

AN A.S. PRATT PUBLICATION

OCTOBER 2018

VOL. 4 • NO. 10

PRATT'S
**GOVERNMENT
CONTRACTING
LAW**
REPORT



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Library of Congress Card Number:

ISBN: 978-1-6328-2705-0 (print)

Cite this publication as:

[author name], [article title], [vol. no.] PRATT’S GOVERNMENT CONTRACTING LAW REPORT [page number] (LexisNexis A.S. Pratt);

Michelle E. Litteken, GAO Holds NASA Exceeded Its Discretion in Protest of FSS Task Order, 1 PRATT’S GOVERNMENT CONTRACTING LAW REPORT 30 (LexisNexis A.S. Pratt)

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An A.S.Pratt® Publication

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An Important Update for Companies That Contract with the National Credit Union Administration: New Debarment Procedures in Place to Target Bad Actors

*By Dominique L. Casimir**

This article provides a description of the key features of the National Credit Union Administration's new suspension and debarment function.

The National Credit Union Administration (“NCUA”) has implemented final procedures for discretionary suspension and debarment of contractors that are not presently responsible. The NCUA adopted the procedures on August 2, 2018, following a request by the General Counsel and Chief Financial Officer.¹

The Final Rule establishing the NCUA’s suspension and debarment procedures will take effect 30 days after they are published in the *Federal Register*.²

The following is a brief description of the key features of the NCUA’s new suspension and debarment function.

WHY DID THE NCUA ADOPT A SUSPENSION AND DEBARMENT PROGRAM?

The Agency explains that although it is not required to follow government-wide acquisition regulations, it has found those authorities to be effective and useful in developing programs to safeguard the expenditure process. The NCUA recognizes that suspension and debarment are important tools in government procurement programs. Like procuring agencies that are subject to the Federal Acquisition Regulation (“FAR”), the NCUA seeks to limit its contracting activities to entities that are presently responsible. The NCUA’s authority to suspend or debar contractors derives from the Federal Credit Union Act.³

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¹ See Regulatory Report, “Federal credit union loan-rate cap remains 18% into March 2020” (Aug. 2, 2018), *available at* <https://www.regreport.info/2018/08/02/federal-credit-union-loan-rate-cap-remains-18-into-march-2020/>.

² <https://www.ncua.gov/About/Documents/Agenda%20Items/AG20180802Item3b.pdf>.

³ 12 U.S.C. 1751 *et seq.* and 12 U.S.C. 1766(i)(2).

WHAT ARE THE GROUNDS FOR DEBARMENT?

The bases for suspension and debarment, and the evidentiary burden applicable to each action, are identical to those appearing in the FAR at 9.406-2 and 9.407-2.

WHAT ARE THE ROLES OF THE KEY PLAYERS IN THE NCUA'S SUSPENSION AND DEBARMENT FUNCTION?

The NCUA Executive Director will have the authority to approve the award of a contract or subcontract to an excluded contractor, if there are compelling reasons for doing so, provided that these reasons are memorialized in writing prior to award of the contract.

The Deputy General Counsel of the NCUA will serve as the Suspension and Debarment Officer ("SDO").

The role of "SDO Admin" will be performed by a procurement attorney within the Office of the General Counsel ("OGC"). The SDO Admin will receive referral packages, will coordinate with various interested stakeholders within the Agency including the Office of the Inspector General ("OIG"), and is responsible for entering ineligible contractors into the SAM.gov database.

The OGC will provide legal advice regarding the suspension and debarment program. The OGC also will review the Action Referral Memorandum issued by the NCUA office recommending the suspension or debarment of a particular contractor.

Contracting Officers will evaluate contractor responsibility, including checking the SAM.gov database, before award, and coordinate with any NCUA office and the SDO Admin.

The OIG will raise matters of concern resulting from audits, evaluations, and investigations, and other NCUA offices may make referrals to the OIG. Contractor disclosures are typically received by procuring agency OIGs.

All NCUA offices will be required to report to the contracting officer and to the SDO Admin any misconduct that may give rise to a suspension or debarment action. NCUA offices must also report possible criminal and fraudulent activities to the OIG. Other matters that NCUA officers are encouraged to report include: contractor fraud, dishonesty, or unethical behavior; repeated or severe contract performance issues; unmitigated or undisclosed conflicts of interest; and improper invoicing and/or questionable costs.

WHAT IS NCUA'S DECISION-MAKING PROCESS?

NCUA will handle suspension and debarment in largely the same manner as the FAR. The SDO will review and consider the recommendation in the Action

Referral Memorandum, and may choose to take no action, to issue a show cause letter, or to issue a Notice of Suspension or Proposed Debarment. In the latter case, such notices constitute exclusions, as they do in FAR-based actions, and the contractor will be listed as excluded in SAM.gov.

A contractor that receives a Notice of Suspension or Proposed Debarment will have an opportunity to submit a presentation of matters in opposition (“PMIO”), and may also request an in-person meeting with the SDO. The SDO will consider mitigating factors, which are derived from the list appearing in FAR 9.406-1. The SDO will conduct fact-finding unless the action is based upon a conviction or a civil judgment. In any fact-finding, the contractor will have the opportunity to submit documentary evidence and confront agency witnesses.

The SDO will compile the administrative record, and issue a written final decision based on that record.

ARE ADMINISTRATIVE AGREEMENTS AVAILABLE?

Yes. At any time during the proceedings, the SDO may elect to negotiate an administrative agreement with the contractor. Administrative agreements will be effective throughout the Executive Branch and will be entered into SAM.gov. The terms of administrative agreements will be negotiated on a case-by-case basis.

HOW DOES THE NCUA SUSPENSION AND DEBARMENT FUNCTION DIFFER FROM THE FAR REGIME?

There are two notable differences between the new NCUA suspension and debarment program and the similar FAR program.

First, unlike the FAR, which does not define the fundamental concept of “present responsibility,” the NCUA has developed its own definition: “A contractor is presently responsible if the contractor is ethical, honest, competent, and has not acted in any way that reveals a lack of business integrity or business honesty, or an inability to satisfactorily perform Government contracts.” It is interesting and unusual that the NCUA elected to define the concept of “present responsibility,” while at the same time modeling its program on the FAR suspension and debarment regime, which does not include a definition of this most fundamental concept.

Second, the NCUA program differs from the FAR in the treatment of existing contracts held by excluded contractors. The FAR only states that such existing contracts may continue, unless the agency head determines otherwise.⁴

⁴ FAR 9.405-1.

The FAR does not impose any requirement that procuring agencies affirmatively review existing contracts held by excluded contractors. The NCUA, by contrast, does impose such a requirement: “The NCUA must review any current contracts held by the contractor to determine whether to terminate or void those contracts. A decision to terminate or void a contract requires OGC concurrence.”

CONCLUSION

While the NCUA has long had the authority to develop a suspension and debarment program, its decision to do so at this time dovetails with the growing trend of developing such programs by non-Department of Defense agencies. Over the last five to seven years, civilian agencies have rushed to develop such programs to protect their business interests.