

Date: June 2, 2017

From: Acting Deputy Senior Procurement Executive

Subj: Class Deviation from VA Acquisition Regulation (VAAR) Section 802.101, Definitions and Subpart 809.4, Debarment, Suspension and Ineligibility (VAIQ 7750933)

To: Heads of Contracting Activities and Debarment and Suspension Committee

1. Purpose: This Class Deviation rescinds “Class Deviation from VA Acquisition Regulation (VAAR) VAAR 802.101, Definitions and from 809.400, Debarment, Suspension and Ineligibility”, dated April 30, 2015. Request approval, in accordance with Federal Acquisition Regulation (FAR) 1.404, Class deviations and Department of Veteran Affairs Acquisition Regulation (VAAR) 801.404, Class deviations, to issue a class deviation from VAAR 802.101, Definitions and VAAR 809.4, Debarment, Suspension and Ineligibility.

2. VAAR Section and Subpart Impacted: VAAR 802.101 and VAAR 809.4

3. Effective Date: Immediately.

4. Expiration Date: Effective until incorporated into the revised VAAR or VA Acquisition Manual (VAAM).

5. Applicability: This deviation applies to the VA Debarment and Suspension Committee for Procurement, the Heads of Contracting Activities, and business concerns and individuals who are subject to a suspension or debarment action.

6. Exception: None

7. Background: On August 6, 2012, Section 706 of Public Law (P.L.) 112-154, Honoring America’s Veterans and Caring for Camp Lejeune Families Act of 2012, amended 38 USC 8127(g), to require VA debar business concerns that willfully and intentionally misrepresent the status of that concern as a small business owned and controlled by either Veterans or by service-disabled Veterans. Section 706 further prescribes the following:

- a. The period of any debarment is a minimum of five (5) years;
- b. The debarment action commences not later than 30 days after determination of willful and intentional misrepresentation by a concern;

c. A final decision on the debarment action is completed within 90 days after determination of willful and intentional misrepresentation by a concern; and

d. The debarment includes “all principals” in the firm.

This deviation implements a broader definition of “willful and intentional misrepresentation” of SDVOSB and VOSB status, implements specific processes and criteria pursuant to 38 U.S.C. § 8127(g), and updates VA’s policies and procedures for suspensions and debarments.

8. Attachment: VA Deviation from the definitions of Debarment and Suspension Committee and Debarring Official in VAAR 802.101 and from VAAR 809.4.

9. Additional Information: Questions and concerns should be addressed to the Office of Acquisition and Logistics (003A), Procurement, Policy and Warrant Management Service (003A2A) at (202) 632-5288 or email:

VA.Procurement.Policy@va.gov.

/s/

Phil W. Parker

Attachment

Distribution:

Under Secretaries for Health, Benefits, and Memorial Affairs; Chief Facilities Management Officer, Office of Facilities Management; Head Contracting Activities, Directors, VHA Service Area Offices; Directors and Network Contract Managers, Veterans Integrated Service Networks; Directors, VA Medical Center Activities, Domiciliary, Outpatient Clinics, Medical and Regional Office Centers, and Regional Offices; Directors, Denver Acquisition and Logistics Center, Corporate Franchise Datacenter, Records Management Center, VBA Benefits Delivery Centers, and VA Health Administration Center; and the Executive Director and Chief Operating Officer, VA National Acquisition Center, National Cemetery Administration

**Class Deviation from VA Acquisition Regulation (VAAR)
802.101 and VAAR 809.400**

Findings

On August 6, 2012, 38 U.S.C. § 8127(g) was amended requiring VA to debar for a minimum of five years any business concerns which have willfully and intentionally misrepresented their service-disabled, Veteran-owned small business (SDVOSB) status or Veteran-owned small business (VOSB) status. 38 U.S.C. § 8127(g) does not include a definition of “willful and intentional misrepresentation”; however, on April 30, 2015, VA interpreted “willful and intentional misrepresentation” of SDVOSB or VOSB status as those types of misrepresentations resulting in a conviction or civil judgment related to fraud or other criminal acts in a class deviation to VA Acquisition Regulation 809.400.

The current definition of “willful and intentional misrepresentation” prevents VA from debarring firms and individuals who have willfully and intentionally misrepresented SDVOSB or VOSB status that did not result in a conviction or civil judgment. To allow VA to debar firms and individuals who have willfully and intentionally misrepresented SDVOSB or VOSB status that did not result in a conviction or civil judgment, the definition of “willful and intentional misrepresentation” must be broadened.

This deviation implements a broader definition of “willful and intentional misrepresentation” of SDVOSB and VOSB status, implements specific processes and criteria pursuant to 38 U.S.C. § 8127(g), and updates VA’s policies and procedures for suspensions and debarments.

