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Federal Contracts Report™

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Contractor Accountability

Contractor Suspension and Debarment: Scalpel or Grenade? Latest Developments in the Debate Over Agency Discretion and Fairness to Contractors



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Government contractors are operating in an intensified enforcement environment. Increasingly, the promulgation of procurement-related legislation is accompanied by sharply-worded statements by some members of Congress indicating that it is time to ''crack down'' on wayward contractors, and to make examples of those whose mistakes place them in the cross-hairs.

Congress has taken a particular interest in the suspension and debarment of government contractors and has expressed dissatisfaction that agencies are not suspending and debarring contractors in greater numbers. In a November 16, 2011, hearing of the Committee on Homeland Security and Governmental Affairs, for example, Senator Lieberman stated that the authority to suspend and debar government contractors ''is a tool that is used all too rarely,'' and that ''it strains the imagination to think that these agencies have not encountered more companies that have overbilled the government, engaged in fraud, or failed to perform or carry out their obligations.''[1] Thus, the message from Congress is that the government is rife with unscrupulous contractors, and that there is a direct correlation between the absolute number of suspension and debarment cases and the degree to which the government's interests are being protected.

Under the Federal Acquisition Regulation, agency suspension and debarment officials (''SDO'') have considerable discretion in determining whether to suspend or debar contractors. This discretion enables the government to protect its interests more effectively by allowing the SDO to consider mitigating factors and to fashion administrative agreements to provide oversight and redress without undue limits on contracting. In the current enforcement environment, however, some in

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[1] *Weeding Out Bad Contractors: Does the Government Have the Right Tools?*, Before the S. Comm. on Homeland Security and Governmental Affairs, 112th Cong. 1-2, Hrg. 112-358 (2011) (statement of Joseph I. Lieberman).

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Congress appear less concerned with the benefits of preserving SDO discretion. Over the past two years, for example, numerous bills have attempted to chip away at SDO discretion by making debarment automatic and mandatory in various circumstances.

Although the momentum in favor of suspension and debarment is unlikely to abate in the near term, there are two recent indications that notions of fairness and appropriate discretion are re-entering the discussion. First, a U.S. district court recently held that an affiliate cannot be suspended for more than 18 months unless legal proceedings are brought against it, notwithstanding the pendency of legal proceedings against another affiliate company. *Agility Defense & Government Services, Inc. v. U.S. Department of Defense*, Civ. Action No. CV-11-S-4111-NE, 2012 BL 1578302012 WL 2480484 (N.D. Ala. June 26, 2012). Second, Department of Defense (''DOD'') officials have reported to the government Accountability Office (''GAO'') that DOD does not intend to implement the recommendation by the Commission on Wartime Contracting (''CWC'') that agencies require a written rationale for not pursuing suspension or debarment in particular cases.[2]

I. Background on Suspension & Debarment. The policy of the U.S. government is to deal only with presently responsible contractors.[3] Suspension and debarment serve the remedial purpose of protecting the government on a going forward basis from the business risk of contractors that lack integrity. Suspension or debarment renders a contractor ineligible for new contracts and covered nonprocurement transactions.[4] The FAR expressly prohibits the use of suspension and debarment to punish otherwise presently responsible contractors for prior incidents.[5] The regulations afford sufficient latitude to enable an SDO to conclude that a contractor has addressed a past problem and no longer poses an unacceptable risk. The suspension or debarment of such a contractor is contrary to the FAR. SDOs also have the discretion to determine that no exclusion is unnecessary, notwithstanding the existence of cause.[6] This discretion gives the government the flexibility to make a determination that the circumstances in a particular case suggest that the contractor's misconduct is unlikely to recur.[7]

Although SDOs have considerable discretion, the regulations direct them to consider a list of mitigating factors in determining the propriety of suspension and debarment, such as:[8]

- existence of effective standards of conduct and internal control systems;
- timely notification;
- investigation of the circumstances;
- cooperation;
- payment of restitution;
- appropriate disciplinary action;
- implementation of remedial measures;
- management recognition of seriousness.

