Subpart 1209.4—Debarment, Suspension, and Ineligibility

Parent topic: PART 1209—CONTRACTOR QUALIFICATIONS

1209.400 Scope of subpart.

This subpart provides DOT's policy and procedures for the debarment and suspension of contractors.

1209.403 Definitions.

As used in this subpart—

DOT Order 4200.5G means the DOT order establishing DOT's internal procedures for Suspension and Debarment, and Ineligibility Policies.

Senior Accountable Official (SAO) for Suspension and Debarment means the Senior Procurement Executive (SPE), as delegated by the Secretary of DOT, for all suspensions and debarments within DOT. The SAO sets forth standards for suspension and debarment policies and procedures for the Department of Transportation, excluding the Office of Inspector General (OIG).

Suspension and Debarment Coordinator (SDC) means the program manager for the Suspension and Debarment Program at each OA and Office of the Secretary of Transportation. The SDC advises the Suspending and Debarring Official (SDO). The SDC coordinates all materials for presentation to the SDO for proposed suspension or debarment activities, enters information regarding any administrative agreement into the Federal Awardee Performance and Integrity Information System (FAPIIS), and enters information regarding suspensions and debarments into *SAM.gov*.

Suspending and Debarring Official (SDO) means the individual designated responsibility as authorized by the Secretary of DOT to impose procurement suspensions and debarments, exclusions, and other related matters pursuant to FAR part 9. Each OA and the OST has separately appointed SDOs. The SPE serves as the SDO for OST. A list of the OA-appointed SDOs is maintained on the OSPE website at *https://www.transportation.gov/assistant-secretary-administration/procu…*.

1209.405 Effect of listing.

(a) The SDO is authorized to make a written determination of compelling reasons to solicit offers from, award contracts to, or consent to subcontract with contractors debarred, suspended, or proposed for debarment and that has an active exclusion record in the System for Award Management (SAM) in accordance with FAR 9.405.

(e)(2) The SDO is authorized to make a written determination of compelling reasons to consider a bid or offer from a contractor whose name or company is included on the listing.

(3) The SDO is authorized to make a written determination of compelling reasons for a contracting

officer to consider proposals, quotations, or offers received from any listed contractor that have an active exclusion record in SAM, and that such proposals, quotations, or offers may be evaluated for award or included in the competitive range, and, if applicable, discussions conducted with a listed offeror as set forth in FAR 9.405(e)(3).

1209.405-1 Continuation of current contracts.

(a) Notwithstanding the suspension, proposed debarment, or debarment of a contractor, contracting officers may continue contracts or subcontracts in existence at the time the contractor was suspended, proposed for debarment, or debarred, if authorized by the SDO and the SDO makes a written determination, consistent with the procedures described in FAR 9.405–1(a) setting forth the compelling reasons for continuing such contract(s) and placing order(s).

(b) The SDO is delegated the authority on behalf of the Secretary of DOT to make the written determination required under FAR 9.405–1(b).

1209.405-2 Restrictions on subcontracting.

(a) The SDO is delegated the authority on behalf of the Secretary of DOT to authorize contracting officers to consent to subcontracts with contractors debarred, suspended, or proposed for debarment as required by FAR 9.405–2(a).

1209.406 Debarment.

1209.406-1 General.

(c) The OST Suspending and Debarring Official (SDO) and each OA-appointed SDO (*see* 1209.403) is authorized to continue business dealings between the agency and a contractor that is debarred or proposed for debarment under FAR 9.406–1(c), except under FAR 23.506(e) if the SDO has made a written determination of compelling reasons justifying the continued business dealings.

(d)

(1) The SDO's authority includes debarments from contracts for the purchase of Federal personal property pursuant to the Federal Management Regulation at 41 CFR 102–117.295 (*see* FAR 9.406–1(d)

(1) through (2)).

1209.406-3 Procedures.

Contracting officers and contracting activities shall comply with DOT Order 4200.5G, Suspension and Debarment, and Ineligibility Policies, and this subpart to include the following procedures—

(a) *Investigation and referral.* Any individual may submit a referral to debar an individual or contractor to the cognizant SDO (the debarring official) (*see* 1209.403). The referral for debarment shall be supported with evidence of a cause for debarment listed in FAR 9.406–2 and this subpart. The contracting officer shall promptly report a proposed debarment action directly to the SDO. Upon review by the SDO, if the matter involves possible criminal or fraudulent activities, the SDO shall also refer the matter to the DOT Office of Inspector General to ensure coordination of appropriate activity. The report shall contain the following information:

(1) The DOT official OA code to identify the OA taking action is as follows: DOT (general) (DOT–OST); Federal Aviation Administration (DOT–FAA); Federal Highway Administration (DOT–FHWA); Federal Motor Carrier Safety Administration (DOT–FMCSA); Federal Railroad Administration (DOT–FRA); Federal Transit Administration (DOT–FTA); Maritime Administration (DOT–MARAD); National Highway Traffic Safety Administration (DOT–NHTSA); Pipeline and Hazardous Materials Safety Administration (DOT–PHMSA); Office of the Assistant Secretary for Research and Technology (OST–R); and Great Lakes St. Lawrence Development Corporation (GLS).

