



March 24, 2020

Class Deviation CD-2020-04

MEMORANDUM FOR WILLIAM S. SCHMIDT  
GSA SUSPENSION AND DEBARMENT OFFICIAL

FROM: JEFFREY A. KOSES <sup>JEFFREY</sup> KOSES  
SENIOR PROCUREMENT EXECUTIVE  
OFFICE OF ACQUISITION POLICY (MV)

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SUBJECT: FAR and GSAR Class Deviation - Flexibilities for Debarring Official  
Notification to Contractors

**1. Purpose.**

This memorandum approves a class deviation from the Federal Acquisition Regulation (FAR) and General Services Acquisition Regulation (GSAR) to provide flexibilities for Debarring Officials who need to notify contractors of being suspended, proposed for debarment, or debarred.

**2. Background.**

FAR 9.406-3 and FAR 9.407-3 currently require contractors to be notified of a suspension, proposed debarment, or debarment action from GSA's Suspension and Debarment Official (SDO) via certified mail, return receipt requested. Unfortunately, as written the FAR precludes any other type of notification such as an electronic means of notification that may be beneficial during times of emergency or crisis such as those presented by the Novel Coronavirus 2019 (COVID-19) pandemic.

This class deviation will allow greater flexibility for Debarring Officials by providing a means of electronic delivery of notices of suspension, proposed debarment, and debarment to contractors in addition to certified mail, return receipt requested as required under FAR 9.406-3 and FAR 9.407-3. In addition, though GSAR 509.406-3(d)(ii) and 509.406-3(d)(iii) are silent on the notification means to contractors

being suspended, proposed for debarment, or debarred, this deviation language is being included for purposes of consistency. The areas of the FAR and GSAR that are being amended by this class deviation are: FAR 9.406-3(c) and (e); FAR 9.407-3(c) and (d); and GSAR 509.406-3(d)(ii) and (d)(iii).

### **3. Authority.**

This class deviation is issued under the authority of FAR 1.404 and General Services Administration Acquisition Manual (GSAM) 501.404. This deviation is issued following consultation with the Chair of the Civilian Agency Acquisition Council (CAAC) in accordance with FAR 1.404(a) and GSAM 501.404(a).

### **4. Deviation.**

See Attachment A for the changes in the FAR text as revised by this deviation. See Attachment B for the changes in the GSAR text as revised by this deviation.

### **5. Effective Date.**

This deviation is effective immediately and remains in effect until rescinded or incorporated into the FAR and GSAR.

### **6. Point of Contact.**

Questions regarding this class deviation may be directed to [GSARPolicy@gsa.gov](mailto:GSARPolicy@gsa.gov).

<b>Attachments</b>	Attachment A – Line-In/Line-Out: FAR Text
	Attachment B – Line-In/Line-Out: GSAR Text
	Attachment C – Business Case

**ATTACHMENT A  
FAR DEVIATION LINE-IN/LINE-OUT TEXT  
FOR CLASS DEVIATION CD-2020-04**

**FAR Baseline: FAC 2020-04 effective 01/15/2020**

- **Additions to baseline made by deviation are indicated by [bold text in brackets]**
- **Deletions to baseline made by deviation are indicated by strikethroughs**
- **Five asterisks (\*\*\*\*\*) indicate that there are no revisions between the preceding and following parts or sections**
- **Three asterisks (\*\*\*) indicate that there are no revisions between the material shown within a section and subsection or subsection**

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Subpart 9.4 - Debarment, Suspension, and Ineligibility

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9.406 Debarment.

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9.406-3 Procedures.

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(c) *Notice of proposal to debar.* A notice of proposed debarment shall be issued by the debarring official [to] ~~advising~~ the contractor and any specifically named affiliates[.]; ~~by certified mail, return receipt requested—~~

(1) [(1) The notice shall be sent by—

- (i) Certified mail, return receipt requested; or
- (ii) Written notice by a means reasonably calculated to reach the recipient at the last known street address, facsimile number, or e-mail address (with a request for a read receipt).

