



United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, DC 20240

MAY 19 2011

CERTIFIED MAIL
RETURN RECEIPT

Mr. Frederick P. Weiner

Beverly Hills, California 90212-4758

Re: Sunland Industries, LLC, DOI Case No. 10-0011-00; and Frederick P. Weiner,
DOI Case No. 10-0011-01

Dear Mr. Weiner:

This is to provide you with my written decision as Debarring Official for the U.S. Department of the Interior (DOI) regarding the proposed debarment of you, and of SUNLAND Industries, LLC (SUNLAND). I find that debarment of you and SUNLAND from Federal procurement and non-procurement activities for three (3) years is presently warranted based upon consideration and balancing of all information presented for the administrative record.

I. Brief Procedural History.

DOI proposed to debar you and SUNLAND by Notices dated November 10, 2010, under the provisions of 48 C.F.R. Subpart 9.4. The respective Notices proposed debarment from Federal procurement and non-procurement program activities for a three (3) year period. Each Notice relied upon information provided in an Action Referral Memorandum (ARM) from the DOI Office of Inspector General (OIG) dated November 8, 2010.

SUNLAND is a corporation, apparently now consisting of two persons, operating from one location in Los Angeles, California. SUNLAND engages principally in government contracting. Among other activities, SUNLAND supplies, through use of subcontractor vendors, asphalt, aggregate, and other industrial materials. You are identified as the owner and Chief Executive Officer (CEO) of SUNLAND.

DOI based the proposed debarment of SUNLAND under 48 C.F.R. §§ 9.406-2(b) (1), and 9.406-2(c). DOI based the action upon the information provided in the ARM about SUNLAND's repeated failure to comply with quarterly reporting requirements under Section 1512 of the American Recovery and Reinvestment Act of 2009 (ARRA), a condition of SUNLAND's receipt of ARRA funds and DOI National Park Service (NPS) Contract Order No. P8410090037. The ARM further indicates that SUNLAND failed to respond to repeated DOI telephonic and voice mail inquiries regarding the reporting delinquencies. Additionally, the ARM at Section IV informs me that while the NPS contract was completed in October 2009 and SUNLAND was paid, to date SUNLAND has failed to pay its subcontractor, Eagle Peak Rock and Paving, Inc. (Eagle Peak).

DOI also proposed to debar you as an individual under 48 C.F.R. § 9.406-5(b) based upon imputation to you of SUNLAND's misconduct, and under 48 C.F.R. §§ 9.406-1(b) and 9.403 based upon your affiliate relationship with SUNLAND.

You timely contested the Notices of Proposed Debarment, by one page letter, with attachments, dated December 3, 2010. Your letter referenced only the SUNLAND Notice. However, by email dated December 7, 2010, you clarified that the letter also contested your individual Notice. Your December 3rd letter provided information in opposition but did not request a meeting with the debarring official, either in person or by telephone conference call, under 48 C.F.R. § 9.406-3(c).

By email dated December 21, 2010, David Sims, the DOI Debarment Program Manager, accorded you the opportunity to provide by close of business January 14, 2011, supplemental information regarding the action bases set forth in the Notices. The DOI December 21st email requested that you specifically address a series of questions focused on the ARRA reporting non-compliance and SUNLAND's non-payment of its subcontractor under the ARRA contract. In response, you provided supplemental written information by one page letter, with attachments, dated December 27, 2010.

You did not request a Presentation of Matters in Opposition. Nevertheless, cognizant that you appeared on your own behalf in these matters, rather than with counsel; and in an effort to provide you ample opportunity to submit information, Mr. Sims, Mr. Stocker, the DOI OIG case representative, together with Ms. Stephanie Baugh, DOI OIG Suspension and Debarment Team Evaluator, held a telephone conference with you on February 2, 2011. As you were advised, that conference call was tape recorded to memorialize it as part of the administrative record. By memorandum dated April 4, 2011, Mr. Stocker submitted for the record final observations on the information presented.

Upon review of the record, the information provided does not raise a genuine dispute over facts material to cause for debarment that would necessitate additional fact-finding proceedings. The matter is ready for final decision.

