

2016 Suspension and Debarment Workshop
Sponsored by CIGIE and ISDC
US Patent & Trademark Office, Alexandria, VA
Friday November 18, 2016

“Suspension, Debarment and Coordination of Remedies: Effective Lifecycle Communication is the Key”

Civil and Administrative Proceedings

Fact-based Suspension and Debarment Actions

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Suspension

- Standard of proof - adequate evidence to suspect a cause for suspension
 - 2 CFR § 180.900 Adequate evidence means information sufficient to support the reasonable belief that a particular act or omission has occurred.
 - Transco Security, Inc. v. Freeman, 639 F. 2d 318, 324 (6th Cir. 1981) cert. denied, 454 U.S. 820 (1981) analogized the adequate evidence standard to a finding of probable cause necessary for an arrest, a search warrant, or a preliminary hearing, i.e., more than uncorroborated suspicion or accusation.
- SDO must be able to conclude that immediate action is necessary to protect the Federal interest
- Lasts for up to one year (with a possible six month extension) or until legal proceedings, such as a criminal case or civil action, have concluded or until debarment proceedings have concluded
- Effective immediately to protect the government's and public's interests

Fact-based Causes for Suspension – NCR (2 CFR Part 180) Pre-Indictment, Pre-Conviction or Civil Judgment

Adequate evidence to suspect:

- .700(a); .800(a)(1): Commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public or private agreement or transaction;
- .700(a); .800(a)(2): Violation of Federal or State antitrust statutes, including those proscribing price fixing between competitors, allocation of customers between competitors, and bid rigging;
- .700(a); .800(a)(3): Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, receiving stolen property, making false claims, or obstruction of justice; or
- .700(a); .800(a)(4): Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects your present responsibility

Fact-based Causes for Suspension – NCR (2 CFR Part 180) Violation of the Terms of a Public Agreement or Transaction

Adequate evidence to suspect:

- .700(b); 800(b): Violation of the terms of a public agreement or transaction so serious as to affect the integrity of an agency program, such as—
 - .800(b)(1) A willful failure to perform in accordance with the terms of one or more public agreements or transactions;
 - .800(b)(2) A history of failure to perform or of unsatisfactory performance of one or more public agreements or transactions; or
 - .800(b)(3) A willful violation of a statutory or regulatory provision or requirement applicable to a public agreement or transaction

Fact-based Causes for Suspension – NCR (2 CFR Part 180) Other Causes

Adequate evidence to suspect:

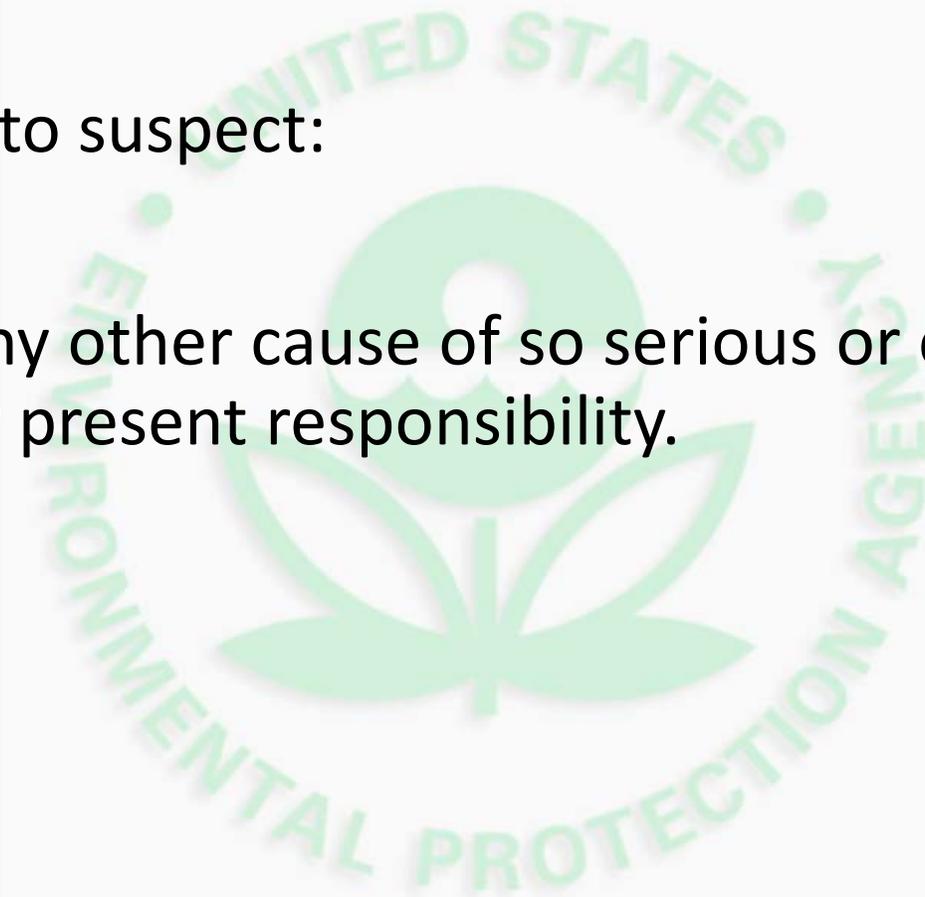
.700(b); 800(c) Any of the following causes:

