AMERICAN BAR ASSOCIATION
Public Contract Law Section

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March 5, 2024

Via Regulatory Portal

Re: **Federal Acquisition Regulation (FAR) Case 2019-015 – Comments on Proposed Rule to Federal Acquisition Regulation: Improving Consistency Between Procurement and Nonprocurement Procedures on Suspension and Debarment**

Dear Ms. Ryba:

The American Bar Association ("ABA") Section of Public Contract Law ("Section") is pleased to offer comments on the Proposed Rule "Federal Acquisition Regulation: Improving Consistency Between Procurement and Nonprocurement Procedures on Suspension and Debarment" (the "Proposed Rule"), FAR Case 2019-015 by the Department of Defense ("DoD"), General Services Administration ("GSA"), and National Aeronautics and Space Administration ("NASA") (collectively, the "FAR Council").[1] 89 Fed. Reg. 1043 (Jan. 9, 2024). The Section consists of attorneys and associated professionals in private practice, industry, and government service. The Section's governing Council and substantive committees include members representing these three segments to ensure that all points of view are considered. By presenting their consensus view, the Section seeks to improve the process of public contracting for needed supplies, services, and public works.

The views expressed herein are presented on behalf of the Section. They have not been reviewed or approved by the House of Delegates or the Board of Governors of the American Bar Association and, therefore, should not be construed as representing the position of the ABA.[2]

[1] Mary Ellen Coster Williams, Section Delegate to the ABA House of Delegates, and Elizabeth Witwer, member of the Section's Council, did not participate in the Section's consideration of these comments and abstained from the voting to approve and send this letter.

[2] This letter providing the Section's comments on the subject proposed rule is available in pdf format at http://www.americanbar.org/groups/public_contract_law/resources/prior_section_comments/.

I. BACKGROUND

The Proposed Rule follows recommendations of the Interagency Suspension and Debarment Committee ("ISDC"), a committee of government suspension and debarment practitioners. Among the stated purposes of the Proposed Rule is to bring into closer alignment (1) the FAR, governing procurement contracts and (2) the Nonprocurement Common Rule ("NCR") governing grants and federal assistance in order to "enhance transparency and consistency within the Government's suspension and debarment procedures."

The Section appreciates the efforts of the ISDC and FAR Council to enhance clarity, flexibility, and transparency in the suspension and debarment process and to codify in the FAR many of the best practices that suspending and debarring officials ("SDOs") have been following for years. The Section offers these comments on the Proposed Rule to further increase alignment between the FAR and NCR and to address ambiguities in the Proposed Rule.

II. COMMENTS

A. The Proposed Rule Should Be Clarified To Encourage, Not Chill, Proactive Outreach to SDOs.

The Section recommends that the FAR Council clarify the interaction and definition of two new definitions in the Proposed Rule: "pre-notice letter," and "potential" suspension and debarment proceeding. The Section recommends these revisions to avoid a potential chilling effect on proactive outreach to SDOs where an agency has not taken any formal action in a "proceeding."

The Proposed Rule helpfully adds a definition of "administrative agreement" to the FAR to recognize the value of resolving present responsibility concerns through such agreements. As defined, an "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*." 89 Fed. Reg. at 1047 (emphasis added). The Section also applauds the FAR Council for the addition of the definition of a "pre-notice letter" and "potential" suspension and debarment proceedings. The Proposed Rule recognizes that an SDO can use a "pre-notice letter" instead of issuing an immediate exclusion and defines a "pre-notice letter" 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." *Id.*

The FAR currently requires that when a contractor enters into an administrative agreement with the Government *to resolve a suspension or debarment proceeding*, the debarring official shall access the website (available at https://www.cpars.gov, then select FAPIIS) and enter the requested information. FAR 9.406-3(f); FAR 9.407-3(e). Based on the experience of practitioners, when an administrative agreement results from a contractor's proactive outreach, the Government does not always post that agreement to FAPIIS. We believe this is because such agreements do not resolve a suspension or debarment "proceeding," because a contractor's proactive outreach frequently obviates such a proceeding altogether.

