

## Bite-Sized Videos on Hot Questions in Suspension & Debarment

### ===== Chapter 2 =====

#### FAR 9.1 vs. FAR 9.4

**JOHN:** Duc Nguyen is the Suspension & Debarment Official at the Environmental Protection Agency. He'll clarify the difference between a Contracting Officer's responsibility determination under FAR 9.1 and a Suspension & Debarment Official's present responsibility inquiry under FAR 9.4.

Hi, Duc. Thanks for joining us.

**DUC:** Hi John.

**JOHN:** Let's jump right in. Can you explain a Contracting Officer's responsibility determination?

**DUC:** Yes, a Contracting Officer's responsibility determination is limited to a prospective contractor's ability to perform a specific contract in question; whereas an SDO's present responsibility determination under FAR subpart 9.4 concerns a contractor or a prospective contractor's ability to perform all contracts across the Federal Government. So, a Contracting Officer's responsibility determination covers such areas as: adequate financial resources; the ability to perform on schedule; satisfactory performance record; a satisfactory record of business integrity and business honesty; adequate controls and technical ability to perform; whether the contractor possesses the necessary equipment and facilities to perform; and otherwise whether they're qualified and eligible to receive the specific award that its competing for under applicable laws and regulations.

**JOHN:** What about a Suspension & Debarment Officials present responsibility inquiry?

**DUC:** A Suspension & Debarment Officials present responsibility determination covers the organization as a whole and looks at the contractor's corporate culture of integrity and honesty, and looks at such factors and considers such factors such as: whether the contractor has an effective compliance and ethics program; whether the contractor has proactively investigated and took corrective actions by disclosing allegations and cooperating with Government officials during the investigation; whether the contractor was open and transparent and cooperative throughout the investigation; whether the contractor accepted responsibility for the misconduct and took the necessary disciplinary actions against the individuals responsible; whether the contractor has an overall corporate culture of integrity and honesty, and if they don't, whether they have initiated reforms within the company to improve their culture of honesty and integrity; whether the contractor is competent in terms of contract performance and compliant with the terms and conditions of the contract; and whether it has effective internal controls and compliance systems to prevent and disclose and identify future misconduct.

Finally, as far as the misconduct involved or the causes involved in the SDO initiating a present responsibility determination, we also look at whether or not the contractor has implemented new and enhanced ethics and standards of business conduct – whether they have instituted new compliance programs, for example, adopting a hotline or reporting procedures, whether they instituted training programs for new hires, as well as current employees, whether they identified and eliminated the root sources of the problem, including terminating the individuals involved or disciplining them. Now, these are not exhaustive; this is not an exhaustive list, and so we look at a variety of factors.

**JOHN:** That all makes good sense. But, can you explain when a Contracting Officer would make a responsibility determination under FAR 9.1, if ever?

**DUC:** That's a good question, John. Under FAR 9.105-2, the Contracting Officer's signing of a contract constitutes a determination that the prospective contractor is responsible to perform with respect to that contract. So, the signature itself is an indication, is a determination of responsibility for that contract. Therefore, the Contracting Officer must consider the contractor's responsibility, all those factors that I've covered, before signing and awarding the contract.

**JOHN:** If Contracting Officers can make their own responsibility determinations under FAR 9.1, how do those responsibility determinations affect the Suspension & Debarment Official's duties?

**DUC:** That's a great question, John. So, as we discussed, Contracting Officers are required to conduct responsibility determinations prior to each and every award. Now, they do this by checking SAM.gov to see if the contractor is eligible at the time of award. If the contractor is eligible at the time of award, they still must make that responsibility determination under FAR subpart 9.1. Where Contracting Officers may get into trouble is when they are considering finding the same contractor non-responsible for multiple awards. In those situations, I would highly encourage Contracting Officers to consult with their Legal Counsel and also refer the case to the Suspension & Debarment Office for consideration. That scenario is called *de facto* debarment – when, not because of an SDOs determination of lack of present responsibility, but a Contracting Officer, either the same Contracting Officer, or multiple Contracting Officers find the same contractor not responsible, pursuant to multiple awards. That scenario is called *de facto* debarment and we have to be extremely careful not to raise an issue for contractors to litigate in court.

**JOHN:** That's a very good point on the *de facto* debarments. Is there anything else you'd add?

**DUC:** Yes, Contracting Officers should also contact the agency Suspension & Debarment Office whenever they discover evidence, whether through the contractor's disclosure or otherwise, of such things as an indictment involving the contractor or one of its senior management official; whether the contractor may have been the target of a civil complaint, has a criminal conviction, or a civil judgment against it; or when the contractor has a Federal tax delinquency in excess of \$3500. Those are the scenarios when the Contracting Officer should contact the SDOs Office in order to facilitate a present responsibility determination.

Now, there are scenarios where the Contracting Officers must contact the SDOs Office, and that was made mandatory pursuant to the 2012 Appropriations Prohibitions passed by Congress, and those scenarios arise when the contractor has a Federal felony conviction within the preceding 24 months, or when the contractor has a delinquent tax liability in any amount. The agency SDO, or an agency SDO, must determine whether suspension or debarment is appropriate before the agency may award the contract.

**JOHN:** Duc, again, thank you for taking the time to share the differences between a Contracting Officer's responsibility determination under FAR 9.1 and a Suspension & Debarment Official's present responsibility inquiry under FAR 9.4.

**DUC:** It's my pleasure, John. Thank you.