GSA Office of the Chief Acquisition Officer

AUG 18 2004

MEMORANDUM FOR RONALD POUSSARD
DIRECTOR
DEFENSE ACQUISITION REGULATIONS COUNCIL

FROM: RODNEY P. LANTIER, DIRECTOR Rodney P. Lantier
REGULATORY AND FEDERAL ASSISTANCE
PUBLICATIONS DIVISION

SUBJECT: GSAR Case 2004-G502, Debarment, Suspension, and Ineligibility

Attached are comments received on the subject FAR case published at 69 FR 34248, June 18, 2004. The comment closing date was August 17, 2004.

Response Number	Date Received	Comment Date	Commenter
2004-G502-1	08/12/04	08/10/04	U.S. EPA
2004-G502-2	08/17/04	08/17/04	DOD
2004-G-502-3	08/17/04	08/17/04	Distributed Solutions, Inc.

Attachments

U.S. General Services Administration
1800 F Street, NW
Washington, DC 20405-0002
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GSAL-2004-G502-1

United States Environmental Protection Agency
Office of Administration and Resources management

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August 10, 2004

General Services Administration
Regulatory Secretariat (MVA),
Room 4035, ATTN: Laurie Duarte
1800 F. Street, NW
Washington, DC. 20405

RE: GSAR 2004-G502
Comments on Notice of Proposed Rule 48 C.F.R. § 509.406-3, RIN 3090-AH97

To Whom it may Concern:

Thank you for the opportunity to comment on the above-referenced proposed GSA rule. Having spent the last 23 years as a Federal agency attorney engaged full-time in procurement and non-procurement suspension and debarment (including the last 9 years as EPA's Suspending and Debarring Official), I am very familiar with the use of show cause letters and the issues related thereto in the context of suspension and debarment proceedings under the FAR and Non-procurement Common Rule (NCR). In addition, as Chair of the OMB Interagency Suspension and Debarment Committee (ISDC), and participating member of the ABA Public Contract Law Section- Committee on Debarment and Suspension, I also have had an opportunity to address the GSA proposed rule with members of both the Federal community and private legal sector. However, this letter is only prepared on behalf of the EPA and does not constitute an official comment of either the ISDC or the ABA.

As you know, the effect given to a proposed debarment under GSAR section 509.405 (and related proposed amendment to 509.406-3) is the result of an interesting historical evolution that began in the early 1980s. Originally, a notice of proposed debarment under the Federal Procurement Regulations (FPR) had no immediate preclusive effect on current or pending contracts. If an agency needed temporary protection pending the conclusion of a debarment proceeding, it could issue a suspension at any time, before, after, or even as part of a notice of

Rec'd 8-12-04

proposed debarment. In a two-stage evolution, beginning with the creation of the FAR as a replacement for the FPR in 1984, notices of proposed debarment under the FAR were given immediate preclusive effect upon issuance but only to contracts to be awarded by the agency proposing debarment. On July 31, 1987, the DoD, NASA and GSA proposed changes to the FAR that extended the preclusive effect to all Federal agencies' contracts for actions initiated under the FAR. The proposal was made final on May 8, 1989. The ABA Public Contract Law Section has been critical of the preclusive effect of proposed debarment and argues, somewhat persuasively, that the FAR now has corrupted any meaningful distinction between suspensions and proposals to debar.

During this evolution, it is worth noting that the Government-wide non-procurement debarment and suspension system under the NCR (i.e., governing debarment and suspension under Federal grants, loans and assistance), was developed. The NCR was prepared by a joint task force comprised of all agencies with both Federal procurement and non-procurement representatives under the direction of OFPP and OFFM within the OMB. But the joint task force deliberately chose not to give preclusive effect for notices of proposed debarment under the NCR. The drafting committee observed that the effect given to notices of proposed debarment under the FAR resulted in a blurring of the differences between proposed debarment and suspension. They also reasoned that giving preclusive effect to notices of proposed debarment would induce contractors suspecting that a debarment action was in the air to informally appear before agency officials in the hope of avoiding official agency action. We also recognized that giving preclusive effect to proposed debarments could cause agencies to go outside the rule and issue show cause notices as a "safe" way to address more complex, and factually disputed cases.

Therefore, in contrast to notices of proposed debarment issued under the FAR, the same notice issued under the NCR has no immediate preclusive effect. Thus, an agency can officially bring in a contractor/participant to answer concerns about its present responsibility without interrupting Government access to services. If the agency has immediate interests to protect, it may do so by joining the notice of proposed debarment to a suspension order, or it may issue a suspension notice separately before or after the notice of proposed debarment is issued.

