



United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, DC 20240

JAN 25 2013

CERTIFIED MAIL
RETURN RECEIPT

Mr. Abel Martin Carreon, Jr.
Chief Executive Officer
Tripartite Escrow Corporation

Fresno, California 93721-2435

Re: Suspension of Tripartite Escrow Corporation: DOI Case No.12-0009-00; and
Abel Martin Carreon, Jr.: DOI Case No. 12-0009-01.

Dear Mr. Carreon:

This is to provide you with my decision as the U.S. Department of the Interior (DOI) Debarring Official in response to your correspondence dated October 2, 2012. Although not so captioned your letter of October 2, 2012, accompanied by no supporting documentation, appears to be, and accordingly is treated as, a request for reconsideration of my Determination dated September 20, 2012. That Determination, issued upon completion of contested case proceedings, continued the suspension of Tripartite Escrow Corporation (TEC), and yourself from Federal non-procurement and procurement activities initially imposed by the DOI Suspension Notice issued under 48 C.F.R. Subpart 9.4, on January 30, 2012.

I. Brief Procedural History.

By Notice dated January 31, 2012, DOI suspended TEC and you individually for a temporary period pending completion of investigation and legal proceedings. The Suspension Notices transmitted an Action Referral Memorandum (ARM) dated December 30, 2011, from the DOI Office of Inspector General, Recovery Oversight Office. The ARM set forth the bases for the action. DOI suspended TEC based upon alleged misconduct in the course of business operations as described in the ARM and again in the Determination issued on September 20, 2012. DOI suspended you as an individual based upon your affiliate, i.e., controlling, relationship with TEC.

The Notices informed Respondents that pursuant to 48 C.F.R. § 9.407-3 (b) (2) at the request of the Department of Justice (DOJ) no additional fact finding proceedings with regard to the material facts presented for the record in support of cause will be conducted as substantial interests of the Government in pending or contemplated legal proceedings based on the same facts as the suspension would be prejudiced. See ARM Exhibit No. 19, and letter dated June 25, 2008. DOJ's request is based on the ongoing criminal investigation. The Notices also advised Respondents that four of the twenty attachments of the ARM were held "in camera" by the Suspending Official and accordingly not provided to Respondents.

You contested your individual suspension by letter dated March 1, 2012. By letter dated April 13, 2012, in response to an April 3, 2012, inquiry letter from David M. Sims, DOI Debarment Program Manager, you clarified that TEC also contests its suspension and further advised that Respondents declined the opportunity for an oral presentation of matters in opposition (PMIO) meeting with the Suspending Official as part of the contest proceedings. By letter dated April 25, 2012, Respondents supplemented their prior submission with a stock certificate representing that you are the sole owner of TEC. On July 11, 2012, Mr. Stocker submitted for the record a brief memorandum in reply to your submissions, recommending continuation of the suspensions. A contested case determination continuing your suspension and that of TEC was issued on September 20, 2012. By letter dated October 2, 2012, Respondents assert that the suspension determination contains certain errors.

A. The Assertions.

The test for reconsideration review under DOI's debarment rule at 48 C.F.R. 1409.407-3(e) (1), is a demonstration by the respondent of the existence of a clear material error of fact or law which would change the outcome of the matter. The October 2nd correspondence advances contentions pertaining to TEC rather than your individual status as an affiliate of TEC.

Respondents first contend that TEC is not a bonding company. Respondents assert that TEC pairs contractors with sureties in order to get a fee. TEC characterizes itself at page 10 of its standard agreement form as a "facilitator" to the transaction. The September 20, 2012 Determination states at page 2 that "[t]he purpose of bonding, as TEC acknowledges, is to protect both the Government and the contractor in the event that a contractor defaults in its performance or fails to pay its subcontractors for work performed under the Government contract. It is clear that regardless of how TEC characterizes its activities, it is in the performance bonding business and may reasonably be expected to seek federal funded work as a participant within the meaning of 2 C.F.R. Part 180 or a contractor within the meaning of 48 C.F.R. Subpart 9.4." Respondents focus on the structure of TEC rather than the essential function it provides. Respondents assert a distinction without a difference which fails to rise to the level of a material fact that would change the outcome of the suspension decision.

