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Parent topic: Defense Federal Acquisition Regulation

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.

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 country that is a state sponsor of terrorism*. See 225.771 .

(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. 4874(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 Security Directorate, Office of the Deputy Under Secretary of Defense, Human Intelligence, Counterintelligence, and Security.

(C) In accordance with 10 U.S.C. 4874(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 interests of the United States. The Secretary has delegated authority to grant this waiver to the Under Secretary of Defense for Intelligence. Waiver requests, prepared by the requiring activity in coordination with the contracting officer, shall be processed through the Principal Director, Defense Pricing, Contracting, and Acquisition Policy, Office of the Under Secretary of Defense (Acquisition and Sustainment), 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 in which award of the contract helps advance those interests;

(4) A statement as to 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 144 c. 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.

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 provision.

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 for contract performance. If the solicitation includes the provision at FAR 52.204-7, do not separately list the provision 252.209-7002 in the solicitation.

209.105 Procedures.

209.105-1 Obtaining information.

(1) For guidance on using the Exclusion section of the System for Award Management, see PGI 209.105-1 .

(2) A satisfactory performance record is a factor in determining contractor responsibility (see FAR 9.104-1(c)).

(i) One source of information relating to contractor performance is Contractor Performance Assessment Reporting System (CPARS), available at https://ww.cpars.gov/.

(ii) Information relating to contract terminations for cause and for default is also available through the Federal Awardee Performance and Integrity Information System (FAPIIS) module of CPARS, available at https://sam.gov. (see FAR subpart 42.15). This termination information is just one consideration in determining contractor responsibility.

(iii) Contracting officers shall consider the supplier risk assessment available in the Supplier Performance Risk System at https://piee.eb.mil/ when determining responsibility. See 204.7603(c).

209.105-2 Determinations and documentation.

(a) The contracting officer shall submit a copy of a determination of nonresponsibility to the appropriate debarring and suspending official listed in 209.403 .

209.105-2-70 Inclusion of determination of contractor fault in Federal Awardee Performance and Integrity Information System (FAPIIS).

If the contractor or a subcontractor at any tier is not subject to the jurisdiction of the U.S. courts and the DoD appointing official that requested a DoD investigation makes a final determination that a contractor’s or subcontractor’s gross negligence or reckless disregard for the safety of civilian or military personnel of the Government caused serious bodily injury or death of such personnel, the

contracting officer shall enter in FAPIIS the appropriate information regarding such determination within three days of receiving notice of the determination, pursuant to section 834 of the National Defense Authorization Act for Fiscal Year 2011 (Public Law 111-383). Information posted in FAPIIS regarding such determinations will be publicly available.

209.106 Preaward surveys.

When requesting a preaward survey, follow the procedures at PGI 209.106 .

209.170 Scope.

This section implements section 1062 of the National Defense Authorization Act for Fiscal Year 2021 (Pub. L. 116-283).

209.170-0 Scope.

This section implements section 1062 of the National Defense Authorization Act for Fiscal Year 2021 (Pub. L. 116-283).

209.170-1 Definitions.

As used in this section—

"Confucius Institute" means —

(1) Any program that receives funding or support from—

(i) The Chinese International Education Foundation; or

(ii) The Center for Language Exchange Cooperation of the Ministry of Education of the People’s Republic of China; or

(2) Any cultural institute directly or indirectly funded by the government of the People’s Republic of China.

"Institution of higher education" has the meaning given in 20 U.S.C. 1002.

209.170-2 Restriction.

None of the funds authorized to be appropriated or otherwise made available for any fiscal year for DoD may be used to contract with an institution of higher education that hosts a Confucius Institute, other than amounts provided directly to students as educational assistance. Contracting officers shall not enter into a contract with any institution of higher education that hosts a Confucius Institute, unless a waiver has been granted.

209.170-3 Waiver of restriction.

The restriction in 209.170-2 can be waived by the Office of the Under Secretary of Defense (Research and Engineering), without power of delegation, in accordance with the Confucius Institute Waiver Program guidance. The waiver authority terminates on October 1, 2026. Any waiver issued shall not apply on or after that date. See PGI 209.170-3.

209.170-4 Solicitation provision.

Use the provision at 252.209-7011, Representation for Restriction on the Use of Certain Institutions of Higher Education, in solicitations, including solicitations using FAR part 12 procedures for the acquisition of commercial products and commercial services, for acquisitions to an institution of higher education.

