

and prices in accordance with otherwise applicable source selection requirements.

(d) If an ESA's terms and conditions and prices represent the best value to the Government, the contracting officer or requiring official shall fulfill the requirement for software or services through the ESA.

(e) If existing ESAs do not represent the best value to the Government, the software product manager (SPM) shall be given an opportunity to provide the same or a better value to the Government under the ESAs before the contracting officer or requiring official may continue with alternate acquisition methods.

(1) The contracting officer or requiring official shall notify the SPM of specific concerns about existing ESA terms and conditions or prices through the ESI webpage.

(2) The SPM shall consider adjusting, within the scope of the ESA, terms and conditions or prices to provide the best value to the customer.

(i) Within 3 working days, the SPM shall—

- (A) Update the ESA;
- (B) Provide an estimated date by which the update will be accomplished; or
- (C) Inform the contracting officer or requiring official that no change will be made to the ESA.

(ii) If the SPM informs the contracting officer or requiring official that no change will be made to the ESA terms and conditions or prices, the contracting officer or requiring official may fulfill the requirement by other means.

(iii) If the SPM does not respond within 3 working days or does not plan to adjust the ESA within 90 days, the contracting officer or requiring official may fulfill the requirement by other means.

(3) A management official designated by the department or agency may waive the requirement to obtain commercial software or related services through an ESA after the steps in paragraphs (e)(1) and (e)(2)(i) of this section are complete. The rationale for use of an alternate source shall be included in the waiver request and shall be provided to the SPM.

**PART 209—CONTRACTOR QUALIFICATIONS**

**Subpart 209.1—Responsible Prospective Contractors**

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- 209.471 Congressional Medal of Honor.

AUTHORITY: 41 U.S.C. 421 and 48 CFR chapter 1.

SOURCE: 56 FR 36313, July 31, 1991, unless otherwise noted.

### Subpart 209.1—Responsible Prospective Contractors

#### 209.101 Definitions.

“Entity controlled by a foreign government,” “foreign government,” and “proscribed information,” are defined in the provision at 252.209-7002, Disclosure of Ownership or Control by a Foreign Government.

[59 FR 51132, Oct. 7, 1994]

#### 209.103 Policy.

(a)(i) Do not deny award to contractors subject to on-site inspection under the Intermediate-Range Nuclear Forces (INF) Treaty, or similar treaty, due to the actual or potential presence of Soviet inspectors at the contractor’s facility unless—

(A) Necessary for reasons of national security;

(B) The decision is based on full information, including comment from the potential contractor or subcontractor on the security issues involved; and

(C) The department or agency acquisition executive reviews the decision and the Under Secretary of Defense (Acquisition, Technology, and Logistics) approves the decision.

(ii) Make any decision to deny consideration for award under paragraph (a)(i) of this section as early as possible in the acquisition process. Notify the firm in writing of any decision not to consider the firm for award of a contract or subcontract.

(c) The additional cost of contract administration and audit due to a contractor’s performance risk may be considered in evaluating the contractor’s price.

[56 FR 36313, July 31, 1991, as amended at 60 FR 29497, June 5, 1995; 61 FR 50452, Sept. 26, 1996; 65 FR 39704, June 27, 2000]

#### 209.103-70 Contract clause.

Use the clause at 252.209-7000, Acquisition from Subcontractors Subject to On-Site Inspection Under the Intermediate-Range Nuclear Forces (INF) Treaty, in all solicitations and contracts exceeding the simplified acquisition

threshold, except solicitations and contracts for commercial items.

[60 FR 61593, Nov. 30, 1995, as amended at 61 FR 50452, Sept. 26, 1996]

#### 209.104 Standards.

##### 209.104-1 General standards.

(e) For cost-reimbursement or incentive type contracts, or contracts which provide for progress payments based on costs or on a percentage or stage of completion, the prospective contractor’s accounting system and related internal controls must provide reasonable assurance that—

(i) Applicable laws and regulations are complied with;

(ii) The accounting system and cost data are reliable;

(iii) Risk of misallocations and mischarges are minimized; and

(iv) Contract allocations and charges are consistent with invoice procedures.

