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Hi, my name is Carl sacado. I'm a partner in the government contracts group of Wiley reine. In Washington, DC. Wiley Ryan is a regulatory law firm that has one of the largest and most prominent government contracting practices. Today I'm going to be talking about suspension and debarment, and government contracting, and in particular suspension and debarment, under the procurement rules of the Federal Acquisition Regulation, otherwise known as the far so during today's webcast, I'll be talking about some trends that have increased focus on suspension and debarment. In the Federal Procurement space, the basics of suspension and debarment. Under the far a little touch on a little bit judicial review of department decisions, where suspension and debarment fit within other available government remedies, administrative agreements that are entered into between the government and contractors in lieu of suspension and debarment. And give you a few practitioner point, pointers or insights based upon my experience in the field of suspension and debarment.

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So the first thing I wanted to talk about, and it starts on slide three are is the increased focus in Congress and UN agencies on the administrative remedy of suspension and debarment. After two contingency operations and concerns that contractors with less than satisfactory records of business, ethics and integrity, seem to be continuing to win contract awards, Congress became concerned with whether or not this remedy of suspension and debarment was being appropriately and sufficiently used. They initiated a study by Gao to go and look at how agencies were using suspension and debarment. And Gao did that report in August of 2011. And and found some gaps in the practices of the six agencies that it that it reviewed that finding and those gaps have led to activity, both at the agency individual agency level and at the global level at the

interagency suspension and debarment committee to shore up some of the practices, increase staffing, and promote Beck's best practices at agencies for exercising suspension and debarment. So fast forward to 2014. And Gao went back and looked at the same six agencies that it looked at the first time and found dramatic improvements, both from a staffing and procedural and consistency perspective. But also, all those statistics don't really tell the whole story of of everything there, there was a market increase in the activity of suspension and debarment at these agencies. So for example, you know, there's just been an increase across the board, but at the six agencies between 20 fiscal year 2009, the six agencies had taken 19 suspension and debarment actions in total. In fiscal year 2013. They took 271. So, message received. Then I mentioned the interagency suspension and debarment. Committee. This is an organization of debarking. Officials that coordinate to assure that lead agencies when more than one agency is affected, that lead agencies are established and respected to share best practices to promote outreach to the community, a variety of different things. They are required by statute to report to Congress on statistics in suspension and debarment. And over the last 10 years, there has also been government wide a marked increase in suspension and debarment. The most recent report came out in March of 2015. And compared fiscal year 2013 and 2014 statistics. So in fiscal year 2013, there was slightly fewer than 1700 debarment action 1696. In 2014, there were over 1900 19 129 debarment action, so an increase between fiscal year 2013 and 14 referrals to suspending and de barring officials or stos also went up by slightly, slightly smaller amount but still went up there. We're in fiscal year 2014, an increase in show cause notices, which we'll talk about as we go through the presentation. And then they also provide statistics on declarations and administrative agreements. On slide five, I've presented some charts that really show a four year look at suspension and debarment between 2010 and 2014. And although the suspension numbers rise Fall slightly, the overall trend is is decidedly upward going from 612 and 2010 and ending in 1009 and 2014 proposed departments likewise, a steady increase from 2010 when there are 12 165 proposed departments to over 2200 in 2014. So, the fact that the regulators are focusing more on suspension and debarment means that we as lawyers need to focus more on suspension and debarment and try to to keep our clients out of that arena.

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On slide six, I have a couple legislative initiatives that were taken in response to some of these Gao reports and the concerns that were on the hill. The fiscal year 2013 NDA put in the requirements for the isdc to report to to Congress shored up some of the Small Business Administration department requirements in light of some high profile lapses. In the Small Business arena, primarily misrepresentations of size status. There has also been since 2013, provisions put into consolidated appropriations acts that say, essentially that no federal funds can be used for any kind of contract grant or award for a contractor who has been found liable for tax delinquencies are a felony within the last 24 months, unless the agency has considered taking suspension and debarment activities. So Congress has followed up on its concerns in these two

ways. So let's turn now to the basics of suspension and debarment. Under the far the far 9.1 is where the responsibility requirements start. In our system of procurement, the government has a policy that it will only do business with what are called responsible contractors, contractors who have both the the ability to perform the contract financially, technically, but also have a satisfactory record of business ethics and integrity. And so far 9.1 deals with those affirmative responsibility requirements and requires the government before the award of a contract to make an affirmative determination that the contractor is presently responsible. And one factor of that is a satisfactory record of business ethics and integrity. Far subpart 9.4 addresses suspension and debarment and that focuses on present responsibility that arises after award and during the course of contract performance. So when we talk about suspension, proposed department and department What are these things, suspension and proposed department disqualify the contractor from government contracting temporarily debarment disqualifies the contractor from government contracting for a specified period generally three years. All of these remedies are discretionary. They are not mandatory, which means that even if there is a cause for suspension, proposed department or department, the SDO does not have to take that action, he or she has discretion to decide that it's not necessary to do so in to protect the government's interests. In addition, these remedies are not supposed to be used punitively, they're not punishment. Instead, it is again, is this is precluding the contractor from contracting with the government either temporarily or permanently necessary to protect the government's interests. An important thing to think about when facing a serious incident at a company or contractor that may affect their present responsibility, is it that suspension and debarment doesn't always relate to activities that occur under the contractors, government contracts per se. It can arise and we'll talk about some of the causes of suspension and debarment that that allow for this, but it can arise from activities that are unrelated to your performance of a government contract. So for example, financial reporting irregularities or accounting irregularities could lead us suspending into barring official to question a contractor's present responsibility.