- .800(c)(1) A nonprocurement debarment by any Federal agency taken before October 1, 1988, or a procurement debarment by any Federal agency taken pursuant to 48 CFR part 9, subpart 9.4, before August 25, 1995;
- .800(c)(2) Knowingly doing business with an ineligible person, except as permitted under § 180.135;
- .800(c)(3) Failure to pay a single substantial debt, or a number of outstanding debts (including disallowed costs and overpayments, but not including sums owed the Federal Government under the Internal Revenue Code) owed to any Federal agency or instrumentality, provided the debt is uncontested by the debtor or, if contested, provided that the debtor's legal and administrative remedies have been exhausted;
- .800(c)(4) Violation of a material provision of a voluntary exclusion agreement entered into under § 180.640 or of any settlement of a debarment or suspension action; or
- .800(c)(5) Violation of the provisions of the Drug-Free Workplace Act of 1988 (41 U.S.C. 701)

Fact-based Causes for Suspension – NCR (2 CFR Part 180)
Any Other Cause

Adequate evidence to suspect:

- .700(b); 800(d): Any other cause of so serious or compelling a nature that it affects your present responsibility.



Fact-based Causes for Suspension – FAR Subpart 9.4

Adequate evidence to suspect:

- 9.407-2(1) Commission of fraud or a criminal offense in connection with— (i) Obtaining; (ii) Attempting to obtain; or (iii) Performing a public contract or subcontract.
- (2) Violation of Federal or State antitrust statutes relating to the submission of offers;
- (3) Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, violating Federal criminal tax laws, or receiving stolen property;
- (4) Violations of 41 U.S.C. chapter 81, Drug-Free Workplace
- (5) Intentionally affixing a label bearing a “Made in America” inscription
- (6) Commission of an unfair trade practice as defined in 9.403 (see section 201 of the Defense Production Act (Pub. L. 102-558));
- (7) Delinquent Federal taxes in an amount that exceeds \$3,500.
- (8) Knowing failure by a principal, until 3 years after final payment on any Government contract awarded to the contractor, to timely disclose to the Government, in connection with the award, performance, or closeout of the contract or a subcontract thereunder, credible evidence of—
 - (i) Violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code;
 - (ii) Violation of the civil False Claims Act (31 U.S.C. 3729-3733); or
 - (iii) Significant overpayment(s) on the contract, other than overpayments resulting from contract financing payments as defined in 32.001; or
- (9) Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a Government contractor or subcontractor.

Suspensions: Fact-Finding

- Fact-Finding: Is there a genuine dispute over facts material to the suspension? Fact-finding possible if suspension is not based on indictment, conviction, civil judgment, or other finding by a Federal, State, or local body for which an opportunity to contest the facts was provided.
- Parallel Proceedings - Declining Fact-Finding: Suspension procedures provide that fact-finding can be declined:
 - FAR: on the basis of DOJ advice that substantial interests of the Government in pending or contemplated legal proceedings based on the same facts as the suspension would be prejudiced.
 - NCR: on the basis of advice from DOJ, office of US Atty, State AG office, or State or local prosecutor's office that substantial interests of the government in pending or contemplated legal proceedings based on the same facts as the suspension would be prejudiced.