The proposed rule in expanding the use of show cause letters on a routine basis, also establishes an "imminent harm" standard for issuing a notice of proposed debarment in lieu of a show cause letter. This standard would be different and higher standard for GSA notices of proposed debarment than actions before other Federal agencies under the FAR. Secondly, within the GSA system, the standard for issuing a proposed debarment would be greater than that for issuing a suspension. All this leads to the inevitable result that GSA officials seeking to institute a debarment action will eventually seek to avoid issuing the show cause letter. In short, the medicine is worse than the disease. I also note that the proposed rule provides no guidance to determine what constitutes "imminent harm," a significant shortcoming.

During my many years of experience with cases under both the FAR and NCR, I have had a unique opportunity to see how notices of proposed debarment work in a practical setting under

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both rules. Furthermore, I have experience with "show cause" letters under both rules. The FAR as currently written, as is true with the GSAR, already allows GSA to use the "show cause" option whenever it is appropriate to do so. At EPA, we use "show cause" letters primarily as an investigative tool to update or receive additional information that may be relevant and prudent to obtain pre-notice. I also use them whenever, for policy reasons, it is in the best procurement or non-procurement interest of the Agency or Government to do so. The reason I mention this is that show cause letters, like the official notices of suspension or proposed debarment are part of the *Government's* administrative arsenal in dealing with threats of waste, fraud, abuse, poor performance, and non-compliance. They should be used with the full intent and discretion of the *Government* to serve its needs in a business context. I believe it is imprudent for any agency to surrender its *option* to employ any tool in its arsenal as a matter of rule or policy except as the individual facts in a given case may warrant in the best interest of the Government.

As neither the FAR Council nor the ISDC appear to desire to *require* issuance of a show cause notice prior to issuing a notice of proposed debarment as a Government-wide measure, I question whether any individual agency proposing to implement such a requirement within its own system is a violation of at least the spirit of flexibility and empowerment intended by OFPP or OFFM when the Government-wide systems were implemented. I say this not because I doubt that any agency has the authority to amplify and guide the use of the options allowed by the FAR or NCR, but because the options and discretion allowed to each agency under the existing rules are fundamental principles consistent with making decisions that impact the *Government* on a case-by-case basis. It was not, in my opinion, envisioned that any agency would surrender an agency's powers because of some external concern about uneven impact on *respondents* based upon factors over which the Government has no control.

I admire GSA's desire to inject "fairness" among the various respondents who may face debarment actions. But I question whether the proposed rule, or any rule change in this regard, can or should achieve that goal. The "advantages" or "disadvantages" that some respondents enjoy over others by reason of their size, location, sophistication, financial strength and other factors are inherent in their composition and access to legal advice. But they have nothing to do with, and are not dependent on, the Government's internal rules of procedure. Larger companies with greater resources will always enjoy an ultimate advantage over smaller companies in effectively resolving an agency's debarment concerns. As an initial matter, since actions initiated under the NCR have no preclusive effect, no respondent, large or small, can be put at a comparative disadvantage merely by having to answer a notice of proposed debarment.

Furthermore, pre-notice meetings with potential respondents often move control of the process from the agency to the respondent's counsel. The real impact of implementing the proposed rule would be to tie the GSA debarring official's hands on all GSA cases across the board, while every other agency enjoys the flexibility to decide which tools in its administrative arsenal to employ as the *Government's* interest demands. Furthermore, once a Show Cause Notice, with its inherent delay, is issued, how can the agency meet the "immediate need"standard required to issue a Notice of Suspension?

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The issue here is not about trying to fix a GSA rule that is broken. Nor is it ultimately about bringing fairness into a system that is unfair. The problem is a fundamental one within the FAR itself that began down a slippery slope in the early 1980s by giving preclusive effect to notices of proposed debarment. Those changes resulted in taking away agency-specific flexibility to issue notices of proposed debarment safely, and awaiting the outcome of debarment proceedings to effect the sanction. Therefore the GSA proposed rule, no matter how well intentioned, is actually necessitated by the fact that the effect of proposed debarment under the FAR caused the very problem GSA now seeks to correct. In that sense, it is trying to undo what the FAR intended to do. To put it plainly, when you find yourself in a hole, it is time to quit digging.

