Subpart 9.4 - Debarment, Suspension, and Ineligibility

Parent topic: Part 9 - Contractor Qualifications

9.400 Scope of subpart.

(a) This subpart-

(1) Prescribes policies and procedures governing the *debarment* and *suspension* of contractors by agencies for the causes given in 9.406-2 and 9.407-2;

(2) Provides for the listing of contractors debarred, suspended, proposed for *debarment*, and declared *ineligible* (see the definition of "*ineligible*" in 2.101); and

(3) Sets forth the consequences of this listing.

(b) Although this subpart does cover the listing of *ineligible* contractors (9.404) and the effect of this listing (9.405), it does not prescribe policies and procedures governing declarations of ineligibility except for contractors that have been declared *ineligible* pursuant to 10 U.S.C. 983 (see 9.110, and 9.405-1(b)).

(c) For Federal *Acquisition* Supply Chain Security Act (FASCSA) orders, see subpart 4.23.

9.401 Applicability.

In accordance with Public Law 103-355, Section 2455 (31 U.S.C.6101, note), and Executive Order 12689, any *debarment*, *suspension* or other Governmentwide exclusion initiated under the Nonprocurement Common Rule implementing Executive Order 12549 on or after August 25, 1995, *shall* be recognized by and effective for Executive Branch agencies as a *debarment* or *suspension* under this subpart. Similarly, any *debarment*, *suspension*, proposed *debarment* or other Governmentwide exclusion initiated on or after August 25, 1995, under this subpart *shall* also be recognized by and effective for those agencies and participants as an exclusion under the Nonprocurement Common Rule.

9.402 Policy.

(a) Agencies *shall* solicit *offers* from, award contracts to, and *consent to subcontracts* with responsible contractors only. *Debarment* and *suspension* are discretionary actions that, taken in accordance with this subpart, are appropriate means to effectuate this policy.

(b) The serious nature of *debarment* and *suspension* requires that these remedies be imposed only in the public interest for the Government’s protection and not for purposes of punishment. Agencies *shall* impose *debarment* or *suspension* to protect the Government’s interest and only for the causes and in accordance with the procedures in this subpart.

(c) Agencies are encouraged to establish methods and procedures for coordinating their *debarment* or *suspension* actions.

(d) When more than one agency has an interest in the *debarment* or *suspension* of a contractor, the Interagency *Suspension* and *Debarment* Committee, established under Executive Order 12549, and authorized by section 873 of the *National Defense* Authorization Act for Fiscal Year 2009 (Pub. L. 110-417) (31 U.S.C.6101, note), *shall* resolve the lead agency issue and coordinate such resolution among all interested agencies prior to the initiation of any *suspension*, *debarment*, or related administrative action by any agency.

(e) Agencies *shall* establish appropriate procedures to implement the policies and procedures of this subpart.

9.403 Definitions.

As used in this subpart—

Administrative agreement means an agreement between an *agency suspending and debarring official* and the *contractor* used to resolve a *suspension* or *debarment* proceeding, or a potential *suspension* or *debarment* proceeding.

Affiliates.–

(1) Business concerns, organizations, or individuals are *affiliates* of each other if, directly or indirectly–

(i) Either one controls or has the power to control the other; or

(ii) A third party controls or has the power to control both.

(2) Indicia of control include, but are not limited to, interlocking management or ownership, identity of interests among family members, shared facilities and equipment, common use of employees, or a business entity organized following the *debarment*, *suspension*, or proposed *debarment* of a *contractor* which has the same or similar management, ownership, or principal employees as the *contractor* that was debarred, suspended, or proposed for *debarment*.

Agency means any executive department, military department or defense *agency*, or other *agency* or independent establishment of the executive branch.

Civil judgment means the disposition of a civil action by any court of competent jurisdiction, whether by verdict, decision, settlement, stipulation, other disposition that creates a civil liability for the complained of wrongful acts, or a final determination of liability under the Program Fraud Civil Remedies Act of 1986 (31 U.S.C. 3801-3812).

Conviction means—

(1) A judgment or any other determination of guilt of a criminal offense by any court of competent jurisdiction, whether entered upon a verdict or plea, including a plea of nolo contendere; or

(2) Any other resolution that is the functional equivalent of a judgment establishing a criminal offense by a court of competent jurisdiction, including probation before judgment and deferred

prosecution. A disposition without the participation of the court is the functional equivalent of a judgment only if it includes an admission of guilt.

Contractor means any individual or other legal entity that–

(1) 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; or

(2) Conducts business, or reasonably *may* be expected to conduct business, with the Government as an agent or representative of another *contractor*.

Indictment means *indictment* for a criminal offense. An information or other filing by competent authority charging a criminal offense is given the same effect as an *indictment*.

Legal proceedings means any civil judicial proceeding to which the Government is a party or any criminal proceeding. The term includes appeals from such proceedings.

Nonprocurement Common Rule means the procedures used by Federal *Executive Agencies* to suspend, debar, or exclude individuals or entities from participation in nonprocurement transactions under Executive Order 12549. Examples of nonprocurement transactions are grants, cooperative agreements, scholarships, fellowships, contracts of assistance, loans, loan guarantees, subsidies, *insurance*, payments for specified use, and donation agreements. See 2 CFR part 180 and *agency* enacting regulations in 2 CFR subtitle B.

Pre-notice letter means a written correspondence issued to a *contractor* in a *suspension* or *debarment* matter, which does not immediately result in an exclusion or ineligibility. The letter is issued at the discretion of the *suspending and debarring official*. The letter is not a mandatory step in the *suspension* or *debarment* process.

