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SOURCE: 75 FR 29185, May 25, 2010, unless otherwise noted.

§ 417.10 What does this part do?

This part adopts the OMB guidance in subparts A through I of 2 CFR part 180, as supplemented by this part, as the USDA policies and procedures for nonprocurement debarment and suspension. It thereby gives regulatory effect for the USDA to the OMB guidance, as supplemented by this part. This part satisfies the requirements in section 3 of Executive Order 12549, “Debarment and Suspension” (3 CFR 1986 Comp., p. 189), Executive Order 12689, “Debarment and Suspension” (3 CFR 1989 Comp., p. 235) and 31 U.S.C. 6101 note (Section 2455, Pub. L. 103–355, 108 Stat. 3327).

§ 417.20 Does this part apply to me?

Through this part, pertinent portions of the OMB guidance in subparts A through I of 2 CFR part 180 (*see* table at 2 CFR 180.100(b)) apply to you if you are a:

(a) Participant or principal in a “covered transaction” (*see* subpart B of 2 CFR part 180 and the definition of “nonprocurement transaction” at 2 CFR 180.970, as supplemented by §§ 417.215 and 417.220 of this part);

(b) Respondent in a USDA debarment and suspension action;

(c) USDA debarment or suspension official; or

(d) USDA grants officer, agreements officer, or other official authorized to enter into any type of nonprocurement transaction that is a covered transaction.

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§ 417.30 What policies and procedures must I follow?

The USDA policies and procedures that you must follow are the policies and procedures specified in this regulation and each applicable section of the OMB guidance in subparts A through I of 2 CFR part 180, as that section is supplemented by the section in this part with the same section number. The contracts that are covered transactions, for example, are specified by section 220 of the OMB guidance (*i.e.*, 2 CFR 180.220) as supplemented by section 220 in this part (*i.e.*, § 417.220). For any section of OMB guidance in subparts A through I of 2 CFR part 180 that has no corresponding section in this part, USDA policies and procedures are those in the OMB guidance.

Subpart A—General

§ 417.137 Who in the USDA may grant an exception to let an excluded person participate in a covered transaction?

Within the USDA, a debarring official may grant an exception to let an excluded person participate in a covered transaction as provided under 2 CFR 180.135.

Subpart B—Covered Transactions

§ 417.210 Which nonprocurement transactions are covered transactions?

All nonprocurement transactions, as defined in § 417.970, are covered transactions unless listed in § 417.215.

§ 417.215 Which nonprocurement transactions, in addition to those listed in 2 CFR 180.215, are not covered transactions?

(a) *Transactions not covered.* In addition to the nonprocurement transactions listed in 2 CFR 180.215, the following nonprocurement transactions are not covered transactions:

(1) An entitlement or mandatory award required by a statute, including a lower tier entitlement or mandatory award that is required by a statute.

(2) The export or substitution of Federal timber governed by the Forest Resources Conservation and Shortage Relief Act of 1990, 16 U.S.C. 620 *et seq.* (The

“Export Act”), which prevents a debarred person from entering into any contract for the purchase of unprocessed timber from Federal lands. *See* 16 U.S.C. 620d(d)(1)(A).

(3) The receipt of licenses, permits, certificates, and indemnification under regulatory programs conducted in the interest of public health and safety, and animal and plant health and safety.

(4) The receipt of official grading and inspection services, animal damage control services, public health and safety inspection services, and animal and plant health and safety inspection services.

(5) If the person is a State or local government, the provision of official grading and inspection services, animal damage control services, animal and plant health and safety inspection services.

(6) The receipt of licenses, permits, or certificates under regulatory programs conducted in the interest of ensuring fair trade practices.

(7) Permits, licenses, exchanges and other acquisitions of real property, rights of way, and easements under natural resource management programs.

(8) Any transaction to be implemented outside the United States that is below the primary tier covered transaction in a USDA foreign assistance program.

(9) Any transaction to be implemented outside the United States that is below the primary tier covered transaction in a USDA export credit guarantee program or direct credit program.

(b) *Limited requirement to check EPLS.* Notwithstanding the fact that transactions to be implemented outside the United States that are below the primary tier covered transaction in a USDA foreign assistance program, export credit guarantee program or direct credit program are not covered transactions, pursuant to paragraphs (a)(8) and (9) of this section, primary tier participants under these programs must check the EPLS prior to entering into any transaction with a person at the first lower tier and shall not enter into such a transaction if the person is

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excluded or disqualified under the EPLS.

(c) *Exception.* A cause for suspension or debarment under §180.700 or §180.800 of this title (as supplemented by §417.800) may be based on the actions of a person with respect to a procurement or nonprocurement transaction under a USDA program even if such transaction has been excluded from covered transaction status by this section or §417.220.

