



FEDERAL RETIREMENT THRIFT INVESTMENT BOARD
77K Street, NE Washington, DC 20002

To: FRTIB Personnel, Contractors, and Subcontractors

Through: Susan Crowder
Chief Acquisition Officer

From: Ervin N. Harris
Attorney-Advisor
Office of General Counsel

Date: 1 October 2018

Re: FRTIB Suspension and Debarment Program

Purpose:

This memorandum informs acquisition staff and current and potential contractors (or subcontractors) of the Agency's policy on suspension and debarment of contractors (or subcontractors) from contracting with FRTIB.

Scope:

The policy set forth in this memorandum applies to contractors submitting offers to provide services or entering into contracts to provide services to FRTIB.

Responsibilities:

Responsibilities of the Office of General Counsel and the Agency's acquisition staff, including Contracting Officers/Specialists, Program Office personnel, and Contracting Officer's Representatives (CORs) in implementing this program are included below in sections.

A. Authority:

- Executive Order 12689—Debarment and Suspension, *August 15, 1989*
- Public Law 103-355, Section 2455 (31 U.S.C. § 6101)
- Executive Order 12549—Debarment and Suspension, February 18, 1986
- Federal Acquisition Regulation (FAR) Subpart 9.4—Debarment, Suspension, and Ineligibility (48 C.F.R. §§ 9.4, et seq).

B. Definitions.

- (1) The *Suspension and Debarment Official* is the Designated Agency Ethics Official (DAEO). The DAEO shall act as the official responsible for rendering suspension and

debarment decisions under this part. In addition to taking suspension and/or debarment action under this part, the DAEO has authority to terminate debarment and suspension proceedings. As used in this part, " Designated Agency Ethics Official" or "DAEO" includes any official designated by the DAEO to act on the DAEO's behalf, including other attorney advisors from the Office of General Counsel.

- (2) The *Ethics Committee* is the committee appointed by the Executive Director of FRTIB, or Executive Director's designee, which provides review of any suspension or debarment decision rendered by the DAEO that is appealed by a contractor who has been suspended and/or disbarred from FRTIB contracting. The committee will consist of at least three FRTIB staff at the GS-14 level or higher: one member from the Office of the General Counsel; one member from Contracting; and one member from a neutral program office.
- (3) *Adequate evidence* means information sufficient to support the reasonable belief that a particular act or omission has occurred.
- (4) *Affiliated business entity* means a company that is under the control of the contractor, is in control of the contractor, or is under common control with the contractor.
- (5) *Civil judgment* means a judgment of a civil offense or liability by any court of competent jurisdiction in the United States.
- (6) *Company* means any corporation, firm, partnership, society, joint venture, business trust, association, consortium or similar organization.
- (7) *Conflict of interest* means a situation in which:
 - (a) A contractor; any management officials or affiliated business entities of a contractor; or any employees, agents, or subcontractors of a contractor who will perform services under a proposed or existing contract with the FRTIB:
 - (i) Has one or more personal, business, or financial interests or relationships that would cause a reasonable individual with knowledge of the relevant facts to question the integrity or impartiality of those who are or will be acting under a proposed or existing FRTIB contract;
 - (ii) Is an adverse party to the FRTIB; or
 - (iii) Has ever been suspended, disbarred, or debarred from contracting with a federal entity or has ever had a contract with FRTIB rescinded or terminated prior to the contract's completion and which rescission or termination involved issues of conflicts of interest or ethical responsibilities; or
 - (b) Any other facts exist that the FRTIB, in its sole discretion, determines may, through performance of a proposed or existing FRTIB contract, provide a contractor with an unfair competitive advantage that favors the interests of the contractor or any person with whom the contractor has or is likely to have a personal or business relationship.