Unfair trade practices means the commission of any or the following acts by a *contractor*–

(1) A violation of section 337 of the Tariff Act of 1930 (19 U.S.C. 1337) as determined by the International Trade Commission.

(2) A violation, as determined by the Secretary of Commerce, of any agreement of the group known as the "Coordination Committee" for purposes of the Export Administration Act of 1979 (50 U.S.C. App. 2401, et seq.) or any similar bilateral or multilateral export control agreement.

(3) A knowingly false statement regarding a material element of a certification concerning the foreign content of an item of supply, as determined by the Secretary of the Department or the *head of the agency* to which such certificate was furnished.

Voluntary exclusion means a *contractor*'s written agreement to be excluded for a period under the terms of a settlement between the *contractor* and the *suspending and debarring official* of one or more *agencies*. A *voluntary exclusion must* have Governmentwide effect.

9.404 Exclusions in the System for Award Management.

(a) The General Services Administration (GSA)—

(1) Operates the web-based *System for Award Management (SAM*), which contains exclusion records; and

(2) Provides technical assistance to *Federal agencies* in the use of SAM.

(b) An exclusion record in SAM contains the—

(1) Names and addresses of the entities debarred, suspended, proposed for *debarment*, voluntarily excluded, declared *ineligible*, or excluded or disqualified under the nonprocurement common rule, with cross-references when more than one name is involved in a single action;

(2) Name of the agency or other authority taking the action;

(3) Cause for the action (see 9.406-2 and 9.407-2 for causes authorized under this subpart) or other statutory or regulatory authority;

(4) Effect of the action;

(5) Termination date for each listing;

(6) *Unique Entity Identifier*;

(7) Social Security Number (SSN), Employer Identification Number (EIN), or other *Taxpayer Identification Number (TIN*), if available; and

(8) Name and telephone number of the agency point of contact for the action.

(c) Each agency *must*—

(1) Identify the individual(s) responsible for entering and updating exclusions data in SAM and assign the appropriate roles;

(2) Remove the exclusion roles in SAM when the individual leaves the organization or changes functions;

(3) For each exclusion, including each voluntary exclusion, accomplished by the agency–

(i) Enter the information required by paragraph (b) of this section within 3 working days after the action becomes effective;

(ii) Determine whether it is legally permitted to enter the SSN, EIN, or other TIN, under agency authority to suspend or debar; and

(iii) Update the exclusion record in SAM, generally within 5 working days after modifying or rescinding an action;

(4) In accordance with internal retention procedures, maintain records relating to each *debarment*, *suspension*, proposed *debarment*, or voluntary exclusion taken or entered into by the agency;

(5) Establish procedures to ensure that the agency does not solicit *offers* from, award contracts to, or *consent to subcontracts* with contractors who have an active exclusion record in SAM, except as otherwise provided in this subpart;

(6) Direct inquiries concerning listed contractors and other entities to the agency or other authority

that took the action; and

(7) Contact GSA for technical assistance with SAM, via the support e-mail address or on the technical support phone line.

(d) SAM is available via https://www.sam.gov.

9.405 Effect of listing.

(a) Contractors debarred, suspended, proposed for *debarment*, or voluntarily excluded, are excluded from receiving contracts, and agencies *shall* not solicit *offers* from, award contracts to, or *consent to subcontracts* with these contractors, unless the *agency head* determines that there is a compelling reason for such action (see 9.405-1(a)(2), 9.405-2, 9.406-1(d), 9.407-1(d), and 26.505(e)). Contractors debarred, suspended, proposed for *debarment*, or voluntarily excluded, are also excluded from conducting business with the Government as agents or representatives of other contractors.

(b) Contractors and other entities that have an active exclusion record in SAM because they have been declared *ineligible* on the basis of statutory or other regulatory procedures are excluded from receiving contracts, and if applicable, subcontracts, under the conditions and for the period set forth in the statute or regulation. Agencies *shall* not solicit *offers* from, award contracts to, or *consent to subcontracts* with these contractors under those conditions and for that period.

(c) Agencies *shall* not enter into, renew, or extend contracts with contractors that have been declared *ineligible* pursuant to 22 U.S.C. 2593e.

(d) Contractors debarred, suspended, proposed for *debarment*, or voluntarily excluded, are excluded from acting as individual *sureties* (see part 28).

(e)

(1) After the opening of bids or receipt of proposals or quotes, the *contracting officer shall* review the exclusion records in SAM.

(2) Bids received from any listed contractor in response to an invitation for bids *shall* be entered on the abstract of bids, and rejected unless the *agency head* determines *in writing* that there is a compelling reason to consider the bid.

(3) Proposals, quotations, or *offers* received from any listed contractor *shall* not be evaluated for award or included in the competitive range, nor *shall* discussions be conducted with a listed *offeror* during a period of ineligibility, unless the *agency head* determines, *in writing*, that there is a compelling reason to do so. If the period of ineligibility expires or is terminated prior to award, the *contracting officer may*, but is not required to, consider such proposals, quotations, or *offers*.

(4) Immediately prior to award, the *contracting officer shall* again review the exclusion records in SAM to ensure that no award is made to a listed contractor.

9.405-1 Continuation of current contracts.

(a) *Contractors debarred, suspended, proposed for debarment, or voluntarily excluded* .

