



# United States Department of the Interior

OFFICE OF THE SECRETARY  
Washington, DC 20240



FEB 24 2012

CERTIFIED MAIL  
RETURN RECEIPT

Mr. Marc Blackman  
Ransom, Blackman LLP

Portland, Oregon 97204-1144

Re: Proposed Debarment of Gunther Wenzek, DOI Case No. 11-0032-00

Dear Mr. Blackman:

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 Gunther Wenzek (Mr. Wenzek). Upon consideration of all information contained in the official record, I conclude that debarment of Mr. Wenzek from Federal nonprocurement and procurement activities for a two year period is presently warranted.

I. Brief Procedural History.

DOI proposed to debar Mr. Wenzek by Notice dated September 2, 2011, under the provisions of 2 C.F.R. Part 180, implemented by DOI through 2 C.F.R. Part 1400. The Notice proposed debarment from Federal non-procurement and procurement program activities for a three (3) year period. The Notice relied upon information provided in an Action Referral Memorandum (ARM) from the DOI Office of Inspector General (OIG). DOI based the action on the fact of Mr. Wenzek's January 15, 2010, criminal conviction in the United States District Court for the District of Oregon.

On behalf of Mr. Wenzek you timely contested the Notice of Proposed Debarment, by letter dated September 20, 2011. By email correspondence to you dated October 4, 2011, David Sims, the DOI Debarment Program Manager, established a case schedule in response to your contest letter, according Mr. Wenzek the opportunity to submit by October 21, 2011, supplemental written information addressing the mitigation and remedial factors considered in reaching a determination on imposition of debarment, found at 2 CFR 180.860 and to state whether or not an oral presentation of matters in opposition (PMIO) meeting was requested as part of the proceedings. The schedule also accorded Mr. Stanley Stocker, the DOI case representative, the opportunity to provide written comments in response to the initial contest letter's information. No further communications were received from you under the initial schedule. By memorandum dated October 28, 2011, Mr. Stocker provided his written comments for the record.

On October 30, 2011, Mr. Sims and Mr. Stocker attempted unsuccessfully to contact you by telephone to verify your receipt of the earlier schedule email and to determine if a PMIO was sought. Thereafter, Mr. Sims sent a revised schedule email to you on December 7, 2011.

Under the revised schedule, you provided additional written argument for the record by email, asserting that Mr. Wenzek is not a "participant" under 2 CFR Part 180, dated December 9, 2011. Your correspondence did not request a PMIO. Mr. Stocker provided a response to your submission, by email dated February 10, 2012. By email dated February 10, 2012, you submitted further information in reply to Mr. Stocker's communication, consisting of a copy of the transcript of October 14, 2009, plea proceedings in Mr. Wenzek's criminal case and a copy of the January 14, 2010, sentencing hearing transcript. With receipt of that final submission the matter is ready for decision.

## II. Discussion.

Debarment is an administrative action taken to shield the government from individuals and entities who, because of waste, fraud, abuse, noncompliance or poor performance, threaten the integrity of federally-funded procurement and nonprocurement activities. Debarment addresses present responsibility.

### A. Preliminary Issue.

Mr. Wenzek contends that he is not a "participant" within the meaning of 2 CFR Part 180, and that debarment is therefore not appropriate. Debarment is a prospective remedy to avoid future business risk by precluding eligibility for future awards. The misconduct need not arise in performance under a Federal award. It is well established that when presented with information indicating a lack of business honesty or integrity the Government need not wait until it is actually harmed in the course of performance under a Federal nonprocurement or procurement award before acting to exclude a person from future award eligibility. It is incumbent on the debarring official when presented with information indicating the presence of past conduct indicating a lack of business integrity, honesty or poor performance to evaluate the necessity for protection of Federal procurement and nonprocurement award program activities.

Under 2 C.F.R. § 180.980, "participant" is defined as "any person who submits a proposal for or enters into a covered transaction, including an agent or representative of a participant." The provisions of 2 C.F.R. 180.120 make it clear that application is not limited to matters arising under an actual award. The scope of "participant" is also prospective. Section 180.120(a) states that the provisions of Part 180 are applicable if one is a "person who has been, is, or *may reasonably be expected to be*, a participant or principal in a covered transaction." (Italics added).

Mr. Wenzek engages in the import/export business, including as the context of this action shows, coral. He owns and operates Cora Pet. Cora Pet according to its website engages in business for the aquarium, pond and terrarium trade. The website for the business describes Cora Pet as "... offering a wide range of natural products..." selling aquarium sand pebbles, shells, and other items. The government is a consumer of an extremely broad range of goods and services.

Aquarium products may well be sought under federally funded nonprocurement projects or direct procurement transactions. Considering the nature of Mr. Wenzek's business field it is reasonable to anticipate that he may seek to participate in federally funded work, directly or indirectly, or as an agent or representative of another contractor or assistance recipient. Accordingly, as a general matter Mr. Wenzek properly falls within the regulatory definition of "participant" at 2 C.F.R. §§ 180.820 and 180.980. It is also noted that based upon his business line Mr. Wenzek also properly falls within the regulatory definition of "contractor" under Federal Acquisition Regulation debarment rules at 48 C.F.R. § 9.403.

