

SUSPENSION AND DEBARMENT

1. PURPOSE

This Directive establishes policies and assigns responsibilities for APHIS' suspension and debarment (S&D) program, to include procurement and nonprocurement S&D actions against persons who are not presently responsible.

2. AUTHORITIES/REFERENCES

- a. Executive Order 12549, Debarment and Suspension.
<http://www.archives.gov/federal-register/codification/executive-order/12549.html>
- b. Executive Order 12689, Debarment and Suspension.
<http://www.epa.gov/isdc/eo12689.htm>
- c. 2 Code of Federal Regulations (CFR), Part 180, OMB Guidelines to Agencies on Governmentwide Debarment and Suspension (Nonprocurement).
http://www.ecfr.gov/cgi-bin/text-idx?SID=c140621fb1f3f6a809de1a1f1b9a7aba&tpl=/ecfrbrowse/Title02/2cfr180_main_02.tpl
- d. 2 CFR, Part 417, USDA Nonprocurement Debarment and Suspension.
http://www.ecfr.gov/cgi-bin/text-idx?SID=c140621fb1f3f6a809de1a1f1b9a7aba&tpl=/ecfrbrowse/Title02/2cfr417_main_02.tpl
- e. Agricultural Acquisition Regulation (AGAR) 48 CFR, Subpart 409.4, Debarment, Suspension, and Ineligibility.
<http://www.ecfr.gov/cgi-bin/text-idx?SID=c140621fb1f3f6a809de1a1f1b9a7aba&node=48:4.0.2.12.10.1&rgn=div6>
- f. Federal Acquisition Regulation (FAR) 48 CFR, Subpart 9.4, Debarment, Suspension, and Ineligibility.
<http://www.ecfr.gov/cgi-bin/text-idx?SID=28b4008ca36f38b57c105759ef0bd3d0&node=48:1.0.1.2.9.4&rgn=div6>

- g. Public Law 110-246, Food Conservation and Energy Act of 2008.
<http://www.gpo.gov/fdsys/pkg/PLAW-110publ246/pdf/PLAW-110publ246.pdf>
- h. Departmental Regulation (DR) 1700-2, OIG Organization and Procedures, dated 6/17/97.
http://www.ocio.usda.gov/sites/default/files/docs/2012/DR1700-002_0.pdf
- i. DR 2280-001, Suspension and Debarment, dated 01/16/13.
<http://www.ocio.usda.gov/sites/default/files/docs/2012/Suspension%20and%20Debarment.pdf>

3. DEFINITIONS

- a. **Contract.** A mutually binding legal relationship obligating the seller to furnish the supplies or services (including construction) and the buyer to pay for them. It includes all types of commitments that obligate the Government to an expenditure of appropriated funds and that, except as otherwise authorized, are in writing. In addition to bilateral instruments, contracts include (but are not limited to): awards and notices of awards; job orders or task letters issued under basic ordering agreements; letter contracts; orders, such as purchase orders, under which the contract becomes effective by written acceptance or performance; and bilateral contract modifications. Contracts do not include grants and cooperative agreements covered by 31 United States Code (U.S.C.) 6301, et seq. For discussion of various types of contracts, see part 16, FAR 48 CFR 2.101.
- b. **Conviction.** 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 any other resolution that is the functional equivalent of a judgment, including probation before judgment and deferred prosecution. A disposition without the participation of the court is the functional equivalent of a judgment only if it includes an admission of guilt (2 CFR § 180.920).
- c. **Covered Transaction.** A nonprocurement or procurement transaction that is subject to the prohibitions of 2 CFR Parts 180 and 417 in that a suspended or debarred person is precluded from participating in covered transactions. See 2 CFR §§ 180.200, 180.205, 180.210, 180.220, 417.210, and 417.220.
- d. **Debarment.** An action taken under FAR 48 CFR 9.406 and AGAR 409.406 for procurement, or subpart H of 2 CFR Parts 180 and 417 for nonprocurement transactions, to exclude a person from participating in covered transactions. 2 CFR § 180.925.
- e. **Nonprocurement Transaction.** As set forth in 2 CFR §§ 180.210 and 180.970, any transaction, regardless of type (except procurement contracts), including, but not limited to: grants; cooperative agreements; scholarships; fellowships; contracts of assistance; loans; loan guarantees; subsidies; insurances; payments

for specified uses; and donation agreements. A nonprocurement transaction at any tier does not require the transfer of Federal funds.

