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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 4, 25, and 52

[FAC 2005-54; FAR Case 2010-018; Item V; Docket 2010-0018, Sequence 1]

RIN 9000-AL91

Federal Acquisition Regulation; Representation Regarding Export of Sensitive Technology to Iran

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

ACTION: Interim rule.

SUMMARY: DoD, GSA, and NASA are issuing an interim rule amending the Federal Acquisition Regulation (FAR) to add a representation to implement section 106 of the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010. Section 106 imposes a procurement prohibition relating to contracts with persons that export certain sensitive technology to Iran.

DATES: Effective Date: [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER.]

Comment Date: Interested parties should submit written comments to the Regulatory Secretariat at one of the addresses shown below on or before [Insert date 60 days after

publication in the FEDERAL REGISTER] to be considered in the formulation of the final rule.

ADDRESSES: Submit comments identified by FAC 2005-54, FAR Case 2010-018 by any of the following methods:

- Regulations.gov: <http://www.regulations.gov>.

Submit comments via the Federal eRulemaking portal by inputting "FAR Case 2010-018" under the heading "Enter Keyword or ID" and selecting "Search." Select the link "Submit a Comment" that corresponds with "FAR Case 2010-018." Follow the instructions provided at the "Submit a Comment" screen. Please include your name, company name (if any), and "FAR Case 2010-018" on your attached document.

- Fax: (202) 501-4067.
- Mail: General Services Administration, Regulatory Secretariat (MVCB), ATTN: Hada Flowers, 1275 First Street, NE., 7th Floor, Washington, DC 20417.

Instructions: Please submit comments only and cite FAC 2005-54, FAR Case 2010-018, in all correspondence related to this case. All comments received will be posted without change to <http://www.regulations.gov>, including any personal and/or business confidential information provided.

FOR FURTHER INFORMATION CONTACT: Ms. Cecelia L. Davis, Procurement Analyst, at (202) 219-0202, for clarification of content. For information pertaining to status or publication

schedules, contact the Regulatory Secretariat at (202) 501-4755. Please cite FAC 2005-54, FAR Case 2010-018.

SUPPLEMENTARY INFORMATION:

I. Background and Discussion

This interim rule expands upon the interim rule published in the Federal Register at 75 FR 60254 on September 29, 2010, under FAR Case 2010-012, Certification Requirement and Procurement Prohibition Relating to Iran Sanctions. FAR Case 2010-012 implementation of section 106 of the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010 (Pub. L. 111-195), included imposing a procurement prohibition relating to contracts with persons that export certain sensitive technology to Iran. To further implement section 106, the rule adds at FAR 25.703-3(b) a requirement for a representation that the offeror does not export any sensitive technology to the government of Iran or any entities or individuals owned or controlled by, or acting on behalf or at the direction of, the government of Iran.

The interim rule provides an exception to the representation requirement for offerors that are providing eligible products in acquisitions that are subject to trade agreements.

The waiver procedure at FAR 25.703-2(d) is moved to FAR 25.703-4, so that waiver of section 106 can be addressed along with the procedures for waiver of section 102 of the

Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010.

The representation that the offeror does not export sensitive technology to Iran is incorporated into the certification at FAR 52.225-25, now titled "Prohibition on Contracting with Entities Engaging in Sanctioned Activities Relating to Iran—Representation and Certification," in order to include the representation and clarify that the prohibition is against contracting with sanctioned entities. Along with the statutory definition of "sensitive technology," an e-mail address is included in the provision, so that offerors can refer questions concerning sensitive technology to the Department of State, prior to making the representation.

This representation requirement is also applied to acquisition of commercial items at FAR 52.212-3, Offeror Representations and Certifications—Commercial Items, paragraph (o) (see section III, Determinations of Applicability).

Offerors will be able to make an annual certification through the Online Representations and Certifications Application, if the offeror is registered in the Central Contractor Registration database. Therefore, conforming changes have been made to FAR part 4 and the FAR clause at 52.204-8, Annual Representations and Certifications.