In order to include the requirements of the revised law in VA regulations, a deviation to VAAR 802.101 (to move the suspension and debarment related definitions from this section to 809.403, Definitions) and subpart 809.4 is necessary until the VAAR is revised and a VA Acquisition Manual is issued which incorporates this new guidance.

Determination

In accordance with FAR 1.404 and VAAR 801.404, I hereby issue a class deviation to VAAR 802.101 and 809.400 that implements 38 U.S.C. § 8127(g).

/s/
Phil W. Parker
Acting Deputy Senior Procurement Executive

June 2, 2017
Date

Class Deviation
Department of Veterans Affairs Acquisition Regulation

802.101 Definitions.

S&D Committee means a committee authorized by the SDO to assist the SDO with suspension and debarment related matters.

The Suspending and Debarring Official (SDO) means the Senior Procurement Executive (SPE), or Deputy Senior Procurement Executive (DSPE) if further delegated in writing by the SPE.

Subpart 809.4 – Suspension, Debarment, and Ineligibility

809.400 Scope of subpart.

This subpart supplements the FAR provisions concerning procedures and related actions for the suspension and debarment of contractors.

809.402 Policy.

(a) When VA is considering a debarment or suspension action, the Suspension and Debarment (S&D) Committee shall coordinate the action with the Interagency Suspension and Debarment Committee (ISDC) to identify other agencies with an interest in the action and to identify the agency that will take the lead on the action.

(b) The S&D Committee shall provide the designated lead agency with any information relevant to the action for consideration in the decision making process.

(c) The S&D Committee shall maintain coordination with the appropriate lead agency official through completion of a final suspension or debarment decision.

(d) The S&D Committee shall accomplish the actions described in FAR 9.404(c).

809.405 Effect of listing.

The authority under FAR 9.405(a), 9.405(d)(2), and 9.405(d)(3) to determine whether to solicit from, evaluate bids or proposals from, or award contracts to contractors with active exclusions in the System for Award Management (SAM) is delegated to the Suspending and Debarring Official (SDO).

809.405-1 Continuation of current contracts.

(a) Notwithstanding the suspension, proposed debarment, or debarment of a contractor, VA may continue contracts or subcontracts in existence at the time the contractor was suspended, proposed for debarment, or debarred, unless the cognizant Head of the Contracting Activity (HCA) directs otherwise. Examples of factors to be considered

include, but are not limited to, potential costs associated with a termination, possible disruption to VA program objectives, and integrity of VA acquisition programs.

(b) Authority to make the determinations under FAR 9.405-1(b) is delegated to the SDO. The SDO further delegates this authority to the HCAs. HCAs must make a written determination of the compelling reasons in accordance with FAR 9.405-1(b). Compelling reasons for the purposes of FAR 9.405-1(b) include, but are not limited to, urgency of the need for new or continued work, lengthy time period to acquire the new work from other sources, and meeting estimated quantity for requirements contracts.

809.405-2 Restrictions on subcontracting.

Authority to make the written determination required under FAR 9.405-2 consenting to a contractor's use of a subcontractor who is suspended, proposed for debarment, or debarred is delegated to the SDO. The SDO further delegates this authority to the HCAs.

809.406 Debarment.

809.406-1 General.

(a) As provided in FAR 9.406-1(c), the authority to determine whether to continue business dealings between VA and a contractor suspended, proposed for debarment, or debarred is delegated to the SDO.

(b) For the purposes of FAR 9.406-1, the SDO's authority includes debarments pursuant to the Federal Management Regulation at 41 CFR 102-117.295.

(c) In addition to the factors listed in FAR 9.406-1, the SDO should consider the following examples before arriving at a debarment decision:

(1) Whether the contractor had a mechanism, such as a hotline, by which employees could have reported suspected instances of improper conduct, and instructions in place that encouraged employees to make such reports; or

(2) Whether the contractor conducted periodic reviews of company business practices, procedures, policies, and internal controls for compliance with standards of conduct and the special requirements of Government contracting.

809.406-2 Causes for debarment.

(a) In addition to the causes listed in FAR 9.406-2, the SDO may debar contractors, based upon a preponderance of the evidence, for

(1) Misrepresentation of Veteran-owned small business (VOSB) or service-disabled, Veteran-owned small business (SDVOSB) status; or

(2) Any deliberate violation of the limitation on subcontracting clause requirements for acquisitions under subpart 819.70.

(b) The SDO shall debar for a period of not less than five years, pursuant to 38 U.S.C. 8127(g), Enforcement Penalties for Misrepresentation, any business concern that has willfully and intentionally misrepresented the status of that concern as a small business concern owned and controlled by Veterans or as a small business concern owned and controlled by service-disabled Veterans pursuant to this subsection.

