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February 27, 1991

BY HAND

United States Sentencing Commission
Suite 1400
1331 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Attention: Paul K. Martin
Communications Director

Re: Sentencing Guidelines for United States Courts;
Mandatory Probation And Suspension And Debarment
From Government Contracting

Gentlemen:

The purpose of this letter is to comment on the proposed sentencing guidelines as they may relate to the imposition of mandatory probation for government contractors convicted of a second or subsequent violation of the criminal False Claims Act, the False Statements Act or other criminal felony statute relating to government procurement.

I am Chairman of the Suspension and Debarment Committee of the Public Contract Section of the ABA. However, the comments in this letter are presented on my own behalf and have not been approved by the Section. In that regard, I am appending a letter sent by the Section to Honorable Charles E. Schumer, Chairman of the Subcommittee on Criminal Justice of the House Judiciary Committee. I believe the Section's letter to be relevant to the question of mandatory probation, particularly with regard to the adequacy of existing regulations to protect the interests of the United States in its relations with contractors. I ask you to consider the position set out in that letter with specific reference to the comments therein under heading I.

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1. In General

It is my understanding that, at the suggestion of the House Judiciary Subcommittee on Criminal Justice and the Department of Justice, the Commission is considering a requirement for mandatory probation of government contractors after a second or subsequent conviction of violation of the criminal False Claims Act, the Criminal False Statements Act or other criminal felony statute relating to government procurement. I understand this effort to arise from concerns expressed by certain members of Congress that too many convicted DoD and other government contractors manage to escape debarment or suspension from government contracting and thus continue to do business with the Government. See, e.g., 136 Cong. Rec. E1484 (daily ed. May 10, 1990.) I further understand that the proponents of this position believe that placing contractors under the supervision of the Federal courts will alleviate this perceived problem.

I submit that mandatory probation is both unnecessary and inappropriate. It is unnecessary because existing regulations adequately address the underlying concerns. It is inappropriate because mandatory probation would deny executive agencies the flexibility necessary to deal with the contractor in a manner determined to be in the government's best interest, as discussed in more detail below.

2. There Is No Evident Need For Mandatory Probation Since The Debarment Regulations Adequately Address The Underlying Concerns

Under Subpart 9.4 of the Federal Acquisition Regulation (FAR) (copy enclosed), Executive agencies have ample authority to debar or suspend contractors who have committed additional relevant offenses that indicate that they are presently not responsible contractors for further awards. This authority is used with some frequency and I am aware of no evidence that the Department of Defense or Federal acquisition agency is lax in its application. This point is discussed in detail under heading I of the enclosed letter to Honorable Charles E. Schumer, dated September 26, 1990. I will not pursue it further here, except to note that the letter to Congressman Schumer was composed by attorneys from both the private sector and the Department of Defense with substantial experience in suspension and debarment proceedings and policy.

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3. Inclusion Of A Mandatory Probation Requirement In The Sentencing Guidelines Would Deny Executive Agencies The Flexibility Necessary To Deal With The Government Contractor In A Manner Determined To Be In The Government's Best Interest.

Executive branch agencies, and particularly the Department of Defense, have long experience in reaching and supervising administrative settlements with errant government contractors, and in managing such settlements in a way calculated to further the best interests of the government. These settlements virtually always address the concerns now being expressed by the proponents of mandatory sentencing. Thus, such settlements require the contractor to adhere to the highest ethical standards, to make full and prompt restitution for any infringement of civil or criminal law, to make available reports of internal inquiries and investigations, whether or not such inquiries and investigation would ordinarily be subject to the attorney-client or other privilege, and to take appropriate disciplinary action, including discharge, with regard to employees who engaged in the improper conduct. These settlement agreements are rendered eminently enforceable not only by the threat of further prosecution but by the high probability that the contractor will be deprived of its economic life if any of the terms of the agreement are violated.

In light of the demonstrated expertise and experience in administrative settlements with and oversight of contractors which the executive branch acquisition agencies have acquired over the years, it seems redundant now to place responsibility for exactly the same functions on an overloaded Federal Court system. This redundancy is particularly apparent when, as in this instance, the functioning of the system will depend on U.S. attorneys who will necessarily be required to consult with the executive acquisition agencies they are representing in probation proceedings before Federal courts. These are the same agencies which, but for the mandatory probation requirement, would themselves be policing the contractor. Thus, the injection of the Federal courts and U.S. attorneys into the management of the acquisition process only creates another layer of responsibility to be managed by entities which are already overworked and are not expert, and have no reason to be expert, in questions of acquisition policy and procedure.

It seems clear that the Federal interest or purpose being served by a contractor performing a contract under the aegis of an executive branch agency is best determined by that

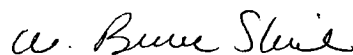
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agency. I ask the Commission to consider the probability that the proposed addition to the acquisition process of this new layer of management may well lead to confusion of the aims of that process, while failing to add anything to the achievement and maintenance of its integrity.

In sum, I submit that, consistent with the position taken by the Public Contract Section of the ABA in the enclosed September 26 letter to Congressman Schumer, mandating probation is unnecessary. Further, and on my own behalf, I suggest that the imposition of mandatory probation would not only be redundant but would quite possibly have a deleterious effect on the government acquisition process.

Sincerely,

SEYFARTH, SHAW, FAIRWEATHER
& GERALDSON



W. Bruce Shirk

Enclosures



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September 26, 1990

BY FEDERAL EXPRESS

Honorable Charles E. Schumer
Chairman, Subcommittee on Criminal Justice
The Committee on the Judiciary
2138 Rayburn House Office Building
Washington, D.C. 20515-6216

Re: **H.R. 4795, 101st Cong., 2d Sess., A Bill To Amend 18 U.S. Code To Provide An Additional Sanction Against Federal Contractors Committing Federal Offenses In Connection With Those Contracts**

Dear Mr. Chairman:

The purpose of this letter is to present to you the American Bar Association ("ABA") Section of Public Contract Law's ("the Section") comments on proposed H.R. 4795. These comments are presented on behalf on the Section and have not been approved by the House of Delegates or the Board of Governors of the ABA and, accordingly, should not be construed as representing the position of the ABA. These comments are, however, consistent with the principles of a proposed Debarment and Suspension Reform Act approved by the ABA House of Delegates in January, 1982.