- f. **Not Covered Transaction.** Nonprocurement transactions listed in 2 CFR §§ 180.215, 417.215, or 417.220.
- g. **Person.** Any individual, corporation, partnership, association, unit of government, or legal entity, however organized.
- h. **Present Responsibility for Nonprocurement.** A person deemed as presently responsible who can participate in USDA programs (USDA DR 2280-001, Suspension and Debarment). The causes for which a Federal agency may suspend or debar a person (i.e., a person deemed not presently responsible) are outlined in 2 CFR §§ 180.700, 180.800/417.800, and below under 4.d.
- i. **Present Responsibility for Procurement.** Prohibition of the award of a purchase order or contract unless the contracting officer makes an affirmative determination of responsibility of the offeror (FAR 9.1). Present responsibility includes an adequate performance records, a record of integrity and business ethics, and qualification and eligibility under applicable laws and regulations.
- j. **Procurement** (i.e., “Acquisition”). The acquiring by contract with appropriated funds of supplies or services (including construction) by and for the use of the Federal Government through purchase or lease, whether the supplies or services are already in existence or must be created, developed, demonstrated, and evaluated (FAR 48 CFR 2.101).
- k. **Respondent.** A person against whom APHIS has initiated an S&D action.
- l. **Suspension and Debarment (S&D) Action.** Discretionary administrative action taken to protect the Federal Government by excluding certain persons from participation in Federal programs. The S&D action ensures that the Federal Government does not conduct business with a person that has an unsatisfactory record of integrity and business ethics. S&D actions are administered Governmentwide; consequently, a person excluded by one Federal agency is excluded from doing business with all Federal agencies. Suspended and debarred persons are listed in the System for Award Management (SAM) which is maintained by the General Services Administration (GSA).
- m. **Suspension.** An action taken by a suspending official under (1) FAR 48 CFR 9.407 and AGAR 409.407 for procurement, or (2) Subpart G of 2 CFR Parts 180 and 417 for nonprocurement transactions, that immediately prohibits a person from participating in covered transactions for a temporary period, pending completion of further proceedings. 2 CFR § 180.1015.

- n. **SAM.** The system maintained by GSA which consolidates the capabilities of the Central Contractor Registration/Federal Agency Registration, Online Representations and Certifications Application, and the Excluded Parties List System. Records reflected in the SAM database identify those persons excluded by Federal Government agencies from receiving certain types of Federal financial and nonfinancial assistance and benefits, Federal contracts, or Federally-approved subcontracts. The purpose of the database is to keep agencies abreast of administrative, as well as statutory exclusions taken throughout the Federal Government. Actions may be taken under 2 CFR Parts 180 and 417, and FAR 48 CFR Subparts 9.4 and 409.4, or other specific statutory authority.
- o. **Voluntary Exclusion.** A person's agreement to be excluded under the terms of a settlement between the person and one or more agencies or the status of a person who has agreed to a voluntary exclusion. Voluntary exclusion has Government-wide effect (2 CFR § 180.1020).

4. POLICY

It is APHIS policy that procurement and nonprocurement S&D actions be implemented in accordance with the applicable regulations following the procedures set forth in this Directive to ensure that:

- a. APHIS solicits offers from, awards contracts to, and consents to subcontracts only with presently responsible persons.
 - (1) A determination of contractor responsibility must be made prior to any contract award, renewal, extension, or assignment. Such determination must be made part of the contract documentation in accordance with the responsibilities and procedures in this Directive.
 - (2) The methods used by APHIS to make a determination of contractor responsibility will include, but not be limited to:
 - (a) Accessing the SAM to ascertain the contractor's current status;
 - (b) Collecting all available information that bears upon a responsibility determination; and/or
 - (c) Meeting with and discussing performance issues with the contractor prior to awarding, renewing, or extending the contract.
- b. Only presently responsible persons participate in APHIS programs, and, more specifically, in covered nonprocurement transactions.
- c. When circumstances warrant, a suspension action will be taken to protect APHIS and the Federal Government by temporarily excluding persons proposed for

debarment from participation in covered transactions while the debarment action is being processed.