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So what are the causes for suspension these are identified and far 9.407 dash two, the sto can suspend a contractor based upon adequate evidence of and when I say adequate evidence of there are different standards of proof that apply for suspension and debarment and proposed debarment. Adequate evidence is the suspension standard. There's a list of the possible causes in 9407 dash two. Some of the obvious ones are commission of fraud in connection with obtaining, attempting to obtain or performing a government contract, anti trust violations, other types of of criminal activity such as embezzlement, bribery, falsification of documents, false statements, there are other, less obvious ones, such as fixing a label to an item saying it was made in America when it was not. For those of you who practice in the government contract space, there was a in 2008 timeframe, a new cause for suspension and debarment added to the far and that relates to the mandatory disclosure obligations that are set forth in the far clause 52.203 dash 13. So if a

principal of a contractor fails to comply with the mandatory disclosure obligations under that far clause, that can be a cause for suspension and debarment. And indictment on the fences that are listed in the in this far provision is equivalent to having adequate evidence. So indictment is enough. Again, that doesn't require the SDO to take action against the contractor and only permits action. There is also in 9407 dash two a catch all. So the sto can suspend a contractor for any cause so serious and compelling in nature, that it affects the contractors present responsibility. That kind of catch all gets the kind of other types of ethical or business conduct lapses that might not be enumerated in the far clause. The causes for debarment are set forth and far 9406 dash two, and here, the SDO can dbar a contractor can not must based on a conviction or civil judgment for some of the same offenses that we saw in the prior far clause. So for example, conviction or civil judgment for commission of fraud in connection with obtaining or attempting to obtain a contract, violation of federal anti trust laws, forgery, bribery, the same kinds of things that we saw. Under this, the suspension code clause, there are also commission of any other offense, indicating a lack of business integrity or business honesty. So if you're convicted for some other type of of violation, perhaps it's a violent violation of an environmental law, or something like that, that could be grounds for suspension and debarment as well. In addition to these conviction judgment based actions, on slide 10, there are other kinds of causes based on a preponderance of evidence standard. So based on a preponderance of evidence standard, the SDO could dubara contractor for again, fixing the label Made in America when something was not delinquent taxes, again, a failure to comply with the mandatory disclosure obligations that I mentioned before that are in in the far another preponderance of the evidence standard that could lead to debarment that we would refer to as fact based as opposed to a statutory based One is if the contractor willfully fails to perform or has a history of non performance of government contracts. So a serial default terminated contractor can face suspension and debarment. Under the far and similar to the suspension causes for suspension and debarment. There is also a catch all under far 9406 dash two for any cause, so serious and compelling in nature, that it affects the contractors president responsibility. So really pretty broad summary numerated Some are left to a pretty broad discretionary standard.

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What is the effect or impact of suspension proposed department and department. Those who are unfamiliar with this administrative remedy might not realize that it applies government wide not just by the agency that initiate action against the contractor. So if the Air Force takes suspend a contractor or proposes that contractor for debarment, that contractor is immediately precluded from competing for contracts with the GSA or the Army or the Department of Interior. It applies government wide. It is also reciprocal there is a separate debarment and suspension regime under the non procurement rules that apply to grants and cooperative agreements and this is called the non procurement. Common role if a if the airforce to use our example, durbars, a contractor from ours proposes a contractor for debarment or suspends a contractor that from