Subpart 209.2 - QUALIFICATIONS REQUIREMENTS

209.202 Policy.

(a)(1) Except for aviation or ship critical safety items, obtain approval in accordance with PGI 209.202 (a)(1) when establishing qualification requirements. See 209.270 for approval of qualification requirements for aviation or ship critical safety items.

209.270 Aviation and ship critical safety items.

209.270-1 Scope.

This section—

(a) Implements—

(1) Section 802 of the National Defense Authorization Act for Fiscal Year 2004 (Pub. L. 108-136); and

(2) Section 130 of the National Defense Authorization Act for Fiscal Year 2007 (Pub. L. 109-364); and

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

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”—

(1) With respect to an aviation critical safety item, 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; and

(2) With respect to a ship critical safety item, means the systems command of a military department that is specifically responsible for ensuring the seaworthiness of a ship or ship equipment in which a ship critical safety item is to be used.

“Ship critical safety item” means any ship part, assembly, or support equipment containing a characteristic the failure, malfunction, or absence of which could cause—

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

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

209.270-3 Policy.

(a) The head of the contracting activity responsible for procuring an aviation or ship 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 or ship critical safety items.

209.270-4 Procedures.

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

(1) Identify items that meet the criteria for designation as aviation or ship critical safety items. See additional information at PGI 209.270-4 ;

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

(3) Qualify and identify aviation and ship 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.

209.270-5 Contract clause.

The contracting officer shall insert the clause at 252.209-7010 , Critical Safety Items, in solicitations and contracts when the acquisition includes one or more items designated by the design control activity as critical safety items.

Subpart 209.3 - Reserved

Subpart 209.4 - DEBARMENT, SUSPENSION, AND INELIGIBILITY

209.402 Policy.

(d) The suspension and debarment procedures in Appendix H are to be followed by all debarring and suspending officials.

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

209.403 Definitions.

“Debarring and suspending official.”

(1) For DoD, the designees are—

(i) Army—Director, Soldier & Family Legal Services

(ii) Navy/Marine Corps—The Assistant General Counsel (Acquisition Integrity)

(iii) Air Force—Deputy General Counsel (Contractor Responsibility)

(iv) Defense Advanced Research Projects Agency—The Director

(v) Defense Information Systems Agency—The General Counsel

(vi) Defense Logistics Agency—The Special Assistant for Contracting Integrity

(vii) Defense Intelligence Agency—The Senior Procurement Executive

(viii) National Geospatial Intelligence Agency—The General Counsel

(ix) Defense Threat Reduction Agency—The Director

(x) National Security Agency—The Senior Acquisition Executive

(xi) Missile Defense Agency—The General Counsel

(xii) United States Cyber Command—The Staff Judge Advocate

(xiii) Defense Health Agency—The General Counsel

(xiv) 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).

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

(GSA), GSA Suspension and Debarment Official, Office of Acquisition Policy, 1275 First Street, N.E., Washington, DC 20417. 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 Exclusions section of the System for Award Management (SAM Exclusions) identifies contractor facilities where no part of a contract or subcontract may be performed 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 Section 8 of Executive Order 11738, the agency head may grant an exemption permitting award to a contractor using a Code "H" ineligible facility if the agency head determines that such an exemption is in the paramount interest of the United States.

(A) The agency head may delegate this exemption 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 exemption—

(1) Shall promptly notify the Environmental Protection Agency suspending and debarring official of the exemption and the corresponding justification; and

(2) May grant a class exemption only after consulting with the Environmental Protection Agency suspending and debarring official.

(C) Exemptions shall be for a period not to exceed one year. The continuing necessity for each exemption shall be reviewed annually and, upon the making of a new determination, may be extended for periods not to exceed one year.

(D) All exemptions must be reported annually to the Environmental Protection Agency suspending and debarring official.

(E) See PGI 209.405 for additional procedures and information.

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 in SAM Exclusions as being owned or controlled by the government of a country that is a state sponsor of terrorism unless the agency head states in writing the compelling reasons for the subcontract. (See also 225.771 .)

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 FAR subpart 3.10; 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.

209.406-2 Causes for debarment.

(1) 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 or its outlying areas that was not made in the United States or its outlying areas (10 U.S.C. 4658).

(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 Principal Director, Defense Pricing, Contracting, and Acquisition Policy, who will notify Congress within 30 days after the decision is made.