(1) Notwithstanding the *debarment*, *suspension*, proposed *debarment*, or voluntary exclusion, of a contractor, agencies *may* continue contracts or subcontracts in existence at the time the contractor was debarred, suspended, proposed for *debarment*, or voluntarily excluded, unless the *agency head* directs otherwise. A decision as to the type of termination action, if any, to be taken *should* be made only after review by agency *contracting* and technical personnel and by counsel to ensure the propriety of the proposed action.

(2) For contractors debarred, suspended, proposed for *debarment*, or voluntarily excluded, unless the *agency head* makes a written determination of the compelling reasons for doing so, ordering activities *shall* not—

(i) Place orders exceeding the guaranteed minimum under indefinite quantity contracts;

(ii) Place orders under Federal Supply Schedule contracts, blanket purchase agreements, or basic ordering agreements; or

(iii) Add new work, exercise *options*, or otherwise extend the duration of current contracts or orders.

(b) *Ineligible* contractors. A covered agency, as defined in 9.110-1, *shall* terminate existing contracts and *shall* not place new orders or award new contracts with contractors that have been declared *ineligible* pursuant to 10 U.S.C. 983 (see 9.110), except for contracts at or below the *simplified acquisition threshold* or contracts for the *acquisition* of *commercial products* and *commercial services*.

9.405-2 Restrictions on subcontracting.

(a) When a contractor debarred, suspended, proposed for *debarment*, or voluntarily excluded, is proposed as a subcontractor for any subcontract subject to Government consent (see subpart 44.2), *contracting officers shall* not *consent to subcontracts* with such contractors unless the *agency head* states *in writing* the compelling reasons for this approval action. (See 9.405 concerning declarations of ineligibility affecting sub-*contracting*.)

(b) The Government suspends or debars contractors to protect the Government’s interests. Contractors are prohibited from entering into any subcontract in excess of $45,000, other than a subcontract for a commercially available off-the-shelf item, with a contractor that has been debarred, suspended, proposed for *debarment*, or voluntarily excluded, unless there is a compelling reason to do so. If a contractor intends to enter into a subcontract in excess of $45,000, other than a subcontract for a commercially available off-the-shelf item, with a party that is debarred, suspended, proposed for *debarment*, or voluntarily excluded, as evidenced by the party's having an active exclusion record in SAM (see 9.404), a corporate officer or designee of the contractor is required by operation of the clause at 52.209-6, Protecting the Government’s Interest when Subcontracting with Contractors Debarred, Suspended, Proposed for *Debarment*, or Voluntarily Excluded, to notify the *contracting officer*, *in writing*, before entering into such subcontract. For contracts for the *acquisition* of *commercial products*, the notification requirement applies only for first-tier subcontracts. For all other contracts, the notification requirement applies to subcontracts at any

tier. The notice *must* provide the following:

(1) The name of the subcontractor;

(2) The contractor’s knowledge of the reasons for the subcontractor having an active exclusion record in SAM;

(3) The compelling reason(s) for doing business with the subcontractor notwithstanding its having an active exclusion record in SAM; and

(4) The systems and procedures the contractor has established to ensure that it is fully protecting the Government’s interests when dealing with such subcontractor in view of the specific basis for the party’s *debarment*, *suspension*, proposed *debarment*, or voluntary exclusion.

(c) The contractor’s compliance with the requirements of 52.209-6 will be reviewed during Contractor Purchasing System Reviews (see subpart 44.3).

9.406 Debarment.

9.406-1 General.

(a) It is the *suspending and debarring official*'s responsibility to determine whether *debarment* is in the Government's interest. The *suspending and debarring official may*, in the public interest, debar a contractor for any of the causes in 9.406-3. The existence of a cause for *debarment*, however, does not necessarily require that the contractor be debarred; the seriousness of the contractor's acts or omissions and any remedial measures, mitigating factors, or aggravating factors *should* be considered in making any *debarment* decision. Before arriving at any *debarment* decision, the *suspending and debarring official should* consider factors such as the following (some of the factors below could apply to individuals such as contractors that are individuals, and are so marked):

(1) Whether the contractor had effective standards of conduct and internal control systems in place at the time of the activity which constitutes cause for *debarment* or had adopted such procedures prior to any Government investigation of the activity cited as a cause for *debarment*.

(2) Whether the contractor (including an individual) brought the activity cited as a cause for *debarment* to the attention of the appropriate Government agency in a timely manner.

(3) Whether the contractor has fully investigated the circumstances surrounding the cause for *debarment* (or the individual cooperated with the investigation) and, if so, made the result of the investigation available to the *suspending and debarring official*.

(4) Whether the contractor (including an individual) cooperated fully with Government agencies during the investigation and any court or administrative action.

(5) Whether the contractor (including an individual) has paid or has agreed to pay all criminal, civil, and administrative liability for the improper activity, including any investigative or administrative costs incurred by the Government, and has made or agreed to make full restitution.

(6) Whether the contractor has taken appropriate disciplinary action against the individuals responsible for the activity which constitutes cause for *debarment*.

(7) Whether the contractor (including an individual) has implemented or agreed to implement remedial measures, including any identified by the Government.

(8)

(i) Whether the contractor has instituted or agreed to institute new or revised review and control procedures, ethics training, or other relevant training programs.

(ii) For an individual, whether the individual has attended relevant remediation training.

(9) Whether the contractor (including an individual) has had adequate time to eliminate the circumstances that led to the cause for *debarment*.

(10)

(i) Whether the contractor's management recognizes, accepts, and understands the seriousness of the misconduct giving rise to the cause for *debarment* and has implemented programs to prevent recurrence.

(ii) For an individual, whether the individual recognizes, accepts, and understands the seriousness of the misconduct giving rise to the cause for *debarment* and has adopted practices to prevent recurrence.

