PART 909—CONTRACTOR QUALIFICATIONS

Authority: 42 U.S.C. 7101 and 50 U.S.C. 2401

Source: 49 FR 11949, Mar. 28, 1984, unless otherwise noted.

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Parent topic: SUBCHAPTER B—COMPETITION ACQUISITION PLANNING

Subpart 909.1—Responsible Prospective Contractors

909.104 Standards.

909.104-1 General standards.

(h) For solicitations for contract work subject to the provisions of 10 CFR part 707, Workplace Substance Abuse Programs at DOE sites, the prospective contractor must agree, in accordance with 970.5226-4, Agreement Regarding Workplace Substance Abuse Programs at DOE Sites, to provide the contracting officer with its written workplace substance abuse program in order to be determined responsible and, thus, eligible to receive the contract award.

909.104-3 Application of standards.

(e) *Guaranteeing corporate entities.* The Department of Energy (DOE) may select an entity which was newly created to perform the prospective contract, including, but not limited to, a joint venture or other similarly binding corporate partnership. In such instances when making the determination of responsibility pursuant to 48 CFR 9.103, the contracting officer may evaluate the financial resources of other entities only to the extent that those entities are legally bound, jointly and severally if more than one, by means of a performance guarantee or other equivalent enforceable commitment to supply the necessary resources to the prospective contractor and to assume all contractual obligations of the prospective contractor. The guaranteeing corporate entity(ies) must be found to have sufficient resources in order to satisfy its guarantee.

Subpart 909.4—Debarment, Suspension, and Ineligibility

Source: 61 FR 39857, July 31, 1996, unless otherwise noted.

909.400 Scope of subpart.

This subpart—

(a) Prescribes policies and procedures governing the debarment and suspension of organizations and individuals from participating in Department of Energy (DOE) and National Nuclear Security Administration (NNSA) contracts, procurement sales contracts, and real property purchase agreements, and from participating in DOE and, NNSA approved subcontracts and subagreements;

(b) Sets forth the causes, procedures, and requirements for determining the scope, duration, and effect of DOE and NNSA debarment and suspension actions; and

(c) Implements and supplements 48 CFR subpart 9.4 with respect to the exclusion of organizations and individuals from procurement contracting and Government approved subcontracting.

909.401 Applicability.

The provisions of this subpart apply to all procurement debarment and suspension actions initiated by DOE and NNSA on or after the effective date of this subpart. Nonprocurement debarment and suspension rules are codified in 2 CFR part 901.

909.403 Definitions.

In addition to the definitions set forth at 48 CFR 9.403, the following definitions apply to this subpart:

Debarring and suspending official, for the DOE, the designees are:

(1) *Debarring Official* means the Debarring Official for DOE contracts is the Director, Office of Acquisition Management, DOE, or designee. The debarring Official for NNSA contracts is the Deputy Associate Administrator for the Office of Partnership and Acquisition Services, or designee.

(2) *Suspending Official* means the Suspending Official for DOE contracts is the Director, Office of Acquisition Management, DOE, or designee. The suspending Official for NNSA contracts is the Deputy Associate Administrator for the Office of Partnership and Acquisition Services, or designee.

909.405 Effect of listing.

(e) The Department of Energy may not solicit offers from, award contracts to or consent to subcontracts with contractors debarred, suspended, or proposed for debarment unless the Senior Procurement Executive makes a written determination justifying that there is a compelling reason for such action in accordance with 48 CFR 9.405(a). For NNSA, the Head of the Contracting Activity (HCA) makes the written determination justifying the compelling reason.

(f) DOE or NNSA may disapprove or not consent to the selection (by a contractor) of an individual to serve as a principal investigator, as a project manager, in a position of responsibility for the administration of Federal funds, or in another key personnel position, if the individual is listed in the System for Award Management (SAM) exclusions.

(g) DOE or NNSA shall not conduct business with an agent or representative of a contractor if the agent's or representative's name has an active exclusion in SAM.