The interim rule includes two additional changes:

- FAR 25.703-2(b) - Adds an authority for termination— FAR part 49 and a cite to FAR 12.403 for termination of commercial contracts.
- FAR 52.225-25(d) - Adds two more examples of trade agreement provisions that may be included in the solicitation to indicate the applicability of trade agreements to the acquisition.

II. 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 a significant regulatory action and, therefore, was 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.

III. Determinations of Applicability

The Federal Acquisition Regulatory Council (FAR Council) has made a determination to apply the requirement of section 106 of the Comprehensive Iran Sanctions, Accountability, and

Divestment Act of 2010, to contracts at or below the simplified acquisition threshold (SAT), contracts for the acquisition of commercial items, and contracts for the acquisition of commercially available off-the-shelf (COTS) items.

1. Applicability to contracts at or below the SAT

41 U.S.C. 1905 governs the applicability of laws to contracts or subcontracts in amounts not greater than the SAT. It is intended to limit the applicability of laws to them. 41 U.S.C. 1905 provides that if a provision of law contains criminal or civil penalties, or if the FAR Council makes a written determination that it is not in the best interest of the Federal Government to exempt contracts or subcontracts at or below the SAT, the law will apply to them. Therefore, given that the requirements of sections 102 and 106 of the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010 were enacted to widen the sanctions against Iran, the FAR Council has determined that it is in the best interest of the Federal Government to apply this rule to all acquisitions including contracts at or below the SAT, as defined at FAR 2.101. An exception for acquisitions at or below the SAT would exclude a significant portion of Federal contracting and the contractors who provide these products and services, thereby undermining the overarching public policy purpose of the law.

2. Applicability to contracts for the acquisition of commercial items

41 U.S.C. 1906 governs the applicability of laws to contracts for the acquisition of commercial items, and is intended to limit the applicability of laws to contracts for the acquisition of commercial items. 41 U.S.C. 1906 provides that if a provision of law contains criminal or civil penalties, or if the FAR Council makes a written determination that it is not in the best interest of the Federal Government to exempt commercial item contracts, the provision of law will apply to contracts for the acquisition of commercial items.

Therefore, given that the requirements of sections 102 and 106 of the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010 were enacted to widen the sanctions against Iran, the FAR Council has determined that it is in the best interest of the Federal Government to apply the rule to contracts for the acquisition of commercial items, as defined at FAR 2.101. An exception for contracts for the acquisition of commercial items would exclude a significant portion of Federal contracting and the contractors who provide these products and services, thereby undermining the overarching public policy purpose of the law.

3. Applicability to contracts for the acquisition of COTS items

41 U.S.C. 1907 governs the applicability of laws to contracts for the acquisition of COTS items, and is intended to limit the applicability of laws to them. 41 U.S.C. 1907 provides that if a provision of law contains criminal or civil penalties, or if the Administrator for Federal Procurement Policy makes a written determination that it is not in the best interest of the Federal Government to exempt contracts for the acquisition of COTS items, the provision of law will apply. Therefore, given that the requirements of sections 102 and 106 of the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010 were enacted to widen the sanctions against Iran, the Administrator for Federal Procurement Policy has determined that it is in the best interest of the Federal Government to apply the rule to contracts for the acquisition of COTS items, as defined at FAR 2.101. An exception for contracts for the acquisition of COTS items would exclude a significant portion of Federal contracting and the contractors who provide these products and services, thereby undermining the overarching public policy purpose of the law.

IV. Regulatory Flexibility Act

DoD, GSA, and NASA do not expect this interim 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., because this rule will only have an impact on an offeror that is exporting sensitive

technology to Iran. Domestic entities are generally prohibited from engaging in activity that would cause them to be subject to the procurement bans described in this rule due to current restrictions on trade with Iran (see, e.g., Department of the Treasury Office of Foreign Assets Control regulations at 31 CFR part 560).

Although this rule mainly affects foreign entities, the Regulatory Flexibility Act is for the protection of domestic small entities, not foreign entities. For the definition of "small business," the Regulatory Flexibility Act refers to the Small Business Act, which in turn allows the U.S. Small Business Administration (SBA) Administrator to specify detailed definitions or standards (5 U.S.C. 601(3) and 15 U.S.C. 632(a)). The SBA regulations at 13 CFR 121.105 discuss who is a small business: "(a)(1) Except for small agricultural cooperatives, a business concern eligible for assistance from SBA as a small business is a business entity organized for profit, with a place of business located in the United States, and which operates primarily within the United States or which makes a significant contribution to the U.S. economy through payment of taxes or use of American products, materials or labor."

