

March 7, 2024

*Via Regulatory Portal*

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

Dear Ms. Ryba:

The following sets forth my comments on the captioned proposed rule. The views expressed are my own and do not purport to represent the views of Haynes and Boone, LLP.

I commend the efforts of the Interagency Suspension and Debarment Committee (ISDC) and the FAR Council to bring the FAR and the Nonprocurement Common Rule (NCR) into closer alignment. I have confined my comments to two portions of the alignment effort.

**1. A Notice of Proposed Debarment Should Not Result in Immediate Exclusion**

As noted in the “Background” section of the Proposed Rule, a notice of proposed debarment under the NCR does not result in immediate exclusion. 89 Fed. Reg. at 1043. A notice of proposed debarment under the FAR, in contrast, does have immediate exclusionary effect. The Proposed Rule would retain this difference. This, however, is the one alignment with the NCR that is most needed.

The term “notice of proposed debarment” under the FAR is misleading. Under the FAR, debarment is not “*proposed*” -- it is “*imposed*.” Even the Appropriations Act, which the drafters rely on, states that debarment should be imposed where a contractor has a felony conviction within the preceding 24 months “*unless*” the SDO has considered suspension or debarment “and *determined* exclusion is not necessary.” This requires a determination and rules out immediate peremptory exclusion.

Take the case of a conviction. Who is convicted? On what grounds? What steps did the company take in response? Is the person still employed? What remedial measures are now in place? The SDO cannot know this without affording the contractor an opportunity to respond.

In fact, the FAR *itself* rules out immediate exclusion. It states:

- The Suspension and Debarment Official (SDO) must “*determine* whether debarment is in the Government’s interest.”
- “The existence of a cause for debarment ... does *not* necessarily require that the contractor be debarred.”
- “[T]he seriousness of the contractor's acts or omissions *and any remedial measures or mitigating factors* should be considered in making any debarment decision.”

(Emphasis added.)

These FAR provisions compel the conclusion that a pre-notice letter should be the *norm*. Immediate exclusion should be the *exception*. The SDO should be required to justify immediate exclusion.

The FAR Council comments assert that the SDO needs two tools for immediate exclusion: suspension and notice of proposed debarment. In fact, the SDO only needs one and suspension fills that need. The NCR rule reflects the appropriate practice and it serves the public interest in both procurement and nonprocurement. The FAR Council has not made the case for continuing the immediate exclusionary effect of the FAR “notice of proposed debarment.”

## **2. The Proposed Rule Should be Strengthened to Confirm the Opportunity to Demonstrate Non-Receipt of Notice**

The comments to the proposed rule state that a contractor that does not receive notice of a proposed debarment can ask the SDO to reduce the “period or extent of debarment” under FAR 9.406-4. To make this clear, the proposed rule should contain an amendment to this FAR paragraph to strengthen allowance of “demonstration of non-receipt of notice.” This would require immediate reinstatement of the contractor. The contractor would then have an opportunity to be heard.

FAR Case 2019-015

Comments on Proposed FAR Revisions to Align with NCR on Suspension and Debarment

March 7, 2024

Page 3

FAR 9.406-4 does contain a catch-all “(5) Other reasons the debarring official deems appropriate.” Additional clarifying language would make resort to the catch-all unnecessary. In the past, when the SDO sent the notice to the last-known address, for example, the contractor was deemed to have received notice. As a result, the contractor could not challenge the proposed ground of debarment, but was relegated to proof of newly discovered evidence, etc. The requested change would eliminate the presumption and confirm that the affected party may prove non-receipt.

### **Conclusion**

I appreciate the effort the FAR Council has put into this important project and thank you for the opportunity to participate.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'John S. Pachter', written in a cursive style.

John S. Pachter