

# Part 809 - Contractor Qualifications

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## **Subpart 809.1 - Responsible Prospective Contractors**

### **809.104 Standards.**

#### **809.104-2 Special standards.**

(a) For a pre-award survey prescribed by [809.106-1](#), a contracting officer must develop special standards of sanitation applicable to the acquisition of subsistence and services prescribed by [809.106-1\(a\)](#).

(b) An appropriate specialist will assist the contracting officer in developing the special standards under paragraph [\(a\)](#) of this section.

#### **809.106 Pre-award surveys.**

##### **809.106-1 Conditions for pre-award surveys.**

(a) Except as provided in paragraphs [\(b\)](#) through [\(e\)](#) of this section, a committee under the direction of the contracting officer and composed of representatives of the medical service or using service chiefs or designees appointed by the facility or VISN director will conduct a pre-award on-site evaluation of the plant, personnel, equipment and processes of the prospective contractor for contracts covering the products and services of the following:

- (1) Bakeries.
- (2) Dairies.
- (3) Ice cream plants.
- (4) Laundry and dry cleaning activities.

(b) Before any inspection, the contracting officer will determine whether another VA facility or another Federal agency has recently inspected and approved the plant.

(1) The contracting officer will accept an approved inspection report of another VA facility.

(2) If another Federal agency made a plant inspection not more than 6 months before the proposed VA contract period, the contracting officer may accept an approved inspection report of that other Federal agency as satisfactory evidence that the facilities of the bidder meet the bid requirements.

(c) VA will not conduct a pre-award on-site evaluation of a dairy plant when VA receives an acceptable bid from a supplier of dairy products designated as No. 1 in the Federal Specifications if the following conditions are met:

(1) The supplier has received a pasteurized milk rating of 90 percent or more for the type of product being supplied, on the basis of the U.S. Public Health Service milk ordinance and code.

(2) The rating is current (not over 2 years old) and has been determined by a certified State milk sanitation rating officer in the State of origin or by the Public Health Service. The contractor must maintain the rating of 90 percent or more during the period of the contract.

(3) The solicitation specifications must include the requirements in paragraphs [\(c\)\(1\)](#) and [\(2\)](#) of this section.

(d) A dairy plant that does not meet paragraph [\(c\)](#) of this section may offer only dairy products designated as No. 2 in the Federal Specifications. VA will make an award to such a firm only after it completes a pre-award on-site evaluation conducted under paragraph [\(a\)](#) of this section.

(e) Before it makes an open market purchase of fresh bakery products (such as pies, cakes, and cookies), VA will inspect and evaluate the plant where these products are produced or prepared under paragraph (a) of this section. VA will make an on-site evaluation at least annually and record the results on VA Form 10-2079, Inspection Report of Bakery.

## **Subpart 809.2 - Qualifications Requirements**

### **809.201 Definitions.**

For the purposes of this subpart:

VA QPL means a VA Qualified Products List, a list of products qualified by the VA under VA specifications, or purchase descriptions, or commercial item descriptions.

VISN QPL means a VISN Qualified Products List, a list of products qualified by a VISN under VA specifications, or purchase descriptions, or commercial item descriptions.

### **809.202 Policy.**

The HCA may sign a justification required by [FAR 9.202\(a\)\(1\)](#).

### **809.204 Responsibilities for establishment of a qualification requirement.**

(a) Under [FAR Subpart 9.2](#), VA may create VA QPLs for use on individual solicitations or on multiple solicitations issued by one or more VA facilities.

(b) An HCA or designee must support the creation of a VA QPL using one or more of the following justifications:

(1) The time required for testing the product after award would unduly delay product delivery.

(2) The cost of repetitive product testing would be excessive.

(3) Testing the product would require purchasing an expensive or complicated apparatus not commonly available.

(4) It is in the Government's interest to be assured before contract award that the product is satisfactory for its intended use.

(5) Determining acceptability would require providing product performance data to supplement technical requirements in the specification.

