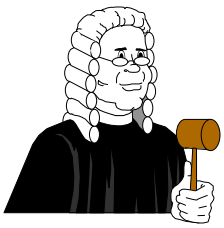

It's The Law

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What's New In Nonprocurement Debarment and Suspension

by Eric Moll

On November 26, 2003, over thirty Executive branch agencies, including Department of Commerce (DOC), issued a new common rule making substantive changes and amendments to the Governmentwide Nonprocurement Debarment and Suspension Regulation. See 68 Fed. Reg. 66534 (November 26, 2003). The Interagency Suspension and Debarment Committee coordinated the publication of the final rule. DOC's rule is found at 15 CFR Part 26.

The new rule adopts a different approach to the structure and format of the common rule. Matters common to a particular class of readers, or to a particular subject, appear together. Readers now have easy access to information that may be of particular importance to them. The final rule uses fewer technical legal terms, more commonly understood words, and shorter sentences. It also presents information in a question-and-answer format.

Several changes bring the procurement and nonprocurement debarment rules into greater conformity with each other. For example, Section __.220 of the final rule brings the nonprocurement rule into closer conformity with the Federal Acquisition Regulation (FAR) by limiting the mandatory down-tier application of an exclusion to the first procurement level. However, the DOC chose the option of extending down one additional tier to subcontracts under a procurement which equal or exceed $25,000. In addition, the threshold level for application of an exclusion for all procurement-type transactions under a nonprocurement transaction is set at $25,000, the same amount in the FAR. Section __.860 of the final rule is new. This section identifies factors that a debarring official may regard as mitigating or aggravating factors, including factors that currently appear under §9.406-1(a) of the FAR.

Several modifications to the existing common rule enhance the effectiveness of, or clarify, requirements and processes. For example, a new term, "disqualification," is used to refer to ineligibility that arises from sources other than discretionary actions taken under either the nonprocurement rule or the FAR. This type of ineligibility may arise by operation of a statute, executive order, or other directive and may not be subject to the discretion of the agency

suspending or debarring official. The final rule refers to these and other forms of ineligibility as "disqualifications." For discretionary actions that result in ineligibility under the suspension and debarment procedures covered by the common rule and the FAR, the final rule uses the term "exclusion." Therefore, an ineligibility may result from either a "disqualification" or an "exclusion."

The term "conviction" was redefined under the new rule. Previously, the common rule defined conviction as a judgment that had to be "entered" by the court before it was recognized as constituting a ground for suspension or debarment. In recent years, courts have used many vehicles to conclude criminal matters short of "entry" of a judgment of conviction such as probation before judgment or deferred prosecution. Under the final rule, the suspending or debarring official will be able to take action in criminal matters concluded under special terms without the benefit of a formal entry of judgment. An alternative disposition to a criminal entry of a judgment is treated as the functional equivalent of a judgment if it occurs with the participation of the court; or in a case that involves only an agreement with the prosecutor, if it occurs in the context of an admission of guilt.

The final rule also eliminates a chain of paper certifications previously required to be submitted to an agency or between lower-tier participants. Advancements in technology allow anyone with access to a personal computer to receive up-to-date information about a person's eligibility by accessing the Excluded Parties Listing System (EPLS) on line. This makes the written certification process largely obsolete. The final rule allows agencies to employ any method of enforcement of the EPLS that is administratively and commercially feasible. For instance, to impose the requirements on participants, an agency could include a term or condition in the agreement requiring their compliance and that they include a term or condition in the agreement requiring their compliance and that they include a similar condition in lower-tier covered transactions. The DOC chose this method of enforcement.

Finally, the final rule permits an agency to use facsimile and e-mail transmissions to notify respondents of suspension and proposed debarment actions against them. It also requires respondents to provide certain information in their responses to proposed debarments. Respondents must identify specific facts that contradict those facts presented in the notice and prohibits the use of general denials. In its written submission, the respondent is also required to disclose any prior, current, and proposed debarment actions taken against it under the Executive Order (EO 12549), and any similar actions by an Federal, State, or local authority, including criminal and civil proceedings not identified in the notice of suspension or proposed debarment, and the names and addresses of all of the respondents's affiliates.

If you have any questions concerning the recent issuance of the revised regulation on debarment and suspension, please contact the Federal Assistance Law Division at (202) 482-8035.