Debarment

- Standard of proof - preponderance of the evidence that the person has engaged in conduct that warrants debarment
 - 2 CFR § 180.990 Preponderance of the evidence means proof by information that, compared with information opposing it, leads to the conclusion that the fact at issue is more probably true than not.
- SDO imposes debarment for a specified period as a final determination that a person is not presently responsible
- Generally excluded for 3 years, but debarment term can be longer or shorter in duration

Fact-based Causes for Debarment – NCR (2 CFR Part 180) Violation of the Terms of a Public Agreement or Transaction

Must conclude, based on a preponderance of the evidence, that the person has engaged in conduct that warrants debarment:

- .800(b): Violation of the terms of a public agreement or transaction so serious as to affect the integrity of an agency program, such as—
 - .800(b)(1) A willful failure to perform in accordance with the terms of one or more public agreements or transactions;
 - .800(b)(2) A history of failure to perform or of unsatisfactory performance of one or more public agreements or transactions; or
 - .800(b)(3) A willful violation of a statutory or regulatory provision or requirement applicable to a public agreement or transaction

Fact-based Causes for Debarment – NCR (2 CFR Part 180)

Other Causes

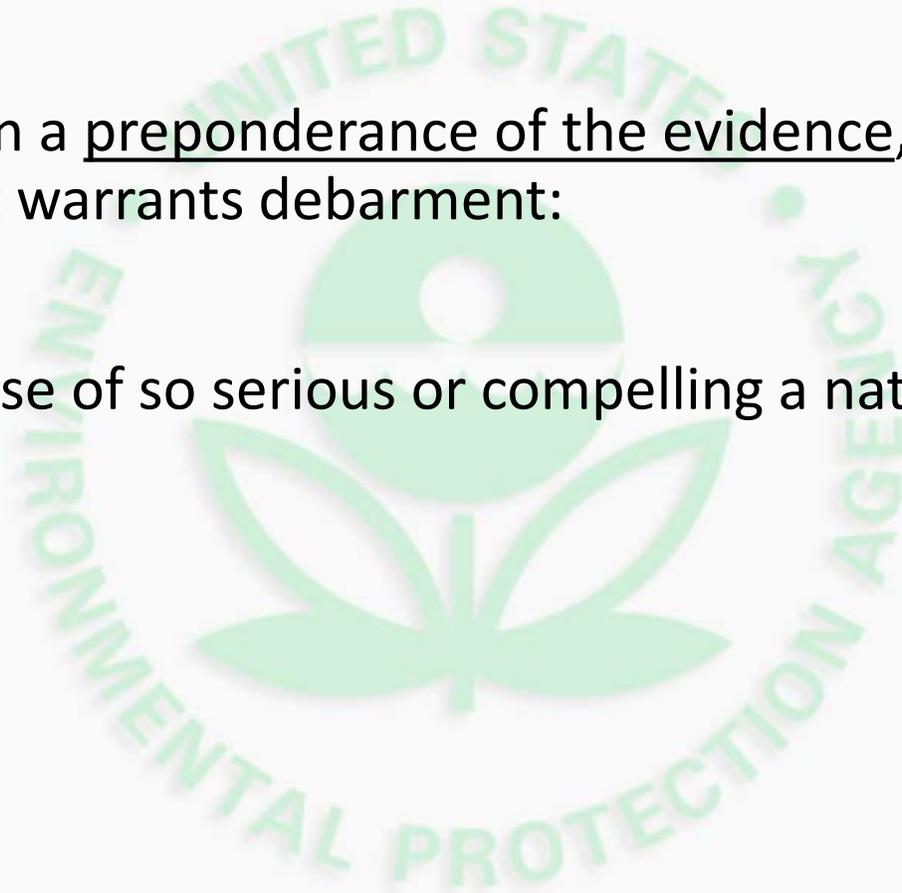
Must conclude, based on a preponderance of the evidence, that the person has engaged in conduct that warrants debarment:

