

(iii) As required by section 3010 of the Supplemental Appropriations Act, 2010 (Pub. L. 111-212), all information posted in FAPIIS on or after April 15, 2011, except *past performance* reviews, will be publicly available. 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 [subpart 42.15](#);

(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) The *contracting officer*, or any other Government official, *shall* not post any information in the non-public *segment* of FAPIIS that is 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 and 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.**

(a) Except as provided in subpart 24.2, Freedom of Information Act, information (including the *preaward survey* report) accumulated for purposes of determining the responsibility of a prospective contractor *shall* not be released or disclosed outside the Government.

(b) The *contracting officer* may discuss *preaward survey* information with the prospective contractor before determining responsibility. After award, the *contracting officer* or, if it is appropriate, the head of the *surveying activity* or a designee may discuss the findings of the *preaward survey* with the company surveyed.

(c) *Preaward survey* information may contain proprietary or *source selection information* and *should* be marked with the appropriate legend and protected accordingly (see 3.104-4).

### **9.106 Preaward surveys.**

#### **9.106-1 Conditions for preaward surveys.**

(a) A *preaward survey* is normally required only when the information on hand or readily available to the *contracting officer*, including information from commercial sources, is not sufficient to make a determination regarding responsibility. In addition, if the contemplated contract will have a fixed price at or below the *simplified acquisition threshold* or will involve the *acquisition* of *commercial products* or *commercial services* (see part 12), the *contracting officer* *should* not request a *preaward survey* unless circumstances justify its cost.

(b) When a cognizant *contract administration office* becomes aware of a prospective award to a contractor about which unfavorable information exists and no *preaward survey* has been requested, it *shall* promptly obtain and transmit details to the *contracting officer*.

(c) Before beginning a *preaward survey*, the *surveying activity* *shall* ascertain whether the prospective contractor is debarred, suspended, or *ineligible* (see subpart 9.4). If the prospective contractor is debarred, suspended, or *ineligible*, the *surveying activity* *shall* advise the *contracting officer* promptly and not proceed with the *preaward survey* unless specifically requested to do so by the *contracting officer*.

#### **9.106-2 Requests for preaward surveys.**

The *contracting officer's* request to the *surveying activity* (*Preaward Survey* of Prospective

Contractor (General),[SF 1403](#)) shall-

- (a) Identify additional factors about which information is needed;
- (b) Include the complete *solicitation* package (unless it has previously been furnished), and any information indicating prior unsatisfactory performance by the prospective contractor;
- (c) State whether the *contracting office* will participate in the survey;
- (d) Specify the date by which the report is required. This date *should* be consistent with the scope of the survey requested and normally *shall* allow at least 7 working days to conduct the survey; and
- (e) When appropriate, limit the scope of the survey.

### **9.106-3 Interagency preaward surveys.**

When the *contracting office* and the *surveying activity* are in different agencies, the procedures of this section 9.106 and [subpart 42.1](#) shall be followed along with the regulations of the agency in which the *surveying activity* is located, except that reasonable special requests by the *contracting office* shall be accommodated (also see [subpart 17.5](#)).

### **9.106-4 Reports.**

- (a) The *surveying activity* shall complete the applicable parts of [SF 1403](#), *Preaward Survey of Prospective Contractor (General)*; [SF 1404](#), *Preaward Survey of Prospective Contractor-Technical*; [SF 1405](#), *Preaward Survey of Prospective Contractor-Production*; [SF 1406](#), *Preaward Survey of Prospective Contractor-Quality Assurance*; [SF 1407](#), *Preaward Survey of Prospective Contractor-Financial Capability*; and [SF 1408](#), *Preaward Survey of Prospective Contractor-Accounting System*; and provide a narrative discussion sufficient to support both the evaluation ratings and the recommendations.
- (b) When the contractor surveyed is a small business that has received preferential treatment on an ongoing contract under Section 8(a) of the Small Business Act (15 U.S.C. 637) or has received a Certificate of Competency during the last 12 months, the *surveying activity* shall consult the appropriate Small Business Administration field office before making an affirmative recommendation regarding the contractor's responsibility or nonresponsibility.
- (c) When a *preaward survey* discloses previous unsatisfactory performance, the *surveying activity* shall specify the extent to which the prospective contractor plans, or has taken, corrective action. Lack of evidence that past failure to meet contractual requirements was the prospective contractor's fault does not necessarily indicate satisfactory performance. The narrative shall report any persistent pattern of need for costly and burdensome Government assistance (*e.g.*, engineering, *inspection*, or testing) provided in the Government's interest but not contractually required.
- (d) When the *surveying activity* possesses information that supports a recommendation of complete award without an on-site survey and no special areas for investigation have been requested, the *surveying activity* may provide a short-form *preaward survey* report. The short-form report shall consist solely of the *Preaward Survey of Prospective Contractor (General)*, [SF 1403](#). Sections III and IV of this form shall be completed and block21 shall be checked to show that the report is a short-

form preaward report.