(g)(i) *Ownership or control by the government of a terrorist country.* (A) Under 10 U.S.C. 2327(b), a contracting officer shall not award a contract of \$100,000 or more to a firm or to a subsidiary of a firm when a foreign government—

(1) Either directly or indirectly, has a significant interest—

(i) In the firm; or

(ii) In the subsidiary or the firm that owns the subsidiary; and

(2) Has been determined by the Secretary of State under 50 U.S.C. App. 2405(j)(1)(A) to be a government of a country that has repeatedly provided support for acts of international terrorism.

(B) The Secretary of Defense may waive the prohibition in paragraph (g)(i)(A) of this subsection in accordance with 10 U.S.C. 2327(c). This waiver authority may not be delegated.

(ii) *Ownership or control by a foreign government when access to proscribed information is required to perform the contract.* (A) Under 10 U.S.C. 2536(a), no DoD contract under a national security program may be awarded to an entity controlled by a foreign government if that entity requires access to proscribed information to perform the contract.

(B) Whenever the contracting officer has a question about application of the

provision at 252.209-7002, the contracting officer may seek advice from the Director, Defense Security Programs, Office of the Assistant Secretary of Defense for Command, Control, Communications and Intelligence.

(C) In accordance with 10 U.S.C. 2536(b)(1)(A), the Secretary of Defense may waive the prohibition in paragraph (g)(ii)(A) of this subsection upon determining that the waiver is essential to the national security interest of the United States. The Secretary has delegated authority to grant this waiver to the Assistant Secretary of Defense Command, Control, Communications and Intelligence. Waiver requests, prepared by the requiring activity in coordination with the contracting officer, shall be processed through the Director of Defense Procurement and Acquisition Policy, Office of the Under Secretary of Defense (Acquisition, Technology, and Logistics), and shall include a proposed national interest determination. The proposed national interest determination, prepared by the requiring activity in coordination with the contracting officer, shall include:

(1) Identification of the proposed awardee, with a synopsis of its foreign ownership (include solicitation and other reference numbers to identify the action);

(2) General description of the acquisition and performance requirements;

(3) Identification of the national security interests involved and the ways award of the contract helps advance those interests;

(4) The availability of another entity with the capacity, capability and technical expertise to satisfy defense acquisition, technology base, or industrial base requirements; and

(5) A description of any alternate means available to satisfy the requirement, e.g., use of substitute products or technology or alternate approaches to accomplish the program objectives.

(D) In accordance with 10 U.S.C. 2536(b)(1)(B), the Secretary of Defense may, in the case of a contract awarded for environmental restoration, remediation, or waste management at a DoD facility, waive the prohibition in paragraph (g)(ii)(A) of this subsection upon—

(1) Determining that—

(i) The waiver will advance the environmental restoration, remediation, or waste management objectives of DoD and will not harm the national security interests of the United States; and

(ii) The entity to which the contract is awarded is controlled by a foreign government with which the Secretary is authorized to exchange Restricted Data under section 144c. of the Atomic Energy Act of 1954 (42 U.S.C. 2164(c)); and

(2) Notifying Congress of the decision to grant the waiver. The contract may be awarded only after the end of the 45-day period beginning on the date the notification is received by the appropriate Congressional committees.

[58 FR 28464, May 13, 1993, as amended at 59 FR 51131, 51132, Oct. 7, 1994; 60 FR 29497, June 5, 1995; 62 FR 34121, June 24, 1997; 63 FR 11851, Mar. 11, 1998; 63 FR 14837, Mar. 27, 1998; 65 FR 39704, June 27, 2000; 67 FR 4208, Jan. 29, 2002; 68 FR 7439, Feb. 14, 2003]

#### **209.104-4 Subcontractor responsibility.**

Generally, the Canadian Commercial Corporation's (CCC) proposal of a firm as its subcontractor is sufficient basis for an affirmative determination of responsibility. However, when the CCC determination of responsibility is not consistent with other information available to the contracting officer, the contracting officer shall request from CCC and any other sources whatever additional information is necessary to make the responsibility determination.

#### **209.104-70 Solicitation provisions.**

(a) Use the provision at 252.209-7001, Disclosure of Ownership or Control by the Government of a Terrorist Country, in all solicitations expected to result in contracts of \$100,000 or more. Any disclosure that the government of a terrorist country has a significant interest in an offeror or a subsidiary of an offeror shall be forwarded through the head of the agency to the Director of Defense Procurement and Acquisition Policy, ATTN: OUSD(AT&L)DPAP/(PAIC), 3060 Defense Pentagon, Washington, DC 20101-3060.

