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Suspension & Debarment

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I. Overview

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. The Government's policy is driven by the public interest in protecting the Government, and not for purposes of punishment. FAR 9.402. The Government, and particularly DoD agencies, has implemented procedures to effect the policies of FAR Subpart 9.4. In addition, 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.). FAR 9.404. Contracting officers are required to review the EPLS to protect the Government by excluding ineligible parties prior to entering new contracts, FAR 9.405(d)(1) and (4), unless the head of the procuring agency has determined that there is a compelling reason to allow the procurement. FAR 9.405(a). The FAR also restricts suspended or debarred parties from participating in subcontracting under government procurements. FAR 9.405-2.

II. Debarment

Debarment may occur for a variety of causes. Some of the causes lead to relatively automatic debarment (in the majority of cases) and other causes require the finding of certain facts based on a preponderance of the evidence. FAR 9.406-2.

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.

FAR 9.406-2(a).

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A contractor may also be debarred if "under a preponderance of the evidence" any of the following are found:

- 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 credible evidence of 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).

Federal agencies are required to give notice and an opportunity to submit, in person or through a representative, information or argument in opposition to a proposed debarment. And in the case of proposed debarments based on circumstances other than a conviction or civil judgment, where material facts are in dispute, the contractor is afforded what amounts to an administrative mini-trial. FAR 9.406-3(1) & (2). In addition to opposing the proposed debarment on the merits, the contractor may present mitigating factors, such as internal controls and compliance, remedial measures, cooperation with the government, etc. FAR 9.406-1(a)(1)-(10). In both instances, the debarring official must render a decision, and in the cases involving "mini-trials" the official must provide written findings of fact. FAR 9.406-3(d).

Debarments are set for definite terms, generally no longer than three years (with exceptions and potential extensions for continued or new violations) and may be reduced for newly-discovered evidence, reversal of a conviction, etc. FAR 9.406-4. Debarments may apply to all divisions and affiliates of the contractor, or may be tailored to specific divisions or organizational elements of the contractor. FAR 9-406-1(b).

In addition, contractors may avoid the consequences of debarment by entering into administrative agreements with agencies under which certain conditions are imposed. When such agreements are reached, the debarring official is required to enter information relevant to the agreement on the Federal Awards Performance and Integrity Information System (FAPIIS). FAR 9.406-3(f)(1).

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III. Suspension

Suspension is essentially the predecessor to debarment and is temporary rather than for a fixed term. FAR 9.407-1. Also, rather than requiring a "preponderance of the evidence," suspension may be imposed only on the basis of "adequate evidence." FAR 9.407-1(a) & (b)(1). It is discretionary, and the 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. FAR 9.407-1(b)(2).

IV. Recent Developments

Over the past few years, Federal agencies have been heavily criticized for not using suspension and debarment proceedings as aggressively as politicians and public advocacy groups would like. Likely as a result of this scrutiny, proposed debarments by the Department of Defense (DoD) increased by approximately 60 percent in FY 2011. The information below explains some of the primary drivers behind the increased suspension and debarment proceedings and highlights some of the recent high-profile cases.

V. The Growing Pressure on Agencies

In today's heated political environment, which is often focused on wartime policies and budgets, it is appealing for Congressional representatives from either side of the aisle to say that contractors with a history of misbehavior or poor performance should not be receiving Federal funds. However, several reports issued over the past year by inspectors general and the Government Accountability Office (GAO) have heightened Congressional interest in this topic.

For instance, in January 2011, the DoD, in coordination with its Inspector General's office, released a draft report to Congress summarizing fraud by DoD contractors over a ten-year period that sparked a flurry of inquiry and press. That draft report found that 30 DoD contractors were criminally convicted of fraud over the period, but only 17 of them were debarred or suspended and three continued to receive Federal contracts (which were valued at a total of nearly $350 million). Over that same period, 91 DoD contractors were the subjects of civil judgments that required fines or restitution payments, 35 of which continued to receive contracts (which were valued at a total of nearly $5 billion). Furthermore, 120 DoD contractors entered into settlement agreements over the preceding three-year period, most of which were the result of criminal convictions or civil judgments. Finally, the report highlighted that more than $5 million had been obligated to DoD contractors **after** having been suspended or debarred

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for fraudulent activity. Nevertheless, the report concluded that the existing remedies with respect to contractor wrongdoing were sufficient.