II. Discussion.

Debarment is an administrative action taken to shield the government from individuals and entities who, because of waste, fraud, abuse, non-compliance or poor performance, threaten the integrity of federally-funded procurement and non-procurement activities. Debarment is not to be used as punishment. Rather, debarment addresses present responsibility.

A. Cause for Debarment.

The existence of past misconduct is the requisite starting point for evaluation. The factual information of record establishes the existence of cause for debarment under the bases set forth in the DOI Notice.

1. The ARRA Quarterly Reporting Noncompliance Over Three Quarters.

In September 2009, the NPS awarded to SUNLAND contract no. P8410090037. The contract funding occurred under ARRA. The contract required provision and delivery of unpaved road aggregate to Lava Beds National Monument in Siskiyou and Modoc Counties, California. The initial contract award of \$224,361 was thereafter modified in the amount of \$4,971.82 to increase the total award to \$229,332.82.

ARRA, as implemented by Federal Acquisition Regulation (FAR) clause 52.204-11, a material term incorporated into SUNLAND's contract at Section I.3, requires reporting of certain information for purposes of transparency and accountability to the public for the use of ARRA funds via the online reporting tool available at www.FederalReporting.gov, as follows:

I. For the prime contract, in essence: 1) The government contract and order number; 2) the amount of ARRA funds invoiced by the contractor for the reporting period; 3) a list of all significant services performed or supplies delivered, including construction, for which the contractor invoiced in the calendar quarter; 4) the program or project title, if any; 5) a description of the overall purpose and expected outcomes or results of the contract, including significant deliverables and if appropriate, associated units of measure; 6) an assessment of the contractor's progress towards completion of the project or activity and expected outcomes or results of the contract; 7) a brief description of the type of jobs created and/or retained by the project activity; 8) an estimate of the number of jobs created and number of jobs retained by the project or activity by the contractor and all first tier subcontracts valued at \$25,000 or more; and 9) the names and total compensation of each of the five most highly compensated officers of the contractor for the calendar year the contract was awarded if the contractor received 80 percent, and \$25 million or more, of its annual gross revenues from Federal contracts, loans, grants and cooperative agreements; and the public does not have access to the senior executive compensation information through certain SEC or IRS required filings.

II. For subcontracts less than \$25,000, subcontracts awarded to individuals, and subcontracts awarded to a subcontractor that in the previous tax year had a gross income under \$300,000: The contractor shall only report the total number of such first tier subcontracts awarded in the quarter and the aggregate total dollar amount. For first tier subcontracts over \$ 25,000, and not subject to reporting under FAR clause 52.204-11(d) (9), the contractor shall secure and provide: 1) The subcontractor's DUNS number; 2) name; 3) subcontract amount; 4) date; 5) North American Industrial Classification Code; 6) funding agency; 7) description of the products or services being provided and purpose and expected results of the subcontract; 8) the subcontract number; 9) the subcontractor's business address; 10) the primary performance location; 11) the names and total compensation of each of the subcontractor's five most highly compensated officers for the award calendar year if the subcontractor received 80 percent, and \$25 million or more, of its annual gross revenues from Federal contracts, loans, grants and cooperative agreements; and the public does not have access to the senior executive compensation information through certain SEC or IRS required filings; 12) a narrative description of the employment impact of the ARRA funded work; 13) a narrative description of the types of jobs created and retained; and 14) an estimate of the number of jobs created and retained by the subcontractor.

FAR Clause 52-204-11, incorporated into the SUNLAND contract at page 10, specifies at Section (d) that "The contractor shall report the [required] information, using the online reporting tool available at www.FederalReporting.gov."

It is undisputed that following the DOI contract award in September 2009, over the successive three ARRA reporting quarters, SUNLAND failed to report any of the required ARRA information. You contend that you were not provided assistance regarding the information to report. However, the SUNLAND contract, at Section 3.I., enumerated the particular information items to be reported and the website to use. Phone and email logs and copies of correspondence provided by the OIG for this proceeding document repeated, unsuccessful efforts by NPS Contracting Specialists and other representatives to reach out to you and SUNLAND to assist in securing compliance with the ARRA reporting requirement, including providing the reporting template. During the February 2, 2011, conference call you also acknowledged that you had an information technology (IT) employee on the SUNLAND payroll; yet you provide no statements or other evidence to show any attempts by SUNLAND's IT employee to go online, access the reporting site, and enter data.