(11) Whether the contractor (including an individual) has a pattern or prior history of wrongdoing, the frequency of incidents and/or duration of the wrongdoing, and the actual or potential harm or impact that results, or *may* result, from the wrongdoing.

(12) Whether and to what extent the contractor (including an individual) planned, initiated, or carried out the wrongdoing, and the kind of positions within the contractor's organization held by the individual involved in the wrongdoing.

(13) Whether the wrongdoing was pervasive within the contractor's organization.

(14) Whether the individual or the contractor's principals tolerated the offense.

(15) Whether the contractor (including an individual) is or has been excluded or disqualified by an agency of the Federal Government or has not been allowed to participate in State or local contracts or assistance agreements on a basis of conduct similar to one or more of the causes for *debarment* specified in this subpart.

(16) Whether the contractor (including an individual) has entered into an administrative agreement with a *Federal agency* or a similar agreement with a State or local government that is not Governmentwide but is based on conduct similar to one or more of the causes for *debarment* specified in this subpart.

(17) Whether there are any other factors to consider for the contractor (including an individual) appropriate to the circumstances of a particular case.

(b) The existence or nonexistence of any aggravating or mitigating factors or remedial measures such as set forth in paragraph (a) of this section is not necessarily determinative of a contractor's present responsibility. Accordingly, if a cause for *debarment* exists, the contractor has the burden of demonstrating, to the satisfaction of the *suspending and debarring official*, its present responsibility

and that *debarment* is not necessary.

(c) *Debarment* constitutes *debarment* of all divisions or other organizational elements of the contractor, unless the *debarment* decision is limited by its terms to specific divisions, organizational elements, or commodities. The *suspending and debarring official may* extend the *debarment* decision to include any *affiliates* of the contractor if they are—

(1) Specifically named; and

(2) Given written notice of the proposed *debarment* and an opportunity to respond (see 9.406-3(c)).

(d) A contractor's *debarment*, or proposed *debarment*, *shall* be effective throughout the executive branch of the Government, unless the *agency head* or a designee (except see 26.505(e)) states *in writing* the compelling reasons justifying continued business dealings between that agency and the contractor.

(e)

(1) When the *suspending and debarring official* has authority to debar contractors from both contracts pursuant to the Federal *Acquisition* Regulation in this chapter and contracts for the purchase of Federal *personal property* pursuant to the Federal Management Regulation (FMR) in 41 CFR part 102-38, that official *shall* consider simultaneously debarring the contractor from the award of *acquisition* contracts and from the purchase of Federal *personal property*.

(2) When debarring a contractor from the award of *acquisition* contracts and from the purchase of Federal *personal property*, the *debarment* notice *shall* so indicate and the appropriate FAR and FMR citations *shall* be included.

9.406-2 Causes for debarment.

The *suspending and debarring official may* debar-

(a) A contractor for a *conviction* of or civil judgment for-

(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) 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 Law102-558)); or

(5) 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.

(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.

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

(A) Failure to comply with the requirements of the clause at 52.226-7, *Drug-Free Workplace*; or

(B) Such a number of contractor employees convicted of violations of criminal drug statutes occurring in the workplace as to indicate that the contractor has failed to make a good faith effort to provide a *drug-free workplace* (see 26.504).

(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 Law102-558)).

(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 $10;000.

(A) Federal taxes are considered delinquent for purposes of this provision if both of the following criteria apply:

(1) *The tax liability is finally determined.* The liability is finally determined if it has been assessed. A liability is not finally determined if there is a pending administrative or judicial challenge. In the case of a judicial challenge to the liability, the liability is not finally determined until all judicial appeal rights have been exhausted.

(2) *The taxpayer is delinquent in making payment.* A taxpayer is delinquent if the taxpayer has failed to pay the tax liability when full payment was due and required. A taxpayer is not delinquent in cases where enforced collection action is precluded.

(B) Examples.

(1) The taxpayer has received a statutory notice of deficiency, under I.R.C. §6212, which entitles the taxpayer to seek Tax Court review of a proposed tax deficiency. This is not a delinquent tax because it is not a final tax liability. *Should* the taxpayer seek Tax Court review, this will not be a final tax

liability until the taxpayer has exercised all judicial appeal rights.

(2) The IRS has filed a notice of Federal tax lien with respect to an assessed tax liability, and the taxpayer has been issued a notice under I.R.C. §6320 entitling the taxpayer to request a hearing with the IRS Office of Appeals contesting the lien filing, and to further appeal to the Tax Court if the IRS determines to sustain the lien filing. In the course of the hearing, the taxpayer is entitled to contest the underlying tax liability because the taxpayer has had no prior opportunity to contest the liability. This is not a delinquent tax because it is not a final tax liability. *Should* the taxpayer seek tax court review, this will not be a final tax liability until the taxpayer has exercised all judicial appeal rights.

(3) *The taxpayer has entered into an installment agreement pursuant to I.R.C. §6159.* The taxpayer is making timely payments and is in full compliance with the agreement terms. The taxpayer is not delinquent because the taxpayer is not currently required to make full payment.

(4) *The taxpayer has filed for bankruptcy protection.* The taxpayer is not delinquent because enforced collection action is stayed under 11 U.S.C. 362 (the Bankruptcy Code).

(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.

(vii) Determination of a false certification under 52.209-13, Violation of Arms Control Treaties or Agreements-Certification.

(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.

(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.

9.406-3 Procedures.