§417.220 Are any procurement contracts included as covered transactions?

(a) Covered transactions under this part:

(1) Do not include any procurement contracts awarded directly by a Federal agency; but

(2) Do include some procurement contracts awarded by non-Federal participants in nonprocurement covered transactions (*see* appendix to this part).

(b) Specifically, a contract for goods or services is a covered transaction if any of the following applies:

(1) The contract is awarded by a participant in a nonprocurement transaction that is covered under §417.210, and the amount of the contract is expected to equal or exceed \$25,000.

(2) The contract requires the consent of a USDA official. In that case, the contract, regardless of the amount, always is a covered transaction, and it does not matter who awarded it. For example, it could be a subcontract awarded by a contractor at a tier below a nonprocurement transaction, as shown in the appendix to this part.

(3) The contract is for federally-required audit services.

(c) Any procurement contract to be implemented outside the United States that is below the primary tier covered transaction in a USDA foreign assistance program is not a covered transaction, notwithstanding the provisions in paragraphs (a) and (b) of this section.

(d) Any procurement contract to be implemented outside the United States that is below the primary tier covered transaction in a USDA export credit guarantee program or direct credit program is not a covered transaction, not-

withstanding the provisions in paragraphs (a) and (b) of this section.

(e) Notwithstanding the fact that procurement contracts to be implemented outside the United States that are below the primary tier covered transaction in a USDA foreign assistance program, export credit guarantee program or direct credit program are not covered transactions, pursuant to paragraphs (c) and (d) of this section, primary tier participants under these programs must check the EPLS prior to entering into any procurement contract that is expected to equal or exceed \$25,000 with a person at the first lower tier and shall not enter into such a procurement contract if the person is excluded or disqualified under the EPLS.

§417.221 How would the exclusions from coverage for the USDA's foreign assistance programs apply?

The primary tier covered transaction would be the food aid grant agreement entered into between USDA and a program participant, such as a U.S. private voluntary organization. USDA would have to check the EPLS before entering into the food aid grant agreement to ensure that the U.S. private voluntary organization that would be the primary tier participant is not excluded or disqualified. A transaction at the first lower tier might be a subrecipient agreement between the U.S. private voluntary organization and a foreign subrecipient of the commodities that were provided under the food aid grant agreement. Pursuant to §417.215(a)(8), this nonprocurement transaction would not be a covered transaction. In addition, a transaction at the first lower tier might be a procurement contract entered into between the U.S. private voluntary organization and a foreign entity to provide supplies or services that are expected to equal or exceed \$25,000 in value and that are needed by such organization to implement activities under the food aid grant agreement. Pursuant to §417.220(c), this procurement contract would not be a covered transaction. However, pursuant to §§417.215(b) and 417.220(e), the U.S. private voluntary organization would be prohibited from entering into, at the first lower tier, an

agreement with a subrecipient or a procurement contract that is expected to equal or exceed \$25,000 with an entity that appears on the EPLS as excluded or disqualified.

§ 417.222 How would the exclusions from coverage for USDA's export credit guarantee and direct credit programs apply?

(a) *Export credit guarantee program.* In the case of the export credit guarantee program, the primary tier covered transaction would be the guarantee issued by the USDA to a U.S. exporter. The U.S. exporter usually assigns the guarantee to a U.S. financial institution, and this would create another primary tier covered transaction between USDA and the U.S. financial institution. USDA would have to check the EPLS before issuing a guarantee or accepting a guarantee assignment to ensure that the U.S. exporter or financial institution that would be the primary tier participant is not excluded or disqualified. A transaction at the first lower tier under the export credit guarantee program might be a payment obligation of a foreign bank to the U.S. exporter to pay on behalf of the importer for the exported U.S. commodities that are covered by the guarantee. Similarly, a transaction at the first lower tier might be a payment obligation of a foreign bank under an instrument, such as a loan agreement or letter of credit, to the U.S. financial institution assigned the guarantee, which has paid the exporter for the exported U.S. commodities and, in so doing, issued a loan to the foreign bank, which the foreign bank is obligated to repay on deferred payment terms. Pursuant to § 417.215(a)(9), these nonprocurement transactions would not be covered transactions. In addition, a transaction at the first lower tier under the export credit guarantee program might be a procurement contract (*i.e.*, a contract for the purchase and sale of goods) that is expected to equal or exceed \$25,000 entered into between the U.S. exporter and the foreign importer for the U.S. commodities, the payment for which is covered by the guarantee. Pursuant to § 417.220(d), this procurement contract would not be a covered transaction. However, pursu-

ant to §§ 417.215(b) and 417.220(e), the U.S. exporter or U.S. financial institution would be prohibited from entering into, at the first lower tier, an agreement with an importer (or intervening purchaser) or foreign bank or a procurement contract that is expected to equal or exceed \$25,000 with an entity that appears on the EPLS as excluded or disqualified.

