

SUBPART 209.4--DEBARMENT, SUSPENSION, AND INELIGIBILITY

(Revised November 18, 1999)

209.402 Policy.

(d) The suspension and debarment procedures in Appendix H are to be followed by all debarring and suspending officials.

(e) The department or agency shall provide a copy of Appendix H, Debarment and Suspension Procedures, to contractors at the time of their suspension or when they are proposed for debarment, and upon request to other interested parties.

209.403 Definitions.

“Debarring and suspending official.”

(1) For DoD, the designees are—

Army--Commander, U.S. Army Legal Services Agency

Navy--The General Counsel of the Department of the Navy

Air Force--Deputy General Counsel (Contractor Responsibility)

Defense Advanced Research Projects Agency--The Director

Defense Information Systems Agency--The General Counsel

Defense Logistics Agency--The Special Assistant for Contracting Integrity

National Imagery and Mapping Agency--The General Counsel

Defense Threat Reduction Agency--The Director

National Security Agency--The Director

Ballistic Missile Defense Organization--The General Counsel

Overseas installations--as designated by the agency head

(2) Overseas debarring and suspending officials—

(i) Are authorized to debar or suspend contractors located within the official's geographic area of responsibility under any delegation of authority they receive from their agency head.

(ii) Debar or suspend in accordance with the procedures in FAR Subpart 9.4 or under modified procedures approved by the agency head based on consideration of the laws or customs of the foreign countries concerned.

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(iii) In addition to the bases for debarment in FAR 9.406-2, may consider the following additional bases—

(A) The foreign country concerned determines that a contractor has engaged in bid-rigging, price-fixing, or other anti-competitive behavior; or

(B) The foreign country concerned declares the contractor to be formally debarred, suspended, or otherwise ineligible to contract with that foreign government or its instrumentalities.

(3) The Defense Logistics Agency Special Assistant for Contracting Integrity is the exclusive representative of the Secretary of Defense to suspend and debar contractors from the purchase of Federal personal property under the Federal Property Management Regulations (41 CFR 101-45.6) and the Defense Materiel Disposition Manual (DoD 4160.21-M).

209.405 Effect of listing.

Under 10 U.S.C. 2393b, when a department or agency determines that a compelling reason exists for it to conduct business with a contractor that is on the list of parties excluded from procurement programs, it shall provide written notice of the determination to the General Services Administration, Office of Acquisition Policy. Examples of compelling reasons are—

(1) Only a listed contractor can provide the supplies or services;

(2) Urgency requires contracting with a listed contractor;

(3) The contractor and a department or agency have an agreement covering the same events which resulted in the listing and the agreement includes the department/agency decision not to debar or suspend the contractor; or

(4) The national defense requires continued business dealings with the listed contractor.

209.405-1 Continuation of current contracts.

(b) Unless the agency head makes a written determination that a compelling reason exists to do so, ordering activities shall not—

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

(ii) When the agency is an optional user, place orders against Federal Supply Schedule contracts.

(c) This includes exercise of options.

209.405-2 Restrictions on subcontracting.

(a) The contracting officer shall not consent to any subcontract with a firm, or a subsidiary of a firm, that is identified by the Secretary of Defense as being owned or

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controlled by the government of a terrorist country unless the agency head states in writing the compelling reasons for the subcontract.

209.406 Debarment.

209.406-1 General.

(a)(i) When the debarring official decides that debarment is not necessary, the official may require the contractor to enter into a written agreement which includes—

(A) A requirement for the contractor to establish, if not already established, and to maintain the standards of conduct and internal control systems prescribed by Subpart 203.70; and

(B) Other requirements the debarring official considers appropriate.

(ii) Before the debarring official decides not to suspend or debar in the case of an indictment or conviction for a felony, the debarring official must determine that the contractor has addressed adequately the circumstances that gave rise to the misconduct, and that appropriate standards of ethics and integrity are in place and are working.

209.406-2 Causes for debarment.

(a) Any person shall be considered for debarment if criminally convicted of intentionally affixing a label bearing a “Made in America” inscription to any product sold in or shipped to the United States that was not made in America (10 U.S.C. 2410f).