H.R. 4795, entitled by its sponsors the "Federal Contract Crimes Sentencing Act," would add a new section 3560 to 18 U.S. Code, as follows:

(a) In General.-The court, in imposing a sentence on a person who is convicted of a second or subsequent contract exclusion offense within a

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10-year period, shall order that such person be excluded from Government contracting and Government-approved subcontracting for a period of not less than 5 years after the date the conviction becomes final.

(b) National Security Exception. - The court shall not make an order under subsection (a) of this section if the Attorney General certifies in writing that to make such an order would be harmful to national security.

(c) Definition. - As used in this section, the term 'contract exclusion offense' means an offense under section 201, 371, 641, 1001, 1002, 1031, 1341, or 1343 of this title that involves a Federal Government contract or subcontract.

The Section of Public Contract Law opposes the enactment of H.R. 4795 for three principal reasons: (1) there is no evident need for this legislation since Department of Defense ("DoD") regulations adequately address the underlying concerns; (2) the Bill would deny DoD and other agencies flexibility in debarring only those particular segments of a company responsible for the wrongdoing while sparing the innocent segments; and (3) the Bill would transform the character of administrative debarment from protection of the Government's proprietary interests into a punitive sanction with adverse legal consequences under the Eighth Amendment and the Double Jeopardy Clause of the Fifth Amendment. We discuss these in turn. There are, in addition, technical problems with the wording of the Bill which we will address separately when appropriate.

1. There Is No Evident Need for this Legislation Since the Debarment Regulations Adequately Address the Underlying Concerns

Under Subpart 9.4 of the Federal Acquisition Regulation (FAR) (copy enclosed), Executive agencies have ample authority to debar or suspend contractors who have committed additional relevant offenses that indicate that they are presently not responsible contractors for further awards. Thus, for example, FAR 9.406-4(b) states that "[t]he debarring official may extend the

debarment for an additional period, if that official determines that an extension is necessary to protect the Government's interest" for reasons other than the "facts and circumstances upon which the initial debarment action was based."

Our impression is that the DoD and other Executive agencies are, and have been, vigilant in protecting the Government's interests by debarring contractors who have committed procurement fraud, and by suspending contractors who are suspected, upon adequate evidence, of having committed such fraud. In actual practice, these preventive measures are taken unless the debarring and suspending officials are persuaded that the particular contractor has removed from Government contracting all persons involved in the alleged wrongdoing and has taken all other remedial actions necessary to establish that it is presently a responsible contractor. The debarment and suspension process is directly supported by the ongoing investigative efforts of the Inspectors General and other investigative agencies of the Executive branch which refer procurement fraud cases to the appropriate debarring and suspending officials of the Executive agencies. The semi-annual reports of DoD, for instance, show, that at least over the last five years, DoD alone has debarred and suspended several hundred firms each year (645 during the first half of fiscal 1990) from all government contracting. In fact, the number of debarments has climbed steadily over the last fifteen years.

It is evident that Congressman Miller, the principal sponsor of the Bill, nevertheless believes that too many convicted DoD contractors manage to escape debarment or suspension and continue to do business with the Government. See 136 Cong. Rec. E1484 (daily ed. May 10, 1990). We believe the DoD's debarment regulations adequately address this concern by providing that when there is a relevant felony conviction as listed in FAR 9.406-2, "for any decision not to debar or to debar for one year or less, the mitigating factors must demonstrate clearly to the debarring official's complete satisfaction, that the contractor has eliminated such circumstances' ["within the contractor's organization that encouraged the belief that the acts or omissions on which the organization's conviction was based would escape accountability or be condoned"] and has implemented or agrees to implement remedial measures." DoD FAR Supplement 209.406-1(d) (copy enclosed herewith). In addition, this regulation further provides:

Whenever, following a felony conviction, the debarring official determines that debarment is not

necessary to protect the government's interests, the debarring official shall require the contractor to enter into a written agreement, which includes (i) a requirement for the contractor to establish (if the contractor has not already established such standards of conduct and internal control systems) and/or maintain effective standards of conduct and internal control systems as outlined in 203.7000, and (ii) other requirements as the debarring official deems to be appropriate.

DoD FAR Supplement 209.406-1(e) (copy enclosed herewith together with DoD FAR Supplement 203.7000).

We are not aware of any significant indications that DoD is failing to comply with these regulations or that these regulations do not adequately protect the Government's interests in the circumstances that have prompted the Bill's sponsorship. We are equally unaware of debarment laxity in the other Executive agencies, and Mr. Miller asserts none.

2. The Bill Would Deny Executive Agencies the Necessary Flexibility to Debar Only Those Particular Segments of the Company Responsible for the Wrongdoing, While Sparing the Innocent Segments

A related concern is that the Bill, in mandating that "such person be excluded from Government contracting and Government-approved subcontracting for a period of not less than five years after the date the conviction becomes final," will preclude the agency's flexibility in limiting the scope of debarment to the particular segment, division or subsidiary of a government contractor that is not presently responsible in the wake of having been convicted for a second or subsequent contract exclusion offense. We see no need to punish separate and severable elements of a contractor's organization that have no responsibility for the particular offenses, so long as the top management did not know and had no reason to know of them. It would not be in the public interest to debar an entire company and put thousands of employees out of work who had nothing to do with the wrongdoing. The Bill needlessly denies this flexibility that is essential to administrative debarment by the Executive agencies.

3. The Bill Would Transform the Character of Administrative Debarment into a Punitive Sanction with Adverse Consequences Under the Eighth Amendment and the Double Jeopardy Clause of the Fifth Amendment

A fundamental premise of administrative debarment and suspension is that "[t]he serious nature of debarment and suspension requires that these sanctions be imposed for the Government's protection and not for purposes of punishment." FAR 9.402(b). *Accord, Robinson v. Cheney*, 876 F.2d 152, 160 (D.C. Cir. 1989) ("affording the contractor this opportunity to overcome a blemished past assures that the agency will impose debarment only in order to protect the Government's proprietary interest and not for purpose of punishment"); *Gonzalez v. Freeman*, 334 F.2d 570, 576 (D.C. Cir. 1964) (debarment "not intended to punish"). This premise is fundamental to the authority for administrative debarment and suspension because only Congress can impose punishment for offenses it establishes.