The Proposed Rule appears to expand upon the FAR's current FAPIIS posting requirement by requiring the Government to submit an administrative agreement to FAPIIS not only if a contractor enters into an administrative agreement to resolve a suspension or debarment proceeding, but also if a contractor enters into an administrative agreement to resolve a "potential" suspension or debarment proceeding. 89 Fed. Reg. at 1049, 1051. Specifically, from the Proposed Rule, it appears that the addition of the terms "*potential* suspension proceeding" and "*potential* debarment proceeding" are intended to address those situations where an agency issues a pre-notice letter, as distinct from initiating a "proceeding" through the issuance of a notice of suspension or a notice of proposed debarment as currently contemplated in the FAR. *See generally* FAR 9.406; FAR 9.407. Nonetheless, it is not clear whether a "potential . . . proceeding," and therefore the requirement for a publicly posted administrative agreement in FAPIIS, would also apply to those situations where a contractor proactively contacts an SDO to address a responsibility matter that eventually results in an administrative agreement without any formal process initiated by a suspending or debarring official.

The Section believes that proactive outreach by contractors to SDOs when there are issues that may implicate the contractor's present responsibility is in the best interests of the procurement system. We believe that such proactive outreach should be encouraged. The Section is concerned, however, that the public posting of an administrative agreement that results from such proactive outreach, when there is no formal "proceeding," may have a chilling effect on proactive outreach. Accordingly, we recommend that the final rule clarify that the terms "potential suspension proceeding" and "potential debarment proceedings" are those suspension or debarment proceedings initiated by, at a minimum, a pre-notice letter, or other formal action and further clarify that an administrative agreement resulting from proactive outreach, as opposed to a "proceeding," need not be publicly posted to FAPIIS.

B. The Proposed Rule Should Be Revised to Align the FAR and the NCR With Respect to the Exclusionary Effect of Proposed Debarment.

The "Background" section of the Proposed Rule recognizes that under the NCR, a notice of proposed debarment does not result in an immediate exclusion of the affected participant. 89 Fed. Reg. at 1043. The Proposed Rule states that one difference between the NCR and the FAR that is not being changed is the immediate exclusionary effect of a notice of proposed debarment under the FAR. *Id*. The Proposed Rule states that the FAR Council is proposing to retain this difference "in recognition of the necessity to continue to protect the Government's interests and taxpayer's money by minimizing business risk where procurements are involved." *Id*. The Proposed Rule further "notes that contracts are more likely than nonprocurement transactions, such as Federal financial assistance, to require immediate exclusion when something goes wrong." *Id*. at 1044. According to the Proposed Rule, immediate exclusion is less likely to be required for nonprocurement transactions because "[p]articipants in nonprocurement transactions—while subject to the terms and conditions of a Federal award—are typically required to meet overall program goals and objectives, rather than perform to an exact contractual requirement." *Id*. The Proposed Rule further reasons that nonprocurement transactions are less likely to require immediate exclusion because "[f]ederal financial assistance typically is for public purposes of support or economic stimulation, rather than for the direct benefit of the U.S. Government." *Id*. Finally, the Proposed Rule asserts that retaining proposed

debarments as exclusionary is consistent with recurring Appropriations Act language that states that federal funds cannot be used for contracts with a contractor that has had a felony conviction in the preceding 24 months unless a suspending and debarring official has considered suspension or debarment and determined exclusion is not necessary. *Id*.

As discussed above, the Section supports the FAR Council's amendment to FAR 9.406-3 to clarify that SDOs may issue a pre-notice letter prior to proposing a contractor for debarment. Providing contractors with an opportunity to respond to an SDO's concerns prior to exclusion is beneficial to the procurement system by encouraging concerns that may affect a contractor's present responsibility to be addressed early and proactively. It is also consistent with the NCR and due process.