Considering these factors facilitates a fair assessment of whether a contractor's remedial measures minimize the government's risk to an acceptable level, such that suspension and debarment become unnecessary, and helps ensure that exclusion is not used as punishment.

II. Congressional Interest in More Suspensions and Debarments. The calls for contractor accountability reveal a deep-seated presumption that the government's interests are not being adequately protected, and that more must be done to place lucrative contracting opportunities out of the reach of contractors with blemishes on their records.

1. Congressional Concern that the Department of Justice Acts Obstructs Debarments.

In a May 18, 2010 letter to DOJ, Representative Edolphus Towns, Chairman of the House Committee on Oversight and Government Reform, expressed concern ''that settlements of civil and criminal cases by DOJ are being used as a shield to foreclose other appropriate remedies, such as suspension and debarment, that protect the government from continuing to do business with contractors who do not have satisfactory records of quality performance and business ethics.'' He requested that DOJ ''identify all instances in which DOJ officials intervened in a suspension and debarment proceeding on behalf of government contractors since 2005 and explain the basis for the DOJ intervention.''

In a January 2011 hearing, Senator Franken questioned the Assistant Attorney General for the Criminal Division of DOJ, Lanny Breuer about whether agencies would be excluding contractors in greater numbers but for DOJ intervention through settlement agreements:[9]

> I am particularly worried that Federal agencies are giving a free pass to large contractors. According to the Project on Government Oversight's Records, over the past 15 years, there have been only five suspension actions and zero debarment actions of the government's top 100 contractors, which receive 55 percent of all contracts. . . . How frequently is DOJ putting in settlements, specific language that can be used to prevent debarments and suspensions?

Mr. Breuer denied that DOJ shields contractors from debarment:[10]

> I do not think we would do it, for the very reasons you said. I do not think that the Department of Justice believes that it is our role to determine whether someone should be debarred or not because we do not have the expertise of the department of agency who has to decide how valuable this particular contractor is.

This assurance did little to assuage Congress, or to abate its efforts to increase the number of excluded contractors.

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[2] U.S. Gov't Accountability Office, GAO 12-854R; Contingency Contracting: Agency Actions To Address Recommendations By The Commission On Wartime Contracting In Iraq And Afghanistan (2012) at 26.

[3] *See* FAR 9.402(a).

[4] *See* FAR 9.406-1(c), 9.407-1(d); *see also* 2 C.F.R. §§ 180.130, 180.145.

[5] FAR 9.402(b).

[6] *See* FAR 9.406-1(a), 9.407-1(a)(2); *see also* 2 C.F.R. § 180.845(a).

[7] *See Roemer v. Hoffman*, 419 F. Supp. 130, 132 (D.D.C. 1976) (holding that the proper focus of a debarment determination is the contractor's present responsibility as opposed to past misconduct).

[8] *See* FAR 9.406-1(a); *see also* 2 C.F.R. § 180.860.

[9] *See Protecting American Taxpayers: Significant Accomplishments and Ongoing Challenges in the Fight Against Fraud: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. (Jan. 26, 2011).

[10] *Id.*

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2. The Commission on Wartime Contracting Criticizes Administrative Agreements, Favors Mandatory Debarment, and Calls on Agencies to Document the Rationale for Not Suspending or Debarring Contractors.

In 2008, Congress created the CWC to examine the extent of waste, fraud, and abuse in contingency contracting and to provide recommendations for improving the contract management process. The CWC submitted interim reports to Congress in June 2009 and February 2011, and submitted its final report in August 2011.[11]

The CWC told Congress that agencies have not suspended or debarred contractors or individuals as frequently as necessary. The commission was particularly critical of agencies' use of administrative agreements as an alternative to suspension and debarment: ''Agencies sometimes do not pursue suspensions or debarments in a contingency environment, preferring instead to enter into administrative agreements with the problematic contractor. When agencies fail to take action to bar contractors from participation in the federal market despite chronic misconduct, criminal behavior, or repeated poor performance, taxpayer dollars can be wasted and mission objectives compromised—while the contractor is left with no incentive to improve.''[12]