Respondents contend that TEC's practice has not resulted in a loss of any money to the government. Respondents provide no documentation to support this assertion or how, even if accurate, it would constitute a material error. The question of whether or not the government incurred actual damages is immaterial to the question of whether Respondents engaged in criminal or otherwise improper conduct. The absence of loss does not justify fraudulent practices such as TEC is alleged to have committed. As the September 20, 2012 Determination states:

"The purpose of performance bonds is to protect the government from loss in the event of contractor default. TEC does not proffer documentation to show that where such a default has occurred on the part of contractors using its escrow process that assets existed to back pay out coverage. A bond backed by nonexistent or insufficient assets renders its

very purpose meaningless and places the Government and the taxpayers in a position of uninsured loss in the event of contractor performance failure. Presented with information posing a direct threat to the integrity of the procurement award process and public confidence in such programs, the initial imposition of suspension was appropriate. Respondents offer no information to show measures or actions taken which could persuasively demonstrate that notwithstanding the ongoing investigation, pending its completion and any ensuing proceedings, they do not pose a present continuing risk to the integrity of the federal award process."

Respondents contend that TEC has no obligation under the tripartite escrow agreement arrangement to inspect or confirm assets. Respondents provide no detailed explanation or authorities to show the presence of clear material error. A reasonable inference may be drawn that even if the function of arranging a tripartite escrow agreement is viewed as that of a "broker" there still may exist a basic due diligence obligation to investigate and ascertain the validity of surety assets proffered for matching to a contractor under a tripartite agreement. However, this contention directly relates to the underlying investigation of TEC and whether liability attaches to TEC based on its conduct, whether fraudulent, or willfully negligent. The information of record is sufficient to show the existence of "adequate evidence" to support suspension. As Respondents were informed in their suspension notices, fact finding on the alleged misconduct and the ultimate question of liability is precluded as a part of this suspension proceeding, by directive of the Department of Justice under 48 C.F.R. 9.407-3(c) (6) that to do so may jeopardize substantial interests of the government in pending or contemplated legal proceedings based on the same facts as the suspension.

Respondents assert that the statement at page 5 of the Determination that "TEC represented it backed the bond..." is inaccurate. Similarly, Respondents assert that "TEC never represented itself as pledging any stock it owned for any bond". Again, for purposes of federal contracting, the essence of TEC's business is to identify and make available to contractors surety sources with assets. The assets owned by the surety are provided as collateral for what in effect is a performance bond in the event of default, or performance failure by the contractor. It appears that in the triangular structure of the tripartite agreement, TEC enters into and manages an escrow agreement with the contractor. Under the agreement TEC designates the financial institution, such as a bank, to hold the assets. Assets of a surety identified by TEC for use as collateral are transferred from the surety to an escrow account at the financial institution. The financial institution acts as the escrow agent. TEC serves as the escrow account manager and receives a fee for its services.

Respondents assert that an error of fact appears on page 7 of the Determination. However it is unclear from the October 3rd letter precisely what Respondents believe to be the factual error. The paragraph in question states:

Respondents' business activities indicate a focus on the Federal award community. At the time of the suspension notice issuance, TEC was actively engaged in seeking surety transaction work under federally funded projects. Respondents state in their March 1,

2012, letter that they are "no longer referring contractors to any individual sureties and [have] removed individual surety bond information on the TEC website". However, information provided by OIG indicates that Respondents advertized on the Fedbizopps website until at least August 30, 2012. Absent the protection of suspension, it is reasonable to conclude that respondents may likely seek to participate in federally funded projects prior to the completion of the ongoing investigation. Continuation of suspension effectively removes from Respondents the discretion on whether or not to seek award participation.

The factual point of the paragraph on page 7 of the decision is that Respondents currently seek business under federal funded projects. Respondents acknowledge in their October 2nd letter that they "...do advertize every day on Fedbizopps..." Respondents do not establish the presence of a clear material error in the Determination.

III. Conclusion.

Respondents do not demonstrate the presence of clear material error that would alter the conclusion in the September 20, 2012, Determination that based upon the information of record at this stage of the proceedings, adequate evidence, i.e., "probable cause" remains to support continuation of suspension pending completion of investigation. Moreover, Respondents' assertions directly relate to the underlying investigation of Respondents' conduct on which fact finding in this suspension action is precluded under 48 C.F.R. 9.407-3(c) (6), as it may jeopardize substantial interests of the government in pending or contemplated legal proceedings based on the same facts as the suspension.

Respondents remain suspended. Suspension, however, is not indefinite. Both the Notices and the Determination state that under 48 C.F.R. § 9.407-4(a), suspension ordinarily does not exceed twelve (12) months from the date of its initiation unless legal or debarment proceedings are initiated. Under 48 C.F.R § 9.407-4(b), the suspending official may extend the twelve month limit by an additional six months, upon the written request of an Assistant Attorney General. In no event will the suspensions exceed eighteen (18) months from the January 30, 2012, date of the initial notices absent initiation of legal or debarment proceedings.

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 Files