With the increasing use of pre-notice letters and proactive outreach even before a pre-notice letter is issued, the Section recommends that the FAR Council amend FAR 9.406-1 to eliminate the immediate exclusionary effect of notices of proposed debarment. If the risk to the Government in a specific case requires immediate exclusion to protect the Government's business interests, an SDO can issue a notice of suspension under FAR 9.407. Where immediate exclusion is not necessary and the Government would not choose to suspend the contractor, the proposal for debarment should not have an exclusionary effect. Immediate exclusion is particularly unwarranted in cases where the proposed debarment is not based on a conviction or civil judgment, and fact-finding proceedings are necessary.

The Section respectfully submits that the FAR Council's rationale for retaining the immediate exclusionary effect of notices of proposed debarment in the FAR is not supported. Federal assistance, like procurements, involves the use of taxpayer dollars. That federal assistance is awarded to carry out a public purpose of support or stimulation, while contracts are awarded for the direct use and benefit of the Government, does not necessarily mean that nonprocurement transactions present less risk to the Government. As with contracts, fraud, waste, and abuse by federal assistance recipients can and does occur, which puts the Government's interests, taxpayer funds, and the public purpose of the federal assistance (which can be just as critical as procurements for the Government's direct use and benefit) at risk. At bottom, whether for a procurement contract or federal assistance, the spending of Government agencies is for the benefit of U.S. taxpayers.

Furthermore, the Appropriations Act language cited in the Proposed Rule does not require an SDO to issue an exclusionary notice as part of the assessment of whether suspension and debarment is appropriate. Those statutes simply require the official to have considered whether exclusion is necessary to protect the Government, which can be done without an immediate exclusion (e.g., with a pre-notice letter or proactive outreach by the contractor).

Because the purpose of the Proposed Rule is to align the FAR with the NCR, and the Proposed Rule recognizes the use and benefits of pre-notice letters, the Section recommends that the FAR Council reconsider its decision and align the FAR with the NCR in any final rule by eliminating the immediate exclusionary effect of notices of proposed debarment in the FAR.

C. The Proposed Rule Should Be Revised to Require an SDO to Provide the Administrative Record or Similar Information with a Pre-Notice Letter.

In addition to adding the definition and concept of a pre-notice letter to the FAR, the FAR Council should consider revising the Proposed Rule to require that with any pre-notice letter, the SDO must provide to the contractor the agency's administrative record, or any other compilation of information that relates to the basis for the pre-notice letter. For proposed debarments or suspensions, the SDO is obliged to provide the administrative record. *See* FAR 9.406-3(c)(2) (notice of proposed debarment must advise the contractor "[o]f 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"). The NCR likewise entitles parties to nonprocurement transactions to receive such information with a notice of proposed debarment. 2 C.F.R. § 180.805. But, because a notice of proposed debarment under the NCR does not have an immediate exclusionary effect (unlike such a notice under the FAR), the recipient has the opportunity to review and respond to the administrative record before an exclusion becomes effective.

Although the Proposed Rule defines pre-notice letter, it does not include minimum requirements for the SDO to advise the contractor of the reasons that potential suspension or debarment is being considered. Requiring SDOs to provide the administrative record, or any other compilation of information that forms the basis of the pre-notice letter, with a pre-notice letter would ensure that contractors have sufficient information to respond to the SDO's concerns, which in turn would facilitate informed decision-making by SDOs about whether to proceed with proposed suspension or debarment. We recommend that the FAR Council revise the Proposed Rule to require the issuing agency, in the pre-notice letter, to state if it has assembled an administrative record or other information that forms the basis of the notice. If it has, the agency should be required to provide that record or information with the pre-notice letter in order to ensure the contractor is able to address fully the basis for the pre-notice letter.

D. The FAR Council Should Clarify the Proposed Rule Concerning Notice and Opportunity to Present Matters in Opposition Remotely.

The Section supports the proposed amendments to FAR 9.406-3(b)(1) and FAR 9.407-3(b)(1) to permit contractors and their representatives to present matters in opposition remotely via telephone and the internet (or "appropriate technology"). 89 Fed. Reg. at 1045, 1049. These changes will ensure that contractors have adequate opportunity to present matters in opposition, which in turn will facilitate informed decision-making by SDOs about whether to proceed with the proposed debarment or suspension. To further improve the rule, the Section believes that the Proposed Rule would benefit from additional clarity in the areas listed below.

