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### Contractor Accountability

## Suspensions and Debarments: A Practical Guide to Navigating Government Contract Exclusion Proceedings



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**F**ederal exclusion proceedings, that is, the suspension and/or debarment of contractors that violate federal contracting rules, are sharply on the rise. Sparked by a desire to protect taxpayer dollars in this age of unprecedented government spending, the number of suspended and debarred contractors has increased each year since 2009, and all indications are

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that 2013 is poised to be another record setting year.<sup>1</sup> Contractors must be keenly aware of this heightened level of government scrutiny concerning the performance of public contracts and have a practical approach in place to deal with alleged violations.

Since the enactment of the American Recovery and Reinvestment Act (ARRA) in February 2009, the United States Government has spent an estimated \$840 billion dollars in an effort to jumpstart the economy and create jobs. Of those funds, nearly a third, approximately \$240 billion, has been spent on contracts, grants, and loans in areas such as: transportation (\$35.5 billion); infrastructure (\$29.0 billion); and energy and the environment (\$26.7 billion).<sup>2</sup>

In light of the enormity of ARRA spending, Congress has expressed an ongoing interest in ensuring that taxpayer dollars are spent responsibly, and that contracts are awarded only to reliable and dependable contractors capable of satisfactorily performing the work.<sup>3</sup> In that regard, among the tools at Congress's disposal are

<sup>1</sup> Statistics available through the Interagency Suspension and Debarment Committee's (ISDC) reports to Congress for fiscal years 2009, 2010, and 2011.

<sup>2</sup> Statistics are available from <http://www.recovery.org>.

<sup>3</sup> See Council of the Inspectors General on Integrity and Efficiency, *Don't Let the Tool Box Rust: Observations on Suspension and Debarment, Debunking Myths, and Suggested Practices for Offices of Inspectors General*, September 20, 2011, at 1-2; United States Government Accountability Office (Highlights of GAO-11-739, a report to congressional committees), *Suspension and Debarment, Some Agency Programs Need Greater Attention, and Government Oversight Could Be Improved*, August 2011; Katie M. Manuel, *CRS Report for Congress, Debarment and Suspension of Government Contractors: An Overview of the Law Including Recently Enacted and Proposed Amendments* (RL34753), January 6, 2012, at 4. See also, *United States v. Bizzell*, 921 F.2d 263, 267 (10th Cir. 1990) (Stating that, as a matter of public policy, the federal government seeks to "prevent improper dissipation of public funds" by dealing with only "responsible" contractors); 48 C.F.R. § 9.402(a) (requiring contracting officers on federal projects to "solicit offers from, award contracts to, and consent to subcontracts with responsible contractors only").

governmentwide suspensions and debarments — administrative exclusion remedies designed to allow federal agencies to guard against, among other things, abuse, fraud, non-conformity, and waste.<sup>4</sup> In simple terms, suspensions and debarments amount to a governmentwide ban. All federal agencies are barred from doing business with an individual contractor or company that has engaged in improper conduct and been found not “presently responsible” to perform on federal procurements for a period of up to three years.<sup>5</sup> Although, debarments are, *technically* speaking, not a punitive action, for contractors whose livelihoods are even somewhat dependent on federal contract performance, debarment is not only undesirable, but could be tantamount to professional and financial ruin.

There are two types of debarment: mandatory (or statutory) debarment and discretionary debarment. The former situation arises when an act of Congress mandates debarment as a sanction for certain statutory violations. For example, an employer found to have violated the provisions of the Davis-Bacon Act with respect to wage rates for laborers and mechanics faces a mandatory three-year debarment.<sup>6</sup> Discretionary debarments, however, are less straightforward and contain ample room for interpretation. This article addresses the discretionary debarment provisions of the Federal Acquisition Regulation, as well as the Office of Management and Budget (OMB) Guidelines to Agencies on governmentwide Debarment and Suspension. It also offers practical advice for individuals and organizations in the unfortunate event that they ever face exclusion proceedings, or even think that such events may loom on the horizon.

**A Basic Guide to the Regulations Governing Exclusion Proceedings.** Discretionary suspension and debarment proceedings are governed by one of two sets of regulations: For actions related to federal procurements, the regulations of FAR Part 9.4 apply.<sup>7</sup> In the case of non-procurements (e.g., grants, cooperative agreements, contracts of assistance, loans, and loan guarantees), the OMB sets forth guidelines for federal agencies that can be found at 2 C.F.R. Part 180.<sup>8</sup> Notably, whether dealing with the procurement or non-procurement variety of exclusion proceedings, suspensions and debarments have a governmentwide reciprocal effect, which means that suspension or debarment with respect to one federal agency is applied with equal force to all agencies.

