

# PRATT'S GOVERNMENT CONTRACTING LAW REPORT

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Editorial Office  
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# Federal Acquisition Regulatory Council Proposes Revisions to Suspension and Debarment Rules

*By Edward V. Arnold\**

*In this article, the author discusses a proposal by the Federal Acquisition Regulatory Council to amend existing rules to harmonize the procurement and nonprocurement procedures regarding suspension and debarment.*

Suspension and debarment are among the most powerful administrative remedies the government has at its disposal to address non-compliance with laws and regulations, and to protect the government's business interests. Debarment is the total exclusion of a contractor and its affiliates from government contracting or subcontracting for a specific period of time—generally no more than three years. On the other hand, suspension is the temporary exclusion of a contractor from government contracting designed to be imposed pending the completion of investigation and any ensuing legal proceedings against the contractor.

Different regulatory regimes exist for suspension and debarment within procurement and non-procurement matters—Federal Acquisition Regulation (FAR) 9.4 governs procurement contracts, while the Nonprocurement Common Rule (NCR), located at 2 CFR Part 180, governs non-procurement activities, such as grants, cooperative agreements, and contracts of assistance. Although these two systems are similar, they are not identical, with slightly different definitions and procedures.

The Federal Acquisition Regulatory Council (FAR Council) recently published a proposal to amend the FAR to harmonize the procurement and nonprocurement procedures regarding suspension and debarment. In particular, the FAR Council is looking to incorporate existing NCR practices governing suspension and debarment that are not currently in the FAR. Among these changes include updating and adding new definitions, increasing the number of mitigating and aggravating factors the government may reference when considering a proposed debarment, and a variety of procedural changes designed to modernize the FAR's suspension and debarment system.

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\* The author, a partner in the Washington, D.C., office of Seyfarth Shaw LLP, may be contacted at [earnold@seyfarth.com](mailto:earnold@seyfarth.com).

## NEW AND UPDATED DEFINITIONS

### **Administrative Agreements**

Despite making mention of it, the FAR currently contains no definition for “administrative agreement.” The proposed rule would provide clarity to what constitutes an “administrative agreement” in FAR 9.403 as “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.” The FAR Council’s rationale for adding such a definition is to address the suspension and debarment official’s common practice of resolving present responsibility concerns through administrative agreements, rather than through exclusion. The proposed rule notes that administrative agreements often require the contractor to take affirmative steps toward present responsibility, such as through implementation of enhanced internal corporate governance practices and procedures and/or the use of independent third party monitors, and may include provisions whereby the contractor agrees not to participate in certain procurement and/or nonprocurement transactions or in specific activities for the term of the administrative agreement, or pending the implementation of appropriate remedial measures.

### **Pre-Notice Letter**

The proposed rule defines “pre-notice” letter in FAR 9.403 as “a written correspondence issued to a potential respondent in a suspension or debarment matter, which does not immediately result in an exclusion or ineligibility.” Thus, because suspension and debarment officials are encouraged under both FAR and NCR regimes to handle actions as informally as practicable consistent with principles of fundamental fairness, the pre-notice letter reflects the existing practice of suspension and debarment officials to elect to engage in preliminary discussions with potential respondents or their counsel under a variety of circumstances.

Notably, the Interagency Suspension and Debarment Committee has tracked the issuance of pre-notice letters since FY 2009, and found that the use of the letters has significantly increased over the past decade.

### **Conviction**

The proposed rule defines “conviction” as “(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.” The FAR Council clarified the need for the revision due to its view that where there is a sufficient evidentiary basis that the contractor was responsible for the misconduct for purposes of a proposed debarment, fact-finding proceedings are not necessary. Here, the FAR would adopt the NCR definition of “conviction.”

### **Voluntary Exclusion**

The FAR Council noted that there is currently no definition in the FAR for voluntary exclusion, and it is only briefly described in the NCR. The proposed rule creates a new definition for “voluntary exclusion” defined as “a contractor’s written agreement to be excluded for a period under the terms of a settlement between the contractor and the suspending and debarment official of one or more agencies. A voluntary exclusion must have a Government-wide effect.”

The proposed rule notes that there are numerous reasons a contractor may agree to a voluntary exclusion, such as to signal to its business partners and stakeholders “that it chose to voluntarily exclude itself rather than being involuntarily excluded by the government through suspension or debarment.” A contractor who is voluntarily excluded will be placed on the excluded parties list in the System for Award Management (SAM), which will have government-wide effects pursuant to the terms of the voluntary exclusion agreement.

### **ADDITIONAL REMEDIAL MEASURES**

The proposed rule seeks to increase the number of remedial measures and mitigating factors for the debarment official to consider. Currently, FAR 9.406-1(a) contains 10 such factors, while the NCR at 2 CFR 180.860 contains 18 factors plus a catchall for consideration of “other factors that are appropriate to the circumstances of a particular case.” The proposed rule seeks to add 7 new aggravating or mitigating factors to the FAR that the suspension and debarment official should consider before arriving at a decision. The factors are equivalent to NCR factors at 2 CFR 180.860(a) through (f), (j), (k), (m), and (s).