- (8) *Contractor* means a person or company that has submitted an offer to perform services for the FRTIB or has a contractual arrangement with the FRTIB to perform services. For purposes of this part, contractor also includes:
- (a) A contractor's affiliated business entities, key employees, and management officials of the contractor;
 - (b) Any subcontractor performing services for FRTIB and the management officials and key employees of such subcontractors; and
 - (c) Any entity or organization seeking to perform services for FRTIB.
- (9) *Contract(s)* means agreement(s) between FRTIB and a contractor, including, but not limited to, agreements identified as "task orders," for a contractor to provide services to FRTIB. Contracts also means contracts between a contractor and its subcontractor.

C. Suspension & Debarment Process

- (1) Information concerning the possible existence of any cause for suspension or exclusion shall be reported to the DAEO.
- (2) Notices
- (a) *Notice of proposal to debar.* A notice of proposed debarment shall be issued by the DAEO advising the contractor and any specifically named affiliates—
 - (i) That debarment is being considered;
 - (ii) 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;
 - (iii) Of the cause(s) relied upon for proposing debarment;
 - (iv) 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;
 - (v) Of the FRTIB's procedures governing debarment decision-making (i.e., a copy of the Suspension and Debarment Program);
 - (vi) Of the effect of the issuance of the notice of proposed debarment; and
 - (vii) Of the potential effect of an actual debarment.
 - (b) *Notice of suspension.* When a contractor and any specifically named affiliates are suspended, they shall be immediately advised—
 - (i) That they have been suspended and that the suspension is based on an indictment or other adequate evidence that the contractor has committed irregularities—
 1. Of a serious nature in business dealings with the Government or
 2. 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;

3. That the suspension is for a temporary period pending the completion of an investigation and such legal proceedings as may ensue;
4. Of the cause(s) relied upon for imposing suspension;
5. Of the effect of the suspension;
6. 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
7. That additional proceedings to determine disputed material facts will be conducted unless—
 - The action is based on an indictment; or
 - A determination is made by the DAEO that the substantial interests of the Government in pending or contemplated legal proceedings based on the same facts as the suspension would be prejudiced.

(c) *Service of notices.* Notices will be sent to the contractor by first class mail, postage prepaid. For purposes of compliance with this section, notice shall be considered to have been received by the contractor if the notice is properly mailed to the last known address of such contractor. Whenever practical, a copy of the notice will also be transmitted to the contractor by email. In the event the notice is not sent by facsimile, a copy will be sent by an overnight delivery service such as Express Mail or a commercial equivalent.

(3) Responses.

- (a) The contractor will have 15 days from the date of the notice within which to respond.
- (b) The response shall be in writing and may include: information and argument in opposition to the proposed debarment and/or suspension, including any additional specific information pertaining to the possible causes for debarment; and information and argument in mitigation of the proposed period of debarment.
- (c) The response may request a meeting with an FRTIB official identified in the notice to permit the contractor to discuss issues of fact or law relating to the suspension and/or proposed debarment or to otherwise resolve the pending matters.
 - (i) Any such meetings between a contractor and FRTIB shall take such form as FRTIB deems appropriate.
 - (ii) In cases of suspensions, no meeting will be held where the DAEO determines that a substantial interests of the Government would be prejudiced by such a meeting and a suspension is based on the same facts as pending or contemplated legal proceedings.
- (d) Failure to respond to the notice shall be deemed an admission of the existence of the cause(s) for suspension and/or debarment set forth in the notice and an acceptance of the period of suspension/debarment proposed therein. In such circumstances, the FRTIB may proceed to a final decision without further proceedings.
- (e) Where a contractor has received more than one notice, the FRTIB may consolidate the pending proceedings, including the scheduling of any meetings.

(4) The DAEO shall conduct an investigation and compile an administrative record, to the extent he/she deems necessary.

(5) DAEO debarment decisions

(a) If the DAEO decides to impose debarment, the contractor and any affiliates involved shall be given prompt notice by certified mail, return receipt requested

- Referring to the notice of proposed debarment;
- Specifying the reasons for debarment;
- Stating the period of debarment, including effective dates; and
- Advising that the debarment is effective throughout the executive branch of the Government unless the head of an agency or a designee makes the statement called for by 9.406-1(c).