### **9.107 Surveys of nonprofit agencies participating in the AbilityOne Program.**

(a) The Committee for Purchase From People Who Are Blind or Severely Disabled (Committee), as authorized by 41 U.S.C. chapter 85, determines what *supplies* and services *Federal agencies* are required to purchase from AbilityOne participating nonprofit agencies serving people who are blind or have other severe disabilities (see [subpart 8.7](#)). The Committee is required to find an AbilityOne participating nonprofit agency capable of furnishing the *supplies* or services before the nonprofit agency can be designated as a mandatory source under the AbilityOne Program. The Committee *may* request a *contracting office* to assist in assessing the capabilities of a nonprofit agency.

(b) The *contracting office*, upon request from the Committee, *shall* request a capability survey from the activity responsible for performing preaward surveys, or notify the Committee that the AbilityOne participating nonprofit agency is capable, with supporting rationale, and that the survey is waived. The capability survey will focus on the technical and production capabilities and applicable *preaward survey* elements to furnish specific *supplies* or services being considered for addition to the *Procurement List*.

(c) The *contracting office shall* use the [Standard Form 1403](#) to request a capability survey of organizations employing people who are blind or have other severe disabilities.

(d) The *contracting office shall* furnish a copy of the completed survey, or notice that the AbilityOne participating nonprofit agency is capable and the survey is waived, to the Executive Director, Committee for Purchase From People Who Are Blind or Severely Disabled.

### **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 Prohibition.**

(a) 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) prohibit, on a Governmentwide basis, the use of appropriated (or otherwise made available) funds



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 [9.108-4](#) Waiver.

(b)

(1) Section 745 and its successor provisions include the following exception: This section *shall* not apply to any Federal Government contract entered into before the date of the enactment of this Act, or to any *task order* issued pursuant to such contract.

(2) To ensure appropriate application of the prohibition and this exception, *contracting officers should* consult with legal counsel if, during the performance of a contract, a contractor becomes an *inverted domestic corporation* or a *subsidiary* of one.

### **9.108-3 Representation by the offeror.**

(a) In order 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 [9.108-4](#).

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

### **9.108-4 Waiver.**

Any *agency head may* waive the prohibition in subsection [9.108-2](#) and the requirement of subsection [9.108-3](#) for a specific contract if the *agency head* determines *in writing* that the waiver is required in the interest of national security, documents the determination, and reports it to the Congress.

### **9.108-5 Solicitation provision and contract clause.**

The *contracting officer shall*-

(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*); and

(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.**

*Contracting officers shall not award, renew, or extend a contract for the procurement of products or services with an entity identified as excluded in the System for Award Management, specifically for this subpart, on the basis of 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) In order to be eligible for contract award, an *offeror* is required to—

(1)

(i) 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 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) Similarly certify with regard to any entity owned or controlled by the *offeror*; or

(2) 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 the *contracting officer* has reason 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 shall be 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)).

### **9.109-5 Solicitation provision.**

Unless the exception at 9.109-3 applies, the *contracting officer* shall 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 the *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.**

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—

(a) The Secretary of Defense will create an active exclusion record for the institution in the *System for Award Management*; and

(b) A *covered agency* shall not solicit *offers* from, award contracts to, or *consent to subcontracts* with the institution. The prohibition in this paragraph (b) 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.**

The *contracting officer* shall insert the clause at 52.209-14, Reserve Officer Training Corps and

Military Recruiting on Campus, in *solicitations* and contracts that are expected to exceed the *simplified acquisition threshold*, with institutions of higher education, when using funds from a *covered agency*. The clause is not prescribed for *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 and prescribes policies and procedures regarding *qualification requirements* and the *acquisitions* that are subject to such requirements.

### **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) The *head of the agency* or designee *shall*, before establishing a *qualification requirement*, prepare a written justification-

(i) Stating the necessity for establishing 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 in order to become qualified. Only those requirements which are the least restrictive to meet the purposes necessitating the establishment of the *qualification requirements shall* be specified.

(2) Upon request to the *contracting activity*, potential *offerors shall* be provided-

(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).

(3) If the services in paragraph (a)(2)(ii) of this section are provided by contract, the contractors selected to provide testing and evaluation services *shall be*-

(i) Those that are 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.

(4) A potential *offeror* seeking qualification *shall be* promptly informed as to whether qualification is attained and, in the event it is not, promptly furnished specific reasons why qualification was not attained.