from contracting under the far that contractor is also considered to be precluded from from contracting under the non procurement rules, so no more grants or cooperative agreements, the effect of a suspension or deposed proposed debarment and mind you propose debarment not just DEP is immediate. So as soon as an agency decides it's necessary to take action by suspending a contractor, or proposing that contractor for the barman that the contractor is precluded from competing for new government contracts as soon as as that decision is made, and it's effective upon listing on a database that's called the System for Award Management or Sam. Sam is a conglomeration of various other databases, one of which was the former excluded party list system that listed all suspended and debarred contractors and individuals that's now been rolled into Sam. So as soon as the contractor is listed on Sam, that contractor is precluded from government contracting, and then the contractor also has going forward obligations. This affects representations and certifications that are also required under the far and the the action must be reflected in in the certifications of the contractor going forward until the action is lifted or expired. One thing I talked about new government contracts and contracting activities. Under the far the government is not required to terminate existing contracts, it can decide that that whatever the conduct is that the contractor entered into is grounds for default termination, but it's not required to terminate contracts that are in existence, what it cannot do is issue or solicit new contracts. And so what does what does this mean in reality, like if you have a task order contract and Id iQ? Well, it means that they're if there's a guaranteed minimum they can place additional orders under it can place orders under optional agreements like BPA is blank a purchase agreements can't add work to a contract can't add scope, can't exercise options can't extend the performance date. In a sense, that contract is maintained and frozen at the status quo at the time that the activity was taken. In the sealed bidding context. say there are bids outstanding. The bids are logged, but they are rejected in the FAR Part 15 negotiated procurement proposal context where you were a contractor might have submitted proposals and then a department action is taken against the contractor. The proposals can't be evaluated. That contractor is not put into the competitive range, they are not privy to discussions with the agency. If the suspension or debarment is lifted during the course of the competition, the contracting officer may allow the contractor back into the competition, but he or she is not required to do so. Under limited circumstances, when there's a compelling need, the government can enter into a contract with a suspended or debarred contractor. Again, they have to show that there's that the compelling needs exception is met. So for example,

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say there's a contractor and that contractor is the one of only a couple manufacturers have a particular vaccine that's very important, like smallpox, or anthrax or, or polio. And you need to have want to have for industrial base reasons, at least two contractors going or at least some kind of back supply that might satisfy a compelling needs exception, but it's rarely exercised. It's truly when there is not another option. It's not widely exercised. You cannot switch your hats as a

suspended or debarred contractor and suddenly become a representative for or a subcontractor for or an agent for another contractor. So it really freezes you as a contractor at that moment in time when the department action is taken and and the reality of this and why we as counsel and contractors as as responsible business partners would also want to avoid this administrative remedies. It can leak over into your commercial business. Many commercial companies also have policies about who they will do business with as vendors or partners, and may have reluctance to enter into relationships with companies that have been suspended, proposed for debarment or debarred. So, the effects of suspension and debarment in addition to affecting and freezing the contractor can be imputed, both horizontally and vertically. And what does that mean? At the default rule is that the suspension and debarment of, of a company extends to all divisions or organizational elements of that company unless the sto limits the department. So a failure in say,

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you know, one year the it

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division of a company could affect the weapons manufacturing division of the company, even though they're very separate, unless there is a carve out between the divisions of the company. Back in the in the 90s, there was a rather high profile suspension by the Air Force of the Boeing Company for some concerns related to the Launch Services Division of that company. In that instance, only the Launch Services Division was suspended. That was specifically determined by the Sto. The general default, though is that it applies to the whole company. What if the misconduct is really, you know, started with some individuals? Well, the misconduct of an employee, particularly say an executive officer shareholder, can be imputed to the contractor if it occurred in the performance of the employee's duties, or with the contractors knowledge and acquiescence. So it can be imputed from employees up to the company. Likewise, contractor misconduct can be imputed downwards to the to an individual who had reason to know of the misconduct and perhaps took no action in response to it or even participated in it. So that's vertical imputation. It can also extend horizontally to affiliates if those affiliates are x x, specifically named and given written notice and an opportunity to respond. So So and what is an affiliate, it's defined in the far the companies are affiliated if one controls or has the power to control the other or a third party controls are has the power to control both organizations and there's indicia of what is affiliation that are that's identified in the far So not only can the parent be suspended or debarred, that department can extend to all of the subsidiaries if they meet the the the definition of affiliation. And this was tested relatively recently in in 2013, a parent company public warehousing Corporation was suspended for by the Defense Logistics Agency for suspected inappropriate conduct. DLA also suspended all of the affiliates of PwC. And there there were many of them. After a number of months, the the affiliate challenged their suspension

saying well, no legal proceedings have been brought against us the affiliates, and no misconduct by us the affiliates has been identified, and therefore you should lift the suspension and debarment. The affiliates won this argument at the district court level. But at the 11th circuit, the 11th circuit reversed the district court and said that an affiliate can be suspended solely on the basis of its affiliate status, it can be suspended or debarred. There need not be any misconduct by the affiliate itself. And what the courts that is the president responsibility of an affiliate is irrelevant. It's the affiliation that leads to the conclusion. So again, you know, the scope of the action can be very broad and very damaging to to a business that finds himself subject to this administrative remedy.

