DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 9 and 52

[FAC 2021–03; FAR Case 2017–018; Item I; Docket No. FAR–2017–0018; Sequence No. 1]

RIN 9000–AN57

Federal Acquisition Regulation: Violations of Arms Control Treaties or Agreements With the United States

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: DoD, GSA, and NASA are adopting as final, with changes, an interim rule amending the Federal Acquisition Regulation (FAR) to implement a section of the National Defense Authorization Act for Fiscal Year 2017 that addresses measures against persons involved in activities that violate arms control treaties or agreements with the United States.

DATES: *Effective:* February 16, 2021.

FOR FURTHER INFORMATION CONTACT: Mr. Michael O. Jackson, Procurement Analyst, at 202–208–4949 or *michaelo.jackson@gsa.gov* for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202–501–4755 or *GSARegSec@gsa.gov.* Please cite FAC 2021–03, FAR Case 2017–018.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA issued an interim rule at 83 FR 28145 on June 15, 2018, to implement 22 U.S.C. 2593e, as added by section 1290 of the National Defense Authorization Act for Fiscal Year 2017 (Pub. L. 114–328). 22 U.S.C. 2593e addresses measures against persons involved in activities that violate arms control treaties or agreements with the United States and applicable remedies for determining that a person has submitted a false certification regarding such activities. One respondent submitted comments on the interim rule.

II. Discussion and Analysis

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) reviewed the public comments in the development of the final rule. A discussion of the comments and the changes to the rule as a result of those comments are provided as follows:

A. Summary of Changes

The final rule:

1. Clarifies, at FAR 9.405, the effect of an ineligibility determination under 22 U.S.C. 2593e. Conforming changes are made at FAR 9.400(b) and 9.405–2(a).

2. Enumerates causes of suspension and debarment at FAR 9.406–2(b)(1)(vii) and 9.407–2(a)(9).

3. Clarifies at FAR 9.406–4(a)(1)(iii) that the minimum period of debarment of not less than two years, as statutorily mandated by 22 U.S.C. 2593e, for violation of arms control treaties or agreements with the United States is inclusive of any suspension period, if suspension precedes the debarment per FAR 9.406–4(a)(2). A conforming change is also made at FAR 9.109–4(d).

4. Corrects the threshold at FAR 52.209–13 regarding application of the certification requirement.

B. Analysis of Public Comments

1. Causes for suspension and debarment.

Comment: The respondent recommended addition of new causes to the lists of causes for debarment and suspension at FAR 9.406–2 and 9.407–2, respectively, to include determination of a false certification regarding violations of arms control treaties or agreements with the United States under FAR 52.209–13.

Response: The Councils have added the causes at FAR 9.406–2(b)(1)(vii) and 9.407–2(a)(9), as recommended. This change is in line with FAR 9.109–4(d) and reflects statutory remedies under 22 U.S.C. 2593e.

2. Period of debarment.

Comment: The respondent recommended that FAR 9.406–4(a)(1)(iii) should also specify that the statutory requirement for the 2-year minimum debarment period is inclusive of a suspension period, if suspension precedes a debarment. This is consistent with FAR 9.406–4(a)(2), which states that if suspension precedes a debarment, the suspension period shall be considered in determining the debarment period.

The respondent also recommended changing the reference in this paragraph from ''9.109–4(d)'' to the newly proposed ''9.406–2(b)(1)(vii)'', because any suspension or debarment resulting from determination of a false certification under FAR 52.209–13 will be pursued under FAR subpart 9.4.

Response: The Councils are making the changes to FAR 9.406–4(a)(1)(iii) as recommended by the respondent. Suspension as a remedy for determination of a false certification under FAR 52.209–13 continues to follow FAR 9.407–4(b), which limits the maximum period of suspension to 18 months.

3. Certification by the offeror.

Comment: The respondent recommended an edit to FAR 9.109–4(d) to refer more broadly to FAR subpart 9.4, rather than specifying ''subject to procedures set forth in subpart 9.4 (including 9.406–1 and 9.407–1)''. The respondent was concerned that the reference to ''procedures'' set forth in FAR subpart 9.4 might be too narrowly interpreted as only applying to the ''Procedures'' subheading titles of FAR 9.406–3 and 9.407–3.

Response: The Councils are removing ''the procedures'' language to have FAR 9.109–4(d) refer generally to subpart 9.4.

4. Effect of listing.

Comment: The respondent commented that the change to FAR 9.405(b) in the interim rule was unnecessary, because FAR 9.405(b) already states that contractors included in System for Award Management (SAM) exclusions as being ineligible on the basis of statutory procedures are excluded under the conditions and period set forth in the regulation. Specific statutory prohibitions that are not issued under FAR subpart 9.4 procedures to date have not been incorporated into FAR subpart 9.4, and the scope of those debarments are not specifically addressed in FAR section 9.405. The respondent further recommended that if the interim rule revisions to FAR 9.405 are retained, then the provisions should be edited to mirror the statutory language, which also prohibits agencies from entering into and renewing contracts with these entities.

