

debarment to end prior to the award date. The NCR, like the FAR, precludes awards to excluded persons. Since eligibility for award is determined at that time, in most procurement and nonprocurement transactions, agencies often accept bids, applications or proposals subject to an eligibility determination on the date of award. However, this rule does not require that agencies do so. Each agency must determine for itself whether to accept or consider bids, applications or offers submitted by an excluded person when there is a possibility that an exclusion may end or be removed before the date of award. There may be little danger in considering these submissions where it is clear from the *EPLS* that a debarment will end on a date certain. However, where a suspension is in place, or the debarred person is anticipating a favorable ruling on a petition for early reinstatement prior to award, caution is advised. In any event, it is the prerogative of the awarding agency to decide whether and under what conditions it will accept or consider bids, applications or proposals under these circumstances.

What constitutes a new "award?" Once a person is excluded under this rule, it is important to note that the exclusion applies to awards or transactions entered into on or after the date of the exclusion. Because of the varying types of agreements and contracts that may exist, it is not always easy to determine whether a transaction is part of an existing award or if it is a new award subject to the exclusion. As a rule of thumb, if the transaction in question requires the approval of the party awarding the transaction or conferring the benefit, the transaction is a new award, and subject to the prohibition on using excluded persons. If the transaction is part of a larger agreement and the legal obligation and authority to provide goods or services are already in place, the transaction may be regarded as a preexisting transaction. No-cost time extensions under existing awards can be treated as part of the existing award at the option of the agency granting it.

Evidence of misconduct versus mere suspicion. Suspension or debarment may not be imposed upon mere suspicion of misconduct. While the procedures under this rule do not require suspending or debarring officials to follow formal rules of evidence in making decisions, they require that certain standards of proof of misconduct be met in order to suspend or debar a person. These standards (adequate evidence for suspension and preponderance of the evidence for

debarment) require that the suspending or debarring official base his or her decision on an appropriate quality of information, according to the circumstances at hand, so as to preclude suspending or debarring a person on the basis of empty speculation or on mere suspicion of wrongdoing.

Suspension, adequate evidence and immediate need. The standard for suspension is a two part test. First, the suspending official must have *adequate evidence* that a cause for debarment exists. Second, the suspending official must conclude that *immediate action is necessary* to protect Federal interests. In a criminal case, the adequate evidence test is met by the presence of an indictment or information. Suspensions based upon evidence other than an indictment are common during the course of an investigation when the information available to the suspending official is sufficient to support a reasonable belief that an act or omission has occurred. In some cases, evidence may be made available to the suspending official that is sensitive to an ongoing investigation. The suspending official may have to review the evidence *in camera* and be unable to disclose the evidence to a suspended respondent. In such cases, it is important that the suspension notice contain enough information so that the respondent can make a meaningful presentation of matters in opposition, since a fact-finding proceeding is likely to be denied to resolve material facts in dispute. In any event, the record must contain the evidence that was considered in issuing the suspension.

Even in cases where an indictment is present, the suspending official must determine that immediate action is necessary to protect Federal interests before imposing a suspension. As noted in the preamble to the proposed changes to this rule, the determination of "immediate need" does not require that the suspending official issue a separate finding. As stated by the court in *Coleman American Moving Services, Inc. v. Weinberger*, 716 F. Supp. 1405 (M.D. Ala. 1989), immediate need is a conclusion that a suspending official may draw from inferences made from the facts and circumstances present. In cases of serious crimes such as fraud against the Government, or criminal activity that threatens the health and safety of individuals, immediate need may be obvious. In other cases, however, a suspending official's determination of immediate need may not be as clear. It is, therefore, important that the suspending official's record be sufficient for a reviewing court to ascertain why immediate action was

deemed prudent. In this regard the term "immediate" does not connote that future misconduct, loss, or injury is probable. A suspending official may conclude that immediate action is needed based on what a reasonably prudent business person would be expected to do given the risk potential under the circumstances.

It is also important to note that the standard of evidence for issuing a suspension does not change merely because the respondent contests the action and is able to marshal some information that conflicts with information the Government has provided to the suspending official. In cases where an investigation is still underway, particularly when fact-finding is not to be conducted at the request of the prosecuting officials, the suspending official must be careful not to apply the debarment standard of *preponderance of the evidence* when deciding whether to continue the suspension. To do so would place the Government at a disadvantage and bring the suspension decision out of context with its goal of temporary protection pending the outcome of an investigation or legal proceedings. Unless the respondent is able to nullify the evidentiary basis for the suspension without regard to resolving disputed material facts, the Government's evidence may remain adequate to support the action. However, a respondent may still attempt to have a suspension removed by addressing the Government's immediate interests that are at risk. If the respondent can demonstrate that the respondent has taken protective action to eliminate, or reduce to an acceptable level, the Government's risk pending completion of the investigation or legal proceedings, the suspending official may terminate a suspension even though there is adequate evidence to support a suspension.

Impact Analysis—Executive Order 12866

The participating agencies have examined the economic implications of this final rule as required by Executive Order 12866, "Regulatory Planning and Review." Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity). Executive Order 12866 classifies a rule as significant if it meets any one of a number of specified conditions,