Suspension and Debarment in Government Contracting

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Overview

- Increased focus on suspension and debarment
- Basics of Suspension and Debarment
- Judicial Review
- Where Suspension and Debarment Fit within Available Government Remedies
- Administrative Agreements
- Practitioner Pointers

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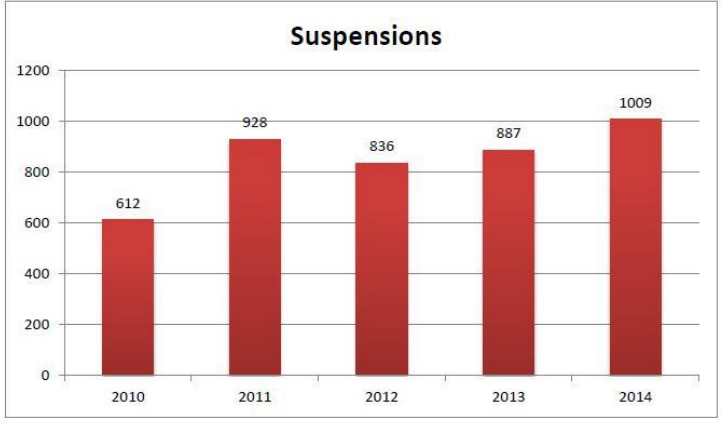
Increased Focus on Suspension and Debarment Activities: GAO Reports

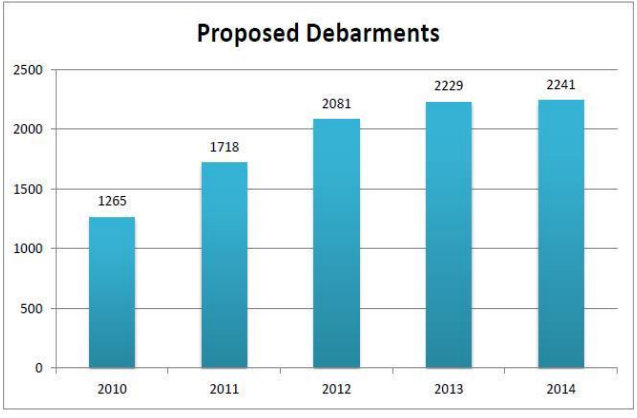
- GAO Report No. 11-739: Some Agency Programs Need Greater Attention, and Governmentwide Oversight Could Be Improved (Aug. 2011)
  - Agencies not relying enough on discretionary suspension and debarment
  - Suspension and debarment practices across agencies inconsistent
- GAO Report No. 14-513: Agencies Have Taken Steps to Improve Suspension and Debarment Programs (May 21, 2014)
  - GAO re-reviewed six agencies (Commerce, Health and Human Services, Justice, State, Treasury, and FEMA) that it had reviewed for which it had made recommendations for improvements in 2011. 2014 study found:
    - Number of suspension and debarment actions government-wide more than doubled from **1836** in FY2009 to **4812** in FY2013
    - Number of suspension and debarment actions for six agencies increased from **19** in FY2009 to **271** in FY2013

Increased Focus on Suspension and Debarment Activities: ISDC Statistics

- Interagency Suspension and Debarment Committee (ISDC) Mar. 31, 2015 Report to Congress re Fiscal Year (FY) 2014 activities:
  - FY 2013: **1696** debarment actions
  - FY2014: **1929** debarment actions
  - FY2013: **3942** referrals to suspending and debarring officials (SDOs)
  - FY2014: **3965** referrals to SDOs
  - Other FY2014 statistics:
    - 161 Show Cause Notices
    - 315 Declinations
    - 47 Administrative Agreements