(h) DOE or NNSA shall review SAM before conducting a pre-award survey or soliciting proposals, awarding contracts, renewing or otherwise extending the duration of existing contracts, or approving or consenting to the award, extension, or renewal of subcontracts.

909.406 Debarment.

909.406-2 Causes for debarment.

(c) The DOE and NNSA Debarring Official may debar a contractor for any other cause of so serious

or compelling a nature that it affects the present responsibility of a contractor. Such cause may include but is not limited to:

(1) Commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a private contract or subcontract.

(2) Inexcusable, prolonged, or repeated failure to pay a debt (including disallowed costs and overpayments) owed to DOE, provided the contractor has been notified of the determination of indebtedness, and further provided that the time for initiating any administrative or legal action to oppose or appeal the determination of indebtedness has expired or that such action, if initiated, has been concluded.

(d) The Debarring Official may debar a contractor:

(1) On the basis that an individual or organization is an affiliate of a debarred contractor, subject to the requirements of 48 CFR 9.406-1(b) and 9.406-3(c).

(2) For failure to observe the material provisions of a voluntary exclusion (see 10 CFR 1036.315 for discussion of voluntary exclusion).

909.406-3 Procedures.

(a) *Investigation and referral.*

(1) Offices responsible for the award and administration of contracts are responsible for reporting to the appropriate Senior Procurement Executive and the DOE Inspector General information about possible fraud, waste, abuse, or other wrongdoing which may constitute or contribute to a cause(s) for debarment under this subpart. Circumstances that involve possible criminal or fraudulent activities must be reported to the Office of the Inspector General in accordance with 10 CFR part 1010, Conduct of Employees, § 1010.103, Reporting Wrongdoing.

(2) At a minimum, referrals for consideration of debarment action should be in writing and should include the following information—

(i) The recommendation and rationale for the referral;

(ii) A statement of facts;

(iii) Copies of documentary evidence and a list of all witnesses, including addresses and telephone numbers, together with a statement concerning their availability to appear at a fact-finding proceeding and the subject matter of their testimony;

(iv) A list of parties including the contractor, principals, and affiliates (including last known home and business addresses, zip codes and DUNS Number or other identifying number for an individual);

(v) DOE's and NNSA's acquisition history with the contractor, including recent experience under contracts and copies of pertinent contracts;

(vi) A list of any known active or potential criminal investigations, criminal or civil proceedings, or administrative claims before the Civilian Board of Contract Appeals or other fact-finding body; and

(vii) A statement regarding the impact of the debarment action on DOE and NNSA programs. This

statement is not required for referrals by the Inspector General.

(3) Referrals may be returned to the originator for further information or development.

(b) *Decisionmaking process.* Contractors proposed for debarment shall be afforded an opportunity to submit information and argument in opposition to the proposed debarment.

(1) In actions based upon a conviction or civil judgment, or in which there is no genuine dispute over material facts, the Debarring Official shall make a decision on the basis of all the information in the administrative record, including any submissions made by the contractor. If the respondent fails to submit a timely written response to a notice of proposed debarment, the Debarring Official shall notify the respondent in accordance with FAR 9.406-3(e) that the contractor is debarred.

(2) In actions not based upon a conviction or civil judgment, the contractor may request a fact-finding hearing to resolve a genuine dispute of material fact. In its request, the contractor must identify the material facts in dispute and the basis for disputing the facts. If the Debarring Official determines that there is a genuine dispute of material fact, the Debarring Official shall appoint, and refer the matter to, a Fact-Finding Official for a fact-finding conference.

(3) *Meeting.* Upon receipt of a timely request from a contractor proposed for debarment, the Debarring Official shall schedule a meeting between the Debarring Official and the respondent, to be held no later than 30 days from the date the request is received. The Debarring Official may postpone the date of the meeting if the respondent requests a postponement in writing. At the meeting, the respondent, appearing personally or through an attorney or other authorized representative, may present and explain evidence that causes for debarment do not exist, evidence of any mitigating factors, and arguments concerning the imposition, scope, or duration of a proposed debarment or debarment.