Moreover, the proposed rule now permits the suspension and debarment official under the FAR to consider “aggravating” factors, something only provided for in the NCR. Such factors not only provide contractors with a playbook on how to remediate and correct non-compliance, but it also serves as a helpful guide for proactive contractors seeking to implement best practices in ethics and compliance programs, where the goal is centered around prevention and detection of misconduct.

### **PROCEDURAL CHANGES**

The proposed rule provides modifications to procedures related to suspension and debarment, including methods of communication and notice require-

ments, reflecting the use of technology and providing more flexibility. These changes are designed to modernize communication methods, streamline notice requirements, and incorporate technological advancements. The aim is to make these processes more efficient and adaptable to current practices, ensuring greater flexibility in handling suspension and debarment cases.

### **SUBMISSIONS AND NOTICES VIA ELECTRONIC MEANS**

Dovetailing with the FAR's ability to permit agencies to establish informal procedures governing suspension and debarment, the proposed rules would allow suspension and debarment officials to allow contractors and counsel to present matters in opposition to the charges via remote means, such as telephone and email, rather than requiring in-person presentations.

The proposed rule also permits suspension and debarment officials to issue a notice of proposed debarment or notice of suspension by mail, facsimile, email, or certified mail with return receipt requested.

### **NOTICE REQUIREMENTS**

The proposed rule provides that the suspension and debarment official is required to send the notice of proposed debarment to the contractor, the contractor's identified counsel for purposes of the administrative proceedings, or the contractor's agent for service of process.

### **TIME FOR THE GOVERNMENT TO MAKE A DECISION**

The FAR currently states that, for actions based upon conviction or civil judgment, or in which there is no genuine dispute over material facts, if no suspension is in effect, the suspension and debarment official must make a decision in 30 working days after receipt of any information and argument submitted by the contractor (unless otherwise extended). The proposed rule seeks to change this from 30 working days to 45 calendar days after the closing of the official record.

### **GOVERNMENT DATABASES**

The proposed rule requires the suspension and debarment official to enter an administrative agreement into Federal Awardee Performance Integrity Information System (FAPIIS), whether the agreement resolves a suspension or debarment action or whether it was a potential suspension or debarment action. The proposed rule also requires the suspension and debarment official to enter voluntary exclusions into the excluded parties section of SAM as is currently required under the NCR.

### **PRE-NOTICE LETTERS**

In addition to the newly added definition of "pre-notice letter," the proposed rule amends FAR 9.406-3 to confirm that prior to initiating a proposed

suspension or debarment, the suspending and debarring official may issue a pre-notice letter alerting the contractor to potential future action, but is not required to do so. This change aims to provide more flexibility in handling such matters and offers an opportunity for early resolution of issues.

### **SUSPENSION FLEXIBILITY**

The proposed rule imports language from the NCR to FAR 9.407-1(b)(1) to give the suspension and debarment official wide discretion to impose suspensions when immediate action is necessary to protect the government's interest, including the statement that 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.

### **PARTIES WHO CAN CONTRIBUTE ADVICE**

The proposed rule adds to the list of parties who can contribute advice on pending or contemplated legal proceedings, to include "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."

### **REQUEST TO EXTEND SUSPENSION**

The proposed rule adds to the parties who may request a six-month extension of a suspension, when legal proceedings have not been initiated within 12 months after the date of the suspension notice. The FAR currently requires the suspension and debarment official to coordinate the need for an extension with an "Assistant Attorney General," something the FAR Council notes is burdensome. Thus, the parties would change from "an Assistant Attorney General" to "an office of a U.S. Assistant Attorney General, U.S. Attorney, or other responsible prosecuting official." It is expected that this will shorten the time it takes to obtain an extension.

### **WHAT REMAINS UNCHANGED**

One notable procedure that the FAR Council is not adopting from the NCR at this time is this—under the FAR, a notice of proposed debarment has the effect of immediately excluding the party. Under the NCR, a notice of proposed debarment does not have the same effect. The proposed rule states that the FAR is maintaining this procedure out of the necessity to continue to protect the government's interests and taxpayer's money by minimizing business risk where procurements are involved. Moreover, the FAR Council notes that procurement contracts are more likely than nonprocurement transactions to require immediate exclusion when something goes wrong. Thus, the FAR Council is continuing to keep both tools, so the suspension and debarment official will continue to have the discretion to choose whichever tool is appropriate for the

particular situation. At the same time, the proposed rule recognizes the suspension and debarment official's discretion to use of a pre-notice letter rather than an immediate exclusion.

## **CONCLUSION**

The FAR Council's proposed revisions signify a progressive step towards streamlining suspension and debarment processes in government contracting. By harmonizing procurement and non-procurement procedures, introducing clear definitions, and modernizing communication methods, the revisions aim to enhance transparency, efficiency, and fairness. These changes reflect a balanced approach to protecting government interests while offering contractors clearer guidelines and flexible remedial avenues. As such, they represent a thoughtful evolution in governance, aligning with contemporary needs while safeguarding public interests.