(b) Use the provision at 252.209-7002, Disclosure of Ownership or Control by

a Foreign Government, in all solicitations, including those subject to the procedures in FAR part 13, when access to proscribed information is necessary to perform a DoD contract under a national security program.

[58 FR 28464, May 13, 1993, as amended at 59 FR 51131, Oct. 7, 1994; 62 FR 34122, June 24, 1997; 63 FR 11851, Mar. 11, 1998; 63 FR 14837, Mar. 27, 1998; 65 FR 39704, June 27, 2000; 67 FR 4208, Jan. 29, 2002; 68 FR 7439, Feb. 14, 2003]

#### **209.105-2 Determinations and documentation.**

(a) When the contracting officer considers such action appropriate, the contracting officer must submit a copy of the determination to the appropriate debarring and suspending official (see 209.403).

[64 FR 62985, Nov. 18, 1999]

#### **209.106 Preaward surveys.**

##### **209.106-1 Conditions for preaward surveys.**

(a) If a preaward survey is requested, include the rationale in block 23 of the SF 1403, Preaward Survey of Prospective Contractor (General).

[60 FR 61593, Nov. 30, 1995]

##### **209.106-2 Requests for preaward surveys.**

(1) The surveying activity is the cognizant contract administration office as listed in the Federal Directory of Contract Administration Services Components. When information is required as part of the survey on the adequacy of the contractor's accounting system or its suitability for administration of the proposed type of contract, the surveying activity will obtain the information from the auditor.

(2) Limited information may be requested by telephone.

(3) The contracting officer may request a formal survey by telephone but must confirm immediately with SF 1403, Preaward Survey of Prospective Contractor (General). For a formal survey, send original and three copies of SF 1403, including necessary drawings and specifications.

(a) List additional factors in item H, section III of the SF 1403 and explain them in block 23. For example—

(i) Information needed to determine a prospective contractor's eligibility under the Walsh-Healey Public Contracts Act. (Note that the Walsh-Healey Public Contracts Act, block 12 of section I, only indicates what the contractor has represented its classification to be under Walsh-Healey.)

(ii) Evaluation of a contractor as a planned producer when the offered item is or may appear on the Industrial Preparedness Planning List (IPPL). When the preaward survey results in a recommendation for award, ask the office responsible for industrial preparedness planning to consider designating the prospective contractor as a planned producer. If the item is already on the IPPL or the prospective contractor is already a planned producer, note the information in block 23.

(iii) Evaluation of the prospective contractor's performance against small business subcontracting plans.

(c) On base level preaward surveys, technical personnel from the requiring installation should participate when there is concern about the ability of a prospective contractor to perform a base level service or construction contract.

(d) Allow more time for—

(i) Complex items;

(ii) New or inexperienced DoD contractors; and

(iii) Surveys with time-consuming requirements, e.g., secondary survey, accounting system review, financial capability analysis, or purchasing office participation.

(e) Only request those factors essential to the determination of responsibility. See 253.209-1(a) for an explanation of the factors in section III, blocks 19 and 20 of the SF 1403.

[56 FR 36313, July 31, 1991, as amended at 58 FR 28464, May 13, 1993; 65 FR 54969, Sept. 12, 2000]

### **Subpart 209.2—Qualifications Requirements**

#### **209.202 Policy.**

(a)(1) The inclusion of qualification requirements in specifications for products that are to be included on a Qualified Products List, or manufactured by business firms included on a Qualified Manufacturers List, requires approval

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by the departmental standardization office in accordance with DoD 4120.24-M, Defense Standardization Program (DSP) Policies and Procedures. The inclusion of other qualification requirements in an acquisition or group of acquisitions requires approval by the chief of the contracting office.

[60 FR 61593, Nov. 30, 1995, as amended at 65 FR 63804, Oct. 25, 2000]

### 209.270 Aviation critical safety items.

#### 209.270-1 Scope.

This section—

(a) Implements Section 802 of the National Defense Authorization Act for Fiscal Year 2004 (Public Law 108-136); and

(b) Prescribes policy and procedures for qualification requirements in the procurement of aviation critical safety items and the modification, repair, and overhaul of those items.