<sup>4</sup> Council of the Inspectors General on Integrity and Efficiency, *Don't Let the Tool Box Rust: Observations on Suspension and Debarment, Debunking Myths, and Suggested Practices for Offices of Inspectors General*, *supra*, at 2.

<sup>5</sup> *Id.* See also, 48 C.F.R. § 9.406 (Debarment).

<sup>6</sup> 40 U.S.C. § 3144 (government-wide debarment for failure to pay wages under the Davis-Bacon Act).

<sup>7</sup> 48 C.F.R. § 9.4 (Debarment, Suspension, and Ineligibility).

<sup>8</sup> Executive Order 12549 (Debarment and Suspension) was enacted in 1986 in an effort to “curb fraud, waste, and abuse in Federal programs, increase agency accountability, and ensure consistency among agency regulations concerning debarment and suspension of participants in Federal programs.” The Executive Order specifically contemplates exclusion procedures governing non-procurement activities. The Non-procurement Suspension and Debarment Common Rule is published at 2 C.F.R. § 180 and has already been adopted by most federal agencies that conduct suspension and debarment actions. See 2 CFR Subtitle B (Federal Agency Regulations for Grants and Agreements).

The broad nature of the exclusion is intended to be within the best interest of the government as a whole — an aim which is served by preventing any agency from doing business with a contractor found to have engaged in misconduct or otherwise been judged as not responsible to perform on federal contracts.<sup>9</sup>

**Bases for Debarment.** Generally speaking, an agency’s designated suspension or debarment official may debar a contractor and/or agent of the contractor from participating in future federal procurements under three distinct circumstances:

- Certain civil judgments and/or criminal convictions with respect to so-called “integrity offenses”;<sup>10</sup>
- Serious violation of the terms of a government contract or subcontract;<sup>11</sup> or
- Any other behavior found to be “of so serious or compelling a nature that it affects the present responsibility” of the contractor.<sup>12</sup>

Debarment can be affected with respect to individuals, business entities, and “affiliates” of the contractor.<sup>13</sup> Further, the FAR also provides that the “improper conduct” of certain individuals associated with the contractor (such as officers, directors, and employees) can be imputed to the contractor when “the conduct occurred in connection with the individual’s performance of duties for or on behalf of the contractor, or with the contractor’s knowledge, approval, or acquiescence,” and the contractor accepts the benefits derived therefrom.<sup>14</sup>

**Exclusions and the Adversarial Process.** Debarment is handled at the agency level through an investigation, referral, and decision making process that is adjudicated on agency-by-agency basis by the appointed suspension and debarment official.<sup>15</sup> Because all government agencies establish their own “methods and procedures for coordinating their debarment or suspension actions,”<sup>16</sup> there is little uniformity in the exclusion process. Notably, however, the Government Accountability Office (in response to the interest of Congress and the OMB concerning the enforcement of exclusion proceedings), has recently recommended that agencies assign additional personnel to suspension and debarment related activities, implement more standardized

<sup>9</sup> 48 C.F.R. § 9.402(b) (“The serious nature of debarment and suspension requires that these sanctions be imposed only in the public interest for the government’s protection and not for purposes of punishment. Agencies shall impose debarment or suspension to protect the government’s interest and only for the causes and in accordance with the procedures set forth in this subpart”).

<sup>10</sup> Katie M. Manuel, *CRS Report for Congress, Debarment and Suspension of Government Contractors: An Overview of the Law Including Recently Enacted and Proposed Amendments* (RL34753), *supra*, at 5-6 (listing some of the “integrity offenses” that can lead to debarment).

<sup>11</sup> 48 C.F.R. § 9.406-2(b) (employing the “preponderance of the evidence standard”).

<sup>12</sup> *Id.* at § 9.406-2(c).

<sup>13</sup> See Katie M. Manuel, *CRS Report for Congress, Debarment and Suspension of Government Contractors: An Overview of the Law Including Recently Enacted and Proposed Amendments* (RL34753), *supra*, at 8.

<sup>14</sup> 48 C.F.R. § 9.406-5.

<sup>15</sup> See 48 C.F.R. § 9.406-3 (Procedures).