Yet the Department of the Air Force characterizes an administrative agreement as a powerful ''carrot'' that motivates a contractor to make substantive changes in its ethical culture, compliance and business processes.[13] In fact, most administrative agreements incorporate monitoring and reporting provisions aimed at protecting the government's interests, and require the contractor to agree that any violation of the administrative agreement constitutes an independent basis for debarment.[14] Administrative agreements are expressly recognized by the FAR and by the Department of Defense FAR Supplement.[15] The FAR directs SDOs to report pertinent information about the administrative agreement into the Federal Awardee Performance and Integrity Information System.[16] In 2006, OMB recognized that administrative agreements are ''an alternative to suspension or debarment.'' [17]

The CWC, on the other hand, concluded that when agencies use administrative agreements, in lieu of suspension or debarment, ''the deterrent threat is lost.''[18] However, suspension and debarment are intended to protect the government from the business risk of contractors that are not ''presently responsible,''[19] not to punish or deter other contractors from engaging in misconduct. Even so, some members of Congress believe the exclusion should be imposed to deter other contractors from misconduct. For example, in an August 6, 2012 letter, Senators Levin and McCain urged Sectary of State Clinton and Secretary of Defense Panetta to consider suspending or debarring Pratt & Whitney Canada based on its guilty plea relating to the export of military software to China in order ''to deter similar action by other U.S. defense contractors.''[20]

In the February 2011 interim report, the CWC recommended mandatory suspension for contractors indicted on contract-related charges.[21] Although the CWC subsequently rescinded that recommendation,[22] the CWC advocated for a requirement that SDOs document their rationale for not imposing suspension and debarment.[23]

3. Congressional Attempts to Force Suspensions and Debarments Through Legislation.

Over the past year, numerous legislative proposals have been introduced that would require automatic suspension and debarment of government contractors in a variety of circumstances. Although such provisions could lead to a greater overall number of exclusions, these laws would significantly erode the discretion of SDOs and preclude them from resolving such matters on a case-by-case basis.

- H.R. 1657, introduced on April 14, 2011, seeks to impose a mandatory five year debarment for small businesses that misrepresent their status as a veteran owned or as service-disabled veteran owned. The bill passed the House on May 23, 2011, and remains pending in the Senate Committee on Veterans Affairs, along with a similar bill, S. 1184.

- H.R. 3588, the Overseas Contractor Reform Act, was introduced on December 7, 2011. The bill requires the debarment of contractors found to be in violation of the Foreign Corrupt Practices Act within 30 days of fi-

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[11] The CWC's reports are available on the Reports page of the CWC website, http://www.wartimecontracting.gov/index.php/reports. In addition to the two interim reports and the final report, the CWC also issued five special reports, all of which are available on the CWC website.

[12] Feb. 2011 Interim Report at 50.

[13] ''Comments on the Wartime Contracting Commission's Recommendations on Suspension and Debarment.'' *Service Contractor*, Sept. 2011 at 15.

[14] *Id.*; *see also* Kate M. Manuel, CONG. RESEARCH SERV., RL34753, DEBARMENT AND SUSPENSION OF GOVERNMENT CONTRACTORS: AN OVERVIEW OF THE LAW INCLUDING RECENTLY ENACTED AND PROPOSED AMENDMENTS9 (2011).

[15] *See* FAR 9.406-3(f)(1); DFARS 209.406-1. Administrative agreements are also recognized as an alternative to the imposition of debarment pursuant to statute. For example, the Environmental Protection Agency (''EPA'') administers the statutory debarment provisions of the Clean Air Act and the Clean Water Act, which requires the automatic exclusion of a contractor that is convicted of violating the Clean Air Act or the Clean Water Act. *See* 2 C.F.R. § 1532.1110. Even in this context, EPA is authorized to resolve a potential debarment under the terms of an administrative agreement. *See* 2 C.F.R. § 1532.1300(a) (''The EPA debarring official may, at any time, resolve your CAA or CWA eligibility status under the terms of an administrative agreement.'').