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I mentioned before that you can't switch hats and all of a sudden become a you know, a government contractor in a different guise. As a suspended or debarred contractor this extends to sub contracting. So, for some actions, the government is required to approve a subcontractor if there if it is required to approve a subcontractor it can't approve a debarred contractor to be a subcontractor. Likewise, many contracts and clewd far provision 52.209 dash six, which is protecting the government from suspended debark contractors, which puts obligations on primes to not enter into sub contracts for more than $30,000, except for commercial off the shelf or cots items, apps and a compelling reason for doing so. If the contractor decides to enter into such a subcontract, it has to go through a number of hoops of notification and ensuring the government that that there's a need to do so and that the government interest will be protected. But you can imagine as a subcontractor or as a prime contract debt contractor that it's unlikely you're going to go through all of these efforts to enter into a subcontract with a company, unless you really can't get the service anywhere else if they've been suspended, or de bar because of the responsibilities it puts on you as a contractor. What is the period for suspension and debarment? The the standard general period for debarment is three years. There are a few exceptions for drug free workplace and certain immigration type Homeland Security violations. But generally the period is three years. If the contractor is suspended, they get credit, so to speak, for time served. extensions of the period of debarment are permitted but not for the same reasons that led to the original department, there has to be something that's happened during that three years, you just can't re up it. And the period of debarment can be also be reduced. So if there's a change in the management of the company, or elimination of the cause that led to the department or some other reason, maybe the reversal of a conviction or civil judgment that led to to the exclusion, if that happens, yes do can reduce the period of the proposed debarment if he or she thinks so. suspension, a suspension as the name success suggests is supposed to be temporary. While the government sort of evaluates whether or not it's necessary to de bar the contractor, so it is in place while the investigation by the SDO continues. Usually, it's supposed to be in place for 12 months, with the six month extension at the request of the DOJ assistant attorney general. So for example, if the DOJ has an investigation that it is conducting, at the same time, that an sto is

considering action against contractor DOJ can request the sto not take action yet and keep the suspension in place while DOJ continues its investigation. It's supposed to stop after 18 months, and can exceed 18 months only if legal proceedings are initiated. And so that was what the affiliates in the agility case war. We're focusing on that no legal proceedings had been brought against them. So after 18 months, they should have been released. But again, like I said that they were sucked in by by virtue of their affiliation with with their parent company. So, if you find yourself a faced with a proposed debarment or suspension, what are your rights as a contractor, the contractor has a will receive a notice of suspension or proposed debarment the notice of suspension and proposed department will state the basis for the cause that led the SDO to to take the action, the contractor will be informed that they have 30 days to provide a response in writing or in person, most of the time people doing and writing information and argument opposing the proposed debarment or suspension.

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Increasingly, there is a push at the isdc level and at the agency you know promoting best practices is where it is not critical to immediately halt a contractor from performing to use something lesser that doesn't get them immediately listed such as a show cause letter or request for information. These are not discussed in the far but for practitioners in the area. This has become a more an increased use of a lesser kind of factor. By the SDO, really, in response to concerns that actions were being taken to suspend suspend and proposed to bar contractors, or when the SDR really hadn't done and if they had just done a little bit more fat gathering, they might have found that that action wasn't necessary. So a lot of agencies are, are heating that, that concern and using show cause letters. Also another way that contractors interact with an sto, and try to sort of fend off suspension and debarment. And I'll talk about this more later. His early interaction with the stos office when there's been an event that might affect the contractors present responsibility, in other words voluntarily going in. But say you receive this this notice of suspension or proposed department, you can ask for the administrative record, there is a process for fact finding, but honestly, it's very rarely used. There has to be a genuine dispute of material fact. So when there has been an indictment or conviction or civil judgment, there's really not a genuine dispute of material fact, or at least the standard is met. And maybe with an indictment, one could argue but an indictment is adequate evidence for suspension, if there's a conviction, you're not gonna re litigate the criminal case before the sto, they're not going to find that there's an adequate a genuine issue of material facts. But if there is a genuine issue of material facts the far provides for the for the process of a hearing, and it's set out in the far and 940634 department and 9407 dash 344 suspension. In in practical terms. I have had several numerous proceedings for contractors were suspended or proposed for debarment receive show cause request for informations I've never had a hearing. These are often resolved, as business matters often through a lot of exchange of written information meetings. But there is the process that for a hearing if if so demanded and and and warranted because of a genuine issue of material fact, the SDO that

when is he or she supposed to give a decision? If it's if the action is based on a conviction or civil judgment, or there's no genuine issue of material fact, the SDS decision is supposed to come within 30 days of the contractor submission apps in good cause. Where there is an indictment, no issue of genuine fact or DOJ precludes factfinding proceedings, there's not really a time limit. in there, all of the time periods are frankly pretty wofully in the in the far so it's not like you know, you can guarantee that you're going to get a decision on on a particular date. I mentioned before that there are certain actions that are sufficient to establish a cause for suspension and debarment. So adequate evidence of the offenses for suspension, preponderance of the evidence or, or an indictment or civil conviction on suspension side indictment on debarment sides of a conviction. Those satisfy the burden of establishing a cause for suspension and debarment. After causes establish it's the contractors responsibility and burden to demonstrate present responsibility. Generally, this is done.