(b) If debarment is not imposed, the debarring official shall promptly notify the contractor and any affiliates involved, by certified mail, return receipt requested.

(6) DAEO suspension decisions. Prompt written notice of suspension shall be sent to the contractor and any affiliates involved, by certified mail, return receipt requested.

D. Scope of Debarment.

(1) The DAEO may debar a contractor from the FRTIB contracting program for any of the causes set forth in this memorandum.

(2) Debarment is a serious action to be imposed when there exists a preponderance of the evidence that one or more of the causes applies to a contractor. Contractors debarred from FRTIB contracting programs are prohibited from entering into any new contracts with FRTIB for the duration of the period of debarment as determined pursuant to this part. FRTIB shall not solicit offers from, award contracts to, extend or modify existing contracts, award task orders under existing contracts, or consent to subcontracts with such contractors. Debarred contractors are also prohibited from conducting business with FRTIB as agents or representatives of other contractors.

(3) Except when one or more of the established mandatory bars to contracting are shown to exist, the existence of a cause for debarment does not necessarily require that the contractor be debarred; the seriousness of the contractor's acts or omissions and any mitigating or aggravating circumstances shall be considered in making any debarment decision.

E. Causes for debarment.

(1) FRTIB may debar a contractor upon a finding that:

(a) The contractor has been convicted of any felony;

(b) The contractor has demonstrated a pattern or practice of defalcation;

- (c) The contractor has failed to disclose a material fact to FRTIB;
- (d) The contractor has failed to disclose any material adverse change in the representations and certifications provided to FRTIB;
- (e) The contractor is debarred from participating in other federal programs;
- (f) The contractor has been convicted of, or subject to a civil judgment for:
 - (i) Commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public or private agreement or transaction, or conspiracy to do the same;
 - (ii) Violation of federal or state antitrust statutes, including those proscribing price fixing between competitors, allocation of customers between competitors, and bid rigging, or conspiracy to do the same;
 - (iii) Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, receiving stolen property, making false claims, obstruction of justice, or conspiracy to do the same;
 - (iv) Commission of any other offense indicating a breach of trust, dishonesty, or lack of integrity, or conspiracy to do the same;
- (g) The contractor's performance under previous contract(s) with FRTIB has resulted in:
 - (i) The FRTIB declaring such contract(s) to be in default; or
 - (ii) The termination of such contract(s) for poor performance; or
 - (iii) A violation of the terms of a contract that would have resulted in a default or termination of the contract for poor performance if that violation had been discovered during the course of the contract; or
- (h) The contractor has engaged in any conduct:
 - (i) Indicating a breach of trust, dishonesty, or lack of integrity that seriously and directly affects its ability to meet standards of present responsibility required of an FRTIB contractor; or
 - (ii) So serious or compelling in nature that it adversely affects the ability of a contractor to meet the minimum ethical standards required by these procedures.
- (i) In assessing the adequacy of the evidence, the DAEO will 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.

F. Scope of suspension.

- (1) The DAEO may suspend a contractor for any of the causes set forth in this memorandum.
- (2) Suspension is an action to be imposed when there exists adequate evidence of one or more causes. This includes, but is not limited to, situations where immediate action is necessary to protect the integrity of the FRTIB contracting program and/or the security of FRTIB assets during the pendency of legal or investigative proceedings initiated by FRTIB, any federal agency or any law enforcement authority.
- (3) The duration of any suspension action shall be for a temporary period pending the completion of an investigation and such other legal proceedings as may ensue.
- (4) A suspension shall become effective immediately upon issuance of the Notice of Suspension.
- (5) Contractors suspended from FRTIB contracting programs are prohibited from entering into any new contracts with FRTIB for the duration of the period of suspension. FRTIB shall not solicit offers from, award contracts to, extend or modify existing contracts, award task orders under existing contracts, or consent to subcontracts with such contractors. Suspended contractors are also prohibited from conducting business with FRTIB as agents or representatives of other contractors.