I strongly encourage GSA to re-think the wisdom of finalizing the proposed rule *at this time.* The issue of effect of proposed debarment under the FAR vs the NCR, and the use of show cause letters are very important issues that should be resolved by the FAR Council and the ISDC in consultation with the OMB. If, when the ISDC reconvenes in September, the GSA wishes to explore the issue as a Government-wide matter, I as Chair of the ISDC will place the issue on our agenda to discuss with OMB. GSA's representatives to the ISDC, Joseph Neurauter and Donald Suda can schedule the matter for Government-wide attention. If a change is appropriate, all agencies under the FAR and NCR should be under the same guideline.

As an alternative, I suggest that if GSA still believes that bringing equity within the respondent community in debarment actions is important at this time, it consider delaying issuing a final rule until the matter can be more fully addressed by both the ISDC and the FAR Council. In the mean time, I encourage the GSA Debarment Program (with which EPA's Debarment Program has had a long, close and collegial relationship) to consider issuing internal guidance within its own system to guide the thoughtful and selective use of show cause notices, at least until such time as GSA is satisfied that its noble goals cannot be achieved through a more appropriate and effective Government-wide approach that deals directly with the effect of debarment under the FAR and NCR.

I thank you for the opportunity to comment on your proposed rule. If I can be of any further assistance during your deliberation in this matter, please do not hesitate contact me at the above addresses or phone numbers. Good luck and smooth sailing.

Sincerely,

Robert F. Meunier
EPA Debarring Official

2004-G502-2

"Timperley, William, Mr, OSD-ATL" <William.Timperley@osd.mil>

08/17/2004 03:40 PM

To: "'gsarcase.2004-G502@gsa.gov'" <gsarcase.2004-G502@gsa.gov>
cc: "Cipicchio, Domenico, Mr, OSD-ATL" <Domenico.Cipicchio@osd.mil>
Subject: Case Comments on Suspension and Debarment

We feel that all changes to the suspension and debarment procedures should be developed on an interagency basis and that the Interagency Committee on Debarment and Suspension (ISDC) is the appropriate group for any such effort. All proposed rules should be developed through that group to ensure that the needs and interests of all agencies are addressed. Until such inter agency agreement is reached, we feel that all agencies should be consistent with the Yockey Memorandum that a SCL may be issued "when appropriate." While GSA is not part of DOD, the process contained in the memorandum help assure the implementation of suspension and debarment procedures on a government-wide basis.

We are concerned that the proposed rule would allow for the issuance of a show cause letter without coordination with other agencies who conduct business with an entity, this goes against the principles of lead agency coordination which is necessary for the coordinated Government handling of suspension, debarment and ineligibility matters. An agency sending out the proposed SCL would have made a de facto determination that it is the lead agency and would have done so without proper coordination with other agencies. DoD feels that such coordination is essential to the effective and fair operation of suspension, debarment and ineligibility matters when dealing with public. Also, lack of coordination prior to the issuance of a show cause letter could jeopardize ongoing criminal and civil fraud investigations being conducted by other agencies. It would have a chilling effect on debarment referrals from investigators, out of fear of compromising either an ongoing investigation, or one that should be undertaken because of newly discovered evidence of a continuing crime or fraud. The military departments have been successful in working with investigators and U.S. attorneys in determining the appropriate time to send "show cause" letters so as not to interfere with ongoing criminal investigations, or investigations that should be undertaken While a "show cause" letter may be a good practice it should not be a mandatory one since it has the potential of interfering with criminal investigations, and could have a chilling effect on referrals from federal investigators, U.S. Attorneys, and other federal law enforcement officials.

We are concerned that the proposed issuance of a show cause letter without prior interagency coordination could cause substantial harm if prior coordination does not occur and the contractor is engaged in critical national defense work.

We feel that there is not any need for the proposed rule since SDO currently have the power to proceed in the manner appropriate to the case. Suspension and Debarment Officials (SDOs) have the discretion to issue show cause letters without this additional regulation. SDOs have used that discretion in issuing show cause letters in past cases where appropriate.

DoD is concerned that the proposed rule is not in conformance with EO 12549 which addresses "government-wide effect," "government-wide criteria," and "government-wide minimum due process." Another concern is non compliance with the established rule, that the ICDS is required to monitor the implementation of the EO, is being ignored. In 1982, the Office of Federal Procurement Policy ("OFPP") established substantive guidelines for uniform, Government-wide debarment and suspension. 47 Fed. Reg. 28,854 (July 1, 1982). Executive Order 12549 (1989) further established this principle with respect to non-procurement programs. The "show cause" letter notification process envisioned by GSA would add an additional mandatory step to GSA's suspension and debarment process, a change which would add to the diversity, rather than uniformity, of suspension and debarment regulations throughout the Government . As such, the proposed rule is a regulatory change that should be considered through the conventional rule making process by initiation of a FAR case, and on the non-procurement side, through initiation of a change to the Common Rule.