(b) When justified under the circumstances, the agency activity responsible for establishing a *qualification requirement shall* submit to the advocate for competition for the *procuring activity* responsible for purchasing the item subject to the *qualification requirement*, a determination that it is unreasonable to specify the standards for qualification which a prospective *offeror* (or its product) *must* satisfy. After considering any comments of the advocate for competition reviewing the determination, the head of the *procuring activity may* waive the requirements of paragraph (a)(1)(ii) through (a)(4) of this section for up to 2 years with respect to the item subject to the *qualification requirement*. A copy of the waiver *shall be* furnished to the *head of the agency* or other official responsible for actions under paragraph (a)(1) of this section. The waiver authority provided in this paragraph does not apply with respect to *qualification requirements* contained in a QPL, QML, or QBL.

(c) If a potential *offeror* can demonstrate to the satisfaction of the *contracting officer* that the potential *offeror* (or its product) meets the standards established for qualification or can meet them before the date specified for award of the contract, a potential *offeror may* not be denied 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 [subpart 19.6](#) 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 in order to provide a potential *offeror* with an opportunity to demonstrate its ability to meet the standards specified for qualification. 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* shall 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 shall 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 shall 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) with regard to any product, manufacturer, or potential *offeror* not yet included on an applicable list.)

(b) Specifications requiring a qualified product are included-

- (1) In the GSA 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](http://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 for establishment of a qualification requirement.**

The responsibilities of agency activities that establish *qualification requirements* include the following:

(a) Arranging publicity for the *qualification requirements*. 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 if it is determined 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 of time, 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) Qualifying *products* that meet specification requirements.

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

(d) Furnishing QPL's, QML's, or QBL's or the *qualification requirements* themselves to prospective *offerors* and the public upon request (see [9.202\(a\)\(2\)\(i\)](#)).

(e) Clarifying, as necessary, *qualification requirements*.

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

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

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

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

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

(3) The list *may* be amended without notice;

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

(5) Use of the list for advertising or publicity is permitted. However, it *must* not be stated or implied 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.

(i) Reexamining a qualified product or manufacturer when-

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

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



(3) It is otherwise necessary to determine that the quality of the product is maintained in conformance 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* urge manufacturers and other potential sources to demonstrate their ability to meet the standards specified for qualification and, when possible, give sufficient time to arrange for qualification before award. The responsible agency activity *must*, before establishing any *qualification requirement*, furnish notice through the GPE. The notice *must* include-

(1) Intent to establish a *qualification requirement*;

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

(3) The name and address of the activity to which a request for the information and opportunity described in 9.202(a)(2) *should* be submitted;

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

(5) 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

(6) 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)(4)).

(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) Agencies *may* 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, *may* be enforced without regard to 9.202(a) if they are in either of the following categories:

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

(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* or designee determines that an *emergency* exists, whenever an agency elects, whether before or after award, not to enforce a *qualification requirement* which it established, the requirement *may* not thereafter be enforced unless the agency complies with [9.202\(a\)](#).

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

(d) If a product subject to a *qualification requirement* is to be acquired as a *component* of an end item, the *contracting officer* must ensure that all such *components* and their *qualification requirements* are properly identified in the *solicitation* since the product or source *must* meet the standards specified for qualification before award.

(e) In *acquisitions* subject to *qualification requirements*, the *contracting officer* shall take the following steps:

(1) Use presolicitation notices in appropriate cases to advise potential suppliers before issuing *solicitations* involving *qualification requirements*. The notices *shall* 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 standards specified for qualification. The notice *shall* be publicized in accordance with [5.204](#). Whether or not a presolicitation notice is used, the general synopsis requirements of [subpart 5.2](#) apply.

(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, *contracting officers* shall comply with the time frames specified in [5.203](#) when applicable.

### **9.206-2 Contract clause.**

The *contracting officer* shall 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*, the *contracting officer* shall review the applicable QPL, QML, or QBL or other identification of those sources which have

met the requirement before issuing a *solicitation* to ascertain whether the number of sources is adequate for competition. (See 9.204(a) for duties of the agency activity responsible for establishment of the *qualification requirement*.) If the number of sources is inadequate, the *contracting officer shall* 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 requirement* so that the *solicitation* could be rescheduled to allow as many additional sources as possible to qualify; or

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

(b) *Post solicitation*. The *contracting officer shall* submit to the agency activity which established the *qualification requirement* the names and addresses of concerns which 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)(2) and (4)).

### **9.207 Changes in status regarding qualification requirements.**

(a) The *contracting officer shall* promptly report to the agency activity which established the *qualification requirement* any conditions which *may* merit removal or omission from a QPL, QML, or QBL or affect whether a source *should* continue to be otherwise 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 submitted 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(h)(5);

(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 any of the above or other conditions reasonably 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 *shall*, 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 *shall* 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.**

*Approval*, as used in this subpart, 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* (hereafter referred to as testing and *approval*) ensures that the contractor can furnish a product that conforms to all contract requirements for acceptance. Before requiring testing and *approval*, the *contracting officer shall* 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) There have been subsequent changes in processes or specifications;
  - (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) It is essential to have an approved *first article* to serve as a manufacturing standard.