(6) Conducting a test would result in substantial or repetitive rejections.

(7) VA cannot economically develop clear, professional specifications for the product performance, balance, design, or construction, and professional judgment is required to determine whether the product is acceptable under VA requirements.

(c) If VA plans to establish a VA QPL for any given product, the contracting officer may limit known suppliers to suppliers whose products are covered by a Federal Supply Schedule contract, as provided at [FAR Subpart 8.4](#).

(d) VA will pay the costs to inspect and test a product sample submitted under this section.

(1) The product supplier must pay for the sample and its transportation to the place of inspecting and testing.

(2) After inspection and testing, VA will return any product sample to the supplier “as is” unless:

(i) The inspection or test destroys the sample; or

(ii) The supplier authorizes VA to retain or dispose of the sample.

(e) Once VA accepts a product for the VA QPL, VA may review the product for compliance with the applicable specification at any time.

(1) Where there is a variance between a VA specification that was the basis for the VA QPL and the product furnished by the supplier, the supplier must furnish an item that conforms to the VA specification.

(2) If the supplier fails to or is unable to provide a product that conforms to the applicable VA specification, the product will be removed from the VA QPL.

(f) VA's acceptance of a product for listing on the VA QPL does not:

(1) Guarantee that VA will accept the product in any future purchase; or

(2) Constitute a waiver of the specifications as to acceptance, inspection, testing, or other provisions of any future contract involving the product.

### **809.206 Acquisitions subject to qualification requirements.**

#### **809.206-1 General.**

The HCA may determine that an emergency exists, as provided in [FAR 9.206-1\(b\)](#).

### **809.270 Qualified products for convenience/labor-saving foods.**

(a) Each VISN Nutrition and Food Service representative is authorized to establish a common VISN QPL for convenience and labor-saving foods for use at medical facilities within the representative's VISN.

(1) The VISN Nutrition and Food Service representative must notify the Director, Nutrition and Food Service, VA Central Office, of the establishment or amendment of any VISN QPL.

(2) To avoid unnecessary duplication within a VISN, for medical facilities using an applicable VISN QPL under paragraph [\(b\)](#) of this section, the VISN Nutrition and Food Service representative must coordinate and consolidate test results and recommendations.

(b) Each medical facility may:

(1) Use its VISN QPL; and

(2) Test food of its choice, provided that the facility submits test results to the VISN Nutrition and Food Service representative.

(c) The VISN representative must provide a copy of each approved VISN QPL to the following:

(1) Each contracting office in the VISN.

(2) The Director, Nutrition and Food Service, VA Central office.

(3) Upon request, the Office of Acquisition and Materiel Management, VA Central Office.

## **Subpart 809.4 - Debarment, Suspension, and Ineligibility**

[Deviation per [Class Deviation](#)—from VA Acquisition Regulation (VAAR) Section 802.101, Definitions, and Subpart 809.4, Debarment, Suspension and Ineligibility, dated June 2, 2017, rescinds Class Deviation from VA Acquisition Regulation (VAAR) 802.101, Definitions, and from 809.400, Debarment, Suspension and Ineligibility, dated April 30, 2015; the deviation implements specific processes and criteria pursuant to 38 U.S.C. 8127(g), and updates VA's policies and procedures for suspensions and debarments. This deviation is effective until incorporated in the VAAR or the VAAM or is otherwise rescinded.]

### **809.400 Scope of subpart.**

This subpart supplements provisions of the [FAR provisions](#) concerning procedures and related actions for the suspension and debarment of contractors.

### **809.402 Policy.**

(a) When VA is considering a debarment or suspension action, the Suspension and Debarment (S&D) Committee shall coordinate the action with the Interagency Suspension and Debarment Committee (ISDC) to identify other agencies with an interest in the action and to identify the agency that will take the lead on the action.

(b) The S&D Committee shall provide the designated lead agency with any information relevant to the action for consideration in the decision making process.

(c) The S&D Committee shall maintain coordination with the appropriate lead agency official through completion of a final suspension or debarment decision.