Causes for suspension action include adequate evidence:

- (1) That a cause for debarment may exist (example: conviction).
- (2) To suspect the commission of an offense listed as a cause for debarment.

d. A debarment action is for a fixed, specified time period, generally up to 3 years, but for a longer period or even permanently, where circumstances warrant.

Causes for debarment include:

- (1) Conviction of, or a civil judgment, for:
 - (a) Commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public or private agreement or transaction.
 - (b) Violation of Federal or State antitrust statutes, including those proscribing price fixing between competitors, allocation of customers between competitors, and bid rigging.
 - (c) Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, receiving stolen property, making false claims, or obstruction of justice.
 - (d) Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the person's present responsibility.
- (2) Violation of the terms of a public agreement or transaction so serious as to affect the integrity of an agency program, such as:
 - (a) A willful failure to perform in accordance with the terms of one or more public agreements or transactions.
 - (b) A history of failure to perform or of unsatisfactory performance of one or more public agreements or transactions.
 - (c) A willful violation of a statutory or regulatory provision or requirement applicable to a public agreement or transaction.
- (3) Any of the following causes:

- (a) A nonprocurement debarment by any Federal agency taken before October 1, 1988, or a procurement debarment by any Federal agency taken pursuant to 48 CFR Part 9, Subpart 9.4, before August 25, 1995.
 - (b) Knowingly doing business with an ineligible person, except as permitted under 2 CFR § 180.135.
 - (c) Failure to pay a single substantial debt, or a number of outstanding debts (including disallowed costs and overpayments, but not including sums owed the Federal Government under the Internal Revenue Code) owed to any Federal agency or instrumentality, provided the debt is uncontested by the debtor or, if contested, provided that the debtor's legal and administrative remedies have been exhausted.
 - (d) Violation of a material provision of a voluntary exclusion agreement entered into under 2 CFR § 180.640 or of any settlement of a debarment or suspension action.
 - (e) Violation of the provisions of the Drug-Free Workplace Act of 1988 (41 U.S.C. 701).
- (4) Any other cause of so serious or compelling a nature that it affects a person's present responsibility.

5. SCOPE

This Directive applies to:

- a. APHIS employees who interact with persons who participate, or previously participated, or may reasonably be expected to participate in transactions under Federal procurement and nonprocurement programs.
- b. Procurement Transactions: causes for suspension and debarment are listed in FAR 48 CFR 9.407-2 and 9.406-2, respectively.
- c. Nonprocurement Transactions: causes for suspension and debarment are listed in 2 CFR §§ 180.700 and 180.800/417.800, respectively.
 - (1) All nonprocurement transactions, as defined in 2 CFR § 180.970 are covered transactions unless listed in the exemptions under 2 CFR §§ 180.215, 417.215, or 417.220.
 - (2) Not covered transactions include those related to the receipt of licenses, permits, certificates, and inspection services under regulatory programs

conducted in the interest of animal and plant health and safety, and the receipt of animal damage control services.

- (3) Not covered transactions are not exempt from S&D procedures. A person who abuses a not covered transaction may continue to receive benefits under the program, but may be referred by the Agency for suspension or debarment to protect the Federal Government.

6. RESPONSIBILITIES

- a. **S&D positions.** Any staff with assigned S&D responsibilities must complete the S&D training in AgLearn.
 - (1) The S&D official for procurement activities is the Director, Office of Procurement and Property Management (OPPM), USDA.
 - (2) The S&D official for nonprocurement activities is the Agency Administrator as designated by the Secretary, Department of Agriculture.
 - (3) The S&D Council member is the Marketing and Regulatory Programs Business Services (MRPBS) Deputy Administrator, or designee.
 - (4) The S&D procurement coordinator is the Marketing and Regulatory Programs (MRP) Head of the Contracting Activity Designee (HCAD)/MRPBS Acquisition and Asset Management Division (AAMD) Director.
 - (5) The S&D nonprocurement coordinator is the MRP Chief Financial Officer/MRPBS Financial Management Division (FMD) Director.
 - (6) The lead procurement S&D staff is located in the MRBPS, AAMD, Procurement Branch.
 - (7) The lead nonprocurement S&D staff is located in the MRPBS, FMD, Review and Analysis Branch.
 - (8) The other employees assigned S&D responsibilities include the program area Deputy Administrators, Associate Deputy Administrators, and other program area staff, as assigned by the Deputy Administrators/Associate Deputy Administrators.
- b. **Procurement Responsibilities.** Applicable to procurement S&D actions only.