### **9.304 Exceptions.**

Normally, testing and *approval* is not required 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 it is questionable whether the *products* would meet the requirements without testing and *approval*.

### **9.305 Risk.**

Before *first article approval*, the *acquisition* of materials or *components*, or commencement of production, is normally at the sole risk of the contractor. To minimize this risk, the *contracting officer shall* provide sufficient time in the delivery schedule for *acquisition* of materials and *components*, and for production after receipt of *first article approval*. When Government requirements preclude this action, 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 essential 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—

- (a) Progress payments; and
- (b) Termination settlements if the contract is terminated for the convenience of the Government.

### **9.306 Solicitation requirements.**

*Solicitations* containing a testing and *approval* requirement shall-

(a) Provide, in the circumstance where the contractor is to be 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 that *must* be performed for *approval*; and
- (3) The necessary data that *must* be submitted to the Government in the *first article approval* test report;

(b) Provide, in the circumstance where the Government is to be 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*, one including testing and *approval* 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 desires earlier delivery. In the latter case, any resulting difference in delivery schedules *shall* not be a factor in evaluation for award. The clause at 52.209-4, *First Article Approval-Government Testing*, *shall* 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, when the Government is responsible for *first article testing*, the Government's estimated testing costs as a factor for use in evaluating *offers* (when appropriate); and

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

### **9.307 Government administration 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* at the address specified in the contract, the *contract administration office shall* 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 *shall* inform the *contracting office* whether to approve, conditionally approve, or disapprove the *first article*. The *contracting officer shall* then notify the contractor of the action taken and furnish a copy of the notice to the *contract administration office*. The notice *shall* include the *first article shipment* number, when available, and the applicable *line item number*. Any changes in the drawings, designs, or specifications determined by the *contracting officer* to be necessary *shall* be made under the

Changes clause, and not by the notice of *approval*, conditional *approval*, or disapproval furnished the contractor.

## **9.308 Contract clauses.**

### **9.308-1 Testing performed by the contractor.**

(a)

(1) The *contracting officer shall* insert the clause at 52.209-3, *First Article Approval-Contractor Testing*, in *solicitations* and contracts when a fixed-price contract is contemplated and it is intended that the contract require-

(i) *First article approval*; and

(ii) That the contractor be required to conduct the *first article testing*.

(2) If it is intended that the contractor be required to produce the *first article* and the production quantity at the same facility, the *contracting officer shall* use the clause with its *Alternate I*.

(3) If it is necessary to authorize the contractor to purchase material or to commence production before *first article approval*, the *contracting officer shall* use the clause with its *Alternate II*.

(b)

(1) The *contracting officer shall* insert a clause substantially the same as the clause at 52.209-3, *First Article Approval—Contractor Testing*, in *solicitations* and contracts when a cost-reimbursement contract is contemplated and it is intended that the contract require

(i) *First article approval* and

(ii) That the contractor be required to conduct the *first article test*.

(2) If it is intended that the contractor be required to produce the *first article* and the production quantity at the same facility, the *contracting officer shall* use a clause substantially the same as the clause at 52.209-3, *First Article Approval—Contractor Testing*, with its *Alternate I*.

(3) If it is necessary to authorize the contractor to purchase material or to commence production before *first article approval*, the *contracting officer shall* use a clause substantially the same as the clause at 52.209-3, *First Article Approval—Contractor Testing*, with its *Alternate II*.

### **9.308-2 Testing performed by the Government.**

(a)

(1) The *contracting officer shall* insert the clause at 52.209-4, *First Article Approval-Government Testing*, in *solicitations* and contracts when a fixed-price contract is contemplated and it is intended

that the contract require *first article approval* and that the Government will be responsible for conducting the *first article* test.

(2) If it is intended that the contractor be required to produce the *first article* and the production quantity at the same facility, the *contracting officer shall* use the basic clause with its *Alternate I*.

(3) If it is necessary to authorize the contractor to purchase material or to commence production before *first article approval*, the *contracting officer shall* use the basic clause with its *Alternate II*.

(b)

(1) The *contracting officer shall* insert a clause substantially the same as the clause at 52.209-4, *First Article Approval-Government Testing*, in *solicitations* and contracts when a cost-reimbursement contract is contemplated and it is intended that the contract require *first article approval* and that the Government be responsible for conducting the *first article* test.

(2) If it is intended that the contractor be required to produce the *first article* and the production quantity at the same facility, the *contracting officer shall* use a clause substantially the same as the clause at 52.209-4, *First Article Approval-Government Testing*, with its *Alternate I*.

(3) If it is necessary to authorize the contractor to purchase material or to commence production before *first article approval*, the *contracting officer shall* use a clause substantially the same as the clause at 52.209-4, *First Article Approval-Government Testing*, with its *Alternate II*.