G. Causes for suspension.

- (1) Suspension may be imposed upon adequate evidence, for the following causes:
 - (a) Of suspension by another federal agency;
 - (b) That a cause for debarment may exist;
 - (c) Of the commission of any other offense indicating a breach of trust, dishonesty, or lack of integrity that seriously and directly affects the minimum ethical standards required of an FRTIB contractor; or
 - (d) Of any other cause so serious or compelling in nature that it adversely affects the ability of a contractor to meet the minimal ethical standards required by these procedures.
 - (e) Indictment for any offense described under "Causes for debarment" may be adequate evidence to suspend a contractor.
 - (f) In assessing the adequacy of the evidence, the DAEO will 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.

H. Imputation of causes.

(1) Where there is cause to suspend and/or debar any affiliated business entity of the contractor, that conduct may be imputed to the contractor if the conduct occurred in connection with the affiliated business entity'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.

(2) Where there is cause to suspend and/or debar any contractor, that conduct may be imputed to any affiliated business entity, key employee, or management official of a contractor who participated in, knew of or had reason to know of the contractor's conduct.

(3) Where there is cause to suspend and/or debar a key employee or management official of a contractor, that cause may be imputed to the contractor if the conduct occurred in connection with the key employee or management official'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.

(4) Where there is cause to suspend and/or debar one contractor participating in a joint venture or similar arrangement, that cause 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.

(5) Where there is cause to suspend and/or debar a subcontractor, that cause may be imputed to the contractor for which the subcontractor performed services, if the conduct occurred for or on behalf of the contractor and with the contractor's knowledge, approval, or acquiescence. Acceptance of the benefits derived from the conduct shall be evidence of such knowledge, approval, or acquiescence.

I. Additional proceedings as to disputed material facts.

(1) In actions not based upon a conviction or civil judgment, if the DAEO finds that the contractor's submission raises a genuine dispute over facts material to the proposed suspension and/or debarment, the contractor shall be afforded an opportunity to appear at 77 K St. NE, Suite 1000 (with counsel, if desired), submit documentary evidence, present witnesses, and confront any witnesses FRTIB presents.

(2) The DAEO may refer disputed material facts to another official for analysis and recommendation.

(3) If requested, a transcribed record of any additional proceedings shall be made available at cost to the contractor.

J. DAEO decision-making.

(1) Standard of proof:

(a) A debarment must be based on a finding that the cause(s) for debarment is established by a preponderance of the evidence in the administrative record of the case; and

(b) A suspension must be based on a finding that the cause(s) for suspension is established by adequate evidence in the administrative record of the case.

(2) The administrative record consists of the portion of any information, reports, documents or other evidence identified and relied upon in the Notice of proposal to debar, the Notice of Suspension and/or supplemental notices, if any, together with any material portions of the contractor's response. When additional proceedings are necessary to determine disputed material facts, the DAEO shall base the decision on the disputed material facts, together with any information and argument submitted by the contractor and any other information in the administrative record.

(3) In actions based upon a conviction, judgment, a final enforcement action by a federal financial institution regulatory agency, or in which all facts and circumstances material to the debarment action have been finally adjudicated in another forum, the DAEO may debar a contractor without regard to the guidelines set out in these procedures. Any such decisions will be subject to the review and reconsideration provisions.

(4) Notice of decisions. Contractors shall be given prompt notice of the DAEO's decision. If the DAEO suspends a contractor or imposes a period of debarment, the decision shall:

(a) Set forth the cause(s) for suspension and/or debarment included in the Notice that were found by adequate evidence (for suspensions) or a preponderance of the evidence (for debarments) with reference to the administrative record support for that finding;

(b) Set forth the effect of the debarment action and the effective dates of that action; and

(c) Refer the contractor to its procedural rights of review and reconsideration.

(5) If the ADAEO decides that a period of debarment or suspensions is not warranted, the notice of proposed debarment may be withdrawn or the proceeding may be otherwise terminated. A decision to terminate a debarment proceeding may include the imposition of appropriate conditions on the contractor in their future dealings with FRTIB.