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You know, even if there's a conviction, you can, again, as I said, it's not mandatory that a contractor gets suspended or disbarred, you can try to show that that you're presently responsible and make changes in the organization that mitigate against that and there are and that's how contractors generally go about when there has been something you know, an event in their corporate history that affects their present responsibility. They we tried to meet as many of the far mitigating factors and I'm going to talk about in a minute to show that we are despite that event, despite the mistakes that were made, the contractor is presently responsible. Now individuals can be suspended proposed for debarment and barred for individuals the responses and the burden is a little bit different. Because the Far mitigating factors that I'm going to talk about, don't line up, you know, perfectly with individuals just because they're they're really focused on what a company can do. And an individual, for example, can't Institute an ethics program or something like that. But, you know, again, with individuals, the individual is also trying to come up with bases for assuring the government that, that they don't pose a risk to the to the government, somewhat relying on on the mitigating factors but tailoring them to to the situation of an individual and stos decisions and you can sort of get a sense of this by the nature of the bases for and the causes for suspension and debarment. is afforded considerable deference, there's a lot of discretion that goes into whether or not to exercise the remedy. And, and why and, and those kinds of things. So really, the difference is so high and the effect on on a business is so severe and so immediate, that really, we try as practitioners to make our best case and our best presentation at the sto level, not trying to, you know, fight it out in court after a decision has been made. If, if you haven't quite convinced the sto of your president responsibility in the sto is on the fence, so to speak about the contractors president responsibility. One of the remedies, again, not discussed in the far but commonly used by, by, certainly, some do D agencies, and other civilian agencies is an administrative agreement, which is an agreement in lieu of suspension and debarment. And we'll talk about those. So, again, this administrative agreements aren't really

discussed in the far but they are quite commonly used.

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Alright, so I talked about demonstrating present responsibility, I talked about the mitigating factors in the far the mitigating factors that might mitigate against right counsel, those suspending and de barring official not to take suspension, or debarment. Action, those are in 9.406 dash one and there are 10 mitigating factors, I would say in my experience, they're not 10 equally rated, mitigating factors. So it's not an it's not a math exercise. So it's not if you get eight of them, you know, you're you're in, because you have a B plus, it's really, these are our factors that an sto will consider. And you want to try to line yourself up with as many of them as possible for sure. But, you know, I'll talk about one in particular that I believe if you have the absence of this one, it might undo all your your good works. In these are really just all the factors that an sto would consider to decide whether or not it's really necessary to take action to protect the government's interests. So the first one, and at this point, I'm on slide 18, is an effective standard, did the contractor have effective standards of conduct and internal control systems at the time of misconduct, or since the misconduct now these mitigating factors were put into place in the far before, the requirements for an internal control and ethics system were put in place in the far in far provision 50 to 203 dash 13. So there's a little bit of a disconnect between the current obligation for many, for many contractors to have an internal control and ethics system, and this far mitigating factor. You know, today, contractors of a certain size and variety have to have those kinds of systems in place. So really, what's a contractor gonna? I mean, what's an sto gonna look at, given that you're supposed to have an internal control system? Well, you know, the father doesn't dictate what that internal control system is supposed to, to include down to the every level detail. So they'll want to know if if you had in place, you know, the bare minimum, or did you have a really, you know, a program that went above and beyond? In other words, were you trying to do the good, the right thing? Or worse, or was that contractor you know, either not complying with its obligations under the far provision, not subject to it and not doing anything to ensure an ethical compliance operation, or, you know, flying without a net, or were they trying really hard to do the right thing and yet there was a lapse nonetheless. So when we would go in and talk to a debarring official, we would have a lengthy discussion. have what are the attributes of the ethics and compliance system at the time? And then I'll turn to you know, if mistakes were made, probably you'll want to think about some improvements to that system. second factor, did the contractor raise the issue with the government in a timely manner? Again, mandatory disclosure is now a requirement, as I mentioned before, for certain types of violation, certain civil and criminal violations. But let's say it wasn't one of those, let's say, you know, the procurement integrity act, for example, is not specifically enumerated in the mandatory disclosure requirements. That but the procurement integrity, procurement integrity act violation could certainly be grounds for a debarring official to have concerns about a contractor's president responsibility. Did the contractor bring that procurement integrity act violation to the

government's attention? That would be something that would be indicative of your responsibility, your transparency, your trustworthiness, as a contractor, say it's a mandatory disclosure obligation? Did you do a really full sum? disclosure? Or did you or was the disclosure not quite accurate or not quite complete or not quite truthful? Again, that might be something that factors into whether you raise the issue to the government in a timely manner. Next mitigating factor did the contractor investigate the misconduct and share the results of the investigation with the SDO? Now, you know, in my experience, stos do not require contractors to waive the attorney client privilege. Many internal investigations are done under attorney client privilege. But that doesn't mean you can't share the facts found or facts of the of the misconduct with the SGS office