During the first quarter of 2010, the DOI contractor Pricewaterhouse Coopers (PwC) offered to assist NPS with outreach to non-reporting recipients with awards less than \$250,000. On April 8 and 16, 2010, PwC left a voice message for you. Neither you nor any other individual responded on behalf of SUNLAND.

On May 25, 2010, NPS's Contracting Officer sent the first notification of non-compliance in a letter addressed to you as owner of SUNLAND. That letter directed SUNLAND's attention to the quarterly reporting via the central reporting system located at www.FederalReporting.gov, required both by ARRA Section 1512 and Section 1 (1-3) of the SUNLAND contract. The letter advised SUNLAND that:

"Recovery Act reporting is critical to providing accurate data to the American public during this time of economic recovery. The failure to enter Quarterly award data is a material violation of your award terms and conditions. Delinquent reporting if uncorrected can result in sanctions, including termination of your award and/or referral of your organization for suspension and debarment from future award eligibility."

Between July 19, 2010, and July 22, 2010, NPS representatives attempted to reach you by voice mail message and email regarding the ARRA quarterly reporting. On July 22, 2010, an NPS employee telephoned you to inform you that DOI was again sending a copy of the Federal Reporting Template and to ask that you fill it out and return it to her. You did not return the template. On July 23, 2010, the NPS employee left another voice message and received no response.

By letter dated August 11, 2010, the NPS Contracting Specialist sent SUNLAND a final notification of non-compliance with reporting requirements. The letter again reiterated the ARRA reporting requirement and provided the central reporting system website. The letter

warned that the ARRA reporting delinquency information would be made a part of SUNLAND's past performance record. The letter also required Respondents to provide the ARRA report information during the October 1- 10, 2010, reporting period in order to avoid further sanction action including suspension and debarment action. The NPS continued efforts to reach SUNLAND, attempting unsuccessfully to reach SUNLAND by telephone on September 27, 2010, and September 28, 2010.

Finally, on October 12, 2010, you contacted the NPS. You indicated in your call that you had spoken with a member of the OIG's Recovery Oversight Office (ROO) evaluation team who advised you that the ARRA reporting non-compliance could lead to a recommendation for debarment. The NPS employee emphasized to you the importance of the report. On October 13, 2010, an NPS employee attempted to reach you without success, calling your telephone number several times throughout the day, leaving voice messages and an email message.

You and SUNLAND failed to comply with the statutory and material contract ARRA online reporting requirement for three consecutive quarters. The record further establishes a pattern of non-responsiveness to multiple written and telephonic communications, including two delinquency letters placing you and SUNLAND on notice as to the consequences of continued non-compliance. This knowing and willful failure to comply with the material reporting requirement of the ARRA contract establishes the existence of cause for debarment of SUNLAND, and of you, directly under 48 C.F.R. §§ 9.406-2(b) and 9.406-2(c); and in light of the record of your direct participation, to you by imputation of SUNLAND's conduct, pursuant to 48 C.F.R. § 9.406-5(b).

2. The Failure to Pay SUNLAND's Subcontractor.

NPS issued the ARRA contract solicitation in August of 2009. SUNLAND's role in the procurement appears to have been that of an intermediary to provide, through a vendor, road aggregate under the contract. The bid was due by August 31, 2009. By your own account in these proceedings, on August 17, 2009, SUNLAND, as part of its bid preparation, sought a quote from Eagle Peak to supply the road aggregate. In response, Eagle Peak provided SUNLAND with a price per ton quote of \$22.79. SUNLAND utilized that quote in submitting its bid to DOI.

On September 18, 2009, DOI awarded the contract to SUNLAND. However, shortly thereafter, Eagle Peak informed SUNLAND that the aggregate price would in fact be \$23.50 per ton. You indicate in your December 3, 2010, contest letter that SUNLAND, out of a concern that Eagle Peak's per ton price increase somehow might lead to contract cancellation by the NPS, decided to proceed to undertake the contract work at the per ton price it bid, "intending to resolve that [Eagle's per ton quote change] later."