Debarment is a protective measure, not punishment. This concept has permitted agencies to use debarment effectively with only minimum notions of due process. We are concerned that the Bill would blur the long-standing distinction between an administrative debarment to protect the Government from contracting with nonresponsible business organizations on the one hand, and criminal justice punishments on the other. By requiring that all repeat offenders be excluded from Government contracting for at least five years as part of the sentence to be imposed for the particular felony conviction, the Bill necessarily treats administrative debarment as an additional form of punishment for that conviction.

This mandatory exclusion penalty raises a serious Eighth Amendment issue. The Eighth Amendment bars cruel and unusual punishments. The Supreme Court has applied that bar to penalties that are disproportionate to the crimes committed, based on "(i) the gravity of the offense and the harshness of the penalty; (ii) the sentence imposed on other criminals in the same jurisdiction; and (iii) the sentence imposed for the same crime in other jurisdictions." *Solem v. Helm*, 463 U.S. 277, 292 (1983).

In several recent cases, the courts have, ruled that the forfeiture of assets following a criminal conviction triggers Eighth Amendment scrutiny. *E.g.*, *United States v. Busher*, 817 F.2d 1409, 1413-16 (9th Cir. 1987); *United States v. Horak*, 833 F.2d 1235, 1251 (7th Cir. 1987). Indeed, one court applied the Eighth Amendment to reduce the forfeitures required by the Racketeer-Influenced and Corrupt Organizations Act ("RICO"), cutting some \$17 million in statutorily required forfeitures to approximately \$1.5 million. *United States v. Regan*, 726 F. Supp. 447, 456-60 (S.D.N.Y. 1989).

Because the mandatory debarment or exclusion penalty of the Bill may be so harsh, it also is subject to Eighth Amendment limits. For example, mandatory exclusion of a Government contractor for not less than five years for a criminal offense committed by a relatively low-level employee acting alone would almost certainly put the contractor out of business. The penalty would be grossly disproportionate to the wrong done. The Bill thus would likely not survive a court challenge on these grounds.

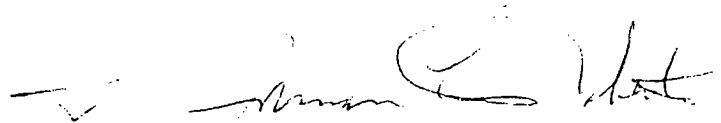
In addition, by so treating debarment as punishment, the Bill would threaten the validity of administrative debarment based on a relevant criminal conviction under the Double Jeopardy Clause of the Fifth Amendment in the light of the Supreme Court's recent decision in *Halper v. United States*, 490 U.S. ___, 109 S. Ct. 1892, 104 L. Ed. 2d 487 (1989). In that case, the manager of a medical laboratory, Irwin Halper, had been convicted on 65 counts of inflating Medicare claims, and sentenced to two years in prison and fined \$5,000. The total value of those 65 false claims was \$585. Thereafter, the Government sued Halper under the Civil False Claims Act, seeking more than \$130,000 in penalties based on the statutory penalty of \$2,000 per false claim.

The Supreme Court ruled that the Civil False Claims Act penalty violated the Double Jeopardy Clause of the Fifth Amendment. The unanimous ruling stressed that a punitive civil sanction triggers the Double Jeopardy Clause even though it is labeled "civil" (104 L. Ed.2d at 501): "Simply put, a civil as well as a criminal sanction constitutes punishment when the sanction as applied in the individual case *serves the goals of punishment*." (emphasis added). Regardless of the label, the Court continued, a civil sanction is really punitive if it "cannot fairly be said *solely* to serve a remedial purpose, but rather can be explained only as *also* serving either retributive or deterrent purposes." *Id.* at 502 (emphasis added).

Halper was applied in *United States v. Sanchez*, 47 Cr. L. Rep. 1026 (S. D. Tex., Apr. 11, 1990), which barred the criminal prosecution of an individual who had been subjected to a civil penalty of \$232,000 for smuggling marijuana. Because the Court found the initial penalty to be "punitive in nature" and unrelated to any loss by the Government, the subsequent criminal prosecution was barred by the Fifth Amendment.

Since the Bill treats debarment as a punitive, there is a substantial concern that the courts, following *Halper*, would find that an administrative debarment based on a relevant criminal conviction is equally punitive so as to trigger the Double Jeopardy clause because, in the words of the Court in *Halper*, that sanction "as applied in the individual case serves the goals of punishment." (104 L. Ed. 2d at 501). Congress should not create the large risk of such devastating consequences to the validity of the majority of administrative debarments imposed under FAR Subpart 9.4. and we would be pleased to testify along the foregoing lines should you hold hearings on the Bill.

Sincerely,



Norman L. Roberts
Chair
Section of Public
Contract Law
American Bar Association

Atch: FAR Subpart 9.4 and DoD FAR
Supplement Subparts 209.4 and 203.70

cc: All Section Officers & Council Members
W. Bruce Shirk, Esq.
Paul C. Besozzi, Esq.
Marilyn M. Neforas

[¶ 29,868]

9.308 Contract clauses.**9.308-1 Testing performed by the contractor.**

(a) (1) The contracting officer shall insert the clause at 52.209-3, First Article Approval—Contractor Testing, in solicitations and contracts when a fixed-price contract is contemplated and it is intended that the contract require (i) first article approval and (ii) that the contractor be required to conduct the first article testing.

(2) If it is intended that the contractor be required to produce the first article and the production quantity at the same facility, the contracting officer shall use the clause with its Alternate I.

(3) If it is necessary to authorize the contractor to purchase material or to commence production before first article approval, the contracting officer shall use the clause with its Alternate II.

(b) (1) The contracting officer shall insert a clause substantially the same as the clause at 52.209-3, First Article Approval—Contractor Testing, in solicitations and contracts when a cost-reimbursement contract is contemplated and it is intended that the contract require (i) first article approval and (ii) that the contractor be required to conduct the first article test.

(2) If it is intended that the contractor be required to produce the first article and the production quantity at the same facility, the contracting officer shall use a clause substantially the same as the clause at 52.209-3, First Article Approval—Contractor Testing, with its Alternate I.

(3) If it is necessary to authorize the contractor to purchase material or to commence production before first article approval, the contracting officer shall use a clause substantially the same as the clause at 52.209-3, First Article Approval—Contractor Testing, with its Alternate II.

[¶ 29,868.10]

9.308-2 Testing performed by the Government.

