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Acquisition & Assistance Policy Directive (AAPD)

From the Director, Office of Acquisition & Assistance Issued: **April 4, 2022**

AAPD 20-02, Revision 1

FLEXIBILITIES FOR SUSPENDING OR DEBARING OFFICIALS

Subject Category: Acquisition Management
Type: POLICY

AAPDs provide information of significance to all agency personnel and partners involved in the Acquisition and Assistance process. Information includes (but is not limited to): advance notification of changes in acquisition or assistance regulations; reminders; procedures; and general information. Also, AAPDs may be used to implement new requirements on short-notice, pending formal amendment of acquisition or assistance regulations.

AAPDs are EFFECTIVE AS OF THE ISSUED DATE unless otherwise noted in the guidance below; the directives remain in effect until this office issues a notice of cancellation.

This AAPD: ☐ Is New ☒ Replaces AAPD 20-02

Applicable to: ☐ Existing awards; ☐ Modification required

☐ No later than

☒ As noted in guidance below

☐ All applicable RFPs and new awards issued after the effective date of this AAPD.

☐ Other

Precedes change to:

☐ AIDAR Part(s) Appendix

☐ USAID Automated Directives System (ADS)

☐ Code of Federal Regulations

☒ Federal Acquisition Regulations

9.406-3 and 9.407-3

☐ No change to regulations

☐ New or Revised Provision/Clause Provided Herein:

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I. PURPOSE:

The purpose of this AAPD is to inform Acquisition and Assistance staff of additional communication methods available to **Suspending or Debarring Officials (SDOs)** and contractors when corresponding with each other on suspension or debarment. These flexibilities and corresponding revisions to the FAR are authorized by class deviation approved by the Director of the Office of Acquisition and Assistance. AAPD 20-02 was originally issued on May 13, 2020 for a two-year period. This Revision 1 renews and extends the content of the original AAPD, with no changes in policy.

This revised AAPD and the class deviation (M-OAA-DEV-FAR-22-02c) from the FAR will remain in effect until the FAR is formally revised through rulemaking (FAR Case 2019-015) or this deviation is rescinded.

II. REQUIRED ACTIONS:

The SDO may use the flexible procedures authorized by this deviation to issue a notice of proposal to debar or a notice of suspension; and to allow a contractor to present matters in opposition via telephone or internet during the debarment or suspension decision-making process in accordance with FAR 9.406-3(b)(1).

When using these procedures during the decision-making process for debarment, the debarring official should change the notice in FAR 9.406-3(c)(3)(iv) to include means of delivery.

When using these procedures during the decision-making process for suspension, the suspending official should change the notice in paragraph FAR 9.407-3(c)(5) to include means of delivery.

III. BACKGROUND:

FAR 9.406-3 and FAR 9.407-3 currently require SDOs to notify contractors of a suspension, proposed debarment, or debarment action via certified mail, return receipt requested, and does not allow any other type of notification such as electronic means of notification

This class deviation allows SDOs to communicate with contractors by mail or electronic notification to deliver required notices and decisions as required in FAR 9.406-3 and FAR 9.407-3, which is beneficial during these times of emergency or crisis caused by the Novel Coronavirus 2019 (COVID-19) pandemic.

This class deviation also provides flexibilities to the SDO to allow contractors to present opposition information and arguments via telephone or internet.

IV. POINT OF CONTACT:

COs may direct questions about this AAPD to the [“Ask M/OAA Policy”](#) Group.

Attachment 1 – FAR Deviation Text

(Deviation #: M-OAA-DEV-FAR-22-02c)

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) 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. 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 the contractor and any specifically named affiliates.

(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) That debarment is being considered;

(ii) 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) Of 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) Of the agency's procedures governing debarment decision making;

(vi) Of the effect of the issuance of the notice of proposed debarment; and

(vii) 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 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 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\(b\)\(2\)\(iv\)](#).

(Deviation #: **M-OAA-DEV-FAR-22-02c**)

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 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 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 at www.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\(b\)\(2\)\(iv\)](#).