(i) The debarring official will make a determination concerning debarment not later than 90 days after determining that a person has been so convicted.

(ii) In cases where the debarring official decides not to debar, the debarring official will report that decision to the Director of Defense Procurement who will notify Congress within 30 days after the decision is made.

209.406-3 Procedures.

(a) *Investigation and referral.*

(i) Refer all matters appropriate for consideration by an agency debarring and suspending official as soon as practicable to the appropriate debarring and suspending official identified in 209.403. Any person may refer a matter to the debarring and suspending official.

(ii) Use the following format when referring a matter to the agency debarring and suspending official for consideration. To the extent practicable, provide all specified information.

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

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(B) Name, contractor and Government entity (CAGE) code, and address of the contractor.

(C) Name and addresses of the members of the board, principal officers, partners, owners, and managers.

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

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

(1) The contract number;

(2) All office identifying numbers or symbols;

(3) Description of supplies or services;

(4) The amount;

(5) The percentage of completion;

(6) The amount paid the contractor;

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

(8) The amount due the contractor.

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

(1) The contract number;

(2) The amount;

(3) The amounts paid the contractor;

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

(5) The amount due the contractor.

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

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

(I) If a contracting office initiates the report, the comments and recommendations of the contracting officer and of each higher-level contracting review authority regarding—

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- (1) Whether to suspend or debar the contractor;
 - (2) Whether to apply limitations to the suspension or debarment;
 - (3) The period of any recommended debarment; and
 - (4) Whether to continue any current contracts with the contractor (or explain why a recommendation regarding current contracts is not included).
- (J) When appropriate, as an enclosure to the report—
- (1) A copy or pertinent extracts of each pertinent contract;
 - (2) Witness statements or affidavits;
 - (3) Copies of investigative reports when authorized by the investigative agency;
 - (4) Certified copies of indictments, judgments, and sentencing actions; and
 - (5) A copy of any available determinations of nonresponsibility in accordance with FAR 9.105-2(a)(1); and
 - (6) Any other appropriate exhibits or documentation.
- (iii) Send three copies of each report, including enclosures, to the appropriate debarring and suspending official.
- (iv) If a referral lacks sufficient evidence of a cause for debarment, the debarring and suspending official may initiate a review or investigation, as appropriate, by reporting the referral to the appropriate Government entity, e.g., contracting activity, inspector general, or criminal investigative agency.
- (b) *Decisionmaking process.*
- (i) The agency debarring and suspending official may initiate the debarment process by issuing a notice of proposed debarment in accordance with FAR 9.406-3(c) when the debarring and suspending official finds that the administrative record contains sufficient evidence of one or more of the causes for debarment stated in FAR 9.406-2 or 209.406-2.
 - (A) The absence of a referral in accordance with paragraph (a)(i) of this subsection, or the absence of any information specified in the report format in paragraph (a)(ii) of this subsection, will not preclude the debarring and suspending official from making such a finding.
 - (B) The signature of the debarring and suspending official on the notice of proposed debarment is sufficient evidence that the debarring and suspending official has made such a finding.

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(ii) The agency debarring and suspending official must use the decisionmaking process stated in FAR 9.406-3(b), DFARS Appendix H, and any agency-specific procedures that were provided to the contractor in advance of the decision.

(d) *Debarring official's decision.* The absence of a referral in accordance with paragraph (a)(i) of this subsection, or the absence of any information specified in the report format in paragraph (a)(ii) of this subsection, will not preclude the debarring and suspending official from making a decision.

209.407 Suspension.

209.407-3 Procedures.

(a) Investigation and referral.

(i) Refer all matters appropriate for consideration by an agency debarring and suspending official as soon as practicable to the appropriate debarring and suspending official identified in 209.403. Any person may refer a matter to the debarring and suspending official.

(ii) Use the format at 209.406-3(a)(ii) when referring a matter to the agency debarring and suspending official for consideration. To the extent practicable, provide all information specified in the format.

(iii) If a referral lacks sufficient evidence of a cause for suspension, the debarring and suspending official may initiate a review or investigation, as appropriate, by reporting the referral to the appropriate Government entity, e.g., contracting activity, inspector general, or criminal investigative agency.