- .800(c) Any of the following causes:
 - .800(c)(1) A nonprocurement debarment by any Federal agency taken before October 1, 1988, or a procurement debarment by any Federal agency taken pursuant to 48 CFR part 9, subpart 9.4, before August 25, 1995;
 - .800(c)(2) Knowingly doing business with an ineligible person, except as permitted under § 180.135;
 - .800(c)(3) Failure to pay a single substantial debt, or a number of outstanding debts (including disallowed costs and overpayments, but not including sums owed the Federal Government under the Internal Revenue Code) owed to any Federal agency or instrumentality, provided the debt is uncontested by the debtor or, if contested, provided that the debtor's legal and administrative remedies have been exhausted;
 - .800(c)(4) Violation of a material provision of a voluntary exclusion agreement entered into under § 180.640 or of any settlement of a debarment or suspension action; or
 - .800(c)(5) Violation of the provisions of the Drug-Free Workplace Act of 1988 (41 U.S.C. 701)

Fact-based Causes for Debarment – NCR (2 CFR Part 180) Any Other Cause

Must conclude, based on a preponderance of the evidence, that the person has engaged in conduct that warrants debarment:

- .800(d): Any other cause of so serious or compelling a nature that it affects your present responsibility.



Fact-based Causes for Debarment – FAR Subpart 9.4 Violation of the Terms of a Government Contract or Subcontract

9.406-2(b)(1) A contractor, based upon a preponderance of the evidence, for any of the following—

(i) Violation of the terms of a Government contract or subcontract so serious as to justify debarment, such as—

(A) Willful failure to perform in accordance with the terms of one or more contracts; or

(B) A history of failure to perform, or of unsatisfactory performance of, one or more contracts.

Fact-based Causes for Debarment – FAR Subpart 9.4 Other Causes

9.406-2(b)(1) A contractor, based upon a preponderance of the evidence, for any of the following—

(ii) Violations of 41 U.S.C. chapter 81, Drug-Free Workplace

(iii) Intentionally affixing a label bearing a “Made in America” inscription (or any inscription having the same meaning) to a product sold in or shipped to the United States or its outlying areas, when the product was not made in the United States or its outlying areas (see Section 202 of the Defense Production Act (Public Law 102-558)).

(iv) Commission of an unfair trade practice as defined in 9.403 (see Section 201 of the Defense Production Act (Pub. L. 102-558)).

(v) Delinquent Federal taxes in an amount that exceeds \$3,500.

(vi) Knowing failure by a principal, until 3 years after final payment on any Government contract awarded to the contractor, to timely disclose to the Government, in connection with the award, performance, or closeout of the contract or a subcontract thereunder, credible evidence of—

(A) Violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code;

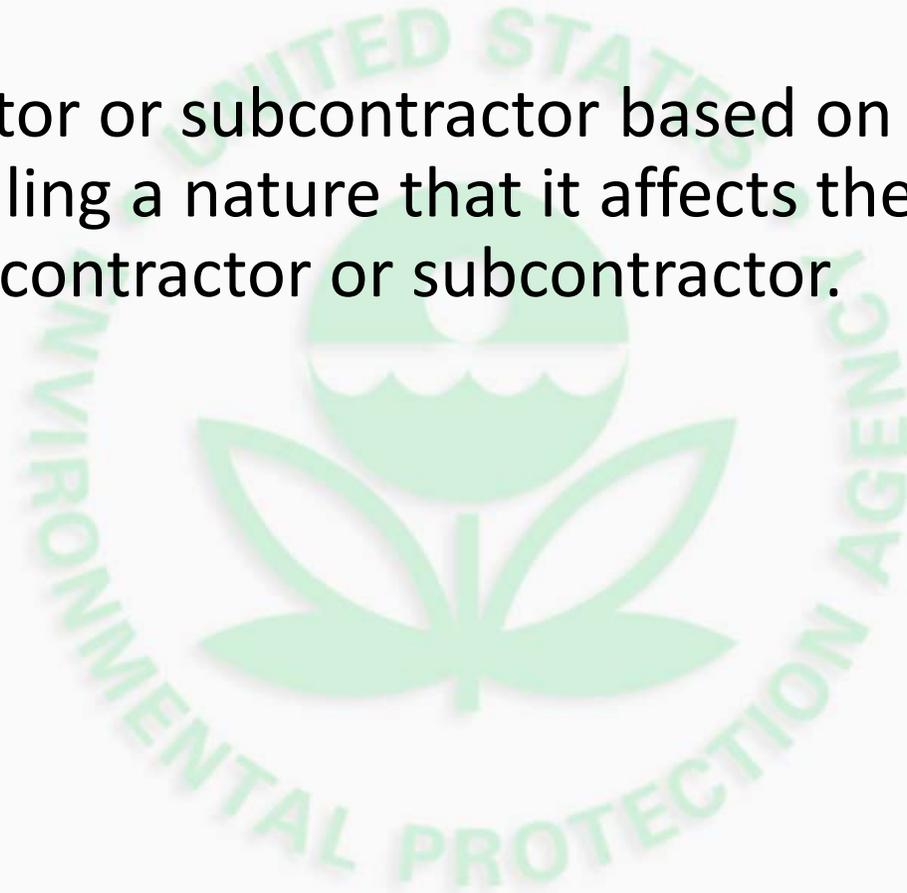
(B) Violation of the civil False Claims Act (31 U.S.C. 3729-3733); or

