

## PART 9—CONTRACTOR QUALIFICATIONS

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**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.**

"Preaward survey" means an evaluation by a surveying activity of a prospective contractor's capability to perform a proposed contract.

"Responsible prospective contractor" means a contractor that meets the standards in 9.104.

"Surveying activity" 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, its possessions, or Puerto Rico; 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 the blind or other severely handicapped (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;

(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.

**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) *Affiliated concerns.* Affiliated concerns (see "Affiliates" and "Concerns" in 19.101) 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.

(d) *Small business concerns.* (1) If a small business concern's offer that would otherwise be accepted is to be rejected because of a determination of nonresponsibility, the contracting officer shall refer the matter to the Small Business Administration, which will decide whether or not to issue a Certificate of Competency (see Subpart 19.6).

(2) A small business that is unable to comply with the limitations on subcontracting at 52.219-14 may be considered nonresponsible.

#### **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.

#### **9.105 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 (see 9.104-1(c)), the contracting officer shall consider relevant past performance information (see Subpart 42.15). In addition, the contracting officer should use the following sources of information to support such determinations:

(1) The List of Parties Excluded from Federal Procurement and Nonprocurement Programs maintained in accordance with Subpart 9.4.

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

(3) The prospective contractor—including bid or proposal information, questionnaire replies, financial data, information on production equipment, and personnel information.

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

(5) Preaward survey reports (see 9.106).

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

(7) If the contract is for construction, the contracting officer may consider performance evaluation reports (see 36.201(c)(2)).

(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 and documents 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 may accept the factors covered by the certificate without further inquiry.

(b) *Support documentation.* Documents and reports supporting a determination of responsibility or nonresponsibility, including any preaward survey reports and any applicable Certificate of Competency, must be included in the contract file.

### **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 and/or source selection information and should be marked with the appropriate legend and protected accordingly (see 3.104-3).

### **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 items (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.

#### **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 block 21 shall be checked to show that the report is a short-form preaward report.

#### **9.107 Surveys of nonprofit agencies serving people who are blind or have other severe disabilities under the Javits-Wagner-O'Day (JWOD) Program.**

(a) The Committee for Purchase From People Who Are Blind or Severely Disabled (Committee), as authorized by 41 U.S.C. 46-48c, determines what supplies and services Federal agencies are required to purchase from JWOD participating nonprofit agencies serving people who are blind or have other severe disabilities (see Subpart 8.7). The Committee is required to find a JWOD participating nonprofit agency capable of furnishing the supplies or services before the nonprofit agency can be designated as a mandatory source under the JWOD 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 JWOD 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 JWOD 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.

### **Subpart 9.2—Qualifications Requirements**

#### **9.200 Scope of subpart.**

This subpart implements 10 U.S.C. 2319 and 41 U.S.C. 253c and prescribes policies and procedures regarding qualification requirements and the acquisitions that are subject to such requirements.

**9.201 Definitions.**

“Procuring activity,” as used in this part or subpart, means a component of an executive agency having a significant acquisition function and designated as such by the head of the agency. Unless agency regulations specify otherwise, the term “procuring activity” shall be synonymous with “contracting activity” as defined in Subpart 2.1.

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

“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.

“Qualified products list (QPL)” means a list of products which have been examined, tested, and have satisfied all applicable qualification requirements.

**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 (a)(2)(ii) above 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 competition advocate 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 competition advocate reviewing the determination, the head of the procuring activity may waive the requirements of 9.202(a)(1)(ii) through (4) above 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 9.202(a)(1). 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 9.202(a).

(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 9.202(a). 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 9.202(a). Any periods for which a waiver under 9.202(b) 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 in the following publications:

(1) GSA Index of Federal Specifications, Standards and Commercial Item Descriptions, FPMR 101-29.1.

(2) Department of Defense Index of Specifications and Standards.

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

(1) Federal Standardization Manual, FSPM-0001.

(2) Defense Standardization Manual 4120.3-M, Chapter IV, as amended by Military Standards 961 and 962.

(d) The publications listed in paragraphs (b) and (c) of this section are sold to the public. The publications in paragraphs (b)(1) and (c)(1) of this section may be obtained from the addressee in 11.201(d)(1). The publications in paragraphs (b)(2) and (c)(2) of this section may be obtained from the addressee in 11.201(d)(2).