(2) Name, address, and telephone number for the point of contact for the activity making the report.

(3) Name and address of the contractor.

(4) Names and addresses of the members of the board, principal officers, partners, owners, and managers.

(5) Names and addresses of all known affiliates, subsidiaries, or parent firms, and the nature of the business relationship.

(6) For each contract affected by the conduct being reported—

(i) The contract number;

(ii) Description of supplies or services;

(iii) The amount;

(iv) The percentage of completion;

(v) The amount paid to the contractor;

(vi) Whether the contract is assigned under the Assignment of Claims Act and, if so, to whom; and

(vii) The amount due to the contractor.

(7) For any other contracts outstanding with the contractor or any of its affiliates—

(i) The contract number(s);

(ii) The amount(s);

(iii) The amounts paid to the contractor;

(iv) Whether the contract(s) is assigned under the Assignment of Claims Act and, if so, to whom; and

(v) The amount(s) due the contractor.

(8) A complete summary of all pertinent evidence and the status of any legal proceedings involving the contractor.

(9) An estimate of any damages sustained by the Government as a result of the contractor's action (explain how the estimate was calculated).

(10) The comments and recommendations of the contracting officer and each higher-level contracting review authority regarding—

(i) Whether to suspend or debar the contractor;

(ii) Whether to apply limitations to the suspension or debarment;

(iii) The period of any recommended debarment; and

(iv) Whether to continue any current contracts with the contractor (explain why a recommendation regarding current contract is not included).

(11) When appropriate, as an enclosure to the report—

(i) A copy or extracts of each pertinent contract;

(ii) Witness statements or affidavits;

(iii) Copies of investigative reports;

(iv) Certified copies of indictments, judgments, and sentencing actions; and

(v) Any other appropriate exhibits or documents.

(b) *Decisionmaking process.* When the SDO finds preponderance of the evidence for a cause for debarment, as listed in FAR 9.406–2 or this subpart, the contracting officer in conjunction with the SDC shall prepare a recommendation and draft notice of proposed debarment for the SDO's consideration. The contractor (and any specifically named affiliates) are provided an opportunity to submit, in person, in writing, or through a representative, information and argument in opposition to the proposed debarment as set forth in paragraph (d) of this section.

(c) *Notice of proposal to debar.* DOT shall send the notice of proposed debarment to the last known address of the individual or contractor, the individual or contractor's counsel, or agent for service of process, by certified mail, return receipt requested, or any other means that allows for confirmation of delivery to include by mail, to the last known street address, to the last known facsimile numbers, or to the last known email address. In the case of a contractor, DOT may send the notice of proposed debarment to the contractor, any partner, principal, officer, director, owner or co-owner, or joint venture; to the contractor's identified counsel for purposes of administrative proceedings; or to the contractor's agent for the service of process. If sent by email, it shall be sent to the last known email addresses for all three, if known. Additionally, for each specifically named affiliate, the notice shall be sent to the affiliate itself, the affiliate's identified counsel for purposes of the administrative proceedings, or the affiliate's agency for service of process. If sent by email, it shall be sent to the last known email addresses for all three, if known. The SDO shall also ensure that the appropriate parties are listed as excluded in the System for Award Management (SAM) in accordance with FAR 9.404.

(d) *Debarring official's decision.*

(1) If DOT does not receive a reply from the contractor within 30 calendar days after sending the notice of proposed debarment, the SDC shall prepare a recommendation in conjunction with the cognizant contracting officer, and refer the case to the SDO for a decision on whether to debar based on the information available. If DOT receives a reply from the contractor within 30 calendar days after sending the notice of proposed debarment, the SDC in conjunction with the cognizant contracting officer shall consider the information in the reply before the SDC makes their recommendation to the SDO.

(2) The SDO reviews submittals and case documents, and acts in accordance with DOT Order 4200.5G and the General DOT Guidelines for Suspension and Debarment, paragraph 12c.

