

audit options exist, the suspending or debarring official should consider whether those remedies may be more appropriate under the circumstances, or whether to await the outcome of those procedures before using the suspension or debarment option.

Covered transactions and principals. While much of the NCR is drafted in terms of an "award" being made by the Government or a participant, it is important to note that the concept of covered transactions is much broader than relationships or benefits that are conferred through traditional vehicles such as grants, cooperative agreements, direct loans, or contracts and subcontracts under them. Loan guarantees, technical assistance, approvals, some licenses and other privileges or events, not necessarily involving an award of money, are covered transactions. Where money is part of the equation, the direct or indirect nature of a participant's cost does not govern whether the transaction is a "covered transaction." This is because many critical services, such as professional fees for legal, accounting, engineering and other services may be charged as an indirect cost to the nonprocurement transaction, but the services of that individual or entity are still critical to performance. For example, an accountant or accounting firm that is debarred for misconduct may be ineligible to perform audit services for a grantee under a covered transaction even though the accounting services are to be charged by the participant as an indirect cost to its grant.

Even where a participant provides services under a covered transaction that is being serviced by a volunteer who has been suspended or debarred, the prohibition on the participant's use of that volunteer in the capacity of a principal will apply to the covered transaction.

Where the NCR is otherwise silent, each agency may describe in its own rule those special transactions it regards as "covered transactions," and the services that when performed on behalf of a participant are those of a "principal." Failure to do so may limit the agency's ability to apply the person's exclusion to or within the transaction.

Jurisdiction to debar versus the effect of debarment. It is important to separate the questions: "Who may an agency suspend or debar?" and "What is the excluded person suspended or debarred from?" The definition of "person" in section 985 and the authority stated under section 135 of this rule answer the first question. An agency may

suspend or debar *any* individual or entity that may reasonably be expected to be involved in a covered transaction. The authority to take action against any person that may be " * * * reasonably expected to be involved in a covered transaction," is not intended to operate as a limitation on an agency's ability to protect itself. On the contrary, this rule gives agencies broad authority to take action to protect public programs against any individual or entity that presents a rational business risk to the Government's nonprocurement programs. The answer to the second question is that the suspended or debarred person is excluded from being a principal or participant in any nonprocurement covered transaction that is not exempt from coverage under the NCR (see section 215). Federal agencies can freely enter into exempt transactions without checking the *EPLS*, collecting certifications or assurances, or conditioning the award upon non-debarment or suspension. Transactions that are exempt from coverage include entitlements such as certain social security, disability, or welfare benefits, etc. Exempt transactions also include benefits a person receives that are incidental in nature, such as benefits flowing to sellers of a primary residence when the sale is financed by an FHA loan, or benefits that occur as a result of normal government operations, such as insurance on deposits in Federal banks, use of the postal services, and public use of national parks and recreation areas. It is important for agencies to distinguish when a beneficiary of a transaction is an intended beneficiary (not necessarily the principal or primary beneficiary) and when a person is an incidental beneficiary.

An agency is not precluded from suspending or debarring any person just because that person happens to be a participant in one of these non-covered transactions. Indeed, an agency may even suspend or debar that person for misconduct that occurs during performance of one of those exempt or non-covered transactions, *e.g.*, engaging in mail fraud, or violating an environmental permit.

Serious violations of health, safety and environmental laws and regulations. Although the causes for debarment do not specifically identify by name various violations that threaten the health and safety of workers or threaten the environment, serious violations of these laws and regulations have always been subject to suspension or debarment under several provisions, including section 305(a)(4) and/or (d) of the NCR (now section 800(a)(4) and/or

(d)). Any violation of law, regulation or agreement; or any conduct, failure to perform or other event that seriously threatens a Federal nonprocurement or procurement activity, is subject to potential suspension and debarment under this rule. On December 27, 2001, the Federal Acquisition Regulatory Council issued a final rule (see 66 FR 66986-66990), revoking the December 20, 2000 amendments to the FAR that included, among other things, a contractor's health, safety and environmental record in the contract officer's pre-award responsibility review. In so doing, the FAR Council acknowledged that the Governmentwide suspension and debarment system is the most effective and appropriate forum to address serious concerns about a contractor's or participant's responsibility for violations of this nature.

Transactions in foreign countries. The prohibitions against using suspended or debarred persons in covered transactions applies equally to transactions entered into by Federal agencies or participants in foreign countries. So long as the transaction is one involving U.S. Executive branch resources or benefits, the protection afforded by the exclusion applies no matter where the covered transaction occurs. The state or country of incorporation, registration, or principal place of business of an excluded entity is irrelevant to its coverage. The prohibition would not apply, however, if the transaction is exempt because it is an award to a foreign government entity as described in section 215(a).

Lead agency. Lead agency is not a jurisdictional concept. It is an administrative procedure employed by the Federal agencies to bring efficiency, focus and coordination of resources to bear on any matter which may touch the interests and expertise of several agencies. A respondent has no right to have any particular agency act as lead agency in a suspension or debarment action. While section 620 of this rule allows for agencies to coordinate their interests and select a lead agency, failure to do so does not invalidate the actions of the agency that handles the matter. The ISDC, under its authority in sections 4 and 5 of E.O. 12549, uses flexible and informal procedures to coordinate actions and assist in selecting a lead agency.

Submission of applications, bids and proposals versus award. Questions often arise as to an excluded person's eligibility to submit a bid, application or proposal for or under a covered transaction where the bidder, applicant or offeror expects its suspension or