

Date: May 8, 2015

From: Associate Deputy Assistant Secretary for Procurement Policy, Systems and Oversight and Deputy Senior Procurement Executive

Subj: VA PROCUREMENT POLICY MEMORANDUM (2015-02) – Guidance for VA Procurement Related Suspension and Debarment Committee to Assist in Implementing 38 U.S.C. § 8127(g), Enforcement Penalties for Misrepresentation (VAIQ 7594322)

To: See Distribution

1. **Purpose:** This Procurement Policy Memorandum (PPM) includes procedures for the Suspension and Debarment Committee to utilize when evaluating referrals based on allegations of willful and intentional misrepresentation of Service-Disabled Veteran-Owned Small Business (SDVOSB)/Veteran-Owned Small Business (VOSB) status.

2. **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 U.S.C. § 8127(g), 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. In a recent audit the United States Government Accountability Office (GAO), GAO-12-697, found that the VA didn't have sufficient fraud-prevention controls in place to prosecute violators who misrepresent their SDVOSB or VOSB status. In its report to the congressional committee, GAO recommended that the VA take additional steps to reduce program vulnerabilities to fraud and abuse. This PPM implements specific processes and criteria for VA to comply with 38 U.S.C. § 8127(g).

3. **Effective Date:** Immediately.

4. **Expiration Date:** This PPM will remain in effect until incorporated into the VAAR or the new VA Acquisition Manual (VAAM).

5. **Applicability:** This PPM applies to the VA Debarment and Suspension Committee for Procurement and the Suspending and Debarring Official

6. **Exceptions:** None

7. **Action Required:** The Suspension and Debarment Committee shall utilize the following revised definitions and guidance:

a. 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.

b. Interagency Suspension and Debarment Committee Coordination

- (1) 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.
- (2) The S&D Committee shall provide the designated lead agency with any information relevant to the action for consideration in the decision making process.
- (3) The S&D Committee shall maintain coordination with the appropriate lead agency official through completion of a final suspension or debarment decision.
- (4) The S&D Committee shall enter exclusion records in the System for Award Management Exclusions within 3 working days after the action becomes effective.

c. Additional Debarment Considerations

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

d. Additional Causes for debarment

- (1) In addition to the causes listed in FAR 9.406-2, the SDO may debar contractors, based upon a preponderance of the evidence, for
 - i. Misrepresentation of Veteran-owned small business (VOSB) or service-disabled, Veteran-owned small business (SDVOSB) status; or
 - ii. Any deliberate violation of the limitation on subcontracting clause requirements for acquisitions under subpart 819.70.

- (2) 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.
 - i. “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 conviction or civil judgment related to fraud or other criminal acts.
 - Conviction means 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 no contest; 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.
 - ii. 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.

e. Process from Acceptance of Referral through Debarment Decision

- (1) 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 in accordance with 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.
- (2) When the S&D Committee finds preponderance of the evidence for a cause for debarment in accordance with VAAR 809.406-2, it shall prepare a recommendation and draft notice of proposed debarment for the SDO's consideration.
- (3) 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.
- (4) 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.
- (5) 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.
- (6) 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.

- (7) If the contractor's submission in opposition to the proposed debarment contains only general denials to information contained in the notice of proposed debarment, the contractor shall not have an additional opportunity to challenge the facts pursuant to VAAR 809.470, Fact-finding procedures.
- (8) 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. However, a general denial will receive additional scrutiny when used by the proposed party to raise a genuine dispute over facts material to the proposed debarment. The failure to submit to VA documentary evidence in opposition to the action will be weighed in determining whether there is a genuine dispute of material facts and a basis for use of 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 OSD BU, 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.
- (9) 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.
- (10) 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.

f. Period of debarment

- (1) 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.
- (2) The SDO may remove a debarment imposed under VAAR 809.406-2, amend its scope, or reduce the period of debarment based on a S&D Committee recommendation if:
 - i. VA has debarred the contractor;
 - ii. 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.

8. Questions or Concerns: Please direct questions regarding this PPM to the Office of Acquisition and Logistics (003A), Risk Management and Compliance Service (003A2C) at vasuspension&debarment@va.gov.

/s/

C. Ford Heard III

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