(2) The notice shall be sent--

(i) To the contractor, the contractor's identified counsel, and (if known) the contractor's

agent for service of process; and

(ii) For each specifically named affiliate, to the affiliate itself, the affiliate's identified counsel, and (if known) the affiliate's agent for service if process.]

~~(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;~~

~~[(i)]<sup>1</sup> Be sent by certified mail, return receipt requested; or]~~

~~[(ii)] Or By written notice by a means reasonably calculated to reach the contractor to the last known street address, facsimile number, or e-mail address of—~~

~~(1) The contractor or the contractor's identified counsel; or~~

~~(2) The contractor's agent for service of process, or any of the contractor's partners, officers, directors, owners, or joint ventures. The notice is effective if sent to any of those identified above.]~~

[(3) The notice shall state--]

[(i)]<sup>4</sup> That debarment is being considered;

[(ii)]<sup>2</sup> 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)]<sup>3</sup> Of the cause(s) relied upon under [9.406-2](#) for proposing debarment;

[(iv)]<sup>4</sup> 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)]<sup>5</sup> Of the agency's procedures governing debarment decisionmaking;

[(vi)]<sup>6</sup> Of the effect of the issuance of the notice of proposed debarment; and

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

\* \* \*

(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~~**[means of delivery set forth in 9.406-3(c)]**—

(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 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~~**[means of delivery set forth in 9.406-3(c)]**.

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9.407 Suspension.

\* \* \*

9.407-3 Procedures.

\* \* \*

(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~~**[means of delivery set forth in 9.406-3(c)]**—

(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.*

\* \* \*

(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~~ **[means of delivery set forth in 9.406-3(c)]**.

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**ATTACHMENT B**  
**GSAR DEVIATION LINE-IN/LINE-OUT TEXT**  
**FOR CLASS DEVIATION CD-2020-04**

**GSAM Baseline: Change 106 effective 02/19/2020**

- **Additions to baseline made by deviation are indicated by [bold text in brackets]**
- **Deletions to baseline made by deviation are indicated by strikethroughs**
- **Five asterisks (\*\*\*\*\* ) indicate that there are no revisions between the preceding and following sections**
- **Three asterisks (\*\*\*) indicate that there are no revisions between the material shown within a subsection**

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509.406-3 Procedures.

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(b) Reports. Include in referrals to the Suspension and Debarment Official a report that contains at least the following:

- (1) The recommendation and supporting rationale.
- (2) A list of parties to be considered for possible debarment, including the contractor, principals, and affiliates. Include **[email addresses,]** last known home and business addresses, zip codes, and DUNS Numbers. **[Also include for each party the email address and business address for any identified attorney and (if known) the agent for service of process.]**
- (3) A statement of facts.
- (4) Copies of documentary evidence and a list of witnesses. Include addresses and telephone numbers. Determine their availability to appear at a fact-finding proceeding and identify the subject matter of their testimony.
- (5) GSA's acquisition history with the contractor. Include recent experience, copies of the pertinent contracts, and an explanation of impact debarment would have on GSA programs. OIG referrals do not require this explanation; the Suspension and Debarment Official will obtain the information directly from the contracting activity(s).
- (6) A list of any known active or potential criminal investigations, criminal or civil proceedings, or administrative claims before the Board of Contract Appeals.

(c) Review. The Suspension and Debarment Official will review the report, and after coordinating with assigned legal counsel—

- (1) Initiate debarment action;
- (2) Decline debarment action.;
- (3) Request additional information; or
- (4) Refer the matter to the OIG for further investigation and development of a case file.

(d) Decisionmaking process.

(1) The Suspension and Debarment Official will provide:

(i) Notice of declinations, proposed debarments, and decisions to the referring activity.