(a) (1) The contracting officer shall insert the clause at 52.209-4, First Article Approval—Government Testing, in solicitations and contracts when a fixed-price con-

tract is contemplated and it is intended that the contract require first article approval and that the Government will be responsible for conducting the first article test.

(2) If it is intended that the contractor be required to produce the first article and the production quantity at the same facility, the contracting officer shall use the basic clause with its Alternate I.

(3) If it is necessary to authorize the contractor to purchase material or to commence production before first article approval, the contracting officer shall use the basic clause with its Alternate II.

(b) (1) The contracting officer shall insert a clause substantially the same as the clause at 52.209-4, First Article Approval—Government Testing, in solicitations and contracts when a cost-reimbursement contract is contemplated and it is intended that the contract require first article approval and that the Government be responsible for conducting the first article test.

(2) If it is intended that the contractor be required to produce the first article and the production quantity at the same facility, the contracting officer shall use a clause substantially the same as the clause at 52.209-4, First Article Approval—Government Testing, with its Alternate I.

(3) If it is necessary to authorize the contractor to purchase material or to commence production before first article approval, the contracting officer shall use a clause substantially the same as the clause at 52.209-4, First Article Approval—Government Testing, with its Alternate II.

SUBPART 9.4—DEBARMENT, SUSPENSION, AND INELIGIBILITY

[¶ 29,869]

9.400 Scope of subpart.

(a) This subpart—

(1) Prescribes policies and procedures governing the debarment and suspension of contractors by agencies for the causes given in 9.406-2 and 9.407-2;

(2) Provides for the listing of contractors debarred, suspended, proposed for debarment, and declared ineligible (see the definition of "ineligible" in 9.403); and

(3) Sets forth the consequences of this listing.

[¶ 29,872]

(b) Although this subpart does cover the listing of ineligible contractors (9.404) and the effect of this listing (9.405(b)), it does not prescribe policies and procedures governing declarations of ineligibility. [FAC 84-46, 54 FR 19814, 5/8/89, effective 6/7/89]

[¶ 29,870]

9.401 Applicability.

This subpart does not apply to the exclusion of participants or principals from Federal financial or nonfinancial assistance programs and benefits pursuant to Executive Order 12549. Such exclusions are contained with the list entitled Parties Excluded from Nonprocurement Programs of the lists of Parties Excluded from Federal Procurement or Nonprocurement Programs. [FAC 84-46, 54 FR 19814, 5/8/89, effective 6/7/89]

[¶ 29,871]

9.402 Policy.

(a) Agencies shall solicit offers from, award contracts to, and consent to subcontracts with responsible contractors only. Debarment and suspension are discretionary actions that, taken in accordance with this subpart, are appropriate means to effectuate this policy.

(b) The serious nature of debarment and suspension requires that these sanctions be imposed only in the public interest for the Government's protection and not for purposes of punishment. Agencies shall impose debarment or suspension to protect the Government's interest and only for the causes and in accordance with the procedures set forth in this subpart.

(c) When more than one agency has an interest in the debarment or suspension of a contractor, consideration shall be given to designating one agency as the lead agency for making the decision. Agencies are encouraged to establish methods and procedures for coordinating their debarment or suspension actions.

(d) Agencies shall establish appropriate procedures to implement the policies and procedures of this subpart. [FAC 84-46, 54 FR 19814, 5/8/89, effective 6/7/89]

9.403 Definitions.

"Adequate evidence" means information sufficient to support the reasonable belief that a particular act or omission has occurred.

"Affiliates." Business concerns, organizations, or individuals are affiliates of each other if, directly or indirectly, (a) either one controls or has the power to control the other, or (b) a third party controls or has the power to control both. Indicia of control include, but are not limited to, interlocking management or ownership, identity of interests among family members, shared facilities and equipment, common use of employees, or a business entity organized following the debarment, suspension, or proposed debarment of a contractor which has the same or similar management, ownership, or principal employees as the contractor that was debarred, suspended, or proposed for debarment.

"Agency," as used in this subpart, means any executive department, military department or defense agency, or other agency or independent establishment of the executive branch.

"Civil judgment" means a judgment or finding of a civil offense by any court of competent jurisdiction.

"Contractor," as used in this subpart, means any individual or other legal entity that (a) submits offers for or is awarded, or reasonably may be expected to submit offers for or be awarded, a Government contract, including a contract for carriage under Government or commercial bills of lading, or a subcontract under a Government contract or (b) conducts business with the government as an agent or representative of another contractor.

"Conviction" means a judgment or conviction of a criminal offense by any court of competent jurisdiction, whether entered upon a verdict or a plea, and includes a conviction entered upon a plea of nolo contendere.

"Debarment," as used in this subpart, means action taken by a debarring official under 9.406 to exclude a contractor from Government contracting and Government-approved subcontracting for a reasonable, specified period; a contractor so excluded is "debarred."

"Debarring official" means (a) an agency head or (b) a designee authorized by the agency head to impose debarment.

"Indictment" means indictment for a criminal offense. An information or other filing by competent authority charging a criminal offense shall be given the same effect as an indictment.

"Ineligible," as used in this subpart, means excluded from Government contracting (and subcontracting, if appropriate) pursuant to statutory, Executive order, or regulatory authority other than this regulation and its implementing and supplementing regulations; for example, pursuant to the Davis-Bacon Act and its related statutes and implementing regulations, the Service Contract Act, the Equal Employment Opportunity Acts and Executive orders, the Walsh-Healey Public Contracts Act, the Buy American Act, or the Environmental Protection Acts and Executive orders.

"Legal proceedings" means any civil judicial proceeding to which the Government is a party or any criminal proceeding. The term includes appeals from such proceedings.

"Parties Excluded from Procurement Programs", formerly referred to as the Consolidated List of Debarred, Suspended, and Ineligible Contractors means a list compiled, maintained, and distributed by the General Services Administration, in accordance with 9.404, containing the names of contractors debarred, suspended, or proposed for debarment by agencies under the procedures of this subpart, as well as contractors declared ineligible under other statutory or regulatory authority other than Executive Order 12549. The list of Parties Excluded from Procurement Programs is contained within the lists of Parties Excluded from Federal Procurement or Nonprocurement Programs.

"Preponderance of the evidence" means proof by information that, compared with that opposing it, leads to the conclusion that the fact at issue is more probably true than not.

"Suspending official" means (a) an agency head or (b) a designee authorized by the agency head to impose suspension.

