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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 9, 12, 13, 43, and 52

[FAC 2021-02; FAR Case 2018-021; Item IV; Docket FAR-2019-0031, Sequence No. 1]

RIN 9000-AN79

Federal Acquisition Regulation: Reserve Officer Training Corps and Military Recruiting on Campus

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 the United States Code section that prohibits the award of certain Federal contracts to institutions of higher education that prohibit Reserve Officer Training Corps units or military recruiting on campus.

DATES: *Effective:* [Insert date 30 days after date of publication in the **FEDERAL REGISTER**].

FOR FURTHER INFORMATION CONTACT: Ms. Zenaida Delgado, Procurement Analyst, at 202-969-7207 or

zenaida.delgado@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 2021-02, FAR Case 2018-021.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA published a proposed rule on September 24, 2019, at 84 FR 49974, to implement 10 U.S.C. 983, which prohibits the award of certain Federal contracts with covered funds to institutions of higher education that prohibit Reserve Officer Training Corps (ROTC) units or military recruiting on campus.

“Covered funds” is defined in 10 U.S.C. 983 to be any funds made available for DoD, Department of Transportation, Department of Homeland Security, or National Nuclear Security Administration of the Department of Energy, the Central Intelligence Agency, or for any department or agency in which regular appropriations are made in the Departments of Labor, Health and Human Services, Education, and Related Agencies Appropriations Act. None of these covered funds may be provided by contract or grant to an institution of higher education (including any sub-element of such institution) that has a policy or practice

(regardless of when implemented) that either prohibits, or in effect prevents, the Secretary of Defense from establishing or operating a Senior ROTC at that institution (or any sub-element of that institution); or that either prohibits, or in effect prevents, a student at that institution (or any sub-element of that institution) from enrolling in a ROTC unit at another institution of higher education.

The statute has similar sanctions against these covered funds being provided to an institution of higher education (or any sub-element of an institution) that has a policy or practice (regardless of when implemented) that either prohibits, or in effect prevents, the Secretary of a Military Department or Secretary of Homeland Security from gaining access to campuses, or access to students (who are 17 years of age or older) on campuses, for purposes of military recruiting, where such policy or practice denies the military recruiter access that is at least equal in quality and scope to the access to campuses and students provided to any other employer; or access to information pertaining to the students' names, addresses, telephone listings, dates and places of birth, levels of education, academic majors, degrees received, and the most recent educational institution enrolled in by the student.

The meaning and effect of the term "equal in quality and scope" was explained in the U.S. Supreme Court decision in *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 126 S. Ct. 1297 (2006). The term means the same access to campus and students provided by the school to any other nonmilitary recruiters or employers receiving the most favorable access. The focus is not on the content of a school's recruiting policy, but instead on the result achieved by the policy and compares the access provided military recruiters to that provided other recruiters. Therefore, compliance with 10 U.S.C. 983 would be considered insufficient if the policy results in a greater level of access for other recruiters than for the military.

The statute provides an exception whereby any Federal funding provided to an institution of higher education or to an individual that is available solely for student financial assistance, related administrative costs, or costs associated with attendance may be used for the purpose for which the funding is provided.

Four respondents submitted comments on 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 discussion of the comments is provided as follows:

A. Summary of changes

There are no changes as a result of comments on the proposed rule. Technical changes were made to the proposed rule.

B. Analysis of public comments

Comment: All four respondents strongly supported the proposed FAR rule.

Response: Noted.

C. Other changes

Made technical changes at FAR 9.405-1, 12.503, and 13.005.

Added language at FAR 9.110-4(b) and 43.105(c) to highlight that the prohibition does not apply to acquisitions at or below the simplified acquisition threshold or to acquisitions of commercial items, including commercially available off-the-shelf items.

Included an exception for contractors that have been declared ineligible pursuant to 10 U.S.C. 983 with a pointer reference to FAR 9.110 and 9.405-1(b), at FAR 9.400(b).

Moved the "Institution of higher education" definition within the FAR clause at 52.209-14(a) to place the definitions in alphabetical order.

III. Expected Impact of the Final Rule

DoD, GSA, and NASA do not expect a cost impact on the public or institutions of higher learning or on the Government because covered agencies already have regulations in place to address their statutory responsibilities. These agencies and the public will be required to comply with the same requirement, but the requirement will now be located in the FAR.

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

DoD, GSA, and NASA do not intend to apply the requirements of 10 U.S.C. 983 at or below the simplified acquisition threshold or to contracts for the acquisitions of commercial items.