Therefore, an Initial Regulatory Flexibility Analysis has not been performed because the number of domestic entities significantly impacted by this rule will be minimal. DoD,

GSA, and NASA invite comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD, GSA, and NASA will also consider comments from small entities concerning the existing regulations in subparts affected by the rule in accordance with 5 U.S.C. 610.

Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (FAC 2005-54, FAR Case 2010-018), in correspondence.

V. Paperwork Reduction Act

The interim rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

VI. Determination to Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense (DoD), the Administrator of General Services (GSA), and the Administrator of the National Aeronautics and Space Administration (NASA) that urgent and compelling reasons exist to promulgate this interim rule without prior opportunity for public comment. FAR Case 2010-012 implemented section 102 and partially implemented section 106 of the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010 (Pub. L. 111-195). This interim rule is necessary because the rule further implements section 106

of the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010, which was signed on July 1, 2010. Section 106 was effective upon enactment, which imposed a procurement prohibition relating to contracts with persons that export certain sensitive technology to Iran entered into or renewed on or after September 29, 2010. However, pursuant to 41 U.S.C. 1707 and FAR 1.501-3(b), DoD, GSA, and NASA will consider public comments received in response to this interim rule in the formation of the final rule.

List of Subjects in 48 CFR Parts 4, 25, and 52

Government procurement.

Dated: October 21, 2011.

/s/

Laura Auletta,
Acting Director,
Office of Governmentwide
Acquisition Policy,
Office of Acquisition Policy,
Office of Governmentwide Policy.

Therefore, DoD, GSA, and NASA amend 48 CFR parts 4, 25, and 52 as set forth below:

1. The authority citation for 48 CFR parts 4, 25, and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 4—ADMINISTRATIVE MATTERS

2. Amend section 4.1202 by revising paragraph (y) to read as follows:

4.1202 Solicitation provision and contract clause.

* * * * *

(y) 52.225-25, Prohibition on Contracting with Entities Engaging in Sanctioned Activities Relating to Iran—Representation and Certification.

* * * * *

PART 25—FOREIGN ACQUISITION

3. Amend section 25.703-1 by—
a. Revising the section heading;
b. Adding an introductory paragraph; and
c. Adding, in alphabetical order, the definition “Sensitive technology”.

The revised and added text reads as follows:

25.703-1 Definitions.

As used in this subpart—

* * * * *

Sensitive technology-

(1) Means hardware, software, telecommunications equipment, or any other technology that is to be used specifically-

(i) To restrict the free flow of unbiased information in Iran; or

(ii) To disrupt, monitor, or otherwise restrict speech of the people of Iran; and

(2) Does not include information or informational materials the export of which the President does not have the authority to regulate or prohibit pursuant to section 203(b)(3) of the International Emergency Economic Powers Act (50 U.S.C. 1702(b)(3)).

4. Amend section 25.703-2 by revising paragraphs (a)(1) and (b)(1); and removing paragraph (d).

The revised text reads as follows:

25.703-2 Iran Sanctions Act.

(a) * * *

(1) As required by the Iran Sanctions Act (50 U.S.C. 1701 note), unless an exception applies in accordance with paragraph (c) of this section, or a waiver is granted in accordance with 25.703-4, each offeror must certify that the offeror, and any person owned or controlled by the offeror, does not engage in any activity for which sanctions may be imposed under section 5 of the Iran Sanctions Act.

* * * * *

(b) * * *

(1) The contracting officer may terminate the contract in accordance with procedures in part 49, or for commercial items, 12.403.

* * * * *

5. Revise section 25.703-3 to read as follows:

25.703-3 Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010, section 106.

(a) The head of an Executive agency may not enter into or extend a contract for the procurement of goods or services with a person that exports certain sensitive technology to Iran, as determined by the President and listed on the Excluded Parties List System at <http://www.epls.gov>.