The record establishes that SUNLAND completed the contract in October of 2009 and that DOI paid SUNLAND the full contract price of \$229,332.82 in a series of payments commencing on November 13, 2009, and ending on January 22, 2010. As a result of the Eagle Peak quote to which SUNLAND agreed, the amount that SUNLAND was paid by the NPS is \$22,797.67 less than what Eagle Peak invoiced to SUNLAND.

Eagle Peak invoiced SUNLAND for the total subcontract amount of \$252,100.49 as follows: \$51,768.15 on October 9, 2009; \$58,712.87 on October 19, 2009; \$65,316.84 on October 22, 2009; \$34,911.84 on October 28, 2009; \$23,750.79 on November 2, 2009; and \$17,640.00 on November 9, 2009. There is no question that Eagle Peak completed delivery of the contracted aggregate material. You state in Respondents' written submission dated December 27, 2010, that the project was successfully completed within three weeks, in mountain country, with excellent performance. However, SUNLAND did not make any payments to Eagle Peak under the subcontract. On January 28, 2010, Eagle Peak sent a letter to SUNLAND stating that the work had been successfully completed as of October 28, 2009, and that Eagle Peak had not yet been paid. The letter requested payment and advised Respondents that absent resolution, litigation would be pursued.

As noted above, the total amount Eagle Peak invoiced SUNLAND is \$252,100.49. You contend in these proceedings that the amount invoiced by Eagle Peak includes an overcharge of \$25,816.12. You contend that amount included a charge of \$17,640 due to time delays, which correspondence from NPS indicates did not occur. You state in your December 3, 2010, written submission that you "have brought in our attorney to handle this matter." During the February 2, 2011, conference call you provided general information which appears to indicate legal proceedings have commenced over the alleged disputed charges.

The instant debarment proceedings are not the forum for resolving contract disputes. The debarment remedy focuses on conformance to proper standards of business honesty and integrity for purposes of present responsibility. Therefore, even if your overcharge contention is accepted for purposes of argument in these debarment proceedings, there remains an uncontested amount of \$226,284.37 which SUNLAND is unquestionably obligated to pay. During the February 2, 2011, conference call with Mr. Sims and Mr. Stocker, you confirmed that SUNLAND has still made no payments toward the uncontested amount.

It is evident that SUNLAND, having entered into an unwise agreement, determined to accept full contract payment from the government but chose not to abide by the subcontract entered into with its subcontractor. The disputed charges represent a relatively small portion of the total amount owed. The failure to make any payment whatsoever on the undisputed amount owed moves SUNLAND's action beyond a mere dispute over questioned charges. It is an action resulting in unjust enrichment and evidences conduct inconsistent with appropriate ethical business standards to which a government contractor must adhere.

The documents that you provide, as well as those the attached to the ARM, establish that business transactions relative to the contract occurred directly between you, on behalf of SUNLAND, and Eagle Peak. Independent of the ARRA reporting delinquencies, your conduct on behalf of SUNLAND in failing to pay SUNLAND's subcontractor establishes the existence of separate cause for debarment of you and SUNLAND under 48 C.F.R. § 9.406-2(b) (1) (B) and (c). Cause for your debarment also exists via 48 C.F.R. § 9.406-5(b), as SUNLAND's conduct is also properly imputed to you.

3. Affiliation.

You do not dispute the ARM's assertion and documentation indicating that you are the owner, CEO, and operator of SUNLAND. Accordingly, you have the ability to control SUNLAND. You and SUNLAND are therefore affiliates within the meaning of under 48 C.F.R. §§ 9.406-1(b) and 9.403, and your debarment on that basis is appropriate.

B. Mitigation Factors and Remedial Measures.

Debarment, both by its remedy nature and as a matter of regulation, is not an automatic result of establishing the existence of cause for debarment. Debarment is first and foremost about the present rather than the past. It is a remedy for use to protect government procurement and non-procurement program interests only where truly warranted. The seriousness of the past misconduct and any information presented by a contractor that persuasively indicates mitigating factors, altered circumstances, remedial measures, or other actions taken that address present responsibility is evaluated in reaching a decision on debarment.