[16] *See* FAR 9.406-3(f)(1) (''If the contractor enters into an administrative agreement with the government in order to resolve a debarment proceeding, the debarring official shall access the website (available at www.cpars.csd.disa.mil, then select FAPIIS) and enter the requested information.

[17] Office of Management and Budget, *Suspension and Debarment, Administrative Agreements, and Compelling Reason Determinations*, Aug. 31, 2006, *available at* http://m.whitehouse.gov/sites/default/files/omb/assets/omb/memoranda/fy2006/m06-26.pdf.

[18] ''Transforming Wartime Contracting: Controlling Costs, Reducing Risks'' Commission on Wartime Contracting (Aug. 2011) 156, available at http://www.wartimecontracting.gov/index.php/reports.

[19] *See* FAR 9.402(a) (''Agencies shall solicit offers from, and award contracts to, and consent to subcontracts with responsible contractors only. Debarment and suspension are discretionary actions that, taken in accordance with this subpart, are appropriate means to effectuate this policy.'').

[20] Available at https://www.documentcloud.org/documents/407409-levin-mccain-letter.html.

[21] CWC Feb. 2011 interim report at 51.

[22] CWC Aug. 2011 final report at 160 n. 4.

[23] *Id.* at 156, 160.

nal judgment. The bill is currently pending in the House Committee on Oversight and Government Reform.

■ In January 2012, the Consolidated Appropriations Act of 2012, (Pub. L. 112-74) took effect. Five of the appropriations bills included provisions requiring the automatic exclusion of companies and individuals that were convicted of any criminal offense in the preceding two years unless the agency affirmatively considered suspension and debarment and determined that such action was unnecessary. The 2013 National Defense Authorization Act does not contain a similar requirement.

■ S. 2139, the Comprehensive Contingency Reform Act, was introduced on February 29, 2012. Section 113 requires the automatic suspension of a contractor charged with criminal offenses or overpayments related to contingency operations, and contractors accused of fraud in civil or criminal proceedings related to any federal contract, whether or not the alleged acts were committed by the contractor, its employee, affiliate, or subsidiary, or any business owned or controlled by the contractor.

Agency feedback on the automatic suspension provision of S.2139 has been negative. For example, Patrick Kennedy, the Under Secretary for Management at the State Department testified:[24]

> With regard to the automatic suspension provisions set out in proposed Section 113, we believe that the current, longstanding policy requiring a reasoned decision from the SDO based on a totality of information remains a sound approach, and would have concerns with a provision that imposes automatic suspension and debarment which will likely lead to due process challenges by the affected contractor community and potential court action that could delay necessary action in crisis situations.

The Office of Federal Procurement Policy has also criticized the mandatory debarment provisions of this bill. For now, the bill remains pending in committee.

■ H.R. 4310, the House version of the National Defense Authorization Act for Fiscal Year 2013, was introduced on March 29, 2012, passed the House on May 18, 2012, and is awaiting conference committee mark-up by the Senate. Section 1683 would amend the Small Business Act (15 U.S.C. 645(d)(2)(C)) to clarify that misrepresentation of small business status in order to obtain certain prime contracts or subcontracts is an independent basis for suspension or debarment. Section 1684 would require the Small Business Administration to report annually to Congress the number of contractors proposed for suspension or debarment, the office that originated the proposed exclusion, the reasons, the outcome, and the number of suspensions or debarments referred to the Inspector General of the SBA or another agency, or to the Attorney General.