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advice and all of those things that go into a privileged communication don't include facts, facts or facts. So did you share the facts of whatever arose? And did you investigate it and how fulsome was that investigation, a contractor that puts its head in the sand might not impress the government as a trustworthy responsible business partner, as opposed to a contractor when when misconduct is brought to its attention goes out and tries to find out, you know, what happened and whether there's truth there and then shares the results with the government? That's the kind of thing that this mitigating factor is getting up? Did the contractor cooperate with the government during its investigation or in any court action? So, you know, say there's a DOJ investigation going on or DCI s NCIS? Was the contractor cooperative? Or was it resistant? Did it fully produce documents make employees available? Or did the contractor say you know, forget it, you're going to have to come in and seize the documents. That's the kind of thing that would also go into a presentation about about President responsibility, has the contractor agreed to pay all criminal civil or administrative fines and liabilities, pretty straightforward. If you're not gonna pay all of the things that have been assessed that might not show that you accept responsibility that might not impress the debarring official, the fact that you have paid up or are willing to pay, you know, we'll talk about this in the context of remedial measures, but perhaps, you know, give a credit to the government or re perform work that would be something that might be impressive to an sto this this the next one has the contractor taken disciplinary action against the wrongdoers? This gets you know, a reasonable amount of attention by sdos really, because of it is a window into an organization whether the contractor only takes action against low level employees for example, and yet the managers and and executives or whomever who directed those low level employees are are not disciplined in any way or are somehow excused or receive a you know, different treatment, how does the contractor as a as an organization as a whole respond when there is an incident or misconduct so you know, in addition to looking at the who is disciplined and how the company reacted in that regard, might be the level of discipline so the proverbial slap on the wrist or was real, effective disciplinary action taken and that, as I said, can be a window into give some insights. To the sto about how that contractor operates. The next mitigating factor is whether the contractor agrees to implement remedial measures. This is a, this

is a big one, in my experience, although stos might, I mean, they're human, they make mistakes and sometimes act without the full information. And sometimes, you know, actually make mistakes, but a lot of the time. While there may not the facts might not be as bad as they think, or the fire burning as brightly as Yes, do my thing. There's often smoke, and the fact that a contractor has found itself in front of an sto,

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often is a time for self reflection, and to see if you know, even if we can avoid suspension and disarming is there improvements that we can make. So, you know, if it was a time charging violation, should we make a credit? Should we do more training? Should we upgrade our systems? Should we provide better oversight of time charging? Those those kinds of things? If it was maybe a product issue a quality issue? Should we repair it, replace it? Again, you know, improve our policies that can apply to anything time charging or quality, improve our policies to clarify what employees should be doing all the time. And, and and, you know, it gives you a chance to when thinking about the remedial measures? How can we prevent a recurrence of the kind of thing that led to the stos concerns in the in the first instance, often there will be an ethics and compliance component to this. Maybe it's with training, maybe it's with a stand down, maybe it's with a, you know, an heightened focus on a particular area. So, you know, if the if the concern related to the Foreign Corrupt Practices Act may be a real initiative to make sure people understand their obligations under the Foreign Corrupt Practices Act. So those kinds of things, have you agreed to take or implement remedial measures to address the misconduct and prevent a reoccurrence. Similar to that, one is, have there been new or revised control procedures and ethics training. So, you know, very similar, we would identify any improvements that were made since the incident, any improvements we agreed to make going forward has time gone by to eliminate the circumstances that led to the proposed department. Shockingly, sometimes, these department actions can really lag behind, you know, say in a civil judgment or some other kind of judgment. And sto is taking action years after the event that that led to the the cause of the concern. So maybe it's a whole new company now maybe it's under new management, maybe it's been sold new sheriff in town kind of mentality. So you might want to show if, if that's happened, that there has been changes that that makes contractor today is not the same contractor as yesterday. And then to me, one of the really the most important ones that sort of signal whether or not every all the other mitigating factors mean anything is whether the contractor management recognizes the seriousness of the misconduct and agrees to implement programs to prevent a reoccurrence. So this is sort of, you know, folded into all of the other mitigating factors, but, but really, it sort of comes down to this, if if management doesn't see anything wrong, and the sto does, and management is not on board with, you know, addressing the concerns, you know, paying your fine is not gonna probably do it, there really needs to, for the government to be comfortable, they really need to have a sense of the tone at the top of the company is one that is transparent and forthcoming, and that you can be a trustworthy business partner. And if that tone at the top is

missing, it's going to be hard to convince the sto that all the other things really kind of matter. So, you know, for at least for me personally, and in my experience, I think tone at the top is critical. And so oftentimes, senior management of the company up to an including the CEO might meet with the SDO, to talk about, you know, the company's response and the facts and to to to convey that the company executives really take the stos concern seriously, and to You know that they are in fact a presently responsible business partner.