(ii) Notice of proposed debarment to each party being considered for debarment **[via the method in FAR 9.406-3(c)] ~~[via certified mail, return receipt requested, written notice to the last known street address, facsimile number or e-mail address of the contractor or contractor's identified counsel, or contractor's identified agent for service of process, any of the contractor's partners, officers, directors, owners, or joint ventures. The notice is effective if sent to any of those identified above.]~~**

(iii) Decision notices to each party after considering information in the administrative record and information and argument submitted by the affected party or parties **[by means of delivery set forth in 59.406-3(d)(1)(ii) ~~d(ii)~~**

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March 23, 2020

**MEMORANDUM FOR:** JEFFREY A. KOSES  
SENIOR PROCUREMENT EXECUTIVE  
OFFICE OF ACQUISITION POLICY (MV)

**FROM:** WILLIAM S. SCHMIDT  
DIRECTOR  
SUSPENSION & DEBARMENT DIVISION (MVAB)

DYLAN MOONEY  
ACTING DEPUTY DIRECTOR  
SUSPENSION & DEBARMENT DIVISION (MVAB)

**SUBJECT:** Business Case in support of a Class Deviation to create alternatives to the requirement to send suspension and debarment notices by certified mail return receipt requested in light of the coronavirus disease (COVID-19).

## 1.0 REQUEST

The U.S. General Services Administration (GSA) Suspension and Debarment Division (MVAB) requests a Class Deviation in accordance with Federal Acquisition Regulation (FAR) Subpart 1.404 and General Services Administration Acquisition Manual (GSAM) 501.404(a). The requested Class Deviation seeks to permit a means of electronic delivery of notices of suspension, proposed debarment, and debarment to contractors in addition to certified mail, return receipt requested as required under FAR 9.406-3 and FAR 9.407-3.

### 1.1 AFFECTED AREAS OF THE FAR AND GSAM

FAR 9.406-3(c) and (e), FAR 9.407-3(c) and (d), GSAM 509.406-3(d)(ii) and (d)(iii)

## 2.0 RATIONALE SUPPORTING THE NEED

FAR 9.406-3 and 9.407-3 require that a debarring official notify contractors being suspended, proposed for debarment, or debarred via certified mail, return receipt requested. GSAM 509.406-3(d)(ii) and 509.406-3(d)(iii) are silent on the notification means to contractors being suspended, proposed for debarment, or debarred, but this deviation language should be included in the GSAM as well for consistency. This mandatory requirement precludes any other type of notification such as an electronic

means of notification, which would allow MVAB to carry out its mission of protecting the Government from doing business with non-responsible contractors during times of emergency or crisis such as those presented by the COVID-19 virus pandemic (COVID-19).

Furthermore, the proposed language addressed in this Deviation implements the upcoming FAR proposed rule 2019-015, *Improving Consistency Between Procurement & Non-Procurement Procedures on Suspension and Debarment*.<sup>1</sup>

## 2.1 DESCRIPTION OF THE PROBLEM OR MATTER TO BE ADDRESSED

MVAB requests a Class Deviation to FAR 9.406-3 and 9.407-3 which currently require that contractors be notified of a suspension, proposed debarment, or debarment action from GSA's Suspension and Debarment Official (SDO) via certified mail, return receipt requested. The notices of suspension and proposed debarment afford the contractor an opportunity to respond to the notice within a given time-frame stated in the notice. Integrity Officers (IOs) within MVAB print the letters and send out the certified mail, return receipt letters themselves. IOs are also responsible for ensuring that a certified mail, return receipt (green card) is received and scanned as confirmation of notice for each contractor that is suspended, proposed for debarment or debarred. MVAB is required to physically collect and track the receipt of green cards from contractors and track whether and when letters were delivered to the contractors because of notification requirements. In this paper-mail process, MVAB is also required to physically collect and track receipt of physical copies of contractor's substantive responses and envelopes returned as undeliverable.

As a result of COVID-19, GSA has implemented an agency-wide telework policy wherein no employees are allowed access to GSA's Headquarters at 1800 F St, NW, in Washington, DC (Central Office) without special permission, for health purposes. As a result, the MVAB division is unable to print and send out notices of suspension, proposal for debarment, and debarment via certified mail, return receipt as required under FAR 9.406-3 and 9.407-3. That would require IOs to go into Central Office to complete this mailing process. Moreover, mailing those notices from Central Office would, in practice, mean that contractors receiving those notices would respond to them by physical mail to Central Office, and green cards and undelivered letters to contractors would also be delivered to Central Office. This would, in turn, require further IO travel to Central Office to collect and scan those mailings to create electronic records.