■ On May 24, 2012, the Senate Armed Services Committee completed its markup of S. 3254, its version of the NDAA; the bill was placed on the Senate Legislative Calendar as of June 4, 2012. Section 881 would place new requirements on the SDOs of the Department of the Army, the Air Force, and the Navy, and the Defense Logistics Agency. In particular, the Senate wants these SDOs to be independent of acquisition officials, and to require that they limit their engagement to suspension and debarment activities and other fraud-remedies activities. The Senate would also mandate that these SDOs document their final decisions — including the decision not to suspend or debar, and the rationale for using an administrative agreement in lieu of exclusion. S. 3254 would also require revision of the DFARS to require automatic referral to SDOs of any entity charged with a crime related to a DOD contract, alleged to have engaged in fraudulent actions in connection with a the award or performance of a DOD contract, or who has been determined by the head of a DOD agency to have failed to refund money owed to the government.

III. Recent Court and Agency Efforts to Safeguard Fairness and Discretion in Suspension and Debarment.

1. Agility: Fairness for Affiliates.

Notwithstanding the potentially catastrophic economic consequences of ineligibility, the government can disqualify a contractor quite readily. Commentators and the contractor community alike have long expressed concerns about the perceived lack of due process and fairness to contractors under the current rules governing suspension and debarment. For instance, if the government suspends a contractor, the suspension is effective as to all of that contractor's divisions or organizational elements unless the suspension decision is limited by its terms to specific divisions, organizational elements, or commodities.[25] In addition, the government can also suspend a contractor's affiliates, even if the affiliates are not suspected of misconduct, simply by naming the affiliates in the notice of suspension and providing them an opportunity to respond.[26] Moreover, although the FAR presumptively limits the period of suspension to a maximum of 18 months, the regulation also allows the suspension to remain in effect pending the resolution of legal proceedings.[27] This has resulted in affiliated companies being unfairly suspended for lengthy periods, even if their present responsibility is not in question.

One recent district court decision addressed this unfairness by holding that the affiliate of a suspended contractor cannot be suspended for more than 18 months unless the government brings legal proceedings against the affiliate. *Agility Defense & Government Services, Inc. v. U.S. Department of Defense*, Civ. Action No. CV-11-S-4111-NE, 2012 BL 1578302012 WL 2480484 (N.D. Ala. June 26, 2012). The case presented compelling facts: in a grand jury indictment, Public Warehousing Company, K.S.C. (''PWC'') was alleged to have defrauded the government of over $6 billion under contracts to supply food to American military personnel stationed in the Middle East. On the heels of the indictment, the Defense Logistics Agency (''DLA'') suspended PWC numerous PWC subsidiaries and three PWC affiliates. The subsidiaries and affiliates were not accused of any involvement in PWC's alleged misconduct.

The affiliates made numerous attempts to persuade DLA to lift their suspensions, to no avail. The affiliates also attempted, but failed, to obtain a temporary re-

[24] Available at http://www.state.gov/m/rls/remarks/2012/188014.htm#.

[25] FAR 9.407-1(c).
[26] *Id.*
[27] FAR 9.407-4.

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straining order from the district court for the District of Columbia. Finally, the affiliates brought an action for declaratory and injunctive relief in the Northern District of Alabama. The affiliates argued that although the government had initiated legal proceedings against PWC, no legal actions had been initiated with respect to the affiliates, which by this time had been suspended for well in excess of 18 months. Indeed, as the court noted, no allegations of wrongdoing had been leveled against the affiliates.

Nevertheless, the court held that the initial 18-month suspension of the affiliates was a valid exercise of DLA's discretion under the FAR. DLA named the affiliates and provided them with an opportunity to respond. Nothing more is required in order to suspend an affiliate for 18 months. The court justified this result by noting that the government may require an 18 month period in order to investigate the affiliates for misconduct.

