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INSIGHTS: The Government's Just Not That Into You—Is it De Facto Contractor Debarment?

BY DOMINIQUE CASIMIR AND ALEXANDRA BARBEE-GARRETT

A recent case decided by the Northern District of Alabama has us thinking about de facto debarment of government contractors—what it is (and isn't), what it takes to show de facto debarment, and, perhaps most importantly, how to nurture your relationship with government customers so you aren't left wondering whether you've been de facto debarred.

Debarment is clear and unmistakable. It occurs after the Suspension and Debarment Official (SDO) issues a Notice of Proposed Debarment and provides an opportunity to be heard. (FAR 9.406-3) If a contractor fails to establish that it is presently responsible and the SDO imposes debarment, the contractor is ineligible for future contracts, and the debarment is made public on SAM.gov.

De facto debarment can be murkier. In rare cases, the government customer may boldly proclaim that the contractor will never work in this town again. More often, the contractor's proposals simply lose out quietly to those of its competitors, again and again, making it difficult to discern that a de facto debarment is occurring until the contractor has lost the opportunity to compete fairly for potentially lucrative awards.

Debarment Threshold What is the threshold for de facto debarment? As one District Court explained, ''Plaintiffs must meet a high standard when seeking to prove a de facto debarment claim.'' (*Highview Eng'g v. U.S. Army Corps of Engineers*, 864 F. Supp.2d 645, 649 (W.D. KY 2012)) Losing one award is not enough. The contractor must show that it has been *repeatedly* shut out, giving the appearance that the government imposed debarment without giving the contractor the requisite notice and opportunity to respond.

Courts will look at whether the contractor can show ''a systematic effort by the procuring agency to reject all of the bidder's contract bids. Two options exist to establish a de facto debarment claim: 1) by an agency's statement that it will not award the contractor future contracts; or 2) by an agency's conduct demonstrating that it will not award the contractor future contracts.'' (*TLT Constr. Corp. v. United States*, 50 Fed. Cl. 212, 215-16 (2001))

Winning under this standard usually requires providing evidence that the contractor competed and lost numerous times, often when it was the low bidder, and on varying types of procurements. (*See, e.g., Phillips v. Mabus*, 894 F. Supp. 2d 71, 81 (D.D.C. 2012); *Leslie and Elliott Co. Inc. v. Garrett*, 732 F.Supp. 191 (D.D.C. 1990); *Art Metal USA Inc. v. Solomon*, 473 F.Supp. 1 (D.D.C. 1978)) Establishing de facto debarment is an uphill battle, and taking discovery is often required (including deposing government officials).

***Sigmatech* Ruling** In the recent case in Alabama, the contractor, Sigmatech Inc., asserted that the Army had de facto debarred the company by taking several actions that Sigmatech construed as an exclusion (*Sigmatech Inc. v. United States Department of Defense*, No. 5:19-cv-0089, N.D. AL. Feb. 4, 2019) (Sigmatech).

First, Sigmatech alleged the Army tried to exclude it from competing for the follow-on to its incumbent contract by issuing the solicitation as a small-business set-aside. (The Army had initially awarded to Sigmatech this way, but over the course of performance Sigmatech grew to be other than small.)

Second, Sigmatech alleged that when the Army could not find enough small businesses to compete for the follow-on contract in a small business set aside procurement, the Army tried to use a different contract vehicle to solicit offers, rather than the Blanket Purchase

Agreement under which the Army had awarded Sigmatech the incumbent contract.

Third, Sigmatech alleged that although the Army ultimately pursued a full and open competition in which Sigmatech participated, the Army awarded the contract to a competitor on the basis of a ''sham discriminator.''

Monday Morning Quarterbacking The court dismissed Sigmatech's claim for lack of subject matter jurisdiction. Because it did not rule on the merits, the case is ripe for Monday morning quarterbacking on the issue of de facto debarment.

Sigmatech's claim that it was de facto debarred because the Army sought to set aside the work for small businesses seems questionable, because the Army was following the same procurement steps that led to the award of the incumbent contract to Sigmatech. A court might view the Army's return to the small business set aside model as reflecting no more than a desire to maximize opportunities for small businesses, consistent with the Army's obligations under the Small Business Act.

Second, while the Army tried to use a different contract vehicle for the follow-on contract, Sigmatech did not explain why this was improper or necessarily motivated by a desire to exclude Sigmatech.

Finally, Sigmatech's argument that the Army made an award based on a ''sham discriminator,'' even if true, still focuses only on one contract award. To show de facto debarment, a plaintiff must show exclusion from multiple awards. Additionally, even if true, this argument is a bid protest claim, for which jurisdiction exists only at the Government Accountability Office or the Court of Federal Claims.

Take Care of Your Relationship Given the difficulty of showing de facto debarment, the best thing a government contractor can do is to tend carefully its relationship with the government, to prevent the relationship from souring to the point where de facto debarment is suspected. An obvious start is to perform well, provide effective management and cost control, and act with integrity.

Additionally, when a contractor loses a competition, it should always seek a debriefing, when available, to learn the reasons why its proposal was not awarded. More broadly, contractors should remain vigilant for indicia of the customer's satisfaction (or dissatisfaction) with the relationship, and react to difficulties with helpfulness and transparency, in the manner one would expect of a responsible business partner.

In the rare cases where the facts support de facto debarment, the contractor must give strong consideration to pressing this claim, despite the odds, because the contractor's very existence as a going concern may hang in the balance.

Author Information

Dominique Casimir is a partner in Arnold & Porter's Government Contract practice group in Washington, D.C. She regularly represents clients in suspension and debarment proceedings and she also handles internal investigations, government enforcement, bid protests, and claims litigation.

Alexandra Barbee-Garrett is an associate in Arnold & Porter's Government Contracts practice group in Washington, D.C. She represents clients in a wide range of government contracting matters, including suspension and debarment proceedings, bid protest litigation, investigations and audits.