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ALERT

FAR Council Proposes Changes to Harmonize Procurement and Nonprocurement Suspension and Debarment Rules

January 11, 2024

WHAT: On January 9, 2024, the Federal Acquisition Regulation (FAR) Council published a proposed rule to amend the FAR to improve consistency between the procurement and nonprocurement rules on suspension and debarment. The proposed rule adds to the FAR certain language and requirements from the Nonprocurement Common Rule (NCR), found in 2 C.F.R. Part 180 and applicable to nonprocurement actions such as grants, cooperative agreements, and assistance contracts, and also incorporates existing "best practices" within both suspension and debarment systems that are currently not in the FAR. Important changes include adding seven NCR factors that suspending and debarring (S&D) officials may consider to the FAR's existing "mitigating factors" and definitions for tools S&D officials may use for increased flexibility in resolving responsibility concerns, such as the pre-notice letters and administrative agreements. One important potential change is not proposed, however: The FAR Council is not proposing to change the immediate exclusionary effect of a proposed debarment to align with the NCR. The proposed changes are based on the recommendations of the Interagency Suspension Debarment Committee.

WHEN: The FAR Council issued the proposed rule on January 9, 2024 with a request for comments within 60 days (by March 11, 2024).

WHAT DOES IT MEAN FOR INDUSTRY: The changes in the proposed rule largely fall in the following categories: (1) adding new definitions to account for existing practices in the suspension and debarment systems that are not currently in the FAR; (2) aligning some of the provisions of the FAR to those in the NCR; and (3) expressly

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acknowledging increased communication methods between the government and contractors. The overarching rationale for many of the additions is to enhance transparency and consistency within the government's suspension and debarment processes and to codify in the FAR processes that give S&D officials increased flexibility when resolving concerns of a contractor's present responsibility.

Proposed Debarment Remains Exclusionary

Perhaps the most notable aspect of the FAR Council's proposed rule is the rejection of changes to the FAR that would make a notice of proposed debarment non-exclusionary. Although a notice of proposed debarment under the NCR is non-exclusionary, *see* 2 C.F.R. 180.810, the FAR Council reasons that procurement contracts are more likely than nonprocurement transactions to require immediate exclusion to protect the government's interests and taxpayers' money by minimizing business risk. This same concern is not present for nonprocurement transactions, according to the notice, because participants 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." Further, federal financial assistance, according to the notice, is "typically for public purposes of support or economic stimulation, rather than for the direct benefit of the U.S. Government." Finally, the FAR Council 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 an S&D official has considered suspension or debarment and determined exclusion is not necessary.

As the FAR Council recognizes, the FAR already includes suspension as a means of immediately excluding a contractor to protect the government's interests (at least in the short term), and the notice does not explain why two exclusionary tools are necessary to protect the government's interests. Further, the FAR and NCR are (and have been for years) reciprocal, meaning that an exclusion under one system is an exclusion under the other. And, just as a procurement contract involves taxpayer dollars, so too do nonprocurement actions. Finally, the cited Appropriations Act language does not require an S&D official to issue an exclusionary notice as part of the assessment of whether suspension and debarment is appropriate. It simply requires the official to have considered whether exclusion is necessary to protect the government, something that can be done with a pre-notice letter first instead of an immediate exclusion.

Given the prominent disconnect between the proposed FAR rule and the NCR, it is foreseeable that this will be an area for industry comment. The FAR Council's declination here is nonetheless ameliorated by its express inclusion of non-exclusionary "pre-notice letters" as a tool to alert a contractor of an agency's present responsibility concerns before issuance of a notice of suspension or proposed debarment.

New Definitions to Align Rules and Acknowledge Current Practices

The proposed rule adds several new definitions to the FAR to incorporate widely used suspension and debarment practices. The most notable are summarized below.