(i) The SDO, upon the request of the contractor proposed for debarment, shall, as soon as practicable, allow the contractor an opportunity to appear before the SDO to present information or argument, in person or through a representative. The contractor may supplement the oral presentation with written information and argument. This information submitted by a contractor proposed for debarment is known as a Presentation of Matters in Opposition as set forth in DOT Order 4200.5G. DOT shall conduct the proceeding in an informal manner and without requirement for a transcript. The SDO may use flexible procedures to allow a contractor to present matters in opposition via telephone or internet. If so, the debarring official should change the notice in paragraph (c) of this section to include those flexible procedures.

(ii) If the SDO finds the contractor's or individual's submission in opposition to the proposed debarment raises a genuine dispute over facts material to the proposed debarment and the debarment action is not based on a conviction or civil judgment, the SDC shall submit to the SDO the information establishing the dispute of material facts. If the SDO agrees there is a genuine dispute of material facts, the SDO shall conduct a fact-finding proceeding or shall refer the dispute to a designee for resolution pursuant to 1209.470. The SDC shall provide the contractor or individual the disputed material fact(s).

(iii) If the proposed debarment action is based on a conviction or civil judgment, or if there are no disputes over material facts, or if any disputes over material facts have been resolved pursuant to 1209.470, the SDO shall make a decision on the basis of all information available including any written findings of fact submitted by the designated fact finder, and oral or written arguments presented or submitted to the SDC by the contractor.

(e) *Notice of debarring official's decision.* In actions processed under FAR 9.406 where no suspension is in place and where a fact-finding proceeding is not required, DOT shall make the final decision on the proposed debarment within 30 business days after receipt of any information and argument submitted by the contractor by the means of delivery set forth in paragraph (c) of this section, unless the SDO extends this period for good cause.

1209.406-4 Period of debarment.

(b) The SDC, in conjunction with the contracting officer, may submit a recommendation to the SDO to extend or reduce the period of debarment, or amend the scope of the debarment, imposed under FAR 9.406.

1209.407 Suspension.

1209.407-1 General.

(b) For the purposes of FAR 9.407–1, the SDO is the suspending official under the Federal Management Regulation at 41 CFR 102–117.295.

(d) The SDO is authorized to make a written determination of compelling reasons justifying continuing business dealings between the agency and a contractor that is suspended. However, in accordance with FAR 23.506(e), only the Secretary of Transportation may waive the suspension of contract payments, termination of a contract for default, or suspension of a contractor for actions under FAR subpart 23.5 and FAR 23.506.

1209.407-3 Procedures.

Contracting officers and contracting activities shall comply with DOT Order 4200.5G, Suspension and Debarment, and Ineligibility Policies, and this subpart to include the following procedures—

(a) *Investigation and referral.* Any individual may submit a referral to suspend an individual or contractor to the SDC or SDO (the debarring official) (*see* 1209.403). The SDC shall promptly report, in writing, a proposed suspension action directly to the SDO. Upon review by the SDO, if the matter involves possible criminal or fraudulent activities, the SDO shall also refer the matter to the DOT OIG to ensure coordination of appropriate activity.

(b) *Decisionmaking process.* When the SDC finds adequate evidence of a cause for suspension, as listed in FAR 9.407–2, the SDC shall prepare a recommendation and draft notice of suspension for the SDO's consideration. After receipt of the report from the SDC, the SDO may request from interested parties, including the contractor if deemed appropriate, a meeting or additional supporting information to assist in the suspension decision. The SDC creates a case in the DOT Suspension and Debarment Tracking System as set forth in DOT Order 4200.5G. The contractor (and any specifically named affiliates) are provided an opportunity to submit, in person, in writing, or through a representative, information and argument in opposition to the proposed debarment as set forth in paragraph (d) of this section.

(c) *Notice of suspension.* DOT shall send the notice of suspension to the last known address of the individual or contractor, the individual or contractor's counsel, or agent for service of process, by certified mail, return receipt requested, or any other means that allows for confirmation of delivery to include by mail, to the last known street address, to the last known facsimile numbers, or to the last known email address. In the case of a contractor, DOT may send the notice of suspension to the contractor, any partner, principal, officer, director, owner or co-owner, or joint venture; to the contractor's identified counsel for purposes of administrative proceedings; or to the contractor's agent for the service of process. If sent by email, it shall be sent to the last known email addresses for all three, if known. Additionally, for each specifically named affiliate, the notice shall be sent to the affiliate itself, the affiliate's identified counsel for purposes of the administrative proceedings, or the affiliate's agency for service of process. If sent by email, it shall be sent to the last known email addresses for all three, if known. The SDO shall also ensure that the appropriate parties are listed as excluded in SAM in accordance with FAR 9.404. After reviewing the SDC's report, and any

additional information received in accordance with paragraph (b) of this section, the SDO shall prepare and coordinate with legal counsel a written notice of suspension.