1. The FAR Council Should Clarify the Proposed Rule Concerning Notice by U.S. Mail and Email.

Currently, FAR 9.406-3(c) requires that a notice of proposed debarment must be issued to "the contractor and any specifically named affiliates, by certified mail, return receipt requested." The Proposed Rule would amend FAR 9.406(c) to provide as follows:

> (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.
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> (1) The written notice shall be sent—
>
> (i) By mail, to the last known street address;
>
> (ii) To the last known email address; or
>
> (iii) By certified mail to the last known street address with return receipt requested.

89 Fed. Reg. at 1049. The Proposed Rule would also amend FAR 9.406-3(e) to provide that the notice provisions in proposed FAR 9.406-3(c)(1) apply to notices of SDO decisions to impose debarment and would amend FAR 9.407-3 to provide that notices relating to suspension should be transmitted pursuant to these procedures. *Id*.

The Section is concerned that permitting notices of proposed debarment, suspension, and SDO decisions to be sent by standard U.S. Mail (with no return receipt requested) or by email "[t]o the last known email address" may be inadequate to give contractors notice and an opportunity to respond. Debarment from federal contracting has far-reaching consequences that impact not only a contractor's ability to do business with the Government, but also its private sector business. *See, e.g.*, *Gonzalez v. Freeman*, 334 F.2d 570, 574 (D.C. Cir. 1964) ("The impact of debarment on a contractor may be a sudden contraction of bank credit, adverse impact on market price of shares of listed stock, if any, and critical uneasiness of creditors generally, to say nothing of 'loss of face' in the business community."); *Sloan v. Dep't of Hous. & Urban Dev.*, 231 F.3d 10, 17 (D.C. Cir. 2000) (suspended parties endured "economic losses, professional indignities, and injuries to their reputations[.]"). Courts have consistently held that contractors must be provided with notice and an opportunity to oppose a proposed debarment prior to its imposition. *See, e.g., Old Dominion Dairy Prod., Inc. v. Sec'y of Def.*, 631 F.2d 953, 963–64 (D.C. Cir. 1980). As a result, it is critical that SDOs provide notices of proposed debarment and suspension in a manner that ensures the contractor receives the notice and has an opportunity to respond before a debarment is imposed.

2. The FAR Council Should Reconsider Allowing Notice Sent by Standard, not Certified, U.S. Mail.

Although the Section recognizes that certified mail can be delayed, regular or standard U.S. Mail, without a return receipt, does not provide adequate assurance that a notice has actually been received. When a letter is sent by certified mail, return receipt requested, there is a paper trail in the U.S. Postal Service records available to the SDO showing the mailing, delivery, and receipt (or non-receipt). But there is no paper trail for letters sent by regular U.S. Mail and, therefore, no means to confirm that a letter or notice has actually been received. The Section is concerned that permitting notice by regular U.S. Mail, with no return receipt, will increase the risk that a contractor could be suspended or debarred without receiving notice or an opportunity to respond.

Permitting use of regular U.S. Mail with no return receipt requested for sending notices of proposed debarment, notices of suspension, and SDO decisions is also inconsistent with the NCR, which requires that notices sent by U.S. Mail be sent by "certified mail or its equivalent." 2 C.F.R. § 180.975. The Section recommends that the FAR Council align this provision with the NCR to require that any notice sent by U.S. Mail be sent by certified mail or its equivalent to increase the likelihood that the notice will actually be received. This requirement is consistent with notions of due process and fundamental fairness. It is also consistent with a purpose of the Proposed Rule: to better align the FAR and NCR.