Not surprisingly, various members of Congress doubted the report's conclusion, and DoD was asked to compile the total obligated funds to DoD contractors that had been criminally convicted of fraud, were the subject of civil judgments or entered settlement agreements over the full ten-year period—irrespective of the offense/settlement dates. This compilation included 37 parent companies from the top 100 DoD contractors and a grand total of over $1 trillion in contracts. Although the vast majority of these contracts were not awarded or performed improperly, the punch line itself garnered significant publicity and fueled a fire that was already raging.

Meanwhile, in February 2011, the Commission on Wartime Contracting issued an interim report, titled "At What Risk? Correcting Over-Reliance on Contractors in Contingency Operations." This report contended that 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. The report recommended that (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.

In July, the DoD Inspector General issued a report, titled "Additional Actions Can Further Improve the DoD Suspension and Debarment Process," which focused on poorly performing contractors not being referred for suspension and debarment. As a result, the report concluded that poorly performing contractors were still receiving Federal contracts.

On August 31, the GAO issued a report, titled "Suspension and Debarment – Some Agency Programs Need Greater Attention, and Government-wide Oversight Could Be Improved." The GAO's report focused on comparing each agency's percentage of the procurement budget to the agency's percentage of suspension and debarment actions. The GAO concluded that many agencies were not pulling their weight in weeding out non-responsible contractors because smaller agencies lacked dedicated programs, staff and resources. This 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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In September, the Council of the Inspectors General on Integrity and Efficiency (an independent executive branch entity) released a report recommending various enhancements to agency referral practices. Additionally, the report attempted to "debunk" the perceived procedural hurdles in sustaining "fact-based" actions. In particular, the report emphasized that only "adequate evidence" was required to suspend a contractor (as opposed to the "preponderance of evidence" standard for debarment).

Lastly, in November there was an important hearing before the Senate Armed Services Committee addressing many of these aforementioned reports. During that meeting, multiple senators expressed an interest in legislative efforts to implement changes, particularly the recommendations of the GAO.

VI. Example Fact-Based Debarments

A. *Cohen v. United States Department of the Air Force*

The *Cohen* case demonstrates some of the difficulties that agencies encounter with fact-based actions and, on the other hand, the hardships that can be imposed on contractors or individuals even if the suspension or debarment actions are weak and not upheld. In that case, Cohen allegedly violated ITAR by traveling to Israel in 2006 with a laptop containing controlled technical data, sharing it with unauthorized sources and conspiring to avoid ITAR constraints. The Department of Justice declined to pursue criminal or civil prosecution against Cohen, but the investigative allegations alone resulted in the Air Force proposing Cohen for debarment – four years after his trip to Israel. Cohen challenged the proposed debarment by submitting factual evidence, including the results of a polygraph test, forensic testimony about the contents of his laptop and a declaration from a high-ranking Air Force official stating that the documents on Cohen's laptop were inconsequential. The Air Force extended the proceedings by supplementing additional evidence and, despite the heavily disputed facts, no hearing was held by the SDO. Instead, six months after proposing Cohen for debarment, the SDO issued a final notice of debarment based simply on the illegal export of ITAR-controlled technical data (dropping the other factual allegations). Approximately three months later, Cohen filed suit in the Federal District Court for the District of Columbia, alleging violations of the FAR, the Administrative Procedures Act and the Due Process Clause. Within 45 days, the case was settled and Cohen's name was withdrawn from the EPLS. However, Cohen was out of work for a year and undoubtedly left with significant legal expenses.