(b) *Direct credit program.* In the case of the direct credit program, the primary tier covered transaction would be the financing agreement between the USDA and the U.S. exporter. USDA purchases the exporter's account receivable in a particular transaction pursuant to the financing agreement. On occasion, such transaction may contemplate a payment obligation of a U.S. or foreign bank to make the required payments. USDA would have to check the EPLS before entering into a financing agreement or accepting such a payor to ensure that the U.S. exporter or the bank, if any, that would be the primary tier participant is not excluded or disqualified. A transaction at the first lower tier might be a payment obligation of the importer to pay the exporter for the exported U.S. commodities that are covered by the financing agreement. Pursuant to § 417.215(a)(9), this nonprocurement transaction would not be a covered transaction. In addition, a transaction at the first lower tier might be a procurement contract that is expected to equal or exceed \$25,000 entered into between the U.S. exporter and the foreign importer for the U.S. commodities, the payment for which is covered by the financing agreement. Pursuant to § 417.220(d), this procurement contract would not be a covered transaction. However, pursuant to §§ 417.215(b) and 417.220(e), the U.S. exporter would be prohibited from entering into, at the first lower tier, an agreement with an importer (or intervening purchaser) or bank, or a procurement contract that is expected to equal or exceed \$25,000 with an entity that appears on the EPLS as excluded or disqualified.

Subpart C—Responsibilities of Participants Regarding Transactions

§ 417.332 What methods must I use to pass down requirements to participants in lower tier covered transactions with whom I intend to do business?

You as a participant must include a term or condition in lower tier covered transactions requiring lower tier participants to comply with subpart C of the OMB guidance in 2 CFR part 180, as supplemented by subpart C of this part.

Subpart D—Responsibilities of Department of Agriculture Officials Regarding Transactions

§ 417.437 What method do I use to communicate to a participant the requirements described in the OMB guidance at 2 CFR 180.435?

To communicate to a participant the requirements described in 2 CFR 180.435, you must include a term or condition in the transaction that requires the participant's compliance with subpart C of 2 CFR part 180, as supplemented by subpart C of this part, and requires the participant to include a similar term or condition in lower tier covered transactions.

Subparts E–F [Reserved]

Subpart G—Suspension

§ 417.755 When will I know whether the USDA suspension is continued or terminated?

The suspending official must make a written decision whether to continue, modify, or terminate your suspension within 45 days of closing the official record. The official record closes upon the suspending official's receipt of final submissions, information and findings of fact, if any. The suspending official may extend that period for good cause. However, the record will remain open for the full 30 days, as called for in § 180.725, even when you make a submission before the 30 days expire.

Subpart H—Debarment

§ 417.800 What are the USDA causes for debarment?

A Federal agency may debar a person for—

(a) Conviction of or civil judgment for—

(1) Commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public or private agreement or transaction;

(2) Violation of Federal or State anti-trust statutes, including those proscribing price fixing between competitors, allocation of customers between competitors, and bid rigging;

(3) Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, receiving stolen property, making false claims, or obstruction of justice; or

(4) Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects your present responsibility;

(b) Violation of the terms of a public agreement or transaction so serious as to affect the integrity of an agency program, such as—

(1) A willful failure to perform in accordance with the terms of one or more public agreements or transactions;

(2) A history of failure to perform or of unsatisfactory performance of one or more public agreements or transactions; or

(3) A willful violation of a statutory or regulatory provision or requirement applicable to a public agreement or transaction;

(c) Any of the following causes:

(1) A nonprocurement debarment by any Federal agency taken before March 1, 1989, or a procurement debarment by any Federal agency taken pursuant to 48 CFR part 9, subpart 9.4, before August 25, 1995;

(2) Knowingly doing business with an ineligible person, except as permitted under § 180.135;

(3) Failure to pay a single substantial debt, or a number of outstanding debts (including disallowed costs and overpayments, but not including sums owed

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the Federal Government under the Internal Revenue Code) owed to any Federal agency or instrumentality, provided the debt is uncontested by the debtor or, if contested, provided that the debtor's legal and administrative remedies have been exhausted;

(4) Violation of a material provision of a voluntary exclusion agreement entered into under § 180.640 or of any settlement of a debarment or suspension action; or

(5) Violation of the provisions of the Drug-Free Workplace Act of 1988 (41 U.S.C. 701); or

(d) Any other cause of so serious or compelling a nature that it affects your present responsibility.

§ 417.865 How long may my debarment last?