- Pre-Notice Letter: The proposed rule recognizes the use of a pre-notice letter, which the rule would define in FAR 9.403 as "written correspondence issued to a potential respondent in a suspension and debarment matter, which does not immediately result in an exclusion or ineligibility." A pre-notice letter gives S&D officials the option to alert the contractor to present responsibility concerns or potential future action in lieu of using an immediate exclusionary tool. The FAR Council notes that both the FAR and NCR recognize the authority of agencies to handle actions as informally as practicable, consistent with principles of fundamental fairness. Accordingly, S&D officials may choose to engage in preliminary discussions with potential respondents via a pre-notice letter, which may lead to resolving concerns involving a contractor's present responsibility without issuing a formal notice. The proposed rule, however, makes clear that an S&D official is not required to send a pre-notice letter prior to initiating a suspension or debarment action.
- Administrative Agreement: The FAR currently references administrative agreements somewhat cryptically, without defining what they are. The proposed rule remedies that situation by proposing to define an "administrative agreement" in FAR 9.403 as "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." The FAR Council noted that over the years, S&D officials have recognized the value of resolving present responsibility concerns through administrative agreements. These agreements provide an alternative for the government to implement protective measures short of exclusion, while also allowing contractors who are working toward present responsibility additional time to implement appropriate remedial measures. The proposed rule requires the S&D official to enter into FAPIIS (now part of the System for Award Management (SAM)) whether the administrative agreement resolves an actual or a potential suspension or debarment.
- Conviction: The proposed rule also revises the definition of "conviction" in FAR 9.403 to align with the definition in the NCR, 2 C.F.R. 180.920, to mean "a judgment or any other determination of guilt of a criminal offense by any court of competent jurisdiction, whether entered upon a verdict or plea, including a plea of nolo contendere" or "[a]ny other resolution that is the functional equivalent of a judgment, establishing a criminal offense by a court of competent jurisdiction, including probation before judgment and deferred prosecution." The definition would also provide that "[a] disposition without the participation of the court is the functional equivalent of a judgment only if it includes an admission of guilt."
- Voluntary Exclusion: The proposed rule also adds the concept and a definition for "voluntary exclusion," which is briefly described in the NCR but not in the current FAR. In a voluntary exclusion, a contractor chooses to voluntarily exclude itself from procurements governmentwide for a certain period of time. The notice states that a contractor may choose this path "so that it may represent itself in a more favorable light to various constituencies including but not limited to customers, creditors, and the public" by indicating that it chose exclusion rather than having exclusion imposed involuntarily. A contractor that is voluntarily excluded will be placed on the excluded parties list in SAM, as is currently required under the NCR. The proposed rule states that the terms for both voluntary exclusions and administrative agreements that are executed prior to the final rule will remain in effect regardless of the outcome of the final rule.

Additional Changes to Align the FAR with the NCR

The FAR Council also proposes to harmonize the procurement and nonprocurement systems by adding to the FAR several provisions already found in the NCR.

- Additional NCR Factors: The proposed rule seeks to add seven new mitigating or aggravating factors to FAR 9.406-1 that S&D officials should consider in suspension and debarment actions. The new factors are equivalent to the factors found in the NCR. The FAR Council reasons that "[i]ncorporating these aggravating factors will provide consistency between the two rules, as well as more guidance and increased options for the suspending and debarring official to consider when making present responsibility determinations."
- Parties Who Can Contribute Advice: The proposed rule revises the list of parties who can contribute advice on pending or contemplated legal proceedings. The proposed list includes "advice from the Department of Justice, a U.S. Attorney's office, State attorney general's office, or a State or local prosecutor's office." The FAR Council proposes adding this language, which is equivalent to language in the NCR, because the particular FAR provision currently does not reflect that suspensions can be based on state and local proceedings.
- Time to Decide Actions Based on a Conviction or Civil Judgment: The FAR Council also proposes to change the time S&D officials have to make a debarment decision in deciding actions based upon a conviction or civil judgment, or in which there is no genuine dispute over material facts. The FAR Council proposes changing the current rule of 30 working days after the close of the official record to 45 calendar days, which is the language included in the NCR. The FAR Council notes that in addition to harmonizing the FAR and NCR, the change will avoid conflicts with how other countries compute working days.

Increased Communication Methods

The proposed rule seeks to increase the methods of communication that can be used between the government and contractors. The FAR Council proposes adding telephone or internet as permissible communications for contractors and their representatives to use to present matters in opposition. The FAR Council also proposes permitting S&D officials to issue a notice of proposed debarment or notice of suspension by mail, facsimile, or email, instead of solely by certified mail with return receipt requested. Additionally, the proposed rule will allow S&D officials to send the notice of proposed debarment to the contractor, the contractor's identified counsel for purposes of the administrative proceedings, or the contractor's agent for service of process. The FAR Council added these new flexibilities so the government and contractors will have additional means of communication, including in situations where the parties' ability to meet in person is limited or contractors are located abroad.

One other notable issue from the proposed rule: The notice includes a chart that summarizes the Council's attempt to calculate the number and percentage of small businesses excluded from federal contracting over the past three fiscal years. According to the Council's calculation, roughly 75% of all exclusions have involved small businesses. The FAR Council anticipates that the proposed changes will impose only minor procedural

changes for both contractors and the government and that these procedural changes will have a positive impact on small entities. Whether this bears out, the statistics nonetheless counsel small businesses to monitor their compliance and consider whether there are enhancements that could be made to prevent them from joining these statistics.

Wiley's Government Contracts practitioners represent contractors of all sizes in suspension and debarment actions under the FAR and NCR. We also assist contractors with assessing and improving their compliance programs to ensure that they remain presently responsible. We will continue to monitor developments in this area.