



Suspension & Debarment

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The Government's Strongest Tool

- One of the Government's strongest tools to insure that it deals only with responsible contractors and individuals is its ability to exclude firms and individuals from participating in government contracts
 - Driven by public interest in protecting Government, not for purposes of punishment

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Excluded Parties List System (EPLS)

- The General Services Administration operates the Excluded Parties List System (EPLS), a web-based system listing all contractors who are debarred, suspended, proposed for debarment or barred under the Nonprocurement Common Rule (covering grants, scholarships, etc.)
- Contracting officers are required to review the EPLS to protect the Government by excluding ineligible parties prior to entering new contracts, unless the head of the procuring agency has determined that there is a compelling reason to allow the procurement
- The FAR also restricts suspended or debarred parties from participating in subcontracting under government procurements

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Debarment

- Relatively automatic debarment may occur for:
 - A criminal conviction or civil judgment involving fraud or criminal conduct in connection with obtaining or performing a government contract or subcontract;
 - Federal or state antitrust violations relating to submission of offers;
 - Embezzlement, theft, forgery, bribery, falsification or destruction of records, false statements, tax crimes or receiving stolen property;
 - Intentionally mislabeling a "Made in America" inscription to a product not made in America; or
 - Commission of any other offense reflecting dishonesty or lack of integrity affecting the present responsibility of a contractor or subcontractor.

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Debarment

- Others require finding of certain facts based on a preponderance of the evidence
 - Serious, willful violations of duties in the performance of a government contract, or a history of same;
 - Violations of the Drug-Free Workplace Act;
 - Commission of unfair trade practices;
 - Delinquent federal taxes exceeding \$3000.00;
 - Knowing failure by a principal to timely disclose a violation of Federal criminal law in connection with a contract or subcontract involving fraud, bribery, conflict of interest, the False Claims Act or gratuities, or a significant overpayment (the Mandatory Disclosure Rule).

FAR 9.406-2(b).

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Suspension

- Predecessor to debarment; temporary rather than for a fixed term (FAR 9.407-1)
- Requires "adequate evidence" rather than a "preponderance of evidence"
- Contractor has the burden of promptly presenting its evidence, although evidence of remedial measures or mitigating factors is not necessarily determinative of a contractor's present responsibility

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Recent Developments

- Federal agencies heavily criticized for not using suspension and debarment proceedings as aggressively as politicians and public advocacy groups would like
- Proposed debarments by the Department of Defense (DoD) increased by approximately 60 percent in FY 2011

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Growing Pressure on Agencies

- January 2011 – DoD and Inspector General's office, released a draft report to Congress summarizing fraud by DoD contractors over a ten-year period
 - 30 DoD contractors criminally convicted of fraud; only 17 were debarred or suspended and three continued to receive Federal contracts (value: nearly \$350 million)
 - Ninety-one (91) DoD contractors were subjects of civil judgments that required fines or restitution payments, 35 continued to receive contracts (value: nearly \$5 billion)
 - One hundred twenty (120) DoD contractors entered into settlement agreements over the preceding three-year period, most were the result of criminal convictions or civil judgments
 - More than \$5 million had been obligated to DoD contractors **after** having been suspended or debarred for fraudulent activity
 - Overall, the report concluded that the existing remedies with respect to contractor wrongdoing were sufficient

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Growing Pressure on Agencies

- Various members of Congress doubted the report's conclusion; DoD was asked to compile the total obligated funds to contractors that had been criminally convicted of fraud, were the subject of civil judgments or entered settlement agreements over the full ten-year period
 - 37 parent companies from the top 100 DoD contractors and a grand total of over \$1 trillion in contracts
 - Firestorm of publicity – Even though the vast majority of these contracts were not awarded or performed improperly

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Growing Pressure on Agencies

- February 2011 –Commission on Wartime Contracting issued interim report: “At What Risk? Correcting Over-Reliance on Contractors in Contingency Operations”
 - Federal agencies were not suspending or debarring contractors as often as they should, blaming the difficulty in proving “fact-based” actions and a preference toward administrative agreements
 - Recommendations: (1) suspensions be mandatory upon indictment; (2) suspension and debarring officials (SDOs) be required to document the basis for not suspending or debarring a contractor referred for action; and (3) the FAR requirement for a factual hearing be withdrawn with respect to wartime contractors

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Growing Pressure on Agencies

- July 2011 – DoD Inspector General issued a report: “Additional Actions Can Further Improve the DoD Suspension and Debarment Process”
 - Focused on poorly performing contractors not being referred for suspension and debarment
 - Concluded that poorly performing contractors were still receiving Federal contracts

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Growing Pressure on Agencies

- August 31, 2011 – GAO issued a report: “Suspension and Debarment – Some Agency Programs Need Greater Attention, and Government-wide Oversight Could Be Improved”
 - Focused on comparing each agency’s percentage of the procurement budget to the agency’s percentage of suspension and debarment actions
 - Concluded that many agencies were not pulling their weight in weeding out non-responsible contractors because smaller agencies lacked dedicated programs, staff and resources
 - Prompted action by the Office of Management and Budget in November to require all executive branch agencies to appoint a senior accountable official who would ensure the effective use of suspension and debarment

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Growing Pressure on Agencies

- September 2011 – Council of the Inspectors General on Integrity and Efficiency (an independent executive branch entity) released a report recommending various enhancements to agency referral practices
 - Report attempted to “debunk” the perceived procedural hurdles in sustaining “fact-based” actions
 - Report emphasized that only “adequate evidence” was required to suspend a contractor (as opposed to the “preponderance of evidence” standard for debarment)

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Growing Pressure on Agencies

- November 2011 – Hearing before the Senate Armed Services Committee addressing many of these aforementioned reports
 - Multiple senators expressed an interest in legislative efforts to implement changes, particularly the recommendations of the GAO

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Example Fact-Based Debarments

- *Cohen v. United States Department of the Air Force*
 - Demonstrates difficulties that agencies encounter with fact-based actions as well as the hardships that can be imposed on contractors or individuals even if the suspension or debarment actions are weak and not upheld
- USAID’s Suspension of AED
 - Demonstrates how more aggressive suspension actions can lead to the demise of an organization

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Example Fact-Based Debarments

- Booz Allen Hamilton's San Antonio Office
 - Demonstrates how suspensions and debarments can be compartmentalized to one particular office or division

These examples highlight the need to have effective compliance programs in place

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