However, as a matter of first impression, the court held that an agency cannot suspend an affiliate for longer than 18 months merely on the basis that legal proceedings had been brought against the principal company. The court stated that the government lacks the power to suspend an affiliate indefinitely without even the suspicion of misconduct. Yet, as of the date of the court's decision, the affiliates had been suspended for 31 months, nearly twice the regulatory limit in the absence of legal proceedings. The court sympathized with the plight of the affiliates, who ''suffered the loss of business,'' and suggested to the government that 18 months provides adequate time for the government investigate the affiliates for misconduct. The court rejected the government's prediction that an 18-month limitation on the suspension of an affiliate will prompt suspended contractors to establish wholly-owned subsidiaries. As the court noted, a suspending official can suspend a contractor pursuant to the FAR's catch-all provision, and the creation of a subsidiary with the intent to circumvent a suspension would supply a basis for suspension under the catch-all provision. The court thus granted summary judgment in favor of the affiliates, and held that their suspensions were contrary to law, in violation of the Administrative Procedures Act.

2. DOD Declines to Implement the CWC Recommendation to Document the Rationale for not Pursuing Suspension or Debarment.

Following the reports issued by the CWC, GAO undertook an investigation to gauge whether and to what extent agencies are implementing the CWC's recommendations. On Aug, 1, 2012, GAO issued Report No. 12-854R, CONTINGENCY CONTRACTING: AGENCY ACTIONS TO ADDRESS RECOMMENDATIONS BY THE COMMISSION ON WARTIME CONTRACTING IN IRAQ AND AFGHANISTAN.

As stated *supra*, the CWC recommended that SDOs be required to document their rationale for not suspending or debarring a contractor. Notwithstanding Congressional inclination toward such a requirement, DOD does not plan to require its SDOs to document their rationale for not pursuing suspension and debarment. According to the GAO report, DOD believes that the requirement erodes the discretion of SDOs in a manner that will produce disadvantageous consequences for the government:[28]

> DOD officials stated the department does not plan to implement this recommendation. While DOD reported it supports strengthened enforcement tools, officials stated that they disagreed with the CWC's specific recommendation. DOD officials noted that they have concerns about requiring a written rationale for not pursuing proposed suspension and debarments, stating this provision might have a negative effect on the suspension and debarment official's discretion or result in de facto debarments, thereby potentially increasing the risk of litigation.

It remains to be seen whether DOD will persist in this approach, and whether it will incite further Congressional ire.

IV. Conclusion. Some members of Congress are clearly of the belief that contractors have treated the government unfairly and taken advantage of U.S. taxpayer money. This perception has been bolstered no doubt by alarming and attention-grabbing information, such as the CWC's finding that up to $60 billion in taxpayer money may have been lost to fraud, waste, and abuse during contingency operations in Iraq and Afghanistan,[29] and GAO's finding that many agencies lack robust suspension and debarment programs.[30] In such a climate, advocating for fairness to contractors and for preserving SDO discretion is particularly challenging.

It is important for contractors to be aware that Congressional interest in suspension and debarment is not likely to dissipate in the near future. Contractors should also understand that SDOs are operating under considerable scrutiny. In the current environment, where suspension and debarment are ''hot topics'' and are widely perceived punitive measures to provide redress for past misconduct, members of Congress may not be satisfied with the knowledge that an SDO has exercised his or her discretion and decided not to suspend or debar a contractor, or to enter into an administrative agreement in lieu of exclusion.

Contractors should be aware of the possibility that an SDO's decision not to suspend or debar has the potential to become the subject of public debate and controversy. Even an administrative agreement that the contractor perceives as stringent may be perceived by the public as ''letting the contractor off the hook.'' For this and other reasons, it is important that a contractor be proactive in terms of developing and refining its compliance programs to avoid finding itself in the crosshairs of the current enforcement environment. If a cause for suspension or debarment arguably exists, it is imperative that the contractor be prepared to engage in early communication with an SDO and that the contractor provide the SDO with a defensible administrative record.

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[28] GAO-12-854R at 8.

[29] CWC Aug. 2011 final report at 1.

[30] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-739, SUSPENSION AND DEBARMENT: SOME AGENCY PROGRAMS NEED GREATER ATTENTION, AND GOVERNMENTWIDE OVERSIGHT COULD BE IMPROVED (2011).