The FAR requirement that notices of suspension, proposed debarment, and debarment be delivered exclusively by certified mail, return receipt requested is outdated and fails to recognize more current, efficient modes of delivery. Likewise, this method presents major challenges when delivering notices to contractors in emergency and pandemic circumstances such as those presented by COVID-19, when Government workers do not have access to Central Office to print letters, scan copies of mailed materials, retrieve green cards and responses from contractors, and use the necessary mailing materials to send out notices to contractors via the United States Postal Service without exposing themselves to potential harm. Similarly, insofar as many contractors are also working remotely during the COVID-19

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<sup>1</sup> See FAR proposed rule 2019-015, *Improving Consistency Between Procurement & Non-Procurement Procedures on Suspension and Debarment* (*available at*: <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201910&RIN=9000-AN98>).

outbreak, it is anticipated that they will have difficulty receiving notices sent by certified mail, return receipt requested, which will further delay the Government's ability to proceed efficiently with the suspension and debarment process.

### **3.0 BACKGROUND**

Suspension and debarment are remedies designed to protect the Government's business interests from potential harm posed by individuals or entities whose conduct indicates a lack of business honesty or integrity or serious, poor performance. Agencies take suspension, proposed debarment, and debarment actions against both business entities and individuals who engage in misconduct, in order to reduce business risk to taxpayer funds or interests. The SDO exercises business judgment in deciding whether or not to take suspension, proposed debarment and debarment actions. SDOs exercise their discretion to exclude parties from participation in certain transactions, while affording those parties due process via notice pursuant to FAR 9.406-3 and 9.407-3, GSAM 509.406-3(d)(ii) and 509.406-3(d)(iii).

It is necessary to note that the suspension and debarment process is based on Executive Order and regulation, rather than statute. Although suspension and debarment are governed by the Administrative Procedure Act in general, there is no statutory requirement that the notice must be accomplished via certified mail, return receipt requested. Rather, that requirement is wholly regulatory, and thus subject to deviation, so long as the deviation serves to accomplish sufficient notice of the pending action.

## **4.0 DISCUSSION OF THE EFFECT, IF ANY, ON GSA'S INTERNAL OPERATING PROCEDURES**

### **4.1 GSA WORKFORCE**

Under the current regulations, if the SDO decided to suspend, propose for debarment, or debar a contractor during this period of mandatory telework, the SDO could sign the notice electronically but MVAB staff would not be able to send the notice to the contractor without exposing themselves to risk by traveling to Central Office or a non-Government office to print and send out the notice via certified mail, return receipt requested. This affects GSA's operational procedures as the FAR requires contractors to be notified. Failure of adequate notification is a violation of both the applicable FAR requirements and the Administrative Procedure Act. Additionally, if the SDO delays suspension and debarment actions during this time where notifying contractors by certified mail return receipt is not possible, then the Government's interests would not be protected as the acquisition workforce could continue to award to, and renew and modify contracts with non-responsible contractors. This proposed deviation would enable MVAB staff to complete this process remotely.

Additionally, this deviation would save significant time for MVAB staff and GSA Mailroom staff at Central Office. MVAB staff process up to 400 SDO actions<sup>2</sup> per fiscal year via certified mail, return receipt requested. Each of those notices generates at least one piece of mail in return to Central Office, as described above. GSA Mailroom staff collect and route each of these mailings. MVAB staff prepare the paper letters and envelopes for mailing, and must scan all these pieces of mail to create electronic records of their creation and receipt. Sending and receiving these pieces of mail electronically would

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<sup>2</sup> NOTE: These actions include more than just suspension, debarment letters. Specifically, MVAB sends letters for the following actions: Request for Information, Show Cause letters, and Termination letters.

free GSA Mailroom staff of this responsibility. It would relieve MVAB staff of significant time spent generating paper materials from an otherwise fully electronic case-management system, mailing and collecting paper materials, then scanning them as records in our electronic case-management system.