"Suspension," as used in this subpart, means action taken by a suspending official under 9.407 to disqualify a contractor temporarily from Government contracting and Government-approved subcontracting; a contractor so disqualified is "suspended." [FAC

84-46, 54 FR 19814, 5/8/89, effective 6/7/89]

[¶ 29,873]

9.404 Parties excluded from procurement programs.

(a) The General Services Administration (GSA) shall—

(1) Compile and maintain a current, consolidated list of all contractors debarred, suspended, proposed for debarment, or declared ineligible by agencies or by the General Accounting Office;

(2) Periodically revise and distribute the list and issue supplements, if necessary, to all agencies and the General Accounting Office; and

(3) Include in the list the name and telephone number of the official responsible for its maintenance and distribution.

(b) The list entitled Parties Excluded from Procurement Programs shall indicate—

(1) The names and addresses of all contractors debarred, suspended, proposed for debarment, or declared ineligible, in alphabetical order, with cross-references when more than one name is involved in a single action;

(2) The name of the agency or other authority taking the action;

(3) The cause for the action (see 9.406-2 and 9.407-2 for causes authorized under this subpart) or other statutory or regulatory authority;

(4) The effect of the action;

(5) The termination date for each listing;

(6) The DUNS No.; and

(7) The name and telephone number of the point of contact for the action.

(c) Each agency shall—

(1) Notify GSA of the information required by paragraph (b) above within 5 working days after the action becomes effective;

(2) Notify GSA within 5 working days after modifying or rescinding an action;

(3) Notify GSA of the names and addresses of agency organizations that are to receive the consolidated list and the number of copies to be furnished to each;

(4) In accordance with internal retention procedures, maintain records relating to each debarment, suspension, or proposed debarment taken by the agency;

(5) Establish procedures to provide for the effective use of the Parties Excluded from Procurement Programs, including internal distribution thereof, to ensure that the agency does not solicit offers from, award contracts to, or consent to subcontracts with contractors on the Parties Excluded from Procurement Programs, except as otherwise provided in this subpart; and

(6) Direct inquiries concerning listed contractors to the agency or other authority that took the action.

(d) The public may obtain a subscription to the list from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402, or by calling the Government Printing Office Order and Inquiry Desk at (202) 783-3238. [FAC 84-46, 54 FR 19814, 5/8/89, effective 6/7/89]

[¶ 29,874]

9.405 Effect of listing.

(a) Contractors debarred, suspended, or proposed for debarment are excluded from receiving contracts, and agencies shall not solicit offers from, award contracts to, or consent to subcontracts with these contractors, unless the acquiring agency's head or designee determines that there is a compelling reason for such action (see 9.405-2, 9.406-1(c), 9.407-1(d), and 23.506(e)). Contractors debarred, suspended or proposed for debarment are also excluded from conducting business with the Government as agents or representatives of other contractors.

(b) Contractors included on the Parties Excluded from Procurement Programs as having been declared ineligible on the basis of statutory or other regulatory procedures are excluded from receiving contracts, and if applicable, subcontracts, under the conditions and for the period set forth in the statute or regulation. Agencies shall not solicit offers from, award contracts to, or consent to subcontracts with these contractors under those conditions and for that period.

(c) Contractors debarred, suspended, or proposed for debarment are excluded from acting as individual sureties (see Part 28). [FAC 84-25, 52 FR 9038, 3/20/87, effective 7/1/87; Interim rule, FAC 84-43, 54 FR

4968, 1/31/89, effective 3/18/89 for contracts issued on or after that date; FAC 84-46, 54 FR 19315, 5/8/89, effective 6/7/89; FAC 84-53, 54 FR 48982, 11/28/89, effective 2/26/90; FAC 84-57, 55 FR 21707, 5/25/90, effective 7/24/90]

[¶ 29,874.05]

9.405-1 Continuation of current contracts.

(a) Notwithstanding the debarment, suspension, or proposed debarment of a contractor, agencies may continue contracts or subcontracts in existence at the time the contractor was debarred, suspended, or proposed for debarment unless the acquiring agency's head or a designee directs otherwise. A decision as to the type of termination action, if any, to be taken should be made only after review by agency contracting and technical personnel and by counsel to ensure the propriety of the proposed action.

(b) Agencies shall not renew or otherwise extend the duration of current contracts, or consent to subcontracts, with contractors debarred, suspended, or proposed for debarment, unless the acquiring agency's head or a designee states in writing the compelling reasons for renewal or extension. [FAC 84-46, 54 FR 19315, 5/8/89, effective 6/7/89]

[¶ 29,874.10]

9.405-2 Restrictions on subcontracting.

(a) When a contractor debarred, suspended, or proposed for debarment is proposed as a subcontractor for any subcontract subject to Government consent (see Subpart 44.2), contracting officers shall not consent to subcontracts with such contractors unless the acquiring agency's head or a designee states in writing the compelling reasons for this approval action. (See 9.405(b) concerning declarations of ineligibility affecting subcontracting.)

(b) The Government suspends or debars contractors to protect the Government's interests. Contractors shall not enter into any subcontract equal to or in excess of \$25,000 with a contractor that has been debarred, suspended, or proposed for debarment unless there is a compelling reason to do so. If a contractor intends to subcontract with a party that is debarred, suspended, or proposed for debarment as evidenced by the parties' inclusion on the list of Parties

Excluded from Procurement Programs (see 9.404), a corporate officer or designee of the contractor is required by operation of the clause at 52.209-6, Protecting the Government's Interests when Subcontracting with Contractors Debarred, Suspended, or Proposed for Debarment, to notify the contracting officer, in writing, before entering into such subcontract. The notice must provide the following:

- (1) The name of the subcontractor;
- (2) The contractor's knowledge of the reasons for the subcontractor's being on the list of Parties Excluded from Procurement Programs;
- (3) The compelling reason(s) for doing business with the subcontractor notwithstanding its inclusion on the list of Parties Excluded from Procurement Programs; and
- (4) The systems and procedures the contractor has established to ensure that it is fully protecting the Government's interests when dealing with such subcontractor in view of the specific basis for the party's debarment, suspension, or proposed debarment.

(c) The contractor's compliance with the requirements of 52.209-6 will be reviewed during Contractor Purchasing System Reviews (see Subpart 44.3). [FAC 84-46, 54 FR 19315, 5/8/89, effective 6/7/89]

[¶ 29,875]

9.406 Debarment.

9.406-1 General.

