National Nuclear Security Administration

NNSA Policy Letter: BOP-003.0403
Date: June 14, 2004

TITLE: Deviation to DEAR 909.4 Debarment, Suspension, and Ineligibility

I. OBJECTIVE:

The objective of this Policy Letter is to provide an approved deviation to the Department of Energy Acquisition Regulation (DEAR) Subpart 909.4.

II. BACKGROUND:

The DEAR names the DOE Director of Procurement and Assistance Management as the Debarring and Suspending Official for both DOE and NNSA. Properly, the Debarring and Suspending Official for NNSA is the Director of Acquisition and Supply Management, NA-63. To formally effectuate this change, NNSA's Senior Procurement Executive has approved the attached deviation.

III. APPLICABILITY:

All NNSA elements including non-NNSA entities at sites where NNSA is the landlord.

IV. REQUIREMENTS:

NNSA Contracting Activities and Contracting Officers shall comply with the attached deviation in lieu of DEAR 909.4.

V. POINT OF CONTACT FOR ADMINISTRATION OF POLICY LETTER:
Deputy Director, Office of Acquisition and Supply Management (NA-63), 202-586-8559.

BY ORDER OF THE SENIOR PROCUREMENT EXECUTIVE:

Robert C. Braden
Senior Procurement Executive
National Nuclear Security Administration

Subpart 909.4 Debarment, Suspension, and Ineligibility

909.400 Scope of subpart.

This subpart.

(a) Prescribes policies and procedures governing the debarment and suspension of organizations and individuals from participating in National Nuclear Security Administration (NNSA) contracts, procurement sales contracts, and real property purchase agreements, and from participating in NNSA approved subcontracts and subagreements.

(b) Sets forth the causes, procedures, and requirements for determining the scope, duration, and effect of NNSA debarment and suspension actions; and

(c) Implements and supplements FAR subpart 9.4 with respect to the exclusion of organizations and individuals from procurement contracting and Government approved subcontracting.

909.401 Applicability.

This subpart applies to all procurement debarment and suspension actions initiated by NNSA on or after the effective date of this deviation. Nonprocurement debarment and suspension rules are codified in 10 CFR part 1036.

909.403 Definitions.

In addition to the definitions set forth at FAR 9.403, the following definitions apply to this subpart:

Debarring Official. The NNSA Debarring Official is the Director, Office of Acquisition and Supply Management, or designee.

Suspending Official. The NNSA Suspending Official is the Director, Office of Acquisition and Supply Management, or designee.

909.405 Effect of listing. (NNSA coverage paragraph (e), (f), (g) and (h))

(e) The NNSA may not solicit offers from, award contracts to, or consent to subcontract with contractors debarred, suspended or proposed for debarment unless the Head of the Contracting Activity makes a written determination justifying that there is a compelling reason for such action in accordance with FAR 9.405(a).

(f) NNSA may disapprove or not consent to the selection (by a contractor) of an individual to serve as a principal investigator, as a project manager, in a position of responsibility for the administration of Federal funds, or in another key personnel position, if the individual is on the GSA List.

(g) NNSA shall not conduct business with an agent or representative of a contractor if the agent's or representative's name appears on the GSA List.

(h) NNSA shall review the GSA List before conducting a preaward survey or soliciting proposals, awarding contracts, renewing or otherwise extending the duration of existing contracts, or approving or consenting to the award, extension, or renewal of subcontracts.

909.406 Debarment.

909.406-2 Causes for debarment. (NNSA coverage paragraphs (c) and (d))

(c) The Debarring Official may debar a contractor for any other cause of so serious or compelling a nature that it affects the present responsibility of a NNSA contractor. Such cause may include but is not limited to:

(1) Commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a private contract or subcontract; and

(2) Inexcusable, prolonged, or repeated failure to pay a debt (including disallowed costs and overpayments) owed to NNSA, provided the contractor has been notified of the determination of indebtedness, and further provided that the time for initiating any administrative or legal action to oppose or appeal the determination of indebtedness has expired or that such action, if initiated, has been concluded.

(d) The Debarring Official may debar a contractor:

(1) On the basis that an individual or organization is an affiliate of a debarred contractor, subject to the requirements of FAR 9.406-1(b) and 9.406- 3(c);

(2) For failure to observe the material provisions of a voluntary exclusion (see 10 CFR 1036.315 for discussion of voluntary exclusion).

909.406-3 Procedures. (NNSA coverage paragraphs (a), (b) and (d))

(a) *Investigation and referral*. (1) Offices responsible for the award and administration of contracts are responsible for reporting to both the Director, Acquisition and Supply Management and the DOE Inspector General information about possible fraud, waste, abuse, or other wrongdoing which may constitute or contribute to a cause(s) for debarment under this subpart. Circumstances that involve possible criminal or fraudulent activities must be reported to the Office of the Inspector General in accordance with 10 CFR Part 1010, Conduct of Employees, Sec. 1010.217(b), Cooperation with the Inspector General.