A. Applicability to Contracts at or Below the Simplified Acquisition Threshold

Section 1905 of Title 41 of the United States Code 41 U.S.C. 1905 governs the applicability of laws to contracts or subcontracts in amounts not greater than the simplified acquisition threshold. It is intended to limit the

applicability of laws to such contracts or subcontracts. Section 1905 provides that if a provision of law contains criminal or civil penalties, specifically refers to section 1905 and provides that the law shall nevertheless be applicable to contracts or subcontracts below the simplified acquisition threshold, 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 simplified acquisition threshold, the law will apply to them. Section 1983 of Title 10 does not contain criminal or civil penalties, nor expressly refer to section 1905 of Title 41, and the FAR Council does not intend to make the requisite determination. Therefore, this rule does not apply at or below the simplified acquisition threshold.

B. Applicability to Contracts for the Acquisition of Commercial Items, Including COTS Items

Section 1906 of Title 41 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. Section 1906 provides that if a provision of law contains criminal or civil penalties, specifically refers to section 1906 and provides that it shall nevertheless be applicable to

contracts for the procurement of commercial items, 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. Likewise, 41 U.S.C. 1907 governs the applicability of laws to COTS items, and provides the same criteria for determining whether a provision of law applies to COTS items, except that the Administrator for Federal Procurement Policy is charged with making the decision whether it is in the best interest of the Government to apply a provision of law to acquisitions of COTS items in the FAR. As noted above with respect to section 1905, section 983 of Title 10 does not impose civil or criminal penalties. Nor does it refer to sections 1906 or 1907 of Title 41. The FAR Council and the Administrator for Federal Procurement Policy do not intend to make the requisite determinations. Therefore, this rule does not apply to the acquisition of commercial items, including COTS items. This rule adds 10 U.S.C. 983 to the list at FAR 12.503 of laws inapplicable to contracts for the acquisition of commercial items. The law is not added to the lists at FAR 12.504 (subcontracts) and 12.505 (COTS items), because the clause does not flow down to subcontracts and is already

inapplicable to the acquisition of COTS items, because the Federal Government does not buy COTS items from institutions of higher education.

V. 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 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, 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.

VI. Executive Order 13771

This rule is not subject to E.O. 13771, Reducing Regulation and Controlling Regulatory Costs, because this rule has a *de minimis* impact on the public (see section III of this preamble).

This rule affects institutions of higher education that receive Federal monies but that do not allow DoD's

ROTC and military recruiting on campus. However, the FAR Council is not aware of any institution that currently has such a prohibition in place.

VII. 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 rule is required to implement 10 U.S.C 983, which prohibits the award of certain Federal contracts to institutions of higher education that prohibit ROTC units or military recruiting on campus.

There were no significant issues raised by the public in response to the initial regulatory flexibility analysis.

In Fiscal Year 2017, the Federal Procurement Data System (FPDS) shows that there were 345 awards to small organizations which are institutions of higher education, by the following covered agencies: Department of Defense, Department of Labor, Department of Health and Human Services, Department of Education, Department of Transportation, and Department of Homeland Security. The National Nuclear Security Administration is not included in this number because the Department of Energy does not break out the information. The Central Intelligence Agency is not included because it does not report in FPDS. These small organizations are small entities under the Regulatory Flexibility Act but are not small business concerns. There will not be an impact on an institution of higher education as long as that institution has no policies or practices in place that prohibit ROTC units or military recruiting on campuses. No institution of higher education has been determined by the Secretary of Defense to be ineligible based on this policy.

There are no reporting or recordkeeping requirements. There is a compliance requirement; institutions of higher education which have contracts with covered agencies (defined in the FAR text) must not prohibit ROTC units or military recruiting on campus. This is not a new requirement. No increase in burden is intended.

There are no available alternatives to the rule to accomplish the desired objective of the statute.

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.

VIII. Paperwork Reduction Act

The 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).

List of Subjects in 48 CFR Parts 9, 12, 13, 43, and 52

Government procurement.

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Therefore, DoD, GSA, and NASA amend 48 CFR parts 9, 12, 13, 43, and 52 as set forth below:

1. The authority citation for 48 CFR parts 9, 12, 13, 43, 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. Add sections 9.110 through 9.110-5 to read as follows:

9.110 Reserve Officer Training Corps and military recruiting on campus.

9.110-1 Definitions.

As used in this section—

Covered agency means—

- (1) The Department of Defense;
- (2) Any department or agency for which regular appropriations are made in a Department of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act;
- (3) The Department of Homeland Security;
- (4) The National Nuclear Security Administration of the Department of Energy;
- (5) The Department of Transportation; or
- (6) The Central Intelligence Agency.

Institution of higher education means an institution that meets the requirements of 20 U.S.C. 1001 and includes all sub-elements of such an institution.

9.110-2 Authority.

This section implements 10 U.S.C. 983.

9.110-3 Policy.

