United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, DC 20240

TAKE PRIDE IN AMERICA

JUN 21 2013

CERTIFIED MAIL
RETURN RECEIPT

Scott Gordon Muir

Chico, California 95928-4340

Re: Proposed Debarment of Daylight Tree Service, also operating as Daylight Trade Services & Equipment, LLC, Daylight Tree Service and Equip, LLC, and Daylight Tree Service and Equipment, LLC, DOI Case No. 11-0003-00; and Scott Gordon Muir, DOI Case No. 11-0003-01

Dear Mr. Muir:

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 Daylight Tree Service, also operating as Daylight Trade Services & Equipment, LLC, Daylight Tree Service and Equip, LLC, and Daylight Tree Service and Equipment, LLC (DTS). Upon consideration of the information presented in the completed administrative record, I conclude that, as explained below, imposition of a period of debarment of you and DTS from Federal procurement and nonprocurement activities is presently unnecessary.

I. Brief Procedural History.

DOI initially proposed to debar you and DTS by Notices dated May 25, 2011, 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 April 4, 2011.

The initial action notice was based upon information in the ARM regarding a history of serious poor performance by you and your company Daylight Tree Service (DTS) on contract AG-9A40-C-07-0054 (the Long Shanahan Contract) awarded in 2007 to DTS by the Department of Agriculture's United States Forest Service for work to be performed at the Groveland Ranger District of the Stanislaus National Forest in California. The ARM indicated that the serious violation of the terms of the contract included: failure to make adequate progress towards contract completion; failure to meet contract specifications; utilization of equipment poorly maintained or incapable of contract compliant performance; damage to forest resources; use of unauthorized equipment at or proximate to the job site; and attempted concealment of the unauthorized equipment use.

You, on your own behalf and that of DTS timely contested the April 11, 2011 Notices. Matters were scheduled and additionally you entered into discussions with Mr. Stanley Stocker, the DOI OIG debarment case representative, to informally discuss the action bases. Information generated in the course of the proceedings indicated the presence of performance rating sheets for several DOI contracts awarded to DTS subsequent to the 2007 Forest Service contract reporting overall satisfactory or better performance in completing several DOI contracts awarded between 2008 and 2010. However, the information disclosed indicated a remaining serious performance issue pertaining to DTS's nonpayment of a subcontractor under a DOI funded contract.

On July 16, 2012, DOI issued Amended Notices of Proposed Debarment to you and DTS based upon a superseding ARM submitted by the DOI OIG. The amended Notices and superseding ARM informed you that subcontractor nonpayment constituted the sole remaining action basis for the proposed debarments.

You, on your own behalf and that of DTS, timely contested the Amended Notices of Proposed Debarment, by letter dated August 23, 2012. Your letter included a request as part of your contest of the notices, to meet with the Debarring Official for an oral presentation of matters in opposition (PMIO). David Sims, the DOI Debarment Program Manager, then established a case schedule including a PMIO.

Under the schedule you provided additional written information by submissions dated October 19 and 23, 2012. Mr. Stocker provided a written reply to your information by memorandum dated November 27, 2012. The case schedule initially set the PMIO for November 29, 2012. You requested rescheduling. Following scheduling coordination, the PMIO took place on January 29, 2013. At the PMIO you indicated that you intended to provide additional information pertaining to the action basis of the amended Notice.

When DOI did not hear further from you, Mr. Sims sent you a follow up inquiry on February 14, 2013, and then in the absence of a reply closed the record by email dated March 5th. By reply email on March 5th you requested additional time to submit information which you anticipated receiving under a pending Freedom of Information Request evidently submitted to the OIG.

In response to your March 5th email, Mr. Sims reopened the administrative record, according you until close of business April 5, 2013, in which to make your supplemental submission of written information. Additional time extensions subsequently followed at your request.

Ultimately, by email dated June 7, 2013 and June 17, 2013, DOI received your final submissions of written information and the record closed on the latter date. 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, noncompliance 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 Amended Notices. The superseding ARM, at Sections III and IV, indicates that review of DTS's recent DOI contract performance evaluations identified an issue indicating a serious business integrity issue under the Freeman Creek mastication contract L06PC90275.