Response: The Councils decided to retain the language at FAR 9.405 and adopted the respondent's change by adding ''enter into'' and ''renew''. Also, the Councils adopted the respondent's recommendation to break out the paragraph by adding a new paragraph (c).

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold (SAT) and for Commercial Items, Including Commercially Available Off-the-Shelf (COTS) Items

Consistent with 41 U.S.C. 1905—1907, the interim rule did not apply the certification required by 22 U.S.C. 2593e to contracts at or below the simplified acquisition threshold (SAT), or to

contracts for the acquisition of commercial items, including commercially available off-the-shelf (COTS) items. However, when acquiring products or services, the Government is still prohibited from contracting with entities listed as excluded in the SAM. Similarly, this final rule does not affect the applicability of the certification required by 22 U.S.C. 2593e, as implemented in FAR 52.209–13, to contracts at or below the SAT, or to contracts for the acquisition of commercial items, including COTS items.

IV. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

V. Executive Order 13771

This rule is not subject to E.O. 13771, Reducing Regulation and Controlling Regulatory Costs, because this rule is not a significant regulatory action under E.O. 12866.

VI. Regulatory Flexibility Act

DoD, GSA, and NASA have prepared a Final Regulatory Flexibility Analysis (FRFA) consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* The FRFA is summarized as follows:

This final rule is necessary to implement changes to the interim rule published at 83 FR 28145. The interim rule amended the FAR to implement section 1290 of the National Defense Authorization Act for Fiscal Year 2017 (Pub. L. 114–328). The objective of this rule is to provide a response to public comments on the interim rule by clarifying the suspension and debarment remedies for determination of a false certification under 22 U.S.C. 2593e. In addition to the aforementioned, this final rule makes some other technical corrections to the interim rule.

DoD, GSA, and NASA do not expect this rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* This final rule makes changes to the interim rule published at 83 FR 28145 on June 15, 2018. The objective of this rule is to provide a response to public comments on the interim rule by clarifying the suspension and debarment remedies for determination of a false certification under 22 U.S.C. 2593e, specifically those related to suspension and debarment under FAR subpart 9.4. No significant issues were raised by public comments in response to the initial regulatory flexibility analysis.

Using FPDS data for FY 2017, 2018, and 2019, this rule applies to 19,511 small entities. Of this number, an average of 6,504 small entities annually are required to fill out the certification.

This final rule requires certification from each offeror that submits an offer in response to a Government solicitation that exceeds the simplified acquisition threshold and is not for the acquisition of a commercial item, including COTS items.

Estimated burden hours are 11,106 hours per year for the first certification by an average of 6,504 small entities. The final rule adds determination of a false certification under FAR 52.209–13 as an enumerated cause for both suspension and debarment. It was clear from the interim rule that cause for suspension and debarment was part of the remedy for determination of a false certification, however, the cause was not enumerated under FAR 9.407–2 and 9.406–2, respectively. This revision has no impact (or low impact) on small business entities as it provides additional clarifications without adding a new burden.

The rule does not duplicate, overlap, or conflict with any other Federal rules.

DoD, GSA, and NASA considered whether to apply the certification provision to contracts at or below the SAT and to the acquisition of commercial items, including COTS items, or to exempt such acquisitions in accordance with 41 U.S.C. 1905—1907. The FAR Council and the Administrator for Federal Procurement Policy did not sign determinations that the provision should apply to contracts at or below the SAT and to the acquisition of commercial items, including COTS items, thus minimizing the impact on small business to the extent permitted by law.

Interested parties may obtain a copy of the FRFA from the Regulatory Secretariat Division. The Regulatory Secretariat Division has submitted a copy of the FRFA to the Chief Counsel for Advocacy of the Small Business Administration.

VII. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. chapter 35) does apply; however, these changes to the FAR do not impose additional information collection requirements to the paperwork burden previously approved under OMB Control Number 9000–0198, titled: Violations of Arms Control Treaties or Agreements.

List of Subjects in 48 CFR Parts 9 and 52

Government procurement.

William F. Clark,

Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.

Therefore, DoD, GSA, and NASA adopt the interim rule published June 15, 2018, as final with amendments to 48 CFR parts 9 and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 9 and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

PART 9—CONTRACTOR QUALIFICATIONS

■ 2. Amend section 9.109–4 by—
■ a. Removing from the last sentence in paragraph (a)(1)(i) ''via the internet at'' and adding ''at'' in its place; and
■ b. Revising paragraph (d).

The revision reads as follows:

9.109–4 Certification by the offeror.