(C) Significant overpayment(s) on the contract, other than overpayments resulting from contract financing payments as defined in 32.001.

(2) A contractor, based on a determination by the Secretary of Homeland Security or the Attorney General of the United States, that the contractor is not in compliance with Immigration and Nationality Act employment provisions (see Executive Order 12989, as amended by Executive Order 13286). Such determination is not reviewable in the debarment proceedings.

Fact-based Causes for Debarment – FAR Subpart 9.4
Any Other Cause

9.406-2(c) A contractor or subcontractor based on any other cause of so serious or compelling a nature that it affects the present responsibility of the contractor or subcontractor.



Affiliation and Imputation

Affiliation - relationship between one person/entity and another, may extend the Government risk beyond the principal Respondent (based on current relationship of control, not culpability)

See: 2 CFR 180.625(b), 2 CFR 180.905, FAR 9.407-1(c), FAR 9.406-1(b), FAR 9.403

Imputation – where fraudulent, criminal, or other seriously improper conduct may be imputed

- (1) from individual to company;
 - (2) from company to individual; or
 - (3) from a company in a joint venture or similar arrangement to other participating companies
- (based on culpability)

See: 2 CFR 180.630, FAR 9.407-5, FAR 9.406-5

Referral for Fact-Finding

- SDO determines that material fact(s) to support a suspension or proposed debarment are genuinely in dispute.
- SDO refers the disputed facts to a Fact-Finding Official (FFO).
- FFO conducts a fact-finding proceeding.
- FFO prepares written findings of fact on the facts at issue, as mandated by 2 CFR §§ 180.745(a)(2) and 180.845(a)(2), and FAR 9.406-3(d)(2)(i) and 9.407-3(d)(2)(i). FFO will not make recommendations concerning the SDO's ultimate decision whether to debar or continue a suspension.
- Under 2 CFR §§ 180.745(c) and 180.845(c), and FAR 9.406-3(d)(2)(ii) and 9.407-3(d)(2)(ii), either the Agency or the Respondent may request that the SDO reject the FFO's findings of fact. The SDO may reject the FFO's findings of fact, in whole or in part, only after specifically determining them to be arbitrary, capricious, or clearly erroneous.

Genuine Dispute of Material Fact

- The material facts must not be genuinely disputed for a Respondent to be debarred without a fact-finding hearing. Sameena Inc. v. United States Department of Air Force, 147 F. 3rd 1148, 1153-1155 (9th Cir. 1998).
- General denials unaccompanied by evidence that the factual basis for the cause for debarment may be in error are insufficient to establish a genuine dispute of material fact that must be resolved by a fact-finding hearing. 2 CFR §§ 180.825(a)(1), 180.830(a)(2); see also, Robinson v. Cheney, 876 F. 2d 152, 157, 161-164 (D.C. Cir. 1989) (Questions regarding the credibility of unsworn statement of witness to misconduct unaccompanied by direct evidence from alleged wrongdoer describing a different version of events insufficient to establish genuine dispute of material fact).

