

Administrative Remedies Aimed At Combating Procurement Fraud – Suspension And Debarment

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Under the Federal Acquisition Regulations, agencies of the United States Government are permitted to contract only with “responsible” contractors.¹ Suspension and debarment are discretionary administrative remedies taken by the Government to help ensure that this policy is effectuated.² Companies or individual employees of companies can be suspended or debarred from United States Government procurement activity.³ Contractors who are suspended or debarred by the United States may not receive (or, in the case of an individual, participate in) Government prime contracts or subcontracts.⁴ Moreover, the Government may not renew or otherwise extend the duration of current contracts with contractors who become suspended or debarred, unless the head of a procuring agency articulates compelling reasons for such an action.⁵ Agencies may impose these remedies only for the purpose of protecting the interests of the Government.⁶ Suspension and debarment should not be imposed as a means of punishing a Government contractor.⁷

The administrative remedies of suspension and debarment have extensive ramifications on the affected Government contractor. Suspension and debarment create a comprehensive, Government-wide ban on conducting business with the affected contractor, unless the director of a procuring agency has “compelling reasons” to warrant an ongoing relationship.⁸ In addition, suspension and debarment typically apply to all organizational elements and divisions of an affected contractor, including all affiliates of that contractor.⁹

Debarment

The cognizant debarment official is responsible for determining whether the debarment of a contractor is in the best interests of the Government.¹⁰ The cognizant debarment official may debar a contractor for any of the reasons set forth in FAR §9.406-2 (discussed below), if debarment is deemed to be in the Government’s interest.¹¹ However, the existence of a cause for debarment does not automatically require that a contractor be debarred.¹² The debarment official must consider the seriousness of the contractor’s conduct and any remedial measures taken by the contractor, as well as all mitigating factors.¹³ Relevant mitigating factors include whether the contractor had effective standards of conduct and internal controls in place at the time of the cited activity; whether the contractor brought the cited activity to the attention of the Government; whether the contractor cooperated fully during any Government investigation of the cited activity; and whether the contractor has taken appropriate remedial action.¹⁴

Procedures For Debarment

Under the Federal Acquisition Regulations, contracting agencies are required to establish procedures for the prompt reporting, investigation and referral to the debarment official of matters appropriate for that official’s consideration.¹⁵ If a debarment official believes that debarment is warranted, the official must issue a notice of proposed debarment to the cited contractor.¹⁶ The notice, which is accompanied by the administrative record (upon which the debarment official relied to propose debarment), must state: the reason(s) for the proposed debarment; the causes relied upon under FAR §9.406-2 for the proposed debarment; that the contractor may submit a response within 30 days; and the effects of the

proposed debarment and an actual debarment.¹⁷

In debarment actions not based upon a conviction or judgment of civil fraud, if the contractor’s opposition to debarment raises a genuine dispute over material fact, the contractor is entitled to an administrative hearing.¹⁸ The administrative judge must prepare findings of fact for consideration by the debarment official in rendering a decision.¹⁹

If the debarment official determines that the imposition of debarment is warranted, the official must give prompt notice to the contractor and any impacted affiliates.²⁰ This notice must set forth the reasons for the debarment, the period of the debarment, and the fact that the debarment is effective throughout the executive branch of the Government.²¹ If debarment is not imposed, the debarment official must so promptly notify the contractor and its related affiliates.²²

Causes of Debarment

The debarment official may debar a contractor if that contractor has been convicted, or had a civil judgment rendered against it, for:

- fraud related to a public contract;
- antitrust violations;
- embezzlement, theft, forgery, bribery, falsification of records, false statements, tax evasion or receiving stolen property;
- intentionally indicating that goods not made in the United States were made in the United States; or
- commission of any other offense indicating a lack of business integrity.²³

In addition, the debarment official may debar a contractor, based upon a preponderance of the evidence,²⁴ for:

- serious violations of the terms of a Government contract;
- violating the Drug-Free Workplace Act of 1988;
- intentionally indicating that goods not made in the United States were made in the United States; or
- commission of an unfair trade practice.²⁵

Debarment is also warranted when the Attorney General of the United States has determined that that contractor has not complied with the employment provisions of the Immigration and Nationality Act,²⁶ or upon any other finding demonstrating that the contractor lacks present responsibility.²⁷

Period of Debarment

The period of debarment must be commensurate with the seriousness of the cause or causes of debarment.²⁸ Typically, debarment should not exceed three years,²⁹ however, debarment for violations of the Drug-Free Workplace Act may be for a period not to exceed five (5) years.³⁰ Debarment for failure to comply with the Immigration and Nationality Act typically shall not exceed one year.³¹

The debarment official may extend the period of debarment for an additional period if the official determines that extension is in the best interests of the Government.³² However, a debarment may not be extended solely on the basis of the facts and circumstances upon which the initial debarment decision was based.³³ The period of debarment may also be reduced, in consideration of factors such as new evidence, reversal of a conviction, or a valid change in ownership.³⁴