(5) The SDO, upon the request of the contractor suspended, shall, as soon as practicable, allow the contractor an opportunity to appear before the SDO to present information or argument, in person or through a representative. The contractor may supplement the oral presentation with written information and argument. DOT shall conduct the proceeding in an informal manner and without requirement for a transcript.

(6)(i) If the SDC finds the contractor's or individual's submission in opposition to the suspension raises a genuine dispute over facts material to the suspension, or for the purposes of FAR 9.407–3(b)(2), in actions not based on an indictment, the SDC shall submit to the SDO the information establishing the dispute of material facts. If the SDO agrees there is a genuine dispute of material facts, the SDO shall conduct a fact-finding proceeding or refer the dispute to a designee for resolution pursuant to 1209.470. The SDC shall provide the contractor or individual the information that established the dispute of material fact(s) in advance of the fact-finding proceeding, in the event the contractor would like to add to the facts prior to the decision of the SDO.

(ii) If the suspension is based on a conviction or civil judgment, or if there are no disputes over material facts, or if any disputes over material facts have been resolved pursuant to 1209.470, the SDO shall make a decision on the basis of all information available including any written findings of fact submitted by the designated fact finder, and oral or written arguments presented or submitted by the contractor. The contractor may supplement the oral presentation with written information and argument. The proceeding will be conducted in an informal manner and without requirement for a transcript.

(d) *Suspending official's decision.* The SDO shall notify the contractor of the decision whether to impose a suspension. The SDO shall then forward the original signed decision to the contracting officer for inclusion in the contract file. The SDO reviews submittals and case documents, and acts in accordance with DOT Order 4200.5G and the General DOT Guidelines for Suspension and Debarment, paragraph 12c. The SDO may use flexible procedures to allow a contractor to present matters in opposition via telephone of internet. If so, the debarring official should change the notice in paragraph (c) of this section to include those flexible procedures.

1209.470 Fact-finding procedures.

The provisions of this section constitute the procedures to be used to resolve genuine disputes of material fact pursuant to 1209.406–3 and 1209.407–3. The SDC shall establish the date for the fact-finding hearing, normally to be held within 30 business days after notifying the contractor or individual that the SDO has determined a genuine dispute of material fact(s) exists.

(a) The Government's representative and the contractor shall each have an opportunity to present evidence relevant to the genuine dispute(s) of material fact identified by the SDO. The contractor or individual may appear in person or through counsel at the fact-finding hearing and should address all defenses, contested facts, admissions, remedial actions taken, and, if a proposal to debar is involved, mitigating and aggravating factors. The contractor or individual may submit documentary evidence, present witnesses, and confront any person the agency presents.

(b) Witnesses may testify in person. Witnesses will be reminded of the official nature of the proceedings and that any false testimony given is subject to criminal prosecution. Witnesses are

subject to cross-examination. The fact-finding proceeding is an informal evidentiary hearing, during which the Rules of Evidence and Civil Procedure do not apply. Hearsay evidence may be presented and will be given appropriate weight by the fact-finder.

(c) The proceedings shall be transcribed and a copy of the transcript shall be made available at cost to the contractor upon request, unless the contractor and the factfinder, by mutual agreement, waive the requirement for a transcript.

(d) The fact-finder shall prepare a written finding(s) of fact for the record by a preponderance of the evidence for proposed debarments, and by adequate evidence for suspensions. A copy of the findings of fact shall be provided to the SDO, the Government's representative, and the contractor or individual. The SDO will consider the written findings of fact in the decision regarding the suspension or proposed debarment.

1209.471 Appeals.

Based on the decision by the SDO, the respondent may elect to request reconsideration as provided for in paragraph (a) of this section. If the request for reconsideration is denied, the respondent may seek judicial review as provided for in paragraph (b) of this section.

(a) *Request for reconsideration.* Upon receiving a final decision to debar from the SDO, a debarred individual or entity may ask the SDO to reconsider the debarment decision or to modify the debarment by reducing the time period or narrowing the scope of the debarment. This request must be in writing and supported with documentation.

(b) *Judicial review.* A suspended or debarred individual or entity may seek judicial review upon denial of a request for reconsideration.