## **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 subpart 4.23.

### **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, *shall* 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 *shall* also be recognized by and effective for those agencies and participants as an exclusion under the Nonprocurement Common Rule.

### **9.402 Policy.**

(a) Agencies *shall* 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 sanctions be imposed only in the public interest for the Government's protection and not for purposes of punishment. Agencies *shall* impose *debarment* or *suspension* to protect the Government's interest and only for the causes and in accordance with the procedures set forth 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 Committee on *Debarment* and *Suspension*, 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), *shall* 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 *shall* establish appropriate procedures to implement the policies and procedures of this subpart.

### **9.403 Definitions.**

As used in this subpart—

*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 a judgment or finding of a civil offense by any court of competent jurisdiction.

*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*.

*Debarring official* means-

(1) An *agency head*; or

(2) A designee authorized by the *agency head* to impose *debarment*.

*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.

*Suspending official* means-

(1) An *agency head*; or

(2) A designee authorized by the *agency head* to impose *debarment*.

*Unfair trade practices* means the commission of any or 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.

## **9.404 Exclusions in the System for Award Management.**

(a) The General Services Administration (GSA)—

(1) Operates the web-based *System for Award Management (SAM)*, 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) Names and addresses of the entities debarred, suspended, proposed for *debarment*, 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 accomplished by the Agency—

(i) Enter the information required by paragraph (b) of this section within 3 working 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 working days after modifying or rescinding an action;

(4) In accordance with internal retention procedures, maintain records relating to each *debarment*, *suspension*, or proposed *debarment* taken 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;

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

(7) Contact GSA for technical assistance with SAM, via the support e-mail address or on the technical support phone line.

(d) SAM is available via <https://www.sam.gov>.

### **9.405 Effect of listing.**

(a) Contractors debarred, suspended, or proposed for *debarment* are excluded from receiving contracts, and agencies *shall* not solicit *offers* from, award contracts to, or *consent to subcontracts* with these contractors, unless the *agency head* determines that there is a compelling reason for such action (see [9.405-1\(a\)\(2\)](#), [9.405-2](#), [9.406-1\(c\)](#), [9.407-1\(d\)](#), and [26.505\(e\)](#)). Contractors debarred, suspended, or proposed for *debarment* 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* on the basis of 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. Agencies *shall* not solicit *offers* from, award contracts to, or *consent to subcontracts* with these contractors under those conditions and for that period.

(c) Agencies *shall* 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, or proposed for *debarment* are excluded from acting as individual *sureties* (see [part 28](#)).

(e)

(1) After the opening of bids or receipt of proposals or quotes, the *contracting officer shall* review the exclusion records in SAM.

(2) Bids received from any listed contractor in response to an invitation for bids *shall* be entered on the abstract of bids, and rejected unless the *agency head* determines *in writing* that there is a compelling reason to consider the bid.

(3) Proposals, quotations, or *offers* received from any listed contractor *shall* not be evaluated for award or included in the competitive range, nor *shall* discussions be conducted with a listed *offeror* during a period of ineligibility, unless the *agency head* determines, *in writing*, that there is a compelling reason to do so. 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, the *contracting officer shall* again review 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, or proposed for debarment.*

(1) Notwithstanding the *debarment, suspension, or proposed debarment* of a contractor, agencies may continue contracts or subcontracts in existence at the time the contractor was debarred, suspended, or proposed for *debarment* 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, or proposed for *debarment*, unless the *agency head* makes a written determination of the compelling reasons for doing so, ordering activities *shall* 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](#), *shall* terminate existing contracts and *shall* 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) When a contractor debarred, suspended, or proposed for *debarment* is proposed as a subcontractor for any subcontract subject to Government consent (see [subpart 44.2](#)), *contracting officers shall not consent to subcontracts* with such contractors unless the *agency head* states *in writing* the compelling reasons for this approval action. (See [9.405](#) concerning declarations of ineligibility affecting sub-*contracting*.)

(b) The Government suspends or debars contractors to protect the Government's interests. Contractors are prohibited from entering into any subcontract in excess of \$35,000, other than a subcontract for a commercially available off-the-shelf item, with a contractor that has been debarred, suspended, or proposed for *debarment*, unless there is a compelling reason to do so. If a contractor intends to enter into a subcontract in excess of \$35,000, other than a subcontract for a commercially available off-the-shelf item, with a party that is debarred, suspended, or proposed for *debarment* 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 Interests when Subcontracting with Contractors Debarred, Suspended, or Proposed for *Debarment*, 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*, or proposed *debarment*.

(c) The contractor's compliance with the requirements of [52.209-6](#) will be reviewed during Contractor Purchasing System Reviews (see [subpart 44.3](#)).