(d) The S&D Committee shall accomplish the actions described in [FAR 9.404\(c\)](#).

[Deviation per [Class Deviation](#) from Various VA Acquisition Regulation Sections to Update Head of Contracting Activity Delegation and Redelelegation Authorities; and Increase the Threshold for Review of Acquisition Plans, dated March 8, 2018 revises 809.405, 809.405-1, and 809.405-2 to change the HCA authority to redelegable. Effective until incorporated into the VAAR or the VAAM or is otherwise rescinded.]

### **809.405 Effect of listing.**

The authority under [FAR 9.405\(a\)](#), [9.405\(d\)\(2\)](#), and [9.405\(d\)\(3\)](#) to determine whether to solicit from, evaluate bids or proposals from, or award contracts to contractors with active exclusions in the System for Award Management (SAM) is delegated to the Suspending and Debarring Official (SDO). The SDO further delegates this authority to the HCA or designee.

### **809.405-1 Continuation of current contracts.**

(a) Notwithstanding the suspension, proposed debarment, or debarment of a contractor, VA may continue contracts or subcontracts in existence at the time the contractor was suspended, proposed for debarment, or debarred, unless the cognizant Head of the Contracting Activity (HCA) directs otherwise. Examples of factors to be considered include, but are not limited to, potential costs associated with a termination, possible disruption to VA program objectives, and integrity of VA acquisition programs.

(b) Authority to make the determinations under [FAR 9.405-1\(b\)](#) is delegated to the SDO. The SDO further delegates this authority to the HCA or designee. HCA or designee must make a written determination of the compelling reasons in accordance with [FAR 9.405-1\(b\)](#). Compelling reasons for the purposes of [FAR 9.405-1\(b\)](#) include, but are not limited to, urgency of the need for new or continued work, lengthy time period to acquire the new work from other sources, and meeting estimated quantity for requirements contracts.

### **809.405-2 Restrictions on subcontracting.**

Authority to make the written determination required under [FAR 9.405-2](#) consenting to a contractor's use of a subcontractor who is suspended, proposed for debarment, or debarred is delegated to the SDO. The SDO further delegates this authority to the HCA or designee.

### **809.406 Debarment.**

#### **809.406-1 General.**

(a) As provided in [FAR 9.406-1\(c\)](#), the authority to determine whether to continue business dealings between VA and a contractor suspended, proposed for debarment, or debarred is delegated to the SDO.

(b) For the purposes of [FAR 9.406-1](#), the SDO's authority includes debarments pursuant to the Federal Management Regulation at 41 CFR 102-117.295.

(c) In addition to the factors listed in [FAR 9.406-1](#), the SDO should consider the following examples before arriving at a debarment decision:

(1) Whether the contractor had a mechanism, such as a hotline, by which employees could have reported suspected instances of improper conduct, and instructions in place that encouraged employees to make such reports; or

(2) Whether the contractor conducted periodic reviews of company business practices, procedures, policies, and internal controls for compliance with standards of conduct and the special requirements of Government contracting.

#### **809.406-2 Cause for debarment.**

(a) In addition to the causes listed in [FAR 9.406-2](#), the SDO may debar contractors, based upon a preponderance of the evidence, for

(1) Misrepresentation of Veteran-owned small business (VOSB) or service-disabled, Veteran-owned small business (SDVOSB) status; or

(2) Any deliberate violation of the limitation on subcontracting clause requirements for acquisitions

under subpart [819.70](#).

(b) The SDO shall debar for a period of not less than five years, pursuant to 38 U.S.C. 8127(g), Enforcement Penalties for Misrepresentation, any business concern that has willfully and intentionally misrepresented the status of that concern as a small business concern owned and controlled by Veterans or as a small business concern owned and controlled by service-disabled Veterans pursuant to this subsection.