K. Duration of suspensions and debarment.

(1) *Suspensions.*

(a) Suspensions shall be for a temporary period pending the completion of an investigation or other legal or debarment proceedings.

(b) If legal or administrative proceedings are not initiated within 12 months after the date of the suspension notice, the suspension shall be terminated unless an extension is requested in writing. In such cases, the suspension may be extended for an additional six months. In no event may a suspension be imposed for more than 18 months, unless legal or administrative proceedings have been initiated within that period.

(c) FRTIB shall notify the Department of Justice of an impending termination of a suspension at least 30 days before the 12-month period expires to give the Department of Justice an opportunity to request an extension.

(d) The time limitations for suspension in this section may be waived by the affected contractor.

(2) *Period of debarment.*

(a) Debarments shall be for a period commensurate with the seriousness of the cause(s) after due consideration of mitigating evidence presented by the contractor.

(b) If a suspension precedes a debarment, the suspension period shall be considered in determining the debarment period.

(c) Debarment for cause generally should not exceed three years, but where circumstances warrant, a longer period of debarment may be imposed.

(d) The DAEO may extend an existing debarment for an additional period if the DAEO determines that an extension is necessary to protect the integrity of FRTIB contracting program and the public 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 FAR 9.406-3 shall be followed to extend the debarment.

L. Abrogation of contracts.

(1) FRTIB may, in its discretion, rescind or terminate any contract, for cause, in existence at the time a contractor is suspended or disbarred.

(2) Any contract not rescinded or terminated shall continue in force in accordance with the terms thereof.

(3) The right to rescind or terminate a contract in existence is cumulative and in addition to any other remedies or rights FRTIB may have under the terms of the contract, at law, or otherwise.

M. Exceptions to suspensions and debarments.

(1) Exceptions to the effects of suspensions and debarments may be available in unique circumstances, where there are compelling reasons to utilize a particular

contractor for a specific task. Requests for such exceptions may be submitted only by the FRTIB program office requesting the contract services.

(2) In the case of the modification or extension of an existing contract, the DAEO may except such a contracting action from the effects of suspension and/or debarment upon a determination, in writing, that a compelling reason exists for utilization of the contractor in the particular instance. The DAEO's authority under this section shall not be delegated to any lower official.

(3) In the case of new contracts, the Ethics Committee may except a particular new contract from the effects of suspension and/or debarment upon a determination in writing that a compelling reason exists for utilization of the contractor in the particular instance.

N. Review and reconsideration of DAEO decisions.

(1) Review.

(a) A suspended and/or disbarred contractor may appeal the suspension/debarment decision to the Ethics Committee.

(b) In order to avail itself of the right to appeal, a suspended and/or disbarred contractor must file a written notice of intent to appeal within 5 days of the DAEO's decision.

(c) The appeal shall be filed in writing within 30 days of receipt of the decision.

(d) The Ethics Committee, at its discretion and after determining that it is in the best interests of FRTIB, may stay the effect of the suspension and/or debarment pending conclusion of its review of the matter.

(2) Reconsideration.

(a) A suspended and/or disbarred contractor may submit a request to the ADAEO to reconsider the suspension and/or debarment decision, reduce the period of debarment or terminate the suspension and/or debarment.

(b) Such requests shall be in writing and supported by documentation that the requested action is justified by:

- Reversal of the conviction or civil judgment upon which the suspension and/or debarment was based;
- Newly discovered material evidence;
- Bona fide change in ownership or management;
- Elimination of other causes for which the suspension and/or debarment was imposed; or
- Other reasons the DAEO deems appropriate.

(c) A request for reconsideration based on the reversal of the conviction or civil judgment may be filed at any time.

(d) Requests for reconsideration based on other grounds may only be filed during the period commencing 60 days after the DAEO's decision imposing the suspension and/or debarment. Only one such request may be filed in any twelve month period.

(e) The DAEO's decision on a request for reconsideration is subject to the review procedure set forth in paragraph (a) of this section

Approval

Name: _____
Susan C. Crowder

Title: Chief Acquisition Officer, FRTIB