## **9.406 Debarment.**

### **9.406-1 General.**

(a) It is the debarring official's responsibility to determine whether *debarment* is in the Government's interest. The 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 or mitigating factors *should* be considered in making any *debarment* decision. Before arriving at any *debarment* decision, the debarring official *should* consider factors such as the following:

(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 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* and, if so, made the result of the investigation available to the debarring official.

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

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

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

(9) Whether the contractor has had adequate time to eliminate the circumstances within the contractor's organization that led to the cause for *debarment*.

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

The existence or nonexistence of any mitigating factors or remedial measures such as set forth in this paragraph (a) 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 debarring official, its present responsibility and that *debarment* is not necessary.

(b) *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 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\(c\)](#)).

(c) A contractor's *debarment*, or proposed *debarment*, *shall* be 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.

(d)

(1) When the debarring official has authority to debar contractors from both *acquisition* contracts pursuant to this regulation and contracts for the purchase of Federal *personal property* pursuant to the Federal Property Management Regulations (FPMR) 101-45.6, that official *shall* consider simultaneously debarring the contractor from the award of *acquisition* contracts and from the purchase of Federal *personal property*.

(2) When debarring a contractor from the award of *acquisition* contracts and from the purchase of Federal *personal property*, the *debarment* notice *shall* so indicate and the appropriate FAR and FPMR citations *shall* be included.

#### **9.406-2 Causes for debarment.**

The debarring 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 (Pub.L. 102-558)).
  - (v) Delinquent Federal taxes in an amount that exceeds \$10,000.
    - (A) Federal taxes are considered delinquent for purposes of this provision 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 there is a pending administrative or judicial challenge. 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.

(B) Examples.

(1) The taxpayer has received a statutory notice of deficiency, under I.R.C. §6212, which entitles the taxpayer to seek Tax Court review of a proposed tax deficiency. This is not a delinquent tax because it is not a final tax liability. *Should* the taxpayer seek Tax Court review, this will not be a final tax liability until the taxpayer has exercised all judicial appeal rights.

(2) The IRS has filed a notice of Federal tax lien with respect to an assessed tax liability, and the taxpayer has been issued a notice under I.R.C. §6320 entitling the taxpayer to request a hearing with the IRS Office of Appeals contesting the lien filing, and to further appeal to the Tax Court if the IRS determines to sustain the lien filing. In the course of the hearing, the taxpayer is entitled to contest the underlying tax liability because the taxpayer has had no prior opportunity to contest the liability. This is not a delinquent tax because it is not a final tax liability. *Should* the taxpayer seek tax court review, this will not be a final tax liability until the taxpayer has exercised all judicial appeal rights.

(3) *The taxpayer has entered into an installment agreement pursuant to I.R.C. §6159.* The taxpayer is making timely payments and is in full compliance with the agreement terms. The taxpayer is not delinquent because the taxpayer is not currently required to make full payment.

(4) *The taxpayer has filed for bankruptcy protection.* The taxpayer is not delinquent because enforced collection action is stayed under 11 U.S.C. 362 (the Bankruptcy Code).

(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.

(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 shall establish procedures for the prompt reporting,

investigation, and referral to the debarring official of matters appropriate for that official's consideration.

(b) Decisionmaking process.

(1) Agencies *shall* establish procedures governing the *debarment* decisionmaking process that are as informal as is practicable, consistent with principles of fundamental fairness. These procedures *shall* 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*.

(2) In actions not based upon a *conviction* or civil judgment, if it is found that the contractor's submission in opposition raises a genuine dispute over facts material to the proposed *debarment*, agencies *shall* 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*. A notice of proposed *debarment shall* be issued by the debarring official advising the contractor and any specifically named *affiliates*, by certified mail, return receipt requested-

(1) That *debarment* is being considered;

(2) Of 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;

(3) Of the cause(s) relied upon under [9.406-2](#) for proposing *debarment*;

(4) 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;

(5) Of the agency's procedures governing *debarment* decisionmaking;

(6) Of the effect of the issuance of the notice of proposed *debarment*; and

(7) Of the potential effect of an actual *debarment*.

(d) *Debarring official's decision*.

(1) In actions based upon a *conviction* or civil judgment, or in which there is no genuine dispute over material facts, the debarring official *shall* make a decision on the basis of all the information in the administrative record, including any submission made by the contractor. If no *suspension* is in effect, the decision *shall* be made within 30 working days after receipt of any information and argument submitted by the contractor, unless the debarring official extends this period for good cause.

(2)

(i) In actions in which additional proceedings are necessary as to disputed material facts, written findings of fact *shall* be prepared. The debarring official *shall* 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 debarring official *may* refer matters involving disputed material facts to another official for findings of fact. The 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 debarring official's decision *shall* be made 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 debarring official's decision.

(1) If the debarring official decides to impose *debarment*, the contractor and any *affiliates* involved *shall* be given prompt notice by certified mail, return receipt requested-

(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(c).