(4) *Fact-finding conference.* The purpose of a fact-finding conference under this section is to provide the respondent an opportunity to dispute material facts through the submission of oral and written evidence; resolve facts in dispute; and provide the Debarring Official with findings of fact based, as applicable, on adequate evidence or on a preponderance of the evidence. The fact-finding conference shall be conducted in accordance with rules consistent with 48 CFR 9.406-3(b). The Fact-Finding Official will notify the affected parties of the schedule for the hearing. The Fact-Finding Official shall deliver written findings of fact to the Debarring Official (together with a transcription of the proceeding, if made) within a certain time period after the hearing record closes as specified by the Fact-Finding Official. The findings shall resolve any disputes over material facts based upon a preponderance of the evidence, if the case involves a proposal to debar, or on adequate evidence, if the case involves a suspension. Since convictions or civil judgments generally establish the cause for debarment by a preponderance of the evidence, there usually is no genuine dispute over a material fact that would warrant a fact-finding conference for those proposed debarments based on convictions or civil judgments.

(d) *Debarring Official's decision.* (4) The Debarring Official's final decision shall be based on the administrative record. In those actions where additional proceedings are necessary as to disputed material facts, written findings of fact shall be prepared and included in the final decision. In those cases where the contractor has requested and received a fact-finding conference, the written findings of fact shall be those findings prepared by the Fact-Finding Official. Findings of fact shall be final and conclusive unless, within 15 days of receipt of the findings, the Department or the respondent requests reconsideration, or unless set aside by a court of competent jurisdiction. The Fact-Finding Official shall be provided a copy of the Debarring Official's final decision.

909.406-70 Requests for reconsideration of debarment.

(a) At any time during a period of debarment, a respondent may submit to the Debarring or Suspending Official a written request for reconsideration of the scope, duration, or effects of the suspension/debarment action because of new information or changed circumstances, as discussed at 48 CFR 9.406-4(c).

(b) In reviewing a request for reconsideration, the Debarring or Suspending Official may, in his or her discretion, utilize any of the procedures (meeting and fact-finding) set forth in 909.406-3 and 909.407-3. The Debarring or Suspending Official's final disposition of the reconsideration request shall be in writing and shall set forth the reasons why the request has been granted or denied. A notice transmitting a copy of the disposition of the request for reconsideration shall be sent to the respondent.

909.407 Suspension.

909.407-2 Causes for suspension.

(d) The Suspending Official may suspend an organization or individual—

(1) Indicted for or suspected, upon adequate evidence, of the causes described in 909.406-2(c)(1);

(2) On the basis of the causes set forth in 909.406-2(d)(2); or

(3) On the basis that an organization or individual is an affiliate of a suspended or debarred contractor.

909.407-3 Procedures.

(b) *Decisionmaking process.*

(1) In actions based on an indictment, the Suspending Official shall make a decision based upon the administrative record, which shall include submissions made by the contractor in accordance with 909.406-3(b)

(1) and 909.406-3(b)(3).

(2) For actions not based on an indictment, the procedures in 909.406-3(b)(2) and 48 CFR 9.407-3(b)(2) apply.

(3) Coordination with Department of Justice. Whenever a meeting or fact-finding conference is requested, the Suspending Official's legal representative shall obtain the advice of appropriate Department of Justice officials concerning the impact disclosure of evidence at the meeting or fact-finding conference could have on any pending civil or criminal investigation or legal proceeding. If such Department of Justice official requests in writing that evidence needed to establish the existence of a cause for suspension not be disclosed to the respondent, the Suspending Official shall—

(i) Decline to rely on such evidence and withdraw (without prejudice) the suspension or proposed debarment until such time as disclosure of the evidence is authorized; or

(ii) Deny the request for a meeting or fact-finding and base the suspension decision solely upon the information in the administrative record, including any submission made by the respondent.

(e) *Notice of suspending official's decision.* In actions in which additional proceedings have been held, following such proceedings, the Suspending Official shall notify respondent, as applicable, in accordance with paragraphs (e)

(1) or (e)(2) of this section.