### 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 shall—

(1) Periodically publish notice in the Commerce Business Daily soliciting additional sources or products to seek 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) above).

(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 shall 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 shall, before establishing any qualification requirement, furnish notice to the—

U.S. Department of Commerce  
Office of Field Operations  
P.O. Box 5999  
Chicago, Illinois 60680

for synopsis in the Commerce Business Daily. The notice shall 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, including eligible products from designated countries under the terms of the Trade Agreements Act (see Subpart 25.4).

**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 on the List of Parties Excluded from Federal Procurement and Nonprocurement Programs (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 Definitions.**

“Approval,” as used in this subpart, means the contracting officer’s written notification to the contractor accepting the test results of the first article.

“First article,” as used in this subpart, means preproduction models, initial production samples, test samples, first lots, pilot lots, and pilot models.

“First article testing” means testing and evaluating the first article for conformance with specified contract requirements before or in the initial stage of production.

#### **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—

- (1) Progress payments; and
- (2) 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 9.306(c));

(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 12.104). 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 9.306(c);

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

(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).

(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 contract 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 9.403); 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(b)), it does not prescribe policies and procedures governing declarations of ineligibility.

#### **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) When more than one agency has an interest in the debarment or suspension of a contractor, consideration shall be given to designating one agency as the lead agency for making the decision. Agencies are encouraged to establish methods and procedures for coordinating their debarment or suspension actions.

(d) Agencies shall establish appropriate procedures to implement the policies and procedures of this subpart.

#### **9.403 Definitions.**

“Adequate evidence” means information sufficient to support the reasonable belief that a particular act or omission has occurred.

“Affiliates.” Business concerns, organizations, or individuals are affiliates of each other if, directly or indirectly, (a) either one controls or has the power to control the other, or (b) a third party controls or has the power to control both. 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,” as used in this subpart, 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,” as used in this subpart, means any individual or other legal entity that—

(a) 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

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

“Conviction” means a judgment or conviction of a criminal offense by any court of competent jurisdiction, whether entered upon a verdict or a plea, and includes a conviction entered upon a plea of *nolo contendere*.

“Debarment,” as used in this subpart, means action taken by a debarring official under 9.406 to exclude a contractor from Government contracting and Government-approved subcontracting for a reasonable, specified period; a contractor so excluded is “debarred.”

“Debarring official” means—

(a) An agency head; or

(b) 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 shall be given the same effect as an indictment.

“Ineligible,” as used in this subpart, means excluded from Government contracting (and subcontracting, if appropriate) pursuant to statutory, Executive order, or regulatory authority other than this regulation and its implementing and supplementing regulations; for example, pursuant to the Davis-Bacon Act and its related statutes and implementing regulations, the Service Contract Act, the Equal Employment Opportunity Acts and Executive orders, the Walsh-Healey Public Contracts Act, the Buy American Act, or the Environmental Protection Acts and Executive orders.

“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.

“List of Parties Excluded from Federal Procurement and Nonprocurement Programs” means a list compiled, maintained and distributed by the General Services Administration (GSA) containing the names and other information about parties debarred, suspended, or voluntarily excluded under the Nonprocurement Common Rule or the Federal Acquisition Regulation, parties who have been proposed for debarment under the Federal Acquisition Regulation, and parties determined to be ineligible.

“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, coop-

erative agreements, scholarships, fellowships, contracts of assistance, loans, loan guarantees, subsidies, insurance, payments for specified use, and donation agreements.

“Preponderance of the evidence” means proof by information that, compared with that opposing it, leads to the conclusion that the fact at issue is more probably true than not.

“Suspending official” means—

(a) An agency head; or

(b) A designee authorized by the agency head to impose suspension.

“Suspension,” as used in this subpart, means action taken by a suspending official under 9.407 to disqualify a contractor temporarily from Government contracting and Government-approved subcontracting; a contractor so disqualified is “suspended.”