(a) The debarring official may, in the public interest, debar a contractor for any of the causes in 9.406-2, using the procedures in 9.406-3. The existence of a cause for debarment, however, does not necessarily require that the contractor be debarred; the seriousness of the contractor's acts or omissions and any mitigating factors should be considered in making any debarment decision. In this connection, the supplying of information by the contractor to the Government pursuant to the Anti-Kickback Act of 1986 (see 3.502) shall be favorable evidence of the contractor's responsibility.

(b) Debarment constitutes debarment of all divisions or other organizational elements of the contractor, unless the debarment decision is limited by its terms to specific divisions, organizational elements, or

commodities. The debarring official may extend the debarment decision to include any affiliates of the contractor if they are (1) specifically named and (2) given written notice of the proposed debarment and an opportunity to respond (see 9.406-3(c)).

(c) A contractor's debarment, or proposed debarment, shall be effective throughout the executive branch of the Government, unless an acquiring agency's head or a designee (except see 23.506(e)) states in writing the compelling reasons justifying continued business dealings between that agency and the contractor.

(d)(1) When the debarring official has authority to debar contractors from both acquisition contracts pursuant to this regulation and contracts for the purchase of Federal personal property pursuant to the Federal Property Management Regulations (FPMR) 101-45.6, that official shall consider simultaneously debarring the contractor from the award of acquisition contracts and from the purchase of Federal personal property.

(2) When debarring a contractor from the award of acquisition contracts and from the purchase of Federal personal property, the debarment notice shall so indicate and the appropriate FAR and FPMR citations shall be included. [FAC 84-24, 52 FR 6122, 2/27/87, effective 2/6/87; Interim rule, FAC 84-43, 54 FR 4968, 1/31/89, effective 3/18/89 for contracts issued on or after that date; FAC 84-46, 54 FR 19315, 5/8/89, effective 6/7/89; FAC 84-57, 55 FR 21707, 5/25/90, effective 7/24/90; corrected, 55 FR 30465, 7/26/90]

[¶ 29,875.02]

9.406-2 Causes for debarment.

The debarring official may debar a contractor for any of the causes listed in paragraphs (a) through (c) following:

(a) The debarring official may debar a contractor for a conviction of or civil judgment for—

(1) Commission of fraud or a criminal offense in connection with (i) obtaining, (ii) attempting to obtain, or (iii) performing a public contract or subcontract;

(2) Violation of Federal or State antitrust statutes relating to the submission of offers;

(3) Commission of embezzlement, theft, forgery, bribery, falsification or destruction

of records, making false statements, or receiving stolen property; or

(4) Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a Government contractor or subcontractor.

(b) The debarring official may debar a contractor, based upon a preponderance of the evidence, for—

(1) Violation of the terms of a Government contract or subcontract so serious as to justify debarment, such as—

(i) Willful failure to perform in accordance with the terms of one or more contracts; or

(ii) A history of failure to perform, or of unsatisfactory performance of, one or more contracts.

(2) Violations of the Drug-Free Workplace Act of 1988 (Pub. L. 100-690), as indicated by—

(i) The offeror's submission of a false certification;

(ii) The contractor's failure to comply with its certification; or

(iii) Such a number of contractor employees having been convicted of violations of criminal drug statutes occurring in the workplace, as to indicate that the contractor has failed to make a good faith effort to provide a drug-free workplace (see 23.504).

(c) Any other cause of so serious or compelling a nature that it affects the present responsibility of a Government contractor or subcontractor. [Interim rule, FAC 84-43, 54 FR 4968, 1/31/89, effective 3/18/89 for contracts issued on or after that date; FAC 84-46, 54 FR 19315, 5/8/89, effective 6/7/89; FAC 84-57, 55 FR 21707, 5/25/90, effective 7/24/90]

[¶ 29,875.03]

9.406-3 Procedures.

(a) *Investigation and referral.* Agencies shall establish procedures for the prompt reporting, investigation, and referral to the debarring official of matters appropriate for that official's consideration.

(b) *Decisionmaking process.* (1) Agencies shall establish procedures governing the debarment decisionmaking process that are as informal as is practicable, consistent with principles of fundamental fairness. These procedures shall afford the contractor (and

any specifically named affiliates) an opportunity to submit, in person, in writing, or through a representative, information and argument in opposition to the proposed debarment.

(2) In actions not based upon a conviction or civil judgment, if it is found that the contractor's submission in opposition raises a genuine dispute over facts material to the proposed debarment, agencies shall also—

(i) Afford the contractor an opportunity to appear with counsel, submit documentary evidence, present witnesses, and confront any person the agency presents; and

(ii) Make a transcribed record of the proceedings and make it available at cost to the contractor upon request, unless the contractor and the agency, by mutual agreement, waive the requirement for a transcript.

(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) Of the reasons for the proposed debarment in terms sufficient to put the contractor on notice of the conduct or transaction(s) upon which it is based;

(3) Of the cause(s) relied upon under 9.406-2 for proposing debarment;

(4) That, within 30 days after receipt of the notice, the contractor may submit, in person, in writing, or through a representative, information and argument in opposition to the proposed debarment, including any additional specific information that raises a genuine dispute over the material facts;

(5) Of the agency's procedures governing debarment decisionmaking;

(6) Of the effect of the issuance of the notice of proposed debarment; and

(7) Of the potential effect of an actual debarment.

(d) *Debarring official's decision.* (1) In actions based upon a conviction or judgment, or in which there is no genuine dispute over material facts, the debarring official shall make a decision on the basis of all the information in the administrative record, including any submission made by the contractor. If no suspension is in effect, the decision shall be made within 30 working days after receipt of any information and argument submitted

by the contractor, unless the debarring official extends this period for good cause.

(2) (i) In actions in which additional proceedings are necessary as to disputed material facts, written findings of fact shall be prepared. The debarring official shall base the decision on the facts as found, together with any information and argument submitted by the contractor and any other information in the administrative record.

(ii) The debarring official may refer matters involving disputed material facts to another official for findings of fact. The debarring official may reject any such findings, in whole or in part, only after specifically determining them to be arbitrary and capricious or clearly erroneous.

(iii) The debarring official's decision shall be made after the conclusion of the proceedings with respect to disputed facts.

(3) In any action in which the proposed debarment is not based upon a conviction or civil judgment, the cause for debarment must be established by a preponderance of the evidence.