Suspension

Suspension of a contractor is warranted when the cognizant suspending official determines that immediate administrative action is necessary to protect the interests of the Government.³⁵ Suspension is a “serious action” imposed on the basis of adequate evidence, pending the completion of a Government investigation or legal proceeding.³⁶ Like with debarment, the existence of a cause for suspension does not automatically require that a contractor

be suspended.³⁷ The suspending official must consider the seriousness of the contractor’s conduct and any remedial measures taken by the contractor, as well as all mitigating factors.³⁸ Suspension of a contractor constitutes suspension from federal Government procurement activity of all organizational elements of a contractor, unless the suspension by its terms is limited to specific divisions.³⁹

Procedures For Suspension

United States Government contracting agencies are required to establish procedures for the prompt reporting, investigation and referral to the suspending official of matters appropriate for that official’s consideration.⁴⁰ Procedures governing the suspension decision-making process should be as informal as practicable, consistent with considerations of fundamental fairness.⁴¹ Notice to the contractor is not required prior to the imposition of suspension.⁴² However, when a contractor becomes suspended, the Government must immediately notify the contractor that it is suspended, that the suspension is temporary pending the completion of an investigation, the causes of the suspension, the effect of the suspension, and that the contractor can submit an argument in opposition of suspension within 30 days.⁴³ The status of suspension is temporary, covering the period of time until the suspending official reaches a final decision. In suspension actions not based upon an indictment, if the contractor’s opposition to debarment raises a genuine dispute over material fact, the contractor is entitled to an administrative hearing.⁴⁴ The contractor is entitled to a transcribed record of these proceedings, which must be used by the suspending official in making a final determination.⁴⁵ In actions based on an indictment where the contractor’s opposition raises material issues of disputed facts, the suspending official must prepare written findings of fact, and the final decision shall include these findings of fact within the administrative record.⁴⁶ In actions based on an indictment where the contractor’s opposition does not raise any issues of disputed material fact, the suspending official must make a final decision based on the entire administrative record, including the contractor’s opposition.⁴⁷

The suspending official’s final decision may modify the initial determination of suspension, terminate the suspension, or leave it in force.⁴⁸ A decision to modify or terminate the suspension shall be without prejudice to the subsequent imposition of suspension or debarment by any other agency.⁴⁹ Prompt, written notice of the suspending authority’s final decision must be mailed to the interested contractor and related affiliates.⁵⁰

The suspending official’s final decision may modify the initial determination of suspension, terminate the suspension, or leave it in force.⁴⁸ A decision to modify or terminate the suspension shall be without prejudice to the subsequent imposition of suspension or debarment by any other agency.⁴⁹ Prompt, written notice of the suspending authority’s final decision must be mailed to the interested contractor and related affiliates.⁵⁰

Causes of Suspension

The suspending official may suspend a contractor upon “adequate evidence”⁵¹ of:

- fraud related to a public contract;
- antitrust violations;
- embezzlement, theft, forgery, bribery, falsification of records, false statements, tax evasion or receiving stolen property;
- violation of the Drug-Free Workplace Act of 1988;
- commission of an unfair trade practice;
- intentionally indicating that goods not made in the United States were made in the United States; or
- commission of any other offense indicating a lack of business integrity.⁵²

Indictment for any of the causes listed above is deemed adequate evidence for suspension.⁵³ Upon adequate evidence, the suspending official may also suspend a contractor for any other cause of so serious or compelling a nature that it affects the present responsibility of that entity.⁵⁴

Period of Suspension

Unless terminated sooner by the suspending

official, suspension should be for a temporary period, pending the completion of any ongoing Government investigation and ensuing legal proceedings.⁵⁵ If legal proceedings are not initiated within 12 months of a suspension, the suspension should be terminated unless the Assistant Attorney General requests an extension.⁵⁶ Suspensions may not extend beyond 18 months, unless legal proceedings initiated within that period of time are continuing.⁵⁷

¹ FAR §9.402(a). The “test for whether debarment is warranted is the present responsibility of the contractor.” *Delta Rocky Mountain Petroleum, Inc. v. DoD*, 726 F. Supp. 278, 280 (D. Colo. 1989)

² FAR § 9.402(a).

³ Under the definitions set forth in FAR §9.403, a “contractor” is defined as an individual or other legal entity that conducts business with the Government or participates in prime Government contracts or Government subcontracts.

⁴ FAR § 9.405(a).

⁵ FAR § 9.405-1(c). Nonetheless, procuring agencies may continue to administer existing contracts with contractors who become suspended or debarred, absent contrary direction from the head of that procuring agency. FAR §9.405-1(a).

⁶ FAR §9.402(b). The sanction of debarment is a non-punitive means of ensuring compliance with statutory goals. See *Janik Paving & Construction v. Brock*, 828 F.2d 84, 91 (2d Cir. 1987).

⁷ FAR § 9.402(b). The non-punitive remedies of suspension and debarment are appropriate because “[t]he security of the United States, and thus of the general public, depends upon the quality and reliability of items supplied by . . . contractors.” *Caola v. Carroll*, 851 F.2d 395, 398 (D.C. Cir. 1998).