“Unfair trade practices,” as used in this subpart, 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 List of Parties Excluded from Federal Procurement and Nonprocurement Programs.**

(a) The General Services Administration (GSA) shall—

(1) Compile and maintain a current list of all parties debarred, suspended, proposed for debarment, or declared ineligible by agencies or by the General Accounting Office;

(2) Periodically revise and distribute the list and issue supplements, if necessary, to all agencies and the General Accounting Office; and

(3) Include in the list the name and telephone number of the official responsible for its maintenance and distribution.

(b) The List of Parties Excluded from Federal Procurement and Nonprocurement Programs shall indicate—

(1) The names and addresses of all contractors debarred, suspended, proposed for debarment, or declared ineligible, in alphabetical order, with cross-references when more than one name is involved in a single action;

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

(3) The 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) The effect of the action;

(5) The termination date for each listing;

(6) The DUNS No.; and

(7) The name and telephone number of the point of contact for the action.

(c) Each agency shall—

(1) Notify GSA of the information required by paragraph (b) of this section within 5 working days after the action becomes effective;

(2) Notify GSA within 5 working days after modifying or rescinding an action;

(3) Notify GSA of the names and addresses of agency organizations that are to receive the list and the number of copies to be furnished to each;

(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 provide for the effective use of the List of Parties Excluded from Federal Procurement and Nonprocurement Programs, including internal distribution thereof, to ensure that the agency does not solicit offers from, award contracts to, or consent to subcontracts with contractors on the List of Parties Excluded from Federal Procurement and Nonprocurement Programs, except as otherwise provided in this subpart; and

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

(d) Information on the List of Parties Excluded from Federal Procurement and Nonprocurement Programs is available as follows:

(1) The printed version is published monthly. Copies may be obtained by purchasing a yearly subscription.

(i) Federal agencies may subscribe to the list through their organization's printing and distribution office.

(ii) The public may subscribe by writing the—

Superintendent of Documents,  
U.S. Government Printing Office  
Washington, DC 20402

or by calling the Government Printing Office Inquiry and Order Desk at (202) 512-1800.

(2) The electronic version is updated daily and provides access to the names of firms and individuals on the list by using an asynchronous ASCII terminal (*e.g.*, a word processor or microcomputer). Users can access the system 24 hours a day, 7 days a week using FTS 2000, or commercial telephone lines and the equipment described in the user's manual. Aside from the normal costs of local or long-

distance telephone calls, access is free of charge to the user. To obtain a copy of the user's manual for accessing the system, contact GSA at (202) 501-4740.

(3) A telephone inquiry service to answer general questions about entries on the List of Parties Excluded from Federal Procurement and Nonprocurement Programs is also available by calling GSA at (202) 501-4873 or 501-4740. The inquiry will be answered within one working day.

#### **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 or a designee determines that there is a compelling reason for such action (see 9.405-2, 9.406-1(c), 9.407-1(d), and 23.506(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 included on the List of Parties Excluded from Procurement Programs as having 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) Contractors debarred, suspended, or proposed for debarment are excluded from acting as individual sureties (see Part 28).

(d)(1) After the opening of bids or receipt of proposals, the contracting officer shall review the List of Parties Excluded from Federal Procurement and Nonprocurement Programs.

(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 or a designee 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 or a designee 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 List to ensure that no award is made to a listed contractor.

**9.405-1 Continuation of current contracts.**

(a) 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 or a designee 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.

(b) Ordering activities may continue to place orders against existing contracts, including indefinite delivery contracts, in the absence of a termination.

(c) Agencies shall not renew or otherwise extend the duration of current contracts, or consent to subcontracts, with contractors debarred, suspended, or proposed for debarment, unless the agency head or a designee authorized representative states, in writing, the compelling reasons for renewal or extension.

**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 or a designee states in writing the compelling reasons for this approval action. (See 9.405(b) concerning declarations of ineligibility affecting subcontracting.)