(e) *Notice of debarring official's decision.*
(1) If the debarring official decides to impose debarment, the contractor and any affiliates involved shall be given prompt notice by certified mail, return receipt requested—

(i) Referring to the notice of proposed debarment;

(ii) Specifying the reasons for debarment;

(iii) Stating the period of debarment, including effective dates; and

(iv) Advising that the debarment is effective throughout the executive branch of the Government unless the head of an acquiring agency or a designee makes the statement called for by 9.406-1(c).

(2) If debarment is not imposed, the debarring official shall promptly notify the contractor and any affiliates involved, by certified mail, return receipt requested. [FAC 84-46, 54 FR 19815, 5/8/89, effective 6/7/89]

[¶ 29,875.04]

9.406-4 Period of debarment.

(a) Debarment shall be for a period commensurate with the seriousness of the cause(s). Generally, debarment should not exceed 3 years, except that debarment for

violation of the provisions of the Drug-Free Workplace Act of 1988 (see 23.506) may be for a period not to exceed 5 years. If suspension precedes a debarment, the suspension period shall be considered in determining the debarment period.

(b) The debarring official may extend the debarment for an additional period, if that official determines that an extension is necessary to protect the Government's interest. However, a debarment may not be extended solely on the basis of the facts and circumstances upon which the initial debarment action was based. If debarment for an additional period is determined to be necessary, the procedures of 9.406-3 above shall be followed to extend the debarment.

(c) The debarring official may reduce the period or extent of debarment, upon the contractor's request, supported by documentation, for reasons such as—

(1) Newly discovered material evidence;

(2) Reversal of the conviction or civil judgment upon which the debarment was based;

(3) Bona fide change in ownership or management;

(4) Elimination of other causes for which the debarment was imposed; or

(5) Other reasons the debarring official deems appropriate. [Interim rule, FAC 84-43, 54 FR 4968, 1/31/89, effective 3/18/89 for contracts issued on or after that date; FAC 84-46, 54 FR 19815, 5/8/89, effective 6/7/89; FAC 84-57, 55 FR 21707, 5/25/90, effective 7/24/90]

[¶ 29,875.05]

9.406-5 Scope of debarment.

(a) The fraudulent, criminal, or other seriously improper conduct of any officer, director, shareholder, partner, employee, or other individual associated with a contractor may be imputed to the contractor when the conduct occurred in connection with the individual's performance of duties for or on behalf of the contractor, or with the contractor's knowledge, approval, or acquiescence. The contractor's acceptance of the benefits derived from the conduct shall be evidence of such knowledge, approval, or acquiescence.

(b) The fraudulent, criminal, or other seriously improper conduct of a contractor may be imputed to any officer, director, shareholder, partner, employee, or other individ-

ual associated with the contractor who participated in, knew of, or had reason to know of the contractor's conduct.

(c) The fraudulent, criminal, or other seriously improper conduct of one contractor participating in a joint venture or similar arrangement may be imputed to other participating contractors if the conduct occurred for or on behalf of the joint venture or similar arrangement, or with the knowledge, approval, or acquiescence of these contractors. Acceptance of the benefits derived from the conduct shall be evidence of such knowledge, approval, or acquiescence.

[¶ 29,876]

9.407 Suspension.

9.407-1 General.

(a) The suspending official may, in the public interest, suspend a contractor for any of the causes in 9.407-2, using the procedures in 9.407-3.

(b) Suspension is a serious action to be imposed on the basis of adequate evidence, pending the completion of investigation or legal proceedings, when it has been determined that immediate action is necessary to protect the Government's interest. In assessing the adequacy of the evidence, agencies should consider how much information is available, how credible it is given the circumstances, whether or not important allegations are corroborated, and what inferences can reasonably be drawn as a result. This assessment should include an examination of basic documents such as contracts, inspection reports, and correspondence.

(c) Suspension constitutes suspension of all divisions or other organizational elements of the contractor, unless the suspension decision is limited by its terms to specific divisions, organizational elements, or commodities. The suspending official may extend the suspension decision to include any affiliates of the contractor if they are (1) specifically named and (2) given written notice of the suspension and an opportunity to respond (see 9.407-3(c)).

(d) A contractor's suspension shall be effective throughout the executive branch of the Government, unless an acquiring agency's head or a designee (except see 23.506(e)) states in writing the compelling reasons justifying continued business dealings between that agency and the contractor.

(e)(1) When the suspending official has authority to suspend contractors from both acquisition contracts pursuant to this regulation and contracts for the purchase of Federal personal property pursuant to FPMR 101-45.6, that official shall consider simultaneously suspending the contractor from the award of acquisition contracts and from the purchase of Federal personal property.

(2) When suspending a contractor from the award of acquisition contracts and from the purchase of Federal personal property, the suspension notice shall so indicate and the appropriate FAR and FPMR citations shall be included. [Interim rule, FAC 84-43, 54 FR 4968, 1/31/89, effective 3/18/89 for contracts issued on or after that date; FAC 84-46, 54 FR 19816, 5/8/89, effective 6/7/89]

[¶ 29,876.02]

9.407-2 Causes for suspension.

(a) The suspending official may suspend a contractor suspected, upon adequate evidence, of—

(1) Commission of fraud or a criminal offense in connection with (i) obtaining, (ii) attempting to obtain, or (iii) performing a public contract or subcontract;

(2) Violation of Federal or State antitrust statutes relating to the submission of offers;

(3) Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property; or

(4) Violations of the Drug-Free Workplace Act of 1988 (Pub. L. 100-690), as indicated by—

(i) The offeror's submission of a false certification;

(ii) The contractor's failure to comply with its certification; or

(iii) Such a number of contractor employees having been convicted of violations of criminal drug statutes occurring in the workplace, as to indicate that the contractor has failed to make a good faith effort to provide a drug-free workplace (see 23.504).

(5) Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a Government contractor or subcontractor.

(b) Indictment for any of the causes in paragraph (a) above constitutes adequate evidence for suspension.

(c) The suspending official may upon adequate evidence also suspend a contractor for any other cause of so serious or compelling a nature that it affects the present responsibility of a Government contractor or subcontractor. [Interim rule, FAC 84-43, 54 FR 4968, 1/31/89, effective 3/18/89 for contracts issued on or after that date; FAC 84-57, 55 FR 21707, 5/25/90, effective 7/24/90]

[¶ 29,876.03]

9.407-3 Procedures.