(1) "Willful and intentional" misrepresentations, for the purpose of debarment actions taken pursuant to subsection (b), are defined as misrepresentations concerning the status of the concern as a small business concern owned and controlled by Veterans or as a small business concern owned and controlled by service-disabled Veterans resulting in an admission, criminal conviction, civil judgment, or administrative decision related to fraud or other criminal acts.

(2) Debarment of a business concern pursuant to subsection (b) shall include the debarment of all principals in the business concern. Debarment shall be for a period of not less than five years.

### **809.406-3 Procedures.**

(a) Any individual may submit a referral to debar an individual or contractor to the SDO or to the S&D Committee. The referral for debarment shall be supported with evidence of a cause for debarment listed in [FAR 9.406-2](#), or [VAAR 809.406-2](#). The SDO shall forward referrals for debarment to the S&D Committee. If the referring individual is a VA employee and the referral for debarment is based on possible criminal or fraudulent activities, the VA employee shall also refer the matter to the VA Office of Inspector General.

(b) When the S&D Committee finds preponderance of the evidence for a cause for debarment, as listed in [FAR 9.406-2](#) or [VAAR 809.406-2](#), it shall prepare a recommendation and draft notice of proposed debarment for the SDO's consideration.

(c) VA shall send the notice of proposed debarment to the last known address of the individual or contractor, the individual or contractor's counsel, or agent for service of process, by certified mail, return receipt requested, or any other means that allows for confirmation of delivery.' In the case of a contractor, VA may send the notice of proposed debarment to any partner, principal, officer, director, owner or co-owner, or joint venture. The S&D Committee concurrently shall list the appropriate parties as excluded in the System for Award Management (SAM) in accordance with [FAR 9.404](#).

(d) If VA does not receive a reply from the contractor within 30 days after sending the notice of proposed debarment, the S&D Committee shall prepare a recommendation and refer the case to the SDO for a decision on whether or not to debar based on the information available.

(e) If VA receives a reply from the contractor within 30 days after sending the notice of proposed debarment, the S&D Committee shall consider the information in the reply before the S&D Committee makes its recommendation to the SDO.

(f) The S&D Committee, upon the request of the contractor proposed for debarment, shall, as soon as practicable, allow the contractor an opportunity to appear before the S&D Committee to present information or argument in person or through a representative. The contractor may supplement the oral presentation with written information and argument. VA shall conduct the proceeding in an informal manner and without requirement for a transcript.

(g) If the S&D Committee finds the contractor's or individual's submission in opposition to the proposed debarment raises a genuine dispute over facts material to the proposed debarment and the

debarment action is not based on a conviction or civil judgment, the S&D Committee shall submit to the SDO the information establishing the dispute of material facts. If the SDO agrees there is a genuine dispute of material facts, the SDO shall refer the dispute to a designee for resolution pursuant to [809.470](#), Fact-finding procedures. The S&D Committee shall provide the contractor or individual the disputed material fact(s). Decisions and determinations of VA's CVE or OSDDBU, such as status protest decisions, and size determinations of the SBA shall not be subject to dispute or fact-finding in proposed debarment actions. The S&D Committee and SDO shall accept these decisions and determinations as resolved facts.

(h) If the proposed debarment action is based on a conviction or civil judgment, or if there are no disputes over material facts, or if any disputes over material facts have been resolved pursuant to [809.470](#), Fact-finding procedures, the SDO shall make a decision on the basis of all information available including any written findings of fact submitted by the designated fact finder, and oral or written arguments presented or submitted to the S&D Committee by the contractor.

(i) In actions processed under [FAR 9.406](#) where no suspension is in place and where fact finding is not required, VA shall make the final decision on the proposed debarment within 30 working days after receipt of any information and argument submitted by the contractor, unless the SDO extends this period for good cause.

(j) In actions processed under [VAAR 809.406-2\(b\)](#), the SDO notifies the individuals and/or contractors of the determination of willful and intentional misrepresentation in the notice of proposed debarment. VA shall issue the final decision, removing or upholding the determination, within 90 days after the SDO's determination of willful and intentional misrepresentation.