(a) Except as provided in paragraph (b) of this section, 10 U.S.C. 983 prohibits the covered agency from providing funds by contract 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 Homeland Security from gaining access to campuses, or access to students (who are 17 years of age or older) on campuses, for purposes of military recruiting in a manner that is at least equal in quality and scope to the

access to campuses and to students that is provided to any other employer; or

(4) Military recruiters from accessing certain information pertaining to students (who are 17 years of age or older) enrolled at that institution:

(i) Name, address, and telephone listings.

(ii) Date and place of birth, educational level, academic majors, degrees received, and the most recent educational institution enrolled in by the student.

(b) The prohibition in paragraph (a) of this section 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 section; or

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

9.110-4 Procedures.

If the Secretary of Defense determines, pursuant to the procedures at 32 CFR part 216, that an institution of higher education is ineligible to receive funds from a covered agency because of a policy or practice described in 9.110-3—

(a) The Secretary of Defense will create an

active exclusion record for the institution in the System for Award Management; and

(b) A covered agency shall not solicit offers from, award contracts to, or consent to subcontracts with the institution. The prohibition in this paragraph (b) does not apply to acquisitions at or below the simplified acquisition threshold or to acquisitions of commercial items, including commercially available off-the-shelf items.

9.110-5 Contract clause.

The contracting officer shall insert the clause at 52.209-14, Reserve Officer Training Corps and Military Recruiting on Campus, in solicitations and contracts that are expected to exceed the simplified acquisition threshold, with institutions of higher education, when using funds from a covered agency. The clause is not prescribed for solicitations and contracts using part 12 for the acquisition of commercial items.

3. Amend section 9.400 by revising paragraph (b) to read as follows:

9.400 Scope of subpart.

* * * * *

(b) Although this subpart does cover the listing of ineligible contractors (9.404) and the effect of this

listing (9.405(b)), it does not prescribe policies and procedures governing declarations of ineligibility except for contractors that have been declared ineligible pursuant to 10 U.S.C. 983 (see 9.110, and 9.405-1(b)).

9.405 [Amended]

4. Amend section 9.405 by removing from paragraph (a) "(see 9.405-1(b))" and adding "(see 9.405-1(a)(2))" in its place.

5. Revise section 9.405-1 to read as follows:

9.405-1 Continuation of current contracts.

(a) *Contractors debarred, suspended, or proposed for debarment.* (1) Notwithstanding the debarment, suspension, or proposed debarment of a contractor, agencies may continue contracts or subcontracts in existence at the time the contractor was debarred, suspended, or proposed for debarment unless the agency head directs otherwise. A decision as to the type of termination action, if any, to be taken should be made only after review by agency contracting and technical personnel and by counsel to ensure the propriety of the proposed action.

(2) For contractors debarred, suspended, or proposed for debarment, unless the agency head makes a written determination of the compelling reasons for doing so, ordering activities shall not—

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

(ii) Place orders under Federal Supply Schedule contracts, blanket purchase agreements, or basic ordering agreements; or

(iii) Add new work, exercise options, or otherwise extend the duration of current contracts or orders.

(b) *Ineligible contractors.* A covered agency, as defined in 9.110-1, shall terminate existing contracts and shall not place new orders or award new contracts with contractors that have been declared ineligible pursuant to 10 U.S.C. 983 (see 9.110), except for contracts at or below the simplified acquisition threshold or contracts for the acquisition of commercial items.

PART 12—ACQUISITION OF COMMERCIAL ITEMS

6. Amend section 12.503 by revising paragraphs (a) (1) through (9) to read as follows:

12.503 Applicability of certain laws to Executive agency contracts for the acquisition of commercial items.

(a) * * *

(1) 10 U.S.C. 983, Institutions of Higher Education that Prevent ROTC Access or Military Recruiting on Campus: Denial of Grants and Contracts from Department of Defense,

Department of Education, and Certain Other Departments and Agencies (see 9.110).

(2) 31 U.S.C. 1354(a), Limitation on Use of Appropriated Funds for Contracts with Entities Not Meeting Veterans' Employment Reporting Requirements (see 22.1302).

(3) 41 U.S.C. 1708(e)(3), Minimum Response Time for Offers (see 5.203).

(4) 41 U.S.C. 2303(b), Policy on Personal Conflicts of Interest by Contractor Employees (see subpart 3.11).

(5) 41 U.S.C. 3901(b) and 10 U.S.C. 2306(b), Contingent Fees (see 3.404).

(6) 41 U.S.C. 4706(d)(1) and 10 U.S.C. 2313(c)(1), GAO Access to Contractor Employees, section 871 of Public Law 110-417 (see 52.214-26 and 52.215-2).

(7) 41 U.S.C. chapter 65, Contracts for Materials, Supplies, Articles, and Equipment Exceeding \$10,000 (see subpart 22.6).

(8) 41 U.S.C. chapter 81, Drug-Free Workplace (see 23.501).