(2) Any contractor that knowingly provides compensation to a former DoD official in violation of section 847 of the National Defense Authorization Act for Fiscal Year 2008 may face suspension and debarment proceedings in accordance with 41 U.S.C. 2105(c)(1)(C).

209.406-3 Procedures.

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. Follow the procedures at PGI 209.406-3 .

209.407 Suspension.

209.407-3 Procedures.

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. Follow the procedures at PGI 209.407-3 .

209.409 Contract clause.

Use the clause at 252.209-7004, Subcontracting with Firms that are Owned or Controlled by the Government of a Country that is a State Sponsor of Terrorism, in solicitations and contracts with a value of $200,000 or more.

209.470 Reserved.

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.

Subpart 209.5 - ORGANIZATIONAL AND CONSULTANT CONFLICTS OF INTEREST

209.503 [Reserved]

209.503-70 Waiver.

Notwithstanding FAR 9.503, for consulting services, as defined at 209.572(b), the waiver approval authority is the Secretary of Defense and the following officials, without power of delegation below an official appointed by the President and confirmed by the Senate:

(a) The Under Secretary of Defense (Acquisition and Sustainment).

(b) The assistant secretaries of the military departments. (See PGI 209.503-70.)

209.505 General rules.

209.505-4 Obtaining access to proprietary information.

(b)(i) For contractors, other than litigation support contractors, accessing third party proprietary technical data or computer Software, nondisclosure requirements are addressed at 227.7103-7(b),

through use of the clause at 252.227-7025 as prescribed at 227.7103-6(c) and 227.7203-6(d). Pursuant to that clause, covered Government support contractors may be required to enter into nondisclosure agreements directly with the third party asserting restrictions on limited rights technical data, commercial technical data, or restricted rights computer software. The contracting officer is not required to obtain copies of these agreements or to ensure that they are properly executed.

(ii) For litigation support contractors accessing litigation information, including that originating from third parties, use and nondisclosure requirements are addressed through the use of the clause at 252.204-7014, as prescribed at 204.7403(a). Pursuant to the clause, litigation support contractors are not required to enter into nondisclosure agreements directly with any third party asserting restrictions on any litigation information.

209.570 Limitations on contractors acting as lead system integrators.

209.570-1 Definitions.

“Lead system integrator,” as used in this section, is defined in the clause at 252.209-7007 , Prohibited Financial Interests for Lead System Integrators. See PGI 209.570-1 for additional information.

209.570-2 Policy.

(a) Except as provided in paragraph (b) of this subsection, 10 U.S.C. 4292 prohibits any entity performing lead system integrator functions in the acquisition of a major system by DoD from having any direct financial interest in the development or construction of any individual system or element of any system of systems.

(b) The prohibition in paragraph (a) of this subsection does not apply if—

(1) The Secretary of Defense certifies to the Committees on Armed Services of the Senate and the House of Representatives that—

(i) The entity was selected by DoD as a contractor to develop or construct the system or element concerned through the use of competitive procedures; and

(ii) DoD took appropriate steps to prevent any organizational conflict of interest in the selection process; or

(2) The entity was selected by a subcontractor to serve as a lower-tier subcontractor, through a process over which the entity exercised no control.

(c) In accordance with section 802 of the National Defense Authorization Act for Fiscal Year 2008 (Pub. L. 110-181; 10 U.S.C. 4292 note), DoD may award a new contract for lead system integrator functions in the acquisition of a major system only if—

(1) The major system has not yet proceeded beyond low-rate initial production; or

(2) The Secretary of Defense determines in writing that it would not be practicable to carry out the

acquisition without continuing to use a contractor to perform lead system integrator functions and that doing so is in the best interest of DoD. The authority to make this determination may not be delegated below the level of the Under Secretary of Defense for Acquisition and Sustainment. Also, see 209.570-3 (b).

(d) Effective October 1, 2010, DoD is prohibited from awarding a new contract for lead system integrator functions in the acquisition of a major system to any entity that was not performing lead system integrator functions in the acquisition of the major system prior to January 28, 2008.

209.570-3 Procedures.

(a) In making a responsibility determination before awarding a contract for the acquisition of a major system, the contracting officer shall—

(1) Determine whether the prospective contractor meets the definition of “lead system integrator”;

(2) Consider all information regarding the prospective contractor’s direct financial interests in view of the prohibition at 209.570-2 (a); and

(3) Follow the procedures at PGI 209.570-3 .