Increased Focus on Suspension and Debarment Activities: ISDC Statistics





Increased Focus on Suspension and Debarment Activities: Congressional Actions

- FY13 NDAA, Pub. L. No. 112-239, Sections 861, 1682-83
  - Requires independent SDOs for the Army, Navy, Air Force, DLA, State, and USAID; the SDOs cannot report to Acquisitions or an IG
  - Requires formal policies from these agencies for formal suspension and debarment referrals
  - Requires annual ISDC reports by January 31 of each year
  - Requires annual reports on suspension and debarment activities from the Small Business Administration and makes suspension and debarment more "automatic" for misrepresentations
- Consolidated and Further Appropriations Act of 2015, Pub. L. No. 113-235, Sections 744-745
  - No Federal funds for award of contract, grant, etc. to contractor with tax delinquency or felony conviction in past 24 months
  - Agency must be "aware" of conviction/delinquency for prohibition to apply
  - Agency may nevertheless award contract if it has considered suspension or debarment and concluded that "further action is not necessary to protect the interests of the Government"

Basics of Suspension and Debarment

- FAR Subpart 9.1 requires the Government to contract with responsible contractors with satisfactory record of integrity and business ethics
  - Focuses on *making award* to responsible contractor
- FAR Subpart 9.4 addresses suspension and debarment
  - Focuses on present responsibility *after* award and *during* course of performance
- Suspension or Proposed Debarment: Disqualifies contractor from government contracting temporarily
- Debarment: Disqualifies contractor from government contracting for specified period
- Both are discretionary, not mandatory, and are not to be used for purposes of punishment
- Right to compete for government contracts can be extinguished for reasons unrelated to performance of them

Basics of Suspension and Debarment: Causes for Suspension (FAR 9.407-2)

- SDO can suspend a contractor based on "adequate evidence" of:
  - Commission of fraud in connection with obtaining, attempting to obtain, or performing public contract/subcontract
  - Violation of federal/state antitrust laws relating to submission of offers
  - Commission of embezzlement, theft, forgery, bribery, falsification/destruction of records, making false statements, tax evasion, violating federal criminal tax laws, or receiving stolen property
  - Violation of Drug Free Workplace rules;
  - Intentionally affixing label that says item is "Made in America" when it is not;
  - Unfair trade practices;
  - Delinquent taxes over $3K;
  - Knowing failure by principal of contractor to comply with mandatory disclosure obligations; or
  - "Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility" of a contractor
- Indictment for one of these offenses = adequate evidence
- SDO can also suspend a contractor "for any other cause of so serious and compelling a nature" that it affects contractor's present responsibility

Basics of Suspension and Debarment: Causes for Debarment (FAR 9.406-2)

- SDO can debar based on a conviction or civil judgment for:
  - Commission of fraud in connection with obtaining, attempting to obtain, or performing a public contract/subcontract
  - Violation of federal/state antitrust laws relating to the submission of offers
  - Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, violating federal criminal tax laws, or receiving stolen property
  - Intentionally affixing label that says item is "Made in America" when it is not
  - "Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility" of a contractor

Or……

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Basics of Suspension and Debarment: Causes for Debarment (FAR 9.406-2) (cont'd)

- Or "based on a preponderance of the evidence," any of the following:
  - Violation of the terms of a Government contract so serious as to justify debarment, such as a willful failure to perform or a history of failure to perform
  - Violations of Drug Free Work Place regulations
  - Intentionally affixing label that says item is "Made in America" when it is not
  - Unfair trade practices
  - Delinquent taxes over $3K
  - Knowing failure by a principal of a contractor to comply with mandatory disclosure obligations
  - Failure to comply with certain immigration requirements
- Or
  - For "any other cause of so serious and compelling a nature" that it affects contractor's present responsibility

Basics of Suspension and Debarment: Effect and Impact

- Apply Government-wide (not just with initiating agency)
- Reciprocal, meaning that nonprocurement suspension and debarment under Nonprocurement Common Rule is recognized by Executive agencies as a suspension and debarment under FAR Subpart 9.4, and vice versa. FAR 9.401
- Listed as excluded on System for Award Management (www.sam.gov) (formerly the Excluded Parties List System (EPLS), which was one of Government databases consolidated on SAM)
  - Agency to provide notice to GSA to place on SAM Exclusions w/in 3 working days after action becomes effective and w/in 5 working days of change/rescission
- Suspension and proposed debarment *automatic* upon listing
- Must be reflected in certifications per FAR 52.209-5