(a) *Investigation and referral*. Agencies *shall* establish procedures for the prompt reporting, investigation, and referral to the *suspending and debarring official* of matters appropriate for that official's consideration.

(b) *Decision-making process.*

(1) Agencies *shall* establish procedures governing the *debarment* decision-making process that are as informal as is practicable, consistent with principles of fundamental fairness. These procedures *shall* afford the contractor (and any specifically named *affiliates*) an opportunity to submit, in person,

in writing, or through a representative, information and argument in opposition to the proposed *debarment*. If the *suspending and debarring official* extends the opportunity for the contractor to submit material in opposition, then the official *should* also give a deadline for submission of materials. The *suspending and debarring official may* use flexible procedures to allow a contractor to present matters in opposition in person or remotely through appropriate technology; if so, the *suspending and debarring official should* change the notice in paragraph (c)(3)(iv) of this section to include those flexible procedures.

(2) In actions not based upon a *conviction* or civil judgment, if it is found that the contractor's submission in opposition raises a genuine dispute over facts material to the proposed *debarment*, agencies *shall* also-

(i) Afford the contractor an opportunity to appear with counsel, submit documentary evidence, present witnesses, and confront any person the agency presents; and

(ii) Make a transcribed record of the proceedings and make it available at cost to the contractor upon request, unless the contractor and the agency, by mutual agreement, waive the requirement for a transcript.

(c) *Notice of proposal to debar*. A notice of proposed *debarment shall* be issued by the *suspending and debarring official* to the contractor and any specifically named *affiliates*.

(1) The written notice *shall* be sent—

(i) By U.S. mail or private delivery service to the last known street address, with delivery notification service;

(ii) By email to the point of contact email address in the contractor's SAM registration, if any, or to the last known email address as confirmed by the agency; or

(iii) By certified mail to the last known street address with return receipt requested.

(2) The notice *shall* be sent—

(i) To the contractor, the contractor's identified counsel for purposes of the administrative proceedings, or the contractor's agent for service of process; and

(ii) For each specifically named affiliate, to the affiliate itself, the affiliate's identified counsel for purposes of the administrative proceedings, or the affiliate's agent for service of process.

(3) The notice *shall* state—

(i) That *debarment* is being considered;

(ii) The reasons for the proposed *debarment* in terms sufficient to put the contractor on notice of the conduct or transaction(s) upon which it is based;

(iii) The cause(s) relied upon under 9.406-2 for proposing *debarment*;

(iv) That, within 30 days after receipt of the notice, the contractor *may* submit, in person, *in writing*, or through a representative, information and argument in opposition to the proposed *debarment*, including any additional specific information that raises a genuine dispute over the material facts;

(v) The agency's procedures governing *debarment* decision making;

(vi) The effect of the issuance of the notice of proposed *debarment*;

(vii) The potential effect of an actual *debarment*;

(viii) That in addition to any information and argument in opposition to a proposed *debarment*, the contractor *must* identify—

(A) Specific facts that contradict the statements contained in the notice of proposed *debarment*. Include any information about any of the factors listed in 9.406-1(a). A general denial is insufficient to raise a genuine dispute over facts material to the proposed *debarment*;

(B) All existing, proposed, or prior exclusions and all similar actions taken by Federal, State, or local agencies, including administrative agreements that affect only those agencies;

(C) All criminal and civil proceedings not included in the notice of proposed *debarment* that grew out of facts relevant to the cause(s) stated in the notice; and

(D) All of the contractor's *affiliates*; and

(ix) That if the contractor fails to disclose the information in paragraph (c)(3)(viii) of this section, or provides false information, the agency taking the action *may* seek further criminal, civil, or administrative action against the contractor, as appropriate.

(d) *Suspending and debarring official's decision*.

(1) In actions based upon a *conviction* or civil judgment, or in which there is no genuine dispute over material facts, the *suspending and debarring official shall* make a decision on the basis of all the information in the administrative record, including any submission made by the contractor. If no *suspension* is in effect, the decision *shall* be made within 45 days from the date that the official administrative record is closed, unless the *suspending and debarring official* extends this period for good cause. The official record closes upon the expiration of the contractor's time to submit information and argument in opposition, including any extensions (see paragraph (b)(1) of this section).

(2)

(i) In actions in which additional proceedings are necessary as to disputed material facts, written findings of fact *shall* be prepared. The *suspending and debarring official shall* base the decision on the facts as found, together with any information and argument submitted by the contractor and any other information in the administrative record.

(ii) The *suspending and debarring official may* refer matters involving disputed material facts to another official for findings of fact. The *suspending and debarring official may* reject any such findings, in whole or in part, only after specifically determining them to be arbitrary and capricious or clearly erroneous.

(iii) The *suspending and debarring official*'s decision *shall* be made after the conclusion of the proceedings with respect to disputed facts.

(3) In any action in which the proposed *debarment* is not based upon a *conviction* or civil judgment, the cause for *debarment must* be established by a *preponderance of the evidence*.

(e) *Notice of suspending and debarring official's decision*.

(1) If the *suspending and debarring official* decides to impose *debarment*, the contractor and any *affiliates* involved *shall* be given prompt notice using the procedures in paragraphs (c)(1) and (2) of this section—

(i) Referring to the notice of proposed *debarment*;

(ii) Specifying the reasons for *debarment*;

(iii) Stating the period of *debarment*, including effective dates; and

(iv) Advising that the *debarment* is effective throughout the executive branch of the Government unless the head of an agency or a designee makes the statement called for by 9.406-1(d).