(1) "Willful and intentional" misrepresentations, for the purpose of debarment actions taken pursuant to subsection (b), are defined as misrepresentations concerning the status of the concern as a small business concern owned and controlled by Veterans or as a small business concern owned and controlled by service-disabled Veterans resulting in an admission, criminal conviction, civil judgment, or administrative decision related to fraud or other criminal acts.

(2) Debarment of a business concern pursuant to subsection (b) shall include the debarment of all principals in the business concern. Debarment shall be for a period of not less than five years.

809.406-3 Procedures.

(a) Any individual may submit a referral to debar an individual or contractor to the SDO or to the S&D Committee. The referral for debarment shall be supported with evidence of a cause for debarment listed in FAR 9.406-2, or VAAR 809.406-2. The SDO shall forward referrals for debarment to the S&D Committee. If the referring individual is a VA employee and the referral for debarment is based on possible criminal or fraudulent activities, the VA employee shall also refer the matter to the VA Office of Inspector General.

(b) When the S&D Committee finds preponderance of the evidence for a cause for debarment, as listed in FAR 9.406-2 or VAAR 809.406-2, it shall prepare a recommendation and draft notice of proposed debarment for the SDO's consideration.

(c) VA shall send the notice of proposed debarment to the last known address of the individual or contractor, the individual or contractor's counsel, or agent for service of process, by certified mail, return receipt requested, or any other means that allows for confirmation of delivery. In the case of a contractor, VA may send the notice of proposed debarment to any partner, principal, officer, director, owner or co-owner, or joint venture. The S&D Committee concurrently shall list the appropriate parties as excluded in the System for Award Management (SAM) in accordance with FAR 9.404.

(d) If VA does not receive a reply from the contractor within 30 days after sending the notice of proposed debarment, the S&D Committee shall prepare a recommendation and refer the case to the SDO for a decision on whether or not to debar based on the information available.

(e) If VA receives a reply from the contractor within 30 days after sending the notice of proposed debarment, the S&D Committee shall consider the information in the reply before the S&D Committee makes its recommendation to the SDO.

(f) The S&D Committee, upon the request of the contractor proposed for debarment, shall, as soon as practicable, allow the contractor an opportunity to appear before the S&D Committee to present information or argument in person or through a representative. The contractor may supplement the oral presentation with written information and argument. VA shall conduct the proceeding in an informal manner and without requirement for a transcript.

(g) If the S&D Committee finds the contractor's or individual's submission in opposition to the proposed debarment raises a genuine dispute over facts material to the proposed debarment and the debarment action is not based on a conviction or civil judgment, the S&D Committee shall submit to the SDO the information establishing the dispute of material facts. If the SDO agrees there is a genuine dispute of material facts, the SDO shall refer the dispute to a designee for resolution pursuant to 809.470, Fact-finding procedures. The S&D Committee shall provide the contractor or individual the disputed material fact(s). Decisions and determinations of VA's CVE or OSDDBU, such as status protest decisions, and size determinations of the SBA shall not be subject to dispute or fact-finding in proposed debarment actions. The S&D Committee and SDO shall accept these decisions and determinations as resolved facts.

(h) If the proposed debarment action is based on a conviction or civil judgment, or if there are no disputes over material facts, or if any disputes over material facts have been resolved pursuant to 809.470, Fact-finding procedures, the SDO shall make a decision on the basis of all information available including any written findings of fact submitted by the designated fact finder, and oral or written arguments presented or submitted to the S&D Committee by the contractor.

(i) In actions processed under FAR 9.406 where no suspension is in place and where fact finding is not required, VA shall make the final decision on the proposed debarment within 30 working days after receipt of any information and argument submitted by the contractor, unless the SDO extends this period for good cause.

(j) In actions processed under VAAR 809.406-2(b), the SDO notifies the individuals and/or contractors of the determination of willful and intentional misrepresentation in the notice of proposed debarment. VA shall issue the final decision, removing or upholding the determination, within 90 days after the SDO's determination of willful and intentional misrepresentation.

809.406-4 Period of debarment.

(a) The SDO will base the period of debarment on the circumstances surrounding the cause(s) for debarment.

(b) The SDO may remove a debarment imposed under FAR 9.406, amend its scope, or reduce the period of debarment based on a S&D Committee recommendation if:

(1) VA has debarred the contractor;

(2) The action is indicated after the SDO reviews documentary evidence submitted by or on behalf of the contractor setting forth the appropriate grounds for granting relief. Appropriate grounds include newly discovered material evidence, reversal of a conviction, bona fide change of ownership or management, elimination of the cause for which debarment was imposed, or any other appropriate grounds.