[69 FR 55988, Sept. 17, 2004]

#### 209.270-2 Definitions.

As used in this section—

*Aviation critical safety item* means a part, an assembly, installation equipment, launch equipment, recovery equipment, or support equipment for an aircraft or aviation weapon system if the part, assembly, or equipment contains a characteristic any failure, malfunction, or absence of which could cause—

(1) A catastrophic or critical failure resulting in the loss of or serious damage to the aircraft or weapon system;

(2) An unacceptable risk of personal injury or loss of life; or

(3) An uncommanded engine shutdown that jeopardizes safety.

*Design control activity* means the systems command of a military department that is specifically responsible for ensuring the air worthiness of an aviation system or equipment in which an aviation critical safety item is to be used.

[69 FR 55988, Sept. 17, 2004]

#### 209.270-3 Policy.

(a) The head of the contracting activity for an aviation critical safety item may enter into a contract for the procurement, modification, repair, or

overhaul of such an item only with a source approved by the head of the design control activity.

(b) The approval authorities specified in this section apply instead of those otherwise specified in FAR 9.202(a)(1), 9.202(c), or 9.206-1(c), for the procurement, modification, repair, and overhaul of aviation critical safety items.

[69 FR 55988, Sept. 17, 2004]

### 209.270-4 Procedures.

For items identified as aviation critical safety items—

(a) The head of the design control activity shall—

(1) Approve qualification requirements in accordance with procedures established by the design control activity; and

(2) Qualify and identify aviation critical safety item suppliers and products.

(b) The contracting officer shall—

(1) Ensure that the head of the design control activity has determined that a prospective contractor or its product meets or can meet the established qualification standards before the date specified for award of the contract;

(2) Refer any offers received from an unapproved source to the head of the design control activity for approval. The head of the design control activity will determine whether the offeror or its product meets or can meet the established qualification standards before the date specified for award of the contract; and

(3) Refer any requests for qualification to the design control activity.

(c) See 246.407 (S-70) and 246.504 for quality assurance requirements.

[69 FR 55988, Sept. 17, 2004]

## Subpart 209.3—First Article Testing and Approval

### 209.303 Use.

(d) The contracting officer may require that first articles be manufactured using the same facilities, production processes, methods, and materials to be used for production units under the contract.

### 209.305 Risk.

The contracting officer may give this authorization to a contractor only

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after approval by a level higher than the contracting officer.

### 209.306 Solicitation requirements.

(a)(1) To be sure that the contractor and the Government clearly understand and interpret contract terms and conditions in the same manner, avoid describing first article requirements exclusively in general terms such as “visual,” “dimensional,” “workmanship,” or “specification compliance.”

### 209.308 Contract clauses.

Alternate I of the clauses at FAR 52.209-3, First Article Approval—Contractor Testing, or 52.209-4, First Article Approval—Government Testing, as appropriate, may be used when—

(1) The form, fit, or function of the product would be adversely affected by contractor changes in the production facilities, processes, methods, or materials subsequent to first article approval; and

(2) The Government has relied upon first article testing in the absence of complete design specifications to supplement a performance specification; or

(3) It is essential to have an approved first article to serve as a manufacturing standard.

## Subpart 209.4—Debarment, Suspension, and Ineligibility

### 209.402 Policy.

(d) The uniform suspension and debarment procedures to be followed by all debarring and suspending officials are set out in appendix H to this chapter.

(e) The department or agency shall provide a copy of the Debarment and Suspension Procedures at DFARS appendix H to this chapter to contractors at the time of their suspension or when they are proposed for debarment, and upon request to other interested parties.

[59 FR 27668, May 27, 1994]

### 209.403 Definitions.

*Debarring and suspending official.* (1) For DoD, the designees are—

Army—Commander, U.S. Army Legal Services Agency

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Navy—The General Counsel of the Department of the Navy

Air Force—Deputy General Counsel (Contractor Responsibility)

Defense Advanced Research Projects Agency—The Director

Defense Information Systems Agency—The General Counsel

Defense Logistics Agency—The Special Assistant for Contracting Integrity

National Imagery and Mapping Agency—The General Counsel

Defense Threat Reduction Agency—The Director

National Security Agency—The Director

Missile Defense Agency—The General Counsel

Overseas installations—as designated by the agency head

(2) Overseas debarring and suspending officials—

(i) Are authorized to debar or suspend contractors located within the official's geographic area of responsibility under any delegation of authority they receive from their agency head.

(ii) Debar or suspend in accordance with the procedures in FAR subpart 9.4 or under modified procedures approved by the agency head based on consideration of the laws or customs of the foreign countries concerned.