#### B. Cause for Debarment.

The presence of past misconduct is the requisite starting point for evaluation. The ARM's information presents a clear and rational basis for concern. Mr. Wenzek pled guilty to and was convicted of Importation Contrary to Law, and the aiding and abetting thereof, in violation of 18 U.S.C. §§ 545 and 2. This crime is a felony offense.

It is contrary to law to import wildlife, such as coral, without declaring it to the DOI Fish and Wildlife Service (FWS). Between 2007 and 2008, Mr. Wenzek knowingly assisted in the importation into the United States of two twenty foot containers holding coral sand and dead coral fragments, constituting living or dead wildlife within the meaning of the Lacey Act at 16 U.S.C. 3371(a) without FWS Import/Export Declaration Form 3-177. That form is required to accompany all shipments of any part of any wildlife, whether living or dead. The shipping documents described the contents of the containers as "Mactan rock" or "broken gravel." In fact the imported materials included "stony corals" protected by international law against the threat of extinction. Cause for debarment under 2 CFR Part 180 includes a broad range of offenses including commission of embezzlement, theft, forgery, falsification or destruction of records, making false statements, making false claims, obstruction of justice, and "any other offense indicating a lack of business integrity or business honesty that seriously and directly affects...present responsibility."

Mr. Wenzek elected to plead guilty rather than proceed to trial. The elements of the offense to which he pled are: (1) he knowingly imported merchandise into the United States; (2) he did so contrary to law; and (3) he knew that the merchandise was imported contrary to law. At page 43 of the plea hearing transcript Mr. Wenzek states that by the time the shipment reached the Port of Portland, Oregon in April 2008 he knew that importation without the required FWS Wildlife Importation Declaration Form 3-177 was against the law and still did not make the required declaration. For the Court to accept the plea, it had to be supported by sufficient facts as to the elements of the offense.

Mr. Wenzek's conviction is a fact of record. His crime in essence is one of false statement by omission. He stands convicted of a felony offense. Felony offenses inherently reflect adversely on his business honesty and integrity, both as an individual and business operator. The fact of Mr. Wenzek's conviction establishes the existence of cause for debarment under 2 C.F.R. § 180.800 (a) (3) and/or (a) (4).

### C. Mitigation Factors and Remedial Measures.

Debarment, both by its nature and as a matter of regulation, is not an automatic result of establishing the existence of cause for debarment. Debarment is used to protect government procurement and nonprocurement program interests only where truly warranted, rather than additional punishment for past misconduct. Consequently, in reaching a decision the Debarring Official considers along with the seriousness of the past misconduct any information presented by a Respondent persuasively indicating mitigating factors, altered circumstances, remedial measures, or other actions taken that address present responsibility. Mr. Wenzek has not provided for consideration information expressly addressing the mitigation and or remedial factors found at 2 C.F.R. § 180.860. Nevertheless, the information of record is given careful review and evaluation in connection with that provided by OIG against the criteria applicable here.

#### 1. Fulfillment of the Court Imposed Sanctions.

An inherent degree of ameliorative impact may attach to the experience of criminal or civil prosecution and the fulfillment of court imposed sanctions. Mr. Wenzek does not indicate whether he is fulfilling the court imposed sentence. However, there is no indication from the record that he is not timely in his payments of the Court ordered financial penalties or is otherwise not in compliance with the terms of the Courts' sentence. This information is considered and weighed for value in light of the information presented for the record. Generally, the mere fact of proceeding towards involuntary completion of a court imposed judgment, without more buttressing mitigation information, does not provide persuasive evidence of an altered present attitude regarding business honesty and integrity to assure voluntary adherence to appropriate standards of business conduct and a conclusion that the protection provided by imposition of a period of debarment is unnecessary.

#### 2. Self-Disclosure of Misconduct and the Level of Cooperation with the Prosecution.

The act of voluntary self-disclosure of misconduct and extraordinary cooperation with an ensuing investigation and legal proceedings can speak to a person's present conformance with ethical standards of business conduct. The record indicates that Mr. Wenzek did not self disclose. The illegal importation was apparently detected by an alert port inspector who noticed an ocean odor coming from a shipping container. To the contrary, the Information to which Mr. Wenzek pled contains recitations regarding emails sent from Mr. Wenzek to the shipment recipient which appear to urge actions designed to preclude Customs becoming aware that the shipping containers held coral products. The record also is devoid of information indicating any extraordinary level of cooperation with the investigative and prosecuting authorities once the investigation began that could be weighed in terms of evidencing an altered standard of business ethics.