The information you have provided in your written submissions and your statements during the February 2, 2011, conference call is taken into consideration and weighed for its value in reaching a decision regarding the need for, and period of, debarment in this matter. This information, together with that provided by the OIG, received careful review and evaluation under the relevant criteria at 48 C.F.R. § 9.406-1(a).

You appear in your December 3 and December 27, 2010, written submissions to urge, by way of mitigation, that the reason for SUNLAND's failure over three consecutive quarters to submit the required quarterly ARRA reports was that Eagle Peak did not provide SUNLAND with payroll reports for its truckers. Your December 3, 2010, letter states that SUNLAND was unable to furnish a description and quantity of jobs created due to Eagle Peak's refusal to furnish wage reports, and further noting that Eagle Peak had advised that they were not paying minimum wage. You state that Eagle Peak advised you that there would be no payroll to the truckers delivering materials to the jobsite because prevailing wages would not be paid to the drivers, and that this was solely an act of Eagle Peak and not an action on the part of SUNLAND.

I take cognizance of the fact that a separate provision of your contract did require SUNLAND to submit Davis-Bacon wage reports for all work on the contract. This is noted in the September 21, 2009, Notification of Award letter to SUNLAND from the NPS Contracting Specialist, which you provide as Exhibit G to your supplemental written submission dated December 27, 2010. However, subcontractor payroll data was not required for ARRA quarterly reporting under ARRA Section 1512 and NPS contract Section I.3. The award notification letter clearly instructs SUNLAND to submit the copies of its payroll directly to the designated NPS Contracting Specialist, while Section I.3 (d) of the contract specifies the ARRA reporting is to be done online via the Federal Reporting.gov website.

As a government contractor it was incumbent upon you and SUNLAND to seek clarification regarding material terms of the contract if they were unclear. The efforts by NPS to reach you to

assist with the reporting provided you with ample opportunity to do so behalf of SUNLAND, of which you effectively declined to avail yourself prior to the debarment proceedings.

During the proceedings, Mr. Sims, in his December 21, 2010, email to you, enumerated the ARRA information required to be reported, noting that subcontractor payroll data was not included. Mr. Sims and Mr. Stocker reiterated this in the course of the February 2, 2011, conference call. However, even this information provided in the course of the debarment proceedings did not prompt a compliance response on your part. Furthermore, you offer no explanation of why, even if SUNLAND believed it must enter payroll data which it did not have, SUNLAND did not attempt to enter into the online ARRA website as much of the enumerated required reporting information as it possessed. Considering the information as presented, no weight attaches to your assertion regarding Eagle Peak's non-submission of payroll reports as a factor to mitigate SUNLAND's ARRA reporting delinquencies over three quarters.

Following the issuance of the Notices of Proposed Debarment on November 10, 2010, you and SUNLAND still did not correct the reporting delinquency. The first attachment accompanying your December 27, 2010, written submission in these debarment proceedings appears to possibly provide some partial information of the type called for by the ARRA reporting requirements as identified in Mr. Sims December 21, 2010, email to you. The letter, however, does not state this to be an attempt to comply with the ARRA reporting requirements. Moreover, even if this were the case, as the SUNLAND contract documents and correspondence from NPS make clear, the required reporting must be completed via the online reporting tool rather than paper.

During the February 2, 2011, conference call as part of these proceedings, Mr. Sims and Mr. Stocker explained to you again the information required for the online ARRA reporting. During that call, you repeatedly stated that you could do no more to comply with the reporting requirements. Mr. Sims and Mr. Stocker advised you that NPS personnel could assist you in making SUNLAND's report. In response you again insisted that you could do no more to comply with the reporting requirements. However, the next day, February 3, 2011, you sent an email to an NPS employee requesting instructions on how to submit your report and requesting a list of information that you would have to submit. In response to your request, the NPS employee sent an email to you on February 8, 2011, providing the information you requested. Thereafter, NPS did not receive a response from you and SUNLAND.