(b) A determination to use a contractor to perform lead system integrator functions in accordance with 209.570-2 (c)(2)—

(1) Shall specify the reasons why it would not be practicable to carry out the acquisition without continuing to use a contractor to perform lead system integrator functions, including a discussion of alternatives, such as use of the DoD workforce or a system engineering and technical assistance contractor;

(2) Shall include a plan for phasing out the use of contracted lead system integrator functions over the shortest period of time consistent with the interest of the national defense; and

(3) Shall be provided to the Committees on Armed Services of the Senate and the House of Representatives at least 45 days before the award of a contract pursuant to the determination.

209.570-4 Solicitation provision and contract clause.

(a) Use the provision at 252.209-7006 , Limitations on Contractors Acting as Lead System Integrators, in solicitations for the acquisition of a major system when the acquisition strategy envisions the use of a lead system integrator.

(b) Use the clause at 252.209-7007 , Prohibited Financial Interests for Lead System Integrators—

(1) In solicitations that include the provision at 252.209-7006 ; and

(2) In contracts when the contractor will fill the role of a lead system integrator for the acquisition of a major system.

209.571 Organizational conflicts of interest in major defense acquisition programs.

209.571-0 Scope of subpart.

This subpart implements section 207 of the Weapons System Acquisition Reform Act of 2009 (Pub. L. 111-23).

209.571-1 Definitions.

As used in this section—

“Lead system integrator” includes “lead system integrator with system responsibility” and “lead system integrator without system responsibility”.

(i) “Lead system integrator with system responsibility” means a prime contractor for the development or production of a major system, if the prime contractor is not expected at the time of award to perform a substantial portion of the work on the system and the major subsystems.

(ii) “Lead system integrator without system responsibility” means a prime contractor under a contract for the procurement of services, the primary purpose of which is to perform acquisition functions closely associated with inherently governmental functions (see section 7.503(d) of the Federal Acquisition Regulation) with respect to the development or production of a major system.

“Major subcontractor” means a subcontractor that is awarded a subcontract that equals or exceeds—

(i) Both the certified cost or pricing data threshold and 10 percent of the value of the contract under which the subcontract is awarded; or

(ii) $55 million.

“Pre-Major Defense Acquisition Program” means a program that is in the Materiel Solution Analysis or Technology Development Phases preceding Milestone B of the Defense Acquisition System and has been identified to have the potential to become a major defense acquisition program.

“Systems engineering and technical assistance.”

(1) “Systems engineering” means an interdisciplinary technical effort to evolve and verify an integrated and total life cycle balanced set of system, people, and process solutions that satisfy customer needs.

(2) “Technical assistance” means the acquisition support, program management support, analyses, and other activities involved in the management and execution of an acquisition program.

(3) “Systems engineering and technical assistance”—

(i) Means a combination of activities related to the development of technical information to support various acquisition processes. Examples of systems engineering and technical assistance activities include, but are not limited to, supporting acquisition efforts such as—

(A) Deriving requirements;

(B) Performing technology assessments;

(C) Developing acquisition strategies;

(D) Conducting risk assessments;

(E) Developing cost estimates;

(F) Determining specifications;

(G) Evaluating contractor performance and conducting independent verification and validation;

(H) Directing other contractors' (other than subcontractors) operations;

(I) Developing test requirements and evaluating test data;

(J) Developing work statements (but see paragraph (ii)(B) of this definition).

(ii) Does not include—

(A) Design and development work of design and development contractors, in accordance with FAR 9.505-2(a)(3) or FAR 9.505-2(b)(3), and the guidance at PGI 209.571-7 ; or

(B) Preparation of work statements by contractors, acting as industry representatives, under the supervision and control of Government representatives, in accordance with FAR 9.505-2(b)(1)(ii).

209.571-2 Applicability.

(a) This subsection applies to major defense acquisition programs.

(b) To the extent that this section is inconsistent with FAR subpart 9.5, this section takes precedence.

209.571-3 Policy.

It is DoD policy that—

(a) Agencies shall obtain advice on major defense acquisition programs and pre-major defense acquisition programs from sources that are objective and unbiased; and

(b) Contracting officers generally should seek to resolve organizational conflicts of interest in a manner that will promote competition and preserve DoD access to the expertise and experience of qualified contractors. Accordingly, contracting officers should, to the extent feasible, employ organizational conflict of interest resolution strategies that do not unnecessarily restrict the pool of potential offerors in current or future acquisitions. Further, contracting activities shall not impose per se restrictions or limitations on the use of particular resolution methods, except as may be required under 209.571-7 or as may be appropriate in particular acquisitions.