⁸ FAR §§ 9.406-1(c), 9.407-1(d).

⁹ FAR §§ 9.406-1(b), 9.407-1(c).

¹⁰ FAR § 9.406-1(a). The debarment and suspending official for U.S. Army procurement is the Commander, U.S. Army Legal Services Agency; the General Counsel for the Department of the Navy for U.S. Navy procurement; the Deputy General Counsel (Contractor Responsibility) for U.S. Air Force procurement; and the Special Assistant for Contracting Integrity for Defense Logistics Agency procurement. See DFARS § 209.403. Hereinafter, the administrative official responsible for debarment or suspension will be referred to as the “debarment official” or the “suspending official.”

¹¹ FAR § 9.406-1(a).

¹² Id.

¹³ Id.

¹⁴ See FAR § 9.406-1(a)(1)-(10).

¹⁵ FAR § 9.406-3(a).

¹⁶ FAR § 9.406-3(c).

¹⁷ FAR § 9.406-3(c)(1-7).

¹⁸ FAR § 9.406-3(b)(2).

¹⁹ FAR § 9.406-3(d)(2)(i).

²⁰ FAR § 9.406-3(e)(1).

²¹ FAR § 9.406-3(e)(1)(i-iv). An agency’s decision to debar a contractor is subject to judicial review in accordance with the Administrative Procedures Act. *Silverman v. DoD*, 817 F. Supp. 846, 848 (S.D. Cal. 1993). The agency’s decision is subject to an “arbitrary and capricious” standard of review by the federal court. Id.

²² FAR § 9.406-3(e)(2).

²³ FAR § 9.406-2(a)(1-5). Of course, individual employees of a contractor can be debarred if they participated in or had reason to know about the contractor’s conduct. FAR § 9.406-5(b). See also *Novicki v. Cook*, 946 F.2d 938 (D.C. Cir. 1991). However, individuals in like positions must be treated consistently. The inconsistent treatment of corporate officials justifies the overturning of the debarment of a corporate official. *Kisser v. Kemp*, 786 F. Supp. 38 (D. C. 1992).

²⁴ “Preponderance” means proof by information that, compared with that opposing it, leads to the conclusion that the fact is probably more true than not true. FAR § 9.403.

²⁵ FAR § 9.406-2(b)(1).

²⁶ FAR § 9.406-2(b)(2).

²⁷ FAR § 9.406-2(c).

²⁸ FAR § 9.406-4(a)(1).

²⁹ Id.

³⁰ FAR § 9.406-4(a)(1)(i).

³¹ FAR § 9.406-4(a)(1)(ii).

³² FAR § 9.406-4(b).

³³ Id.

³⁴ FAR § 9.406-4(c)(1-4).

³⁵ FAR §§ 9.407-1(a), 9.407-1(b)(1).

³⁶ FAR § 9.407-1(b)(1).

³⁷ FAR § 9.407-1(b)(2).

³⁸ Id. Such mitigating factors include whether the contractor had effective standards of conduct and internal controls in place at the time of the cited activity; whether the contractor brought the cited activity to the attention of the Government; whether the contractor cooperated fully during any Government investigation of the cited activity; and whether the contractor has taken appropriate remedial action. See FAR § 9.406-1(a)(1)-(10).

³⁹ FAR § 9.407-1(c).

⁴⁰ FAR § 9.407-3(a).

⁴¹ FAR § 9.407-3(b)(1).

⁴² Id.

⁴³ FAR § 9.407-3(c)(1-6). The Government need not disclose in detail the evidence upon which the imposition of a suspension is based when it is conducting a concurrent criminal investigation, because the Government has a “right to protect the secrecy of its ongoing criminal investigation.” *Tranco Security, Inc. of Ohio v. Freeman*, 639 F.2d 318, 324, cert. denied, 454 U.S. 820 (1981).

⁴⁴ FAR § 9.407-3(b)(2).

⁴⁵ FAR § 9.407-3(b)(2); FAR § 9.407-3(d)(1).

⁴⁶ FAR § 9.407-3(d)(2).

⁴⁷ FAR § 9.407-3(d)(1).

⁴⁸ FAR § 9.407-3(d)(3).

⁴⁹ Id.

⁵⁰ FAR § 9.407-3(d)(4).

⁵¹ FAR § 9.407-1(b). In considering whether adequate evidence exists for a suspension, the suspending official should consider how much evidence is available, the credibility of such evidence, whether important allegations are corroborated, and the reasonable inferences that can be drawn from the evidence. Id.

⁵² FAR § 9.407-2(a)(1-7).

⁵³ FAR § 9.407-2(b).

⁵⁴ FAR § 9.407-2(c).

⁵⁵ FAR § 9.407-4(a).

⁵⁶ FAR § 9.407-4(b). Such an extension may be for no longer than six months. Id.

⁵⁷ Id.

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