Basics of Suspension and Debarment: Effect and Impact (cont'd)

- FAR 9.405-1: Government is not *required* to terminate existing contracts, but Government cannot issue or solicit new contracts
  - No consent to subcontracts with suspended/debarred entity
  - No orders above guaranteed minimum
  - No orders under optional use FSS, BPAs or basic ordering agreements
  - No added work, no options, no extension of performance date
- Bids are logged but rejected. FAR 9.405(d)(2)
- Proposals may not be evaluated, may not be put in competitive range, may not be subject to discussions (if suspension/debarment lifted during competition, CO may consider offer). FAR 9.405(d)(3)
- "Compelling needs" exception. *E.g.*, FAR 9.405-1(b); FAR 9.405(d)(2)-(3)
- Precluded from conducting business with Government as agent or representatives of other contractors. FAR 9.405(a)
- *Reality*: Impact can be even greater because Government and other companies will be reluctant to do business with suspended/debarred contractor even if FAR does not preclude it; lose potential long-term business opportunities; incur reputational damage; lose employees

Basics of Suspension and Debarment: Vertical and Horizontal Imputation

- Default is that suspension or debarment extends to all divisions or organizational elements unless SDO limits it to specific divisions
- Misconduct of employee can be imputed to contractor if it occurred in performance of employee's duties or with contractor knowledge/acquiescence. FAR 9.406-5; FAR 9.407-5
- Contractor misconduct imputed to individual who knew/had reason to know of misconduct
- May extend to affiliates if specifically named and given written notice and opportunity to respond. FAR 9.406-1(b);
  FAR 9.407-1(c)
  - Companies are affiliated if one controls or has power to control the other or third party controls or has power to control both organizations
  - *Agility Def. & Gov't Services v. Dep't of Defense*, 739 F.3d 586 (11th Cir. 2013): Affiliate can be suspended or debarred solely on basis of affiliate status (i.e., no misconduct by affiliate)/ "The present responsibility of an affiliate is irrelevant"

Basics of Suspension and Debarment: Subcontractor Issues (FAR 9.405-2 and 52.209-6)

- FAR 9.405-2: When an ineligible contractor is proposed as a subcontractor subject to Government consent (FAR 44.2), the CO shall not consent except for compelling agency reasons
- FAR 52.209-6 prohibits primes from entering subcontracts of more than $30K (except for COTS items) absent compelling reason for doing so
  - If prime intends to contract with suspended or debarred entity over $30K and not for COTS, must provide advance notice to Government
  - For commercial item contracts, notification requirement applies to first-tier subs. For all other contracts, notification applies to all tiers
  - In addition to information on subcontractor, notice must describe procedures established to protect Government in light of basis for suspension or debarment

Basics of Suspension and Debarment: Period of suspension and debarment (FAR 9.406-4; 9.407-4)

- FAR 9.406-4: Period of debarment commensurate with the cause
  - Generally, not longer than three years, except violations of Drug-Free Workplace may be five years and certain Homeland Security violations may be one year, *see* FAR 9.406-2(b)(2), unless extended for cause
- Administrative Record must include findings on appropriateness of length of debarment
  - Period of suspension a factor per FAR 9.406-4(a)(2)
- Extensions are permitted but not on original bases per FAR 9.406-4(b)
  - Same procedures apply for extensions
- Debarment period may be reduced for reasons such as reversal of conviction/civil judgment, change in ownership/management, elimination of cause for which debarment imposed, "other reasons the [SDO] deems appropriate"
- FAR 9.407-4: Suspension is temporary (in theory)
  - While investigation continues
  - 12 months with 6-month extension at Asst Atty General request
  - Can exceed 18 months only if legal proceedings are initiated

Basics of Suspension and Debarment: Procedures (FAR 9.406-3 and 9.407-3)