(2) If *debarment* is not imposed, the debarring official *shall* promptly notify the contractor and any *affiliates* involved, by certified mail, return receipt requested.

(f)

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

(2) The debarring official is responsible for the timely submission, within 3 working days, and accuracy of the documentation regarding the administrative agreement.

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

#### **9.406-4 Period of debarment.**

(a)

(1) *Debarment shall* 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) *shall* be for 1 year unless extended pursuant to paragraph (b) of this section; and

(iii) *Debarments* under 9.406-2(b)(1)(vii) *shall* 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 *shall* be considered in determining the *debarment* period.

(b) The 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. If *debarment* for an additional period is determined to be necessary, the procedures of 9.406-3 *shall* be followed to extend the *debarment*.

(c) The 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 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 *shall* be 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 *shall* be evidence of such knowledge, approval, or acquiescence.

## **9.407 Suspension.**

### **9.407-1 General.**

(a) The suspending 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 on the basis of *adequate evidence*, pending the completion of investigation or legal proceedings, when it has been determined that immediate action is necessary to protect the Government's interest. In assessing the adequacy of the evidence, agencies *should* consider how much information is available, how credible it is given the circumstances, whether or not 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.

(2) The existence of a cause for *suspension* does not necessarily require that the contractor be suspended. The suspending official *should* consider the seriousness of the contractor's acts or omissions and *may*, but is not required to, consider remedial measures or mitigating factors, such as those set forth in 9.406-1(a). A contractor has the burden of promptly presenting to the suspending 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 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 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 shall* be 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 official has authority to suspend contractors from both *acquisition* contracts pursuant to this regulation and contracts for the purchase of Federal *personal property* pursuant to FPMR 101-45.6, that official *shall* consider simultaneously suspending the contractor from the award of *acquisition* contracts and from the purchase of Federal *personal property*.

(2) When suspending a contractor from the award of *acquisition* contracts and from the purchase of Federal *personal property*, the *suspension* notice shall so indicate and the appropriate FAR and FPMR citations shall be included.

#### **9.407-2 Causes for suspension.**

(a) The suspending 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 \$10,000. 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.

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

(c) The suspending 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 *shall* establish procedures for the prompt reporting, investigation, and referral to the suspending official of matters appropriate for that official's consideration.

(b) Decisionmaking process.

(1) Agencies *shall* establish procedures governing the *suspension* decisionmaking process that are as informal as is practicable, consistent with principles of fundamental fairness. These procedures *shall* 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*.

(2) In actions not based on an indictment, if it is found that 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 Justice advice, that substantial interests of the Government in pending or contemplated legal proceedings based on the same facts as the *suspension* would be prejudiced, agencies *shall* 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, they *shall* be immediately advised by certified mail, return receipt requested-

(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-any such irregularities *shall* be described in terms sufficient to place the contractor on notice without

disclosing the Government's evidence;

(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; and

(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 Department of Justice advice, that the substantial interests of the Government in pending or contemplated legal proceedings based on the same facts as the *suspension* would be prejudiced.

(d) *Suspending official's decision.*

(1) In 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 on the basis of Department of Justice advice, the suspending official's decision *shall* be based on all the information in the administrative record, including any submission made by the contractor.

(2)

(i) In actions in which additional proceedings are necessary as to disputed material facts, written findings of fact *shall* be prepared. The suspending official *shall* 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 official *may* refer matters involving disputed material facts to another official for findings of fact. The suspending 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 official's decision *shall* be made after the conclusion of the proceedings with respect to disputed facts.

(3) The suspending 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* *shall* 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 official's decision *shall* be sent to the contractor and any *affiliates* involved, by certified mail, return receipt requested.

(e)

(1) If the contractor enters into an administrative agreement with the Government in order to resolve a *suspension* proceeding, the suspending official *shall* access the website (available at <https://www.cpars.gov>, then select FAPIIS) and enter the requested information.

(2) The suspending official is responsible for the timely submission, within 3 working days, and accuracy of the documentation regarding the administrative agreement.

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

#### **9.407-4 Period of suspension.**

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

(b) If legal proceedings are not initiated within 12 months after the date of the *suspension* notice, the *suspension shall* be terminated unless an Assistant Attorney General 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 official *shall* notify the Department of Justice of the proposed termination of the *suspension*, at least 30 days before the 12-month period expires, to give that Department an opportunity to request an extension.

#### **9.407-5 Scope of suspension.**

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

#### **9.408 [Reserved]**

#### **9.409 Contract clause.**

The *contracting officer shall* insert the clause at 52.209-6, Protecting the Government's Interests when Subcontracting with Contractors Debarred, Suspended, or Proposed for *Debarment*, in *solicitations* and contracts where the contract value exceeds \$35,000.