### 3. Acknowledgement of the Seriousness of the Misconduct and Acceptance of Responsibility.

Whether a person acknowledges the seriousness of past misconduct and truly accepts responsibility factors into the decision on whether a potential business risk presently remains. Mr. Wenzek consented to enter a guilty plea to resolve the criminal case without trial. The fact that he chose to plead guilty is considered with respect to its potential mitigation value in this debarment proceeding. Taken in context with other information of record, such an action can contribute to indices of acceptance of responsibility for illegal conduct and commitment to altered future conduct. However, without other persuasive supporting indicia of altered business attitude the action may reflect no more than self-interest in limiting the potential for significantly greater liability attendant on proceeding to trial.

Mr. Wenzek appears to essentially urge through his submissions in these proceedings that his felony offense should not be viewed as serious misconduct. He offers no personal statement for this proceeding, expressing remorse for, and recognition of, the seriousness of his criminal conduct and the threat such conduct poses to the integrity of government program operation and public confidence in them, and true acceptance of responsibility. On balance, the information and argument presented by Mr. Wenzek does not readily support a conclusion that he clearly acknowledges the seriousness of the misconduct and truly accepts responsibility.

### 4. The Seriousness of the Offense and Level of Relative Culpability.

Mr. Wenzek asserts in his September 20, 2011, contest letter that his conviction does not warrant debarment. He contends that he "is an honest and well respected businessman who became ensnared in conflicting and confusing foreign law issues." He asserts that while he pled guilty, "the trial court specifically found that his offense was not a crime of moral turpitude." Mr. Wenzek does not provide a specific citation for the assertion. Review of the plea hearing transcript shows discussion commencing at page 6 and continuing through page 9, indicates that a finding by the court of "no moral turpitude" was sought for Mr. Wenzek for purposes of avoiding adverse immigration consequences for travel to or from the United States. The Court advised Mr. Wenzek that it "was not empowered to give him any enforceable assurance..." with regard to avoiding adverse immigration consequences flowing from entrance of his guilty plea. The Judge indicates a personal view at page 9 that it does not view Mr. Wenzek's offense "as the kind of conduct that suggests in any way a willful violation as it is known in other areas of the criminal law..." adding that "...it's not a crime of violence and it's not an aggravated felony." The Judge however, then again cautions Mr. Wenzek that "I'm not able to give the defendant any specific assurance about the Immigration Service's interpretation..."

The transcripts indicate that the Department of Justice did not oppose a finding but did not join in Mr. Wenzek's request to the Court for the finding. At the sentencing hearing the Court found that "...the conduct of Mr. Wenzek was not "inherently based, vile, depraved, or contrary to the private and social duties a man owes to his fellow men or to society in general" and that therefore his actions did not constitute acts of moral turpitude (Transcript, page 7).

The debarment remedy serves different objectives than that of the criminal justice process. Debarment, an administrative remedy, focuses on responsibility and accountability as to the potential for assessment of business risk to government transactions posed by potential transaction participants rather than liability and punishment for criminal conduct. The Court's observations regarding whether moral turpitude attached to Mr. Wenzek's conduct do not answer the question of whether his conduct indicates a lack of business honesty and integrity for present responsibility purposes.

The criminal offense of importation contrary to law, in essence smuggling, is a serious one. The maximum statutory penalty under 18 U.S.C § 545, is twenty years imprisonment followed by a period of probation, with a fine of \$ 250,000. The record indicates that the Court did not impose a jail term. Instead the Court sentenced Mr. Wenzek to thirty-six months probation, with a \$16,510 fine, a community service payment of \$8,890, and a restitution payment in the amount of \$9,954.72.

The Court imposed a sentence at the lower end of the penalty scale. The sentencing information indicates an assessment by the Court under the criminal law sentencing guidelines of a relative lower level of culpability. As stated above, these debarment proceedings focus on accountability and responsibility rather than criminal punishment. The record indicates that Mr. Wenzek initiated the illegal conduct. He does not appear to be an ancillary, or minor, participant in a scheme conceived and directed by others. However, the illegal acts of record do appear to be limited in duration.

There is no indication of previous or subsequent civil or criminal prosecutions. Nor is there information showing previous or subsequent exclusions or disqualifications from Federal non-procurement or procurement programs, or any administrative agreements with the government based on conduct similar to that underlying your civil adjudication. The above information does not provide a basis to conclude that a period of debarment is presently unnecessary. But, it is given weight for purposes of determining the length of the period of debarment to impose.

### III. Conclusion.

The DOI action notice proposed a three (3) year debarment, the general time period provided under the rules. The record establishes the presence of cause for debarment. The record contains minimal mitigation information. Based on the information presented imposition of a period of debarment is warranted.

Prescribing the appropriate length of time of that debarment is not a precise science. Balancing the information presented for the record, and discussed above, a two year period of debarment provides the appropriate degree of remedial protection for the government's non-procurement and procurement program interests. Under 2 C.F.R. § Part 180, the period of debarment imposed measures from the date of this determination.

As stated previously in this decision, debarment is a present, protective, remedy. In the event of changed circumstances, reversal of the criminal conviction upon which debarment is based, or other new relevant information about remedial or mitigation actions, Respondent may at any time petition in writing for reinstatement, as provided under 2 C.F.R. § 180.880.

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