(b) Decisionmaking process.

(i) The agency debarring and suspending official may initiate the suspension process by issuing a notice of suspension in accordance with FAR 9.407-3(c) when the debarring and suspending official finds that the administrative record contains sufficient evidence of one or more of the causes for suspension stated in FAR 9.407-2.

(A) The absence of a referral in accordance with paragraph (a)(i) of this subsection, or the absence of any information specified in the report format at 209.406-3(a)(ii), will not preclude the debarring and suspending official from making such a finding.

(B) The signature of the debarring and suspending official on the notice of suspension is sufficient evidence that the debarring and suspending official has made such a finding.

(ii) In deciding whether to terminate a suspension following a submission of matters in opposition, the agency debarring and suspending official must use the decisionmaking process stated in FAR 9.407-3(b), DFARS Appendix H, and any

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agency-specific procedures that were provided to the contractor in advance of the decision.

(d) *Suspending official's decision.* The absence of a referral in accordance with paragraph (a)(i) of this subsection, or the absence of any information specified in the report format at 209.406-3(a)(ii), will not preclude the debarring and suspending official from making a decision.

209.409 Solicitation provision and contract clause.

Use the clause at 252.209-7004, Subcontracting with Firms That Are Owned or Controlled by the Government of a Terrorist Country, in solicitations and contracts with a value of \$100,000 or more.

209.470 Military recruiting on campus.

209.470-1 Policy.

(a)(1) Section 558 of the National Defense Authorization Act for Fiscal Year 1995 (Pub. L. 103-337) provides that no funds available to DoD may be provided by grant or contract to any institution of higher education that has a policy of denying or that effectively prevents the Secretary of Defense from obtaining for military recruiting purposes—

- (i) Entry to campuses or access to students on campuses; or
- (ii) Access to directory information pertaining to students.

(2) Section 541 of the National Defense Authorization Act for Fiscal Year 1996 (10 U.S.C. 983) provides that no funds appropriated or otherwise available to DoD may be obligated by contract or by grant, including a grant of funds to be available for student aid, to any institution of higher education that, as determined by the Secretary of Defense, has an anti-ROTC policy and at which, as determined by the Secretary, the Secretary would otherwise maintain or seek to establish a unit of the Senior Reserve Officer Training Corps, or at which the Secretary would otherwise enroll or seek to enroll students for participation in a unit of the Senior Reserve Officer Training Corps at another nearby institution of higher education. This prohibition applies to new contracts and all contract modifications (see 243.105). This prohibition shall cease to apply to that institution upon a determination by the Secretary that the institution no longer has an anti-ROTC policy.

(b) Institutions of higher education that are determined under 32 CFR Part 216 to have the policy or practice in paragraph (a)(1) or (a)(2) of this subsection shall be listed as ineligible on the List of Parties Excluded from Federal Procurement and Nonprocurement Programs published by the General Services Administration (see FAR 9.404).

(c) In cases where a determination is made under 32 CFR Part 216 that specific subordinate elements of an institution of higher education, rather than the institution as a whole, have the policy or practice in paragraph (a)(1) or (a)(2) of this subsection, 32 CFR Part 216 provides that the prohibition on use of DoD funds applies only to those subordinate elements.

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209.470-2 Procedures.

(a) Agencies shall not solicit offers from, award contracts to, or consent to subcontracts with ineligible contractors.

(b) After a determination of ineligibility under 209.470-1(a)(1), departments and agencies shall make no further payments under existing contracts with the institutions, and shall initiate termination action.

209.470-3 Contract clause.

Use the clause at 252.209-7005, Military Recruiting on Campus, in all solicitations and contracts with institutions of higher education.

209.471 Congressional Medal of Honor.

In accordance with Section 8118 of Pub. L. 105-262, do not award a contract to, extend a contract with, or approve the award of a subcontract to any entity that, within the preceding 15 years, has been convicted under 18 U.S.C. 704 of the unlawful manufacture or sale of the Congressional Medal of Honor. Any entity so convicted will be listed as ineligible on the List of Parties Excluded from Federal Procurement and Nonprocurement Programs published by the General Services Administration.