* * * * *

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

* * * * *

9.400 [Amended]

■ 3. Amend section 9.400 by removing from paragraph (b) ''(9.405(b))'' and adding ''(9.405)'' in its place.

■ 4. Amend section 9.405 by—
■ a. Removing the last sentence from paragraph (b);
■ b. Redesignating paragraphs (c) and (d) as paragraphs (d) and (e); and
■ c. Adding a new paragraph (c) to read as follows:

9.405 Effect of listing.

* * * * *

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

* * * * *

9.405–2 [Amended]

■ 5. Amend section 9.405–2 by removing from paragraph (a) ''9.405(b)'' and adding ''9.405'' in its place.

■ 6. Amend section 9.406–2 by adding paragraph (b)(1)(vii) to read as follows:

9.406–2 Causes for debarment.

* * * * *

(b) * * *

(1) * * *

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

* * * * *

■ 7. Amend section 9.406–4 by revising paragraph (a)(1)(iii) to read as follows:

9.406–4 Period of debarment.

(a) * * *

(1) * * *

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

* * * * *

■ 8. Amend section 9.407–2 by—

■ a. Redesignating paragraph (a)(9) as (a)(10); and

■ b. Adding a new paragraph (a)(9) to read as follows:

9.407–2 Causes for suspension.

(a) * * *

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

* * * * *

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 9. Amend section 52.209–13 by—

■ a. Revising the date of the provision;

■ b. Removing from paragraph (a) ''acquisitions below'' and adding ''acquisitions at or below'' in its place;

■ c. Removing from paragraph (b)(1)(i) ''available via the internet at'' and adding ''available at'' in its place; and

■ d. Removing from paragraph (b)(1)(ii) ''available via the internet at'' and adding ''available at'' in its place.

The revision reads as follows:

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

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Violation of Arms Control Treaties or Agreements—Certification (Feb 2021)

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 12, 13, 15, 16, and 37

[FAC 2021–03; FAR Case 2018–016; Item II; Docket No. FAR–2018–0016, Sequence No. 1]

RIN 9000–AN75

Federal Acquisition Regulation: Lowest Price Technically Acceptable Source Selection Process

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: DoD, GSA, and NASA are issuing a final rule amending the Federal Acquisition Regulation (FAR) to implement a section of the John S. McCain National Defense Authorization Act for Fiscal Year 2019 that applies criteria for and limitations on the use of the lowest price technically acceptable source selection criteria in solicitations.

DATES: *Effective:* February 16, 2021.

FOR FURTHER INFORMATION CONTACT: Mr. Michael O. Jackson, Procurement Analyst, at 202–208–4949 or *Michaelo.jackson@gsa.gov* for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at (202) 501–4755 or *GSARegSec@gsa.gov.* Please cite FAC 2021–03, FAR Case 2018–016.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA published a proposed rule at 84 FR 52425 on October 2, 2019, to implement section 880 of the John S. McCain National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019 (Pub. L. 115–232, 41 U.S.C. 3701 Note). Section 880 specifies the criteria that must be met in order to include lowest price technically acceptable (LPTA) source selection criteria in a solicitation; and requires solicitations predominantly for the acquisition of certain services and supplies to avoid the use of LPTA source selection criteria, to the maximum extent practicable. Nine respondents submitted public comments in response to the proposed rule.

II. Discussion and Analysis

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) reviewed the public comments in the development of the final rule.

A. Summary of Significant Changes From the Proposed Rule

No changes were made to the final rule as a result of public comments. Minor edits were made to the final rule to account for baseline updates and to add the full name of the applicable statute. A discussion of the comments is provided as follows:

B. Analysis of Public Comments

Comment: Respondents expressed support for the rule and advised that the rule is beneficial to the small business community and provides them with a greater opportunity to compete in the Federal marketplace.

Response: The Councils acknowledge support for the rule.

Comment: Respondents expressed support for using the LPTA source selection process, when its use is appropriate and the selection criteria can be well-defined.

Response: The Councils agree that use of the LPTA source selection process is a valuable part of the best value continuum and an acceptable and appropriate source selection approach for many acquisitions.

Comment: Respondents expressed concern that the rule will be considered a complete ban on the use of the LPTA source selection process. A respondent is specifically concerned that the use of the LPTA source selection process is prohibited for a significant number of information technology (IT) supplies and services that can be appropriately purchased using the process. As a result, the respondent recommends that the rule not be implemented, or be revised to narrow the scope of IT products and services to which the rule applies, because the rule, as proposed, will result in increased acquisition lead times and higher prices without a corresponding increase in quality of services.

Response: It is not the intent of the rule to prohibit the use of the LPTA source selection process. Instead, the intent of the rule is to implement the statutory language, which aims to identify circumstances that must exist for an acquisition to use the LPTA source selection process and certain types of requirements that will regularly benefit from the use of tradeoff source selection procedures. Specifically, section 880 requires use of the LPTA