- (1) S&D Procurement Coordinator/HCAD:
 - (a) Receives and reviews S&D referral records from contracting officers and forwards them to OPPM.
 - (b) Shares information and developments with internal and external interested offices, as necessary, if assigned as the lead agency.
 - (c) Serves as the point of contact for outside party inquiries (examples: from banks, employers, or the general public) regarding a contractor's status in SAM, which involves verifying an identity match between APHIS' excluded contractors listed in SAM and the subject of the inquiry by the outside party. As needed, coordinates with the Office of General Counsel (OGC) when responding to outside inquiries to ensure that no deliberative process, attorney-client, or attorney work product privileges are waived by sharing information with the outside party.
 - (d) Coordinates the investigation of causes for possible suspension or debarment, and reports findings to the contracting officer.

- (2) Contracting Officer:
 - (a) Reviews SAM after the opening of offers and immediately prior to award. (NOTE: Contractors listed in SAM will not receive awards and will have their bids or proposals rejected, unless the APHIS Administrator decides otherwise in accordance with FAR 48 CFR 9.405-1(b) and AGAR 409.405)
 - (b) When recommending that the S&D official initiate suspension or debarment action, prepares the referral record, in consultation with OGC if needed, and forwards it to the HCAD.

- (3) Lead Procurement S&D staff (and other employees assigned S&D responsibilities):
 - (a) Assists the contracting officer in any Agency procurement S&D-related issues.
 - (b) Advises the contracting officer of any situations or concerns that may warrant consideration of S&D action.

c. **Nonprocurement Responsibilities.** Applicable to nonprocurement S&D actions only.

(1) APHIS Administrator:

- (a) Serves as the S&D official and is authorized to impose S&D actions in accordance with the procedures set forth in 2 CFR, Parts 180 and 417.
- (b) Determines if a suspension or debarment is warranted based on the administrative record.

(2) S&D Coordinator:

- (a) Receives and reviews referral records from the lead nonprocurement S&D staff and either returns the referral record for revisions or forwards the referral record to the S&D official.
- (b) Shares information and developments with internal and external interested offices, as necessary, if assigned as the lead agency.
- (c) Serves as the point of contact for outside party inquiries (examples: from banks, employers, or the general public) regarding a person's status in SAM, which consists of verifying an identity match between APHIS' excluded person and the subject of the inquiry by the outside party. As needed, coordinates with the OGC when responding to outside inquiries to ensure that no deliberative process, attorney-client, or attorney work product privileges are waived by sharing information with the outside party.
- (d) Provides USDA, Office of the Chief Financial Officer (OCFO) with the nonprocurement S&D report within 45 days after each fiscal year quarter.
- (e) Establishes the administrative record for the S&D official to initiate an S&D action.

(3) Other employees assigned S&D responsibilities:

- (a) Ensure that the requirements in 2 CFR § 180.425 are met, and that SAM is checked, when required, to confirm that only presently responsible persons are allowed to participate in APHIS nonprocurement covered transactions.
- (b) In instances where an APHIS program identifies a person who has been or is engaged in any of the activities outlined in section 4.d. as causes for debarment, whether involving covered or not covered nonprocurement transactions, the APHIS program, after confirming the existence of a possible cause for suspension or

debarment, will refer the matter to the lead nonprocurement S&D staff for consideration.

(4) Lead Nonprocurement S&D staff:

- (a) Coordinates investigations where applicable, depending on if the potential causes for suspension or debarment are obtained from external sources (examples: OIG, other Federal agencies, hotline complaints, media) or through internal program operations (example: Investigative and Enforcement Services investigations, reviews of program activities, etc.).
- (b) Receives and reviews each referral from the APHIS programs or other employees, assigns an APHIS case number unique to each respondent and develops and forwards the referral record to the S&D coordinator.
- (c) Coordinates activities to support an S&D action.

7. INQUIRIES

- a. Direct procurement questions to MRPBS, AAMD, at 612-336-3209.
- b. Direct nonprocurement questions to MRPBS, FMD, at 301-851-2834.
- c. This Directive can be accessed at www.aphis.usda.gov/library.

/s/

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