3. The FAR Council Should Augment the Proposed Rule Regarding Notices Sent by Email.

The Section understands that providing notice by email provides flexibility and, in situations such as a pandemic when employees are not working in the office, may increase the likelihood of actual receipt of a notice. Nonetheless, the Section is concerned that providing notices of proposed debarment, notices of suspension, and SDO decisions to "the last known email address" will frequently be inadequate to ensure receipt. The Proposed Rule does not describe how SDOs will determine "the last known email address" for a contractor, its identified counsel for purposes of the administrative proceedings, or its agent for service of process. An email sent to "the contractor" would need to be directed to a specific person within a contractor's organization. If the individual to whom the email is directed no longer works at the organization, or if there have been any other changes to that individual's email address (or to the contractor's email domain), the email might not be received. There is also a risk that such an email could be overlooked if, for example, it gets caught in a SPAM filter. The Section recommends that the FAR Council clarify how SDOs will determine the "last known email address" for a contractor, its identified counsel, or agent for service of process. The Section further recommends that the FAR Council consider defining the contractor's "last known email address" as the point of contact email address in the contractor's SAM registration. Additionally, the Section recommends that the FAR Council require SDOs to take additional steps to confirm the contractor's receipt of notices sent by email, such as requiring a response to confirm receipt, requesting a "read receipt" on the email, or following up by telephone to confirm that the email was received.

4. The FAR Council Should Revise the Proposed Rule in Connection with the Remedies in Cases of Nonreceipt of a Notice of Proposed Debarment.

The Proposed Rule states that a contractor that makes a case for nonreceipt of a notice of proposed debarment can request that the SDO reduce the "period or extent of debarment" under FAR 9.406-4, making it clear that an SDO may proceed with a debarment without confirmation that the contractor received adequate notice of the proposed debarment. See 89 Fed. Reg. at 1045. But, as explained above, contractors must be afforded notice and an opportunity to oppose a proposed debarment prior to its imposition. Allowing a contractor to request reduction of the "period or extent of debarment" is not equivalent to allowing the contractor to provide information in opposition, including facts that might challenge the existence of cause for exclusion or mitigating factors that would counsel against exclusionary action even if cause exists. In short, a contractor will be deprived of its rights under the FAR and due process to provide information in opposition to exclusion if a contractor's only remedy in cases of

nonreceipt of a notice would be to request that the "period or extent of the debarment" be reduced.

The Section recommends that the FAR Council adopt the Section's comments concerning notices by U.S. Mail and email to ensure that adequate notice of a proposed debarment or suspension is provided. The Section further recommends that the FAR Council consider providing for immediate reinstatement of contractors debarred without receiving notice of a proposed debarment. The SDO could then reissue the notice of proposed debarment and provide the contractor an opportunity to respond before determining whether to continue the debarment for the remainder of the period of debarment. If the SDO determines that debarment is warranted, the contractor would be debarred only for the amount of time remaining in the original period of debarment prior to reinstatement. If the SDO determines that debarment was not warranted, all records of the prior exclusion should be removed from SAM.gov and other applicable government databases. And, if the SDO determines that an administrative agreement is appropriate, information in relevant government databases should be amended to reflect that the contractor was proposed for debarment and an administrative agreement was executed but should not reflect that debarment was ever imposed.

5. The Section Supports The Proposed Rule's Provisions Regarding Who Must Receive Notice.

The Section commends the FAR Council's decision to require that notices of proposed debarment be sent directly to the contractor, the contractor's identified counsel for purposes of the administrative proceedings, or the contractor's agent for service of process, rather than permitting notices to be sent to partners, officers, directors, owners, or joint venturers. The Section also commends the FAR Council for retaining the requirement that notices be sent directly to specifically named affiliates (and adding that such notices may be sent to the affiliate's identified counsel for purposes of the administrative proceedings, or the affiliate's agent for service of process). Requiring that notices be sent directly to the party named in the notice promotes due process by helping ensure that notices are actually received and that the cognizant party has an opportunity to respond.

E. The FAR Council Should Provide More Clarity on the Contents of an Administrative Record.

The FAR does not provide any procedures or guidance relating to the contents of the administrative or official record assembled in connection with a suspension or debarment proceeding (hereinafter "AR"). The NCR, at 2 CFR 180.750(a), provides limited guidance relating to the AR in suspension actions:

> The suspending official bases the decision on all information contained in the official record. The record includes—
>
> (1) All information in support of the suspending official's initial decision to suspend you;
>
> (2) Any further information and argument presented in support of, or opposition to, the suspension; and

> (3) Any transcribed record of fact-finding proceedings.