(2) If *debarment* is not imposed, the *suspending and debarring official shall* promptly notify the contractor and any *affiliates* involved, using the procedures in paragraphs (c)(1) and (2) of this section.

(f) *Administrative agreements*.

(1) If the contractor enters into an administrative agreement with the Government in order to resolve a *debarment* or potential *debarment* proceeding, the *suspending and debarring official shall* access the website (available at https://www.cpars.gov, then select FAPIIS), enter the requested information, and upload documentation reflecting the administrative agreement.

(2) The *suspending and debarring official* is responsible for the timely and accurate submission of documentation reflecting the administrative agreement. The submission *should* be made within 3 working days.

(3) With regard to information that *may* be covered by a disclosure exemption under the Freedom of Information Act, the *suspending and debarring official shall* follow the procedures at 9.105-2(b)(2)(iv).

(g) *Voluntary exclusions*.

(1) If the contractor enters into a voluntary exclusion with the Government in order to resolve a *debarment* or potential *debarment* matter, the *suspending and debarring official shall* access the website (available at https://www.sam.gov) and enter the requested information into the exclusions section of SAM (see 9.404(c)(3)).

(2) The *suspending and debarring official* is responsible for the timely and accurate submission of documentation reflecting the voluntary exclusion. The submission *should* be made within 3 working days.

(3) Regarding information that *may* be covered by a disclosure exemption under the Freedom of Information Act, the *suspending and debarring official shall* follow the procedures at 9.105-2(b)(2)(iv).

(h) *Pre-notice letters*. Prior to initiating a proposed *debarment*, a pre-notice letter *may* be issued at the discretion of the agency *suspending and debarring official*. A pre-notice letter is not required to initiate *debarment* under this subpart. (See 9.403.)

9.406-4 Period of debarment.

(a)

(1) *Debarment shall* be for a period commensurate with the seriousness of the cause(s). Generally, *debarment should* not exceed 3 years, except that-

(i) *Debarment* for violation of the provisions of 41 U.S.C. chapter 81, *Drug-Free Workplace* (see 26.505) *may* be for a period not to exceed 5 years;

(ii) *Debarments* under 9.406-2(b)(2) *shall* be for 1 year unless extended pursuant to paragraph (b) of this section; and

(iii) *Debarments* under 9.406-2(b)(1)(vii) *shall* be for a period of not less than 2 years, inclusive of any *suspension* period, if *suspension* precedes a *debarment* (see paragraph (a)(2) of this section).

(2) If *suspension* precedes a *debarment*, the *suspension* period *shall* be considered in determining the *debarment* period.

(b) The *suspending and debarring official may* extend the *debarment* for an additional period, if that official determines that an extension is necessary to protect the Government's interest. However, a *debarment may* not be extended solely on the basis of the facts and circumstances upon which the initial *debarment* action was based. *Debarments* under 9.406-2(b)(2) *may* be extended for additional periods of one year if the Secretary of Homeland Security or the Attorney General determines that the contractor continues to be in violation of the employment provisions of the Immigration and Nationality Act. If *debarment* for an additional period is determined to be necessary, the procedures of 9.406-3 *shall* be followed to extend the *debarment*.

(c) The *suspending and debarring official may* reduce the period or extent of *debarment*, upon the contractor's request, supported by documentation, for reasons such as-

(1) Newly discovered material evidence;

(2) Reversal of the *conviction* or civil judgment upon which the *debarment* was based;

(3) Bona fide change in ownership or management;

(4) Elimination of other causes for which the *debarment* was imposed; or

(5) Other reasons the the *suspending and debarring official* deems appropriate.

9.406-5 Scope of debarment.

(a) The fraudulent, criminal, or other seriously improper conduct of any officer, director, shareholder, partner, employee, or other individual associated with a contractor *may* be imputed to the contractor when the conduct occurred in connection with the individual's performance of duties for or on behalf of the contractor, or with the contractor's knowledge, approval, or acquiescence. The contractor's acceptance of the benefits derived from the conduct *shall* be evidence of such knowledge, approval, or acquiescence.

(b) The fraudulent, criminal, or other seriously improper conduct of a contractor *may* be imputed to any officer, director, shareholder, partner, employee, or other individual associated with the contractor who participated in, knew of, or had reason to know of the contractor’s conduct.

(c) The fraudulent, criminal, or other seriously improper conduct of one contractor participating in a joint venture or similar arrangement *may* be imputed to other participating contractors if the conduct occurred for or on behalf of the joint venture or similar arrangement, or with the knowledge, approval, or acquiescence of these contractors. Acceptance of the benefits derived from the conduct *shall* be evidence of such knowledge, approval, or acquiescence.

9.407 Suspension.

9.407-1 General.

(a) The *suspending and debarring official may*, in the public interest, suspend a contractor for any of the causes in 9.407-2, using the procedures in 9.407-3.

(b)

(1) *Suspension* is a serious action to be imposed on the basis of *adequate evidence*, pending the completion of an investigation or legal proceedings, when it has been determined that immediate action is necessary to protect the Government's interest. In deciding whether immediate action is necessary to protect the Government's interest, the *suspending and debarring official* has wide discretion. The *suspending and debarring official may* infer the necessity for immediate action to protect the Government's interest either from the nature of the circumstances giving rise to a cause for *suspension* or from potential business relationships or involvement with a program of the Federal Government. In assessing the adequacy of the evidence, agencies *should* consider how much information is available, how credible it is given the circumstances, whether or not important allegations are corroborated, and what inferences can reasonably be drawn as a result. This assessment *should* include an examination of basic documents such as contracts, *inspection* reports, and correspondence. An indictment or other official findings by Federal, State, or local bodies that determine factual and/or legal matters, constitutes *adequate evidence* for purposes of *suspension* actions.