(b) Each offeror must represent that it does not export any sensitive technology to the government of Iran or any entities or individuals owned or controlled by, or acting on behalf or at the direction of, the government of Iran.

(c) Exception for trade agreements. The representation requirement of paragraph (b) of this subsection does not apply with respect to the procurement of eligible products, as defined in section 308(4) of the Trade Agreements Act of 1974 (19 U.S.C. 2518(4)), of any foreign country or instrumentality designated under section 301(b) of that Act (19 U.S.C. 2511(b)) (see subpart 25.4).

6. Add section 25.703-4 to read as follows:

25.703-4 Waiver.

(a) An agency or contractor seeking a waiver of these requirements, consistent with section 6(b)(5) of the Iran Sanctions Act or section 401(b) of the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010 (Pub. L. 111-195), and the Presidential Memorandum of September 23, 2010 (75 FR 67025), shall submit the request to the Office of Federal Procurement Policy, allowing sufficient time for review and approval.

(b) Agencies may request a waiver on an individual or class basis; however, waivers are not indefinite and can be cancelled, if warranted.

(1) A class waiver may be requested only when the class of supplies or equipment is not available from any other source and it is in the national interest.

(2) Prior to submitting the waiver request, the request must be reviewed and cleared by the agency head.

(c) In general, all waiver requests should include the following information:

(1) Agency name, complete mailing address, and point of contact name, telephone number, and e-mail address.

(2) Offeror's name, complete mailing address, and point of contact name, telephone number, and e-mail address.

(3) Description/nature of product or service.

(4) The total cost and length of the contract.

(5) Justification, with market research demonstrating that no other offeror can provide the product or service and stating why the product or service must be procured from this offeror, as well as why it is in the national interest for the President to waive the prohibition on contracting with this offeror that—

(i) Conducts activities for which sanctions may be imposed under section 5 of the Iran Sanctions Act; or

(ii) Exports sensitive technology to the government of Iran or any entities or individuals owned or controlled by, or acting on behalf or at the direction of, the government of Iran.

(6) Documentation regarding the offeror's past performance and integrity (see the Past Performance Information Retrieval System and the Federal Awardee Performance Information and Integrity System at www.ppirs.gov, and any other relevant information).

(7) Information regarding the offeror's relationship or connection with other firms that—

(i) Conduct activities for which sanctions may be imposed under section 5 of the Iran Sanctions Act; or

(ii) Export sensitive technology to the government of Iran or any entities or individuals owned or controlled by, or

acting on behalf or at the direction of, the government of Iran.

(8) Describe—

(i) The activities in which the offeror is engaged for which sanctions may be imposed under section 5 of the Iran Sanctions Act; or

(ii) The sensitive technology and the entity or individual to which it was exported (i.e., the government of Iran or an entity or individual owned or controlled by, or acting on behalf or at the direction of, the government of Iran).

7. Amend section 25.1103 by revising paragraph (e) to read as follows:

25.1103 Other provisions and clauses.

* * * * *

(e) The contracting officer shall include in all solicitations the provision at 52.225-25, Prohibition on Contracting with Entities Engaging in Sanctioned Activities Relating to Iran—Representation and Certification.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

8. Amend section 52.204-8 by revising the date of the provision and paragraph (c)(1)(xx) to read as follows:

52.204-8 Annual Representations and Certifications.

* * * * *

ANNUAL REPRESENTATIONS AND CERTIFICATIONS (NOV 2011)

* * * * *

(c) * * *

(1) * * *

(xx) 52.225-25, Prohibition on Contracting with Entities Engaging in Sanctioned Activities Relating to Iran-Representation and Certification. This provision applies to all solicitations.

* * * * *

9. Revise section 52.212-3 by-

a. Revising the date of the provision;

b. In paragraph (a), adding, in alphabetical order, the definition "Sensitive technology"; and

c. Revising paragraph (o).

The revised and added text reads as follows:

52.212-3 Offeror Representations and Certifications-

Commercial Items.