- Contractor has opportunity to provide within 30 days (in writing, in person) information and argument opposing proposed debarment or suspension
  - "Show cause" letters and/or early contact with SDO more frequent
  - Get AR; fact-finding is rare based on genuine dispute of material facts
- Unless based on conviction or civil judgment, where contractor submission shows genuine dispute of material facts, hearing is provided
  - For suspension not based on indictment, and DOJ permits, same applies
- Timing and standard for SDO's decision
  - If based on conviction/civil judgment or no genuine issue of material fact, SDO decision due within 30 days of contractor submission absent "good cause"
  - Where suspension based on indictment, no genuine dispute of material facts or DOJ precludes fact proceedings, no set time limit
  - Where based on disputed material facts, SDO must make findings of fact
  - Fact-based debarments based on preponderance of evidence

Basics of Suspension and Debarment: Contractor Burden To Demonstrate Present Responsibility

- Once a cause for suspension or debarment is established, contractor must demonstrate that it is presently responsible
  - Generally, contractor tries to show that contractor satisfies as many "mitigating factors" as possible in FAR 9.406-1 (discussed below)
  - Slightly different for individuals, for which mitigating factors do not quite line up
- SDO decisions are afforded significant deference by courts, and effect of suspension and debarment so severe on business, that contractor must make best case possible to SDO
- If SDO "on the fence" about contractor's present responsibility, Administrative Agreement may provide assurances necessary to avoid suspension/debarment

Basics of Suspension and Debarment: FAR 9.406-1 Mitigating Factors

- Effective standards of conduct and internal control systems at time of misconduct or since the misconduct
  - Internal control system now required by FAR 52.203-13. Was the contractor "flying without a net"? Do the contractor's internal control systems go *beyond* the minimum?
  - Response generally includes detailed discussion of ethics and compliance program, including management oversight, relevant policies and training programs/records
- Contractor raises issue with Government in timely manner
  - Mandatory disclosure now *required*. SDO may be looking for *more* than compliance with minimum legal obligations
  - To whom in the USG was the issue raised (CO? SDO, OIG?)? How fulsome was the disclosure?
- Contractor investigates and shares results of investigation with SDO
  - Quality of investigation? [Outside counsel may provide benefit here, both before and after the fact]
  - Privilege need not be waived, but transparency, accuracy, and completeness is *critical*

Basics of Suspension and Debarment: FAR 9.406-1 Mitigating Factors (cont'd)

- Contractor cooperation with Government during investigation or court action
  - Access to records *and* employees? Timely? Complete?
- Contractor agrees to pay all criminal, civil, administrative liability
- Contractor takes disciplinary actions against wrongdoers
  - Consider whether employees implicated require separate counsel because of potential conflict of interest with company
  - *Level* of discipline appropriate for wrongdoing?
  - Discipline applied to all involved (e.g., management and lower level employees) *equally*?
- Contractor implements/agrees to implement remedial measures
  - Remedial measures tailored to address concerns raised by SDO may include credits (e.g., time charging issues), product replacement/repairs (e.g., defective products), often include enhancements to ethics/compliance program or other changes to organization (e.g., removing officers implicated in misconduct)

Basics of Suspension and Debarment: FAR 9.406-1 Mitigating Factors (cont'd)

- New/revised review & control procedures and ethics training
  - Contractor identifies improvements to ethics and compliance program since incident that led to SDO's concern
  - Contractor identifies additional improvements to ethics/compliance program intended to prevent recurrence of incident that led to SDO action
- Adequate time to eliminate circumstances that led to debarment
  - Demonstrate that contractor has already or is prepared to respond to concerns that led to SDO action
  - Has there been a change in senior management since incident? Other relevant organizational changes that demonstrate that "new management" not implicated in misconduct and is presently responsible?
- Contractor management recognizes seriousness of misconduct and implement programs to prevent recurrence
  - "Tone at the top" is *critical*
  - Denial of any problem or recalcitrance in adopting remedial measures spells disaster
  - Management changes may be required to address SDO concerns

Judicial Review

- Generally reviewable in U.S. District Court under APA
- Highly deferential standard: “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law”
  - Review relevant evidence in the record and give satisfactory explanation for action, including rational connection between facts found and action
  - Generally, declaratory and injunctive relief is remedy
  - Preliminary injunctive relief requires meeting traditional four-factor test
- Judicial Review Key Issues
  - Exhaustion of administrative remedies
  - Failure to consider adequately mitigating factors
  - Challenging duration of suspension/debarment (not express limit of three years)