(2) The existence of a cause for *suspension* does not necessarily require that the contractor be suspended. The *suspending and debarring official should* consider the seriousness of the contractor's acts or omissions and *may*, but is not required to, consider remedial measures, mitigating factors, or aggravating factors, such as those in 9.406-1(a). A contractor has the burden of promptly presenting to the *suspending and debarring official* evidence of remedial measures or mitigating factors when it has reason to know that a cause for *suspension* exists. The existence or nonexistence of any remedial measures or aggravating or mitigating factors is not necessarily determinative of a contractor's present responsibility.

(c) *Suspension* constitutes *suspension* of all divisions or other organizational elements of the contractor, unless the *suspension* decision is limited by its terms to specific divisions, organizational elements, or commodities. The *suspending and debarring official may* extend the *suspension* decision to include any *affiliates* of the contractor if they are-

(1) Specifically named; and

(2) Given written notice of the *suspension* and an opportunity to respond (see 9.407-3(c)).

(d) A contractor's *suspension shall* be effective throughout the executive branch of the Government, unless the *agency head* or a designee (except see 26.505(e)) states *in writing* the compelling reasons justifying continued business dealings between that agency and the contractor.

(e)

(1) When the *suspending and debarring official* has authority to suspend contractors from both contracts pursuant to the Federal *Acquisition* Regulation in this chapter and contracts for the purchase of Federal *personal property* pursuant to Federal Management Regulation (FMR) in 41 CFR part 102-38, that official *shall* consider simultaneously suspending the contractor from the award of *acquisition* contracts and from the purchase of Federal *personal property*.

(2) When suspending a contractor from the award of *acquisition* contracts and from the purchase of Federal *personal property*, the *suspension* notice *shall* so indicate and the appropriate FAR and FMR citations *shall* be included.

9.407-2 Causes for suspension.

(a) The *suspending and debarring official may* suspend a contractor suspected, upon *adequate evidence*, of-

(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*, as indicated by-

(i) Failure to comply with the requirements of the clause at 52.226-7, *Drug-Free Workplace*; or

(ii) Such a number of contractor employees convicted of violations of criminal drug statutes occurring in the workplace as to indicate that the contractor has failed to make a good faith effort to provide a *drug-free workplace* (see 26.504);

(5) 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 Law102-558));

(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 $10;000. See the criteria at 9.406-2(b)(1)(v) for determination of when taxes are delinquent;

(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) Determination of a false certification under 52.209-13, Violation of Arms Control Treaties or Agreements-Certification.

(10) 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.

(b) Indictment for any of the causes in paragraph (a) of this section constitutes *adequate evidence* for *suspension*.

(c) The *suspending and debarring official may* upon *adequate evidence* also suspend a contractor for any other cause of so serious or compelling a nature that it affects the present responsibility of a Government contractor or subcontractor.

9.407-3 Procedures.

(a) *Investigation and referral*. Agencies *shall* establish procedures for the prompt reporting, investigation, and referral to the *suspending and debarring official* of matters appropriate for that official's consideration.

(b) *Decision-making process*.

(1) Agencies *shall* establish procedures governing the *suspension* decision-making process that are as informal as is practicable, consistent with principles of fundamental fairness. These procedures *shall* afford the contractor (and any specifically named *affiliates*) an opportunity, following the imposition of *suspension*, to submit, in person, *in writing*, or through a representative, information and argument in opposition to the *suspension*. If the *suspending and debarring official* extends the opportunity for the contractor to submit material in opposition, then the official *should* also give a deadline for submission of materials. The *suspending and debarring official may* use the flexible procedures in 9.406-3(b)(1); if so, the *suspending and debarring official should* change the notice in paragraph (c)(5) of this section to include those flexible procedures.

(2) In actions not based on an indictment, if it is found that the contractor's submission in opposition raises a genuine dispute over facts material to the *suspension* and if no determination has been

made, on the basis of advice from the Department of Justice, a U.S. Attorney's office, State attorney general's office, or a 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, agencies *shall* also-

(i) Afford the contractor an opportunity to appear with counsel, submit documentary evidence, present witnesses, and confront any person the agency presents; and

(ii) Make a transcribed record of the proceedings and make it available at cost to the contractor upon request, unless the contractor and the agency, by mutual agreement, waive the requirement for a transcript.

(c) *Notice of suspension*. When a contractor and any specifically named *affiliates* are suspended, they *shall* be immediately advised using the procedures in 9.406-3(c)(1) and (2)—

(1) That they have been suspended and that the *suspension* is based on an indictment or other *adequate evidence* that the contractor has committed irregularities–

(i) Of a serious nature in business dealings with the Government; or

(ii) Seriously reflecting on the propriety of further Government dealings with the contractor—any such irregularities *shall* be described in terms sufficient to place the contractor on notice without disclosing the Government's evidence;

(2) That the *suspension* is for a temporary period pending the completion of an investigation and such legal proceedings as *may* ensue;

(3) Of the cause(s) relied upon under 9.407-2 for imposing *suspension*;

(4) Of the effect of the *suspension*;

(5) That, within 30 days after receipt of the notice, the contractor *may* submit, in person, *in writing*, or through a representative, information and argument in opposition to the *suspension*, including any additional specific information that raises a genuine dispute over the material facts;

(6) That additional proceedings to determine disputed material facts will be conducted unless–

