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INSIGHT: Contractors Facing Sanctions Shouldn't Rush to Fire Workers

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The federal government spends approximately $500 billion per year on federal contracts—an amount it describes as roughly the size of Sweden's economy. As a result, the government must protect itself from the bad apples, i.e., companies and individuals who will not perform as promised or might commit fraud or other misconduct. The government's power to suspend or debar companies and individuals from receiving government contracts is one of the most potent weapons in the federal arsenal of protective measures. Indeed, suspension and debarment are commonly referred to as the ''death penalty'' because of their devastating effects.

If a federal contractor is accused of misconduct, the government generally goes after both the company and the employees responsible for the misconduct. This raises an important strategic consideration for federal contractors: what should they do with the accused employees? Since the ultimate resolution of a proposed debarment rests on a contractor's ''present responsibility,'' some contractors simply dismiss the accused employee. This, however, is not always the best option.

Debarment Is Devastating A suspended or debarred company or individual is ineligible to receive new federal contracts from any executive branch agency – in fact, their proposals cannot even be evaluated. Existing contracts cannot be renewed or extended. The names and other identifying information of suspended or debarred companies and individuals are displayed publicly for all to see on the SAM.gov database, which can lead to an array of adverse consequences from reputational harm to parallel exclusions by state and local governments, or the inability to access capital from banks. They normally cannot receive subcontracts from prime contractors. And, even after the government lifts the suspension or debarment, contractors or individuals find themselves having to disclose the prior exclusion in future proposals, representations and certifications, and employment applications. For companies and individuals whose primary source of revenue comes from federal contracts, surviving a suspension or debarment is an uncertain proposition.

While the effect of a suspension or debarment is severe for both companies and individuals, the effects can be particularly life altering for individuals. If they are fired based on a suspension, debarment, or proposed exclusion, individuals must contend not only with loss of income, but also with decreased employment prospects. Prospective employers will no doubt be wary of the risk of employing a person who is or who may soon be excluded from federal contracting. Such individuals may be unable to maintain or obtain security clearances, and, if fired for cause, may be unable to obtain unemployment benefits.

On the whole, companies are better equipped to respond to a potential suspension or debarment than individuals. Companies are more likely to have the resources to hire experienced lawyers to shepherd them through the process. Even in cases of admitted prior misconduct, companies are in a better position to demonstrate that they have instituted remedial measures such as new training programs and enhanced internal controls. Additionally, companies can fire, discipline, or demote employees. Individual employees, by contrast, often find themselves unable to point to concrete ac-

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tions or systemic changes that they can make to persuade the Government that they meet the Federal Acquisition Regulation's standard of ''present responsibility.''

When the Government Goes After Employees Because companies act through their individual employees, the government often names both a company and particular employees in a notice of suspension or proposed debarment. Given the high stakes, a company's initial instinct in responding to a notice may be to fire the named employees, and point to that response as evidence that the company is presently responsible. That instinct is understandable. After all, one of the mitigating factors that the government considers in deciding to exclude a company is ''whether the contractor has taken appropriate disciplinary action against the individuals responsible for the activity which constitutes cause for debarment.'' FAR 9.406-1(a)(6).

Further, the 2015 memorandum issued by then-Deputy Attorney General Sally Yates (commonly known as ''the Yates Memo'') stated that ''one of the most effective ways to combat corporate misconduct is by seeking accountability from the individuals who perpetrated the wrongdoing.'' The Yates Memo further stated that ''in order for a company to receive any credit for cooperation under the Principles of Federal Prosecution of Business Organizations, the company must completely disclose to the Department all relevant facts about individual misconduct. . .

''That is, to be eligible for any credit for cooperation, the company must identify all individuals involved in or responsible for the misconduct at issue, regardless of their position, status or seniority, and provide to the Department all facts relating to that misconduct.''

While these powerful incentives may motivate a company to sacrifice employees who are named respondents in a debarment action, rushing to fire such employees, may not actually be in anyone's best interest.

This is not to say that companies facing a proposed exclusion should always act to protect their accused employees. Rather, before rushing to take action against employees, companies should consider whether doing so is in their best interests. Firing employees comes at a cost to the company—it can be disruptive to ongoing work, bad for morale, and require a significant investment of resources to recruit, hire, and train replacements. Additionally, if a company's principal response to an incident is to fire the employees involved, the company may have a compliance blind spot, whereby it fails to identify and remediate the underlying causes for the misconduct. Employee misconduct is usually the result of poor training, bad incentives, or the lack of an ethical culture. In many cases, the government is more keen to see the company address these larger issues rather than simply firing employees, and to address them through targeted training and disciplinary action short of termination. Moreover, a terminated employee is likely a disgruntled employee, which creates new risks for the company.

Firing a valuable employee to save the company is not necessarily the ticket to avoiding exclusion of the company. Just as the Federal Acquisition Regulation prohibits the government from imposing suspension or debarment for purposes of punishment, FAR 9.402(b), companies should avoid reflexive punishment (i.e., termination) of individual employees where less drastic actions may be appropriate. Companies whose employees are named in a show cause notice, or who are suspended or proposed for debarment should carefully assess the circumstances, and make a deliberate, defensible decision about how best to demonstrate present responsibility to the government.

Best Practices For all of these reasons, companies that have successfully overcome debarment actions have learned to take a more measured approach to dealing with their accused employees. We offer the following suggestions that may help guide a company's response to a show cause notice, suspension, or proposal for debarment that also extends to their employees:

First, the company should assess whether its interests and those of the named employees are likely to diverge. If so, the company should advise the employees to retain separate counsel. A joint defense agreement can then be used to protect communications among the various respondents.

Second, in a suspension setting, in which an individual's ultimate culpability may not yet be known, consider placing employee on administrative leave rather than terminating, while the company conducts its investigation.

Third, before rushing to judgment, it is prudent for companies to conduct their own internal investigations to determine why the government is proposing an exclusion. In addition to showing the government that the company is taking the matter seriously, this investigation can also inform the company about the conduct of its employees and the appropriate remedy. Is the individual respondent a principal of the company, or a rank and file employee? Did the government impute the conduct of the individual to the company? Did the individual act knowingly, or recklessly? If so, will the individual accept responsibility and show remorse? What reputation does the individual have? Can the employee plausibly argue that the company failed to provide adequate training? The company can then present a well-supported position to the government.

Fourth, the company should base its remedial actions on the results of the investigation. In cases of knowing or reckless misconduct, particularly on the part of principals, the company may reasonably feel that it has no choice but to terminate an employee or reassign the individual respondent to non-federal programs. On the other hand, misconduct that may reflect a misunderstanding of the legal obligations (which can be common in areas such as sanctions and export control compliance, for example), can often be remedied by training.

Finally, keep in mind that taking action against an employee is only one of 10 mitigating factors that the government considers in reviewing a proposed debarment. Companies should bear in mind that the government has three principal questions that it considers when deciding whether to impose suspension or debarment: (1) what did the contractor do to prevent missteps before misconduct occurred? (2) What controls did the contractor have in place to identify the misconduct? And (3) how did the contractor respond once the problem was discovered?

Under that framework, knee-jerk termination or demotion of employees, particularly those who did not knowingly commit misconduct or who are willing to accept personal responsibility and show contrition, should not be a required element for the contractor to

establish that it is presently responsible. Ultimately the government may find it more compelling to see both the company and the employee accept responsibility and take concrete steps to prevent recurrence – improved training, enhanced management/oversight, and more robust internal controls. If the company explains to the government that termination was considered, but was determined not to be the best approach in a particular case, the government may well be persuaded that termination of the employee is not a required element of the company's present responsibility.

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