## **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*, shall set forth the extent of the conflict, and requires approval by the *agency head* or a designee. *Agency heads shall* 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 shall* 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 shall* 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 shall* 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 shall* 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 *shall* be submitted in accordance with [9.503](#). The waiver request and decision *shall* 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) *shall* 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 *shall* 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 shall* 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* first *should* 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 shall*, 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 *shall*-

(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 shall*-

(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 *shall* 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 shall* 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 shall* contain a proposed clause that specifies both the nature and duration of the proposed restraint. The *contracting officer shall* 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 *shall* 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 *shall* 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.

## **Subpart 9.6 - Contractor Team Arrangements**

### **9.601 Definition.**

*Contractor team arrangement*, as used in this subpart, means an arrangement in which-

(1) Two or more companies form a partnership or joint venture to act as a potential prime contractor; or

(2) A potential prime contractor agrees with one or more other companies to have them act as its subcontractors under a specified Government contract or *acquisition* program.

### **9.602 General.**

(a) *Contractor team arrangements* may be desirable from both a Government and industry standpoint in order to enable the companies involved to-

(1) Complement each other's unique capabilities; and

(2) *Offer* the Government the best combination of performance, cost, and delivery for the system or product being acquired.

(b) *Contractor team arrangements* may be particularly appropriate in complex research and development *acquisitions*, but *may* be used in other appropriate *acquisitions*, including production.

(c) The companies involved normally form a *contractor team arrangement* before submitting an *offer*. However, they *may* enter into an arrangement later in the *acquisition* process, including after contract award.

## **9.603 Policy.**

The Government will recognize the integrity and validity of *contractor team arrangements*; *provided*, the arrangements are identified and company relationships are fully disclosed in an *offer* or, for arrangements entered into after submission of an *offer*, before the arrangement becomes effective. The Government will not normally require or encourage the dissolution of *contractor team arrangements*.

## **9.604 Limitations.**

Nothing in this subpart authorizes *contractor team arrangements* in violation of antitrust statutes or limits the Government's rights to-

(a) Require *consent to subcontracts* (see [subpart 44.2](#));

(b) Determine, on the basis of the stated *contractor team arrangement*, the responsibility of the prime contractor (see [subpart 9.1](#));

(c) Provide to the prime contractor data rights owned or controlled by the Government;

(d) Pursue its policies on competitive *contracting*, subcontracting, and *component* breakout after initial production or at any other time; and

(e) Hold the prime contractor fully responsible for contract performance, regardless of any team arrangement between the prime contractor and its subcontractors.

## **Subpart 9.7 - Defense Production Pools and Research and Development Pools**

### **9.701 Definition.**

*Pool*, as used in this subpart, means a group of concerns (see [19.001](#)) that have-

(1) Associated together in order to obtain and perform, jointly or in conjunction with each other, defense production or research and development contracts;

(2) Entered into an agreement governing their organization, relationship, and procedures; and

(3) Obtained approval of the agreement by either-

(i) The Small Business Administration (SBA) under section 9 or 11 of the Small Business Act ([15 U.S.C.638](#) or 640) (see 13 CFR125); or

(ii) A designated official under PartV of Executive Order10480, August 14,1953 (18 FR4939, August 20,1953) and section 708 of the Defense Production Act of1950 (50 U.S.C. App.2158).

## **9.702 Contracting with pools.**

(a) Except as specified in this subpart, a *pool shall* be treated the same as any other prospective or actual contractor.

(b) The *contracting officer shall* not award a contract to a *pool* unless the *offer* leading to the contract is submitted by the *pool* in its own name or by an individual *pool* member expressly stating that the *offer* is on behalf of the *pool*.

(c) Upon receipt of an *offer* submitted by a group representing that it is a *pool*, the *contracting officer shall* verify its approved status with the SBA District Office Director or other approving agency and document the contract file that the verification was made.

(d) *Pools* approved by the SBA under the Small Business Act are entitled to the preferences and privileges accorded to small business concerns. Approval under the Defense Production Act does not confer these preferences and privileges.

(e) Before awarding a contract to an unincorporated *pool*, the *contracting officer shall* require each *pool* member participating in the contract to furnish a certified copy of a *power of attorney* identifying the agent authorized to sign the *offer* or contract on that member's behalf. The *contracting officer shall* attach a copy of each *power of attorney* to each signed copy of the contract retained by the Government.

## **9.703 Contracting with individual pool members.**

(a) *Pool* members *may* submit individual *offers*, independent of the *pool*. However, the *contracting officer shall* not consider an independent *offer* by a *pool* member if that *pool* member participates in a competing *offer* submitted by the *pool*.

(b) If a *pool* member submits an individual *offer*, independent of the *pool*, the *contracting officer shall* consider the *pool* agreement, along with other factors, in determining whether that *pool* member is a *responsible prospective contractor* under subpart 9.1.