(iii) In addition to the bases for debarment in FAR 9.406-2, may consider the following additional bases—

(A) The foreign country concerned determines that a contractor has engaged in bid-rigging, price-fixing, or other anti-competitive behavior; or

(B) The foreign country concerned declares the contractor to be formally debarred, suspended, or otherwise ineligible to contract with that foreign government or its instrumentalities.

(3) The Defense Logistics Agency Special Assistant for Contracting Integrity is the exclusive representative of the Secretary of Defense to suspend and debar contractors from the purchase of Federal personal property under the Federal Property Management Regulations (41 CFR 101-45.6) and the Defense Materiel Disposition Manual (DoD 4160.21-M).

[56 FR 36313, July 31, 1991, as amended at 56 FR 67212, Dec. 30, 1991; 59 FR 27669, May 27, 1994; 60 FR 61593, Nov. 30, 1995; 61 FR 50452, Sept. 26, 1996; 63 FR 11528, Mar. 9, 1998; 64 FR 51075, Sept. 21, 1999; 64 FR 62985, Nov. 18, 1999; 68 FR 7439, Feb. 14, 2003]

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### 209.405 Effect of listing.

(a) Under 10 U.S.C. 2393(b), when a department or agency determines that a compelling reason exists for it to conduct business with a contractor that is debarred or suspended from procurement programs, it must provide written notice of the determination to the General Services Administration, Office of Acquisition Policy. Examples of compelling Reasons are—

(i) Only a debarred or suspended contractor can provide the supplies or services;

(ii) Urgency requires contracting with a debarred or suspended contractor;

(iii) The contractor and a department or agency have an agreement covering the same events that resulted in the debarment or suspension and the agreement includes the department or agency decision not to debar or suspend the contractor; or

(iv) The national defense requires continued business dealings with the debarred or suspended contractor.

(b)(i) The Procurement Cause and Treatment Code “H” annotation in the GSA List of Parties Excluded from Federal Procurement and Nonprocurement Programs identifies contractors that are declared ineligible for award of a contract or subcontract because of a violation of the Clean Air Act (42 U.S.C. 7606) or the Clean Water Act (33 U.S.C. 1368).

(ii) Under the authority of 40 CFR 32.215(b), the agency head may grant an exception permitting award to a Code “H” ineligible contractor if it is in the paramount interest of the United States.

(A) The agency head may delegate this exception authority to a level no lower than a general or flag officer or a member of the Senior Executive Service.

(B) The official granting the exception must provide written notice to the Environmental Protection Agency debarment official.

[65 FR 52955, Aug. 31, 2000]

### 209.405-1 Continuation of current contracts.

(b) Unless the agency head makes a written determination that a compel-

ling reason exists to do so, ordering activities shall not—

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

(ii) When the agency is an optional user, place orders against Federal Supply Schedule contracts.

(c) This includes exercise of options.

[60 FR 29497, June 5, 1995, as amended at 60 FR 61593, Nov. 30, 1995]

### 209.405-2 Restrictions on subcontracting.

(a) The contracting officer shall not consent to any subcontract with a firm, or a subsidiary of a firm, that is identified by the Secretary of Defense as being owned or controlled by the government of a terrorist country unless the agency head states in writing the compelling reasons for the subcontract.

[63 FR 14837, Mar. 27, 1998]

### 209.406 Debarment.

#### 209.406-1 General.

(a)(i) When the debarring official decides that debarment is not necessary, the official may require the contractor to enter into a written agreement which includes—

(A) A requirement for the contractor to establish, if not already established, and to maintain the standards of conduct and internal control systems prescribed by subpart 203.70; and

(B) Other requirements the debarring official considers appropriate.

(ii) Before the debarring official decides not to suspend or debar in the case of an indictment or conviction for a felony, the debarring official must determine that the contractor has addressed adequately the circumstances that gave rise to the misconduct, and that appropriate standards of ethics and integrity are in place and are working.

[57 FR 14992, Apr. 23, 1992]

#### 209.406-2 Causes for debarment.

(a) Any person shall be considered for debarment if criminally convicted of intentionally affixing a label bearing a “Made in America” inscription to any product sold in or shipped to the

United States that was not made in America (10 U.S.C. 2410f).

(i) The debarring official will make a determination concerning debarment not later than 90 days after determining that a person has been so convicted.