#### **809.406-4 Period of debarment.**

(a) The SDO will base the period of debarment on the circumstances surrounding the cause(s) for debarment.

(b) The SDO may remove a debarment imposed under [FAR 9.406](#), amend its scope, or reduce the period of debarment based on a S&D Committee recommendation if:

(1) VA has debarred the contractor;

(2) The action is indicated after the SDO reviews documentary evidence submitted by or on behalf of the contractor setting forth the appropriate grounds for granting relief. Appropriate grounds include newly discovered material evidence, reversal of a conviction, bona fide change of ownership or management, elimination of the cause for which debarment was imposed, or any other appropriate grounds.

(c) The period of debarment for willful and intentional misrepresentations of SDVOSB or VOSB status pursuant to [VAAR 809.406-2\(b\)](#) shall not be less than 5 years.

#### **809.407 Suspension.**

##### **809.407-1 General.**

(a) As provided in [FAR 9.407-1\(d\)](#), the authority to determine whether to continue business dealings between VA and a suspended contractor is delegated to the HCAs. Compelling reasons include, but are not limited to, urgency of the need for new or continued work, lengthy time period to acquire the new work from other sources, and meeting estimated quantities for requirements contracts.



(b) For the purposes of FAR [9.407-1](#), the SDO is the suspending official under the Federal Management Regulation at 41 CFR 102-117.295.

### **809.407-3 Procedures.**

(a) Any individual may submit a referral to suspend an individual or contractor to the SDO or to the S&D Committee. Referrals shall include supporting evidence of a cause for suspension listed in [FAR 9.407-2](#). The SDO shall forward the referral to the S&D Committee. If the referring individual is a VA employee and the referral for suspension is based on possible criminal or fraudulent activities, the VA employee shall also refer the matter to the VA Office of Inspector General.

(b) When the S&D Committee finds adequate evidence of a cause for suspension, as listed in [FAR 9.407-2](#), it shall prepare a recommendation and draft notice of suspension for the SDO's consideration.

(c) VA shall send the notice of suspension to the last known address of the individual or contractor, the individual or contractor's counsel, or agent for service of process, by certified mail, return receipt requested, or any other means that allows for confirmation of delivery. In the case of a contractor, VA may send the notice of suspension to any partner, principal, officer, director, owner or co-owner, or joint venture. The S&D Committee concurrently shall list the appropriate parties as excluded in the System for Award Management (SAM) in accordance with [FAR 9.404](#).

(d) If VA receives a reply from the contractor within 30 days after sending the notice of suspension, the S&D Committee shall consider the information in the reply before the Committee makes further recommendations to the SDO. The S&D Committee, upon the request of a suspended contractor, shall, as soon as practicable, allow the contractor an opportunity to appear before the S&D Committee to present information or argument in person or through a representative. The contractor may supplement the oral presentation with written information and argument. The proceeding will be conducted in an informal manner and without requirement for a transcript.

(e) For the purposes of [FAR 9.407-3\(b\)\(2\)](#), Decision making process, in actions not based on an indictment, if the S&D Committee finds that the contractor's submission in opposition to the suspension raises a genuine dispute over facts material to the suspension, the S&D Committee shall submit to the SDO the information establishing the dispute of material facts. However, the S&D Committee may first coordinate any further proceeding regarding the material facts in dispute with the Department of Justice or with a State prosecuting authority in a case involving a State jurisdiction. VA shall take no further action to determine disputed material facts pursuant to this section or [809.470](#) if the Department of Justice or a State prosecuting authority advises VA in writing that additional proceedings to make such a determination would prejudice Federal or State legal proceedings.

(f) If the SDO agrees that there is a genuine dispute of material facts, the SDO shall refer the dispute to the designee for resolution pursuant to [809.470](#).