(a) *Investigation and referral.* Agencies shall establish procedures for the prompt reporting, investigation, and referral to the suspending official of matters appropriate for that official's consideration.

(b) *Decisionmaking process.* (1) Agencies shall establish procedures governing the suspension decisionmaking process that are as informal as is practicable, consistent with principles of fundamental fairness. These procedures shall afford the contractor (and any specifically named affiliates) an opportunity, following the imposition of suspension, to submit, in person, in writing, or through a representative, information and argument in opposition to the suspension.

(2) In actions not based on an indictment, if it is found that the contractor's submission in opposition raises a genuine dispute over facts material to the suspension and if no determination has been made, on the basis of Department of Justice advice, that substantial interests of the Government in pending or contemplated legal proceedings based on the same facts as the suspension would be prejudiced, agencies shall also—

(i) Afford the contractor an opportunity to appear with counsel, submit documentary evidence, present witnesses, and confront any person the agency presents; and

(ii) Make a transcribed record of the proceedings and make it available at cost to the contractor upon request, unless the contractor and the agency, by mutual agreement, waive the requirement for a transcript.

(c) *Notice of suspension.* When a contractor and any specifically named affiliates are suspended, they shall be immediately

advised by certified mail, return receipt requested—

(1) That they have been suspended and that the suspension is based on an indictment or other adequate evidence that the contractor has committed irregularities (i) of a serious nature in business dealings with the Government or (ii) seriously reflecting on the propriety of further Government dealings with the contractor—any such irregularities shall be described in terms sufficient to place the contractor on notice without disclosing the Government's evidence;

(2) That the suspension is for a temporary period pending the completion of an investigation and such legal proceedings as may ensue;

(3) Of the cause(s) relied upon under 9.407-2 for imposing suspension;

(4) Of the effect of the suspension;

(5) That, within 30 days after receipt of the notice, the contractor may submit, in person, in writing, or through a representative, information and argument in opposition to the suspension, including any additional specific information that raises a genuine dispute over the material facts; and

(6) That additional proceedings to determine disputed material facts will be conducted unless (i) the action is based on an indictment or (ii) a determination is made, on the basis of Department of Justice advice, that the substantial interests of the Government in pending or contemplated legal proceedings based on the same facts as the suspension would be prejudiced.

(d) *Suspending official's decision.* (1) In actions (i) based on an indictment, (ii) in which the contractor's submission does not raise a genuine dispute over material facts, or (iii) in which additional proceedings to determine disputed material facts have been denied on the basis of Department of Justice advice, the suspending official's decision shall be based on all the information in the administrative record, including any submission made by the contractor.

(2) (i) In actions in which additional proceedings are necessary as to disputed material facts, written findings of fact shall be prepared. The suspending official shall base the decision on the facts as found, together with any information and argument submitted by the contractor and any other information in the administrative record.

(ii) The suspending official may refer matters involving disputed material facts to another official for findings of fact. The suspending official may reject any such findings, in whole or in part, only after specifically determining them to be arbitrary and capricious or clearly erroneous.

(iii) The suspending official's decision shall be made after the conclusion of the proceedings with respect to disputed facts.

(3) The suspending official may modify or terminate the suspension or leave it in force (for example, see 9.406-4(c) for the reasons for reducing the period or extent of debarment). However, a decision to modify or terminate the suspension shall be without prejudice to the subsequent imposition of (i) suspension by any other agency or (ii) debarment by any agency.

(4) Prompt written notice of the suspending official's decision shall be sent to the contractor and any affiliates involved, by certified mail, return receipt requested. [FAC 84-12, 51 FR 2649, 1/17/86, effective 1/20/86]

[¶ 29,876.04]

9.407-4 Period of suspension.

(a) Suspension shall be for a temporary period pending the completion of investigation and any ensuing legal proceedings, unless sooner terminated by the suspending official or as provided in this subsection.

(b) If legal proceedings are not initiated within 12 months after the date of the suspension notice, the suspension shall be terminated unless an Assistant Attorney General requests its extension, in which case it may be extended for an additional 6 months. In no event may a suspension extend beyond 18 months, unless legal proceedings have been initiated within that period.

(c) The suspending official shall notify the Department of Justice of the proposed termination of the suspension, at least 30 days before the 12-month period expires, to give that Department an opportunity to request an extension. [FAC 84-12, 51 FR 2649, 1/17/86, effective 1/20/86]

[¶ 29,876.05]

9.407-5 Scope of suspension.

The scope of suspension shall be the same as that for debarment (see 9.406-5), except

that the procedures of 9.407-3 shall be used in imposing suspension.

[¶ 29,876.06]

9.408 Certification regarding debarment, suspension, proposed debarment, and other responsibility matters.

(a) When an offeror, in compliance with the provision at 52.209-5, Certification Regarding Debarment, Suspension, Proposed Debarment, and Other Responsibility Matters, indicates an indictment, charge, civil judgment, conviction, suspension, debarment, proposed debarment, ineligibility, or default of a contract, the contracting officer shall—

(1) Request such additional information from the offeror as the contracting officer deems necessary in order to make a determination of the offeror's responsibility (but see 9.405); and

(2) Notify, prior to proceeding with award, in accordance with agency procedures (see 9.406-3(a) and 9.407-3(a)), the agency official responsible for initiating debarment or suspension action, where an offeror indicates the existence of an indictment, charge, conviction, or civil judgment.

(b) Offerors who do not furnish the certification or such information as may be requested by the contracting officer shall be given an opportunity to remedy the deficiency. Failure to furnish the certification or such information may render the offeror nonresponsible. [FAC 84-46, 54 FR 19816, 5/8/89, effective 6/7/89]

[¶ 29,876.07]

9.409 Solicitation provision and contract clause.

(a) The contracting officer shall insert the provision at 52.209-5, Certification Regarding Debarment, Suspension, Proposed Debarment, and Other Responsibility Matters, in solicitations where the contract value is expected to exceed \$25,000.

(b) The contracting officer shall insert the clause at 52.209-6, Protecting the Government's Interests when Subcontracting with Contractors Debarred, Suspended, or Proposed for Debarment, in solicitations and contracts where the contract value exceeds \$25,000. [FAC 84-46, 54 FR 19816, 5/8/89, effective 6/7/89]