<sup>16</sup> *Id.* at § 9.402(c).

intra-agency guidelines, and invigorate their exclusion programs.<sup>17</sup> Stated in simpler terms, suspension and debarment activity is on the rise and seems destined to become increasingly systematic and organized within the government.

To begin the formal exclusion process, the contractor must be afforded a formal notice of proposed suspension and/or debarment by the agency in question, which must include at least the following information: notice that debarment is being considered; the reasons for the proposed debarment in terms sufficient to put the contractor on notice of the alleged conduct upon which the action is based; the procedures that will govern the agency's decision-making process; and the effects of proposed and actual debarment.<sup>18</sup>

Within 30 days after receipt of the notice, the contractor may submit (in person, in writing, or through a representative) information and arguments in opposition to debarment, including information that raises a genuine dispute of material fact.<sup>19</sup> In actions based upon convictions or an undisputed record, the agency's debarment official must render a decision within 30 days after receipt of the contractor's response. However, if material issues of fact raised by the contractor necessitate additional proceedings, the agency's decision can be rendered only after the conclusion of all such proceedings and must be based upon a written statement setting forth the agency's factual findings.<sup>20</sup> The debarment official's decision must be in accordance with a preponderance of the evidence standard based on information contained in the official record.<sup>21</sup>

Once a decision is reached by the agency, the debarment official must provide prompt notice to the contractor. If the official decides to impose debarment, it must be set for a period commensurate with the seriousness

of the conduct at issue. Generally, debarment does not exceed three years, but can be reduced or extended based upon newly discovered material evidence.<sup>22</sup>

**The Role of Suspensions in the Exclusion Process.** Both procurement and non-procurement exclusion procedures allow federal agencies to impose suspensions where it is determined that adequate evidence of a violation exists, but an investigation or other legal proceedings are still pending.<sup>23</sup> When government agencies receive information from any source concerning potential misconduct, an investigation will promptly be conducted. If sufficient evidence exists, the appropriate agency will issue a notice of suspension and proposed debarment.<sup>24</sup>

Suspensions are considered to be a serious action that should be imposed under limited circumstances, including when there exists a "cause of so serious or compelling a nature that it affects the [contractor's] present responsibility,"<sup>25</sup> and only as necessary to protect the government's interest. The procedures for suspension are largely the same as those discussed above for debarment under the FAR regulations, including those requiring the agency to provide proper notice and allow the contractor to submit evidence on its behalf.<sup>26</sup> However, there are some important differences. The following chart<sup>27</sup> summarizes some of the most relevant distinctions between suspensions and debarments in terms of what actions can be taken at each stage in the process:

<sup>22</sup> *Id.* at 9.406-4(a). *See also*, 2 C.F.R. § 180.865.

<sup>23</sup> *Id.* at § .9.407-1. *See also*, 2 C.F.R. § 180.700.

<sup>24</sup> *See e.g.*, 2 C.F.R. § 180.600 ("When Federal agency officials receive information from any source concerning a cause for suspension or debarment, they will promptly report it and the agency will investigate. The officials refer the question of whether to suspend or debar you to their suspending or debarment official for consideration, if appropriate").

<sup>25</sup> 48 C.F.R. § 9.407-2(c).

<sup>26</sup> *See generally*, 48 C.F.R. § 9.407 (Suspension); 2 C.F.R. § 180.700 (Suspension).

<sup>27</sup> The information contained in this chart is based upon information found in 2 C.F.R. § 180.605 (How does suspension differ from debarment).

SUSPENSION	DEBARMENT
A temporary measure enacted pending completion of an investigation or formal legal proceedings	A final determination that a contractor is not presently responsible to perform on government contracts
Must be supported by adequate evidence of a recognized cause for debarment	Must be supported by a finding, based on a preponderance of the evidence standard, that the contractor has engaged in conduct that warrants debarment
Usually imposed first, and then reevaluated after the contractor has an opportunity to contest through formal proceedings with the agency	Imposed only after the contractor is provided notice and an opportunity to contest the proposed debarment
Cannot extend any longer than a maximum of 12 months (or 18 months, if an extension is sought and granted) without legal proceedings being initiated with respect to the contractor's alleged misconduct	Generally does not exceed three years, but can be extended if necessary to protect the public interest

Suspension and debarment are serious and significant actions taken by the government and should be viewed with equal seriousness by contractors. Indeed, a negative outcome in the exclusion process can result in devastating professional consequences. Here we offer a practical perspective on what contractors must, can, and should do in responding to a notice of suspension and proposed debarment received from a government agency, or when the contractor has reason to believe that such an action might be on the horizon.