(2) At a minimum, referrals for consideration of debarment action must be in writing and should include the following information:

(i) The recommendation and rationale for the referral;

(ii) A statement of facts;

(iii) Copies of documentary evidence and a list of witnesses, including addresses and telephone numbers, together with a statement concerning their availability to appear

at a fact-finding proceeding and the subject matter of their testimony;

(iv) A list of parties including the contractor, principals, and affiliates (including last known home and business addresses, zip codes and DUNS Number);

(v) NNSA's acquisition history with the contractor, including recent experience under contracts and copies of pertinent contracts;

(vi) A list of any known active or potential criminal investigations, criminal or civil proceedings, or administrative claims before the Board of Contract Appeals; and

(vii) A statement regarding the impact of the debarment action on NNSA programs. This statement is not required for referrals by the Inspector General.

(3) Referrals may be returned to the originator for further information or development.

(b) *Decision making process*. Contractors proposed for debarment shall be afforded an opportunity to submit information and argument in opposition to the proposed debarment.

(1) In actions, based upon a conviction or civil 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 submissions made by the contractor. If the respondent fails to submit a timely written response to a notice of proposed debarment, the Debarring Official shall notify the respondent in accordance with FAR 9.406-3(e) that the contractor is debarred.

(2) In actions, not based upon a conviction or civil judgment, the contractor may request a fact-finding hearing to resolve a genuine dispute of material fact. In its request, the contractor must identify the material facts in dispute and the basis for disputing the facts. If the Debarring Official determines that there is a genuine dispute of material fact, the Debarring Official shall refer the matter to the Energy Board of Contract Appeals for a fact-finding conference.

(3) *Meeting*. Upon receipt of a timely request therefore from a contractor proposed for debarment, the Debarring Official shall schedule a meeting between the Debarring Official and the respondent, to be held no later than 30 days from the date the request is received. The Debarring Official may postpone the date of the meeting if the respondent requests a postponement in writing. At the meeting, the respondent, appearing personally or through an attorney or other authorized representative, may present and explain evidence that causes for debarment do not exist, evidence of any mitigating factors, and arguments concerning the imposition, scope, or duration of a proposed debarment or debarment.

(4) *Fact-finding conference*. The purpose of a fact-finding conference under this section is to provide the respondent an opportunity to dispute material facts through the submission of oral and written evidence; resolve facts in dispute; and provide the Debarring Official with findings of fact based, as applicable, on adequate evidence or on a preponderance of the evidence. The fact-finding conference shall be conducted

in accordance with rules consistent with FAR 9.406-3(b) promulgated by the Energy Board of Contract Appeals. The Energy Board of Contract Appeals will notify the affected parties of the schedule for the hearing. The Energy Board of Contract Appeals shall deliver written findings of fact to the Debarring Official (together with a transcription of the proceeding, if made) within a certain time period after the hearing record closes, as specified in the Energy Board of Contract Appeals Rules. The findings shall resolve any disputes over material facts based upon a preponderance of the evidence, if the case involves a proposal to debar, or on adequate evidence, if the case involves a suspension. Since convictions or civil judgments generally establish the cause for debarment by a preponderance of the evidence, there usually is no genuine dispute over a material fact that would warrant a fact-finding conference for those proposed debarments based on convictions or civil judgments.

(5) *Debarring Official's decision*. The Debarring Official's final decision shall be based on the administrative record. In those actions where additional proceedings are necessary as to disputed material facts, written findings of fact shall be prepared and included in the final decision. In those cases where the contractor has requested and received a fact-finding conference, the written findings of fact shall be those findings prepared by the Energy Board of Contract Appeals. Findings of fact shall be final and conclusive unless within 15 days of receipt of the findings, the NNSA or the respondent requests reconsideration, as provided in the Board's Rules, or unless set aside by a court of competent jurisdiction. The Energy Board of Contract Appeals shall be provided a copy of the Debarring Official's final decision.

909.406-6 Requests for reconsideration of debarment.

(a) At any time during a period of debarment, a respondent may submit to the Debarring or Suspending Official a written request for reconsideration of the scope, duration, or effects of the suspension/debarment action because of new information or changed circumstances, as discussed at FAR 9.406-4(c).

(b) In reviewing a request for reconsideration, the Debarring or Suspending Official may, in his or her discretion, use any of the procedures (meeting and fact-finding) set forth in 48 CFR (DEAR) 909.406-3 and 909.407-3 as may be modified by this deviation. The Debarring or Suspending Official's final disposition of the reconsideration request shall be in writing and shall set forth the reasons why the request has been granted or denied. A notice transmitting a copy of the disposition of the request for reconsideration shall be sent to the respondent and, if a fact-finding conference under 48 CFR (DEAR) 909.406-3(b)(4) as may be modified by this deviation is pending (as in the case of a request for reconsideration of a suspension, where the proposed debarment is the subject of a fact-finding conference), a copy of the disposition shall be transmitted to the Energy Board of Contract Appeals.