2 CFR 180.845(b) provides limited guidance relating to the AR in debarment actions:

> The debarring official bases the decision on all information contained in the official record. The record includes—
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> (1) All information in support of the debarring official's proposed debarment;
>
> (2) Any further information and argument presented in support of, or in opposition to, the proposed debarment; and
>
> (3) Any transcribed record of fact-finding proceedings.

At a minimum, to promote a decision-making process that is "as informal as is practicable, consistent with principles of fundamental fairness," *see* FAR 9.406-3(b), and to standardize practices across all SDO activities, the Section recommends that the FAR Council adopt the NCR language regarding the contents of an AR.

The Section also recommends the FAR Council add a definition of "Administrative Record" (or "Official Record") to the FAR. The Section recommends language similar to the following:

> "Administrative Record" means the evidence a Suspending and Debarring Official uses when determining whether to issue, affirm, propose or impose a suspension or debarment. Administrative Records must include the whole decisional record relied upon for reaching decisions under this Part. The Administrative Record includes all evidence the Suspending and Debarring Official relied upon to issue the suspension or proposed debarment, any material a Respondent submits in opposition to the suspension or proposed debarment, any material related to a fact-finding proceeding that is reviewed by the Suspending and Debarring Official, and all other material the Suspending and Debarring Official reviews in determining whether to maintain a suspension as well as impose, maintain or terminate a debarment. In rare cases, the Administrative Record will include material the Respondent may not see without compromising a significant governmental interest. In those cases, some or all of the Administrative Record will be withheld from Respondent. If there is a reason to withhold from the contractor any portion of the Administrative Record, the Respondent will be informed of what is withheld and the reasons for withholding. The Administrative Record in those rare cases must, nevertheless, contain information sufficient to put the Respondent on notice of the improper conduct and allow for the Respondent to present a reasonable defense.

The Section encourages the FAR Council to consider making this change to promote fundamental fairness.

F. The FAR Council Should Revise the Proposed Rule to Address the Timing of Distribution of the Initial Administrative Record to Respondents.

Current agency practices generally provide for producing a copy of the AR to the Respondent only after the Respondent responds to the notice of proposed debarment/suspension notice or requests a copy of the AR. The Section recommends that the FAR Council include language in the final rule that imposes the requirement on all agencies to (i) provide as part of the notice initiating a proposed debarment or suspension, or with a pre-notice letter, a copy of the relevant AR or other compiled information, in the case of a pre-notice letter, and (ii) distribute, upon receipt of a request from a Respondent for the AR or information supporting a pre-notice letter, a copy of the AR or compiled information to the Respondent within five days of receipt of the written request. These recommended changes promote a decision-making process that is "as informal as is practicable, consistent with principles of fundamental fairness," *see* FAR 9.406-3(b), and serve to standardize practices across all federal SDO activities. The Section recognizes this recommendation falls outside the stated objective of improving the "consistency between the procurement and nonprocurement procedures on suspension and debarment." Nonetheless, the Section encourages the FAR Council to consider making this change to promote consistent standards of fundamental fairness. In in an appropriate rulemaking, a similar change could be made to the NCR to achieve alignment.

G. The FAR Council Should Address the Timing of Distribution of Supplemental Administrative Records to Respondents.

As discussed above, the Section recommends that FAR Council conform the FAR with the NCR regarding the description of the AR. Should the FAR Council adopt this recommendation, it should also revise the Proposed Rule to address the timing for distribution of the supplemented AR to the Respondent. Under the NCR, SDOs are required to include in the AR for proposed debarments and suspension "[a]ny further information and argument presented in support of, or opposition to, the [action]." 2 CFR 180.750(a)(2) and 180.845(b)(2). The Section recommends the FAR Council include in the Proposed Rule a requirement to distribute to the Respondent a copy of all supplemental materials not provided by the Respondent within five days of the SDO's decision to include the materials in the AR. This change promotes consistent standards across agencies as well as fundamental fairness.