(ii) In cases where the debarring official decides not to debar, the debarring official will report that decision to the Director of Defense Procurement and Acquisition Policy who will notify Congress within 30 days after the decision is made.

[58 FR 28464, May 13, 1993, as amended at 68 FR 7439, Feb. 14, 2003]

#### 209.406-3 Procedures.

##### (a) *Investigation and referral.*

(i) Refer all matters appropriate for consideration by an agency debarring and suspending official as soon as practicable to the appropriate debarring and suspending official identified in 209.403. Any person may refer a matter to the debarring and suspending official.

(ii) Use the following format when referring a matter to the agency debarring and suspending official for consideration. To the extent practicable, provide all specified information.

(A) Name, address, and telephone number of the point of contact for the activity making the report.

(B) Name, contractor and Government entity (CAGE) code, and address of the contractor.

(C) Name and addresses of the members of the board, principal officers, partners, owners, and managers.

(D) Name and addresses of all known affiliates, subsidiaries, or parent firms, and the nature of the business relationship.

(E) For each contract affected by the conduct being reported—

- (1) The contract number;
- (2) All office identifying numbers or symbols;
- (3) Description of supplies or services;
- (4) The amount;
- (5) The percentage of completion;
- (6) The amount paid the contractor;
- (7) Whether the contract is assigned under the Assignment of Claims Act and, if so, to whom; and
- (8) The amount due the contractor.

(F) For any other contracts outstanding with the contractor or any of its affiliates—

- (1) The contract number;
- (2) The amount;
- (3) The amounts paid the contractor;
- (4) Whether the contract is assigned under the Assignment of Claims Act and, if so, to whom; and
- (5) The amount due the contractor.

(G) A complete summary of all pertinent evidence and the status of any legal proceedings involving the contractor.

(H) An estimate of any damages sustained by the Government as a result of the contractor's action (explain how the estimate was calculated).

(I) If a contracting office initiates the report, the comments and recommendations of the contracting officer and of each higher-level contracting review authority regarding—

- (1) Whether to suspend or debar the contractor;
- (2) Whether to apply limitations to the suspension or debarment;
- (3) The period of any recommended debarment; and
- (4) Whether to continue any current contracts with the contractor (or explain why a recommendation regarding current contracts is not included).

(J) When appropriate, as an enclosure to the report—

- (1) A copy or pertinent extracts of each pertinent contract;
- (2) Witness statements or affidavits;
- (3) Copies of investigative reports when authorized by the investigative agency;
- (4) Certified copies of indictments, judgments, and sentencing actions;
- (5) A copy of any available determinations of nonresponsibility in accordance with FAR 9.105-2(a)(1); and
- (6) Any other appropriate exhibits or documentation.

(iii) Send three copies of each report, including enclosures, to the appropriate debarring and suspending official.

(iv) If a referral lacks sufficient evidence of a cause for debarment, the debarring and suspending official may initiate a review or investigation, as appropriate, by reporting the referral to the appropriate Government entity, e.g., contracting activity, inspector

general, or criminal investigative agency.

(b) *Decisionmaking process.*

(i) The agency debarring and suspending official may initiate the debarment process by issuing a notice of proposed debarment in accordance with FAR 9.406-3(c) when the debarring and suspending official finds that the administrative record contains sufficient evidence of one or more of the causes for debarment stated in FAR 9.406-2 or 209.406-2.

(A) The absence of a referral in accordance with paragraph (a)(i) of this subsection, or the absence of any information specified in the report format in paragraph (a)(ii) of this subsection, will not preclude the debarring and suspending official from making such a finding.

(B) The signature of the debarring and suspending official on the notice of proposed debarment is sufficient evidence that the debarring and suspending official has made such a finding.

(ii) The agency debarring and suspending official must use the decisionmaking process stated in FAR 9.406-3(b), DFARS Appendix H, and any agency-specific procedures that were provided to the contractor in advance of the decision.

(d) *Debarring official's decision.* The absence of a referral in accordance with paragraph (a)(i) of this subsection, or the absence of any information specified in the report format in paragraph (a)(ii) of this subsection, will not preclude the debarring and suspending official from making a decision.

[64 FR 62985, Nov. 18, 1999; 65 FR 4864, Feb. 1, 2000]

**209.407 Suspension.**

**209.407-3 Procedures.**

(a) *Investigation and referral.*

(i) Refer all matters appropriate for consideration by an agency debarring and suspending official as soon as practicable to the appropriate debarring and suspending official identified in 209.403. Any person may refer a matter to the debarring and suspending official.