909.407-2 Causes for suspension. (NNSA coverage paragraph (d))

(d) The Suspending Official may suspend an organization or individual:

(1) Indicted for or suspected, upon adequate evidence, of the causes described in 48 CFR (DEAR) 909.406-2(c)(1) as may be modified by this deviation.

(2) On the basis of the causes set forth in 48 CFR (DEAR) 909.406-2(d)(2) as may

be modified by this deviation.

(3) On the basis that an organization or individual is an affiliate of a suspended or debarred contractor.

909.407-3 Procedures. (NNSA coverage paragraphs (b) and (e))

(b) Decision making process.

(1) In actions based on an indictment, the Suspending Official shall make a decision based upon the administrative record, which shall include submissions made by the contractor in accordance with 48 CFR (DEAR) 909.406-3(b)(1) and 909.406-3(b)(3) as may be modified by this deviation.

(2) For actions not based on an indictment, the procedures in 48 CFR (DEAR) 909.406-3(b)(2) as may be modified by this deviation and FAR 9.407-3(b)(2) apply.

(3) Coordination with the Department of Justice. Whenever a meeting or fact-finding conference is requested, the Suspending Official's legal representative shall obtain the advice of the appropriate Department of Justice officials concerning the impact disclosure of evidence at the meeting or fact-finding conference could have on any pending civil or criminal investigation or legal proceeding. If such Department of Justice official requests in writing that evidence needed to establish the existence of a cause for suspension not be disclosed to the respondent, the Suspending Official shall:

(i) Decline to rely on such evidence and withdraw (without prejudice) the suspension or proposed debarment until such time as disclosure of the evidence is authorized; or

(ii) Deny the request for a meeting or fact-finding and base the suspension decision solely upon the information in the administrative record, including any submission made by the respondent.

(e) Notice of suspending official's decision. In actions in which additional proceedings have been held, following such proceedings, the Suspending Official shall notify respondent, as applicable, in accordance with paragraphs (e)(1) or (e)(2) of this section.

(1) Upon deciding to sustain a suspension, the Suspending Official shall promptly send each affected respondent a notice containing the following information:

(i) A reference to the notice of suspension, the meeting and the fact-finding conference;

(ii) The Suspending Official's findings of fact and conclusions of law;

(iii) The reasons for sustaining a suspension;

(iv) A reference to the Suspending Official's waiver authority under 48 CFR (DEAR) 909.405 as may be modified by this deviation;

(v) A statement that the suspension is effective throughout the Executive Branch as provided in FAR 9.407-1(d);

(vi) Modifications, if any, of the initial terms of the suspension;

(vii) A statement that a copy of the suspension notice was sent to GSA and that the respondent's name and address will be added to the GSA List; and

(viii) If less than an entire organization is suspended, specification of the organizational element(s) or individual(s) included within the scope of the suspension.

(2) If the Suspending Official decides to terminate a suspension, the Suspending Official shall promptly send, by certified mail, return receipt requested, each affected respondent a copy of the final decision required under this section.

NATIONAL NUCLEAR SECURITY ADMINISTRATION

DETERMINATION AND FINDINGS

DEPARTMENT OF ENERGY ACQUISITION REGULATION (DEAR) CLASS DEVIATION REGARDING DEAR SUBPART 909.4 DEBARRMENT, SUSPENSION, AND INELEIGIBILITY

FINDINGS

1. DEAR subpart 909.4 erroneously names the Department of Energy (DOE) Director of Procurement and Assistance Management as the debarring and suspending official for both DOE and the National Nuclear Security Administration (NNSA). See DEAR 909.403.

2. DEAR subpart 909.4 erroneously names the DOE Deputy Assistant Secretary for Procurement and Assistance Management as the individual that may make the determinations required by Federal Acquisition Regulation, 9.405(a). See DEAR 909.405(e).

3. The NNSA Act vests procurement authority directly in NNSA and prohibits DOE employees from exercising supervision or control over NNSA employees or NNSA contractors.

4. An interim final rule to effectuate a correction of the DEAR has been prepared and agreed to by the NNSA and DOE procurement organizations. That Federal Register Notice has been delayed for several months.

DETERMINATION

I hereby authorize a class deviation from the requirements of DEAR subpart 909.4, Debarment, Suspension, and Ineligibility to correctly identify the proper individuals in NNSA that are responsible for debarment, suspension, and ineligibility activities.

APPROVAL

Robert C. Braden

Robert C. Braden
Senior Procurement Executive

DATE

June 9, 2004