(i) The action is based on an indictment; or

(ii) A determination is made, on the basis of advice by the Department of Justice, a U.S. Attorney's office, State attorney general's office, or a State or local prosecutor's office, that the substantial interests of the Government in pending or contemplated legal proceedings based on the same facts as the *suspension* would be prejudiced;

(7) That, in addition to any information and argument in opposition to a *suspension*, the contractor *must* identify–

(i) Specific facts that contradict the statements contained in the notice of *suspension*. Include any information about any of the factors listed in 9.406-1(a). A general denial is insufficient to raise a genuine dispute over facts material to the *suspension*;

(ii) All existing, proposed, or prior exclusions and all similar actions taken by Federal, State, or local agencies, including administrative agreements that affect only those agencies;

(iii) All criminal and civil proceedings not included in the notice of *suspension* that grew out of facts relevant to the cause(s) stated in the notice; and

(iv) All of the contractor's *affiliates*; and

(8) That if the contractor fails to disclose the information in paragraph (c)(7) of this section or provides false information, the agency taking the action *may* seek further criminal, civil, or administrative action against the contractor, as appropriate.

(d) *Suspending and debarring official's decision*.

(1) The *suspending and debarring official*'s decision *shall* be based on all the information in the administrative record, including any submission made by the contractor, for actions—

(i) Based on an indictment;

(ii) In which the contractor's submission does not raise a genuine dispute over material facts; or

(iii) In which additional proceedings to determine disputed material facts have been denied on the basis of advice from the Department of Justice, a U.S. Attorney's office, State attorney general's office, or a State or local prosecutor's office.

(2)

(i) In actions in which additional proceedings are necessary as to disputed material facts, written findings of fact *shall* be prepared. The *suspending and debarring official shall* base the decision on the facts as found, together with any information and argument submitted by the contractor and any other information in the administrative record.

(ii) Thesuspending and debarring official *may* refer matters involving disputed material facts to another official for findings of fact. The *suspending and debarring official may* reject any such findings, in whole or in part, only after specifically determining them to be arbitrary and capricious or clearly erroneous.

(iii) The *suspending and debarring official*'s decision *shall* be made after the conclusion of the proceedings with respect to disputed facts.

(3) The *suspending and debarring official may* modify or terminate the *suspension* or leave it in force (for example, see 9.406-4(c) for the reasons for reducing the period or extent of *debarment*). However, a decision to modify or terminate the *suspension shall* be without prejudice to the subsequent imposition of—

(i) *Suspension* by any other agency; or

(ii) *Debarment* by any agency.

(4) Prompt written notice of the *suspending and debarring official*'s decision *shall* be sent to the contractor and any *affiliates* involved, using the procedures in 9.406-3(c)(1) and (2).

(e) *Administrative agreement*.

(1) If the contractor enters into an administrative agreement with the Government in order to resolve a *suspension* or potential *suspension* proceeding, the *suspending and debarring official shall* access the website (available at *https://www.cpars.gov*, then select FAPIIS), enter the requested information, and upload documentation reflecting the administrative agreement.

(2) The *suspending and debarring official* is responsible for the timely and accurate submission of documentation reflecting the administrative agreement. The submission *should* be made within 3 working days.

(3) With regard to information that *may* be covered by a disclosure exemption under the Freedom of Information Act, the *suspending and debarring official shall* follow the procedures at 9.105-2(b)(2)(iv).

(f) *Voluntary exclusion*.

(1) If the contractor enters into a voluntary exclusion with the Government in order to resolve a *suspension* or potential *suspension* proceeding, the *suspending and debarring official shall* access the website (available at https://www.sam.gov) and enter the requested information into the exclusions section of SAM (see 9.404(c)(3)).

(2) The *suspending and debarring official* is responsible for the timely and accurate submission of documentation reflecting the voluntary exclusion. The submission *should* be made within 3 working days.

(3) Regarding information that *may* be covered by a disclosure exemption under the Freedom of Information Act, the *suspending and debarring official shall* follow the procedures at 9.105-2(b)(2)(iv).

(g) *Pre-notice letter*. Prior to initiating a *suspension*, a pre-notice letter *may* be issued at the discretion of the agency *suspending and debarring official*. A pre-notice letter is not required to initiate *suspension* under this subpart. (See 9.403.)

9.407-4 Period of suspension.

(a) *Suspension shall* be for a temporary period pending the completion of an investigation and any ensuing legal proceedings, unless sooner terminated by the *suspending and debarring official* or as provided in this section.

(b) If legal proceedings are not initiated within 12 months after the date of the *suspension* notice, the *suspension shall* be terminated unless an office of a U.S. Assistant Attorney General, U.S. Attorney, or other responsible prosecuting official requests its extension, in which case it *may* be extended for an additional 6 months. In no event *may* a *suspension* extend beyond 18 months, unless legal proceedings have been initiated within that period.

(c) The *suspending and debarring official shall* notify the Department of Justice or other responsible prosecuting official of the proposed termination of the *suspension*, at least 30 days before the 12-month period expires, to give that official an opportunity to request an extension on the Government's behalf.

9.407-5 Scope of suspension.

The scope of *suspension shall* be the same as that for *debarment* (see 9.406-5), except that the procedures of 9.407-3 *shall* be used in imposing *suspension*.

9.408 [Reserved]

9.409 Contract clause.

The *contracting officer shall* insert the clause at 52.209-6, Protecting the Government's Interest when Subcontracting with Contractors Debarred, Suspended, Proposed for *Debarment*, or Voluntarily Excluded, in *solicitations* and contracts where the contract value exceeds $45,000.