H. The FAR Council Should Clarify the Timing of the Closing of the Record in Debarment Actions.

The Section supports the proposal to promote consistency between the FAR and NCR by revising the FAR to require that an SDO to make a debarment decision within 45 days after the "the official administrative record is closed." 89 Fed. Reg. at 1049. Given the significance of the closing of the "official administrative record," the Section further recommends that the FAR Council also require a notification to the Respondent of the date when the official administrative record is to close. This revision promotes transparency and orderly process in the debarment proceedings, allows the Respondent to add any additional information to the record before its

closure, and allows the Respondent to assert procedural rights relating to the timing of the debarment decision. The recommended change would also ensure that the agency and the Respondent are on the same footing for purposes of measuring the time given for the SDO's decision-making. The Section asserts that this change would also promote consistent standards across agencies and is consistent with notions of fundamental fairness.

I. The FAR Council Should Augment the Aggravating and Mitigating Factors When Applied to Individuals as Opposed to Organizations.

The Proposed Rule adopts various factors from the NCR to supplement the FAR's current mitigating factors that an SDO considers when deciding whether to suspend or debar a contractor. Even with the proposed inclusion of additional aggravating or mitigating factors from the NCR in the FAR, the factors in from both sets of rules provide insufficient guidance for assessing the present responsibility of individuals, as opposed to organizations. Stated differently, under both the FAR and the NCR, the factors that an SDO considers to evaluate whether exclusion is necessary apply most directly to organizations, not people.

This gap is significant given that the majority of suspension and debarment actions appear to be brought against individuals, as opposed to organizations. Moreover, unlike an organization, an individual proposed for exclusion may not be able to afford counsel to represent him or her in a suspension or debarment proceeding. As these factors are currently drafted, and without the means to secure experienced counsel, an individual may not even realize that the mitigating and aggravating factors are a consideration that could apply in the situation of an individual facing potential exclusion.

Fundamental fairness, transparency, informality, and due process counsel in favor of developing factors that the average person can understand. Examples of potential factors that could apply to an individual person proposed for exclusion include:

1. Did the individual's employer have an adequate ethics and compliance program consistent with the requirements of FAR 52.203-13 at the time of the underlying cause of the action?

2. Was the individual aware of whether the activity cited as a cause for the action was improper?

3. Did the individual have concerns regarding the conduct and seek out guidance before engaging in the improper conduct?

4. Does the individual now recognize and understand the seriousness and improper nature of their conduct and are they remorseful for their conduct?

5. At the time of the events forming the basis for the cause of the action occurred, what was the individual's level of sophistication, including level of education, position the individual held in the organization, and length of time with the organization?

6. Whether and to what extent the individual planned, initiated, or carried out the wrongdoing?

7. Whether the individual has a pattern or prior history of misconduct and wrongdoing?

8. Has the individual accepted responsibility for the underlying conduct?

9. Did the individual benefit from the underlying conduct? If so, has the individual provided appropriate restitution?

10. What consequences has the individual sustained as a result of the underlying conduct, including discipline, termination of employment, financial damage, reputational harm, or imprisonment?

11. Has the individual learned any lessons from the underlying events and taken appropriate corrective action to mitigate reoccurrence, including tailored training?

12. Did the individual cooperate with the employer's investigation into the circumstances surrounding the cause of the action?

13. Did the individual cooperate fully with government agencies during any investigation or any related enforcement action?

14. Has sufficient time passed since the underlying events that has to enabled the individual to learn from the experience and to take appropriate measures to prevent reoccurrence?

15. What has the individual been doing since the underlying events and has the individual been involved in any other improper actions since the underlying event?

The Section recognizes that this suggestion extends beyond mere alignment of the FAR with the NCR. Nonetheless, given the FAR Council's commendable goal of encouraging transparency, the Section encourages the FAR Council to consider adding these additional factors to promote fundamental fairness in the treatment of individuals proposed for suspension or debarment.

III. CONCLUSION

The Section appreciates the opportunity to provide these comments and is available to provide additional information or assistance as you may require.

Sincerely,

/s/ Eric Whytsell

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Chair, Section of Public Contract Law

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