(1) Upon deciding to sustain a suspension, the Suspending Official shall promptly send each affected respondent a notice containing the following information:

(i) A reference to the notice of suspension, the meeting and the fact-finding conference;

(ii) The Suspending Official's findings of fact and conclusions of law;

(iii) The reasons for sustaining a suspension;

(iv) A reference to the Suspending Official's waiver authority under 909.405;

(v) A statement that the suspension is effective throughout the Executive Branch as provided in 48 CFR 9.407-1(d);

(vi) Modifications, if any, of the initial terms of the suspension;

(vii) A statement that the respondent's name and address will be added to the SAM exclusion; and

(viii) If less than an entire organization is suspended, specification of the organizational element(s) or individual(s) included within the scope of the suspension.

(2) If the Suspending Official decides to terminate a suspension, the Suspending Official shall promptly send, by certified mail, return receipt requested, each affected respondent a copy of the final decision required under this section.

Subpart 909.5—Organizational and Consultant Conflicts of Interest

Source: 62 FR 40751, July 30, 1997, unless otherwise noted.

909.503 Waiver.

Heads of Contracting Activities are delegated the authorities in 48 CFR 9.503 regarding the waiver of organizational and consultant conflicts of interest requirements.

909.504 Contracting officer's responsibility.

(d) The contracting officer shall evaluate the statement by the apparent successful offeror or, where individual contracts are negotiated with all firms in the competitive range, all such firms for interests relating to a potential organizational conflict of interest in the performance of the proposed contract. Using that information and any other credible information, the contracting officer shall make written determination of whether those interests create an actual or significant potential organizational conflict of interest and identify any actions that may be taken to avoid, neutralize, or mitigate such conflict. In fulfilling their responsibilities for identifying and resolving potential conflicts, contracting officers should avoid creating unnecessary delays, burdensome information requirements, and excessive documentation.

(e) The contracting officer shall award the contract to the apparent successful offeror unless a conflict of interest is determined to exist that cannot be avoided, neutralized, or mitigated. Before determining to withold award based on organizational conflict of interest considerations, the contracting officer shall notify the offeror, provide the reasons therefor, and allow the offeror a reasonable opportunity to respond. If the conflict of interest cannot be avoided, neutralized, or mitigated to the contracting officer's satisfaction, the contracting officer may disqualify the offeror from award and undertake the disclosure, evaluation, and determination process with the firm next in line for award. If the contracting officer finds that it is in the best interest of the United States to award the contract notwithstanding a conflict of interest, a request for waiver shall be submitted in accordance with 909.503. The waiver request and decisions shall be included in the contract file.

909.507 Solicitation provisions and contract clause.

909.507-1 Solicitation provisions.

(e) The contracting officer shall insert the provision at 952.209-8, Organizational Conflicts of Interest Disclosure-Advisory and Assistance Services, in solicitations for advisory and assistance services expected to exceed the simplified acquisition threshold. In individual procurements, the Head of the Contracting Activity may increase the period subject to disclosure in 952.209-8 (c)

(1) up to 36 months.

909.507-2 Contract clause.

(a)

(1) The contracting officer shall insert the clause at 952.209-72, Organizational Conflicts of Interest, in each solicitation and contract for advisory and assistance services expected to exceed the simplified acquisition threshold.

(2) Contracting officers may make appropriate modifications where necessary to address the potential for organizational conflicts of interest in individual contracts. Contracting officers shall determine the appropriate term of the bar of paragraph (b)(1)

(i) of the clause at 952.209-72 and enter that term in the blank provided. In the usual case of a contract for advisory and assistance services a period of three, four, or five years is appropriate;

however, in individual cases the contracting officer may insert a term of greater or lesser duration.

(3) The contracting officer shall include Alternate I with the clause in instances in which a meaningful amount of subcontracting for advisory and assistance services is expected.

(b) Contracts, which are not subject to part 970 but provide for the operation of a DOE site or facility or environmental remediation of a specific DOE site or sites, shall contain the organizational conflict of interest clause at 952.209-72. The organizational conflicts of interest clause in such contracts shall include Alternate I to that clause.