(b) The Government suspends or debar contractors to protect the Government's interests. By operation of the clause at 52.209-6, Protecting the Government's Interests When Subcontracting with Contractors Debarred, Suspended or Proposed for Debarment, contractors shall not enter into any subcontract in excess of \$25,000 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 subcontract with a party that is debarred, suspended, or proposed for debarment as evidenced by the parties' inclusion on the List of Parties Excluded from Federal Procurement and Nonprocurement Programs (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. The notice must provide the following:

(1) The name of the subcontractor;

(2) The contractor's knowledge of the reasons for the subcontractor being on the List of Parties Excluded from Federal Procurement and Nonprocurement Programs;

(3) The compelling reason(s) for doing business with the subcontractor notwithstanding its inclusion on the List of Parties Excluded from Federal Procurement and Nonprocurement Programs; 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 23.506(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 contractor for any of the causes listed in paragraphs (a) through (c) following:

(a) The debarring official may debar 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, 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, when the product was not made in the United States (see Section 202 of the Defense Production Act (Pub. L. 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) The debarring official may debar a contractor, based upon a preponderance of the evidence, for—

(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 the Drug-Free Workplace Act of 1988 (Pub. L. 100-690), as indicated by—

(A) Failure to comply with the requirements of the clause at 52.223-6, 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 23.504).

(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, when the product was not made in the United States (see Section 202 of the Defense Production Act (Pub. L. 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)).

(2) The debarring official may debar a contractor, based on a determination by the Attorney General of the United States, or designee, that the contractor is not in compliance with Immigration and Nationality Act employment provisions (see Executive Order 12989). The Attorney General's determination is not reviewable in the debarment proceedings.

(c) Any other cause of so serious or compelling a nature that it affects the present responsibility of a Government 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.

### 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 the Drug-Free Workplace Act of 1988 (see 23.506) may be for a period not to exceed 5 years; and

(ii) Debarments under 9.406-2(b)(2) shall be for one year unless extended pursuant to paragraph (b) of this subsection.

(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 Attorney General or designee 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 23.506(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 per-

sonal 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, or receiving stolen property;

(4) Violations of the Drug-Free Workplace Act of 1988 (Pub. L. 100-690), as indicated by—

(i) Failure to comply with the requirements of the clause at 52.223-6, 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 23.504);

(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, when the product was not made in the United States (see section 202 of the Defense Production Act (Pub. L. 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)); or

(7) 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) above 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.

#### **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 Certification regarding debarment, suspension, proposed debarment, and other responsibility matters.**

(a) When an offeror, in compliance with the provision at 52.209-5, Certification Regarding Debarment, Suspension, Proposed Debarment, and Other Responsibility Matters, indicates an indictment, charge, civil judgment, conviction, suspension, debarment, proposed debarment, ineligibility, or default of a contract, the contracting officer shall—

(1) Request such additional information from the offeror as the contracting officer deems necessary in order to make a determination of the offeror's responsibility (but see 9.405); and

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

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

#### **9.409 Solicitation provision and contract clause.**

(a) The contracting officer shall insert the provision at 52.209-5, Certification Regarding Debarment, Suspension, Proposed Debarment, and Other Responsibility Matters, in solicitations where the contract value is expected to exceed the simplified acquisition threshold.

(b) 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 \$25,000.

### **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) and Office of Federal Procurement Policy (OFPP) Letter 89-1, Conflict of Interest Policies Applicable to Consultants.

#### **9.501 Definitions.**

“Marketing consultant” 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—

- (a) Services excluded in Subpart 37.2;
- (b) Routine engineering and technical services (such as installation, operation, or maintenance of systems, equipment, software, components, or facilities);
- (c) Routine legal, actuarial, auditing, and accounting services; and
- (d) Training services.

“Organizational conflict of interest” means that because of other activities or relationships with other persons, a person is unable or potentially unable to render impartial assistance or advice to the Government, or the person’s objectivity in performing the contract work is or might be otherwise impaired, or a person has an unfair competitive advantage.

#### **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 3.104-3) 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. This rule 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 subparagraph (b)(1) of this section.

(3) For the reasons given in 9.505-2(a)(3), 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) of this subsection).

(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) following 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” means an arrangement in which—

- (a) Two or more companies form a partnership or joint venture to act as a potential prime contractor; or
- (b) 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, sub-contracting, 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—

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

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

(c) Obtained approval of the agreement by either—

(1) The Small Business Administration (SBA) under section 9 or 11 of the Small Business Act (15 U.S.C. 638 or 640) (see 13 CFR 125); or

(2) A designated official under Part V of Executive Order 10480, August 14, 1953 (18 FR 4939, August 20, 1953) and section 708 of the Defense Production Act of 1950 (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 SBADistrict 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.

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