You also urge as a mitigating factor that Respondents did not understand what or how to undertake the web-based online ARRA reporting. However, as discussed above, SUNLAND failed to submit the required quarterly reports for three consecutive quarters despite repeated attempts by DOI personnel to contact SUNLAND both through written communications and by telephone to offer assistance, including efforts made by DOI during this debarment proceeding. Moreover, in the course of the February 2, 2011, telephone conference call to you by Mr. Sims and Mr. Stocker, you demonstrated a lack of understanding of the public value of the ARRA data reporting and a continuing unwillingness to mitigate the non-compliance. The information of record regarding the ARRA reporting delinquencies does not indicate the presence of mitigating factors or remedial measures to support a conclusion that imposition of debarment is now unnecessary.

With regard to SUNLAND's non-payment of its subcontractor, you appear to urge, by way of mitigation consideration, that Eagle Peak did not complete performance as contractually obligated, claiming SUNLAND was both over and incorrectly charged on six occasions, citing an amount of \$25,816.12 in overcharges. The available records regarding the contract performance do not appear to support that contention. As discussed above, even if for purposes of argument the amount of \$25,816 were legitimately in dispute, SUNLAND has to not to date, more than a year after contract completion, made any payment to Eagle Peak on a contract balance exceeding \$200,000 for work acknowledged to be performed. Consequently, no mitigation value attaches to the argument you present.

In the course of these proceedings, you stated that you have provided services under contract to the Federal Government for many years. However, this extensive experience did not prevent the failure to comply with the reporting requirements under §1512 of ARRA and the NPS contract. Nor did it preclude SUNLAND's failure pay its subcontractor undisputed amounts owed under the contract or promptly act to resolve any dispute as to remaining amounts claimed.

Your prior government contractor experience should, if anything, have fostered knowledge and an enhanced awareness of the requirements and standards of conduct attaching to the performance of government contracts and the importance of compliance with contractual terms and legal requirements for performance. This contextual background information indicates the presence of a significant level of relative culpability which factors into this decision to debar.

You contend that debarment will put SUNLAND out of business. You indicate that SUNLAND suspended business activities in response to Notice of Proposed Debarment. However, SUNLAND remains an incorporated entity. Where a Respondent engages in a significant amount of business with the Federal Government, adverse economic consequences may well attach to a debarment. However, the government is required to do business only with presently responsible persons. Consequently, the fact that a debarment will impact the revenues of a business cannot properly operate as a bar to the exercise of the remedy.

Whether or not the contractor has instituted, or committed to institute, new or revised business practices and procedures to preclude recurrence of the misconduct giving rise to the cause for debarment is an important factor in deciding whether debarment is warranted. In this case you and SUNLAND present no information to show even at this late date that measures have been taken to provide the ARRA reporting data required by law and by the terms of SUNLAND's government contract, and to resolve the prolonged nonpayment of Eagle Peak.

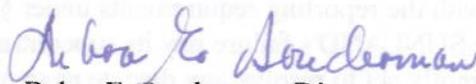
III. Conclusion.

Weighing the information of record, as discussed above, imposition of a period of debarment is warranted. Prescribing the length of time is not a precise science. The Notice proposed a three (3) year debarment, the general period under the rules. Considering and balancing the information presented and discussed above, imposition of the general three year period of debarment for you and for SUNLAND provides the appropriate degree of remedial protection for government procurement and non-procurement program interests.

Under the FAR at 48 C.F.R. §§ 9.405(a) and 9.406-4, award ineligibility is effective upon the date of the Notice of Proposed Debarment. The period of debarment imposed begins from that date of any initial award ineligibility. Accordingly, the three year debarment period runs from November 10, 2010, the date of the Notices of Proposed Debarment.

As stated earlier in this decision, debarment is a present, protective, remedy. In the event of changed circumstances, or other new relevant information about remedial or mitigation actions, you may at any time petition in writing for reinstatement, as provided under 48 C.F.R. § 9.406-4(c).

Sincerely,



Debra E. Sonderman, Director
Office of Acquisition and Property Management

cc: David M. Sims, PAM
Jim Weiner, SOL
Lori Vassar, OIG
Stanley Stocker, OIG
Official Case File