### **809.470 Fact-finding procedures.**

The provisions of this section constitute the procedures to be used to resolve genuine disputes of material fact pursuant to [809.406-3](#) and [809.407-3](#) of this chapter. The SDO shall appoint a designee to conduct the fact-finding. OGC shall represent VA at any fact-finding hearing and may present witnesses for VA and question any witnesses presented by the contractor. The proceedings before the fact-finder will be limited to a finding of the material facts in dispute, as determined by the SDO. The fact-finder shall establish the date for the fact-finding hearing, normally to be held within 30 days

after the S&D Committee notifies the contractor or individual that the SDO has established a genuine dispute of material fact(s) exists.

(a) The Government's representative and the contractor will have an opportunity to present evidence relevant to the material fact(s) identified by the SDO. The contractor or individual may appear in person or through a representative at the fact-finding hearing. The contractor or individual may submit documentary evidence, present witnesses, and confront any person the agency presents.

(b) Witnesses may testify in person. Witnesses will be reminded of the official nature of the proceedings and that any false testimony given is subject to criminal prosecution. Witnesses are subject to cross-examination. Hearsay evidence may be presented and will be given appropriate weight by the fact-finder.

(c) The proceedings shall be transcribed and a copy of the transcript shall be made available at cost to the contractor upon request, unless the contractor and the fact-finder, by mutual agreement, waive the requirement for a transcript.

(d) The fact-finder shall determine the disputed fact(s) by a preponderance of the evidence for proposed debarments, and by adequate evidence for suspensions. Written findings of fact shall be prepared by the fact-finder. A copy of the findings of fact shall be provided to the SDO, the Government's representative, and the contractor or individual. The SDO will consider the written findings of fact in the decision regarding the suspension or proposed debarment.

## **Subpart 809.5 - Organizational and Consultant Conflicts of Interest**

### **809.503 Waiver**

The HCA is delegated authority to waive any general rule or procedure of [FAR Subpart 9.5](#). As provided at [FAR 9.503](#), this authority may not be redelegated.

### **809.504 Contracting officer responsibilities.**

(a) A contracting officer must determine whether awarding a contract will result in an actual or potential conflict of interest for the contractor.

(1) The contracting officer will make a conflict of interest determination after reviewing information submitted by offerors, evaluating information gathered under [FAR 9.506](#), and exercising his or her own judgment.

(2) In evaluating possible organizational conflicts of interest, the contracting officer may obtain the advice of legal counsel and the assistance of technical specialists.

(b) If the contracting officer determines that there is no way to avoid or mitigate an organizational conflict of interest arising from a contract award, the contracting officer may disqualify the offeror from award under [FAR 9.504\(e\)](#).

(c) Even if awarding a contract will result in an organizational conflict of interest, the contracting officer may request a waiver from his or her HCA if awarding the contract is in the best interests of the Government.

(1) Before granting a waiver request under this paragraph, the HCA must obtain the concurrence of OGC.

(2) If the HCA grants a waiver request, the contracting officer may set contract terms and conditions to reduce any organizational conflict of interest to the greatest extent possible.

(d) In any solicitation for the services addressed at [FAR 9.502](#), the contracting officer must require that each offeror submits a statement with its offer disclosing all facts relevant to an existing or potential organizational conflict of interest involving the contractor or any subcontractor during the life of the contract (see [809.507-1\(b\)](#) and [852.209-70](#)).

**809.507 Solicitation provisions and contract clause.**

**809.507-1 Solicitation provisions.**

(a) While conflicts of interest may not presently exist, award of certain types of contracts may create potential future organizational conflicts of interest (see [FAR 9.508](#) for examples). If a solicitation may create a potential future organizational conflict of interest, the contracting officer shall insert a provision in the solicitation imposing an appropriate restraint on the contractor's eligibility for award of contracts in the future. Under [FAR 9.507-1](#), the restraint must be appropriate to the nature of the conflict and may exclude the contractor from award of one or more contracts in the future.

(b) The clause at [809.507-1\(b\)](#) and [852.209-70](#), Organizational conflicts of interest, must be included in any solicitation for the services addressed in [FAR 9.502](#).