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B. USAID's Suspension of AED

The Academy for Educational Development (AED) was a 50-year-old nonprofit that entered contracts and grants with government agencies to run health, education, social and economic development programs in about 150 countries. Up until last year, AED was receiving about $500 million in grants and contracts each year and employed nearly 3,000 people across the world. In addition, in light of their overlapping missions, AED was a key contractor for the U.S. Agency for International Development (USAID), holding 65 USAID contracts and grants worth approximately $640 million. In 2010, however, whistleblower allegations surfaced about corporate misconduct at AED, wherein AED had allegedly purchased substandard products and services under cooperative agreements at inflated prices in Pakistan and Afghanistan. During the initial stages of the investigation, in December 2010, AED was suspended by USAID – prohibiting AED from receiving any new contracts or grants.

Knowing that it could not withstand a lengthy suspension throughout the investigation, AED desperately sought an administrative agreement by ensuring all executives related to the incidents resigned or retired, adding internal controls, returning all of the related money, instituting outside audits and proposing an external monitor. USAID refused to enter such an agreement, perhaps because USAID had been singled out in the Wartime Contracting Commission's report for not pursuing suspension actions aggressively in the past. Consequently, in March 2011 (less than three months after being suspended), the 50-year-old international, nonprofit announced that it was going out of business.

C. Booz Allen Hamilton's San Antonio Office

Booz Allen Hamilton (Booz Allen) is a 100-year-old management-consulting firm with annual revenue of more than $5 billion, 17,000 employees and offices all over the country. In 2011, Booz Allen was ranked No. 9 in the top 100 Federal contractors. Booz Allen's San Antonio office employs approximately 700 people and had been chosen as one of the best places to work by the *San Antonio Business Journal* in 2011. In April 2011, Booz Allen's San Antonio office hired a former Air Force Official (Joey Meneses). On Mr. Meneses' first day with Booz Allen, he e-mailed a copy of an IT modernization contract that had been awarded to another company to four other Booz Allen employees. Booz Allen was planning to bid for the follow-on effort and put Mr. Meneses on the capture team as a "Capture Lead." None of the four other employees reported the disclosure and, in fact, one of them created and circulated a presentation showing the incumbent's labor categories, rates, hours and costs.

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Approximately two weeks later, someone in Booz Allen's pricing department recognized the sensitive nature of the document and reported it to Booz Allen's law department. Over the following months, Mr. Meneses was fired and, through a series of voicemails and e-mails to the Air Force contracting personnel involved with the follow-on procurement, Booz Allen disclosed that Mr. Meneses brought the incumbent contract to Booz Allen and that Booz Allen would not be bidding on the new contract. After further investigation by the Air Force in February 2012, Booz Allen's entire San Antonio office was prohibited from bidding on any new contracts.

The Air Force's suspension memorandum clearly reflected the SDO's disappointment with Booz Allen's narrow investigation into the incident and the firm's failure to disclose the matter to the Inspector General in accordance with the FAR Mandatory Disclosure Rule. Approximately two months later, the company was able to enter an administrative agreement with the Air Force, lifting the suspension in exchange for Booz Allen's agreement to implement certain changes to its ethics and compliance program and to submit quarterly reports on compliance issues for the next three years. To this date, two of the Booz Allen employees and Mr. Meneses remain proposed for debarment.

It is common when large government contractors face allegations of serious misconduct for the offending individuals to be punished and suspension or debarment to be compartmentalized to one particular office or division. In this respect, the harm to innocent employees and investors can be minimized, and essential contractors are not jeopardized. For instance, when Boeing faced a criminal investigation in 2003 regarding the possession and use of Lockheed's proprietary documents in connection with the U.S. Air Force Evolved Expendable Launch Vehicle, the suspension was limited to the Boeing Launch Service and Delta Program business units. On the other hand, the AED case reminds us that the decision to limit the scope of a suspension, or to even allow an administrative agreement, is entirely subject to the discretion of the SDO. In that respect, the growing pressure on SDOs to act more aggressively in suspension and debarment proceedings presents a risk for all government contractors, regardless of size, and highlights the need to have effective compliance programs in place.

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Tim Noelker works primarily on commercial disputes, claims and compliance issues involved with the federal government. He also works with health care firms on their litigation, compliance and regulatory issues. Tim previously served in the Attorney General's Honors Program as a Trial Attorney in the Department of Justice in Washington, DC.

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