



UNITED STATES Suspension and Debarment System

Basic Concepts, Rules, and Process

INTRODUCTION

BASIC PRINCIPLE

Government contracts and discretionary assistance, loan and benefit program transactions are awarded only to “presently responsible” parties.





NATURE OF SUSPENSION AND DEBARMENT

- Administrative remedy – decision about significant business risk
- Inherent authority of the Government as a consumer



PURPOSE

- Protect the integrity of Federal procurement and non-procurement program activities
- The remedy is consistent with and supports a basic OIG objective of prevention of poor performance, fraud, waste, and abuse

TWO RULES

- Two separate governmentwide debarment rules
- For procurement: 48 CFR 9.4
- For nonprocurement: OMB Guidelines at 2 CFR Part 180 separately adopted by each Agency

THRESHOLD DEFINITIONS: Contractor; Participant

- › Contractor (FAR): Any individual or other legal entity that directly or indirectly submits offers for or is awarded, or reasonably may be expected to submit offers or be awarded a government contract, or certain subcontracts, or is an agent or representative of a contractor
- › Participant (Pt 180): Any person who submits a proposal for or who enters into a covered transaction, including an agent or representative of a participant



THRESHOLD DEFINITIONS CONT.

NONPROCUREMENT TRANSACTIONS

- Examples include but are not limited to:
- Grants and Cooperative Agreements
- Scholarships and Fellowships
- Assistance Contracts
- Loans and Loan Guarantees
- Subsidies and Insurances
- Payments for specified uses
- Donation agreements
- Does not require transfer of Federal funds



THRESHOLD DEFINITIONS CONT. COVERED TRANSACTIONS

A covered nonprocurement transaction is

- 1) between a Federal agency and a person or a lower tier, or
- 2) between a participant in a covered transaction and another person
- 3) Embraces most kinds of nonprocurement award transactions
- 4) Leases included as covered nonprocurement transaction awards

THRESHOLD DEFINITIONS CONT.

NON COVERED TRANSACTIONS

- In general:
- Direct awards to: public international organization, foreign government/entity or foreign government owned entity
- Entitlements
- Federal natural disaster response transactions
- permits, licenses, certificates or similar instruments for regulating public health, safety, or the environment, unless designated as covered transaction by agency

THRESHOLD DEFINITIONS CONT.

Suspension:

- An SDO action taken which temporarily excludes a person from eligibility for new Federal procurement and discretionary assistance awards pending completion of investigation and any judicial or administrative proceedings that may ensue.

THRESHOLD DEFINITIONS:

Debarment:

- An SDO action taken upon completion of proceedings to impose award ineligibility from new procurement and nonprocurement awards when in the best interests of the Government for a fixed time period, generally not to exceed three years. But can be for longer period where circumstances warrant.



NEVER USE THE REMEDY...

- To punish;
- To coerce;
- To embarrass, harass or get even

EFFECT OF ACTION

- Reciprocal effect of action
- Prospective effect – new awards only
- Awarding officials must separately decide proper action on existing awards



EFFECT OF ACTION (CONT.)

- For contractors proposed for debarment, suspended, or debarred - excluded from receiving new contracts and federally approved subcontracts
- For participants – no new awards

EFFECT OF ACTION (CONT.)

- Ineligible persons cannot be agents, representatives, or principals, including key employees for award performance purposes
- Names entered into the web-based Exclusions Section of the GSA System for Award Management (sam.gov)
- Awarding officials must check following receipt of offer or proposal and again “immediately before making award”

Who can be debarred or suspended?

- Individuals
- Businesses and organizations
- Affiliates controlled by bad actor
- Conduct may be imputed from individuals to entity from entity to individuals and between entities

Offense Based CAUSE FOR DEBARMENT

- Conviction or civil judgment for fraud, false statements, falsification of records, theft, bribery, or other misconduct showing a lack of honesty or integrity



Fact Based CAUSE FOR DEBARMENT

- ▶ Information showing a lack of business honesty, integrity, or poor performance including violation of terms of award such as willful failure to perform, and certain tax delinquencies

CAUSES FOR SUSPENSION

- Same general categories of illegal or improper conduct as for debarment but less evidence required
 - ▶ test is “adequate evidence” (i.e., probable cause)
 - ▶ Indictment, Information, or equivalent charging document meets evidentiary test

STANDARD OF REVIEW AND BURDEN FOR DEBARMENT

- “preponderance of evidence”
- Conviction or civil judgment meets standard under FAR and Pt 180.
- Under Pt 180 deferred prosecution agreement participated in by a court, or pre-trial diversion, is “functional equivalent” of conviction.
- Non-offense fact-based cause: Government has burden of proof to establish existence of cause
- SDO must conduct fact-finding where facts material to action determined to be “genuinely in dispute”

STANDARD OF REVIEW AND BURDEN FOR SUSPENSION

- “adequate evidence” (i.e., probable cause).
- Indictment, Information, or equivalent charging document meets the evidentiary test.
- SDO must conduct fact-finding where facts material to cause determined to be “genuinely in dispute” unless precluded under Rule.
- Under FAR, DOJ instruction that “substantial interests of the government in pending or contemplated legal proceedings based on the same facts as the suspension would be prejudiced...” - 48 CFR 9.407-3(c)
- Under Pt 180, DOJ, AUSA, State AG, or State or local prosecutor instruction - 2 C.F.R. 180.735(a)(4)



MITIGATING FACTORS AND REMEDIAL MEASURES (FAR AND PT 180)

- Standards of conduct
- Voluntary disclosure
- Internal investigation
- Full cooperation
- Paid costs/restitution
- Disciplined employee
- Agreed to implement remedial actions
- Ethics training
- Adequate time to eliminate causes
- Management recognition of problem

AGGRAVATING FACTORS

(PT 180 Only)

- Actual/potential harm
- Frequency/duration of wrongdoing
- Pattern or prior history of wrongdoing
- Prior exclusion for similar conduct
- Existence of prior AA for similar conduct
- Role in wrongdoing: planner, initiator, principal
- Kind of positions held in organization by those involved in wrongdoing
- Pervasiveness of, toleration of, wrongdoing within organization

BASIC DUE PROCESS PROVIDED

- Written Notice (Affiliates must get separate notice);
- Opportunity to submit written information in opposition;



BASIC DUE PROCESS CONTINUED

- Only informal meeting with SDO, upon request, in offense-based cases and those where material facts not genuinely in dispute
- Fact-finding hearing where genuine dispute of facts material to action; and
- Written decision based on an administrative record
- Can resolve matter alternatively, by Administrative Agreement where in best interests of US. Govt.

Suspensions

- Same basic notice and contest process as debarment process.
- Exception: no evidentiary proceeding where fact finding precluded per regulation.

SOME TAKE AWAYS

- DEBARMENT IS A POTENT REMEDY
- PROVIDES PROSPECTIVE PROTECTION FOR FEDERAL AWARD PROGRAMS INTEGRITY
- ESSENTIALLY A BUSINESS RISK ASSESSMENT
- ONE ACTION PROTECTS US GOVT WIDE
- CAN REACH BOTH ORGANIZATIONS AND BAD INDIVIDUAL ACTORS
- CAN DRIVE ALTERED CORPORATE ATTITUDE/PRACTICES AND PROCEDURES

CONTACT

David M. Sims, Chair

Interagency Suspension and Debarment Committee

Debarment Program Director

Office of Acquisition and Property Management

U.S. Department of the Interior

Telephone: 202-513-0689

Email: david_sims@ios.doi.gov