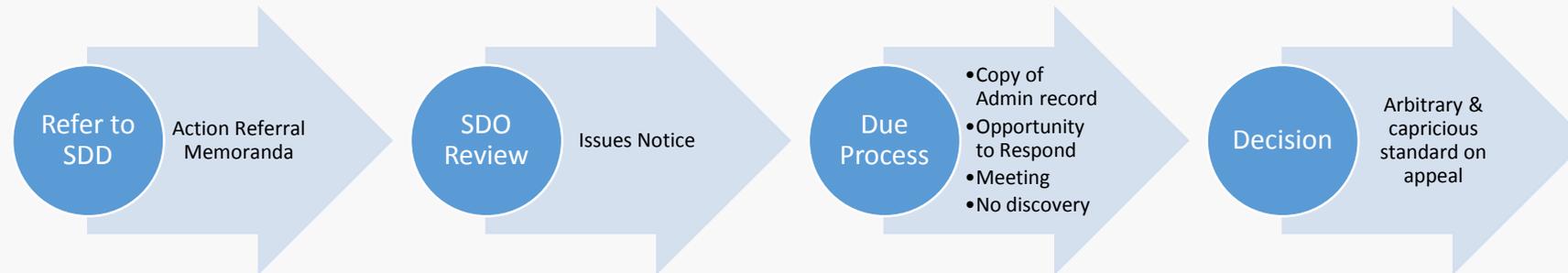
Fact-Finding Hearings

- **Transcripts:** An official record is made of the fact-finding proceeding. Fact-finding proceedings are transcribed, as required by 2 CFR §§ 180.745(b) and 180.840(b) and FAR 9.406-3(b)(2)(ii) and 9.407-3(b)(2)(ii), unless the Agency and the Respondent, by mutual agreement, waive the requirement for a transcript.
- **Procedures:** The Agency and the Respondent will have an opportunity to present evidence relevant to the facts at issue, and to question witnesses.
- **Informal Hearings:** Debarment and suspension proceedings are not subject to the hearing requirements of the Administrative Procedures Act. Neither the Federal Rules of Evidence nor the Federal Rules of Civil Procedure govern S&D fact-finding proceedings although the FFO may look to the Rules for general guidance as appropriate. Hearsay evidence may be presented. The FFO will weigh all evidence in the record when making findings of fact.

Importance of Fact-Based Actions

- By coordinating, we can better protect the government's interests by using the full range of the government's remedies.
- When immediate action is necessary - suspend upon adequate evidence of cause for debarment.
- Provide due process and avoid de facto debarments.
- Curb fraud, waste and abuse.
- Ensure the integrity of Federal programs by conducting business only with presently responsible persons.

EPA S&D Process Overview



- Make referrals to Suspension and Debarment Division (SDD): SDD works with EPA Office of Acquisition Management, EPA Office of Grants and Debarment, EPA Office of Inspector General, EPA Criminal Investigation Division, EPA Regions, and other Agencies to develop suspension and debarment cases.
- EPA Suspension and Debarment Official's Office (SDOO) processes cases. EPA Suspension and Debarment Official (SDO) exercises S&D authority for the Agency.
- EPA Suspension and Debarring Hearing Officers serve as Fact-Finding Officials.
- EPA has an administrative appeals process for SDO Decisions.
- For more information, see the EPA Suspension and Debarment Program Website: <https://www.epa.gov/grants/suspension-and-debarment-program>

Resources

- **Interagency Suspension and Debarment Committee**
(<https://isdc.sites.usa.gov/>)
- **DOJ Memo: Coordination of Parallel Criminal, Civil, Regulatory, and Administrative Proceedings** (<https://www.justice.gov/usam/organization-and-functions-manual-27-parallel-proceedings>)
- **System for Award Management (SAM)** (<https://www.sam.gov/>)
- **Federal Awardee Performance and Integrity Information System (FAPIIS)**
(<https://www.fapiis.gov/>)
- **USASpending** (<http://usaspending.gov/>)
- **Federal Procurement Data System** (<https://www.fpds.gov/>)
- **FAR Subpart 9.4 (48 CFR 9.400 – 9.409)**
(https://www.acquisition.gov/far/current/html/Subpart%209_4.html#wp1083280)
- **Nonprocurement Common Rule (2 CFR Part 180.5 – 180.1020)** (<http://www.gpo.gov/fdsys/pkg/CFR-2008-title2-vol1/xml/CFR-2008-title2-vol1-part180.xml>)