



APRIL 22, 2020

Class Deviation CD-2020-07

MEMORANDUM FOR WILLIAM S. SCHMIDT
DIRECTOR, SUSPENSION AND DEBARMENT DIVISION

FROM: JEFFREY A. KOSES
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OFFICE OF ACQUISITION POLICY (MV)

SUBJECT: FAR and GSAR Class Deviation - Suspension and Debarment Action Meetings

1. Purpose.

This memorandum approves a class deviation from the Federal Acquisition Regulation (FAR) and General Services Acquisition Regulation (GSAR) to permit alternative ways of conducting in-person meetings for suspension and proposed debarment actions.

2. Background.

FAR 9.406-3 and 9.407-3 allow a contractor that is being suspended or proposed for debarment to have the opportunity "to submit, in person, in writing, or through a representative, information and argument in opposition" to a suspension or proposed debarment to the Suspension and Debarment Official (SDO). Many agencies have, through practice, effectively interpreted these FAR provisions to provide respondents with a procedural right to an in-person meeting for presentations of matter in opposition (PMIO). GSAM 509.406-3(d) also requires that a contractor be allowed the opportunity to present information and argument to the SDO via an in-person oral presentation. These requirements do not specifically permit any other means of conducting PMIOs, such as virtually or telephonically.

This class deviation will allow the SDO to carry out its mission of protecting the Government from doing business with non-responsible contractors, while still allowing parties to exercise their due process rights during times of emergency or crisis such as those presented by COVID-19, by allowing meetings to be conducted virtually or via telephone. The areas of the FAR and GSAR that are being amended by this class deviation are: FAR 9.406-3(b); FAR 9.407-3(b); and GSAR 509.406-3(d)(2) and (3).

3. Authority.

This class deviation is issued under the authority of FAR 1.404 and General Services Administration Acquisition Manual (GSAM) 501.404. Civilian Agency Acquisition Council (CAAC) Letter 2020-01, Class Deviation from the Federal Acquisition Regulation (FAR) Regarding Flexibilities for the Suspending or Debarring Official's Correspondence with Contractors, issued April 1, 2020 serves at the consultation with the CAAC Chair.

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.

Any questions regarding this deviation may be directed to GSARPolicy@gsa.gov.

Attachments

- Attachment A – Line-In/Line-Out: FAR Text
- Attachment B – Line-In/Line-Out: GSAR Text
- Attachment C – [Business Case](#)
- Attachment D – [CAAC Letter 2020-01](#)

**ATTACHMENT A
FAR DEVIATION LINE-IN/LINE-OUT TEXT
FOR CLASS DEVIATION CD-2020-07**

FAR Baseline: FAC 2020-05 effective 03/30/2020

- 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

Part 9 - Contractor Qualifications

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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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(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. **[The debarring official may also use flexible procedures to allow a contractor (and any specifically named affiliates) to submit such information and argument via teleconference, web conference, or other virtual meeting. If so, the debarring official should change the notice in paragraph (c)(4) of this section to include those flexible procedures.]**

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9.407 Suspension.

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9.407-3 Procedures.

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(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. **[The suspending official may use the flexible procedures in 9.406-3(b)(1). If so, the suspending official should change the notice in paragraph (c)(5) of this section to include those flexible procedures.]**

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ATTACHMENT B
GSAR DEVIATION LINE-IN/LINE-OUT TEXT
FOR CLASS DEVIATION CD-2020-07

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

Part 509 - Contractor Qualifications

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Subpart 509.4 - Other than Full and Open Competition

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509.406 - Debarment

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509.406-3 Procedures.

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(d) Decisionmaking process.

(1) * * *

(2) A party proposed for debarment:

(i) Has 30 calendar days after receipt of the notice to respond to the Suspension and Debarment Official or the debarment becomes final.

(ii) May request and receive a copy of the administrative record that was the basis for the proposed debarment. If information is withheld, the party will be notified and provided the reason.

(iii) May request the opportunity to present information and argument in person to the Suspension and Debarment Official. The Suspension and Debarment Official will schedule an

oral presentation **[and may use flexible procedures to allow a party to present information and argument, such as via teleconference, web conference, or other virtual meeting]** within 20 calendar days of receipt of the request, unless a longer period of time is requested by the party. An oral presentation is informal and a transcript usually is not made. The party may supplement the oral presentation with written information and arguments.

(iv) May identify to the Suspension and Debarment Official material facts in dispute and the bases. For an action other than one based on a conviction or civil judgment, a party may request review and a written finding by a fact-finding official.

(3) Following a review of the record and, if needed, a presentation by the contractor in opposition to the proposed action **[or via the method in paragraph (d)(2)(iii) of this section]**, the Suspension and Debarment Official will determine whether there is a genuine dispute of material fact. If so, the Suspension and Debarment Official will initiate the fact-finding process. The fact-finding official will:

(i) Establish a date for a fact-finding proceeding, normally to be held within 45 days of the determination of who will function as the fact-finding official.

(ii) Grant extensions for good cause.

(iii) Provide notice of the scheduled hearing.

(iv) Provide the parties with a schedule for exchange of documents and witness lists.

(v) Develop an official transcript of the fact-finding proceeding.

(vi) Provide the Government's representative and the contractor with an opportunity to present evidence relevant to the facts at issue. The contractor may appear in person or through a representative **[or via the method in paragraph (d)(2)(iii) of this section]**.

(vii) Conduct hearings under rules consistent with FAR 9.406-3 pertaining to fact finding. Neither the Federal Rules of Evidence nor the Federal Rules of Civil Procedure govern fact finding. Hearsay evidence may be presented and will be given appropriate weight by the fact-finding official.

(viii) Provide for witness testimony. Witnesses may testify in person **[or via the method in paragraph (d)(2)(iii) of this section]**. Witnesses are subject to cross examination.

(ix) Prepare written findings of fact based on a preponderance of the evidence and submit them to both the Suspension and Debarment Official and the contractor within 20 calendar days following the conclusion of the fact-finding proceeding.

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