(ii) Use the format at 209.406-3(a)(ii) when referring a matter to the agency

debarring and suspending official for consideration. To the extent practicable, provide all information specified in the format.

(iii) If a referral lacks sufficient evidence of a cause for suspension, the debarring and suspending official may initiate a review or investigation, as appropriate, by reporting the referral to the appropriate Government entity, e.g., contracting activity, inspector general, or criminal investigative agency.

(b) *Decisionmaking process.*

(i) The agency debarring and suspending official may initiate the suspension process by issuing a notice of suspension in accordance with FAR 9.407-3(c) when the debarring and suspending official finds that the administrative record contains sufficient evidence of one or more of the causes for suspension stated in FAR 9.407-2.

(A) The absence of a referral in accordance with paragraph (a)(i) of this subsection, or the absence of any information specified in the report format at 209.406-3(a)(ii), will not preclude the debarring and suspending official from making such a finding.

(B) The signature of the debarring and suspending official on the notice of suspension is sufficient evidence that the debarring and suspending official has made such a finding.

(ii) In deciding whether to terminate a suspension following a submission of matters in opposition, the agency debarring and suspending official must use the decisionmaking process stated in FAR 9.407-3(b), DFARS Appendix H, and any agency-specific procedures that were provided to the contractor in advance of the decision.

(d) *Suspending official's decision.* The absence of a referral in accordance with paragraph (a)(i) of this subsection, or the absence of any information specified in the report format at 209.406-3(a)(ii), will not preclude the debarring and suspending official from making a decision.

[64 FR 62985, Nov. 18, 1999; 65 FR 4864, Feb. 1, 2000]

**209.409 Solicitation provision and contract clause.**

Use the clause at 252.209-7004, Subcontracting with Firms That Are

## 209.470

Owned or Controlled by the Government of a Terrorist Country, in solicitations and contracts with a value of \$100,000 or more.

[63 FR 14837, Mar. 27, 1998]

### **209.470 Reserve Officer Training Corps and military recruiting on campus.**

#### **209.470-1 Definition.**

*Institution of higher education*, as used in this section, means an institution that meets the requirements of 20 U.S.C. 1001 and includes all subelements of such an institution.

[65 FR 2056, Jan. 13, 2000]

#### **209.470-2 Policy.**

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

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

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

(3) The Secretary of a military department or the Secretary of Transportation from gaining entry to campuses, or access to students on campuses, for purposes of military recruiting; or

(4) Military recruiters from accessing certain information pertaining to students enrolled at that institution.

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

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

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

[65 FR 2056, Jan. 13, 2000]

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### **209.470-3 Procedures.**

If the Secretary of Defense determines that an institution of higher education is ineligible to receive DoD funds because of a policy or practice described in 209.470-2(a)—

(a) The Secretary of Defense will list the institution on the List of Parties Excluded from Federal Procurement and Nonprocurement Programs published by General Services Administration (also see FAR 9.404 and 32 CFR part 216); and

(b) DoD components—

(1) Shall not solicit offers from, award contracts to, or consent to subcontracts with the institution;

(2) Shall make no further payments under existing contracts with the institution; and

(3) Shall terminate existing contracts with the institution.

[65 FR 2057, Jan. 13, 2000, as amended at 67 FR 49254, July 30, 2002]

### **209.470-4 Contract clause.**

Use the clause at 252.209-7005, Reserve Officer Training Corps and Military Recruiting on Campus, in all solicitations and contracts with institutions of higher education.

[65 FR 2057, Jan. 13, 2000]

### **209.471 Congressional Medal of Honor.**

In accordance with Section 8118 of Pub. L. 105-262, do not award a contract to, extend a contract with, or approve the award of a subcontract to any entity that, within the preceding 15 years, has been convicted under 18 U.S.C. 704 of the unlawful manufacture or sale of the Congressional Medal of Honor. Any entity so convicted will be listed as ineligible on the List of Parties Excluded from Federal Procurement and Nonprocurement Programs published by the General Services Administration.

[64 FR 31733, June 14, 1999]

## **PART 210—MARKET RESEARCH**

AUTHORITY: 41 U.S.C. 421 and 48 CFR Chapter 1.

SOURCE: 67 FR 20688, Apr. 26, 2002, unless otherwise noted.