**The Role of Experienced Outside Counsel.** Undoubtedly, government agencies exert broad discretion in determining whether certain conduct warrants the sanction of exclusion from federal contracting. Nevertheless, contractors possess several mandatory procedural protections that can be utilized by experienced outside counsel familiar with dealing with the government and the applicable debarment regulations.

Perhaps the most important of these protections is Constitutional due process. Specifically, contractors are fully entitled to the due process protections of the Fifth Amendment to the United States Constitution.<sup>28</sup> This means that the government cannot “act arbitrarily, either substantively or procedurally, against a [contractor]” and that a contractor may challenge “the process and the evidence before he is officially declared ineligible for government contracts.”<sup>29</sup>

From a practical perspective, retaining experienced outside counsel at the earliest possible juncture will be of maximum benefit to the contractor. Indeed, even before a formal exclusion process is initiated by the government, the contractor may be aware that a potentially serious violation has occurred. Outside counsel can assist in conducting a thorough internal review or investigation to determine whether (or not) it will be beneficial for the contractor to self-report. Notably, the concept of self-reporting is of supreme importance in today’s hyper-sensitive enforcement environment, as credible evidence of violations *must* be reported under the False Claims Act.<sup>30</sup>

After a notice of suspension and/or proposed debarment is received, the role of outside counsel shifts to that of zealous advocate. Representation in exclusion proceedings will include: preparing legal and equitable arguments against debarment; monitoring and ensuring compliance with the strict deadlines imposed during the exclusion process; representing the contractor during evidentiary hearings before the agency; and communicating and negotiating with the government.

**Conducting a Candid Assessment of the Alleged Violation.** After a notice of a pending exclusion proceeding is received from the government (or even if such an action is merely anticipated by the contractor), it is essential for the contractor to assess its level of culpability and proceed accordingly.

In assessing its case, it is important for the contractor to understand that the mere allegation of impropriety by the government by no means indicates that debar-

ment is a foregone conclusion. To the contrary, the applicable debarment regulations state that suspension and debarment are “serious action[s]” that should be reserved for only the most willful and serious misconduct committed by a federal contractor.<sup>31</sup> Suspension must be supported by adequate evidence suggesting that the contractor is not “presently responsible” due to an established cause for debarment. For example, with respect to allegations based on violation of a public contract or subcontract, the evidence must indicate one of the following:

- a willful failure to perform in accordance with the terms of one or more public agreements or transactions;
- a history of failure to perform or of unsatisfactory performance of one or more public agreements or transactions; or
- a willful violation of a statutory or regulatory provision or requirement applicable to a public agreement or transaction.<sup>32</sup>

Importantly, the causes for debarment discussed above involve instances of a *willful* violation of or a *history* of failure to perform. Accordingly, the regulations differentiate between intentional and unintentional conduct, and contractors can often present a legally-sound defense to proposed debarments based on inadvertent or isolated violations.

**The Importance of Understanding the Function of Mitigating Factors.** Whether or not there is a legal defense available, the contractor can benefit immensely from facilitated communications with the government aimed at diminishing or negating possible sanctions. Indeed, the FAR specifically provides that a cause for debarment “does not necessarily require that the contractor be debarred.”<sup>33</sup>

The FAR and OMB debarment regulations each set forth an express list of mitigating and aggravating factors that the debarment official may consider in determining whether debarment is an appropriate sanction. None of the factors are determinative, and it therefore is in the contractor’s best interest to include a thorough explanation of all factors in its favor during proceedings with the government. For procurement proceedings, the FAR sets out a complete list of mitigating factors, including:

- The contractor’s level of cooperation with the government;
- The contractor’s willingness to make restitution and take disciplinary action against individuals involved with the violation;
- The contractor’s willing to impose remedial measures and internal controls; and
- The contractor’s appreciation of the seriousness of the conduct warranting debarment.

In the case of non-procurement proceedings, the OMB guidelines include a similar, but unique set of

<sup>28</sup> For a complete discussion of contractor’s rights in federal procurement proceedings, see Katie M. Manuel, *CRS Report for Congress, Debarment and Suspension of Government Contractors: An Overview of the Law Including Recently Enacted and Proposed Amendments* (RL34753), *supra*, at 12-16.