Suspension and Debarment in Context with Other Government Remedies

- Suspension and debarment often arises in connection with other Government enforcement proceedings:
  - Criminal proceedings (e.g., violation of FCPA)
  - Civil proceedings (e.g., False Claims Act)
  - Administrative proceedings (e.g., DoD IG investigation)
- Suspension and debarment activity is monitored by Government fraud units (OIG and DOJ), and vice versa
- Suspension and debarment can improve Government position in a parallel criminal and civil proceeding, and vice versa
- Government does not have a policy of global settlements

Administrative Agreements

- Document remedial measures taken to prevent reoccurrence of incident that lead to suspension or debarment
- Vary among agencies and from settlement to settlement
- Give Government assurances and protection to allow lifting suspension/proposed debarment/debarment
- Generally last three years
- Violation of AA is separate and independent basis for debarment
- Publicly posted by some agencies (e.g., Air Force) and identified on FAPIIS

Common Elements of Administrative Agreements

- Agreement that there is cause for suspension or debarment
- Self-governance and ethics program improvements
  - Enhanced training
  - Independent organization review of ethics program
- Commitment to continued cooperation and access to records/employees
- Periodic reporting to Government
  - Examples: training conducted; internal and Government investigations; progress on implementing ethics program improvements; other matters called out in AA
  - May be accompanied by meeting requirements
- Some elements arose prior to FAR 52.203-13 requirements for code of conduct and internal controls

Common Elements of Administrative Agreements (cont'd)

- AA applies to sale of business/unit or acquired business/unit
- Recognition of Government reliance on contractor-provided information and representations
- Release of Government
- Notification to all employees of facts and content of AA within X days of execution of AA
- Notification to major suppliers and subcontractors within X days of execution of AA
  - Emphasize contractor's commitment to integrity
  - Request reports to GC of contractor employee misconduct
  - Provide hotline information
- Obligation to check SAM for new hires and to ensure compliance with obligation not to enter relationships with suspended or debarred entities
- Management responsible for measures

Practitioner Pointers

- Experienced outside counsel is critical
  - Independence and objectivity
  - Experience with process
  - Experience with SDOs
- If faced with situation that may implicate present responsibility (e.g. FCA allegations/action), *early* engagement with SDO (*i.e.*, before suspension/debarment initiated) is advisable
- Suspension and debarment proceedings are *not* "litigation"
  - Litigation "tactics" and "tone" both inappropriate to demonstrate present responsibility *and* ineffective
  - SDO is "the decider" and has already determined that there is a concern
  - Appropriate tone is one that recognizes seriousness of SDO's concern and both tells the contractor's story and accepts responsibility for misconduct that led to SDO's concern

Practitioner Pointers

- Objective is to lift suspension/proposed debarment/debarment *quickly*. Contractor usually does not (not required to) wait 30 days to respond. Getting to a hearing is not necessarily the end game, either
- *Sometimes*, if SDO believes contractor has provided adequate assurances, suspension/proposed debarment can be "converted" to show cause. Not required, however
- Contractor must *demonstrate* present responsibility
  - Being a presently responsible contractor means that the contractor can self-identify cause of concern and appropriate remedial measures
  - SDO will not (and should not have to) tell contractor what it needs to do to "fix" the situation

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Avoiding Suspension and Debarment

- Institute a “values-based” ethics program (“core values” that govern business rather than rules) combined with robust training (including *in-person*) based on real-life scenarios
- Senior management commitment to values-based ethical culture
- Senior leader in charge of ethics/compliance program, with direct reporting to CEO and necessary resources
- Internal/external reviews of corporate business practices, procedures, policies and internal compliance controls
- Policies and practices that encourage employees to report suspected misconduct and include robust non-retaliation policy
- Policies and practices to identify and investigate serious issues
- Timely, fulsome and transparent disclosure to Government of possible violations (and disclosure to the *right* Government entity given nature of incident)
- Processes to ensure that teammates adhere to similar ethical standards