50:07

So we've gone through the mitigating factors, we've done our presentation, perhaps the the unusual incident of a hearing happens and an adverse decision comes up and you want to get judicial review of it. This is available, you know, in District Court under an APA kind of standard of review. But as those of you who practice in administrative law will know that that's a pretty deferential standard of review. It's arbitrary, capricious abuse of discretion kind of standard. And, and, frankly, a lot, you know, depending on the grounds for suspension and debarment, and how the mitigating factors might have been assessed, you can see that there's, there's multiple avenues and layers for discretion to be exercised. So it's, it's a, it's a difficult challenge. And as I said, before, you know, by the time you're at the judicial review stage, and you're litigating in court, and you're waiting for a court decision, you know, that could put some companies out of business, because the whole time they're precluded from competing for new government business, might not put all companies out of business, but it's certainly going to hurt the bottom line. So, you know, getting to court ish. My view should not be your objective. You know, people usually when when an action is challenged, the relief side is declaratory or injunctive relief, you can try to get a preliminary injunction to enjoin the action. But that requires meeting the traditional four part test, which, you know, some of those grounds might be easier to show than others, but have to do that. So you're going to be unless there's a real deep flaw in the stos. proceedings, then you're going to be fighting it out sort of on the fringes of the facts. Now, that's not to say that some stos don't just get it wrong. But again, getting to the judicial review stages is you want to try to head that off before you get there. suspension and debarment actions often occur in conjunction with the government trying to exercise other remedies, suspension, and debarment is an administrative remedy. It's not a criminal remedy. It's not a civil proceeding, judgment type remedy. But you will often find all of those things occurring together. So a contractor might find itself subject to a criminal investigation by the Department of Justice, there might be civil proceedings relating to the same misconduct, perhaps a key Tam action by an individual and then that same contractor will find itself being questioned about its president responsibility by NSF do these organizations talk to each other? So your mandatory disclosures to add to an ID certainly, if it's going to the Department of Defense, it would be shared with the debarking officials. They share information between the barring officials in the Department of Justice. So So oftentimes, these are all occurring at the same times, and this can be, you know, admittedly a real challenge. Because on the criminal side of the house, there is going to be a

certain perhaps desire, not necessarily depending on the criminal case to say admit liability. Yet on the SDO side, you're going to want to be showing that you accept responsibility, and navigating this, particularly if there hasn't been any resolution of the civil or criminal actions can be you know, it is a challenge and it's it requires careful navigation to to get through, but they often occur at the same time, and settling with one of these doesn't settle everybody else. So you might settle with the Department of Justice on a civil matter, and they might decide not to go forward with a criminal violation, but the SDO might still have concerns about the contractors present responsibility. So you just have to bear in mind that sometimes it is a perfect storm, and you need to navigate that that perfect storm, thoughtfully.

54:39

I mentioned administrative agreements, administrative agreements in lieu of suspension and debarment. These are essentially like settlement agreements where the contractor agrees to put into place various protections and and processes that allow the government to lift the suspension and debarment and have confidence that The that the contractor is presently risk will behave in a presently responsible fashion. Similar to the period of debarment, the period of the administrative agreement is usually three years. It will, you know, different agencies have different predilections towards administrative agreements, some are very receptive to them, others are, are less. So, these are sometimes they you can find them publicly posted on the agency's website. So, for example, the Air Force posts there's they are to be noted, regardless in the fabulous database, the Federal awardee integrity information performance system, which has past performance information so that other contracting officers before when they're doing respond affirmative responsibility determinations, know that that administrative agreement is out there. So what are some of the common elements of an administrative agreement usually there is some statement that there is cause for that the current parties acknowledge that there was cause for suspension in our department. And that a violation of the agreement could be grounds for suspension and debarment. There is usually something in there to improve self governance or ethics or compliance programs, there might be enhanced training, there might be additional resources added to the ethics or compliance department, there might be an agreement to have an independent you know, ethics adviser come in and do a review of the company's program, there might be requirement for an independent monitor to monitor the company's compliance with the administrative agreement and compliance processes generally. Usually, there's a commitment to continued cooperation, access to records and employees for the government. There's usually a periodic reporting requirement that might include reporting on enhancements to the ethics and compliance program and might include reporting on training reporting on internal investigations conducted reporting on subpoenas that the company might receive related to its government business search warrants, government investigations really depends on the agency and and and what is necessary to keep the government comfortable that the contractor is is operating in presently responsible fashion. It may be accompanied by requirements to come in and meet with

the sto every so often and chat, maybe management come in or something like that. So those that's that's fairly standard. Oftentimes, the administrative agreement carries forward if a business unit or businesses is sold, in my subsequent belay be lifted, if the if the concern was based, for example, on affiliation, or something like that, and the affiliated company is no longer affiliated with the original wrongdoer, you might be able to get the government to lift that it would obviously make sense to do so. You know, but the general rule is that it carries forward and then you know, you might be able to get it lifted later. There is usually a release of the government for actions taken in the suspension and debarment action oftentimes will be a requirement to notify employees of the fact of the a notification to major suppliers and subcontractors of the fact of the a, you know, again, both of these emphasizing commitment to integrity and compliance with the with the a and and other responsibility. obligations. Sometimes they'll be obligations to check the System for Award Management for new hires or business partners to make sure that you're not hiring or entering into business relationships with contractors or individuals who are not presently responsible or suspended and debarred. And those kinds of things and and there's, I mean, there's more sometimes, you know, there'll be something about on allowability of costs.