209.571-4 Mitigation

(a) Mitigation is any action taken to minimize an organizational conflict of interest. Mitigation may require Government action, contractor action, or a combination of both.

(b) If the contracting officer and the contractor have agreed to mitigation of an organizational conflict of interest, a Government-approved Organizational Conflict of Interest Mitigation Plan, reflecting the actions a contractor has agreed to take to mitigate a conflict, shall be incorporated into the contract.

(c) If the contracting officer determines, after consultation with agency legal counsel, that the otherwise successful offeror is unable to effectively mitigate an organizational conflict of interest, then the contracting officer, taking into account both the instant contract and longer term Government needs, shall use another approach to resolve the organizational conflict of interest, select another offeror, or request a waiver in accordance with FAR 9.503 (but see statutory prohibition in 209.571-7 , which cannot be waived).

(d) For any acquisition that exceeds $1 billion, the contracting officer shall brief the senior procurement executive before determining that an offeror’s mitigation plan is unacceptable.

209.571-5 Lead system integrators.

For limitations on contractors acting as lead systems integrators, see 209.570 .

209.571-6 Identification of organizational conflicts of interest.

When evaluating organizational conflicts of interest for major defense acquisition programs or pre-major defense acquisition programs, contracting officers shall consider—

(a) The ownership of business units performing systems engineering and technical assistance, professional services, or management support services to a major defense acquisition program or a pre-major defense acquisition program by a contractor who simultaneously owns a business unit competing (or potentially competing) to perform as—

(1) The prime contractor for the same major defense acquisition program; or

(2) The supplier of a major subsystem or component for the same major defense acquisition program.

(b) The proposed award of a major subsystem by a prime contractor to business units or other affiliates of the same parent corporate entity, particularly the award of a subcontract for software integration or the development of a proprietary software system architecture; and

(c) The performance by, or assistance of, contractors in technical evaluation.

209.571-7 Systems engineering and technical assistance contracts.

(a) Agencies shall obtain advice on systems architecture and systems engineering matters with respect to major defense acquisition programs or pre-major defense acquisition programs from Federally Funded Research and Development Centers or other sources independent of the major defense acquisition program contractor.

(b) *Limitation on Future Contracting.*

(1) Except as provided in paragraph (c) of this subsection, a contract for the performance of systems engineering and technical assistance for a major defense acquisition program or a pre-major defense acquisition program shall prohibit the contractor or any affiliate of the contractor from participating as a contractor or major subcontractor in the development or production of a weapon system under such program.

(2) The requirement in paragraph (b)(1) of this subsection cannot be waived.

(c) *Exception.*

(1) The requirement in paragraph (b)(1) of this subsection does not apply if the head of the contracting activity determines that—

(i) An exception is necessary because DoD needs the domain experience and expertise of the highly qualified, apparently successful offeror; and

(ii) Based on the agreed-to resolution strategy, the apparently successful offeror will be able to provide objective and unbiased advice, as required by 209.571-3 (a), without a limitation on future participation in development and production.

(2) The authority to make this determination cannot be delegated.

209.571-8 Solicitation provision and contract clause.

(a) Use the provision at 252.209-7008 , Notice of Prohibition Relating to Organizational Conflict of Interest—Major Defense Acquisition Program, if the solicitation includes the clause at 252.209-7009 , Organizational Conflict of Interest—Major Defense Acquisition Program; and

(b) Use the clause at 252.209-7009 , Organizational Conflict of Interest—Major Defense Acquisition Program, in solicitations and contracts for systems engineering and technical assistance for major defense acquisition programs or pre-major defense acquisition programs.

NO DFARS TEXT

209.572 Conflicts of interest in certain consulting services.

(a) *Scope*.

(1) This section implements section 812 of the National Defense Authorization Act for Fiscal Year 2024 (Pub. L. 118-31).

(2) To the extent that this section is inconsistent with FAR subpart 9.5, this section takes precedence.

(b) *Definitions*. As used in this section—

“Consulting services” means advisory and assistance services, except that “consulting services” does not include the provision of products or services related to—

(i) Compliance with legal, audit, accounting, tax, reporting, or other requirements of the laws and standards of countries; or

(ii) Participation in a judicial, legal, or equitable dispute resolution proceeding.