We are concerned that the proposed rule will undermine the "lead agency coordination" principle that is set forth in FAR 9.402 (c).. The "lead agency" principle has also been adopted by civilian agencies in regard to both

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procurement and non-procurement cases. Recently, the ISDC appointed a subcommittee to study the topic and make recommendations. The final report by the ISDC subcommittee issued on January 14, 2004, recommended that unless an emergency demands otherwise, agencies will make a reasonable effort to ascertain which other agencies have a significant interest in a contractor before they initiate a suspension or debarment action (ISDC LEAD AGENCY REPORT, 01/14/2004, page 3). If adopted, the proposed rule would undermine the "lead agency" principle by initiating a dialog with a contractor regarding allegations of misconduct and the contractor's present responsibility without first considering designation of lead agency responsibility. This would lead to confusion and duplication of effort where other agencies also have an interest in the contractor's present responsibility and are also considering initiating a dialog regarding allegations

We note that in the current regulation-free SCL environment, each agency is free to proceed (after coordination) as it determines best under any given circumstances. In 1982, the Office of Federal Procurement Policy ("OFPP") established substantive guidelines for uniform, Government-wide debarment and suspension. 47 Fed. Reg. 28,854 (July 1, 1982). Executive Order 12549 (1989) further established this principle with respect to non-procurement programs. The "show cause" letter notification process envisioned by GSA would add an additional mandatory step to GSA's suspension and debarment process, a change which would add to the diversity, rather than uniformity, of suspension and debarment regulations throughout the Government . As such, it is a proposed regulatory change that should be considered through the conventional rule making process by initiation of a FAR case, and on the non-procurement side, through initiation of a change to the Common Rule.

The proposed regulation may generate an expectation among the public that all FAR 9.4 action should be preceded by a SCL.

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2004-G502-3

"Tuttle, Peter"
<PeterT@distributedinc.com>
08/17/2004 05:04 PM

To: gsarcase.2004-G502@gsa.gov
cc: "Falcone, Ron" <RonF@distributedinc.com>
Subject: GSAR Case 2004-G502 - Debarment, Suspension and Ineligibility - Proposed Rule

Distributed Solutions Inc. (DSI) is a small business founded in 1992 in Northern Virginia specializing in the manufacture of a robust procurement software solution set called the Automated Acquisition Management System (AAMS). AAMS is currently deployed in more than twenty federal agencies. We appreciate the opportunity to provide the below comments on the proposed rule:

1. We believe that FAR 9.406-3 (c)(1) clearly articulates a requirement that a debarring official shall advise contractors when debarment is being considered, as follows:

(c) *Notice of proposal to debar.* A notice of proposed debarment shall be issued by the debarring official advising the contractor and any specifically named affiliates, by certified mail, return receipt requested --

(1) That debarment is being considered;

2. We agree that the GSAR does not provide explicit supplemental instructions as to the form/format of a notice of pending debarment actions, but we believe that the GSAR does provide adequate instructions for notification under GSAR 509.406-3(d)(1)(ii), as follows:

GSAR 509.406-3 Procedures

(d) *Decisionmaking process.*

(1) The debarring official will provide:

(i) Notice of declinations, proposed debarments, and decisions to the referring activity.
(ii) Notice of proposed debarment to each party being considered for debarment.

3. While the issuance of a Show Cause Notice prior to a Notice of Suspension or a Notice of a Proposed Debarment is well intentioned, several issues exist that may create confusion on the part of the vendor community. One is that a Show Cause Notice has historically been used in association with possible termination actions (FAR 49.402-3). Second, is that a Show Cause Notice is <u>not</u> a mandatory step in the termination process (FAR 49.402-3(e)(1).

4. We recommend that the Show Cause Notice be utilized for what it was intended to support – terminations actions – and not be utilized for additional notifications of prospective debarment actions. GSA can use other correspondence methods for providing advance notification of vendors of potential debarment actions. GSA should consider expanding GSAR 509.406-3(d)(1)(ii) to state that the suspension/debarment official shall provide a written notification to the contractor or party in advance of the formal Notice of Suspension or a Notice of a Proposed Debarment. The official's letter can also encourage the contractor to contact GSA proactively to discuss the situation with cognizant official.

5. The advantage of accepting this recommendation is that the intent and utility of the Show Cause Notice would not be impacted, while the additional text to the GSAR would provide adequate supplemental Departmental guidance to suspension and debarment officials.

Regards,

Peter Tuttle, CPCM
Distributed Solutions, Inc.