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MEMORANDUM THRU
SIGAR ASSISTANT INSPECTOR GENERAL FOR INVESTIGATIONS
SIGAR ASSISTANT INSPECTOR GENERAL FOR AUDITS

FOR SIGAR INVESTIGATORS, AUDITORS AND ANALYSTS

SUBJECT: Basis for Exclusion of Contractors through Suspension and Debarment

1. Purpose. As part of the initiation of the Special Inspector General for Afghanistan's (SIGAR) Suspension and Debarment Program (SDP) this document has been initiated to provide basic guidance to investigators, auditors and analysts to facilitate the use of suspension and debarment in response to investigation and audit findings.

2. Basis for Exclusion through Suspension and Debarment.

a. It is the policy of the Government that contracts will only be awarded to "presently responsible" contractors. To be considered presently responsible, a contactor should have, or be able to obtain, adequate financial resources, internal control systems and the means to comply with contact specifications. In addition, the contractor should have satisfactory history performance, business ethics and integrity. Suspension and Debarment Officials (SDO) located at each Executive Branch agency make determinations of contractor present responsibility. Appeals of their decisions are made to Federal District Court.

b. Parties in suspended or debarred status are listed on the General Service Administration's Excluded Parties List System (EPLS) database, http://www.epls.gov, a publicly accessible listing of suspended and debarred contractors. This database should be consulted by any Government agency seeking to award a contract, grant, loan or allow a party to participate in a Government program. The exclusion is effective throughout the Government, regardless of where the individual, organization or company is located or their nationality. Contractors may continue to participate in Government contracts after being placed in suspended or debarred status only if a determination is made that there is a compelling reason to do so.

c. A "contractor" means any individual or other legal entity that directly or indirectly (e.g., through an affiliate), submits offers for or is awarded, or reasonably may be expected to submit offers for or be awarded a Government contract, including a contract for carriage under Government or commercial bills of lading, or a subcontract under a Government contract. As a result of this definition, any individual, organization or company that provides or has the potential to contract the U.S. Government may be suspended or debarred. This definition includes individuals that are presently military members or civilian employees of the U.S. Government or the Government of the Islamic Republic of Afghanistan (GIRoA) currently or formerly working in, or deployed to, Afghanistan.

d. DoD, USAID and DoS regulations all expressly state that any person may refer a matter for suspension or debarment in accordance with Department of Defense Federal Acquisition Regulation Supplement (DFARS) Section 209.406-3 and 22 CFR §§137.600 and 208.600. The SIGAR SDP may therefore draft and present referrals for suspension and debarment to the appropriate SDOs in cases originating in Afghanistan whenever it is deemed that the evidentiary threshold for such actions is met.

3. Debarment.

a. Debarment of a contractor may occur based on either a criminal conviction or information presented an SDO that shows by a preponderance of the evidence that misconduct has occurred. Debarments are generally based upon a finding that a contractor has been convicted of fraud or a criminal offense in connection a public contract or subcontract, violated antitrust statutes relating to the submission of offers, violated one or more terms of a Government contract, or engaged in conduct of so serious or compelling a nature that it affects the present responsibility of the contractor or subcontractor. "Preponderance of evidence" constitutes evidence that, as a whole, shows that the fact sought to be proved is more probable than not. This standard is the equivalent standard to that amount of evidence necessary to prevail in a civil case and is a lower standard of evidence than the "beyond a reasonable doubt" standard used in determining culpability in a criminal case. In particular, it does not include the criminal intent element required to find criminal responsibility.

b. Debarments include a "proposal for debarment" step, in which a recommendation for action is made to the SDO as an initial step in the debarment process. Following an opportunity by the contractor to respond to his or her proposal for debarment, a separate debarment determination is made by the SDO no earlier than 30 days following notification to the contractor that he or she is in proposed for debarment status. During this proposed for debarment period, the contractor is listed on EPLS and is excluded in the same manner as a debarred contractor.

c. Generally, debarments are for a period not to exceed three years, however, this period may be longer at the discretion of the SDO. Debarment prevents contractors from receiving new Government contracts, grants, loans and prevents contractors from representing other parties in contracting matters. Debarred contractors may not act as subcontractors to other contractors if the subcontract value exceeds $30,000.

4. Suspension.

a. Suspensions are temporary actions taken to protect the Government during an ongoing criminal investigation or after criminal charges have been entered against a contractor. Suspensions are based on a finding of "adequate evidence" by the SDO that a contractor has engaged in misconduct. The reasons for suspension are the same as for debarment, however, a criminal conviction is not necessary to sustain an action based on the commission of fraud or a criminal offense in connection with a public contract or subcontract - only an allegation of wrongdoing is necessary. "Adequate evidence" constitutes evidence which is sufficient to support the reasonable belief that a particular act or omission has occurred. This standard of evidence is equivalent to that amount of evidence necessary to establish "probable cause" for an action, specifically, the existence of circumstances which would lead a reasonably prudent person to believe in the guilt of the party. Mere suspicion or belief, unsupported by facts or circumstances, is insufficient.

b. Suspensions are for a period not to exceed 12 months and suspended contractors are listed on EPLS. If legal proceedings have not been commenced at the conclusion of this 12 month period, the agency that took the suspension action must notify the Department of Justice (DoJ) that a six month extension must be requested for the contractor to remain in suspended status. If, after 18 months, if legal proceedings still have not been initiated, the contractor is removed from EPLS automatically.

5. Questions regarding the SIGAR SDP should be directed to Mr. Brian A. Persico, Senior Counsel for Investigations via e-mail at brian.a.persico.civ@mail.mil (NIPR), brian.persico@hqda-s.army.smil.mil (SIPR) or by phone at (703) 545-6118.