## **4.2 OFFICE OF INSPECTOR GENERAL**

This deviation will also significantly affect the GSA Office of the Inspector General (OIG) as most suspension and debarment cases are referred to MVAB by the OIG. The OIG is responsible for providing current and accurate mailing addresses for the contractors it refers MVAB for exclusion actions. This Deviation would now require the OIG to provide current and accurate email address where possible, in their referrals to MVAB. Accordingly, MVAB has notified the OIG of this deviation request through the appropriate channel, and recommends that GSA seek the OIG's concurrence with this request.

## **4.3 AUTOMATED SYSTEMS**

There would be no impact to the financial or accounting systems.

## **5.0 ANALYSIS OF ALTERNATIVES, RISKS, AND RISK MITIGATION**

Implementing this deviation will result in cost savings to GSA. Currently, a notice of suspension, proposed debarment, or debarment sent out by MVAB costs the Government \$7.10 per letter. In Fiscal Year 2019, MVAB had a total of 364 actions that required notices to be sent certified mail, return receipt requested, which resulted in a total cost to the Government \$2,584.40. This also does not account for notices that are returned to MVAB as undeliverable, or notices that required multiple attempts at different addresses to achieve notice.

This Deviation will also ensure that contractors' due process rights are not violated, by allowing MVAB to promptly notify a contractor of an impending suspension, proposed debarment, or debarment action pursuant to the FAR. In fact, sending notice by electronic means is likely to achieve delivery of notice even sooner than by paper mail. Ensuring that a contractor receives the notice will prevent future litigation. Further, this Deviation will allow the SDO to take suspension, proposed debarment, and debarment action during this agency-wide telework period and will protect the Government's interests so that the acquisition workforce continues to contract with responsible contractors only.

MVAB explored options for continuing to send suspension, proposed debarment, and debarment notices via certified mail, return receipt requested. MVAB consulted GSA management, Office of General Counsel, and the chairwomen of the Interagency Suspension & Debarment Committee. MVAB determined that these alternatives were undesirable because they raised concerns about staff exposure to COVID-19, protection of sensitive data, and would cost more than this proposed alternative.

## **6.0 EFFECTS**

### **6.1 Effects on the Agency, Suspension and Debarment Official (SDO), and Integrity Officers within the Suspension and Debarment Division**

COVID-19 is affecting MVAB's ability to protect the Government's business interests from potential harm posed by contractors lacking the necessary business integrity and honesty to conduct business with the Federal Government. Currently, the SDO can sign documents electronically. The suspension, proposal for debarment, and debarment actions become effective once signed and can be entered on

the System for Award Management (SAM.gov). However, MVAB IOs lack the means to send out the signed notices of suspension, proposed debarment, and debarment as they do not have access to the necessary resources to send out the notices via certified mail, return receipt requested without exposing themselves to potential harm from COVID-19. Furthermore, MVAB employees do not have access to the mail to receive green cards, substantive responses from contractors to SDO actions, or mail to contractors returned as undeliverable.

Without the ability to send out notices of suspension, proposed debarment and debarment, MVAB cannot conduct its mission critical objectives which creates a business risk to taxpayer funds and interests and puts the Government at risk.

This Deviation will allow MVAB to work around this issue and will allow MVAB to send out notices via electronic methods such as email in the interim which will allow MVAB to conduct its mission critical tasks during the remaining period of COVID-19 health concerns.

### 7.0 RECOMMENDED FAR AND GSAM LANGUAGE:

See Attachment A – Proposed FAR Language

See B Attachment B – Proposed GSAM Language

### 8.0 CONCURRENCE AND APPROVALS

#### Statement of Legal Sufficiency

The LP legal counsel concurs that there is no legal barrier to proceeding with the proposed deviation.

**ADAM  
SUPPLE** Digitally signed by ADAM SUPPLE  
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Services Administration, cn=ADAM SUPPLE -  
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Date

Office of General Counsel