(c) The period of debarment for willful and intentional misrepresentations of SDVOSB or VOSB status pursuant to VAAR 809.406-2(b) shall not be less than 5 years.

809.407 Suspension.

809.407-1 General.

(a) As provided in FAR 9.407-1(d), the authority to determine whether to continue business dealings between VA and a suspended contractor is delegated to the HCAs. Compelling reasons include, but are not limited to, urgency of the need for new or continued work, lengthy time period to acquire the new work from other sources, and meeting estimated quantities for requirements contracts.

(b) For the purposes of FAR 9.407-1, the SDO is the suspending official under the Federal Management Regulation at 41 CFR 102-117.295.

809.407-3 Procedures.

(a) Any individual may submit a referral to suspend an individual or contractor to the SDO or to the S&D Committee. Referrals shall include supporting evidence of a cause for suspension listed in FAR 9.407-2. The SDO shall forward the referral to the S&D Committee. If the referring individual is a VA employee and the referral for suspension is based on possible criminal or fraudulent activities, the VA employee shall also refer the matter to the VA Office of Inspector General.

(b) When the S&D Committee finds adequate evidence of a cause for suspension, as listed in FAR 9.407-2, it shall prepare a recommendation and draft notice of suspension for the SDO's consideration.

(c) VA shall send the notice of suspension to the last known address of the individual or contractor, the individual or contractor's counsel, or agent for service of process, by certified mail, return receipt requested, or any other means that allows for confirmation of delivery. In the case of a contractor, VA may send the notice of suspension to any partner, principal, officer, director, owner or co-owner, or joint venture. The S&D

Committee concurrently shall list the appropriate parties as excluded in the System for Award Management (SAM) in accordance with FAR 9.404.

(d) If VA receives a reply from the contractor within 30 days after sending the notice of suspension, the S&D Committee shall consider the information in the reply before the Committee makes further recommendations to the SDO. The S&D Committee, upon the request of a suspended contractor, shall, as soon as practicable, allow the contractor an opportunity to appear before the S&D Committee to present information or argument in person or through a representative. The contractor may supplement the oral presentation with written information and argument. The proceeding will be conducted in an informal manner and without requirement for a transcript.

(e) For the purposes of FAR 9.407-3(b)(2), Decision making process, in actions not based on an indictment, if the S&D Committee finds that the contractor's submission in opposition to the suspension raises a genuine dispute over facts material to the suspension, the S&D Committee shall submit to the SDO the information establishing the dispute of material facts. However, the S&D Committee may first coordinate any further proceeding regarding the material facts in dispute with the Department of Justice or with a State prosecuting authority in a case involving a State jurisdiction. VA shall take no further action to determine disputed material facts pursuant to this section or 809.470 if the Department of Justice or a State prosecuting authority advises VA in writing that additional proceedings to make such a determination would prejudice Federal or State legal proceedings.

(f) If the SDO agrees that there is a genuine dispute of material facts, the SDO shall refer the dispute to the designee for resolution pursuant to 809.470.

809.470 Fact-finding procedures

The provisions of this section constitute the procedures to be used to resolve genuine disputes of material fact pursuant to 809.406-3 and 809.407-3 of this chapter. The SDO shall appoint a designee to conduct the fact-finding. OGC shall represent VA at any fact-finding hearing and may present witnesses for VA and question any witnesses presented by the contractor. The proceedings before the fact-finder will be limited to a finding of the material facts in dispute, as determined by the SDO. The fact-finder shall establish the date for the fact-finding hearing, normally to be held within 30 days after the S&D Committee notifies the contractor or individual that the SDO has established a genuine dispute of material fact(s) exists.

(a) The Government's representative and the contractor will have an opportunity to present evidence relevant to the material fact(s) identified by the SDO. The contractor or individual may appear in person or through a representative at the fact-finding hearing. The contractor or individual may submit documentary evidence, present witnesses, and confront any person the agency presents.

(b) Witnesses may testify in person. Witnesses will be reminded of the official nature of the proceedings and that any false testimony given is subject to criminal prosecution.

Witnesses are subject to cross-examination. Hearsay evidence may be presented and will be given appropriate weight by the fact-finder.

(c) The proceedings shall be transcribed and a copy of the transcript shall be made available at cost to the contractor upon request, unless the contractor and the fact-finder, by mutual agreement, waive the requirement for a transcript.

(d) The fact-finder shall determine the disputed fact(s) by a preponderance of the evidence for proposed debarments, and by adequate evidence for suspensions. Written findings of fact shall be prepared by the fact-finder. A copy of the findings of fact shall be provided to the SDO, the Government's representative, and the contractor or individual. The SDO will consider the written findings of fact in the decision regarding the suspension or proposed debarment.

End Deviation