(a) If the debarring official decides to debar you, your period of debarment will be based on the seriousness of the cause(s) upon which your debarment is based. Generally, debarment should not exceed 3 years. However, if circumstances warrant, the debarring official may impose a longer period of debarment.

(b) In determining the period of debarment, the debarring official may consider the factors in 2 CFR 180.860. If a suspension has preceded your debarment, the debarring official must consider the time you were suspended.

(c) If the debarment is for a violation of the provisions of the Drug-Free Workplace Act of 1988, your period of debarment may not exceed 5 years.

(d) The Secretary shall permanently debar from participation in USDA programs any individual, organization, corporation, or other entity convicted of a felony for knowingly defrauding the United States in connection with any program administered by USDA.

(1) *Reduction.* If the Secretary considers it appropriate s/he may reduce a debarment under this subsection to a period of not less than 10 years.

(2) *Exemption.* A debarment under this subsection shall not apply with regard to participation in USDA domestic food assistance programs. For purposes of this paragraph, participation in a domestic food assistance program does not include acting as an authorized retail food store in the Supple-

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mental Nutrition Assistance Program (SNAP), the Special Supplemental Nutrition Assistance Program for Women, Infants, and Children (WIC), or as a nonbeneficiary entity in any of the domestic food assistance programs. The programs include:

(i) Special Nutrition Assistance Program, 7 U.S.C. 2011, *et seq.*;

(ii) Food Distribution Program on Indian Reservations, 7 U.S.C. 2013(b);

(iii) National School Lunch Program, 42 U.S.C. 1751, *et seq.*;

(iv) Summer Food Service Program for Children, 42 U.S.C. 1761; Child and Adult Care Food Program, 42 U.S.C. 1766;

(v) Special Milk Program for Children, 42 U.S.C. 1772; School Breakfast Program, 42 U.S.C. 1773;

(vi) Special Supplemental Nutrition Program for Women, Infants, and Children, 42 U.S.C. 1786;

(vii) Commodity Supplemental Food Program, 42 U.S.C. 612c note;

(viii) WIC Farmers Market Nutrition Program, 42 U.S.C. 1786;

(ix) Senior Farmers' Market Nutrition Program, 7 U.S.C. 3007; and

(x) Emergency Food Assistance Program, 7 U.S.C. 7501, *et seq.*

§ 417.870 When do I know if the USDA debarring official debars me?

(a) The debarring official must make a written decision whether to debar within 45 days of closing the official record. The official record closes upon the debarring official's receipt of final submissions, information and findings of fact, if any. The debarring official may extend that period for good cause. However, the record will remain open for the full 30 days, as called for in § 180.820, even when you make a submission before the 30 days expire.

(b) The debarring official sends you written notice, pursuant to § 180.615, that the official decided, either:

(1) Not to debar you; or

(2) To debar you. In this event, the notice:

(i) Refers to the Notice of Proposed Debarment;

(ii) Specifies the reasons for your debarment;

(iii) States the period of your debarment, including the effective dates; and

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(iv) Advises you that your debarment is effective for covered transactions and contracts that are subject to the Federal Acquisition Regulation (48 CFR chapter 1), throughout the Executive Branch of the Federal Government unless an agency head or an authorized designee grants an exception.

Subpart I—Definitions

§ 417.930 Debarring official (USDA supplement to governmentwide definition at 2 CFR 180.930).

(a) Debarring official means an agency official who is authorized to impose debarment. The debarring official is either:

- (1) The agency head; or
- (2) An official designated by the agency head.

(b) The head of an organizational unit within USDA (*e.g.*, Administrator, Food and Nutrition Service), who has been delegated authority in 7 CFR part 2 to carry out a covered transaction, is delegated authority to act as the debarring official in connection with such transaction. This authority to act as a debarring official may not be redelegated below the head of the organizational unit, except that, in the case of the Forest Service, the Chief may redelegate the authority to act as a de-

barring official to the Deputy Chief for the National Forest System or an Associate Deputy Chief for the National Forest System.

§ 417.1010 Suspending official (USDA supplement to governmentwide definition at 2 CFR 180.1010).

(a) Suspending official means an agency official who is authorized to impose suspension. The suspending official is either:

- (1) The agency head; or
- (2) An official designated by the agency head.

(b) The head of an organizational unit within USDA (*e.g.*, Administrator, Food and Nutrition Service), who has been delegated authority in 7 CFR part 2 of this title to carry out a covered transaction, is delegated authority to act as the suspending official in connection with such transaction. This authority to act as a suspending official may not be redelegated below the head of the organizational unit, except that, in the case of the Forest Service, the Chief may redelegate the authority to act as a suspending official to the Deputy Chief for the National Forest System or an Associate Deputy Chief for the National Forest System.

Subpart J [Reserved]