GSA Office of Governmentwide Policy
CAAC Letter 2020-01

April 1, 2020

MEMORANDUM FOR CIVILIAN AGENCIES

FROM: WILLIAM CLARK
CHAIR
CIVILIAN AGENCY ACQUISITION COUNCIL (CAAC)

WILLIAM CLARK
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Date: 2020.04.01 12:56:41-04'01'

SUBJECT: Class Deviation from the Federal Acquisition Regulation Regarding Flexibilities for the Suspending or Debarring Official's Correspondence with Contractors

This CAAC letter is being issued to serve as consultation in accordance with Federal Acquisition Regulation (FAR) 1.404 allowing agencies to authorize a class deviation to provide flexibilities for Suspending or Debarring Officials (SDOs) who need to correspond with contractors being suspended, proposed for debarment, or debarred.

FAR 9.406-3 and FAR 9.407-3 currently require contractors to be notified of a suspension, proposed debarment, or debarment action from the SDO via certified mail, return receipt requested. Unfortunately, as written the FAR precludes any other type of notification such as an electronic means of notification that may be beneficial during times of emergency or crisis such as those presented by the Novel Coronavirus 2019 (COVID-19) pandemic.

This class deviation will allow greater flexibility for SDOs by providing a means of electronic delivery of notices of suspension, proposed debarment, and debarment to contractors in addition to certified mail, return receipt requested as required under FAR 9.406-3 and FAR 9.407-3. The class deviation will also allow for greater flexibility in allowing contractors to make presentations via telephone or internet. The areas of the FAR that are being amended by this class deviation are: 9.406-3(b)(1), (c), and (e); 9.407-3(b)(1), (c), and (d)(4).

This CAAC letter constitutes consultation with the Chair of the CAAC required by FAR 1.404(a)(1). Agencies are advised to review any relevant clauses in their supplement, consult with their SDOs and take any action that is appropriate. It is

recommended that the deviation be made effective immediately. Agencies should consider whether the deviation is still necessary when agency employees return to work in their Federal work space.

Agencies are reminded that FAR 1.404 requires agencies to furnish a copy of each approved class deviation to the GSA FAR Regulatory Secretariat. In light of the evolving situation concerning COVID-19, agencies should email the class deviation to GSARegSec@gsa.gov.

If you have any questions or require additional information about this Letter, please contact Curtis E. Glover, Sr. at (202) 295-7548 or at curtis.glover@gsa.gov@gsa.gov.

Attachment A

ATTACHMENT A

FAR DEVIATION TEXT – Baseline - FAR FAC 2020-05, Effective March 30, 2020

Additions are **[bolded and bracketed]**, deletions are ~~struck through~~.

9.406-3 Procedures.

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

(b) Decisionmaking process.

(1) Agencies shall establish procedures governing the debarment decisionmaking 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. **[The debarring official 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)(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 debarring official **[to]** ~~advising~~ the contractor and any specifically named affiliates**[.]**~~, by certified mail, return receipt requested —~~

[(1) The written notice shall be sent —
(i) By mail, to the last known street address;

(ii) To the last known facsimile number; or

(iii) To the last known email address.

(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. If sent

by email, it shall be sent to the last known email addresses for all three, if known; 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. If sent by email, it shall be sent to the last known email addresses for all three, if known.]

[(3) The notice shall state--]

[(i)]~~(1)~~ That debarment is being considered;

[(ii)]~~(2)~~ Of 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)]~~(3)~~ Of the cause(s) relied upon under 9.406-2 for proposing debarment;

[(iv)]~~(4)~~ 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)]~~(5)~~ Of the agency's procedures governing debarment decisionmaking;

[(vi)]~~(6)~~ Of the effect of the issuance of the notice of proposed debarment; and

[(vii)]~~(7)~~ Of the potential effect of an actual debarment.

(d) 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 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 30 working days after receipt of any information and argument submitted by the contractor, unless the debarring official extends this period for good cause.

(2)(i) In actions in which additional proceedings are necessary as to disputed material facts, written findings of fact shall be prepared. The 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 debarring official may refer matters involving disputed material facts to another official for findings of fact. The 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 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 debarring official's decision.

(1) If the debarring official decides to impose debarment, the contractor and any affiliates involved shall be given prompt notice by ~~certified mail, return receipt requested~~ **[means of delivery set forth in 9.406-3(c)] -**

(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(c).

(2) If debarment is not imposed, the debarring official shall promptly notify the contractor and any affiliates involved, by ~~certified mail, return receipt requested~~ **[means of delivery set forth in 9.406-3(c)].**

(f)(1) If the contractor enters into an administrative agreement with the Government in order to resolve a debarment proceeding, the debarring official shall access the website (available at www.cpars.csd.disa.mil, then select FAPIIS) and enter the requested information.

(2) The debarring official is responsible for the timely submission, within 3 working days, and accuracy of the documentation regarding the administrative agreement.

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

9.407-3 Procedures.

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

(b) Decisionmaking process.

(1) Agencies shall establish procedures governing the suspension decisionmaking 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. **[The suspending official may use the flexible procedures in 9.406-3(b)(1). If so, the suspending 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 Department of Justice advice, 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 by ~~certified mail, return receipt requested~~ **[means of delivery set forth in 9.406-3(c)] -**

(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; and

(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 Department of Justice advice, that the substantial interests of the Government in pending or contemplated legal proceedings based on the same facts as the suspension would be prejudiced.

(d) Suspending official's decision.

(1) In 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 Department of Justice advice, the suspending official's decision shall be based on all the information in the administrative record, including any submission made by the contractor.

(2)(i) In actions in which additional proceedings are necessary as to disputed material facts, written findings of fact shall be prepared. The suspending 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 official may refer matters involving disputed material facts to another official for findings of fact. The suspending 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 official's decision shall be made after the conclusion of the proceedings with respect to disputed facts.

(3) The suspending 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 official's decision shall be sent to the contractor and any affiliates involved~~, by certified mail, return receipt requested~~ **[means of delivery set forth in 9.406-3(c)].**

(e)(1) If the contractor enters into an administrative agreement with the Government in order to resolve a suspension proceeding, the suspending official shall access the website (available atwww.cpars.csd.disa.mil, then select FAPIIS) and enter the requested information.

(2) The suspending official is responsible for the timely submission, within 3 working days, and accuracy of the documentation regarding the administrative agreement.

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