59:34

And I'm just giving you a highlight of them. Some of them are very standard. If you You looked on the airforce web page, you would see a lot of, you know, standard clauses you would kind of know a little bit of what to expect. But again, they are also going to be tailored to to the nature of the situation. There might be a requirement for management, for example, to be replaced. That's not necessary in it. Every single incident and so that would, you know, that might be added where, where the sto believes it's necessary and the company agrees to do it. So in closing, I just wanted to give you some, I don't know, I call them practitioner pointers, but I could just say that there are insights from somebody who practices in this area. And my first pointer is, is a little self serving. But but bear with me, I think that it is, when a contractor is faced with a suspension and debarment action, it is very beneficial to, to think about engaging outside counsel with experience in this area. And there's, you know, the first reason is, is really almost the most important to me, and that is that hopefully, outside counsel will bring a little bit of independence and objectivity to the situation. So, you know, the contractor has been living under whatever this event is, or has received, you know, maybe something that is a complete surprise to it, and outside counsel can come in, do a deep dive, you know, hasn't been living with it exercise, some independent, be a little bit more objective doesn't have hopefully the same, you know, embedded relationship with all of the individuals who might be implicated in this to really advise the company. And, and learn to the process, the kind of independence, objectivity, transparency that will help the contractor going forward and demonstrating its present responsibility. In addition to that very important role, I mean, have experience with the process, so it's not a foreign arena might not be before every single sto, but how is counsel has been before many of them and sort

of, you know, has done this before. And, and might actually even know the sto before which the company finds itself having had been there before. If a contractor is faced with a situation that implicates its present responsibility, you know, serious action that that if you were the departing official, you'd want to know about it, early engagement with the SDO is really something that that we advise getting before the problem rather than being reactive to it this can want to demonstrate again, that you are in charge of your own destiny and your ship and your boat, and you know, what you need to do to be presently responsible contractor. But it may also prevent an action such as receiving a notice of suspension or a Notice of Proposed department cold, you might be able to to, you know, avoid that kind of thing. tone is important suspension and debarment proceedings really are not traditional litigation and, and many sdos that I've interacted with, will say this that it is it is business decision, can I do business with you? And so going in guns blazing, you know, with a litigator hat on, and and, you know, they, I don't find it beneficial to this forum, they're you're they're trying to assure them that you're a trusted business partner, not that, you know, you can find some legal, you know, tiny nuance that that undermines their discretion or, or their decision. It's really, you know, the SDO is is functionally for all purposes, the decider, you know, you don't you might be out of business by the time that nuanced legal thing is, is it maybe you're validated, but that's going to be you know, maybe a year down the road and that's a very expensive proposition to face. So we really try to adopt a tone and to promote a tone and to to live a tone that that understands that there are concerns and that nobody's perfect, no program is perfect. No contractors, perfect. Nope. workforces perfect and and you know, recognize that mistakes were made and really try to move forward in a productive fashion to show that we're responsible contractor.

1:04:26

I think I've already said that the objective is to lift the quickly. So if you can get in and make your case and and convince the sto that that that there there is neither smoke nor fire. You don't have to wait 30 days get in there because every day is a day that the contractor is precluded. You might be able again, early initiation with a sto before a notice is issued might help with this. You may be able to ask the sto to to To convert Notice of Proposed debarment or suspension to a show cause there's no requirement to do so. But you know, certain having a certain level of integrity and transparency and authenticity might convince the SDA Okay, I can I trust you enough to at least do that for now. And then also, you know, another thing is a lot of time contractors will be will, you know, what does the sto want? What can I do to make this go away, just tell me what I need to do, I'll do it for a sophisticated stos department, which they're increasingly all becoming very sophisticated. That's not what the inquiry is, you can't just show up be presently responsible by throwing yourself at the feet of the SDR and saying you tell me what to do, you should be able to have the self analysis abilities to identify what needs to be done to fix the problem that led to the suspension and debarment in the first instance. So really, when you go in with your presentation and your your mitigating factors, it should be I've looked at myself, I

know where I'm I saw the weak spots. And this is how I'm going to address them. And the SDM may have additional suggestions, that's fine. But in the first instance, I think you need to fix the contractor, they're not going to fix it for you. my very last point is how to avoid suspension and debarment. Since many companies are large, with a large workforce, you can't be there with everybody all the time. So a value based ethics program that instills in employees, the desire and the the value, frankly, of doing the right thing is really very important, not just having rules and regulations, but but impressing upon people and walking the walk and talking the talk that doing business good is good business. And then I have some other you know, kind of tips here on the last slide. In the interest of time, I would say probably the first one is is the most important because you can't be everywhere at the same time. So with that, I hope you've learned something about suspension and debarment how to avoid it, how to respond when it comes up. And thank you for your time.