“Contract oversight entity” means any of the following:

(i) The contracting officer.

(ii) The contracting officer’s representative.

(iii) The Defense Contract Management Agency.

(iv) The Defense Contract Audit Agency.

(v) The DoD Office of Inspector General or any subcomponent of that office.

(vi) The Government Accountability Office.

“Covered contract” means a DoD contract involving consulting services.

“Covered foreign entity” means any of the following:

(i) The government of the People’s Republic of China, the Chinese Communist Party, the People’s Liberation Army, the Ministry of State Security, or other security service or intelligence agency of the People’s Republic of China.

(ii) The government of the Russian Federation or any entity sanctioned by the Secretary of the Treasury under Executive Order 13662, Blocking Property of Additional Persons Contributing to the Situation in Ukraine.

(iii) The government of any country if the Secretary of State determines that such government has repeatedly provided support for acts of international terrorism pursuant to any of the following:

(A) Section 1754(c)(1)(A) of the Export Control Reform Act of 2018 (50 U.S.C. 4318(c)(1)(A)).

(B) Section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371).

(C) Section 40 of the Arms Export Control Act (22 U.S.C. 2780).

(D) Any other provision of law.

(iv) Any entity included on any of the following lists maintained by the Department of Commerce (see the Export Administration Regulations at 15 CFR subchapter C):

(A) The Entity List in supplement no. 4 to 15 CFR part 744.

(B) The Denied Persons List as described in 15 CFR 764.3(a)(2).

(C) The Unverified List in supplement no. 6 to 15 CFR part 744.

(D) The Military End User List in supplement no. 7 to 15 CFR part 744.

(v) Any entity identified by the Secretary of Defense pursuant to section 1237(b) of the National Defense Authorization Act for Fiscal Year 1999 (Pub. L. 105-261; 50 U.S.C. 1701 note).

(vi) Any entity on the Non-Specially Designated Nationals Chinese Military-Industrial Complex Companies List maintained by the Office of Foreign Assets Control of the Department of the Treasury under Executive Order 14032, Addressing the Threat From Securities Investments That Finance Certain Companies of the People's Republic of China.

(c) *Prohibition*. The contracting officer shall not award a contract assigned a North American Industry Classification System (NAICS) code beginning with 5416 that involves consulting services to an offeror that both—

(1) Cannot certify that neither the offeror nor its subsidiaries or affiliates hold a contract or subcontract involving consulting services with one or more covered foreign entities; and

(2) Does not have a conflict-of-interest mitigation plan that is auditable by a contract oversight entity and approved by the contracting officer.

(d) *Waiver*.

(1) If the prospective contractor(s) certified, in response to paragraph (c) of the provision at 252.209-7012, Prohibition Relating to Conflicts of Interest in Consulting Services—Certification, that it or its subsidiaries or affiliates hold a contract or subcontract involving consulting services with one or more covered foreign entities and the offeror has not submitted an acceptable conflict-of-interest mitigation plan, the contracting officer shall—

(i) Notify the offeror of the potential withholding of award due to the unmitigated conflict of interest; and

(ii) Specify that the offeror has 10 days to respond to the notification.

(2) If the contracting officer determines that it is in the best interests of the United States to award the contract, notwithstanding the conflict of interest, the contracting officer shall request a waiver in accordance with 209.503-70.

(3) The prohibition may be waived on a case-by-case basis if an official listed at 209.503-70 determines that a waiver is necessary for national security purposes.

(4) The contracting officer shall include the waiver request and the waiver in the contract file.

(5) Not later than 30 days after approval of the waiver, the agency shall provide written notification to the House and Senate Armed Services Committees of the use of such waiver authority. The notification shall include—

(i) The specific justification for providing the waiver;

(ii) The number of offerors that did not require a waiver;

(iii) The number of offerors that were granted a waiver;

(iv) Identification of the covered foreign entity that is the subject of the waiver; and

(v) The total dollar value of the covered contract.

(e) *Solicitation provision*. Use the provision at 252.209-7012, Prohibition Relating to Conflicts of Interest in Consulting Services—Certification, in solicitations, including solicitations using FAR part 12 procedures for the acquisition of commercial services, assigned a NAICS code beginning with 5416. Do not include the provision in solicitations for the acquisition of commercial products.