<sup>29</sup> *Gonzalez v. Freeman*, 334 F.2d 570, 574 (D.C. Cir. 1964)

<sup>30</sup> See 31 U.S.C. § 3729, *et seq.*

<sup>31</sup> See 2 C.F.R. §§ 180.700, 180.800. See also, 48 C.F.R. § 9.406-2.

<sup>32</sup> See 2 C.F.R. § 180.800.

<sup>33</sup> 48 C.F.R. § 9.406-1(a).

mitigating factors. The OMB guidelines include these additional mitigating factors:

- The magnitude of the harm or impact resulting from the misconduct;
- The frequency and duration of wrongdoing;
- Prior exclusions or disqualifications from federal contracting;
- The Contractor’s premeditation of the misconduct; and
- The position held within the organization by the wrongdoer.<sup>34</sup>

Ultimately, the decision of whether debarment is an appropriate sanction turns on what is best for the “public interest.”<sup>35</sup> This public interest standard focuses on ensuring that the government does not deal with contractors that are not presently responsible to compete for and perform government contracts.<sup>36</sup> Therefore, the contractor’s overarching theme with respect to the debarment mitigating factors should focus on “[a]ny circumstances suggesting that a contractor is unlikely to repeat past misconduct – such as changes in personnel or procedures, restitution, or cooperation in a government investigation.”<sup>37</sup>

#### **The Benefits of Negotiating Administrative Agreements.**

Throughout this article, we have primarily focused on strategies for contractors to avoid debarment by proving that the subject conduct does not warrant the extreme sanction of debarment. However, the practical realities of the world dictate that, sometimes, prohibited conduct occurs and must be addressed.

When such realities occur, it is sometimes possible to negotiate a settlement with the government as an alternative to debarment. Known as administrative agreements, such settlements allow the contractor to admit to wrongful conduct and agree to make restitution. In exchange, the contractor can receive a reduced sanction, or even avoid debarment all together. Generally, administrative agreements can include: restitution payments intended to make the government whole; separation agreements as between the contractor and the employee that committed the infraction; implementation or expansion of compliance and training programs; in-

<sup>34</sup> The FAR mitigating factors are found at 48 C.F.R. § 9.406-1(a). The OMB guidelines’ mitigating factors can be viewed at 2 C.F.R. § 180.860.

<sup>35</sup> See Katie M. Manuel, *CRS Report for Congress, Debarment and Suspension of Government Contractors: An Overview of the Law Including Recently Enacted and Proposed Amendments* (RL34753), *supra*, at 9 (discussing 48 C.F.R. § 9.406-1(a)).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

ternal or external auditing plans; and/or increased government oversight of the contractor’s operations.<sup>38</sup> Fair warning: once a contractor agrees to make restitution as part of an administrative agreement, it is in its best interests to follow through. The government agency will reserve the right to all available sanctions (most notably, debarment) should the contractor renege on its commitments.<sup>39</sup>

Administrative agreements have certain advantages beyond the obvious possibility of avoiding debarment. Most notably, they are not a creation of the FAR and, as such, not specifically regulated. Rather, they are subject to the individuality of each agency and, unlike debarment, not governmentwide. That is, a signed administrative agreement is exclusive to the particular agency and contractor, and does not have any impact on the contractor’s ability to deal with other agencies.<sup>40</sup>

**Conclusion.** Suspensions and debarments are harsh penalties that can have devastating and long lasting effects on a contractor. While a contractor can hedge against violations by establishing and implementing a well-rounded ethics and compliance program, the practical realities of today’s post-ARRA, hyper-sensitive enforcement environment dictate that mistakes can happen and, when they do, the government will likely come calling.

As demonstrated in this article, an investigation — or even a formal notice of suspension and proposed debarment — does not necessarily mean ruin for a contractor. To the contrary, the exclusion process is marked by due process safeguards that allow contractors to avoid or minimize exposure by taking the following proactive measures when legitimate concerns or potential issues arise:

- Retaining experienced outside counsel;
- Conducting a thorough internal investigation as soon as potential violations are know or suspected;
- Self-reporting to the government when required, or, under certain circumstances, on a voluntary basis; and
- Preparing a complete and thorough assessment of all possible legal defenses and equitable mitigating factors.

In sum, exclusion proceedings are still legal proceedings and should be treated as such by contractors. A robust ethics and compliance program paired with a practical legal strategy will aid contractors in navigating the rough seas associated with the present age of increased government spending and heightened enforcement.

<sup>38</sup> *Id.* at 10

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*