On September 1, 2009, DOI's Bureau of Land Management awarded that contract to DTS, in the amount of $22,230. DTS performed the contract in July 2010. As a part of the Freeman Creek contract, DTS entered into a $5,000 subcontract with Fire Solutions, Inc. (FSI). In a June 29, 2010, email you wrote to the owner of FSI, in pertinent part: "I would like to retain your services as a subcontractor. Daylight will pay [FSI] $1000 per 8 hours of machine operation on the Freeman Mastication Project. Payment is guaranteed 15 days after receiving invoice." FSI completed its subcontract work on the project.

Following the Freeman Creek contract completion, DOI paid DTS in full. However, notwithstanding that receipt of full payment, in the time between the 2010 contract completion and these debarment proceedings you and DTS did not pay FSI nor otherwise act effectively resolve its outstanding obligation to the subcontractor. Under 48 C.F.R. § 9.406-5(b) the fraudulent, criminal, or other seriously improper conduct of a contractor is properly imputed to any officer, director, shareholder, partner, employee, or other individual associated with the contractor who participated in, knew of, or had reason to know of the contractor's conduct.

At the PMIO you contended that the nonpayment was an isolated incident. It is understood that disputes can arise under a contract as to costs incurred. As observed above, this debarment proceeding is not the forum for dispute resolution. BLM paid you the full amount of the contract. Responsible businesses pay their subcontractors. Our duty is to ensure use of federal funds in a proper manner. The record indicates that the total subcontract amount at issue is $5000.00. It appeared that you acknowledged owing at least $2,500. You acknowledged at the time of the PMIO that you had not made any payment to FSI. Although the dollar amount in the underlying dispute, whether $2500 or $5000, is relatively minor, the principle in terms of a practice adversely reflecting on business integrity is major. The failure to make any payment whatsoever on owed amounts or to effectively resolve the claim transformed matters beyond a mere dispute over questioned charges to one resulting in unjust enrichment and evidences conduct inconsistent with appropriate ethical business standards to which a government contractor must adhere.

During the PMIO you offered for consideration information that shortly after DTS declined to pay FSI in the summer of 2010, the subcontractor filed a labor complaint against DTS with the Department of Labor (DOL) regarding the nonpayment. It appears that at that point of initiation all direct communication between you and FSI appropriately ceased pending complaint resolution by DOL.

By your account, at some point thereafter in 2010, FSI also filed its complaint in small claims court. You stated at the PMIO that in summer of 2012, Mr. Stocker shared with you that the DOL investigation was over. You also stated that after learning this from Mr. Stocker you contacted the lawyer representing you in the small claims court brought against DTS by FSI. Again, prior to initiation of debarment action no meaningful dispute resolution occurred.

The failure of DTS to accept full payment from DOI but then not pay its subcontractor for work performed and invoiced, or to otherwise promptly effectively resolve disputes associated with the claim prior to the instant debarment proceedings establishes the existence of past misconduct constituting cause for debarment under 48 C.F.R. § 9.406-2(b)(1)(i) (A) and (B), and/or 9.406-2(c); and § 9.406-5(b).

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 nonprocurement program interests only where truly warranted. Accordingly, even where past misconduct establishes the existence of cause for debarment, 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 whether debarment remains presently necessary.

In the course of this debarment action you raised a number of mitigation contentions with regard to the nonpayment of FSI. I need not, however, address those arguments in light of your June 2013 written submissions. That information documents that you and DTS have now acted to effectively resolve the FSI nonpayment dispute. The debarment remedy focuses on acceptance of and conformance to proper standards of business honesty and integrity for purposes of present responsibility.

With your submission of a fully executed agreement between DTS and FSI resolving the nonpayment dispute you demonstrate actions indicating an acceptance of responsibility for, and appropriate mitigation of, the conduct which gave rise to the cause for debarment. I also take notice of the fact that remedial value also attaches to the period of your award ineligibility running from the May 25, 2011 issuance of the initial notice to date.

III. Conclusion.

Considering the information presented for the record, I conclude that imposition of a period of debarment beyond the period of preliminary award ineligibility which commenced with issuance of the notices of proposed debarment under 48 CFR Subpart 9.4, is not presently necessary to protect government procurement and nonprocurement program interests. Accordingly, the debarment action initiated by the DOI Notices of Proposed Debarment is terminated effective upon the date of this determination.

Sincerely,

Debra E. Sonderman

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