* * * * *

OFFER REPRESENTATIONS AND CERTIFICATIONS-COMMERCIAL ITEMS (NOV 2011)

* * * * *

(a) Definitions. * * *

* * * * *

Sensitive technology-

(1) Means hardware, software, telecommunications equipment, or any other technology that is to be used specifically-

(i) To restrict the free flow of unbiased information in Iran; or

(ii) To disrupt, monitor, or otherwise restrict speech of the people of Iran; and

(2) Does not include information or informational materials the export of which the President does not have the authority to regulate or prohibit pursuant to section 203(b)(3) of the International Emergency Economic Powers Act (50 U.S.C. 1702(b)(3)).

* * * * *

(o) Sanctioned activities relating to Iran. (1) The offeror shall e-mail questions concerning sensitive technology to the Department of State at CISADA106@state.gov.

(2) Representation and Certification. Unless a waiver is granted or an exception applies as provided in paragraph (o)(3) of this provision, by submission of its offer, the offeror—

(i) Represents, to the best of its knowledge and belief, that the offeror does not export any sensitive technology to the government of Iran or any entities or individuals owned or controlled by, or acting on behalf or at the direction of, the government of Iran; and

(ii) Certifies that the offeror, or any person owned or controlled by the offeror, does not engage in any activities for which sanctions may be imposed under section 5 of the Iran Sanctions Act.

(3) The representation and certification requirements of paragraph (o)(2) of this provision do not apply if—

(i) This solicitation includes a trade agreements certification (e.g., 52.212-3(g) or a comparable agency provision); and

(ii) The offeror has certified that all the offered products to be supplied are designated country end products.

* * * * *

10. Revise section 52.225-25 to read as follows:

52.225-25 Prohibition on Contracting with Entities Engaging in Sanctioned Activities Relating to Iran—Representation and Certification.

As prescribed at 25.1103(e), insert the following provision:

PROHIBITION ON CONTRACTING WITH ENTITIES ENGAGING IN SANCTIONED ACTIVITIES RELATING TO IRAN—REPRESENTATION AND CERTIFICATION (NOV 2011)

(a) Definitions. As used in this provision—

Person—

(1) Means—

(i) A natural person;

(ii) A corporation, business association, partnership, society, trust, financial institution, insurer, underwriter, guarantor, and any other business organization, any other nongovernmental entity, organization, or group, and any governmental entity operating as a business enterprise; and

(iii) Any successor to any entity described in paragraph (1)(ii) of this definition; and

(2) Does not include a government or governmental entity that is not operating as a business enterprise.

Sensitive technology—

(1) Means hardware, software, telecommunications equipment, or any other technology that is to be used specifically—

(i) To restrict the free flow of unbiased information in Iran; or

(ii) To disrupt, monitor, or otherwise restrict speech of the people of Iran; and

(2) Does not include information or informational materials the export of which the President does not have the authority to regulate or prohibit pursuant to section

203(b)(3) of the International Emergency Economic Powers Act (50 U.S.C. 1702(b)(3)).

(b) The offeror shall e-mail questions concerning sensitive technology to the Department of State at CISADA106@state.gov.

(c) Except as provided in paragraph (d) of this provision or if a waiver has been granted in accordance with 25.703-4, by submission of its offer, the offeror—

(1) Represents, to the best of its knowledge and belief, that the offeror does not export any sensitive technology to the government of Iran or any entities or individuals owned or controlled by, or acting on behalf or at the direction of, the government of Iran; and

(2) Certifies that the offeror, or any person owned or controlled by the offeror, does not engage in any activities for which sanctions may be imposed under section 5 of the Iran Sanctions Act. These sanctioned activities are in the areas of development of the petroleum resources of Iran, production of refined petroleum products in Iran, sale and provision of refined petroleum products to Iran, and contributing to Iran's ability to acquire or develop certain weapons or technologies.

(d) Exception for trade agreements. The representation requirement of paragraph (c)(1) and the certification requirement of paragraph (c)(2) of this provision do not apply if—

(1) This solicitation includes a trade agreements notice or certification (e.g., 52.225-4, 52.225-6, 52.225-12, 52.225-24, or comparable agency provision); and

(2) The offeror has certified that all the offered products to be supplied are designated country end products or designated country construction material.

(End of provision)

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