(9) Section 806(a)(3) of Public Law 102-190, as amended by sections 2091 and 8105 of Public Law 103-355 (10 U.S.C. 2302 note), Payment Protections for Subcontractors and Suppliers (see 28.106-6).

* * * * *

PART 13—SIMPLIFIED ACQUISITION PROCEDURES

7. Amend section 13.005 by revising paragraph (a) to read as follows:

13.005 List of laws inapplicable to contracts and subcontracts at or below the simplified acquisition threshold.

(a) The following laws are inapplicable to all contracts and subcontracts (if otherwise applicable to subcontracts) at or below the simplified acquisition threshold pursuant to 41 U.S.C. 1905:

(1) 10 U.S.C. 983, Institutions of Higher Education that Prevent ROTC Access or Military Recruiting on Campus: Denial of Grants and Contracts from Department of Defense, Department of Education, and Certain Other Departments and Agencies (see 9.110).

(2) 10 U.S.C. 2306(b) and 41 U.S.C. 3901(b) (contract clause regarding contingent fees).

(3) 10 U.S.C. 2313 and 41 U.S.C. 4706 (authority to examine books and records of (contractors)).

(4) 10 U.S.C. 2402 and 41 U.S.C. 4704 (prohibition on limiting subcontractors direct sales to the United States).

(5) 15 U.S.C. 631 note (HUBZone Act of 1997), except for 15 U.S.C. 657a(b) (2) (B), which is optional for the agencies subject to the requirements of the Act.

(6) 22 U.S.C. 2593e, Measures Against Persons Involved in Activities that Violate Arms Control Treaties or Agreements with the United States. (The requirement at 22 U.S.C. 2593e(c) (3) (B) to provide a certification does not apply.)

(7) 31 U.S.C. 1354(a), Limitation on Use of Appropriated Funds for Contracts with Entities Not Meeting Veterans' Employment Reporting Requirements (see 22.1302).

(8) 41 U.S.C. 8102(a) (1) (Drug-Free Workplace), except for individuals.

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PART 43—CONTRACT MODIFICATIONS

8. Amend section 43.105 by adding paragraph (c) to read as follows:

43.105 Availability of funds.

* * * * *

(c) In accordance with 10 U.S.C. 983, do not provide funds by contract or contract modification, or make contract payments, to an institution of higher education that has a policy or practice of hindering Senior Reserve Officer Training Corps units or military recruiting on

campus as described at 9.110. The prohibition in this paragraph (c) does not apply to acquisitions at or below the simplified acquisition threshold or to acquisitions of commercial items, including commercially available off-the-shelf items.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

9. Add section 52.209-14 to read as follows

52.209-14 Reserve Officer Training Corps and Military Recruiting on Campus.

As prescribed in 9.110-5, insert the following clause:

RESERVE OFFICER TRAINING CORPS AND MILITARY RECRUITING ON CAMPUS

([INSERT ABBREVIATED MONTH AND YEAR 30 DAYS AFTER DATE OF PUBLICATION IN
THE *FEDERAL REGISTER*])

(a) *Definitions.* As used in this clause—

Covered agency means—

(1) The Department of Defense;

(2) Any department or agency for which regular appropriations are made in a Department of Labor, Health and Human Services; and Education, and Related Agencies Appropriations Act;

(3) The Department of Homeland Security;

(4) The National Nuclear Security Administration of the Department of Energy;

- (5) The Department of Transportation; or
- (6) The Central Intelligence Agency.

Institution of higher education means an institution that meets the requirements of 20 U.S.C. 1001 and includes all sub-elements of such an institution.

(b) *Limitation on contract award.* Except as provided in paragraph (c) of this clause, an institution of higher education is ineligible for contract award if the Secretary of Defense determines that the institution has a policy or practice (regardless of when implemented) 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 (or any sub-element of that institution);

(2) A student at that institution (or any sub-element of 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 Homeland Security from gaining access to campuses, or access to students (who are 17 years of age or older) on campuses, for purposes of military recruiting; or

(4) Military recruiters from accessing, for purposes of military recruiting, the following information

pertaining to students (who are 17 years of age or older) enrolled at that institution:

(i) Name, address, and telephone listings.

(ii) Date and place of birth, educational level, academic majors, degrees received, and the most recent educational institution enrolled in by the student.

(c) *Exception.* The limitation in paragraph (b) of this clause 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 (b) of this clause; or

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

(d) Notwithstanding any other clause of this contract, if the Secretary of Defense determines that the institution has violated the contract in paragraph (b) of this clause—

(1) The institution will be ineligible for further payments under this and any other contracts with this agency and any other covered agency, except for contracts at or below the simplified acquisition threshold or contracts for the acquisition of commercial items; and

(2) The Government will terminate this contract for default for the institution's material failure to comply with the terms and conditions of award.

(End of clause)

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